APPLICATION/REQUÊTE No 10038/82

Harriet HARMAN v/the UNITED KINGDOM

Harriet HARMAN c/ROYAUME-UNI

DECISION of 11 May 1984 on the admissibility of the application

DÉCISION du 11 mai 1984 sur la recevabilité de la requête

***Article 7 of the Convention**: Allegedly unforeseeable conviction for the contempt of court (Complaint declared admissible).*

***Articles 10 and 14 of the Convention** : Official documents produced in the course of discovery proceedings : solicitor found guilty of contempt of court notwithstanding that the documents had been read out in open court. Question of violation of right to impart information (Complaint declared admissible).*

***Article 7 de la Convention**: Application prétendument imprévisible pour l'intéressé d'une sanction pour «contempt of court» (Grief déclaré recevable).*

***Articles 10 et 14 de la Convention** : Solicitor reconnu coupable de «contempt of court» pour avoir montré à un journaliste des documents d'origine officielle dont l'apport avait été ordonné par le tribunal dans un procès («discovery»), mais qui avaient été lus en audience publique. Y a-t-il eu violation du droit de communiquer des informations ? (Grief déclaré recevable).*

THE FACTS

(français : voir p. 63)

The applicant, Ms Harriet Harman, born in 1950, is a solicitor by profession and at present resides in London. She is represented in proceedings before the Commission by Messrs Siefert Sedley & Co., solicitors, and Mr Anthony Lester, QC and Mr Andrew Nichol, of counsel.

The applicant has been a solicitor since 1975 and since 1978 has been employed as the Legal Officer of the National Council of Civil Liberties (NCCL). One of her responsibilities in this position is the conduct, as a solicitor, of a number of civil actions on behalf of clients whose cases have been taken up by the NCCL.

One of the cases in which the applicant was involved on behalf of NCCL was that of Michael Williams against the Home Office. While serving a term of imprisonment, Mr Williams had spent six months in a special "control unit" which was part of the prison regime based on solitary confinement for prisoners who were considered particularly disruptive by the prison authorities. He initiated legal proceedings claiming damages for false imprisonment against the Home Office and also sought a declaration that such control units were unlawful and *ultra vires*. In the course of the proceedings Mr Williams applied for "discovery" of certain Home Office documents. In litigation where the Crown is a party an express court order for discovery must be sought. Such orders were granted by the court on three occasions, namely 25 January and 25 October 1979 and 29 January 1980. On the latter occasion the Home Office opposed the application for discovery in relation to 23 of the documents. The Secretary of State for the Home Department signed a certificate claiming that no orders should be made because a disclosure would be injurious to the public interest. After reading the documents, Mr Justice McNeill ruled that five of the documents should be produced to Mr Williams (1). In the course of his decision the judge stated as follows:

> "Risks attendant on inspection and production as postulated by Lord Reid are in any event minimised in two ways. Firstly, if after inspection the court orders production, the order may provide for production of part only of a document, the remainder being sealed up or otherwise obscured. Secondly, it is plain from the decision of the Court of Appeal in Riddick v Thames Board Mills (1977) QB 881 if it was not plain before, that a party who disclosed the document was entitled to the protection of the Court against any use of the document otherwise than in the action in which it is disclosed. As Lord Denning MR put it (at page 896): 'The Court should, therefore, not allow the other party, or anyone else, to use the document for any ulterior or alien purpose ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed.'"

Prior to the second order of discovery the applicant had received a letter from the Treasury Solicitor, seeking assurances that the documents disclosed would only be used for the purposes of the legal action. The letter indicated that the Home Office was concerned at the risks of improper use of the documents and sought assurances that the documents would be returned at the end of the trial; that Mr Williams would

(1) Williams v. Home Office (1981) 1 ALL E.R. 1151.

not retain the disclosed documents except for the purpose of giving instructions to the applicant; that if the applicant or another officer of the NCCL ceased to represent the plaintiff he would return the documents in his possession; and that witnesses would return disclosed documents and any copies to the applicant. The letter continued:

> "My client does, however, require that inspection of the disclosed documents and dissemination of their contents should be limited to the legal officers of NCCL and their assistants at any time concerned with the conduct of this action, except insofar as wider inspection or dissemination is strictly necessary for the conduct of the action. In other words my client would not wish the documents to be used for the general purposes of the NCCL outside your function as a solicitor for the plaintiff."

