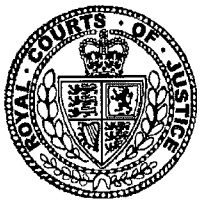

Neutral Citation Number: [2016] EWHC 183 (Admin)

Case No: CO/4249/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2016

Before:

LORD JUSTICE BURNETT
MR JUSTICE SWEENEY

- -

Between:

Terence Patrick Ewing	**Claimant**
- and -	
Crown Court sitting at Cardiff & Newport	**Defendant**
- and -	
Director of Public Prosecutions	**1st Interested Party**
Maurice John Kirk	**2nd Interested Party**

- -
- -

Terence Ewing (in person)
Ben Douglas-Jones (Instructed by **the Crown Prosecution Service**) for the **1st Interested Party**
Maurice Kirk **(in person)**
Louis Mably (Instructed by the **Government Legal Department**) as **Advocate to the Court**

Hearing date: 2nd February 2016

- -

Approved Judgment

Lord Justice Burnett:

Introduction

1. This claim for judicial review concerns the circumstances in which it is appropriate for a Crown Court judge to order that members of the public may not make notes of a hearing otherwise being held in public.

2. The claimant, Terence Patrick Ewing, is a "vexatious litigant". In December 1989, on the application of the Attorney General pursuant to Section 42 of the Supreme Court Act 1981, he became the subject of a Civil Proceedings Order. That was because he had "habitually persistently and without any reasonable grounds" instituted vexatious civil proceedings and made vexatious applications in civil proceedings. One consequence of being the subject of an order under section 42 is that the vexatious litigant may not issue proceedings without leave of the High Court. On 21 January 2015 Gilbart J gave permission to the claimant to issue these proceedings. On 15 May 2015 Kenneth Parker J granted permission to the claimant to apply for judicial review of decisions made by His Honour Judge Crowther QC during appeal proceedings in Cardiff Crown Court on 7 and 8 April 2014 and (adjourned part-heard to Newport Crown Court) on 30 June and 1 July 2014.

3. The judge directed that no member of the public could make notes of the proceedings without his permission and twice ruled that the claimant could not make notes.

The Facts

4. Those appeal proceedings were brought by Maurice John Kirk, the second interested party, in respect of his conviction for common assault at the Cardiff and Vale Magistrates' Court on 10 December 2013. The assault occurred on 21 September 2013. The victim was David Rogan, a prison officer serving at HM Prison Cardiff. Mr Kirk had been on remand in custody at Cardiff Prison until 2 September 2013 and apparently returned on 21 September to retrieve his passport. The detail of the incident and conviction do not need to be rehearsed. It is sufficient to record that following the four day hearing, Mr Kirk's appeal against conviction was dismissed. He appealed further by way of case stated to the High Court. That appeal was dismissed by Gilbart J. However, the underlying context provides the background to these proceedings and the claimant's interest in Mr Kirk's appeal. Mr Kirk has been the defendant in many prosecutions in South Wales and has been in conflict with "the authorities" for many years. Pursuing and defending court cases have become a dominant feature of his life. The papers contain many references to his website where (apparently) he details what he sees as his endless struggle against injustice. Mr Kirk's habit is to appear unrepresented and, unlike a professional advocate who owes duties to the court to conduct proceedings with reasonable dispatch and take only points reasonably arguable, Mr Kirk's approach is to take as long as possible, to raise endless technical objections and seek to use one set of proceedings to assist him in another. The judgment given by the judge at the end of the appeal suggests that Mr Kirk deliberately fomented the incident which led to this prosecution as he suggested himself "to make a fuss". He made "many ancillary applications" during the case, in particular futile and time-wasting applications for disclosure. The transcripts provide strong support for the proposition that he was manipulating the process and being deliberately difficult and contrary. He made lengthy and

irrelevant submissions about his long-standing disputes with the South Wales Police and a forensic clinical psychologist. He made a hopeless application for the case to be dismissed at half time and followed that with an application for a stay as an abuse of process. The court concluded that he had pursued the appeal, which Mr Kirk himself described as "irrelevant", as a "means to acquire information for his other long running disputes". Mr Kirk disputes this analysis.

