HUGO KEITH QC

What is realistic and achievable when seeking disclosure in cases concerning public interest immunity and closed material proceedings?

General Principles

- *Tweed v. Parades Commission for Northern Ireland (Northern Ireland)* [2006] UKHL 53 → Basic test for disclosure in JR "will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly (Lord Bingham, [3]). Court's should adopt a more flexible and less prescriptive approach, considering the approach course to take according to the particular facts of the case at hand (Lord Carswell, [32]).

- *In the Matter of an Application by Brenda Downes for Judicial Review* [2006] NIQB 77 → Duty of candour - Affidavits in the JR should be drafted in clear and unambiguous language. There is no place for "spin". Public bodies and central government agencies are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest (Girvan J, [31]).

- *R. (Al-Sweady) v. Secretary of State for Defence* [2009] EWHC 2387 (Admin) → In JRs concerning disputed breaches of the ECHR, it was vital for the parties to consider whether there were "hard-edged" questions of fact to resolve, as this would be relevant to the court's determination of whether or not to make cross-examination and disclosure orders.

- *R. (Hoareau) v. Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) → Duty of Candour – the defendant must "assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide", which includes "the good, the bad and the ugly." The public authority is not defending private interests but is "engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law" (Singh LJ, [20]).

Public Interest Immunity (in general)

- *R (Wilev) Chief Constable* [1995] 1 AC 274 → The threshold test which must be met before a PII claim arises is one of "substantial harm" to the public interest (281). Three-stage process to be applied to determining a PII claim: (1) is the withheld material relevant to an issue in the proceedings?' (2) is there a real risk that disclosure would cause substantial harm to the public interest?; (3) if so, the public interest in the administration of justice should be balanced against the harm to the public interest in disclosure when determining whether or not to order disclosure.

- *R v. H and Others* [2004] 2 AC 134 → "Serious prejudice" to the public interest is required before a PII claim arises ([18]). While some derogation from the golden rule of full disclosure

may be justified, such derogation must always be the minimum derogation necessary to protect the public interest [18] [check]

- *Al-Rawi v. The Security Service* [2011] UKSC 34 → A successful claim for PII renders a document inadmissible in the proceedings, depriving both the court and the parties of relevant material (at [146]&[159]).

- *R (Terra Services Ltd) v National Crime Agency* [2019] EWHC 3165 (Admin) → The three-stage approach in *Wiley* should not only be applied by the court adjudicating the PII application, but also by the official or minister in deciding to apply for PII in the first place (Irwin LJ, [26]).

Closed Material Procedures (in general)

- *Chahal v. United Kingdom* (1996) 23 EHRR 413 → ECtHR found *inter alia* a violation of art.5(4) as the High Court, which determined the habeas corpus application, did not have access to the full material on which the Secretary of State had based his decision.

- *A v United Kingdom* (2009) 49 EHRR 625 → When a terrorism suspect challenged his certification and detention before the Special Immigration Appeals Commission, if the open material consisted purely of general assertions and the Commission's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Art.5(4) would not be satisfied.

- *Bank Mellat v HM Treasury* [2013] UK 39 → Measures taken by the Treasury under the Counter-Terrorism Act 2008 Sch.7 Pt 3 para.13 to restrict the access of an Iranian bank and its UK subsidiaries to the UK financial markets on the ground that it posed a significant risk to national security by providing banking services to those involved in the development or production of nuclear weapons in Iran were arbitrary and disproportionate as well as being unlawful because of a failure to give prior notice and an opportunity to make advance representations.

- *Al-Rawi v. The Security Service* [supra] → The court had no common law power to adopt a closed material procedure in an ordinary civil claim for damages. Unlike the public interest immunity procedure, a closed material procedure involved a departure from the principles of open and natural justice and such a change could only be for Parliament to make. There are two narrowly defined exceptions to this rule: (1) cases where "the whole object of the proceedings is to protect and promote the best interests of a child" and "disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise" ([63], quoting Lady Hale in *MB* [2007] UKHL 46; and (2) cases where the whole object of the proceedings is to protect a commercial interest and full disclosure "would render the proceedings futile" (i.e. intellectual property proceedings) ([64]).