In her reply, the applicant stated as follows:

> "As far as the documents which have been shown to potential expert witnesses are concerned, we have in the normal way warned those witnesses that the only purpose for which the documents are to be used is for preparing their evidence in this case. As far as 'the general purposes of NCCL' is concerned you may rest assured that, as a solicitor, I am well aware of the rule that requires that documents obtained on discovery should not be used for any other purpose except for the case in hand."

In consequence of the three orders of discovery, the Home Office produced to Mr Williams and his legal advisers about 6,800 pages of documents of which 800 were selected to be used in evidence at the trial of the action and collated into two exhibit bundles. At the hearing of the action, which began on 25 February 1980 and which continued for 22 days, the material parts of these 800 pages were read out in court during the plaintiff's opening address. However, the admissibility of the documents was not agreed by the Home Office and the judge ruled that most of them were inadmissible as evidence. The trial was attended by journalists and subsequent newspaper reports contained references to the material that had been read out.

At the end of the hearing on 20 March 1980 the applicant was visited by Mr David Leigh, a journalist, working with the Guardian Newspaper. He asked to see the exhibit bundles which had been read out in open court. The applicant considered that since all material parts had been read aloud, the documents were no longer confidential and she believed that both her implied undertaking to the court and her express undertaking to the Home Office in her letter of 17 October 1979 had terminated. Accordingly, she permitted Mr Leigh to attend her office and inspect the documents. He was only given access to those documents which had been exhibited and read aloud in open court at the public hearing. He did not take them away or photocopy them and no payment was made. He subsequently wrote an article which was published in the Guardian on 8 April 1980. It provided an account of the control units and their subsequent closure. It described how, during the process of setting

up the units, civil servants had made them into a punishment regime which was to be particularly rigorous and where the staff were to be deliberately distant. The article quoted some of the documents read out in the Williams action to show that the Home Office was aware of possible conflict with the prison rules. It described measures taken by the Home Office to maintain secrecy about the setting up the units and to forestall criticism of the scheme.

The action, brought by Mr Williams against the Home Office, was dismissed by Mr Justice Tudor Evans on 9 May 1980. It was held that he did not have any cause of action notwithstanding that his detention in the control unit for six months was contrary to the prison rules (2).

On 12 June 1980 the Home Office applied to the Divisonal Court for the applicant to be punished, other than by committal, for contempt of court. It was alleged that, in allowing Mr Leigh to look at the documents which had been read aloud in open court, she had broken her undertaking not to use the documents produced on discovery for a collateral or ulterior purpose.

On 27 November 1980 Mr Justice Park found in favour of the Home Office and ruled that the applicant had acted in contempt of court. He accepted that she had acted in good faith and imposed no punishment and made no order as to costs. An appeal to the Court of Appeal was dismissed with costs on 6 February 1981 and a further appeal to the House of Lords was also dismissed with costs on 11 February 1982 (3).

It had been argued *inter alia* by the applicant before the House of Lords that the implied undertaking terminated once the documents had been read in court. It was further submitted that the decision of the lower court violated her rights under Art. 10 of the Convention. The majority of the House of Lords (Lords Diplock, Keith and Roskill) were concerned for the privacy of litigants who had been required to reveal their confidential documents by the process of discovery. They held that the good administration of justice required that the implied obligation continued, notwithstanding the use of the documents in the course of a trial open to the public. In the course of his speech, Lord Keith stated as follows:

> "... Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place on the litigant any harsher

(2) Williams v. Home Office (No. 2) (1981) 1 ALL E.R. 1211.
(3) Home Office v. Harman (1981) 2 WLR 310 (Divisional Court);
(1981) 2 WLR 321 (Court of Appeal);
(1982) 1 ALL E.R. 532 (House of Lords).

