



Neutral Citation Number: [2007] EWCA Crim 1925

Case No: 200702811D5

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CENTRAL CRIMINAL COURT**  
**The Honourable Mr Justice Aikens**  
**T20060004**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/07/2007

Before :

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**THE HONOURABLE MR JUSTICE ELIAS**  
and  
**THE HONOURABLE MR JUSTICE GRIFFITH WILLIAMS**

Between :

**Times Newspapers Ltd & Others**  
**- and -**  
**R**

**Appellant**

**Respondent**

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Mr A Nicol QC and Mr A Hudson for the Appellant  
Mr D. Perry QC and Mr L. Mably for the Respondent

Hearing dates: 10th July 2007  
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**Approved Judgment**

## Lord Phillips of Worth Matravers CJ:

### Introduction

1. This is an appeal that we gave permission to bring at the outset of the hearing. It is brought under section 159 of the Criminal Justice Act 1988 by Times Newspapers Ltd and many other publishers ('the media') against two orders made in the Central Criminal Court by Aikens J on 10 May 2007 at the conclusion of this trial. In the trial the first defendant David Keogh was convicted of two offences under sections 2 and 3 of the Official Secrets Act 1989 (the 'OSA') and sentenced to 6 months imprisonment. The second defendant Leo O'Connor was convicted of one offence under section 5 of the OSA and sentenced to 3 months imprisonment. The first order appealed against was made under section 4(2) of the Contempt of Court Act 1981 ('the CCA'). It postponed indefinitely any reporting of a question and answer ('the question and answer') given in open court during the evidence in chief of David Keogh. The second order appealed against was made under section 11 of the CCA in relation to evidence that the judge had directed should be given *in camera* at the trial.
2. The judgment of Aikens J sets out with admirable clarity the facts, the relevant legislation, the issues, the argument and the reasons for his decision. Rather than repeat that exercise, we have decided to annexe his judgment to our own.
3. This appeal is about restricting publication of matters that relate to court proceedings in the interest of the administration of justice. It is a basic principle of the administration of justice that court proceedings should take place in public and that there should be freedom to publish reports of those proceedings. There are, however, certain circumstances in which the law recognises that restrictions on publication are justified in the interest of the administration of justice:
  - i) The restriction is necessary in order to ensure the fair trial of the proceedings in which the restriction is sought, or subsequent proceedings. A typical example is the restriction on publishing details of a trial within a trial. This restriction is designed to ensure that the jury does not learn of matters that are not admissible as evidence.
  - ii) The restriction is necessary in order to protect a person involved in the proceedings. Typical examples are the restriction on publishing the name of the victim of an alleged rape, or of a child, or of the victim of blackmail.
  - iii) The restriction is necessary in order to protect the object of the proceedings. Typical examples are where the object of the proceedings is the protection of official or trade secrets.

When considering the ambit of legislation that permits restrictions on reporting court proceedings it is helpful to consider the reason for the restrictions in question.

4. This appeal relates to criminal proceedings in relation to the disclosure of official secrets in breach of the OSA. The overall object of such proceedings is the protection of official secrets. The specific object of the proceedings was the prosecution of two men who were alleged to have infringed the OSA. The orders that were made by the judge were not necessary to achieve the specific object of the proceedings. They were made in the

interests of the overall object of the proceedings. The orders were not necessary to procure a fair trial of the two defendants – indeed they were made after the trial was over. Such orders may, however, be necessary for the general administration of justice. If the consequence of bringing prosecutions for breach of the OSA is that the secrets to which they relate become public, it will not, in practice, be possible to bring such prosecutions.

**The order under section 4(2) CCA.**

5. The order under section 4(2) was in the following terms:

“Pursuant to section 4(2) of the Contempt of Court Act 1981

It being necessary to avoid a substantial risk of prejudice to the administration of justice in these proceedings

IT IS ORDERED THAT

No report of the question and answer given by the defendant David Keogh at about 10.46a.m on 30<sup>th</sup> April 2007 whilst giving evidence in chief in the witness box should be published in any form.

Until Further Order.”