- *R (Haralambous) v. St Albans Crown Court* [2018] UKSC 1 → Closed material procedures can be used by magistrates' courts and crown courts when issuing search and seizure warrants (s.8 PACE) and authorising the retention of seized material (s.59 CJPA) 2001 respectively. The High Court can also use closed material procedures in JR proceedings in relation to either of those decisions. Distinguished *Al-Rawi* on the basis that the Court, on that occasion, was not concerned with "this very special situation." If it had done, it "might also have seen a

similarity between this situation and the two exceptions it did identify …" A combination of the scheme authorised by Parliament re warrants in the Mags and Crown Court and Parliament's understanding of the operation of JR supported the conclusion that CMP is permissible by the High Court in reviewing decisions taken under the scheme (Lord Mance, [59]).

- *R (Privacy International) v Investigatory Powers Tribunal* [2019] EWHC 3285 (Admin) → the Divisional Court applied *Haralambous*, holding that it had jurisdiction closed material procedure in considering a judicial review of a decision by the Investigatory Powers Tribunal.

Search Warrant Cases

- *R (Energy Financing Team) v. Bow Street Magistrates' Court* [2006] 1 WLR 1316 → Judicial oversight by way of judicial review cannot operate effectively unless a person affected by a search warrant is able to take meaningful advice on the legality of that warrant and its execution, and if so advised to seek relief from the court (Lord Kennedy, [24(10)]).

- *R (British Sky Broadcasting Ltd) v. Central Criminal Court* [2012] QB 785 → It is a fundamental principle of fairness at common law that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it (re production order) ([28]).

- *R (Golfrate Property Management Ltd) v. Southwark Crown Court* [2014] EWHC 840 (Admin) → Police officers applying for search and seizure warrants need to be aware of the obligation to ensure that judges faced with such applications were presented with a full and clear picture of what lay behind them and to be told of matters that might tell against them: the target of the application was entitled to expect such candour.

- *R (Haralambous) v. St Albans Crown Court* [supra] → As a starting principle, open justice should prevail. Any decision to adopt closed material procedure "should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case" (Lord Mance, [61]).

Special Advocates

- *R (on the application of Privacy International) v Investigatory Powers Tribunal* [supra] → A special advocate was to be appointed to look at closed material on behalf of Privacy International to enable it to determine whether there was an arguable point of law so that it could apply for permission to appeal against the Investigatory Powers Tribunal's decision regarding the sharing of bulk data.

Confidentiality Rings

- *Somerville v. Scottish Ministers* [2007] UKHL 44 → Lord Rodger (at ([152]-[152]) and Lord Mance (at [203]-[204]) strongly disapproved the use of confidentiality rings in PII cases.

- *AHK v. Secretary of State for Home Department* [2013] EQHC 1426 (Admin) → agrees with Lords Rodger and Mance and gives 3 reasons as to why confidentiality rings are inappropriate

re PII material: (1) risk of inadvertent discloser; (2) suspicion might fall on the innocent, in the event of inadvertent disclosure; (3) problem of deciding who to admit to the ring and who to exclude.

Third Party Disclosure

- *R (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court* [2012] EWCA Civ 420 → A newspaper publisher was entitled to inspect and have disclosure of court documents which had been referred to in open court at an extradition hearing; where documents had been placed before a judge and referred to in the course of proceedings, the default position should be that access was permitted on the open justice principle, and particularly so where access was sought for a proper journalistic purpose.

- *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 → Constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. Courts have an inherent jurisdiction to determine what the open justice principle requires in a given case. It is for the person seeking access to explain why he or she seeks it and how granting access would further the open justice principle. The court will conduct a fact-specific balancing exercise, with the purpose of the open justice principle on the one hand, and any risk of harm of disclosure on the other.