5. From the outset it was apparent that the appeal was being conducted by a difficult litigant and that it would be far from straightforward.

6. There was a pre-appeal hearing on 27 March 2014, which was not attended by the claimant. The appeal was fixed for hearing on 7 April. There was reference during the pre-appeal hearing to another unconnected appeal against a conviction for breach of a restraining order which Mr Kirk was pursuing in Bristol Crown Court. He had apparently arrested prosecuting counsel involved in the case. Mr Kirk mentioned a third appeal and two jury trials, although without detail. In the case stated for consideration by the High Court following the appeal there is reference to a "convention that members of the public require permission before taking notes". It was said that the convention exists "so as to prevent forbidden or prejudicial material from entering the public domain". That case refers to Mr Kirk's website "dedicated to his Court appearances" and that the judge had indicated on 27 March that "note taking by members of the public would not be allowed without permission having been granted".

7. The appeal was heard by the judge sitting with two magistrates. On 7 April the judge noticed someone in the public gallery making notes and indicated that he would hear any application to do so. He added

> "[H]enceforth any taking of notes without permission will be regarded as a contempt of court and will be dealt with as such."

8. Mr Kirk asked that someone be allowed to make notes for him. The court agreed that one of his supporters could come forward to make notes. It ruled that the notes should be given to Mr Kirk. They were not to leave the court room except with Mr Kirk. The problem Mr Kirk had indicated with making his own notes was that he did not have any glasses with him. He was in custody for another matter at this stage. It was in these circumstances that the claimant found himself making notes on behalf of Mr Kirk. Later that afternoon Mr Kirk's glasses were located (he had hidden them in the spine of a file) and he asked for pen and paper. The judge told the claimant to stop making notes and return to the public gallery. As a result, Mr Kirk changed his mind about making his own notes but the judge indicated that no one else in court would thereafter make notes for him.

9. The claimant did not attend the appeal on 8 April. The judge repeated that no one was to make notes without his permission and added that "transcripts are available to anyone who wants them and for a modest fee".

10. The claimant wrote a letter threatening judicial review of the decisions of the court relating to note-taking. The court replied on 29 April 2014:

> "1. Mr Kirk applied for the Court's permission that a member of the public be allowed to assist him by taking notes.
>
> 2. Mr Kirk made that application upon the basis that he did not have his glasses, and could not see to write.
>
> 3. That application was granted and a member of the public (who may have been Mr. Ewing) sat in the well of the court and took notes.
>
> 4. At 15:32pm of thereabouts, Mr. Kirk volunteered that his glasses were in fact amongst his property in the cells, and he retrieved them.
>
> 5. Thereafter he made his own notes, and the note-taker withdrew from court.
>
> 6. There was not a direction that no member of the public should take notes; rather that no member of the public should take notes without having asked the Court's permission.
>
> 7. This is a conventional rule and one which is designed to ensure that no prejudicial material leaves the Court through an inexperienced reporter.
>
> 8. It is not a rule which applies to representatives of the media and the Court was open.
>
> 9. At a previous hearing in Mr. Kirk's case, a member of the public had repeatedly sought to take notes covertly and without asking permission. He was warned that to continue to do so could constitute a contempt in the face of the Court – i.e. disobedience to a direct instruction.
>
> 10. No direction has been made that note-taking is forbidden. HHJ Crowther QC would expect that the Court's permission be asked in the usual way; and if Mr. Kirk indicates the notes of another are likely to help him conduct his case, then such permission would be given." (Typographical errors corrected)

11. The transcript in fact shows that after Mr Kirk retrieved his glasses during the afternoon of 7 April the judge directed that "no one else in court will take notes." The claimant attended the adjourned hearing on 30 June. The judge again made it clear that notes could not be taken without permission. A different friend of Mr Kirk, Jeffrey Matthews, asked for and was given permission to make notes having explained that he was there to assist Mr Kirk. He confirmed that he did not intend to use them for any purpose other than to assist Mr Kirk. Later that same day the judge noticed that the claimant was making notes and asked why he had not sought permission to do so. The claimant answered that he was "a member of the public and, as far as I am aware, there [are] no legal restraints on taking notes". In that the

claimant was wrong because he well knew that the court had imposed restraints on note-taking in the appeal. The judge said this in response:

> "This is a case in which there is an appeal in another court centre. I am concerned that promulgation of information regarding this case may have an adverse effect upon the course of justice in that matter. I have allowed somebody acting as Mr Kirk's McKenzie friend to take notes. I am not prepared to allow anyone else to take notes in this case. You will not take notes, sir. Thank you very much."

12. The claimant indicated that he would send another letter, which he did. The court replied. Some further explanation was given for the stance taken by the judge and justices hearing the appeal:

> "17. In making its rulings on 27th March and subsequently, the Court had in mind that the convention that members of the public require permission before taking notes exists so as to prevent forbidden or prejudicial material from entering the public domain, as well as interference with the ongoing appeal.
>
> 18. It took the view that the risk of prejudice was real in this case, given:
>
> - The Appellant maintains, with the assistance of others, a website dedicated to his Court appearances;
> - The Appellant spoke regularly of calling witnesses of fact;
> - There was and is an outstanding Appeal against conviction before the Bristol Crown Court.
>
> 19. The Court took into account on 30th June that the Appellant made no submission that the Claimant should be allowed to take notes or to help him in any other way.
>
> 20. In the circumstances Mr Ewing was not permitted to take notes or to help him in any other way.
>
> 21. Mr Ewing was reminded that disobedience to an order of the Court is a contempt.
>
> 22. No order postponing reporting was made; such an order would have had the effect of preventing proper and responsible reporting by representative of the media."

13. The reference in para 22 to postponing reporting was a response to a point raised by the claimant in his letter to the court which questioned why, if the court was concerned that reporting the instant appeal might prejudice the Bristol appeal, no order was made under section 4(2) of the Contempt of Court Act 1981 postponing

publication until after that appeal had been disposed of. The reference in para 21 to disobedience to an order amounting to a contempt echoed what had been said by the judge in court. It was an uncontroversial statement of the law. Orders of the court must be obeyed, whether a person affected believes them to be right or wrong; and whether he intends to appeal or challenge the order.

Discussion

14. Mr Mably, for whose assistance as advocate to the court we are grateful, submits that if there is a danger of interference in the proper administration of justice it is permissible for a court to restrict the making of notes during a public hearing. However, there is no rule of law, practice or convention prohibiting all those in court from making notes without permission. A necessary feature of the principle of open justice is that those present in court should be able to make notes regarding the proceedings, either for the purposes of reporting (which is not limited to professional reporters and those connected with the media) or for personal interest and private purposes. Mr Mably submits that there was no warrant for imposing the requirement for seeking permission generally and, difficult though the appeal must have been for the judge and justices, the reasons given for stopping the claimant from making notes are not supportable. There was no risk to the proper administration of justice in the appeal in Wales, nor in the forthcoming appeal in Bristol, from members of the public making notes of the proceedings.

15. The claimant supports these submissions. Mr Douglas-Jones, for the Director of Public Prosecutions, accepts the general propositions articulated by Mr Mably but submits that in the circumstances of Mr Kirk's appeal the court was justified in imposing the restrictions it did, both as regards insisting on permission and refusing it to the claimant. He does not contend that the reasons given in the course of the proceedings themselves, or in response to the claimants' letters threatening judicial review, for restricting note-taking provide a sound basis for the decisions in question. He submits that the restrictions were justified to enable the court to maintain its authority in what it anticipated, entirely correctly, would be a testing appeal.

16. The common law has long upheld the principle that open justice is central to the rule of law. It has been repeated on many occasions at the highest level. *Scott v Scott* [1913] AC 417 is often cited as the founding modern authority where Lord Halsbury said at 440, "I am of opinion that every Court of justice is open to every subject of the King". An important aspect of the principle is that justice must be administered in public. The general rule is that the public and representatives of the media have the right to attend court hearings. The importance of the presence of the media is that they may report what occurs. Open justice helps to keep all those involved in the process up to the mark. It ensures public scrutiny of what is being done in the courts and assists in maintaining public confidence in the administration of justice. It also reduces the risk of inaccurate and ill-informed comment on court proceedings.

17. This aspect of the principle of open justice may be curtailed in limited circumstances, generally dictated by Statute or Rules of Court. None applies in this case. Another aspect of the principle of open justice, that all those involved in proceedings should be publicly named and their names capable of dissemination, may similarly give way to competing statutory requirements or privacy concerns. The important corollary of open justice, namely that what has been said and has happened in court may be freely

reported and discussed outside court, is also subject to carefully controlled restrictions. In April 2015 the Judicial College published the third edition of its guide entitled "Reporting Restrictions in Criminal Courts" summarising the statutory and common law principles applicable in such circumstances. It was adopted by the Media Lawyers' Association, the Society of Editors and News Media Association and is available on the websites of all the organisations concerned. Whilst produced with the assistance of what might be regarded as the established or traditional media, the guidance is as valuable to the growing army ~~of *ad hoc* journalists and bloggers~~ (including those like Mr Kirk who maintain personal websites) to whom the law applies without discrimination.

18. There is no primary or secondary legislation that governs note-taking in the Crown Court. Neither is the topic governed by any practice direction. By contrast taking photographs is prohibited by section 41 of the Criminal Justice Act 1925; so too the making of unauthorised sound recordings: section 9 of the Contempt of Court Act 1981 and Criminal Practice Direction 2015 Amendment No 3 [2015] EWCA Crim 430, paragraph 6A.2 ["the Practice Direction"].

19. The Practice Direction also governs the use of live, text-based communications from court. As technology developed in the first decade of this century, journalists, in particular, were interested in sending copy direct from court via computers or mobile devices. In criminal cases the general rule is that witnesses remain out of court until they come to give their evidence. That is to avoid their evidence being tailored by what others have said. Potential difficulties could arise were anyone in court to transmit an account of the evidence being given in real time to a person due to give evidence, especially via email or social media. In December 2011 the Lord Chief Justice issued guidance on this topic, the substance of which is now found in the Practice Direction at Part 6C. It draws a distinction between media representatives and legal commentators, on the one hand, and members of the public, on the other.

> "6C.7 Where a member of the public, who is in court, wishes to use live text-based communications during court proceedings an application for permission to activate and use, in silent mode, a mobile phone, small laptop or similar piece of equipment, solely in order to make live text-based communications will need to be made. The application may be made formally or informally ...
>
> 6C.8 It is presumed that a representative of the media or a legal commentator using live text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case. This is because the most obvious purpose of permitting the use of live text-based communications would be to enable the media to produce fair and accurate reports of the proceedings. As such, a representative of the media or a legal commentator who wishes to use live text-based communications from court may do so without making an application to the court.
>
> 6C9. When considering, either generally on its own motion, or following a formal application or informal request by a

> member of the public, whether to permit text-based communications, and if so by whom, the paramount question for the judge will be whether the application may interfere with the proper administration of justice."

The Practice Direction then draws attention to the risk of briefing witnesses out of court and the possibility that the use of such a device might disturb the proceedings, or distract or worry those giving evidence or otherwise participating in the proceedings. It continues:

> "6C.11 Without being exhaustive, the danger to the administration of justice is likely to be at its most acute in the context of criminal trials e.g., where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of the jury. However, the danger is not confined to criminal proceedings ... simultaneous reporting from the courtroom may create pressure on witnesses, by distracting or worrying them.
>
> 6C.12 It may be necessary for the judge to limit live text-based communications to representatives of the media for journalistic purposes but to disallow its use by the wider public in court. That may arise if it is necessary, for example, to limit the number of mobile electronic devices in use at any one time because of the potential for electronic interference with the court's own sound recording equipment, or because the widespread use of such devices in court may cause a distraction in the proceedings.
>
> 6C.13 Subject to these considerations, the use of an unobtrusive, hand-held, silent piece of modern equipment, for the purposes of simultaneous reporting of proceedings to the outside world as they unfold in court, is generally unlikely to interfere with the proper administration of justice.
>
> 6C.14 Permission to use live text-based communications from court may be withdrawn by the court at any time."

20. In December 2014 the Lord Chief Justice of Northern Ireland issued a consultation paper concerning note-taking in the courts of Northern Ireland and the use of live text-based communications. The responses to the consultation paper remain under consideration with the possibility having been mooted in the paper itself of a practice direction dealing with both aspects. The paper stated as regards members of the public that in Northern Ireland "a practice had developed that those seeking to take notes in court ... must seek the approval of the judge in advance" possibly born of particular risks associated with the recent history of the province. Nonetheless, it noted that there was a strong presumption in favour of the request unless there was some compelling legal reason to derogate from this aspect of open justice and deny permission. The consultation paper explained that the position in England and

Wales, Scotland and the Republic of Ireland did not start from the premise that note-taking was not allowed unless permission was sought and given.

21. It appears from the reasoning of the court in Cardiff, to which I have referred, that a practice of requiring permission to be sought to make notes has developed there.

22. It is court staff who generally have direct dealings with members of the public attending court and who are regularly asked by them about the appropriate way to behave. It is the staff in the first instance who must be vigilant about the use of cameras, mobile phones and the like. Many members of the public who attend court are on unfamiliar territory, are nervous and seek help from court staff. To assist them in the discharge of their functions, Her Majesty's Courts and Tribunals Service ["HMCTS"] has produced guidance for its criminal court staff which includes a section entitled "Note taking in the public gallery of criminal courts". It does not have authoritative legal status but reflects the understanding of HMCTS of the correct position.

> "It is accepted that justice is administered in open court where anyone present may listen to and report what is said. There can be no objection to note taking in the public gallery unless it is done for a wrongful purpose; for example to brief a witness who is not in court on what has already happened. This may occur in the Crown Court, where witnesses who have yet to give evidence are usually kept out of court and in civil cases where a judge has directed that a future witness should be out of court while other evidence is being given, or the hearing is in chambers.
>
> Court staff need to be alert, but it is not for them to prohibit the practice. Courts should not place notices in the court building forbidding note taking. If any member of the court staff sees a member of the public taking notes and there is some reason to suspect it might be for an improper purpose, he or she should report the matter to the clerk of the court (or to the judge ...) and ask for directions. The clerk should, if possible, make enquiries of the member of the public concerned or direct an usher to do so. If the result of the enquiry does not allay suspicion, the matter must then be reported to the judge."

23. In my judgment this guidance is correct is identifying the default position as being that those who attend public court hearings should be free to make notes of what occurs. It is a feature of the principle of open justice that those attending public hearings should ordinarily be able to make notes of what occurs. For any number of reasons a visitor to a court may wish to have a record of the proceedings for later use or out of interest. In this jurisdiction there is no good reason why the starting point should be that note-taking is not allowed unless permission has been sought and granted. Note-taking by members of the public is unlikely, without more, to interfere with the due administration of justice. The reasons for a distinction being drawn between ordinary members of the public and journalists and legal commentators in connection with live text-based communications (described in the Practice Direction) do not apply to ordinary note-taking.

24. The default position is subject to the control of the court which, for good reason, may withdraw the liberty to make notes. The paramount question for the judge if considering withdrawing that liberty would be whether the note-taking in question would be likely interfere with the proper administration of justice. Features which may interfere with the proper administration of justice discussed in the Practice Direction in connection with live text-based communications, and in the HMCTS guidance to staff on note-taking, would provide examples of concerns which could lead to such a withdrawal.

25. Underpinning the reasons for preventing the claimant from making notes on 7 April and 30 June 2014 was the understanding, mistaken as I would hold, that notes should never be taken unless permission was first sought from and granted by the court. The reasons why he was stopped from making notes fell into two groups. The first was that he offered no good reason why he needed to make notes. When Mr Kirk was able to make his own notes an amanuensis was superfluous. That is a manifestation of the approach that requires a prospective note-taker to explain and justify why he wants the notes. The second were case specific and included:

    i) That there was a fear that "prejudicial material" might leave court with an "inexperienced reporter";

    ii) That publishing material might have adverse effect on the Bristol appeal;

    iii) That Mr Kirk ran a website detailing his court appearances;

    iv) That Mr Kirk had said that he might be calling witnesses of fact in the Cardiff proceedings.

26. The judge expressly indicated that the court had no concern about responsible reporting of the appeal by the media. There was also no general concern about notes being made by or on behalf of Mr Kirk, including by the claimant. The judge acknowledged that any person might obtain a transcript. The judge went out of his way to ensure that Mr Kirk was able to make notes of the entire proceedings, alternatively have notes taken for him when he genuinely was unable to do so. The court was clearly alive to the existence of Mr Kirk's website and perhaps was troubled by the possibility that Mr Kirk would place inaccurate information on it. But the risk of that happening would not be reduced by restricting note-taking either by him or by members of the public. The Bristol proceedings comprised an appeal against a conviction in the Magistrates' Court. Neither Mr Mably nor Mr Douglas-Jones was able to suggest how note-taking by the claimant could interfere with the course of justice in those proceedings. The fact that notes may be used to brief a witness yet to give evidence about evidence given by others might provide a basis for restricting note-taking. Yet there is no discernable basis in this case for supposing that there was a risk of that happening.

27. In my judgment Mr Mably and the claimant are correct in their submission that the note-taking in question would not interfere with or pose any threat to the proper administration of justice. Furthermore, I do not consider that it would be appropriate to accede to Mr Douglas-Jones' submission that we should infer that there was a good reason for the course taken by the court, not articulated at the time or in subsequent correspondence. The reason suggested is that Mr Kirk was seeking to manipulate the

proceedings and so the court was doing no more that asserting its authority in denying someone associated with M Kirk the opportunity to make notes. No such reasoning appears in the successive explanations given by the court. It comes to little more than a suggestion that an inroad into the principle of open justice was necessary to show who was boss. It is hardly surprising that such a reason is absent from the transcript and the letters written on behalf of the court. It would be a bad one.

28. In difficult circumstances, and misapprehending the correct starting point when a member of the public wishes to make notes, the court denied the claimant the right to make notes of the proceedings in open court in breach of the common law principle of open justice. For that reason, in my Lord agrees, this claim for judicial review succeeds.

29. The claimant developed detailed submissions in writing to the effect that articles 6, 10 and 14 of the European Convention on Human Rights guaranteed the right of the public to make notes in an open court. It would appear that the Strasbourg Court has not considered the question. It is, however, unnecessary for me to do so given my conclusion applying the common law.

30. The claimant seeks by way of relief an order quashing the whole of Mr Kirk's appeal proceedings with a mandatory order that they be heard again. The claimant's inability to make notes during an appeal hearing (in which he was not a party and had no direct interest) had no bearing on its outcome. Such an order would be inappropriate. In the alternative the claimant seeks a declaration to the effect that the HMCTS guidance, to which I have referred, accurately states the law. He submitted draft declarations after we heard argument together with extensive submissions on the question of relief. In my view a formal declaration linked either to that guidance or more generally summarising the substance to this judgment is unnecessary and would add nothing. The claimant has achieved what he set out to do in this claim, namely to clarify the approach to note-taking in open courts in England and Wales.

Mr Justice Sweeney

31. I agree.