Neutral Citation Number: [2016] EWHC 2792 (Admin)

Case No: CO/1252/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2016

Before:

THE RIGHT HONOURABLE LORD JUSTICE FULFORD
AND
THE HONOURABLE MR JUSTICE LEGGATT

- -

Between:

THE QUEEN on the application of **(1) MATTHEW GLYN O'CONNOR** **(2) DONALD JERRARD**	**Claimants**
- and -	
ALDERSHOT MAGISTRATES COURT	**Defendant**
-and-	
(1) CROWN PROSECUTION SERVICE **(2) HM COURTS AND TRIBUNALS SERVICE**	**Interested parties**

- -

Dr Michael Pelling for **Mr O'Connor** by leave of the Court under the Legal Services Act 2007 with the **Second Claimant** in person
Mr Oliver Sanders (instructed by **The Treasury Solicitor**) for the **Defendant** and the **Second Interested Party**

Hearing dates: 21 and 24 October 2016

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Judgment Approved by the court for handing down

Mr Justice Leggatt (giving the judgment of the court):

1. This case raises questions about the respective powers of courts and court staff to exclude members of the public from a court building because of a perceived risk that they will cause disruption and about when an unlawful limitation of access deprives a hearing of its public character.

The facts

2. The first claimant, Mr Matthew O'Connor, is the founder of an organisation called Fathers4Justice. He was summoned to appear at Basingstoke Magistrates' Court on 23 September 2014, charged with an offence under section 5 of the Public Order Act 1986. On 23 September 2014 Mr O'Connor pleaded not guilty and the trial was adjourned until 12 November 2014 at Aldershot Magistrates' Court. On 12 November 2014 the district judge disclosed that he knew someone connected with the case. Mr O'Connor asked the district judge to recuse himself. He also asked for an adjournment on the ground that two members of the public attending the trial had allegedly overheard the Crown Prosecutor coaching a prosecution witness outside court. Mr O'Connor indicated that he wanted time to prepare an argument based on the evidence of these two individuals that the prosecution evidence was tainted and that the case should be dismissed for this reason. The district judge decided that he should recuse himself and the trial was again adjourned.

3. The case was subsequently re-listed for hearing at Aldershot Magistrates' Court at 10am on 20 February 2015 before three lay magistrates. Mr O'Connor arranged through social media to meet members of the public interested in attending his trial before court on that day. He planned to hold a protest outside the court building with his supporters, as he had done on the days of the two earlier court hearings. The Hampshire Police were aware of the planned protest and a police officer, Inspector Vardy, contacted Mr O'Connor by email on 18 February 2015 to explain that he would be attending on the day as Police Liaison Officer. Inspector Vardy was present outside Aldershot Magistrates' Court on 20 February 2015, but in the event Mr O'Connor decided not to hold a protest before the trial.

4. Between around 9am and 9.30am some eight to ten people assembled outside Aldershot Magistrates' Court. As well as Mr O'Connor himself, they included Dr Pelling, who was acting as Mr O'Connor's McKenzie friend, and Mr Donald Jerrard, a retired solicitor who is the second claimant in these proceedings. Others present included Mr Anthony Hooke, who is a member of Hampshire County Council, and Mr Stanley Evans, a retired engineer. Mr Hooke and Mr Evans were the two individuals whom Mr O'Connor was intending to call to testify that they had overheard the Crown Prosecutor coaching a witness before the previous court hearing. Some of those who had come to observe the trial were supporters of Fathers4Justice, while others were not affiliated with that organisation but were interested in Mr O'Connor's case because they believed that he was a victim of unfair treatment by the Hampshire Police.

5. At around 9.30am Mr O'Connor and those with him attempted to enter the court building to wait in the public area until his case was called on. Unknown to them, however, a decision had been taken to bar anyone who appeared to be associated

with Mr O'Connor from entering the court building, unless they were listed as a witness for the defence. The only list of expected witnesses was contained in a case management form completed by the Crown Prosecutor at the first hearing on 23 September 2014. No one who attempted to enter the court building with Mr O'Connor was named in that list. Consequently, they were all refused entry to the court building by the security staff.

