House of Lords

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Regina v. H (Appellant) (2003) (On Appeal from the Court of Appeal (Criminal Division))
Regina v. C (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (Conjoined Appeals)

HOUSE OF LORDS

SESSION 2003-04
12th REPORT
[2004] UKHL 3
on appeal from: [2003] EWCA Crim 2847

APPELLATE COMMITTEE

Regina v. H (Appellant) (2003) (On Appeal from the Court of Appeal (Criminal Division))
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REPORT

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12TH REPORT

from the Appellate Committee

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5 FEBRUARY 2004

Regina v. H (Appellant) (2003) (On Appeal from the Court of Appeal (Criminal Division))
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ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Woolf, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Carswell) have met and considered the causes Regina *v.* H (Appellant) (2003) (On Appeal from the Court of Appeal (Criminal Division)) and Regina *v.* C (Appellant) (On Appeal from the Court of Appeal (Criminal Divsion)) (Conjoined Appeals). We have heard counsel on behalf of each appellant and on behalf of the Crown as respondent.

1. This is the considered opinion of the Committee.

2. On 16 October 2003 the Court of Appeal (Criminal Division) gave judgment on interlocutory appeals by C and by the Crown: [2003] EWCA Crim 2847, [2003] 1 WLR 3006. The court certified that two points of law of general public importance were involved in its decision, namely

> "1. Are the procedures for dealing with claims for public interest immunity made on behalf of the prosecution in criminal proceedings compliant with article 6 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms?

2. If not, in what way are the procedures deficient and how might the deficiency be remedied?"

The court signalled its recognition of the importance and topicality of these questions by, unusually, granting leave to appeal to the House.

3. Both appellants have been charged, with others, with conspiracy to supply a class A drug, namely heroin, contrary to section 1 of the Criminal Law Act 1977. The street value of the heroin in question was said to be some £1.8 million. The appellant H is alleged to be a wholesaler of heroin. C is alleged to be an associate of H and to have been involved in the distribution of heroin. Another defendant (who has pleaded guilty to the indictment, and who is not involved in the appeals) is said to have stored and delivered heroin on behalf of H. When interviewed under caution, both H and C denied that they had committed any offence.

4. The prosecution case was based on observations which, so far as relevant, began on 3 January 2003 and culminated in the arrest of H and C and others on 21 February. It is alleged that on that date a package, later found to contain 2 kilos of heroin, was taken to H's timber-yard, put by H into a white van with a quantity of timber and taken to C's business premises, where C appeared to inspect it.

5. Both H and C served defence statements as required by section 5(5) of the Criminal Procedure and Investigations Act 1996. H denied that he had any knowledge that controlled drugs were in the van on 21 February. He gave no one permission to place the drugs inside the van. No package was passed to him. The police officer who stated otherwise was lying. He operated a legitimate timber business, a quantity of timber ordered by C was taken to him on 21 February, and that was the sole purpose of his dealings with C on that day. He could not account for traces of heroin on cash found on his person and at the house of his partner; the cash might have been innocently contaminated or there might have been deliberate interference. H's defence statement concluded with a far-reaching request for disclosure of documents by the prosecution. In his defence statement C denied that he had conspired to supply heroin or any class A drug. He knew nothing of any heroin in the van on 21 February. He had ordered a supply of timber, which was delivered on that day. He had no dealings with H, formerly his business partner, save in relation to their former business and the supply of timber. He also made a far-reaching request for disclosure, including disclosure of all material relating to any covert human intelligence sources involved in the investigation "to assist the preparation of his Defence and to establish the legality of the operation".

6. A formal preliminary hearing was held before His Honour Judge Murphy QC, who was not the judge to whom the case was first assigned, on 11 and 12 September 2003. There was then a lengthy argument on disclosure and the withholding of documents from disclosure by the prosecution on the grounds of public interest immunity. On behalf of H, counsel indicated that his client wished to mount a challenge to the legality and propriety of the police operation, and the integrity of the police surveillance evidence. He indicated that his client's case would involve allegations of the planting of evidence, and the falsification of observations. He indicated that it was his client's intention to make an application to stay the prosecution as an abuse of process on the grounds of serious executive misconduct and/or illegality on the part of the investigating officer and/or to seek the exclusion of evidence on the same grounds under section 78 of the Police and Criminal Evidence Act 1984. He sought disclosure *inter alia* of the original police

observation logs, as well as applications and authorisations under the Regulation of Investigatory Powers Act 2000, and supporting material. On behalf of C, counsel sought disclosure *inter alia* of the same material in order "to assist the preparation of his Defence and to establish the legality of the operation". Counsel indicated to the judge that the material was sought in order to "found an application for section 78 exclusion of the observation evidence" and to support an application to dismiss the charge pursuant to section 52(6) of the Crime and Disorder Act 1998.

7. It was argued for C that any assessment of sensitive information held by the prosecution should be conducted in open court in the presence of the defendants and their counsel. The judge rejected this contention, as did the Court of Appeal on C's appeal, and it has not been pursued.

8. In argument before the judge, both H and C relied strongly on the very recent judgment of the European Court of Human Rights in *Edwards and Lewis v United Kingdom* (22 July, 2003, unreported, Appn nos 39647/98 and 40461/98). It was urged that since the judge might be called upon to stay or dismiss the case, or to exclude evidence under section 78 of the 1984 Act, *Edwards and Lewis* required him to appoint special counsel to safeguard the interests of the defendants and test the contentions of the prosecution at any public interest immunity hearing held in the absence of the defendants and their legal representatives. The judge ruled:

> "42. I have just said, I do not feel able to ignore or to circumvent the decision in *Edwards*. That its consequences are inconvenient or novel or unusual are no grounds for concluding that the present case does not fall within its ambit. I have already ruled that *Edwards* does not have the consequence in this case of making the examination of sensitive material a matter for an open court investigation.
>
> 43. What the decision in *Edwards and Lewis* does tell me, however, is that if there is not an independent Counsel appointed, so as to introduce an adversarial element into the public interest immunity enquiry, there is a risk that the trial will be perceived to be unfair, and therefore to be a violation of Article 6.1 of the Convention. I am not prepared to contemplate that."

The judge added that he had received two lever arch files from the prosecution on the day before the preliminary hearing began, but as he was still very new to the case and needed to familiarise himself with the basic facts, he had given the documents "only a very perfunctory perusal".

9. The prosecution's appeal against the judge's order succeeded. The court accepted that in some situations a trial judge can and should invite the Attorney General to appoint special counsel from an approved panel to take part in the proceedings (paragraph 33(v) of the judgment of the court delivered by Rose LJ). But it held that the judge's appointment of special counsel was premature (paragraph 34):

> "He had not looked in detail at the material, nor considered it in the light of the issues in the case or submissions by the prosecution about it. Had that stage been reached, he might have concluded, for example, that disclosure must be made. He was obliged to take account of the *Edwards and Lewis* case. But he was not bound by it in the way in which he would be bound by a decision of this court. In any event, there is nothing in the *Edwards and Lewis* case which required the appointment of independent counsel at that stage".

The appellants contend that the decision of the judge was correct, and seek to reinstate

it.

A fair trial

10. As the House declared in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 68, and recently repeated in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 WLR 1, para 13, it is "axiomatic" "that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all". Article 6 of the European Convention requires that the trial process, viewed as a whole, must be fair. Any answer given to the questions raised by these appeals must be governed by that cardinal and overriding requirement.

11. Fairness is a constantly evolving concept. Hawkins J (*Memoirs*, chapter IV) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: "Gentlemen, I suppose you have no doubt? I have none". Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.

12. While the focus of article 6 of the Convention is on the right of a criminal defendant to a fair trial, it is a right to be exercised within the framework of the administration of the criminal law: as Lord Steyn pointed out in *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118,

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public".

The European Court has repeatedly recognised that individual rights should not be treated as if enjoyed in a vacuum: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52. As Lord Hope of Craighead pointed out in *Montgomery v HM Advocate* [2003] 1 AC 641, 673:

> "the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact."

13. The institutions and procedures established to ensure that a criminal trial is fair vary almost infinitely from one jurisdiction to another, the product, no doubt of historical, cultural and legal tradition. In some countries provision is made for judicial oversight of criminal investigations. That is, for better or worse, entirely contrary to British practice. Instead, the achievement of fairness in a trial on indictment rests above all on the correct and conscientious performance of their roles by judge, prosecuting counsel, defending counsel and jury. Save in defined circumstances (such as when ruling on the voluntariness of a confession in a voir dire or, much more rarely, a specific allegation of official misconduct) the judge is not a factual decision-maker. His task is to ensure that the trial is conducted in a fair and even-handed way. For this latter purpose he is entrusted with

numerous discretions (see Rosemary Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed 1990). The appellants' counsel were generous in their acknowledgement of the high standards of fairness which judges routinely apply. The duty of prosecuting counsel, recently considered by the Judicial Committee of the Privy Council in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237, para 10, is not to obtain a conviction at all costs but to act as a minister of justice. As Rand J put it in the Supreme Court of Canada in *Boucher v The Queen* [1955] SCR 16, 24-25:

> "Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly".

Defending counsel also are subject to clear professional rules: they may not invent a case for their client or pursue serious accusations in the absence of material to support them: Code of Conduct for the Bar of England and Wales, paragraph 708(e). In Dr Johnson's famous formulation, "A lawyer is to do for his client all that his client might *fairly* do for himself, if he could" (emphasis added). To the jury, of course is entrusted the all-important decision to convict or to acquit, and properly-directed juries have over the years shown a remarkable instinct for fairness. To the extent that judges take it upon themselves to decide matters properly within the province of the jury (as for instance by basing a decision to withdraw a case from the jury on their own assessment of the credibility of the evidence, or by ruling whether an incriminating article allegedly found in a defendant's possession had been planted) the process of jury trial is or may be subverted.

Disclosure

14. Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

15. This is a field in which domestic practice has developed markedly, although not always consistently, over the last 20 years. Until December 1981, the prosecution duty was to make available, to the defence, witnesses whom the prosecution did not intend to call, and earlier inconsistent statements of witnesses whom the prosecution were to call: see Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 41st ed (1982), paras 4-178-4-179. Guidelines issued by the Attorney General in December 1981 ([1982] 1 All ER 734) extended the prosecution's duty of disclosure somewhat, but laid down no test other than one of relevance ("has some bearing on the offence(s) charged and the surrounding circumstances of the case") and left the decision on disclosure to the judgment of the prosecution and prosecuting counsel.

16. In *R v Ward* [1993] 1 WLR 619, 674 this limited approach to disclosure was held to be inadequate:

> "An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial".

The rule was stated with reference to scientific evidence, because that is what the case concerned, but the authority was understood to be laying down a general test based on relevance: see *R v Keane* [1994] 1 WLR 746, 752.

17. The Criminal Procedure and Investigations Act 1996 gave statutory force to the prosecution duty of disclosure, but changed the test. Primary disclosure must be made under section 3(1)(a) of any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. Secondary disclosure under section 7(2)(a) is to be made, following delivery of a defence statement, of previously undisclosed material which might be reasonably expected to assist the accused's defence. Section 32 of the Criminal Justice Act 2003, yet to take effect, has amended section 3(1)(a) of the 1996 Act so as to require primary disclosure of any previously undisclosed material "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". Whether in its amended or unamended form, section 3 does not require disclosure of material which is either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence. This rule was not criticised by the appellants' counsel, unsurprisingly since a defendant cannot complain that the defence (and the judge and jury) are not alerted to the existence of material which, if revealed, would lessen his chance of acquittal. The information which came to light in the course of the European Court proceedings in *Edwards* (that he had been involved in the supply of heroin before the start of the undercover operation: judgment, paragraph 16) would not have been disclosable under the present rule, since that information could only have thrown doubt on his contention that he thought he was dealing with jewellery and on any contention that he had been induced to commit the offence of which he was convicted.

Public interest immunity

18. Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.

19. The English law of crown privilege, later public interest immunity (or PII), was largely developed in civil cases. This was because, before and even after the Attorney General's 1981 Guidelines, disclosure was left largely to the judgment of the prosecuting authorities and the prosecution and only exceptionally did the court make any ruling. Thus the defence were commonly unaware of what had not been disclosed and there was no judicial decision against which a defendant could appeal.

20. The shortcomings of this unsatisfactory régime were vividly exposed by the Court of Appeal's ground-breaking decision in *R v Ward* [1993] 1 WLR 619, to which reference has already been made. The effect of the judgment was to require the prosecution, if it sought to claim PII for documents helpful to the defence, to give notice of the claim to the defence so that, if necessary, the court could be asked to rule on the legitimacy of the prosecution's asserted claim: see pages 680-681. The procedural implications of this

judgment were refined by the Court of Appeal six months later in *R v Davis* [1993] 1 WLR 613. The court there distinguished between three classes of case: page 617. In the first, comprising most of the cases in which a PII issue arises, the prosecution must give notice to the defence that they are applying for a ruling of the court, and must indicate to the defence at least the category of the material they hold (that is, the broad ground upon which PII is claimed), and the defence must have the opportunity to make representations to the court. There is thus an inter partes hearing conducted in open court with reference to at least the category of the material in question. The second class comprises cases in which the prosecution contend that the public interest would be injured if disclosure were made even of the category of the material. In such cases the prosecution must still notify the defence that an application to the court is to be made, but the category of the material need not be specified: the defence will still have an opportunity to address the court on the procedure to be adopted but the application will be made to the court in the absence of the defendant or anyone representing him. If the court considers that the application falls within the first class, it will order that procedure to be followed. Otherwise it will rule. The third class, described as "highly exceptional", comprises cases where the public interest would be injured even by disclosure that an ex parte application is to be made. In such cases application to the court would be made without notice to the defence. But if the court considers that the case should be treated as falling within the second or the first class, it will so order. The court thus modified to a limited extent the ruling in *R v Ward* that notice of the making of an application should always be given to the defence: page 618. The test laid down in *R v Davis* was applied in *R v Keane* [1994] 1 WLR 746, 750, where the court stressed

> "that ex parte applications are contrary to the general principle of open justice in criminal trials. They were sanctioned in *Reg v Davis* [1993] 1 WLR 613 solely to enable the court to discharge its function in testing a claim that public interest immunity or sensitivity justifies non-disclosure of material in the possession of the Crown. Accordingly, the ex parte procedure should not be adopted, save on the application of the Crown and only for that specific purpose".

It is plain from the observations of the court at page 752 that the prevailing test of materiality and an excess of caution on the part of prosecutors were by this time tending to impose an undue and inappropriate burden on judges. In *R v Turner* [1995] 1 WLR 264, 267, the court emphasised the need to scrutinise, with great care, applications for disclosure of details about informers. The procedural régime established by *R v Davis* was in effect sanctioned by sections 3(6), 7(5), 14(2), 15(2) and 21(2) of the Criminal Procedure and Investigations Act 1996, by the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997/698) and by the Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997/703).

21. The years since the decision in *R v Davis* and enactment of the CPIA have witnessed the introduction in some areas of the law of a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a "special advocate", who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party, but who, subject to those constraints, is charged to represent that party's interests. This procedure was first introduced by section 6 of the Special Immigration Appeals Commission Act 1997 and rule 7 of the Special Immigration Appeals Commission (Procedure) Rules 1998 (SI 1998/1881), in proceedings concerned with exclusion or removal of a person as conducive to the public good or in the interests of

national security. Similar provision was made by section 91(7) and (8) of the Northern Ireland Act 1998 in relation to national security certificates issued under section 42 of the Fair Employment (Northern Ireland) Act 1976, although no appointment has yet been made under section 91. Similar provision was again made by section 5 of the Terrorism Act 2000 and rule 10 of the Proscribed Organisations Appeal Commission (Procedure) Rules 2001 (SI 2001/443); section 70 of the Anti-Terrorism, Crime and Security Act 2001 and rule 8 of the Pathogens Access Appeal Commission (Procedure) Rules 2002 (SI 2002/1845); and by the Northern Ireland (Sentences) Act 1998, Schedule 2, paragraph 7 (2) and the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564), Schedule 2, paragraph 6. The courts have recognised the potential value of a special advocate even in situations for which no statutory provision is made. Thus the Court of Appeal invited the appointment of a special advocate when hearing an appeal against a decision of the Special Immigration Appeals Commission in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, paragraphs 31-32, and in *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 paragraph 34, the House recognised that this procedure might be appropriate if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service.

22. There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But 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 the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. In the Republic of Ireland, whose legal system is, in many respects, not unlike that of England and Wales, a principled but pragmatic approach has been adopted to questions of disclosure and it does not appear that provision has been made for the appointment of special counsel: see *Director of Public Prosecutions v Special Criminal Court* [1999] I IR 60.

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