or more oppressive burden than is strictly required for the purpose of securing that justice is done. In so far as that must necessarily involve a certain degree of publicity being given to private documents, the result has to be accepted as part of the price of achieving justice. But the fact that a certain inevitable degree of publicity has been brought about does not, in my opinion, warrant the conclusion that the door should therefore be opened to widespread dissemination of the material by the other party or his legal advisers, for any ulterior purpose whatsoever, whether altruistic or aimed at financial gain. The degree of publicity resulting from a document being read out in open court is not necessarily very great. There may be nobody present apart from the parties and their legal advisers. The argument for the appellant, however, goes the length that because the public are notionally present, and anyone might have come in and noted down the contents of any discovered document which is read out, the implied obligation against improper use comes to an end. That is not a proposition which I can find acceptable on any rational ground consistent with the proper administration of justice. The theory behind the proposition is that the reading out of the document destroys its confidentiality, and that, apart from consideration of copyright and defamation, the law does not prohibit the dissemination of documents which are not confidential. The implied obligation not to make improper use of discovered documents is, however, independent of any obligation existing under the general law relating to confidentiality. It affords a particular protection accorded in the interests of the proper administration of justice. It is owed not to the owner of the documents but to the court, and the function of the court in seeing that the obligation is observed is directed to the maintenance of those interests, and not to the enforcement of the law relating to confidentiality. There is good reason to apprehend that, if the argument for the appellant were accepted, there would be substantially increased temptation to a litigant to destroy or conceal the existence of relevant documents which would fall properly within the ambit of discovery. There is also reason to apprehend the introduction into proceedings of tactical manoeuvrings on either side designed to secure that discovered documents were or were not read out in full. Both these developments would be undesirable from the point of view of the proper administration of justice". (loc. cit. pp.540-41)

Lord Diplock did not consider that the case concerned freedom of speech, freedom of the press, openness of justice or documents coming into 'the public domain'. He was of the opinion that the case did not call for consideration of any of the rights and freedoms contained in the European Convention on Human Rights.

It was accepted by the majority that had the applicant communicated a copy of the transcript or mechanical recording of the trial to a party unconnected with the proceedings she would not have been guilty of contempt of court.

There was disagreement, however, as to whether communicating the exhibited documents to an official law reporter or other reporter who sought to check details with a view to publishing an accurate account of the proceedings would constitute contempt of court. Lord Keith considered that if there was any reason to doubt that the party who had disclosed the documents would approve of their being shown to a journalist, it should not be done without such approval (loc. cit., p. 542). Lord Diplock considered that such a practice was at most a technical contempt (ibid., pp. 539-540). Lord Roskill did not consider that such a practice, related as it was to the day-by-day reporting of court proceedings, could be regarded as a contempt (ibid., p. 555).

In a dissenting speech by Lords Scarman and Simon it was accepted that the duty of a recipient of discovered documents to keep them confidential and to use them only for the purposes of the action terminated when the documents were used in an open trial. Referring to Art. 10 of the Convention, Lord Scarman stated "that it could hardly be argued that there was a pressing social need to exclude the litigant and his solicitor from the freedom enjoyed by everyone else to treat such documents as public knowledge". (loc. cit., p.547).

In their view both the nature and duration of the obligation to maintain confidentiality could not be determined merely by referring to the requirements of the law relating to discovery of documents in civil litigation. Regard was also to be had to the requirements of the general law protecting freedom of communication. In this regard, Lord Scarman stated that

> "...A balance has to be struck between two interests of the law, on the one hand the protection of a litigant's private right to keep his documents to himself notwithstanding his duty to disclose them to the other side in the litigation and on the other the protection of the right, which the law recognises, subject to certain exceptions, as the right of everyone, to speak freely, and to impart information and ideas, on matters of public knowledge.
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> In our view, a just balance is struck if the obligation endures only so long as the documents themselves are private and confidential. Once the litigant's private right to keep his documents to himself has been overtaken by their becoming public knowledge, we can see no reason why the undertaking given when they were confidential should continue to apply to them." (loc .cit., p.544)

COMPLAINTS AND SUBMISSIONS

Article 10

1. It is submitted that the decisions of the English courts concerning the applicant constituted an interference with her freedom of expression and freedom to impart information.