6. The decision to restrict entry in this way had been taken the previous day by Ms Donna Beeson, who is employed by Her Majesty's Courts & Tribunal Service ("HMCTS") as a Delivery Manager for courts which include Aldershot Magistrates' Court, and Mr Richard Harvey, the HMCTS Security and Fire Safety Officer for the South West Region. Mr Harvey has made a witness statement in which he explains that the decision was taken after Ms Beeson learnt from the police of the protest planned for that day. In his statement Mr Harvey says that he knows of occasions when members of Fathers4Justice or other "agitating domestic groups" have caused disruption to court hearings in the past. In the light of such incidents, whenever members of a campaign group are known to be coming to court to attend a hearing, Mr Harvey has advised court managers to limit access to defendants and witnesses and to ban all other persons associated with the group from entering the court building. He says that his advice to this effect has been "very well received in the courts system for the South West Region".

7. Mr Harvey was at Aldershot Magistrates' Court himself on 20 February 2015 and came to the front entrance when Mr O'Connor demanded to know who had made the decision to bar his supporters from entering the building. Mr Harvey explained that he had taken that decision. When challenged repeatedly by Mr O'Connor as to whether he had asked the judge, Mr Harvey replied that the case was to be heard by magistrates, not a judge, and that he had not consulted the magistrates.

8. Mr Harvey subsequently allowed Dr Pelling to enter the building after satisfying himself that Dr Pelling was acting as Mr O'Connor's McKenzie friend. However, he refused to allow Mr Hooke to enter the building despite Mr Hooke's protestations that he was a County Councillor. Mr Hooke demanded to speak to the court manager and eventually, about an hour after the start of the hearing, he was admitted to the manager's office to speak to Mr Harvey and Ms Beeson. He told them that he was a defence witness. Mr Harvey nevertheless refused to let him in. Ms Beeson went to check the case management form and, having ascertained that Mr Hooke's name did not appear in it, she asked him to leave (saying that he could send a text message to Mr O'Connor from outside the building to see if he was required as a witness).

9. At about 10.00am Mr O'Connor and Dr Pelling entered the court building and sat in the public waiting area. Some time after 10am the case was called on and they went into court. The legal adviser read out the charge and recorded that Mr O'Connor had pleaded not guilty. Mr O'Connor then addressed the magistrates and said that he wanted to make an application for the people who had been refused admission to be allowed to enter the court and sit in the public gallery. He said that it was his fundamental right to have a public hearing and he was being denied that right. He also said that, if members of the public were excluded, he would not take part in the trial.

10. The magistrates took advice from their legal adviser, Ms Karen Watts. She advised them that there were two distinct issues. The first was who could enter the building. She advised that this was an administrative matter for the court managers who were responsible for the health, safety and security of those within the building and was not a matter for the bench. The second issue was whether or not, as a consequence of the decision to limit entry to the building, the trial was no longer capable of being held in open court with the result that Mr O'Connor could not have a fair trial. In that regard Ms Watts pointed out that there were people in court who were not directly connected with the case. There were at the time two people in court who came in this category. One was a local news reporter and the other was a solicitor who was there for another case.

11. The chair of the bench made it clear that the magistrates would not allow the individuals who had been prevented from entering the court building by the security staff to enter and sit in the public gallery. He indicated that they had made this decision on the basis of the advice received from the legal adviser and the fact that a properly authorised court manager had taken the view that there was a risk on grounds of safety or security.

12. The court then adjourned so that the legal adviser could advise Mr O'Connor about the consequences of not participating in the trial. Mr O'Connor said that he intended to apply for judicial review of the decision to exclude the members of the public and that he would ask for the case to be adjourned while judicial review proceedings were brought.

13. When the hearing resumed, Mr O'Connor asked the magistrates to grant such an adjournment. The legal adviser advised that the presence of a member of the press meant that the proceedings were still being held in open court and that it was preferable for any challenge to the fairness of the trial to be made after it had taken place as Mr O'Connor might be acquitted and, if he was convicted, there might be other matters he would wish to challenge. The Crown Prosecutor also argued that the trial should proceed, pointing out that the prosecution witnesses had come to court to give evidence. The magistrates nevertheless decided to adjourn the trial. The chair of the bench read out the following statement of their reasons:

> "Earlier today we took a decision to decline entry to some members of the public. That decision was taken based on the advice given by our legal adviser in open court, who in turn had been advised by those responsible for the health, safety and security issues in the court building. Mr O'Connor has requested an adjournment in order that he can lodge a judicial review with regard to this decision. We consider that on the grounds of open justice we should allow the requested adjournment."

The proceedings

14. Mr O'Connor commenced this claim for judicial review on 13 March 2015. In giving permission to proceed with the claim at an oral hearing, the court (Davis LJ and Ouseley J) observed that this case raises important issues which have potential

implications for other cases. Mr Jerrard agreed to be joined as a second claimant to ensure that the interests of the excluded members of the public are considered. HMCTS had already been joined by the court as an interested party.

15. At the hearing of the claim we permitted Dr Pelling to address the court on behalf of Mr O'Connor and Mr Jerrard spoke briefly for himself and the other excluded members of the public. Mr Sanders appeared as counsel for both the defendant magistrates' court and HMCTS. The defendant adopted a neutral position and Mr Sanders' substantive submissions were therefore made on behalf of HMCTS. The Crown Prosecution Service, which was also joined as an interested party, has taken no part in the proceedings.

The issues

16. The claim raises two issues. The first issue is whether it was lawful for (a) HMCTS staff and (b) the magistrates to refuse to allow Mr Jerrard and other members of the public to enter Aldershot Magistrates' Court on 20 February 2014 to attend Mr O'Connor's trial. The second issue is whether the exclusion of those people, if unlawful, had the consequence that the hearing on that day was not a public hearing.

(1) Was the restriction of entry lawful?

Arguments

17. Dr Pelling submitted that on the facts there was no rational basis for fearing that the individuals who wanted to attend Mr O'Connor's trial would cause disruption if they entered the court building. He further submitted that the decision of the magistrates to uphold their exclusion was unlawful for a number of reasons: it was irrational on public law principles; it involved an improper delegation to court managers of what must be a judicial decision; it violated the common law principle of open justice, the statutory requirement that trials before magistrates must be held in open court and articles 6 and 10 of the European Convention on Human Rights as enacted into English law by the Human Rights Act 1998; and it was contrary to Part 16 of the Criminal Procedure Rules 2014 and natural justice because the excluded members of the public were not afforded any opportunity to make representations.

18. On behalf of HMCTS, Mr Sanders conceded that the decision to exclude Mr Jerrard and others from the court building was unlawful, but only on the narrow basis that the court managers who made the decision had acted inconsistently with HMCTS policy.

19. Mr Sanders contended that, in addition to the powers which courts have to restrict access to a hearing in limited circumstances, HMCTS has its own free-standing power to exclude individuals from court buildings which may lawfully be exercised without reference to the judiciary. He submitted that this power derives from the ordinary common law powers which HMCTS has as the occupier of the court premises, first, to confer an implied licence on members of the public to enter parts of the building designated as accessible to the public subject to certain conditions and, second, to withdraw that licence in certain circumstances.

20. Mr Sanders acknowledged that, as an executive agency performing public functions, HMCTS must exercise these powers in accordance with public law principles. HMCTS has published two policy documents dealing with issues of security and safety. The first sets out operating procedures for "dealing with confrontational situations / violence, including protests and disruptions." It gives suggested responses to a range of possible incidents of disruption. In some cases the suggested responses include informing or consulting the senior judicial office holder.