6. This order was made in an attempt to protect against the consequences of a mishap that occurred in the trial process. Section 8 (4) of the Official Secrets Act 1920, which applies to the OSA by virtue of section 11(4) of the latter Act, permits the court to exclude the public from that part of a prosecution if publication of evidence to be given or of any statement to be made would be prejudicial to the national safety. Aikens J made an order pursuant to that section in relation to the letter whose disclosure formed the basis of the prosecution. By mishap a question was put and an answer was made in the public part of the trial that should have formed part of the evidence heard in the absence of the public. Aikens J made an immediate order under section 4(2) of the CCA, prohibiting the publication of the question and answer. He repeated that order, with indefinite effect, at the end of the trial.
7. It was apparently common ground before Aikens J that if an order of this kind were to be made it had to be under s4(2). Counsel for the Crown conceded before the Judge that an order of that nature could not be made under s11. That was a concession, however, which he withdrew before us.
8. Objection to this order was taken by the media on two inter-connected grounds:
- i) The order was not necessary to ‘avoid a substantial risk of prejudice to the administration of justice *in those proceedings or any other proceedings pending or imminent*’.
  - ii) The order was an indefinite prohibition of publication whereas section 4(2) of the CCA only permitted postponement of publication, which was necessarily finite.

9. Aikens J rejected both objections. He held that the order was necessary to avoid prejudice to the administration of justice ‘*in those proceedings*’ because it was necessary to prevent the undermining of the *in camera* order that had been made in the proceedings. As to the second point, ‘postpone’ meant the same as ‘defer’ and as a matter of language, publication of facts or evidence could be deferred indefinitely.
10. When considering whether the order was necessary to eliminate the “not insubstantial risk” to the administration of justice in the proceedings he held that it was. He observed that counsel for the media “did not suggest that there was any other way to overcome the risk by some other, less restrictive means. In my view there is none”.
11. Mr Perry QC, for the Crown, supported the reason for an order of this kind. He urged the example of restricting the reporting of the name of a victim of blackmail. Such a restriction would be necessary to avoid the risk of prejudice to the administration of justice in respect the trial of the blackmailer, but the need for the restriction would persist indefinitely after the end of the trial. By the end of his submission Mr Perry appeared to accept that the order ought to have been made under s11 rather than s4(2).
12. We agree, on its natural meaning, section 4(2) is designed to enable the court to prevent the publication of the report of proceedings where the publication will prejudice the conduct of those proceedings, or specific pending proceedings. The section is designed to cater for the first of the three categories in paragraph 3 above. The section permits postponement and the need for postponement cannot subsist beyond the end of the proceedings in question. This construction receives some support from authority.
13. Before the CCA there was uncertainty as to whether a court had power to impose reporting restrictions in aid of the administration of justice or generally. This question received consideration in *Attorney-General v Leveller* [1979] AC 440. The issue in that case was whether, in an official secrets trial, it was a contempt of court to publish the name of a witness who had been permitted in court to describe himself simply as ‘Colonel B’. Discussion, however, ranged wider than this issue and recognised the distinction between prejudicing the administration of justice in a particular case and prejudicing it generally.
14. Thus Lord Diplock said at p. 449:

“Of those contempts that can be committed outside the courtroom the most familiar consist of publishing, in connection with legal proceedings that are pending or imminent, comment or information that has a tendency to pervert the course of justice, either in those proceedings or by deterring other people from having recourse to courts of justice in the future for the vindication of their lawful rights or for the enforcement of the criminal law.”

With regard to the former situation, he added at p. 450:

“So far as proceedings in the courtroom are concerned the trial within a trial is held in open court in the presence of the press and public but in the absence of the jury. So far as publishing those proceedings outside the court is concerned any report of

them which might come to the knowledge of the jury must be withheld until after they have reached their verdict; but it may be published after that.”

15. At p. 463 Lord Edmund-Davies referred to a contempt case in which the names of two victims of blackmail had been published at a late stage of the trial:

“And it should be observed that no publication of the victims’ names took place until the judge was about to sum up, and there was accordingly no question of the administration of justice in *that* case being prejudiced by their being deterred from giving evidence for the prosecution. So the basis of the decision seems to be that publication was objectionable on the *general* ground that in any and every blackmail case the administration of justice in future prosecutions will be interfered with if victims names are published.”

16. At p. 465 he referred to publication of evidence received *in camera*:

“And what appears certain is that at common law the fact that a court sat wholly or partly in camera (and even where in such circumstances the court gave a direction prohibiting publication of information relating to what had been said or done behind closed doors) did not itself and in every case necessarily mean that publication thereafter constituted contempt of court.

For that to arise something more than disobedience of the court’s direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future.”

17. Lord Russell of Killowen also drew the distinction between prejudicing the administration of justice in the case reported and prejudicing the administration of justice as a continuing process:

“In my opinion it really goes without saying that behind the application (and the decision) lay considerations of the due administration of justice. In the first place an alternative to the *via media* adopted would be an application that ‘Colonel B’s’ evidence be taken *in camera*, and in principle the less that evidence is taken *in camera* the better for the due administration of justice, a point with which journalists certainly no less than others would agree. In the second place a decision on anonymity – the *via media* – would obviously, and for the same reasons, be highly desirable in the interest of the due administration of justice as a continuing process in future in such cases.”

18. If these observations are applied to the facts of the present case, it is difficult to characterise the order made by Aikens J under section 4(2) as being necessary to avoid prejudice to the administration of justice in the case that he had been trying.
19. In *R v Horsham Justices ex parte Farquharson* [1982] 1 QB 762 the issue was whether the justices had had power under section 4(2) to impose reporting restrictions on committal proceedings pending the trial to which they related. The Court of Appeal held that they had. Lord Denning MR remarked at p. 791 that it had long been settled that at common law the courts had power to make an order *postponing* publication (but not prohibiting it) if the postponement was necessary for the furtherance of justice in proceedings which were pending or imminent. He went on to give detailed consideration to section 4(2):

“Section 4(1)

Before reading section 4 (2) it is very desirable to read section 4 (1) to understand the impact of it. It gives protection to every ‘fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.’ In so providing, Parliament was carrying out the recommendation contained in the Report of the Committee on Contempt of Court under the chairmanship of Phillimore L.J. (1974) (Cmnd. 5794), para. 141. It is significant that the Report contained no recommendation corresponding to section 4 (2). But, in view of the width of section 4 (1) (which contained no exceptions) it was obviously desirable to preserve the common law exceptions to it. (The Committee had recognised their existence in paragraphs 134 to 140). These exceptions were preserved by section 4 (2).

Section 4 (2)

Section 4 (2) retains the common law about the occasions when a report (otherwise fair and accurate) may be a contempt of court – but with this improvement: Nothing is to be left to implication. It is for the court to make an order telling the newspapers what things they are not to publish. Thus giving the newspaper the warning which the Lords felt was desirable in *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440: see especially, *per* Lord Diplock at p.453 G-H and *per* Lord Edmund-Davies at p. 465E-H.

In short, section 4 (2) only applies to cases where the courts themselves would at common law have jurisdiction to make an order postponing publication: but now it needs an order, not an implication. Thus, when the jury is sent out, the judge should tell the newspaper reporters, ‘You are not to publish anything of what takes place whilst the jury are out’: or, when a pseudonym is sued, ‘You are not to publish his true name or anything which may disclose his identity.’

Such an order operates now so as to bind not only persons within the courtroom but also those outside, thus clearing up the doubts expressed by some of the Lords in the *Leveller* case [1979] A.C.440, 464A-B, 471H, *per* Lord Edmund-Davies and Lord Scarman respectively. This is done by section 11 of the Contempt of Court Act 1981.

*The intention of the legislature*

On this reading of the statute it will be seen that section 4 (2) is to be very strictly confined. It applies only to a very limited type of case. So read, the statute is not a measure for restricting the freedom of the press. It is a measure for liberating it. It is intended to remove the uncertainties which previously troubled editors. It is intended that the court should be able to make an order telling the editors whether the publication would be a contempt or not. Such as the report of a 'trial within a trial,' or publishing a name which the court for good reason orders should be kept secret, or if magistrates in committal proceedings order that the person blackmailed should not be named. Unless the court makes such an order then the newspaper is given complete protection by section 4 (2) from being subjected to proceedings for contempt of court."

20. Ackner LJ's view of the object of section 4(2) appeared at p. 806:

"First of all, the power is a power to *postpone*, not to prohibit totally, publication. Secondly, the power may be exercised in relation to only a *part* of the proceedings. Thirdly, that in order for the jurisdiction to be exercised the court must be satisfied that an order is necessary for avoiding a substantial risk of prejudice to the administration of justice. The obvious case for the postponement of a report of proceedings is where the substantive trial or retrial has yet to take place, or where a fair and accurate report of one trial might still prejudice another trial still to be heard. The prejudice to the administration of justice which is envisaged is the reduction in the power of the court of doing that which is the end for which it exists – namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it: *per* Wills J. in *Rex v. Parke* [1903] 2.K.B. 432, 438, 444. What the court is generally concerned with is the position of a juryman who, unlike the judge, has neither the training nor the experience to assist him in putting out of his mind matter which are not evidence in the case."

21. It is difficult, in the light of the passages referred to above, to say that the order that Aikens J made under section 4(2) on 30 April was 'necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings'. Had the question and answer been published, the criminal proceedings would have continued as before. We find it impossible to say that the repetition of that order, with indefinite effect, after the

trial had been completed fell within the jurisdiction conferred by that section. Accordingly that order must be quashed.

22. It does not follow that there was no way of preventing the mischief that might have been caused by the accidental inclusion of the question and answer in the evidence given in open court when it should have been given *in camera*. Mr Nicol submitted that, once the question had been posed and the answer given in open court, the evidence was in the public domain and publication could not be prevented.
23. We do not accept that submission. There is a world of difference between what is said in open court and what is published, and the CCA is concerned with the latter. The question and answer fell within the category of evidence that the judge had ordered should be withheld from the public by his ruling under section 8(4) of the OSA. It was open to him to make an order under section 11 of the CCA that embraced the question and answer, notwithstanding that the question and answer had, by mistake, been heard in public. Lord Denning plainly envisaged that this was the appropriate section under which to make an order of this nature, as the extract from his judgment in *Farquharson* set out above, demonstrates. Indeed, the question and answer was covered by the terms of his section 11 order, albeit that he may not have intended that it should have been.
24. Alternatively, we think that it would have been open to the judge, having made it plain that the question and answer had been given in open court in breach of his *in camera* direction, to have made it plain that to publish the question and answer would be a contempt of court. This it would have been as it would have constituted the frustrating of an order lawfully made by the court.
25. We are satisfied that the judge had jurisdiction to prevent publication of the question and answer and that it was proper to exercise that jurisdiction, albeit that an order under section 4(2) was not the correct way of achieving this. We shall consider submissions from counsel as to the appropriate order that we should make in these circumstances.

### **The order under section 11 of the CCA**

26. The form of the order was as follows:

“Pursuant to section 11 of the Contempt of Court Act 1981

IT IS ORDERED THAT

1. There cannot be publication in connection with these proceedings of any material which would or might reveal evidence or statements concerning:

a. the content of a letter dated 16 April 2004 from Mr Matthew Rycroft (the Prime Minister’s Private Secretary for Foreign Affairs at the time) to Mr Geoffrey Adams of the Foreign and Commonwealth Office (‘the letter’);

b. the actual, possible or alleged damage resulting from any alleged unauthorised disclosure of the letter.

2. For the avoidance of doubt, this Order does not apply to the following matters:

- a. The date of the letter;
- b. The 'Secret-Personal' marking on the letter or other markings on it;
- c. The heading of the letter, viz. 'Iraq: Prime Minister's Meeting with President Bush';
- d. The contents of the first paragraph of the letter;
- e. The identities of the intended recipients of the letter, as set out in the last paragraph of the letter;
- f. Subject to any order made under section 4(2) of the Contempt of Court Act 1981, evidence given or statements made in open court during the course of the proceedings."

27. The media make two objections to this order:

- i) It prohibits publication of matter that is already in the public domain;
- ii) It is in any event too wide in that it prohibits publication of matters which *might* reveal matter that was subject to the *in camera* hearing.

28. Mr Perry in his skeleton argument stated that the order was intended to cover two classes of material:

- i) Any material covered by the *in camera* order;
- ii) Any material whether or not it had been previously published which might directly or indirectly have the result of revealing the matters dealt with during the *in camera* proceedings.

He explained that the purpose of ii) was to ensure that there was no attempt by the press to link the existing reports in the press about the contents of the letter to the evidence given in open court as this would itself subvert the *in camera* order.

29. As Aikens J observed, section 12(1)(c) of the Administration of Justice Act 1960 ('AJA') already prohibits the publication of 'information relating to' the *in camera* proceedings. Such information would relate to 'matter allowed to be withheld from the public in proceedings before the court' under section 11 of the CCA, so there was jurisdiction to make an order under that section. This question remains whether the terms of Aikens J's order was too wide.

30. The following questions arise in relation to the order that he made:

- i) Could section 11 of the CCA authorise an order that had wider effect than the provisions of section 12(1)(c) of the AJA?

- ii) Did the order that Aikens J made fall within his powers under section 11 of the CCA?

**Could section 11 of the CCA authorise an order that had wider effect than section 12(1)(c) of the AJA?**

31. Section 11 of the CCA gave Aikens J the power to prohibit the publication of ‘*the name or matter*’ that he allowed to be withheld from the public by his *in camera* order ‘*in connection with the proceedings,*’ in so far as this appeared to him to be necessary for the purpose for which the information was withheld. This is a restriction on the freedom of the press to report the proceedings and plainly prevents publication of evidence that was in fact given *in camera* pursuant to Aikens J’s order, should by any means the media obtain possession of this information. His order purports, however, to go further and to prohibit publication in connection with the proceedings of matter which *might* reveal the matter by his *in camera* order. Thus it would appear to cover a publication based on speculation but which did not make it plain that it was mere speculation as to the evidence that was given *in camera* that was, in fact, wholly inaccurate. We do not consider that such a publication could fall within the wording of section 11. It would not be the publication of the name or matter withheld. Nor would prohibition be necessary for the purpose for which the name or matter was withheld, namely to prevent it becoming known to the public in the interests of national security.
32. That is not, however, the end of the story. Such publications would be attempts, albeit unsuccessful, to flout the order made by the court and would be seen by the public as a violation of the order of the court. We consider it likely that any such attempt would, itself, constitute a contempt of court at common law. In making the order that he did under section 11, Aikens J had the praiseworthy object of removing from the media any uncertainty as to what they were or were not permitted to publish having regard to the provisions of section 12(1)(c) of the AJA. His order removed uncertainty and provided the media with mandatory guidance as to how to involve any risk of being in contempt of court, but it went beyond the powers conferred by section 11.
33. In these circumstances we consider that the proper course is to amend the order made under section 11 by deleting the words ‘or might’ from that order. We have drawn attention to the risk that the media will run if they speculate about the content of the evidence that was given *in camera*.
34. The object of the restrictions that are the subject matter of this appeal is the administration of justice. They protect from publication information that, pursuant to the order of the court, is withheld from the public at a trial in circumstances where, if such protection were not available, the due conduct of the trial might be inhibited or prevented. They apply to reports of or in connection with the proceedings in which the information is withheld. As such, the extent of the restriction on freedom of expression that is involved is limited, and the justification for that restriction plain to see.
35. The restrictions themselves do not prevent the media from publishing the matter in question in publications that are not related to the relevant proceedings. Where, as in the present case, the matter in question is withheld from the public at trial on the

ground that its disclosure would be prejudicial to the national safety, there may be other legal inhibitions on the publication of that information, even if this is not in connection with the legal proceedings. This judgment is not concerned with such inhibitions.

36. There have, in the past, been reports in the press of the contents of the letter of 16 April 2004. Aikens J referred to those reports and to the nature of them in the judgment that he gave on 18 July 2006, when he made his order in relation to hearing evidence *in camera*. He referred to the reports as 'inaccurate'. Repetition of those reports will not infringe the order made by Aikens J, as amended by this court. Should any publication allege that those reports accurately represent the evidence that was given *in camera* they will, for the reasons that we have given, be at risk of constituting a contempt of court.
37. This appeal is allowed to the extent set out in this judgment.