As a result of imparting information to Mr Leigh by allowing him to inspect the two exhibit bundles of documents she was found guilty of a serious contempt. This is a grave matter for a solicitor who is an officer of the Supreme Court. In addition, she has had to bear her own costs of the whole proceedings and those of the Home Office in respect of the two appeals. Finally, should the applicant impart similar information in similar circumstances she could expect to be punished more severely. Her future freedom to impart such information is thus restricted.

It is argued that the restriction imposed on the applicant is not "prescribed by law". In this respect, reference is made to the decision of the European Court of Human Rights in the *Sunday Times* case and in particular the requirement that "a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct ..." (para. 49).

The applicant could not have predicted with reasonable certainty that her conduct would be held to be in contempt. In this regard the following submissions are made:.

A. At the relevant time—April 1980—it was established in the case law that the courts would not restrain the use of information imparted in confidence which had since become public knowledge.

B. As the evidence of lawyers and journalists before the Divisional Court showed, it had been a long-standing practice for lawyers to allow exhibited documents used in court to be seen by journalists at their request. In no case had this led to contempt proceedings or any suggestion that the practice was improper.

C. It is submitted that in predicting what restrictions would continue to apply on her freedom to impart information after the hearing had terminated, the applicant was entitled to have regard to the absence of any restrictions on reporting. The court has power to order in circumstances that evidence should not be disclosed or reported outside the courtroom.

D. It has been recognised in some cases that there might be a public interest in favour of disclosure which would overrule the public interest in the administration of justice and the preservation of confidentiality. (Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. (1975) QB 613, 625).

E. Even if it could have been predicted that the discovery rule continued indefinitely in litigation between two private parties, the same could not have been said with reasonable certainty where one of the parties was a Government department, and where it was alleged that the department had acted unlawfully towards those subject to its control. In such circumstances the applicant should have been able to rely on her act coming within the public interest exception referred to above.

2. The applicant submits that the restriction of her rights under Art. 10 could not be justified under the second paragraph with reference to a pressing social need and in the alternative was disproportionate to the interest which was being protected.

Once the documents had been used at a public hearing they lost their confidentiality. Anyone present at the trial might have taken a shorthand note of what was said. Any person might have purchased a transcript of the proceedings either from the official shorthand writer or from anyone who had arranged to have their own transcript prepared. The information so obtained might have been freely imparted and received.

The applicant accepts that the documents in question were initially received by her in confidence. However, she submits that such a justification only applies if the information continues to be confidential at the time when it is imparted. For the restriction to continue after the information has been made public makes it unjustifiable and disproportionate.

Nor can it be submitted that the restriction is justified as necessary for the protection of the rights of the Home Office. Their right of confidentiality terminated once the documents had been used in open court. The restriction cannot be justified as necessary for the protection of the rights of future litigants. While they may find that their opponents are reluctant to make full discovery because of the risk of publicity, this is a risk which has always existed.

The restriction imposed on the applicant had no bearing on the authority or impartiality of the judiciary.

Article 14 in conjunction with Article 10

It is claimed in this context that the restriction was discriminatory for the following reasons:

1. That at least one member of the majority in the House of Lords (Lord Diplock) stated that if she had shown the documents to a law reporter or to any other reporter for the sole purpose of producing an accurate report of what was actually said in court, she would at most have been guilty of a technical contempt, meriting neither punishment nor an adverse order as to costs.

2. That the restriction only applied to her, her client and to other legal advisers. Anyone else in court could have imparted the same information to Mr Leigh. Indeed, she herself could have imparted the same information from a transcript of the hearing rather than the discovered documents themselves.

3. The restriction was only applied to her because the information she imparted was used to write an article critical of the policies of the Home Office. It is inconceivable that had she shown the documents to a journalist who had used them to write a laudatory feature article, proceedings would have been brought against her.

Article 7

It is submitted that the applicant was in substance found guilty of a criminal offence, notwithstanding that the Home Office took proceedings for *civil* as opposed to criminal offences. A civil contempt also involves an obstruction of the fair administration of justice for which the court can impose penal sanctions. Until the rulings of the courts in her proceedings, it was not an offence to show a journalist discovered documents after they had been read out in court. The interpretation of the implied undertaking given by the courts was entirely unpredictable.

