133)

3453

SCSL-03-01-PT
(3453-3495)

THE SPECIAL COURT FOR SIERRA LEONE

Case No.: SCSL-03-01-PT

Before: Hon. Justice Richard Lussick, Presiding
Hon Justice Teresa Doherty
Hon Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 28 November 2006

THE PROSECUTOR

–v–

CHARLES TAYLOR

URGENT AND PUBLIC

DEFENCE MOTION REQUESTING REMOVAL OF CAMERA FROM CONFERENCE ROOM

Office of the Prosecutor
Mr. James C. Johnson
Ms. Nina Jorgensen
Ms. Wendy van Tongeren
Ms. Shyamala Alagendra
Mr. Alain Werner

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
28 NOV 2006
NAME Adera Nsiima K.
SIGN Nsiima
TIME 15:54

Introduction

1. On 10 November 2006, midway through pre-trial preparation, at the International Criminal Court (the "ICC") Scheveningen detention facility, where Mr. Taylor is a detainee, the ICC Detention Unit (the "ICCDU") installed a video surveillance camera in both conference rooms available for Mr. Taylor's legal consultations. The Defence for Mr. Taylor were not given any prior notice that cameras were to be installed, nor were the views of the Defence team invited or taken into account prior to taking this action. Since then, as the video camera in one conference room has apparently been turned off, the ICCDU has actively enforced video surveillance of Mr. Taylor's legal consultations by moving Mr. Taylor's legal consultations to a conference room equipped with a camera that is functioning, switched on, and whose transmissions are monitored.

2. Mr. Taylor is interned in the same detention unit as Mr. Lubanga, an ICC accused, and until recently both Accused used the same conference rooms for legal consultations. On 10 November 2006, the ICC Trial Chamber, in *Lubanga*, in response to Defence submissions, ordered the Registrar to stop using a surveillance camera, and, consistent with the ICC Regulations of the Registry, Regulation 183, place a security guard in front of the conference room instead.[1] The ICCDU complied with this order.[2]

3. In response to a Defence request, the Registry of the ICC, in an email from Ms. Rokhayatou Diarra on 17 November 2006, refused to cease video surveillance of Mr. Taylor's legal consultations, claiming that the decision in *Lubanga* was not binding on Mr. Taylor's conditions of detention.[3]

4. The Defence have had no reply to an email sent to the Head of Detention Services, the Principal Defender and Deputy Registrar of the Special Court for Sierra Leone ("SCSL" or "Special Court") on 14 November 2006 asking for the video surveillance cameras to be removed immediately from the consultation rooms.[4]

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[1] International Criminal Court, *Regulations of the Registry*, ICC-BD/03-01-06, 06 March 2006.
[2] *Prosecutor v. Lubanga*, Case No. ICC-01-04-01-06-T-32-EN, Transcripts, 10 November 2006, p. 34.
[3] *post*, Annexure A.
[4] *post*, Annexure B.

5. The Defence for Mr. Taylor requests the Trial Chamber's (the "Chamber") intervention in removing video surveillance cameras from the conference rooms where Mr. Taylor's legal consultations take place. The Chamber has, it is submitted, "inherent" jurisdiction to review administrative decisions, even ICC administrative decisions, related to Mr. Taylor's detention.

6. The Defence submits that such electronic surveillance is not only inconsistent with SCSL practice and regulations, but infringes Mr. Taylor's right to confidentially, his right to freely and openly communicate with his counsel, and his right to equal treatment vis-à-vis other detainees in the Special Court's jurisdiction.

7. The Defence submits that the ICCDU is mistaken in its position that the use of video surveillance cameras to monitor legal visits is consistent with Regulation 183 of the Regulations of the Registry; as the ICC Trial Chamber's decision in *Lubanga* demonstrates. Although the Defence concedes the Registry's position that *Lubanga* is not binding on the Registry here[5], it is nevertheless of persuasive authority, and it is the only judicial ruling on the application of Regulation 183 available.

8. Even *assuming arguendo* that the ICCDU is acting consistently with Regulation 183, because the use of video surveillance contravenes Mr. Taylor's right to effective representation, privileged communication, and equal protection, it should not be permitted. These Regulations should be interpreted in compliance with "authoritative and applicable"[6] fundamental rights, which are incorporated into the SCSL Statute and have primacy over administrative regulations.

9. The use of video surveillance to monitor legal consultations contravenes Mr. Taylor's right to attorney-client privileged communications pursuant to Rule 97 of the SCSL Rules of Procedure and Evidence (the "RPE"). This is also an element of his statutory right to enjoy, in full equality,

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[5] E-Mail from Rokhayatou Diarra, Legal Coordinator, Division of Court Services, ICC to Mr. Sahota, co-Counsel, Office for the Defence of Mr. Taylor, 17 November 2006.

[6] *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, ICTY, Decision on the Motion by the Prosecutor for Protective Measures for the Prosecution Witnesses pseudonym "B" through "M", Preliminary Judgement, 28 April 1997, para. 27. *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993) (committing the ICTY to "fully respect internationally recognized principles regarding the rights of the accused at all stages of its proceedings.").

the right to defend himself in person or through legal assistance of his own choosing under Article 17(4)(d) of the SCSL Statute and Article 67(1)(d) of the ICC Statute.

10. The Defence strongly objects to the video surveillance of privileged consultations on the basis that the mere presence of a live video camera has a chilling effect, in practice, on confidential communications between Mr. Taylor and his legal team. The camera creates an atmosphere whereby an accused does not feel free to communicate with his counsel. The conditions of use, method of operation and technological limits of the video surveillance facility are unclear. The ICCDU claim that the surveillance camera only records video-footage and does not record or relay any audio conversations. Notwithstanding this claim, the Defence is still concerned that confidential communications may be discovered visually. Confidential material could be identified through the use of lip–reading analysis or, for instance, through the magnification of images of maps, documents and photographs necessarily referred to in legal consultations. Such images would be easily discernable through the use of modern technology. Furthermore, monitoring of the time spent on any particular disclosure package could indicate its significance. Also, there remain practical concerns that confidential material could fall into the hands of a third party and be used against the Accused. The Defence strongly opposes the use of a surveillance camera during the privileged meetings between Mr. Taylor and his defence team even if the camera does not record or relay any audio conversations. Mr. Taylor's ability to frankly and freely communicate with his counsel is thereby circumscribed because of the fear that the video transmission of his consultation, through the recorded video, could be used against him.

11. Mr. Taylor remains within the jurisdiction of the SCSL, and video surveillance is <u>not</u> used in the Freetown detention facility. The Defence submits that the application of the ICC Regulations, which substantively contravene Mr. Taylor's right to equal treatment vis-à-vis other SCSL detainees, is *ultra vires*. Mr. Taylor did not choose to be tried in The Hague and despite the geographical change in venue, Mr. Taylor, indicted by the SCSL, remains within the SCSL's jurisdiction and is entitled to fair trial rights under Article 17, "<u>in full equality</u>" with the other SCSL detainees.

Jurisdiction

12. In the circumstances of the present case, The Chamber, rather than the President of the SCSL, has the "inherent" jurisdiction to review administrative decisions that impact Mr. Taylor's substantive rights. In *Brima,* this Trial Chamber held that it possessed the "judicial prerogative" to subject administrative actions to judicial review "to ensure the observance of the due process of the law [...]."[7] This Chamber exercised jurisdiction in *Brima* to review the Registry's denial of a legal services contract. Mr. Taylor's right to freely communicate with his lawyer, an element of fair trial under Article 17(4)(b), is similarly, if not to a greater extent, compromised by video surveillance of his privileged consultations with his legal team.

13. The ICC's administrative actions in relation to all aspects of Mr. Taylor's conditions of detention are also subject to the Chamber's jurisdiction. The **Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone**, dated 13 April 2006, grants the SCSL jurisdiction and authority over Mr. Taylor. Article **6.4 (Detention Services and Facilities)** provides:

> The Special Court shall retain full legal control and authority over the Detainee and shall assume full legal responsibility for all aspects arising out of the provision of the day to day detention services and facilities under this Article including the well-being of the Detainee.

Article **6.9 (Detention Services and Facilities)** provides:

> Notwithstanding the provisions of Article 15 of this MOU, in the case of any claims by the Detainee or any third parties for acts or omissions arising from the provision of services, facilities and support under this Article, the Special Court shall be responsible for such claims and shall indemnify, hold and save harmless, and defend at the Special Court's own expense, the ICC, its officials, agents, servants and employees from and against all suits, claims, demands and liability of any nature or kind including their costs and expenses.

Indeed, the Chamber's failure to exercise jurisdiction would leave Mr. Taylor, detained pursuant to an SCSL indictment, without recourse to judicial review.

14. The ICCDU sought no clarification from the SCSL Registry or Chambers before proceeding. This course of action is a cause of concern for the Defence, as it suggests that that the

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[7] *The Prosecutor v. Brima et al,* Case No. SCSL-04-16-PT-068, Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 06 May 2004, paras. 65 – 70.

administration, in acting *ultra vires*, is testing its powers. Unless the Chamber intervenes, the ICCDU may continue to implement other similar unilateral initiatives. The Defence reiterates this Chamber's holding in *Brima* that:

> It is our view and conviction as a Chamber, that the legal doctrine of Ultra Vires on which the dispensation of administrative law is principally founded, is a very vital component of the principle of the Rule of Law and of the Due Process. It constitutes an important substratum in the edifice of judicial administration without which it can easily crumble. Indeed, what accounts for and justifies the perenity of this vital doctrine is the role it has played and continues to play in the protection of rights of all sorts, individual and collective, against the formidable armada of the privileged and the ruling class, to which anybody or group, particularly the less privileged, and including of course, even erstwhile omnipotents who at time end up in stormy waters, could fall a victim. It is that vital weapon in the armory of the judicial machinery that checks, controls, mitigates and combats administrative despotism, illegalities and arbitrariness which could otherwise become the order of the day even in the most advanced democracies, and nip in the bud, the implantation of the doctrine of good governance that is rapidly perfecting its grip in the judicial, administrative and political cultures of emerging societies around the world.[8]

SCSL/ICC Regulations

15. No administrative regulation explicitly allows for the video surveillance of privileged legal consultations. The rules relating to communication with and visits from counsel at the SCSL are outlined in Rule 44(D) of the SCSL Rules of Detention, which states that visits "shall be conducted in the sight of but not within the hearing of the staff". There is no reference to visits in the *indirect* sight of staff, or any reference to video surveillance. Furthermore, pursuant to Rule 24(A) video surveillance is only permitted in the detainees' cell and there is no reference to use of video surveillance during privileged counsel visits.

16. Similarly, Regulation 183(1) of the ICC Regulations of the Registry does not specifically provide for the use of video surveillance for privileged counsel visits, and the Defence submits, therefore, that it cannot apply to legal consultations. Regulation 183(1) states that some visits "shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre" while others shall also "be monitored by video surveillance." The rule of lenity,

[8] *The Prosecutor v. Brima et al*, Case No. SCSL-04-16-PT-068, Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 06 May 2004, para. 112

where ambiguities are resolved in favour of the defendant, supports the Defence's narrower interpretation of Regulation 183.

17. Regulation 97(2) of the ICC Regulations of the Court[9] explicitly refers to communication with counsel, stating that "[a]ll communication between a detained person and his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68 and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre". As video surveillance is not mentioned in conjunction with privileged visits, and privileged visits are not explicitly referred to in Regulation 183(1) of the Registry in conjunction with video surveillance, the Defence submits that video surveillance is an "indirect" mode of surveillance not envisaged by the drafters of the two sets of Regulations.

18. The Defence have not been provided with any explanation justifying the installation of video surveillance cameras. The Defence have been informed that the cameras do not record but simply broadcast images. However, no information has been provided as to (i) the purpose of the surveillance cameras; (ii) who has access to the broadcasting or recordings of the privileged conversations; (iii) the method of transmission of the video recordings to the monitoring stations; (iv) the safeguards in place to ensure that transmissions are not intercepted; and (v) how long, if at all, the privileged conversations are kept before being destroyed.

19. In the absence of any further information, the Defence submits that the use of video surveillance is disproportionate to the presumed purpose of Regulation 183(1), which is to address security and safety concerns, particularly as during legal consultations counsel are bound by ethical and professional codes of conduct and must act as officers of the court. The reasons for the ICC's concerns are therefore difficult for the Defence to fathom – is it fear of contraband being handed to Mr. Taylor, the safety of legal counsel, or some other reason?

[9] International Criminal Court, *Regulations of the Court,* ICC-BD/01-01-04, 26 May 2004.

Legal Professional Privilege

20. The right to attorney-client confidential communication, articulated in SCSL RPE Rule 97, SCSL Rules of Detention Rule 44(A), and ICC RPE Rule 73, makes "practical and effective" [10] the right to communicate with counsel. This is a right guaranteed by Article 17(4)(b) of the SCSL Statute and is a foundational right in order to ensure an accused's effective representation. The right to effective representation is provided for in Article 17(4)(d) of the SCSL Statute and Article 67(4) of the ICC Statute. These are themselves restatements of Article 6(3)(c) of the European Convention on Human Rights (ECHR) and Article 14(3)(c) of the International Covenant of Civil and Political Rights (ICCPR).

21. At the national and international level, legal professional privilege is considered fundamental to the fair administration of justice, and in principle, is held by the accused. In *R. v. Derby Magistrates Court ex.p. B.*[11], the House of Lords emphasised that privileged legal communication in a criminal trial is more than just an "ordinary rule of evidence". Lord Taylor, C.J., stated:

> The principle that runs through all [the authorities] is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells the lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.[12]

22. The Defence submits that any limitation of attorney–client privilege cannot be justified on grounds of administrative concerns or regulations and that the video surveillance of legal consultations contravenes the principle of legal professional privilege. Measures such as surveillance or inspection are, in principle, incompatible with this right.

23. Narrowing of the attorney-client privilege is exceptional, granted *only* on showing of good cause, for instance, abuse of the privilege.[13] No such good cause has been shown in this instance, and indeed, no attempt has been made to show good cause. Mere administrative regulations,

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[10] *S v. Switzerland*, Judgment of 28 November 1991, A.220, p. 16.
[11] [1996] 1 A.C. 487.
[12] *R v. Derby Magistrates Court ex.p. B*, [1996] 1 A.C. at 507.
[13] *Campbell and Fell*, Judgment of 28 June 1984, p. 49; P. van Dijk & G.J.H. van Hoof: Theory and Practice of the European Convention on Human Rights, Kluwer International 1998, pp. 469-471, at p. 470.

prompted by no exceptional circumstance particular to this instance, cannot justify a narrowing of the legal privilege.

24. The Defence submits again that the video surveillance of privileged consultations has a chilling effect on the right to open and confidential communication, creating an atmosphere whereby an accused does not feel free to communicate with his counsel.[14]

25. Preserving Mr. Taylor's legal professional privilege requires that the camera be removed from the conference room used for legal consultations, not merely disconnected or switched off. The Defence submits that even the presence of the camera will continue to have a chilling effect on Mr. Taylor's exercise of his right to communicate openly and freely, and in full confidence with his legal team. A judicially ordered blind and mute camera will still require administrative assurances that it is switched off or disconnected, and Mr. Taylor's legal professional privilege cannot rest on the uncertain foundation of these assurances. Hence, the camera must be removed from the conference room.

Equal Treatment with other SCSL Prisoners and Mr Lubanga

26. Mr. Taylor remains in the SCSL's jurisdiction and the Defence do not accept that the decision to install video surveillance cameras is within the unilateral discretion of the ICCDU. As stated above, there was no consideration of the opinion of the Lead Counsel for Mr. Taylor or any other representative of the SCSL. The ICCDU's actions are also contrary to the memorandum of understanding between the ICC and SCSL.

27. Mr. Taylor is also being treated differently to Mr. Lubanga, the only other ICC detainee. The video surveillance camera in one conference room at the ICCDU is switched off during all the Lubunga Defence team legal consultations. To ensure that Mr. Taylor would not benefit from the Trial Chamber's Decision in *Lubanga*, the Taylor Defence Team has now been allocated a different conference room with a camera that is switched on during legal consultations.

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[14] *Supra*, para 10.

28. In Freetown, an attempt was made to install cameras in the visiting areas in the SCSL Detention Facility. The initiative was unsuccessful and cameras were never installed. Mr. Taylor, as an SCSL prisoner, should be entitled to the equal protection of the Chamber, such that he enjoys the same rights as Freetown detainees.

29. The present arrangements therefore contravene Mr. Taylor's right to equal treatment with his fellow SCSL detainees and violate Mr. Taylor's statutory right, as a minimum guarantee and in full equality, "to defend himself in person or through legal assistance of his choosing" (Article 17(4) (d)).

Conclusion

30. On the abovementioned grounds, the Defence for Mr. Taylor requests the Chamber to order the immediate removal of the surveillance camera from any conference room used for legal consultations by Mr. Taylor.

Respectfully submitted,

Karim A. A. Khan
Counsel for Mr. Charles Taylor

Dated this 28th Day of November 2006

ANNEXURE A

**Email Correspondence Dated 17 November 2006
Between Roger Sahota, Co-Counsel for Charles Taylor
and Rokhayatou Diarra, Legal Coordinator for the ICC**

34464

msn Hotmail

karimahmadkhan@hotmail.com

Printed: 28 November 2006 11:32:22

From : Diarra, Rokhayatou <Rokhayatou.Diarra@icc-cpi.int>

Sent : 17 November 2006 09:51:22

To : "roger sahota" <rogersahota@hotmail.com>

CC : <karimahmadkhan@hotmail.com>, <cmbuisman@hotmail.com>, <cmbuisman@yahoo.co.uk>, <singhavi@gmail.com>, "Herman von Hebel" <vonhebel@un.org>, "Dubuisson, Marc" <Marc.Dubuisson@icc-cpi.int>, "Jackson, Terence" <Terence.Jackson@icc-cpi.int>, "Rosette Muzigo-Morrison" <muzigo-morrison@un.org>, "Tjonk, Harry" <Harry.Tjonk@icc-cpi.int>, "Becerra Suarez, Bibiana" <Bibiana.BecerraSuarez@icc-cpi.int>

Subject : RE: New arrangement at the ICC Detention Centre

Dear Mr. Sahota,

I referred your question to Mr. Dubuisson. Please note that although a decision has indeed been taken in the matter, it has been taken by one Chamber (Pre-Trial Chamber I) of the ICC, it concerns the case of Mr. Lubanga Dyilo and the order only covers the period of his confirmation hearing.

We will therefore continue to apply Regulation 183 of the Regulations of the Registry to the detention of Mr. Taylor; and in so doing please note that we are acting pursuant to article 6.1 of the MoU signed with the SCSL.

Kind regards.

Rokhayatou Diarra

Legal Coordinator, Division of Court Services

Coordinatrice Juridique, Direction du service de la Cour

International Criminal Court - Cour pénale internationale

Maanweg 174 - 2516 AB The Hague - The Netherlands

Tel: + 31 070 515 8689 - Fax: + 31 070 515 8001

ANNEXURE B

**Email Correspondence Dated 14 November 2006
Between Karim Khan, Lead Counsel for Charles Taylor,
and Herman von Hebel, Deputy Registrar of the SCSL
and Ray Cardinal, Chief of the Detention Facility of the SCSL**

3466

msn Hotmail®

karimahmadkhan@hotmail.com Printed: 28 November 2006 11:42:20

From : Caroline Buisman <cmbuisman@yahoo.co.uk>
Sent : 28 November 2006 11:31:56
To : karimahmadkhan@hotmail.com
Subject : Fwd: FW: RE: New arrangement at the ICC Detention Centre

Here it is.

Note: forwarded message attached.

Send instant messages to your online friends http://uk.messenger.yahoo.com
From: karim khan <karimahmadkhan@hotmail.com>
To: cardinal@un.org, vonhebel@un.org, nmehielle@un.org, nahamya@un.org
Cc: singhavi@gmail.com, rogersahota@hotmail.com, cmbuisman@yahoo.co.uk, cmbuisman@hotmail.com, karimahmadkhan@hotmail.com
Subject: FW: RE: New arrangement at the ICC Detention Centre
Sent: 14 November 2006 16:57:21

Dear Herman and Ray,

I trust that you are both well.

Please could you both see the e-mail below from Roger sent to the ICC at my request. I would be very grateful if you could also consider this matter yourselves.

As you may be aware, there was a move to install surveillance cameras in the SCSL a few months ago which was finally aborted and good reason prevailed. In any event, no cameras were placed in the UNDU.

Whilst the ICC is obviously a different regime, the placing of cameras *in rooms where legal consultations take place* is a matter of concern to us. I would like early notification of the position of the SCSL to the placing of such cameras in rooms where legal consultations take place. I would also like to know if such cameras are active, if they are recorded and if they are also fitted with microphones. I would also like to know how long such tapes are kept. We are against such cameras in principle. Not only because they have been practically rejected in the SCSL, but because of the chilling effect they have (in practice) on legal consultations. Lip reading is, of course, a very well know and commonly used science / skill in the use of such recordings even if sound microphones are not active. Similarly maps, documents and photographs are and will be used which are legally privileged and sensitive.

Ray is, of course, incharge so to speak of Mr Taylor even though he is in the Hague and I think it may be much quicker to address this to him and you for answers than going round the houses between the ICC system and then coming back to you after being fobbed off the whole time. We need to cut the red tape and the amount of time these type of matters are costing us. As the issue of note books demonstrated, common sense does not always prevail in isolation when it comes from the Defence. Initiatives and proposals are much more likely to be acted upon by the ICC when they come from the SCSL officially.

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I think the note book example is legion and should not be forgotten in understanding the pathology of power and decision making in the ICC at the moment. For months we have been refused permission to take notebooks to see Mr Taylor when IN THE SAME FACILITY we could take THE SAME computers in if we were seeing ICTY detainees in adjoining rooms. It beggers belief that it took so long to get common sense to prevail and I think it was clear that this was only due to the the official intervention from the SCSL.

I do hope that on all these issues the SCSL has an independent view rather than just uncritically accepting whatever the ICC may choose to do. On a related note, Ray, may I enquire when are you planning to go to the ICC Detention Unit to see Mr. Taylor and inspect the prevailing regime. I think your presence there would be very welcome and contribute to a more balanced environment. It would certainly reassure the client and us that the SCSL is taking an interest in its one detainee who is not in Freetown.

with regards

Karim

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From: *roger sahota <rogersahota@hotmail.com>*
To: *"Diarra, Rokhayatou" <rokhayatou.diarra@icc-cpi.int>*
CC: *"karimahmadkhan@hotmail.com" <karimahmadkhan@hotmail.com>,"cmbuisman@hotmail.com" <cmbuisman@hotmail.com>, "cmbuisman@yahoo.co.uk"<cmbuisman@yahoo.co.uk>, "singhavi@gmail.com" <singhavi@gmail.com>*
Subject: *RE: New arrangement at the ICC Detention Centre*
Date: *Tue, 14 Nov 2006 15:19:54 +0000*

Dear Rokhaya

Thank you very much for the notification.

I would also be grateful if you would help us with regard to another issue, namely the placing of a surveillance

List of Authorities

ICC Jurisprudence

1. *Prosecutor v. Lubanga*, Case No. ICC-01-04-01-06-T-32-EN, Transcripts, 10 November 2006, p. 34. http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html

2. International Criminal Court, *Regulations of the Registry,* ICC-BD/03-01-06, 06 March 2006.

3. International Criminal Court, *Regulations of the Court,* ICC-BD/01-01-04, 26 May 2004.

SCSL Jurisprudence

4. *The Prosecutor v. Brima et al*, Case No. SCSL-04-16-PT-068, Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 06 May 2004, para. 112.
http://www.sc-sl.org/Documents/SCSL-04-16-PT-068-5276-5290pdf
http://www.sc-sl.org/Documents/SCSL-04-16-PT-068-5291-5305.pdf
http://www.sc-sl.org/Documents/SCSL-04-16-PT-068-5306-5316.pdf
http://www.sc-sl.org/Documents/SCSL-04-16-PT-068-5317-5326.pdf

ICTY Jurisprudence and Reports

5. *The Prosecutor v. Delalić et al.*, Case N° IT-96-21-T ICTY, Decision on the Motion by the Prosecutor for Protective Measures for the Prosecution Witnesses pseudonym "B" through "M", Preliminary Judgement, 28 April 1997, para. 27.
http://www.un.org/icty/cases-e/index-e.htm

6. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993).
http://www.un.org/icty/legaldoc-e/index.htm

ECHR Jurisprudence

7. *S v. Switzerland*, Judgment of 28 November 1991, *Application no. 12629/87; 13965/88*, A.220, p. 16.
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=S%20%7C%20Switzerland&sessionid=9533723&skin=hudoc-en

8. *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, *Application no. 7819/77; 7878/77*, p. 49.
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=United%20%7C%20Kingdom&sessionid=9530767&skin=hudoc-en

UK Jurisprudence

9. *R v. Derby Magistrates Court ex.p. B*, [1996] 1 A.C. 507.

Literature

10. P. van Dijk & G.J.H. van Hoof: Theory and Practice of the European Convention on Human Rights, Kluwer International 1998, pp. 469-471.

Cour
Pénale
Internationale

International
Criminal
Court

3469

Regulations of the Registry

ICC-BD/03-01-06

Date of entry into force: 6th March 2006

Official Journal Publication

2. Subject to regulation 182, sub-regulation 2, searches of counsel or persons to whom rule 73 applies, shall not extend to reading or copying documents brought to the detention centre by him or her.

3. Any person who refuses to comply with such requirements may be denied access.

4. Visitors may not pass any item to a detained person during a visit. Any items intended for a detained person shall be handed to the staff of the detention centre on entry and shall be dealt with as provided for in regulations 167, 168 and 169.

5. Where the Chief Custody Officer believes that these Regulations or any regulation regarding detention matters are being breached in any way, he or she may immediately terminate the visit and advise the detained person and the visitor of his or her reasons for doing so. The visitor may be required to leave the detention centre and the Chief Custody Officer shall report the matter to the Registrar. This provision applies equally to all visitors.

Regulation 182
Documents passed by counsel

1. Counsel may pass documents to and receive documents from the detained person during a visit. Any quantity of documents which is too large to be physically passed over to the detained person at the visiting facility shall be handed to the Chief Custody Officer, who shall pass them unopened and unread to the detained person concerned.

2. All documents passed to and from a detained person in this manner shall be treated as mail and shall be dealt with as provided for in regulations 167, 168 and 169.

Regulation 183
Supervision of visits

1. Visits shall be conducted within the sight and hearing of the staff of the detention centre and shall be monitored by video surveillance. In addition to visits falling within regulations 97, sub-regulation 2, and 98, sub-regulation 2, of the Regulations of the Court, visits from representatives of the independent inspecting authority and officers of the Court, shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre. Private visits as referred to in regulation 188 shall not be supervised.

2. Where the member of staff supervising the visit believes that these Regulations or any regulation regarding detention matters are being breached in any way, he or she may

terminate the visit, relocate the visitor and the detained person to separate and secure areas and immediately report the matter to the Chief Custody Officer.

3. The Chief Custody Officer shall decide whether or not to confirm the decision taken by the staff member. In the event that the decision of the staff member is confirmed by the Chief Custody Officer, he or she shall immediately report the matter to the Registrar.

Regulation 184
Monitoring of visits

1. Where the Chief Custody Officer has reasonable grounds to believe that the detained person may be attempting to:

   (a) Arrange an escape;

   (b) Interfere with or intimidate a witness;

   (c) Interfere with the administration of justice;

   (d) Otherwise disturb the maintenance of the security and good order of the detention centre;

   (e) Jeopardise public safety or the rights or freedom of any person; or

   (f) Breach an order for non-disclosure made by a Chamber,

   he or she shall provide the Registrar with his or her reasons for asking for the visits to be monitored and shall seek the permission of the Registrar to do so.

2. With the exceptions established in regulation 183, sub-regulation 1, the Registrar may personally order that all or certain visits to the detained person concerned be monitored. The Registrar shall report this to the Presidency.

3. Prior to its implementation, the order of the Registrar taken under sub-regulation 2 shall be notified to the detained person concerned and his or her counsel.

4. The Registrar shall review any order taken under sub-regulation 2 after 14 calendar days of the commencement of the monitoring, in consultation with the Chief Custody Officer, and may decide to extend the monitoring period or to return to the normal regime of visits. The order by the Registrar to extend the period shall be reported to the Presidency and shall be notified to the detained person and to his or her counsel prior to its implementation.

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Cour
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International
Criminal
Court

REGULATIONS OF THE COURT

Adopted by the judges of the Court
on 26 May 2004

Fifth Plenary Session
The Hague, 17- 28 May 2004

Official documents of the International Criminal Court
ICC-BD/01-01-04

person with the right to be heard on the subject of any offence alleged to have been committed, and shall include a right for the detained person to address the Presidency.

Regulation 96
Suspension of regulations on detention

1. In the event of a serious disturbance or other emergency occurring within the detention centre, the Chief Custody Officer may take such action as is immediately necessary to ensure the safety of detained persons and staff of the detention centre, or the security of the detention centre.

2. Any action taken by the Chief Custody Officer under sub-regulation 1 shall be reported immediately to the Registrar, who may, with the approval of the Presidency, temporarily suspend the operation of all or part of these Regulations or the Regulations of the Registry relevant to detention matters to the extent necessary to restore the security and good order of the detention centre.

Section 2
Rights of a detained person and conditions of detention

Regulation 97
Communication with defence counsel

1. A detained person shall be informed of his or her right to communicate fully, where necessary with the assistance of an interpreter, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68.

2. All communication between a detained person and his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68

and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre.

Regulation 98
Diplomatic and consular assistance

1. A detained person shall be informed of his or her right to communicate with and to receive visits from:

(a) A diplomatic and/or consular representative from the State of which the person is a national accredited to the State in which the detention centre is situated or the authority which has made the detention centre available to the Court; or

(b) Where the State of which the person is a national has no diplomatic or consular representation in the State in which the detention centre is situated, a diplomatic and/or consular representative of the State which takes charge of the interests of the State of which the person is a national; or

(c) In case of refugees or stateless persons, a representative of a national or international authority whose task it is to represent the interests of such persons.

2. All communication between a detained person and the persons described in sub-regulation 1 (a), (b) or (c), and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre.

Regulation 99
General entitlements of detained persons

1. Every detained person shall be entitled, *inter alia*, to the following:

(a) To participate in a work programme;

(b) To keep in his or her possession authorised clothing and personal items for his or her use;

***487** Regina v. **Derby Magistrates' Court, Ex parte B.**
Same v. Same, Ex parte Same

[1995] 3 W.L.R. 681

House of Lords
HL
Lord Keith of Kinkel, Lord Mustill, Lord Taylor of Gosforth C.J., Lord Lloyd of Berwick and Lord Nicholls of Birkenhead
1995 June 12, 13, 14, 15; June 22; Oct. 19
[Consolidated Appeals]

Crime--Evidence--Privilege--Prosecution witness previously acquitted of offence with which defendant charged--Defence seeking to question witness as to original instructions to legal advisers--Issue of witness summons for production of instructions--Whether "likely to be material evidence"--Whether admissible as previous inconsistent statement--Whether subject to legal professional privilege--Criminal Procedure Act 1865 (28 & 29 Vict. c. 18), ss. 4, 5--Magistrates' Courts Act 1980 (c. 43), s. 97 (as amended by Contempt of Court Act 1981 (c. 49), s. 14(5), Sch. 2, para. 7 and by Criminal Penalties etc. (Increase) Order 1984 (S.I. 1984 No. 447), art. 2(3), Sch. 3)

[FN1] [FN2] In 1978 the applicant went for a walk with a 16-year-old girl, who was later found murdered. The applicant was arrested and made a statement to the police admitting being solely responsible for the murder. Shortly before his trial at the Crown Court for murder he retracted that statement and alleged that although he had been at the scene of the crime his stepfather had killed the girl. The applicant was acquitted. In 1992 the stepfather was charged with the girl's murder and committal proceedings were commenced before the stipendiary magistrate. The applicant gave evidence for the prosecution and repeated his allegation that his stepfather had murdered the girl. Counsel for the stepfather, in cross-examining the applicant, asked about the instructions he had initially given to his solicitors when admitting to the murder. The applicant declined to answer on the grounds of legal professional privilege. An application was thereupon made on behalf of the stepfather, pursuant to section 97 of the Magistrates' Courts Act 1980, for a witness summons directed to the applicant's solicitor requiring production of the attendance notes and proofs of evidence disclosing the relevant instructions. The stipendiary magistrate held that the documents were "likely to be material evidence" within section 97 and, having weighed the public interest in protecting solicitor and client communications against the public interest in securing that all relevant evidence was available to the defence, issued the summons. A second summons to like effect directed to the applicant himself was later issued. The applicant obtained leave to seek judicial review of the stipendiary magistrate's decisions, but the Divisional Court dismissed the applications.

FN1 Criminal Procedure Act 1865, ss. 4, 5: see post, p. 498D-F.

FN2 Magistrates' Courts Act 1980, s. 97: see post, p. 497B-F.

***488** On the applicant's appeals: -

Held, allowing the appeals,

(1) that the use which could be made in criminal proceedings of a witness's previous inconsistent written statements was governed by sections 4 and 5 of the Criminal Procedure Act 1865, which presupposed that the statements were already available to the cross-examiner to put to the witness so that if he denied making them or denied their inconsistency they could then become admissible evidence; that where the cross-examiner did not have the previous statements to put to the witness they could not be admitted under the Act of 1865 and as such did not meet the requirement of section 97 of the Magistrates' Courts Act 1980 that they were "likely to be material evidence;" that the objection to material not being admitted unless it was already available to the cross-examiner was in accordance with the principle that section 97 could not be used to obtain discovery; and that, accordingly, since the documents sought by the stepfather could not have been admitted under the Act of 1865 and since, further, the object of his application had been to discover what the applicant had said to his solicitor, the conditions for the issue of a witness summons under section 97 had not been satisfied (post, pp. 495B-D, 498G-499B, 500A, D, 509B, 510C).

(2) That, in any event, a witness summons could not be issued under section 97 of the Magistrates' Courts Act 1980 to compel the production of documents subject to legal professional privilege which had not been waived, since the principle that a client should be free to consult his legal advisers without fear of his communications being revealed was a fundamental condition on which the administration of justice as a whole rested; that notwithstanding the public interest in securing that all relevant evidence was made available to the defence, legal professional privilege was to be upheld in all cases as the predominant public interest, even (Lord Nicholls of Birkenhead dubitante) where the witness no longer had any recognisable interest in preserving the confidentiality; and that, accordingly, the applicant had been entitled to claim legal professional privilege (post, pp. 495B-D, 507C-D, 508B-C, H-509A, 509B, D, F-510A, 512C-E, 513D-E).

Reg. v. Barton [1973] 1 W.L.R. 115 and Reg. v. Ataou [1988] Q.B. 798, C.A. overruled.

Decision of Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in their Lordships' opinions:

Anderson v. Bank of British Columbia (1876) 2 Ch.D. 644, C.A..

Balabel v. Air India [1988] Ch. 317; [1988] 2 W.L.R. 1036; [1988] 2 All E.R. 246, C.A..

Barclays Bank Plc. v. Eustice [1995] 1 W.L.R. 1238; [1995] 4 All E.R. 511, C.A..

Berd v. Lovelace (1577) Cary 62

Bolton v. Liverpool Corporation (1833) 1 M. &; K. 88

Bullivant v. Attorney-General for Victoria [1901] A.C. 196, H.L.(E.).

Calcraft v. Guest [1898] 1 Q.B. 759, C.A..

D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.).

Dennis v. Codrington (1579) Cary 100

Grant v. Downs (1976) 135 C.L.R. 674 Greenough v. Gaskell (1833) 1 M. &; K. 98

***489** Hobbs v. Hobbs and Cousens [1960] P. 112; [1959] 3 W.L.R. 942; [1959] 3 All E.R. 827

Holmes v. Baddeley (1844) 1 Ph. 476

Kingston's (Duchess of) Case (1776) 20 St.Tr. 355

Pearce v. Foster (1885) 15 Q.B.D. 114, C.A..

Reg. v. Ataou [1988] Q.B. 798; [1988] 2 W.L.R. 1147; [1988] 2 All E.R. 321, C.A..

Reg. v. Barton [1973] 1 W.L.R. 115; [1972] 2 All E.R. 1192

Reg. v. Beattie (1989) 89 Cr.App.R. 302, C.A..

Reg. v. Cheltenham Justices, Ex parte Secretary of State for Trade [1977] 1 W.L.R. 95; [1977] 1 All E.R. 460, D.C..

Reg. v. Coventry Magistrates' Court, Ex parte Perks [1985] R.T.R. 74, D.C..

Reg. v. Cox and Railton (1884) 14 Q.B.D. 153

Reg. v. Craig [1975] 1 N.Z.L.R. 597

Reg. v. Dunbar and Logan (1982) 138 D.L.R. (3d) 221

Reg. v. Greenwich Juvenile Court, Ex parte Greenwich London Borough Council (1977) 76 L.G.R. 99, D.C..

Reg. v. Keane [1994] 1 W.L.R. 746; [1994] 2 All E.R. 478, C.A..

Reg. v. Reading Justices, Ex parte Berkshire County Council , The Times, 5 May 1995, D.C..

Reg. v. Saunders (unreported), 10 January 1990, Henry J.

Reg. v. Sheffield Justices, Ex parte Wrigley (Note) [1985] R.T.R. 78, D.C..

Reg. v. Skegness Magistrates' Court, Ex parte Cardy [1985] R.T.R. 49, D.C..

Reg. v. Ward [1993] 1 W.L.R. 619; [1993] 2 All E.R. 577, C.A..

Rex v. Birch (1924) 18 Cr.App.R. 26, C.C.A..

S. v. Safatsa 1988 (1) S.A. 868

Southwark and Vauxhall Water Co. v. Quick (1878) 3 Q.B.D. 315, C.A..

Ventouris v. Mountain [1991] 1 W.L.R. 607; [1991] 3 All E.R. 472, C.A..

Waugh v. British Railways Board [1980] A.C. 521; [1979] 3 W.L.R. 150; [1979] 2 All E.R. 1169, H.L.(E.).

Wheeler v. Le Marchant (1881) 17 Ch.D. 675, C.A..

Wilson v. Rastall (1792) 4 Durn. &; E. 753

The following additional cases were cited in argument:

A.M. & S. Europe Ltd. v. Commission of the European Communities (Case 155/79) [1983] Q.B. 878; [1983] 3 W.L.R. 17; [1983] 1 All E.R. 705, E.C.J..

Baker v. Campbell (1983) 153 C.L.R. 52

Bullock & Co. v. Corry & Co. (1878) 3 Q.B.D. 356, D.C..

Derby & Co. Ltd. v. Weldon (No. 7) [1990] 1 W.L.R. 1156; [1990] 3 All E.R. 161, C.A..

Evans v. Chief Constable of Surrey [1988] Q.B. 588; [1988] 3 W.L.R. 127; [1989] 2 All E.R. 594

Knight v. Marquess of Waterford (1835) 2 Y. &; C.Ex. 22

Lonrho Ltd. v. Shell Petroleum Co. Ltd. [1980] 1 W.L.R. 627, H.L.(E.).

Minet v. Morgan (1873) L.R. 8 Ch.App. 361

Nederlandse Reassurantie Groep Holding N.V. v. Bacon & Woodrow [1995] 1 All E.R. 976

Nias v. The Northern and Eastern Railway Co. (1838) 3 M. &; C. 355

Oxfordshire County Council v. M. [1994] Fam. 151; [1994] 2 W.L.R. 393; [1994] 2 All E.R. 269, C.A..

Reece v. Trye (1846) 9 Beav. 316

Reg. v. Blastland [1986] A.C. 41; [1985] 3 W.L.R. 345; [1985] 2 All E.R. 1095, H.L.(E.).

Reg. v. Chief Constable of West Midlands Police, Ex parte Wiley [1995] 1 A.C. 274; [1994] 3 W.L.R. 433; [1994] 3 All E.R. 420, H.L.(E.).

***490** Reg. v. Clowes [1992] 3 All E.R. 440

Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett (No. 2) [1994] 1 All E.R. 289, D.C..

Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L. (E.).

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Reg. v. Riley (1866) 4 F. &; F. 964

Reg. v. Tompkins (1977) 67 Cr.App.R. 181, C.A..

Reg. v. Wright (1866) 4 F. &; F. 967

Sphere Drake Insurance Plc. v. Denby , The Times, 20 December 1991, Judge Kershaw Q.C.

APPEALS from the Divisional Court of the Queen's Bench Division.

These were consolidated appeals, by leave of the House of Lords (Lord Keith of Kinkel, Lord Mustill and Lord Lloyd of Berwick), by the applicant, B., from the judgment of the Divisional Court of the Queen's Bench Division (McCowan L.J. and Gage J.) on 21 October 1994 refusing his applications for judicial review of decisions dated 21 June 1994 and 8 August 1994 in committal proceedings against the applicant's stepfather, ordering, pursuant to section 97 of the Magistrates' Courts Act 1980, that the applicant, a prosecution witness, and his solicitor, produce attendance notes and proofs of evidence made prior to 8 October 1978 disclosing the applicant's factual instructions to his former solicitor in defence of a charge of murder in respect of which the applicant was later acquitted.

The facts are stated in the opinion of Lord Taylor of Gosforth C.J.

Robert Francis Q.C. and *Edward Cousins* for the applicant. Those who seek to communicate in confidence with their legal advisers should be able to do so in the knowledge that their bona fide instructions will remain protected from disclosure. Section 97 of the Magistrates' Courts Act 1980 gives the court no power to make an order for discovery or to mount a fishing expedition, but is confined to making an order to produce specific documents which are known to exist and are likely to be material evidence. The section gives no power to order the production of documents which might be useful to a cross-examiner or otherwise relevant: Reg. v. Cheltenham Justices, Ex parte Secretary of State for Trade [1977] 1 W.L.R. 95. This is so even if it is feared that justice might not otherwise be done: see Reg. v. Greenwich Juvenile Court, Ex parte Greenwich London Borough Council (1977) 76 L.G.R. 99, 104-105; Reg. v. Skegness Magistrates' Court, Ex parte Cardy [1985] R.T.R. 49, 56-57, 60-61; Reg. v. Coventry Magistrates' Court, Ex parte Perks [1985] R.T.R. 74, 76 and Reg. v. Sheffield Justices, Ex parte Wrigley (Note) [1985] R.T.R. 78, 81.

The stipendiary magistrate and the Divisional Court erred in their decisions by relying on the change in policy regarding disclosure of relevant material by the prosecution. The requirements of section 97 remain untouched by that development: Reg. v. Reading Justices, Ex parte Berkshire County Council, The Times, 5 May 1995.

Where a witness is cross-examined as to a previous inconsistent statement under sections 4 and 5 of the Criminal Procedure Act 1865, the cross-examiner must have evidence of the relevant statement already available. Further, before such a statement can be admitted in evidence the witness must have denied making the statement or denied that the ***491** facts contained in it are true. It is unlikely that the applicant would deny having made the statements or that they were inconsistent with his evidence. For these reasons the documents sought to be produced cannot be said to be "likely to be material evidence" within section 97 of the Act of 1980. [Reference was made to *Cross on Evidence*, 7th ed. (1990), pp. 305-308.] The provisions of the Criminal Justice Act 1988 permitting the admission of documentary hearsay in evidence in defined circumstances do not apply here: see section 24(4) of the Act and compare Reg. v. Clowes [1992] 3 All E.R. 440.

In any event, section 97 of the Act of 1980 does not empower the court to order the production of documents which are the subject of legal professional privilege which has not been waived. The public policy which underlies the maintenance of legal professional privilege is the law's necessary response to the absolute requirements of the proper functioning of the system of justice and the right of the citizen to be able to obtain free, unqualified and unconditional access to legal advice and representation without hindrance or fear. It has long been recognised that the privilege may involve the risk that on occasion its protection may prevent relevant material or even the truth emerging, but it is well established that once communication is privileged it remains so for all time, even where its original purpose has lapsed. The privilege is not dependent on there being legal proceedings in contemplation.

Legal professional privilege cannot be weighed in the balance against the other interests of justice. The protection of the privilege is in itself essential to the administration of justice because the privilege applies to all who seek legal advice. Where a witness is refusing to disclose relevant material inferences favourable to the party seeking disclosure can in any event be drawn. [Reference was made to Berd v. Lovelace (1577) Cary 62; Bolton v. Liverpool Corporation (1833) 1 M. & K. 88; Greenhough v. Gaskell (1833) 1 M. & K. 98; Anderson v. Bank of British Columbia (1876) 2 Ch.D. 644; Waugh v. British Railways Board [1980] A.C. 521; Nias v. The Northern

and Eastern Railway Co. (1838) 3 M. & C. 355; Minet v. Morgan (1873) L.R. 8 Ch.App. 361; Balabel v. Air India [1988] Ch. 317; Nederlandse Reassurantie Groep Holding N.V. v. Bacon & Woodrow [1995] 1 All E.R. 976; Reece v. Trye (1846) 9 Beav. 316; Southwark and Vauxhall Water Co. v. Quick (1878) 3 Q.B.D. 315; Wilson v. Rastall (1792) 4 Durn. & E. 753; Knight v. Marquess of Waterford (1835) 2 Y. & C. Ex. 22; Bullock & Co. v. Corry & Co. (1878) 3 Q.B.D. 356; Pearce v. Foster (1885) 15 Q.B.D. 114; Calcraft v. Guest [1898] 1 Q.B. 759; Hobbs v. Hobbs and Cousens [1960] P. 112; Holmes v. Baddeley (1844) 1 Ph. 476; Bullivant v. Attorney-General for Victoria [1901] A.C. 196; Baker v. Campbell (1983) 153 C.L.R. 52 and Derby & Co. Ltd. v. Weldon (No. 7) [1990] 1 W.L.R. 1156.]

Reg. v. Barton [1973] 1 W.L.R. 115 and Reg. v. Ataou [1988] Q.B. 798 were wrongly decided. To allow an exception to the rule and to give priority to the defendant's interest in criminal cases would be to undermine the very purpose of the rule. Legal professional privilege did not prevail in Oxfordshire County Council v. M. [1994] Fam. 151 because different considerations apply in child care proceedings, given the statutory regime and the paramountcy principle.

***492** Even if the magistrate was entitled to undertake a balancing exercise, the only conclusion he could reasonably have drawn was that the documents should not be produced. It cannot be said that the applicant does not continue to have a legitimate interest in asserting his privilege. He is likely to be accused of murder as part of the stepfather's defence and he is entitled to be concerned about any attempt to diminish the benefit of his acquittal at the original trial. Like any other witness, he has a legitimate interest in the preservation of such reputation as remains to him. By contrast, the stepfather would not be materially hampered by refusal of access to those documents. He already has access to the applicant's original confession, his retraction statement, a transcript of his evidence in the civil proceedings and an admission in cross-examination in the present proceedings that he lied.

Jonathan Goldberg Q.C. and *Joanna Greenberg Q.C.* for the stepfather. Both Parliament and the courts have acted to curtail the use of privilege where it is seen to hamper the court's task of ascertaining the truth, for example, in relation to the privilege against self-incrimination and the privilege of a wife not to testify against her husband. Legal professional privilege is not, and never has been, an iron curtain which cannot be raised. Thus a party may use in cross-examination privileged material which has come into his hands after being lost or stolen: Calcraft v. Guest [1898] 1 Q.B. 759. There are a number of statutory exceptions to professional privilege, notably in relation to revenue and bankruptcy matters.

The upholding of the orders made below would not undermine the public's confidence in being able to consult their legal advisers without fear, given the bizarre, if not unique, facts involved. The purpose of legal professional privilege is to encourage a person who is consulting his legal advisers "to make a clean breast of it:" Anderson v. Bank of British Columbia (1876) 2 Ch.D. 644, 649. The orders made below are consistent with that dicum.

Under the rule in Reg. v. Barton [1973] 1 W.L.R. 115 and Reg. v. Ataou [1988] Q.B. 798, legal professional privilege may be overriden in a criminal trial when the person claiming it has no continuing interest in it capable of outweighing the public interest that all relevant and admissible material should be made available to the defence. The applicant's objections to disclosure are plainly outweighed by the interests of justice in ensuring that the stepfather receives a fair trial. It is inconceivable that the applicant would face a charge of perjury. Evidence of more than one witness would be required for such a prosecution, whereas there is at best the stepfather's word against that of the applicant. Any claim for the protection of the applicant's reputation cannot hold good, given the circumstances of the case. Moreover, categorical assurances have been given that the documents will not be used outside the instant criminal proceedings.

The documents sought are "likely to be material evidence" within the terms of section 97 of the Magistrates' Courts Act 1980. The decision in Reg. v. Cheltenham Justices, Ex parte Secretary of State for Trade [1977] 1 W.L.R. 95, that a Department of Trade Inspector could not be compelled to produce statements he had taken from persons who were to ***493** be witnesses for the prosecution, since they could only be used for the purposes of discrediting witnesses in cross-examination and were therefore not in evidence in the case, should not be followed. [Reference was made to Phipson on Evidence, 14th ed. (1990), pp. 125-126, para. 8-05.] The Criminal Procedure Act 1865 provides that when used to contradict a witness's sworn assertion, previous inconsistent statements become evidence of the fact that they were made. They are thus "material evidence" for the purposes of a witness summons under section 97 of the Act of 1980. Archbold, Criminal Pleading Evidence and Practice, 1995 ed., vol. 1, pp. 1/1337-1/1339, paras. 8-110 to 8-113 correctly sets out sections 4 and 5 of the Act of 1865 under the headings oral and written statements respectively, because the sections must be read disjunctively. If it is necessary to satisfy section 4 as a condition precedent to cross-examining the witness on his written statement under section 5, then it would only be where the witness had denied, or not admitted, making the statement, or had denied that it was inconsistent with his present evidence, that it could be admitted as evidence. That would hamper the work of the court. If the documents had to be already in the hands of the defence before the Act of 1865 could be relied on, then the admissibility of some evidence will depend on pure chance. The criminal courts frequently allow juries to retire with documents which have been used to contradict a witness, whether or not he has denied making the document. [Reference was made to Reg. v. Beattie (1989) 89 Cr.App.R. 302.]

Authority undoubtedly discourages a fishing expedition in the guise of a witness summons but the applicant has already admitted that his original story is wholly different from the one he now tells. The question is how much further he may have gone into detail in telling his first story and what other leads it may reveal to the defence. As McCowan L.J. found below, the circumstances of this case do not amount to fishing. [Reference was also made to Reg. v. Saunders (unreported), 10 January 1990; Reg. v. Tompkins (1977) 67 Cr.App.R. 181 and Sphere Drake Insurance Plc. v. Denby, The Times, 20 December 1991.]

The admissibility of a statement tendered in evidence as proof of the maker's knowledge or other state of mind will depend on the degree of relevance of the state of mind sought to be proved to the issue in relation to which the evidence is tendered: Reg. v. Blastland [1986] A.C. 41, 62. There is little doubt that the applicant's proofs may reveal details which could only have been known by the murderer. The content of the documents thus has an independent evidential value of its own, quite apart from the Act of 1865, justifying its reception in evidence and production under section 97 of the Act of 1980.

Stephen Richards and *Nicholas Hilliard* as amici curiae. Little assistance is to be gained from European decisions touching on legal professional privilege, such as A.M. & S. Europe Ltd. v. Commission of the European Communities (Case 155/79) [1983] Q.B. 878. They do not give any guidance as to the scope of the domestic system.

Legal professional privilege does not provide an absolute protection against disclosure of evidence. The privilege is based on the strong public interest in full and free communication between client and lawyer. However strong that public interest, it may in an exceptional case be ***494** outweighed by an even stronger public interest in the court having all relevant evidence before it.

The considerations of public interest underlying legal professional privilege have much in common with certain claims for public interest immunity where the public interest in non-disclosure of a class of information rests on the importance of maintaining full and free communication, for example, in relation to sources of information obtained by the police and other bodies (Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department [1973] A.C. 388 and D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171), evidence volunteered to a non-statutory inquiry (Lonrho Ltd. v. Shell Petroleum Co. Ltd. [1980] 1 W.L.R. 627), communications between the police and the Director of Public Prosecutions (Evans v. Chief Constable of Surrey [1988] Q.B. 588), and reports of officers investigating police complaints. [Reference was also made to Reg. v. Chief Constable of West Midlands Police, Ex parte Wiley [1995] 1 A.C. 274.] The same reasoning underlies both legal professional privilege and public interest immunity: the recognition that the public interest may require that relevant evidence be withheld from disclosure in legal proceedings.

The courts have affirmed that the principle of public interest immunity applies in the context of criminal proceedings and have laid down special procedural rules for the court's examination of claims to public interest immunity in that context. In the balancing process, the courts have stressed that great weight is to be accorded to the public interest in disclosure of information that may establish the innocence of the accused: see Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett (No. 2) [1994] 1 All E.R. 289, 293-294. As a matter of principle, a similar approach should apply to legal professional privilege: see Reg. v. Ataou [1988] Q.B. 798. However, only in exceptional cases should the balance be capable of coming down in favour of disclosure. The order for disclosure does not mean that the privilege has come to an end: it could be cited in any related civil proceedings.

Section 4 of the Criminal Procedure Act 1865 is the operative section when considering whether a previous inconsistent statement, whether made orally or in writing, should be admitted in evidence. The purpose of section 5 of the Act is to make additional provision with respect to written statements, namely, that the witness may be cross-examined without the document being shown to him, unless it is intended to use the document to contradict him. The condition precedent to the document being admitted as evidence is that the witness should deny, or at least not admit, making the written statement: section 4. [Reference was also made to Reg. v. Riley (1866) 4 F. & F. 964 and Reg. v. Wright (1866) 4 F. & F. 967.] Since the Act of 1865 only permits a document going to the reliability of a witness to be put in evidence where he has denied making the statement in the document, the cross-examiner, unless he has the document in his possession, cannot draw it to the attention of the witness. Thus the stepfather cannot satisfy the requirements of the Act of 1865 and, consequently, the documents are not "likely to be material evidence" for the purpose of issuing a witness summons under section 97. Even if he did have the documents, the applicant would be unlikely to deny having made ***495** them. On that ground, too, the documents are not "likely to be material evidence."

Patrick Upward, for the Crown, stated that the Crown took a neutral position on the appeal.

Francis Q.C., in reply, referred to Rex v. Birch (1924) 18 Cr.App.R. 26.

Their Lordships took time for consideration. 22 June. The House allowed the appeals, for reasons to be given later. 19 October. LORD KEITH OF KINKEL.

My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Taylor of Gosforth C.J., which I have read in draft and with which I agree, I would allow these appeals.

LORD MUSTILL.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Taylor of Gosforth C.J. For the reasons which he gives, I, too, would allow these appeals.

LORD TAYLOR OF GOSFORTH C.J.

My Lords, these consolidated appeals raised important questions concerning legal professional privilege and the scope of section 97 of the Magistrates' Courts Act 1980. The applicant challenged by way of judicial review the issue by the stipendiary magistrate for Derby of summonses pursuant to section 97 requiring him and his solicitor to produce certain documents in the course of committal proceedings against the applicant's stepfather. The Divisional Court refused the application but certified points of law of general public importance. This appeal was presented by leave of your Lordships' House. Since the committal proceedings relate to events which occurred as long ago as April 1978 we announced our decision to allow the appeal on 22 June 1995 to enable those proceedings, which have been hanging fire, to proceed. We now give our reasons.

On 3 April 1978, a 16-year-old girl was murdered. Although she was stabbed many times, a number of the wounds were shallow and the cause of death was strangulation. On 9 April the applicant was arrested. He at first denied involvement but subsequently admitted being solely responsible for the murder. On 10 April he made a statement to that effect ("the first account"). In it he alleged that the girl had sexually assaulted and provoked him whereupon he had stabbed her. Proceedings were commenced against him charging him with murder. Preparations for trial were well advanced when, on 6 October 1978 a psychiatrist visited the applicant. Following that visit, on 8 October, the applicant changed his story. He made a statement alleging that his stepfather had killed the girl. Although he, the applicant, was present and took some part he did so under duress ("the second account").

In November 1978, after a trial at Nottingham Crown Court in which the applicant relied upon the second account, he was acquitted. On ***496** 14 December 1978, when interviewed by a senior police officer, the applicant repeated his first account that he alone had killed the girl. However when his solicitor arrived he retracted that confession. On 16 April 1980 the applicant made a statement to the police reaffirming the second account.

On 1 April 1987, the mother of the deceased girl issued a writ against the applicant and his stepfather alleging assault and battery against both. In July 1991 the civil action came on before Rougier J. It lasted some five days and the applicant gave evidence implicating his stepfather who did not give evidence. On 30 September 1991 Rougier J. gave judgment. He held that on the evidence before him he was sure that the sole cause of the girl's death was strangulation by the stepfather but that so far as the stab wounds were concerned the applicant and his stepfather were joint tortfeasors.

On 7 July 1992 the stepfather was arrested and charged with murder. On 8 October 1992 the stipendiary magistrate refused a motion to stay the proceedings on the basis that they were an abuse of process. An application for judicial review of that decision was refused by the Divisional Court in February 1994. On 20 June 1994 committal proceedings against the stepfather began. The applicant was called on behalf of the Crown to give evidence. In the course of cross-examination he was asked about instructions he had given to the solicitors acting for him in 1978 between his giving the first account and the second account. The applicant declined to waive his privilege. Accordingly, an application was made on 21 June for the stipendiary magistrate to grant a witness summons directed to the solicitor seeking the production of privileged documentation, in particular:

"All attendance notes and proofs of evidence which disclose the factual instructions of [the applicant] in defence of the charge of murder in 1978 coming into existence prior to 8 October 1978 and to exclude advice given to him by solicitors and/or counsel."

The stipendiary magistrate granted a witness summons pursuant to section 97 of the Magistrates' Courts Act 1980 in the terms sought. On 8 August 1994, a justice of the peace issued a further summons, this time addressed to the applicant personally, but otherwise in the same terms as the first summons.

Leave to apply for judicial review of the decisions to issue the summonses, dated respectively on 28 June 1994 and 23 August 1994, were granted. The applications were consolidated and heard together by the Divisional Court (McCowan L.J. and Gage J.), the court giving its decision on 21 October 1994. The applications were refused as was leave to appeal to your Lordships' House but the Divisional Court certified the following question:

"Whether a witness summons may properly be issued under section 97 of the Magistrates' Courts Act 1980 to compel production by a prosecution witness in committal proceedings of proofs of evidence and attendance notes giving factual instructions to his solicitor which (a) may contain or record previous inconsistent ***497** statements by the witness; and/or (b) which are the subject of legal professional privilege which has not been waived."

On 5 April 1995 your Lordships' House gave leave to appeal. The case was presented and argued before your Lordships on two broad bases reflecting the two sub-paragraphs of the certified question. It is convenient to consider first whether the material sought to be

produced by the summonses fell properly within the scope of section 97 of the Act of 1980. Section 97, as amended, provides, so far as is relevant:

"(1) Where a justice of the peace . . . is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at an inquiry into an indictable offence by a magistrates' court . . . or at the summary trial of an information or hearing of a complaint by such a court and that that person will not voluntarily attend as a witness or will not voluntarily produce the document or thing, the justice shall issue a summons directed to that person requiring him to attend before the court . . . to give evidence or to produce the document or thing. . . . (3) On the failure of any person to attend before a magistrates' court in answer to a summons under this section, if - (a) the court is satisfied by evidence on oath that he is likely to be able to give material evidence or produce any document or thing likely to be material evidence in the proceedings; and (b) it is proved on oath, or in such other manner as may be prescribed, that he has been duly served with the summons . . . and (c) it appears to the court that there is no just excuse for the failure, the court may issue a warrant to arrest him and bring him before the court . . . (4) If any person attending or brought before a magistrates' court refuses without just excuse to be sworn or give evidence, or to produce any document or thing, the court may commit him to custody until the expiration of such period not exceeding one month as may be specified in the warrant or until he sooner gives evidence or produces the document or thing or impose on him a fine not exceeding £2,500, or both."

The summonses were bespoken because it was assumed that in the period prior to his trial for murder, when he was admitting he had killed the girl although provoked to do so (i.e. before 8 October 1978), the applicant must have given detailed instructions to his solicitor supporting that version of the facts. Those instructions were bound to be inconsistent with the second account which the applicant was now repeating in his evidence at the committal proceedings against his stepfather. Accordingly, counsel for the latter wanted to be able to cross-examine the applicant on his previous inconsistent statements and if possible put them in evidence.

In agreeing to issue the first summons, the stipendiary magistrate gave his reasons. He dealt separately with the terms of section 97 and with legal professional privilege. As to the former, he said of the documents sought:

"It goes without saying that if such statements are inconsistent with [the applicant's] present testimony, they are very material to this ***498** committal and to any subsequent trial. One only has to compare the situation with such statements in the possession of the prosecution which must under the present rules inevitably and properly be disclosed. In the light of other accounts of the relevant events given to the police, as he admitted in cross-examination yesterday, it is a reasonable assumption that [the applicant's] statements of evidence will be in terms different from the allegations involving [his stepfather] which he apparently made . . . in a statement to the police in October 1978. That fact supports my view that the documents sought, the statement or statements, are very material to the conduct of the defence."

Thus, he sought to equate the duty of the prosecution as to disclosure of material in their possession with his own duty to issue a summons under section 97. He also equated documents "material to the conduct of the defence" with documents (in the terms of section 97) "likely to be material evidence." It is therefore necessary to consider the statutory provisions governing the use which can be made of previous inconsistent statements. They are to be found in the Criminal Procedure Act 1865 ("Lord Denman's Act"). Sections 4 and 5 of the Act provide:

"4. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

"5. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

It was contended by Mr. Goldberg for the stepfather that section 4 applies only to oral statements and section 5 deals with written statements. That categorisation is adopted by the editors of Archbold, Criminal Pleading Evidence & Practice, 1995 ed., vol. 1, pp. 1/1337-1/1339, paras. 8-110 to 8- 113, where, in reproducing sections 4 and 5, they have added the headings "Oral statements" and "Written statements" respectively as if they appeared in the statute which they do not. Although section 5 clearly refers only to written statements, we see no reason to confine section 4 to oral statements. Its wording does not so confine it and its content is apt to cover statements both oral and written. This was recognised by Henry J. in a ruling he gave in Reg. v. Saunders (unreported), 10 January 1990. It is also asserted in *Murphy on Evidence,* 5th ed. (1995), p. 477, ***499** and I agree with the exposition to be found there. Section 4 allows proof that a previous inconsistent statement was made if that is not distinctly admitted. Section 5 additionally permits (a) cross examination of a witness as to a previous inconsistent written statement without showing him or her the statement and (b) contradiction of the witness's testimony by putting the previous statement to him. If he denies making it, the statement can be proved: section 4. Even if he admits making the statement but adheres to evidence inconsistent with it, the statement, or such part of it as the judge thinks proper, may be put before the jury: section 5, and see Reg. v. Beattie (1989) 89 Cr.App.R. 302.

It is settled law and has not been disputed on this appeal, that when a previous inconsistent statement goes before the jury, it is not evidence of the truth of its contents: Rex v. Birch (1924) 18 Cr.App.R. 26. Its effect is confined to discrediting the witness generally or, if the inconsistencies relate directly to the matters in issue, to rendering unreliable the witness's sworn evidence on those matters.

In consequence of this, it was argued at one stage of this appeal that any previous inconsistent statement by the applicant could not be "material evidence" within the meaning of section 97 simply because it could not be evidence of the truth of its contents. Only evidence going directly to the proof of facts in issue could be "material." However, Mr. Francis did not finally pursue that argument; rightly so, in my view. In the context of this case, the applicant is an important eye witness. A previous statement giving an account of the murder inconsistent with his evidence-in-chief and thereby casting doubt on its reliability, would, if it could be put before the jury, be material evidence. Any admissible documents tending to contradict a principal witness's account of the crime must be "material evidence."

However, the applicant submits that on two grounds, the applications for summonses under section 97 ought not to be have been granted. Mr. Francis based each on the premise that before issuing them the stipendiary magistrate would have to be satisfied that at that time the documents sought were likely to be material evidence.

The first ground is one of general application. The documents could only be admitted in evidence if the applicant denied making them or denied that they were inconsistent with his evidence. Before they could be admitted they would have to be shown to the applicant and only if he denied making them or denied their inconsistency could they become admissible evidence. Before counsel cross-examining the applicant could show him any such document, he would have to have the document in his hands. But he could not have the document in his hand since at the stage when cross-examination as to its contents must begin the witness producing it cannot give admissible evidence or be made to hand over the document. As Lord Widgery C.J. said in Reg. v. Greenwich Juvenile Court, Ex parte Greenwich London Borough Council (1977) 76 L.G.R. 99, 105, when commenting on section 77 of the Magistrates' Courts Act 1952 (the identical predecessor of section 97): "[The section] is restricted to getting the witness or the documents into the precincts of the court, and what happens to them thereafter depends on the ordinary rules."

***500** Lord Denman's Act contemplates cross-examining counsel having the inconsistent statement (e.g. a deposition) in his hand so that the procedure which may culminate in the document becoming admissible can be begun. Section 97, however, contemplates the production by a witness of documents which are immediately admissible per se and without more. In circumstances such as those of the present case, the two statutes do not marry. Mr. Francis submitted that because the stepfather could not overcome this procedural impasse the documents sought were not "likely to be material evidence." His argument was supported by Mr. Richards, appearing as amicus curiae.

Mr. Francis's second ground is that even if cross-examining counsel could have the documents in his hand it is highly unlikely that the applicant would deny either making them or that they were inconsistent with his evidence-in-chief. Indeed, the applicant had already admitted when cross- examined before the stipendiary magistrate that up to October 1978 he gave the first account not only to the police but also to his solicitors and that he subsequently changed his story, giving the second account to which he now adheres. On this ground too, therefore, it is submitted that the documents sought were not "likely to be material evidence."

In my judgment, both the grounds relied upon are well founded. As to the first, it may seem that the stepfather is defeated by a technical obstacle, the inability to get the documents into his hands. The objection taken is, however, entirely in accordance with the principle that section 97 cannot be used to obtain discovery. That is primarily what is sought here. The object of the application was to discover exactly what the applicant had said to his solicitor in support of the first account and cross-examine him on the details. Mr. Goldberg frankly admitted in argument he had in mind that the applicant may have said things to his solicitor which only the murderer could have known; although whether the first account or the second account was correct the applicant was clearly at the scene and would on either version have had the opportunity to know what happened.

In Reg. v. Cheltenham Justices, Ex parte Secretary of State for Trade [1977] 1 W.L.R. 95, Lord Widgery C.J. made it clear that it was not open to the defence to obtain a witness summons in the magistrates' court to secure discovery of documents for use in cross-examination. In Reg. v. Greenwich Juvenile Court it was held that there is no general power of discovery in the magistrates' court and the decisions in Reg. v. Skegness Magistrates' Court, Ex parte Cardy [1985] R.T.R. 49, Reg. v. Sheffield Justices, Ex parte Wrigley (Note) [1985] R.T.R. 78 and Reg. v. Coventry Magistrates' Court, Ex parte Perks [1985] R.T.R. 74 were to the same effect.

It was submitted to us that those cases should not be followed since there has been a change in the approach of the courts to disclosure following, inter alia, Reg. v. Ward [1993] 1 W.L.R. 619 and Reg. v. Keane [1994] 1 W.L.R. 746. There is no doubt that the duty on the prosecution to disclose material in its possession has been broadened as a result of those decisions. However, here the documents are not in the possession of the prosecution but of a third party. In Reg. v. Reading Justices, Ex parte Berkshire County Council, The Times, 5 May 1995, the Divisional ***501** Court considered an application for judicial review of a decision by the justices to issue a summons pursuant to section 97 in criminal proceedings for common assault. The alleged victim was a child resident at a local

authority home and the summons was directed to the Director of Social Services. In quashing the decision the court dealt with an argument that the court should adopt the same test as applied to the prosecutions duty of disclosure. After considering the authorities, Simon Brown L.J. said:

"The central principles to be derived from those authorities are (i) to be material evidence documents must be not only relevant to the issues arising in the criminal proceedings, but also documents admissible as such in evidence; (ii) documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and, thus, are not material for the purposes of section 97 . . . [Counsel] contends . . . that the jurisprudence under section 97 should be re-examined in the light of the general law governing disclosure in criminal cases, and that a less exacting test of materiality should be applied in future. That is not a submission that I can accept. It seems to me that quite different considerations arise with regard to the production of documents by third parties. . . . I regard the principles established under section 97 as untouched by other developments in the criminal law."

In my judgment those observations are correct. Both the stipendiary magistrate and the Divisional Court in the present case were impressed by the argument deriving from the more stringent duty of disclosure now placed upon the prosecution. They also considered whether the documents sought were "material" in the sense of being generally useful or helpful to the defence rather than whether they were "likely to be material evidence" within the meaning of section 97. In my judgment, for the reasons set out above, the summonses ought not to have been granted under section 97.

I now turn to the second main issue in the case, which would arise only if the conditions for issue of a witness summons under section 97 of the Magistrates' Courts Act 1980 were satisfied, but which raised a discrete ground of appeal. Mr. Francis submitted that the documents covered by the witness summons are protected by legal professional privilege, and are therefore immune from production. In the course of the committal proceedings the applicant was asked whether he was willing to waive privilege. After consulting his solicitor he replied that he was claiming privilege both in respect of his criminal trial in 1978, and in respect of the civil trial in 1991.

The stipendiary magistrate considered that it was his duty to weigh the public interest which protects confidential communications between a solicitor and his client against the public interest in securing that all relevant and admissible evidence is made available to the defence. In his view the balance came down firmly in favour of production. The applicant could no longer be regarded as having any recognisable interest in asserting privilege. The overriding consideration was the need to secure a fair trial for the stepfather. In holding that he was obliged to weigh competing public interests against each other, the stipendiary magistrate was following the decision of the Court of Appeal (Criminal Division) in ***502** Reg. v. Ataou [1988] Q.B. 798. If Reg. v. Ataou was correctly decided, then the stipendiary magistrate was plainly entitled to take the view he did. Indeed, McCowan L.J., in the Divisional Court, described the balancing exercise which he had carried out as flawless. I would not disagree. For there could be no question of the applicant being tried again for murder, and it is most improbable that he would be prosecuted for perjury.

The important question remains, however, whether Reg. v. Ataou was correctly decided, and in particular whether when there is a claim for privilege in respect of confidential communications between solicitor and client there is a balancing exercise to be performed at all. Mr. Francis submits that there is not. He points out that in the long history of legal professional privilege there is no hint of any such exercise having been performed prior to the decision of Caulfield J. in Reg. v. Barton [1973] 1 W.L.R. 115. So it will be necessary to look briefly at the history of the privilege, and then to consider the underlying principles on which it is based. But before doing so, it is convenient to start with the two decisions which, according to Mr. Francis, have introduced a new and erroneous element into the law.

In Reg. v. Barton the defendant was charged with fraudulent conversion, theft and falsification of accounts alleged to have been committed in the course of his employment as a legal executive with a firm of solicitors. A partner in the firm of solicitors was served with a subpoena to produce certain documents which had come into existence while he was acting as the solicitor to the executors of certain estates. The partner took the point that the documents were protected by legal professional privilege. Caulfield J. held that the documents must be produced. After referring to a passage from *Cross on Evidence*, 3rd ed. (1967), p. 240, he continued, at p. 118:

"I think the correct principle is this, and I think it must be restricted to these particular facts in a criminal trial, and the principle I am going to enunciate is not supported by any authority that has been cited to me, and I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. I think that is the principle that should be followed."

It should be borne in mind that Caulfield J.'s decision was one of first impression. It was given as an interlocutory ruling in the course of a criminal trial on circuit. It may be doubted whether he had any books available other than *Cross on Evidence, Archbold* and perhaps Phipson on Evidence; and the only case cited, Wheeler v. Le Marchant (1881) 17 Ch.D. 675, is concerned with a different question altogether, namely, the protection of communications between a solicitor and a third party.

***503** Reg. v. Barton was cited in the New Zealand decision of Reg. v. Craig [1975] 1 N.Z.L.R. 597, and a Canadian case Reg. v. Dunbar and Logan (1982) 138 D.L.R. (3d) 221. These were the only authorities referred to in the decision of the Court of Appeal in Reg. v. Ataou [1988] Q.B. 798.

The facts of Reg. v. Ataou were that the appellant was charged with conspiracy to supply a controlled drug. His co-defendant pleaded guilty, and elected to give evidence for the prosecution. Counsel for the appellant wished to cross-examine him about a previous statement which was said to be favourable to the appellant. The co-defendant claimed privilege. The trial judge upheld the claim for privilege and the appellant was convicted. His appeal against conviction was allowed. The Court of Appeal stated the following principle, at p. 807:

"When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained. That might be done by demonstrating that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege. The judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it."

Applying that principle, the court held that there were only two factors which tended to show that the co-defendant "continued to have a recognisable interest in asserting the privilege," namely, the adverse influence it might have on the judge when he came to sentence the co-defendant, and the risk of a prosecution for perjury. If the trial judge had carried out a balancing exercise, as the Court of Appeal said that he should have done, he would very likely have held that these two factors were outweighed by the appellant's interest in using the document to discredit the co-defendant.

Thus under the principle stated in Reg. v. Ataou, if it be correct, the judge is required to approach an application for production of documents protected by legal privilege in two stages. First he must ask whether the client continues to have any recognisable interest in asserting the privilege and, secondly whether, if so, his interest outweighs the public interest that relevant and admissible documents should be made available to the defence in criminal proceedings.

So stated, the principle seems to conflict with the long established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client: once privileged, always privileged. It also goes against the view that the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or the defence, and that the refusal of the client to waive his privilege, for whatever reason, or for no reason, cannot be questioned or investigated by the court. I therefore turn briefly to the history of the privilege to see to what extent these traditional views are borne out by the authorities.

***504** The first case to which we were referred, and the earliest case cited in *Holdsworth, A History of English Law*, 3rd ed., vol. 9 (1944), p. 201, is Berd v. Lovelace (1577) Cary 62. Since the report is very short, it can be quoted in full:

"Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same; and that he shall be in no danger of any contempt, touching the not executing of the said process."

Holdsworth points out, at pp. 201-202, that the decision in Berd v. Lovelace followed very shortly after the Statute on Perjury of 1562 (5 Eliz. 1, c. 9) by which it was established for the first time that all competent persons could be compelled to testify.

Two years later, in Dennis v. Codrington (1579) Cary 100, the same rule was applied to counsel:

"The plaintiff seeks to have Master Oldsworth examined touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled by subpoena, or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel . . ."

At first it was thought that the reason for the privilege was that a lawyer ought not, in honour, to be required to disclose what he had been told in confidence. But this explanation was rejected in the Duchess of Kingston's Case (1776) 20 St.Tr. 355. In that case Sir Cecil Hawkins, the Duchess's doctor, objected that he should not, in honour, be compelled to give evidence against her at her trial for bigamy. His objection was overruled. But this did not affect the development of legal professional privilege. By the end of the 18th century it was already well on the way to being established on its present basis. In Wilson v. Rastall (1792) 4 Durn. & E. 753, it was decided that the privilege was confined to the three cases of counsel, solicitor and attorney. There was reference in that case, at p. 759, to an earlier case of bribery tried at Salisbury before Lord Hardwicke, in which a Mr. Reynolds wished to give evidence as to what he had learnt while acting as the defendant's attorney. He was rebuked by Buller J. for being willing to reveal the secrets of his former client:

"I strongly animadverted on his conduct, and would not suffer him to be examined: he had acquired his information during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privilege of the party, and not of the attorney: and that the privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut forever."

The case is thus clear early authority for the rule that the privilege is that of the client, which he alone can waive, and that the court will not permit, ***505** let alone order, the attorney to reveal the confidential communications which have passed between him and his former client. His mouth is shut forever.

Although the rule was thus established by the end of the 18th century, the reason for the rule was not fully developed until two cases heard and decided by Lord Brougham L.C., one after the other, at the beginning of 1833. In Greenough v. Gaskell (1833) 1 M. & K. 98, the question was whether the privilege was confined to cases where legal proceedings were already in contemplation. Lord Brougham L.C. held it was not. As to the reason for the rule, Lord Brougham L.C. said, at p. 103:

"The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case."

In Bolton v. Liverpool Corporation (1833) 1 M. & K. 88, the defendant in civil proceedings sought inspection of the plaintiff's case to counsel to advise (though not apparently the advice itself) and filed a bill of discovery in equity for that purpose. Not surprisingly the defendant failed. Lord Brougham L.C. said, at p. 94:

"It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as a right, would produce this effect, and neither more nor less, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel."

Numerous cases throughout the 19th century repeated the same themes. Thus in Holmes v. Baddeley (1844) 1 Ph. 476, 480-481 Lord Lyndhurst L.C. said:

"The principle upon which this rule is established is that communications between a party and his professional advisers, with a view to legal proceedings, should be unfettered; and they should not be restrained by any apprehension of such communications being ***506** afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties. . . . The necessary confidence will be destroyed if it be known that the communication can be revealed at any time."

In Anderson v. Bank of British Columbia (1876) 2 Ch.D. 644, 649 Sir George Jessel M.R. said:

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him, should be kept secret, unless with his consent . . . that he should be enabled properly to conclude his litigation."

In Southwark and Vauxhall Water Co. v. Quick (1878) 3 Q.B.D. 315, 317-318 Cockburn C.J. said:

"The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk."

In Pearce v. Foster (1885) 15 Q.B.D. 114, 119-120 Sir Balliol Brett M.R. said:

"The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confidential communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that this freedom of communication will be impaired. The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action."

In Calcraft v. Guest [1898] 1 Q.B. 759, 761, Sir Nathaniel Lindley M.R. said: "I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived . . ."

***507** I may end with two more recent affirmations of the general principle. In Hobbs v. Hobbs and Cousens [1960] P. 112, 116-117 Stevenson J. said:

"privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor, or when he goes to his counsel, that that which he there divulges will

never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisers that litigation and the business of the law can be carried on satisfactorily. . . . There is . . . an abundance of authority in support of the proposition that once legal professional privilege attaches to a document . . . that privilege attaches for all time and in all circumstances."

In Balabel v. Air India [1988] Ch. 317 the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence.

The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

How then did Mr. Goldberg seek to restrict or disapply the operation of legal professional privilege in this case? In his written case the only argument put forward was that the applicant did not consult his lawyers with a view to obtaining advice in the course of their ordinary professional employment, but with a view to forwarding his criminal purpose of deceiving the jury. The case was thus said to fall within the exception recognised by Stephen J. in Reg. v. Cox and Railton (1884) 14 Q.B.D. 153. The argument was not that the privilege had to be balanced against some other public interest, but rather that the communications were never privileged at all. I need not take further time on this point, since it was formally abandoned by Mr. Goldberg towards the end of his oral argument.

Apart from Reg. v. Cox and Railton, Mr. Goldberg submitted that in other related areas of the law, privilege is less sacrosanct than it was. He points to the restrictions recently imposed on the right to silence, and the statutory exceptions to the privilege against self incrimination in the fields of revenue and bankruptcy. But these examples only serve to illustrate the flaw in Mr. Goldberg's thesis. Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), as to which we did not hear any argument. Mr. Goldberg's difficulty is this: whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched.

***508** Mr. Richards, as amicus curiae, acknowledged the importance of maintaining legal professional privilege as the general rule. But he submitted that the rule should not be absolute. There might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance. He referred by analogy to the balancing exercise which is called for where documents are withheld on the ground of public interest immunity, and cited the speech of Lord Simon of Glaisdale in D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171, 233, and in Waugh v. British Railways Board [1980] A.C. 521, 535. But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.

As for the analogy with public interest immunity, I accept that the various classes of case in which relevant evidence is excluded may, as Lord Simon of Glaisdale suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may also be allowed in another. Legal professional privilege and public interest immunity are as different in their origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits.

In the course of his judgment in the Divisional Court, McCowan L.J. indicated that he not only felt bound by Reg. v. Ataou [1988] Q.B. 798, but he also agreed with it. He continued:

"These further points were made by Mr. Francis. He says that if a man charged with a criminal offence cannot go to a solicitor in the certainty that such matters as he places before him will be kept private for all time, he may be reluctant to be candid with his solicitors. Surely, however, it ought to be an incentive to him to tell the truth to his solicitors, which surely cannot be a bad thing. Mr. Francis went on to suggest that his client's reputation would be damaged if the disclosures were to go to suggest that he was the murderer. For my part, I would be able to bear with equanimity that damage to his reputation. In the interests of justice and of the respondent, it would be a good thing that that reputation should be so damaged."

One can have much sympathy with McCowan L.J.'s approach, especially in relation to the unusual facts of this case. But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature ***509** of legal professional privilege, once established. It follows that Reg. v. Barton [1973] 1 W.L.R. 115 and Reg.

v. Ataou [1988] Q.B. 798 were wrongly decided, and ought to be overruled. I therefore considered these appeals should be allowed on both grounds and the case remitted to the High Court, with a direction that the decisions of the stipendiary magistrate and the justice of the peace dated 21 June and 8 August 1994 be quashed.

LORD LLOYD OF BERWICK.

My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Taylor of Gosforth C.J. I agree with him on both issues, and wish only to add a few words on the second issue.

For the reasons which he gives, I regard Reg. v. Ataou [1988] Q.B. 798 as having been wrongly decided. This is not, I think, because of any inherent difficulty in the balancing exercise proposed in that case. The task is no harder in the case of legal professional privilege than it is in other cases, for example, where there is a claim to withhold documents on the ground of public interest immunity: see D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171, 231-233, *per* Lord Simon of Glaisdale. The reason is rather that the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding the privilege, unless, of course, the privilege is waived.

What then about the cases where the client can be shown to have no "recognisable interest" in continuing to assert the privilege, to use the language first used by Cooke J. in Reg. v. Craig [1975] 1 N.Z.L.R. 597, and subsequently adopted by the Court of Appeal in Reg. v. Ataou? Historically, this has been treated as irrelevant. Thus in one case, Bullivant v. Attorney-General for Victoria [1901] A.C. 196, it was held that the privilege was not destroyed, even though the client himself was dead. It survived in favour of his executors: see p. 206, *per* Lord Lindley. There must have been many other instances among the numerous cases decided in the 19th century and since, upholding legal professional privilege, in which the client no longer had any "recognisable interest" in asserting his claim. Yet it was never suggested that this might make a difference.

Mr. Goldberg argued that times have changed, and that greater emphasis is now placed upon the court being put into possession of all relevant material, in order to arrive at the truth. But the principle remains the same; and that principle is that a client must be free to consult his legal advisers without fear of his communications being revealed. Reg. v. Cox and Railton, 14 Q.B.D. 153 provides a well recognised exception. Otherwise the rule is absolute. Once the privilege is established, the lawyer's mouth is "shut for ever:" see Wilson v. Rastall (1792) 4 Durn. & E. 753, 759, *per* Buller J. If the client had to be told that his communications were only confidential so long as he had "a recognisable interest" in preserving the confidentiality, and that some court on some future occasion might decide that he no longer had any such recognisable interest, the basis of the confidence would be destroyed or at least undermined. There may be cases where the principle will work hardship ***510** on a third party seeking to assert his innocence. But in the overall interests of the administration of justice it is better that the principle should be preserved intact.

For the above reasons, and the reasons given by Lord Taylor of Gosforth C.J., I would allow these appeals on both grounds. I would only add a reference to Bingham L.J.'s statement of the principle in Ventouris v. Mountain [1991] 1 W.L.R. 607, 611. The judgment of Schiemann L.J. in Barclays Bank Plc. v. Eustice [1995] 1 W.L.R. 1238, came too late for our consideration. In any event, Mr. Goldberg abandoned any argument based on Reg. v. Cox and Railton. Finally, I would pay tribute to the careful analysis of Henry J. in Reg. v. Saunders (unreported), 10 January 1990. But he, unlike your Lordships, was bound by Reg. v. Ataou.

LORD NICHOLLS OF BIRKENHEAD.

My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Taylor of Gosforth C.J. I agree with the reasons he gives on the question concerning section 97 of the Magistrates' Courts Act 1980. I add some observations only on the legal professional privilege issue.

Legal professional privilege is concerned with the interaction between two aspects of the public interest in the administration of justice. The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited. But, in practice, candour cannot be expected if disclosure of the contents of communications between client and lawyer may be compelled, to a client's prejudice and contrary to his wishes. That is one aspect of the public interest. It takes the form of according to the client a right, or privilege as it is unhelpfully called, to withhold disclosure of the contents of client-lawyer communications. In the ordinary course the client has an interest in asserting this right, in so far as disclosure would or might prejudice him.

The other aspect of the public interest is that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome.

All this is familiar ground, well traversed in many authorities over several centuries. The law has been established for at least 150 years, since the time of Lord Brougham L.C. in 1833 in Greenough v. Gaskell, 1 M. & K. 98: subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.

The principle has not lacked critics, from Jeremy Bentham onwards. Nevertheless, in Grant v. Downs (1976) 135 C.L.R. 674, 685, Stephen, Mason and Murphy JJ. accurately summarised the legal position thus:

"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and ***511** enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."

In S. v. Safatsa 1988 (1) S.A. 868, 886, Botha J.A. made the cautionary observation that any claim to relaxation of the privilege must be approached with the greatest circumspection.

Now, following the decisions of Caulfield J. in Reg. v. Barton [1973] 1 W.L.R. 115, Cooke J. in Reg. v. Craig [1975] 1 N.Z.L.R. 597, the Ontario Court of Appeal in Reg. v. Dunbar and Logan (1982) 138 D.L.R. (3d) 221, and the (English) Court of Appeal in Reg. v. Ataou [1988] Q.B. 798, your Lordships' House is being asked to re-examine the ambit of the privilege. The particular point raised was not expressly argued in the earlier authorities.

Encouraged by this and by comparatively recent developments in the related field of public interest immunity, Mr. Goldberg and Mr. Richards submitted that the balance between competing aspects of the public interest should not be struck once and for all on a generalised basis. The law should no longer adopt such a crude "all or nothing" approach. Instead, in each individual case the court should weigh the considerations for and against disclosure of the privileged material. The court should attach importance to any prejudice the client might suffer from disclosure. The court should also attach importance to the prejudice an accused person might suffer from non-disclosure. The court should then carry out a balancing exercise. The interest of the client in non-disclosure should be balanced against the public interest in seeing that justice is done. If disclosure were confined to truly exceptional cases, the public interest underlying legal professional privilege would not be at risk of serious damage.

This is a seductive submission, but in my view it should be resisted. The end result is not acceptable. Inherent in the suggested balancing exercise is the notion of weighing one interest against another. On this argument, a client may have a legitimate, continuing interest in non-disclosure but this is liable to be outweighed by another interest. In its discretion the court may override the privilege against non-disclosure. In Reg. v. Ataou the Court of Appeal expressed the matter thus, at p. 807: "The judge must . . . balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it."

There are real difficulties here. In exercising this discretion the court would be faced with an essentially impossible task. One man's meat is ***512** another man's poison. How does one equate exposure to a comparatively minor civil claim or criminal charge against prejudicing a defence to a serious criminal charge? How does one balance a client's risk of loss of reputation, or exposure to public opprobrium, against prejudicing another person's possible defence to a murder charge? But the difficulties go much further. Could disclosure also be sought by the prosecution, on the ground that there is a public interest in the guilty being convicted? If not, why not? If so, what about disclosure in support of serious claims in civil proceedings, say, where a defendant is alleged to have defrauded hundreds of people of their pensions or life savings? Or in aid of family proceedings, where the shape of the whole of a child's future may be under consideration? There is no evident stopping place short of the balancing exercise being potentially available in support of all parties in all forms of court proceedings. This highlights the impossibility of the exercise. What is the measure by which judges are to ascribe an appropriate weight, on each side of the scale, to the diverse multitude of different claims, civil and criminal, and other interests of the client on the one hand and the person seeking disclosure on the other hand?

In the absence of principled answers to these and similar questions, and I can see none, there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp. That in itself is a sufficient reason for not departing from the established law. Any development in the law needs a sounder base than this. This is of particular importance with legal professional privilege. Confidence in non-disclosure is essential if the privilege is to achieve its raison d'etre. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist.

Thus far I have been considering the case where the client retains some interest in insisting on non-disclosure and, in considering whether to direct disclosure, the court would have to carry out the so-called balancing exercise. There remains the case where the

client no longer has any interest in maintaining his privilege. In many cases, once the transaction or proceedings have been concluded there is no conceivable reason why the lawyer-client communications should remain confidential. This is the type of situation Cooke J. seems to have had in mind in Reg. v. Craig, 1 N.Z.L.R. 597, 599, when he referred to the possibility of proving that there was no ground on which the client could any longer be regarded as having a recognisable interest in asserting the privilege. Sir Rupert Cross adverted to this point in *Cross on Evidence*, 5th ed. (1979), p. 286:

"A time may come when the party denying the continued existence of the privilege can prove that the party relying on it no longer has any interest to protect, as where the solicitor for the unsuccessful plaintiff in a civil action takes a statement from a witness who is subsequently prosecuted for perjury, and the prosecution wish to ask the solicitor what the witness said to him."

In Reg. v. Dunbar and Logan, 138 D.L.R. (3d) 221, 252 Martin J.A. observed that no rule of policy requires the continued existence of the privilege when the person claiming the privilege no longer has any interest ***513** to protect. The court there drew a distinction between civil and criminal cases.

Non-availability of the privilege where the client no longer has an interest to protect would not depend upon carrying out any form of balancing exercise, weighing one interest against another. It would depend on proof that no rational person would regard himself as having any continuing interest in protecting the privilege of confidentiality in the originally privileged material. In other words, the privilege has become spent.

Mr. Francis submitted that the client is the best judge of his own interests. He can waive the privilege if he sees fit. Confidence in the system would be eroded if the law were that someone else, namely a judge, may make this decision by holding that the privilege is spent. I see the force of the argument, but I have to say I am instinctively unattracted by an argument involving the proposition that a client can insist on non-disclosure, to the prejudice of a third party, when (ex hypothesi) disclosure would not prejudice the client. I would not expect a law, based explicitly on considerations of the public interest, to protect the right of a client when he has no interest in asserting the right and the enforcement of the right would be seriously prejudicial to another in defending a criminal charge or in some other way.

The point does not arise for determination in the present case. It cannot be said that no rational person would seek to maintain confidentiality in the circumstances confronting the applicant. In the pending criminal proceedings he is likely to be accused of having committed an horrific murder, a charge of which he has been publicly acquitted. He must have a legitimate interest in not disclosing material which would point in the opposite direction. Thus he is entitled to claim the privilege.

As to the "no interest" point, since this does not call for decision I prefer to reserve my final view on it.

Representation

Solicitors: Hunt & Coombs, Peterborough; Greene D'Sa, Leicester; Treasury Solicitor; Crown Prosecution Service Headquarters.

Appeals allowed. No order for costs. (C. T. B.)

Theory and Practice of the European Convention on Human Rights

THIRD EDITION

by

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as far as the rights of the defence has not been irretrievable prejudiced a failure to comply with the requirement of paragraph 3(c) may in principle be cured in appeal on the condition that the appeal court may carry out a full review.[1040]

(b) The Right to Defend Oneself in Person

The right for the accused to defend himself in person is subject to restrictions by national law and the judicial authorities concerned.[1041] The Court accepted in the *Gillow* Case the requirement of representation by a lawyer to lodge an appeal as 'a common feature of the legal systems in several Member States of the Council of Europe'.[1042] From paragraph 3(c) it then results that, if the national law stipulates or the judicial authorities decide that the accused must be assisted by a lawyer, he must be able himself to choose this lawyer and, in case of inability to pay for such legal aid, must have a lawyer assigned to him; indeed, in that case such legal aid is evidently considered necessary by the national law or the judicial authorities in the interests of justice.

Although some restrictions to the right of the accused to defend himself in person are permitted, these restrictions cannot go so far that the protection offered by the Convention becomes illusory. In the *Kremzow* Case the situation at issue was that the national legislation granted the right of a detained person to be present at the hearing of an appeal against sentence only if the person concerned made a request to this effect in his appeal. The applicant had failed to make such a request. Nevertheless, because the applicant risked a substantial increase of his sentence of imprisonment, the Court held that the national authorities had been obliged to enable the applicant to be present at the hearing and to 'defend himself in person'. The failure to fulfil this duty amounted to a breach of paragraph 6(1) in conjunction with the provision under (c).[1043] The right to be present in person in court is indeed very closely linked with that to a fair trial and has been discussed in that context above.[1044]

(c) Legal Assistance; Implied Rights

As regards the contact with counsel, the Court has attached to the right of access to court, implied in Article 6(1), the consequence that this right has been violated if a detainee is not permitted to correspond with a lawyer or another person giving legal assistance. The Court held that: 'hindering the effective exercise of a right

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1040 Judgment of 24 May 1991, *Quaranta*, A.205, p. 18.

1041 Appl. 2676/65, *X* v. *Austria*, Coll. 23 (1967), p. 31 (35); Appl. 5923/72, *X* v. *Norway*, D&R 3 (1976), p. 43 (44). For the reverse case, but then in the sphere of a civil suit, for which para. 3 does not apply, see Appl. 1013/61, *X and Y* v. *Federal Republic of Germany*, Yearbook V (1962), p. 158: the court need not recognise a representative nominated by a party if the character of the case is not such that the principle of a 'fair hearing' as laid down in Art. 6(1) makes such a representation necessary.

1042 Judgment of 24 November 1986, A.109, p. 27.

1043 Judgment of 21 September 1993, A.268-B, p. 45.

1044 *Supra* pp. 433-435.

may amount to a breach of that right, even if the hindrance is of a temporary character.'[1045] Consequently, as soon as a detainee wants to institute an action or wishes to prepare his defence against a criminal charge, such contact must be possible. This may hold good in the pre-trial phase[1046] and even with regard to an internal preliminary inquiry.[1047]

The provision under (c) embodies the right of an accused to communicate with his counsel out of hearing of a third person. Without this requirement the guarantee offered by the Convention would not be practical and effective.[1048] However, the risk of collusion may justify some restrictions on this right. In *S* v. *Switzerland* the fear that the lawyer of the applicant would collude with the lawyer of a co-accused was based on the fact that the lawyers proposed to coordinate their defence-strategy. This fact could not justify the restriction on the free communication of the accused and his lawyer.[1049] In the *Can* Case the Commission took the view – with regard to subparagraph 6(3)(b) – that restrictions constitute a violation only if they are of such a nature that they affect the position of the defence during the proceedings, and thus also the outcome.[1050] Such a criterion, however, would appear difficult to apply in practice, since such an impact can only be established afterwards, and even then not with certainty. If the starting-point is to be maintained that the confidential relation calls for a private conversation, an adverse influence of restrictions of this private character on the defence will have to be assumed, and the burden of proof for the necessity of the restriction should rest on the authorities.

Searching of counsel and inspection of the correspondence of counsel with his detained client by the prison authorities are in principle also incompatible with the position of counsel. Measures of this kind are justified only in very exceptional circumstances, where the authorities have sound reasons to assume that counsel himself is abusing his position or is allowing it to be abused.[1051] And even then

[1045] Judgment of 21 February 1975, *Golder*, A.18, pp. 12-20. Thus also the Commission in its report of 11 October 1980, *Silver*, B.51 (1987), pp. 100-101.

[1046] Judgment of 8 February 1996, *John Murray*, Reports 1996-I, Vol. 1, paras 66-70.

[1047] Appl. 7878/77, *Fell* v. *the United Kingdom*, D&R 23 (1981), p. 102 (113). See also the report of 12 May 1982, *Campbell and Fell*, A.80, pp. 76-77.

[1048] Judgment of 28 November 1991, *S* v. *Switzerland*, A.220, p. 16. The Court reached this conclusion by referring to the Standard Minimum Rules for the Treatment of Prisoners and the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights.

[1049] *Ibidem*, p. 16.

[1050] Report of 12 July 1984, A.96, pp. 16-17. See also the report of 8 October 1987, *Lamy*, A.151, p. 26.

[1051] In its decision on Appl. 2375/64, *X* v. *Federal Republic of Germany*, Coll. 22 (1967), p. 45 (47), the Commission deemed inspection of the correspondence inherent to the detention on remand. The Commission here wrongly applied only Art. 8 and not Art. 6, although the applicant had stated that the challenged control had also led to great delay in the correspondence. Since the restriction grounds of Art. 8(2) do not necessarily also apply in the context of Art. 6(3)(b), the conformity of the measure with the latter provision should also have been reviewed.

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[1054] Appl. 722/60, *X* v.
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[1055] Report of 14 July

[1056] See, *e.g.*, Appl. 69

[1057] Judgment of 25 Ap

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there will have to be complete openness, so that those concerned are aware of the surveillance.[1052]

The provision under paragraph 3(c), taken together with the first paragraph of Article 6, also implies that counsel who attends the trial must be enabled to conduct the defence in the absence of the accused, regardless of whether or not there exists an excuse for the latter's absence.[1053]

(d) Legal Assistance; The Right to Choose a Lawyer

According to the Strasbourg case-law the right of the accused to choose his own lawyer is not an absolute right; he is bound by the provisions applying in the relevant legal system with regard to the question as to who may act as counsel in court.[1054] If the court is given the power to exclude a specific lawyer or group of lawyers from the defence, for specific accused persons this might constitute an acute problem for an optimal defence, since in certain cases it may be very difficult to find a suitable lawyer. It is therefore important that in the *Goddi* Case the Commission took the view that:

> In most cases a lawyer chosen by the accused himself is better equipped to undertake the defence. It follows that as a general rule an accused must not be deprived, against his will or without his knowledge, of the assistance of the defence counsel he has appointed.[1055]

In the past the Commission has taken the view that in the case of free legal aid the accused does not have the right to make his own choice or to be consulted as to the assignment.[1056] The *Pakelli* judgment, however, in which a juxtaposition of the two rights was opted for through the word *et* in the French text,[1057] pointed already in a different direction and more recently, in the *Croissant* Case, the Court expressed as its opinion that national courts when appointing defence counsel must take into account the accused's wishes. However, those wishes may be overridden if required 'in the interests of justice'.[1058] In any case, if it should be found that there exists or arises such an unsatisfactory relationship between the accused and the lawyer assigned to him that an adequate defence is impossible,

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1052 See the judgment of 28 June 1984, *Campbell and Fell*, A.80, p. 49. The Dutch Supreme Court had declared the practice of wire-tapping in the *Menten* Case unlawful, even though this was done by order of the investigating judge: Supreme Court, 10 April 1979, *NJ*, 1979, No. 374. This induced the Commission to declare a complaint manifestly ill-founded which Menten nevertheless raised on this point; Appl. 9433/81, *Menten* v. *the Netherlands*, D&R 27 (1982), p. 133 (138).

1053 Judgments of 22 September 1994, *Lala*, A.297-A, p. 13 and *Pelladoah*, A.297-B, pp. 34-35.

1054 Appl. 722/60, *X* v. *Federal Republic of Germany*, Yearbook V (1962), p. 104 (106); Appls 7572, 7586 and 7587/76, *Ensslin, Baader and Raspe* v. *Federal Republic of Germany*, Yearbook XXI (1978), p. 418 (464).

1055 Report of 14 July 1982, B.61 (1987), p. 25.

1056 See, *e.g.*, Appl. 6946/75, *X* v. *Federal Republic of Germany*, D&R 6 (1977), p. 114 (116-117).

1057 Judgment of 25 April 1983, A.64, p. 15. See *supra* p. 468.

1058 Judgment of 25 September 1992, A.237-B, p. 33. In this case the applicant contested the necessity of the appointment of a third defence counsel.