21. The second relevant document published by HMCTS contains policy guidance on matters of security and safety. Mr Sanders drew attention, in particular, to one of the "key principles / requirements" of the guidance which states:

> "Senior Persons on Site must consult the appropriate judicial office holder/justices' clerk if it is intended to bar or limit the access of anyone claiming legitimate business at the court (for example attendance as a party or witness in a case), and should keep the senior judicial office holder of the court informed."

22. HMCTS takes the position that not every member of the public who wishes to attend a hearing can claim to have "legitimate business" at the court. However, HMCTS accepts that in the present case its staff should have consulted the judiciary but did not. Its policy was therefore not followed. For this reason, the decision-making process was flawed: see R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12, [2012] 1 AC 245. Mr Sanders further accepted that this flaw infected the decision of the magistrates to endorse the actions taken by HMCTS staff.

23. Mr Sanders nevertheless maintained that (a) HMCTS is the primary decision maker, (b) the final decision whether to admit a person to or exclude a person from a court building lies with HMCTS, and not with the judiciary, and (c) although there should be consultation, in a case where HMCTS and the court disagree over an exclusion, the view of HMCTS must nevertheless prevail.

The open justice principle

24. In our view, although the concession made by HMCTS that its own policy was not followed in this case is correct, the reasons why it was unlawful to exclude members of the public from the court lie much deeper.

25. The principle of open justice which requires court proceedings to be conducted in public is a fundamental principle of the common law: see e.g. Scott v Scott [1913] AC 417; Al-Rawi v Security Service [2012] 1 AC 531, paras 10-11; R (Guardian News and Media Ltd) v Westminster Magistrates' Court [2013] QB 618, paras 1-4. As Toulson LJ explained in the latter case (at para 1): "Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or worse." In Scott v Scott [1913] AC 417 at 477, Lord Shaw quoted Jeremy Bentham: "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks

applicable to judicial injustice operate."[1] And again: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."[2] The authorities also stress the vital importance of openness and transparency to maintaining public confidence in the fairness of the justice system.

26. In the case of criminal trials in magistrates' courts, the open justice principle is also embodied in section 121(4) of the Magistrates' Courts Act 1980 which states that, "subject to the provisions of any enactment to the contrary, a magistrates' court must sit in open court."

The right to attend a criminal trial

27. It is implicit in the open justice principle that members of the public who wish to attend a criminal trial have a right to do so. The deep historical roots of this right were reviewed by the US Supreme Court in Richmond Newspapers Inc. v Virginia, 448 US 555 (1980). In a learned opinion Burger CJ explained why, in the light of the long and unbroken history in England and America of criminal trials being presumptively open, the right of a citizen to attend a criminal trial is a constitutional right even though it is not explicitly mentioned in the US Constitution. Many statements of this fundamental right can also be found in our own case law. In Scott v Scott [1913] AC 417, 440, the Earl of Halsbury said: "I am of opinion that every Court of justice is open to every subject of the King". In the earlier case of Daubney v Cooper (1829) 10 B & C 237 the Court of King's Bench held that magistrates were liable to an action in trespass for removing an individual from the courtroom without a specific reason. Bayley J, giving the judgment of the Court, said:

> "… we are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose – provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed – have a right to be present for the purpose of hearing what is going on."

See also McPherson v McPherson [1936] AC 177, 200; R v Denbigh Justices, ex p Williams [1974] QB 759; R v Leicester City Justices [1991] 2 QB 260.

28. It is a necessary incident of the right to attend a criminal trial (or other public court hearing) that a member of the public may enter the court building in which the trial is taking place. We cannot accept the submission made by counsel for HMCTS that, as the occupier of the building in which the Aldershot Magistrates' Court sits, HMCTS has the ordinary power of an occupier to give or withhold permission to enter the building or to impose conditions on entry in its discretion and subject only to general public law constraints. Access to a court building for the purpose of attending a public hearing is a matter of legal right and does not

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1 Jeremy Bentham, *Collected Works* (1843) vol 9, p492.

2 Ibid, vol 4, p316.

require any express or implied permission from the occupier. It is analogous to the right of the public to attend meetings of public bodies conferred by the Public Bodies (Admissions to Meetings) Act 1960, which was considered in Laporte v Metropolitan Police Commissioner [2015] EWHC 3574 (QB). But in the case of court proceedings, in contrast to meetings of local authorities, there was no need to enact legislation to confer a right of admission on members of the public because the right of the public to be present at court hearings is an ancient common law right.

29. The right to attend a public court hearing and to enter the court building for that purpose is not unqualified. It is qualified, first of all, by the court's power to restrict public access to the courtroom where it is necessary to do so in the interests of justice (for example, to prevent disorder). This is an aspect of the court's inherent jurisdiction to control its own procedure, though the manner in which the power is exercised in criminal proceedings is now regulated by Part 6 of the Criminal Procedure Rules 2015.

The statutory power to exclude

30. The right is also qualified by the Courts Act 2003, which confers powers on court security officers who have been designated as such by the Lord Chancellor (see section 51(1)) to exclude or remove persons from court buildings in specified circumstances. Section 53 provides:

> "**Powers to exclude, remove or restrain persons**
>
> (1) A court security officer acting in the execution of his duty may exclude or remove from a court building, or a part of a court building, any person who refuses-
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> (a) to permit a search under section 52(1), or
>
> (b) to surrender an article in his possession when asked to do so under section 54(1).
>
> (2) A court security officer acting in the execution of his duty may-
>
> (a) restrain any person who is in a court building, or
>
> (b) exclude or remove any person from a court building, or a part of a court building,
>
> if it is reasonably necessary to do so for one of the purposes given in subsection (3).
>
> (3) The purposes are-
>
> (a) enabling court business to be carried on without interference or delay;
>
> (b) maintaining order;

> (c) securing the safety of any person in the court building.
>
> (4) A court security officer acting in the execution of his duty may remove any person from a courtroom at the request of a judge or a justice of the peace.
>
> (5) The powers conferred by subsections (1), (2) and (4) include power to use reasonable force, where necessary."

31. These provisions do not prevent court managers from taking decisions about whether to exclude a person or group of people from a court building and giving instructions to court security officers to implement such a decision, as happened in this case. Nor do they prevent HMCTS from formulating policies about how their staff should respond to situations of actual or threatened disruption. Section 53 is not dealing with policies or decisions but with actions. It confers on court security officers authority to take the action of excluding or removing a person from a court building, and it specifies when such an action is lawful. Thus, if a court security officer acts on instructions from a court manager to exclude an individual from a court building when the conditions set out in section 53 are not satisfied, the exclusion will be unlawful. The statutory provisions leave no room for some parallel power under which court security officers (or people who are not court security officers) may lawfully exclude a person from a court building on the ground, for example, that they have failed to comply with a condition of entry imposed by HMCTS as occupier, even though the requirements of section 53 of the Courts Act have not been met.

32. In the present case the only power that was potentially relevant was that conferred by section 53(2)(b). Hence, whether the court security officers at Aldershot Magistrates' Court had the power to exclude Mr Jerrard and others from the court building depended upon whether it was reasonably necessary to do so for one of the purposes specified in section 53(3).

33. It is implicit in this requirement that the court security officer must believe it to be reasonably necessary to exclude the person concerned for one of the specified purposes. But the test of reasonable necessity is otherwise an objective test. Accordingly, the ultimate arbiters of whether the test is satisfied and hence of whether the officer has power to exclude a person from a court building are the courts.

<u>When reference to the court is necessary</u>

34. The powers under section 53 may lawfully be exercised without reference to the judiciary, and in plain cases – for example, where an individual is drunk or violent – there is no reason to consult a judge or magistrate about the decision to exclude or remove the individual. But where a member of the public is seeking to attend a particular court hearing and there is a dispute or room for dispute about whether they have the right to do so, that question should be decided by the court concerned at the time the question arises. If a person is wrongly being denied entry, they should not be left in the position of having to incur the substantial

burden of bringing proceedings after the event to vindicate their right, when the opportunity to be present has been lost. Furthermore, as we will consider shortly, decisions to exclude members of the public potentially affect the fairness and validity of the court process. It is therefore integral to the court's ability to control its own process that such decisions are taken by the court.

35. The present case, where a decision was made in advance to refuse entry to the court building to anyone who appeared to be associated with a particular campaign group, was a paradigm example of a situation where reference to the court was essential. The decision to exclude people who wanted to attend Mr O'Connor's trial was bound to be controversial, and the question whether their exclusion was reasonably necessary to enable court business to be carried on without interference or delay or to maintain order was therefore one on which the court needed to rule.

36. Mr Sanders emphasised that HMCTS has a duty to ensure the safety of its own staff, members of the judiciary and visitors to court premises, who may include not only parties and their lawyers but also children, jurors, vulnerable complainants and witnesses, as well as members of the general public. He argued that HMCTS staff must retain at least a residual right to exclude people from the court building, even if magistrates or a judge have decided that they ought to be admitted, where for example professional security staff apprehend a risk of disturbance that they could not control.

37. A situation in which there is such an unresolvable disagreement is, we hope, one which will in practice seldom, if ever, arise. When court managers or security officers have good reason for fearing violence or other disruptive behaviour, courts can be expected to heed their concerns and, if necessary, make orders restricting access. If an impasse of the kind postulated by Mr Sanders really were to be reached, however, we would expect the court to hesitate before making an order which, if disobeyed, would put court managers and staff in contempt. If the magistrates in this case had concluded that it was not reasonably necessary to exclude Mr O'Connor's supporters from the court but the court managers had insisted that it would be dangerous to admit them, the magistrates might reasonably have decided that the best (or least bad) course was to adjourn the trial and leave the issue to be decided by the Divisional Court, as was done in this case.

The lawfulness of the exclusion in this case

38. That said, there was in fact no disagreement between the court managers and the court in the present case, as the magistrates decided that Mr O'Connor's supporters should not be admitted to the court. They did so, however, without being advised that it was for them to judge whether it was reasonably necessary to exclude the individuals concerned for one of the purposes specified in section 53(3) of the Courts Act, and in the mistaken belief that the issue was an administrative matter for the court managers. They therefore made the decision on an incorrect legal basis. As a result, they made no inquiry into the facts and hence their decision was also defective because it was not based on any evidence. We further consider that this was a case in which, if an entire group of people was to be excluded simply because of their affiliation with the group, fairness required that at least one representative member of the group should be given an

opportunity to make representations to the court before a final decision was taken to exclude them from the court building.[3]

39. For all these reasons, the magistrates' decision to uphold the exclusion of those who had been refused entry to the court building was flawed.

40. We are satisfied that, if a proper procedure had been followed and the magistrates had been informed of the facts and correctly advised as to the law, they would have reached a different decision. In particular, inquiries would have elicited the following facts:

    i) The HMCTS managers had no information from the police or from any other source which indicated that there was any plan or intention to hold a protest or cause disruption within the court building.

    ii) The HMCTS managers had no information from the police or from any other source that any of the members of the public who wanted to enter the court building had any previous history of causing disruption.

    iii) In his witness statement Mr Harvey has said that he had in mind an incident when a large group of Fathers4Justice protestors caused disruption at county courts in Bristol. Mr Harvey did not mention the date of this incident. Mr O'Connor's uncontradicted evidence is that the incident (which was a general protest not relating to any individual court hearing) occurred in 2008 and that there have been no further incidents of disruption involving Fathers4Justice since then.

    iv) Mr Harvey also relied on another incident of past disruption caused by a different protest group, entirely unrelated to Fathers4Justice. That was plainly an irrelevant consideration.

    v) Mr O'Connor has given undisputed evidence that he has attended many court hearings over the years (sometimes as a party and sometimes in other capacities) and that at such hearings he has always been courteous and polite, his supporters have never previously been excluded from the court and they have never caused any disturbance or disrupted the proceedings.

    vi) In particular, in the instant case Mr O'Connor had already appeared twice before the Hampshire magistrates, on 23 September and 12 November 2014. On those occasions there had been peaceful protests held outside the court building of just the same kind as Mr O'Connor planned to hold on 20 February 2015, arranged through social media in just the same way. On those earlier occasions there had been no attempt to bar anyone from entering the court building, supporters of Mr O'Connor and Fathers4Justice had been present at the hearings including some of the same people who came to watch the trial on 20 February 2015 and there had been no disruption or disturbance.

[3] See also r.16.2(3) of the Criminal Procedure Rules 2014, now r.6.2(3) of the Criminal Procedure Rules 2015.

41. In these circumstances it was plainly not reasonably necessary to exclude anyone from Aldershot Magistrates' Court on 20 February 2015 for the purpose of enabling court business to be carried on without interference or delay or of maintaining order, and the exclusion of Mr Jerrard and the other members of the public who wanted to attend Mr O'Connor's trial was unlawful.

(2) Was the hearing in public?

42. So far we have been considering the rights of members of the public to attend a criminal trial or other public court hearing. A further aspect of the open justice principle is the right of a party to have their case heard in a court open to the public. It is Mr O'Connor's contention that he was denied that right by the unlawful exclusion from the court on 20 February 2015 of people who wished to observe his trial and that an order should in consequence be made quashing the proceedings.

43. An example of a case in which a quashing order was made because the hearing was not open to the public is Storer v British Gas plc [2000] 1 WLR 1237. In that case a hearing in an industrial tribunal, at which the applicant's claim was dismissed, took place in a room not normally used as a courtroom as all the available courtrooms were in use. The room was in a secure area of the building which could only be reached through a door marked "private" and protected by a push-button, coded lock. Although there was no evidence that any member of the public had attempted to watch the proceedings, the Court of Appeal held that the hearing had clearly not been open to the public and, in view of the importance of the obligation to sit in public, quashed the tribunal's decision and ordered a rehearing.

44. In Storer the hearing took place in a court from which the public was for practical purposes completely excluded. In the present case the restriction on access was partial, being limited to members (or those believed to be members) of a particular group. On behalf of Mr O'Connor, Dr Pelling did not seek to argue that the unlawful exclusion of one or more members of the public from a courtroom automatically means that the court is not "open" and the hearing is not in public. He submitted that the question is one of fact and degree. His argument was that in this case some 90% of the members of the public who attempted to enter Aldershot Magistrates' Court on 20 February 2015 for the purpose of observing Mr O'Connor's trial were unlawfully refused entry. Dr Pelling's figure was based on the fact that ten members of the public or thereabouts came to observe the trial, of whom only one (the local journalist mentioned earlier) was allowed to do so while the others were all barred from the court building. Dr Pelling submitted that the extent of this restriction on access was so substantial that the hearing could not fairly be described as having been in open court.

45. Mr Sanders did not seek to defend the advice given to the magistrates by the legal adviser that the presence of a member of the press in the public gallery necessarily meant that the proceedings were in open court. He accepted that the admission of the press, while a relevant and beneficial factor, is not decisive: see e.g. R v Denbigh Justices, ex p Williams [1974] QB 759, 765. Mr Sanders did not accept, however, that as a result of the unlawful exclusion of all Mr O'Connor's supporters, the hearing was not open to the public. He also emphasised that

nothing happened in the trial beyond reciting the charge and Mr O'Connor's plea and deciding whether the excluded individuals should be allowed to attend the hearing, because the magistrates then granted an adjournment. He submitted that in these circumstances, even if the hearing did not take place in public, it is unnecessary to grant any relief.

46. The question whether proceedings were in open court arose in the Denbigh Justices case. The applicants in that case were two members of the Welsh Language Society who were summoned before the magistrates for having television sets without licences, an action which they had taken for political reasons. They arrived at the magistrates' court with 20-30 friends and supporters. The courtroom was small with only five seats for members of the public. These were filled. When their cases were called on, the applicants asked for a trial in the Welsh language. When the requests were refused, the applicants and the members of the public left the court. The applicants were then convicted in their absence. They applied to have their convictions quashed on the ground that the proceedings had not been in open court.

47. The Divisional Court dismissed the application. Lord Widgery CJ (with whom Ashworth and Bristow JJ agreed) based the decision on a finding that it was not established that any member of the public who wished to enter the courtroom when there was space available was refused admission. But the Lord Chief Justice also indicated that he would still have concluded that the proceedings were in open court even if it had been shown that requests were made to fill the five public seats after they became vacant. He said (at p766D):

> "I would have come to the same conclusion because I do not think that the question 'open court or no?' can depend on such minutiae as to whether at a particular moment there was a particular member of the public anxious to come in who was wrongly refused. Here the question 'open court or no?' has to be answered by a broad consideration of all the circumstances of the case …"

48. On this authority and as a matter of principle we accept the submission that the question of when a hearing ceases to be open to the public is one of fact and degree. In a case where members of the public are unlawfully excluded from the court, we think the essential question is whether the nature and extent of the exclusion are such as to deprive the hearing of its open and public character.

49. We are bound to conclude that this was the effect of the exclusion in the present case. It is not simply a matter of counting heads, although the numbers are compelling. Mr O'Connor's case had aroused a strong interest, not only among some supporters of his organisation but also among some individuals involved in local Hampshire politics. To prevent all the people who came to support Mr O'Connor, without any valid reason, from exercising their right to observe the proceedings not only created a strong and understandable sense of grievance but had the consequence that justice could not be seen to be done.

50. We agree with Mr Sanders that, as the trial was adjourned before the prosecution had opened their case, it is unnecessary to make any order quashing the

proceedings. In view of the importance of the principle at stake, we nevertheless think it right to record our conclusion in a declaratory judgment.

Conclusions

51. The claimants raised a number of other points. These included criticism of a procedure outlined in the HMCTS policy documents for issuing a "banning letter" to inform an individual that he or she is banned from entering a particular court building for a specified period of time. Dr Pelling submitted that HMCTS has no lawful authority to issue such letters and that to do so involves a usurpation of powers which belong only to the courts. Although that question does not arise for decision, as no "banning letter" was issued in this case, this criticism seems to us to have considerable force. It is apparent from the pro forma "banning letter" annexed to the HMCTS operating procedures that such letters assume that HMCTS has the ordinary rights of an occupier to restrict entry to its premises. We have explained in this judgment why that assumption is mistaken.

52. We also mentioned earlier that arguments were advanced by the claimants based on articles 6 and 10 of the European Convention on Human Rights. We have not found it necessary to address those arguments because this is a case where, without recourse to the Convention, the common law has all the resources needed to protect the rights concerned.

53. For the reasons given, we will make declarations: (1) that the refusal of HMCTS staff and of the magistrates sitting at Aldershot Magistrates' Court on 20 February 2015 to allow Mr Jerrard and other members of the public to attend Mr O'Connor's trial was unlawful; and (2) that, in consequence, no valid proceedings in Mr O'Connor's trial took place on that day.