In this regard the applicant refers to decisions of the United States Supreme Court in the field of due process (Bouie against the City of Columbia 378 U.S. 347 (1964) and Marks against United States 97 S.CT. 990 (1977); a decision of the European Court of Justice Defrenne against Sabena and the admissibility decision of the Commission in Application No. 8710/79 (D.R. 28, 77) where it was stated that "existing offences should not be extended to cover facts which previously clearly did not constitute a criminal offence".

OBJECT OF THE APPLICATION

The applicant seeks a decision or judgment that

(a) her rights as set out above have been violated by the decision of the English courts;

(b) the law of the United Kingdom as stated by the House of Lords is in violation of these provisions of the Convention.

She also seeks just satisfaction under Art. 50, including compensation for violation of her rights under the Convention and reimbursement of her legal costs.

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THE LAW

The applicant, who was found guilty of contempt of court, complains firstly that she has been found guilty of an act which does not constitute a criminal offence under the law of the United Kingdom at the time it was committed, contrary to Art. 7 para. 1 of the Convention. She maintains in this respect that until the decisions of the courts in the proceedings against her it was not considered to be an offence to show a journalist discovered documents after they had been read out in court. She submits in essence that the courts have developed a new criminal offence in her case.

She further complains that the decision of the courts in her case have breached her right to freedom of expression, and in particular her freedom to impart information, contrary to Art. 10 para. 1. She contends that such an interference with her

freedom to impart information cannot be justified under the second paragraph of this provision since once the documents in question have been read out in court they entered the public domain. Accordingly, it could not be argued that the restriction of her rights was necessary to prevent the disclosure of information received in confidence. Furthermore, the decision of the courts that she was guilty of contempt of court in such circumstances would be disproportionate to the interests sought to be protected. Finally, she contends that such restriction was not "prescribed by law" since she could not have predicted with reasonable certainty that her actions would be construed as contempt of court.

The applicant also alleges that the restriction imposed on her freedom of expression was discriminatory contrary to Art. 14 of the Convention. In this regard she maintains that had she shown the documents to a law reporter, or to any other reporter for the purpose of producing an accurate report of what was said in court she would at most have been guilty of a technical contempt. Moreover, the restriction did not apply to anyone else in court who could, with impunity, have imparted the same information to any journalist. Finally, she alleges that the restriction was only applied to her as the journalist in question had written an article which was critical of the Home Office.

The respondent Government submit that she was not convicted of a criminal offence within the meaning of Art. 7 para. 1 since the courts found that she had committed a civil as opposed to a criminal contempt of court. It is argued that the purpose of the penalties which can be imposed for civil contempt is not to punish the contemnor but to ensure respect for undertakings given to a court. They further contend that the decision of the court in the applicant's case did not involve the creation of a restrospective criminal offence, since the courts were applying generally accepted principles of law to a factual situation which they had not previously had to consider.

It is further submitted that to the extent that there has been a restriction of her freedom of expression including her freedom to impart information, it is prescribed by law and justified under the second paragraph of Art. 10 as necessary for the protection of the rights of others, and for the prevention of the disclosure of information received in confidence as well as for the maintenance of the authority and impartiality of the judiciary. It is argued that the information did not cease to be confidential when it had been read out in open court. The continued confidentiality of the documents is necessary for the proper functioning of civil litigation in a common-law jurisdiction. It is necessary, in order that cases may be disposed of quickly and fairly with a minimum of costs, that the litigant who discloses confidential documents to his opponent is assured that they will not be given any wider dissemination than is strictly necessary for the purpose of disposing of the action. If a litigant did not have such an assurance, he would be tempted to withhold or otherwise dispose of relevant documents.

Finally, the respondent Government deny that there has been discrimination, contending that the distinctions between the applicant and law reporters or members of the public present at the hearing finds a reasonable and objective justification in the public interest in a proper administration of justice.

The Commission has made a preliminary examination of the parties' submissions and considers that the application raises important and complex issues under the Convention which should be determined in an examination of the merits of the case. It does not consider that the application can as a whole be rejected as manifestly ill-founded.

It concludes, therefore, that the application is, as a whole, admissible without prejudice to the merits.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE.