[GB] Court of Appeal rules on principle of “open justice” and national security

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Erol Incedal, a 28-year-old law student from south London, was arrested in October 2013 and found to be in possession of a bomb-making manual on a memory card hidden inside his mobile phone case. He had been stopped for speeding in an E-class Mercedes, and a piece of paper inside his glasses case had a note of the address of a property owned by ex-prime minister Tony Blair and his wife. Following an almost totally secret trial, he was cleared of plotting a terrorist attack on the streets of London but was imprisoned for having the manual in his possession. Only 10 of the almost 70 hours of evidence were heard in open court. 10 specially accredited journalists were allowed to hear some of the secret evidence in locked sessions, but they were banned from telling others what they had seen or heard, and the Court retained their notebooks (mobile phones had to be surrendered on entering the Court and were locked away). More than a third of the prosecution case was held in complete secrecy with the journalists told they could face jail if they ever revealed what they had heard.

On 9 February 2016, the Court of Appeal (for England and Wales) gave its judgment on an application by several media organisations, pursuant to section 159 of the Criminal Justice Act 1988, for permission to appeal an order made by Nicol J on 1 April 2015. The order dismissed the application made on behalf of various media organisations that the reporting restrictions which applied during Incedal’s trial be varied so as to permit the publication of reports of most, if not all, of what took place during hearings held in private but in the presence of accredited journalists. The media parties included Guardian News and Media Ltd, Times Newspapers Limited, News Group Newspapers Limited, Associated Newspapers Limited, Independent Print Limited, Telegraph Media Group, the BBC and ITN. The application was also supported by BSkyB Limited and the Press Association.

The media parties submitted that, following the conclusion of the trial against Incedal, there is no longer a significant risk or serious possibility that the administration of justice would be frustrated if the media could publish reports of the core of Incedal's trial. In consequence, there is no longer a continuing justification for the restrictions on reporting the trial that were imposed by the Court of Appeal's Order of 12 June 2014. Alternatively, the publication of reports of parts of the core of the trial would not give rise to such a risk.

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The judges dismissed the media parties' appeal. They said that they were "quite satisfied from the nature of the evidence for reasons which we can only provide in a closed annex to this judgment that a departure from the principles of open justice was strictly necessary if justice was to be done. It was in consequence necessary that the evidence and other information heard when the journalists were present was heard in camera." Further, because of the nature of that evidence, "those reasons continue to necessitate a departure from the principle of open justice after the conclusion of the trial and at the present time." The judges accepted that the decision compromised the press' function of being the watchdog of the public interest in holding the prosecution to public accountability; however, the Court noted that, since the context was terrorism, accountability would be possible through the work of the Intelligence and Security Committee of the House of Commons (Parliament). Finally, the Court noted that "it must always be a possibility, that at a future date, disclosure will be sought at a time when it is said that there could no longer be any reason to keep the information from the public, including this court's reasons for upholding the decision of the trial judge."

Guardian News Media Ltd and Others v. R and Erol Incedal [2016] EWCA Crim 11

http://www.bailii.org/ew/cases/EWCA/Crim/2016/11.html

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