Hilary Term
[2018] UKSC 1
On appeal from: [2016] EWHC 916 (Admin)

JUDGMENT

R (on the application of Haralambous) (Appellant) *v* Crown Court at St Albans and another (Respondents)

before

Lord Mance, Deputy President
Lord Kerr
Lord Hughes
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

24 January 2018

Heard on 8 November 2017

Appellant
Mark Summers QC
Jessica Jones
(Instructed by Stokoe Partnership Solicitors)

Respondents
Martin Chamberlain QC
David Matthew
(Instructed by Hertfordshire Constabulary Legal Services)

Intervener (Secretary of State for the Home Department)
James Eadie QC
Melanie Cumberland
(Instructed by The Government Legal Department)

LORD MANCE: (with whom Lord Kerr, Lord Hughes, Lady Black and Lord Lloyd-Jones agree)

Introduction

1. This appeal raises significant issues regarding the procedures whereby, firstly, magistrates may issue warrants to enter and search premises and seize property under section 8 of the Police and Criminal Evidence Act 1984 ("PACE"), secondly, Crown courts may, under section 59 of the Criminal Justice and Police Act 2001 ("CJPA"), order the retention by the police of unlawfully seized material on the grounds that, if returned, the material would be immediately susceptible to lawful seizure and, thirdly persons affected may challenge such decisions by judicial review. Central to the issues is whether the relevant judicial authorities are, under the principle in *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531 and in the absence of express Parliamentary authorisation to conduct a closed material procedure, precluded at each or any of these stages from having regard to information which, on public interest grounds, cannot be disclosed to any person affected who wishes to challenge the warrant or any seizure or order for retention under section 59.

2. Section 8 of PACE sets out conditions for obtaining a search and seizure warrant:

> "(1) If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing -
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> (a) that an indictable offence has been committed; and
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> (b) that there is material on premises … which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
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> (c) that the material is likely to be relevant evidence; and

(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and

(e) that any of the conditions specified in subsection (3) below applies,

he may issue a warrant authorising a constable to enter and search the premises ...

(3) The conditions mentioned in subsection (1)(e) above are -

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them."

3. Section 15 of PACE contains safeguards relating to the procedure for obtaining such a warrant:

"(1) This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

(2) Where a constable applies for any such warrant, it shall be his duty -

(a) to state -

(i) the ground on which he makes the application;

(ii) the enactment under which the warrant would be issued; and

(iii) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired;

(b) to specify the matters set out in subsection (2A) below; and

(c) to identify, so far as is practicable, the articles or persons to be sought.

(2A) The matters which must be specified pursuant to subsection (2)(b) above are -

(a) if the application relates to one or more sets of premises specified in the application, each set of premises which it is desired to enter and search;

(b) if the application relates to any premises occupied or controlled by a person specified in the application -

(i) as many sets of premises which it is desired to enter and search as it is reasonably practicable to specify;

(ii) the person who is in occupation or control of those premises and any others which it is desired to enter and search;

(iii) why it is necessary to search more premises than those specified under sub-paragraph (i); and

(iv) why it is not reasonably practicable to specify all the premises which it is desired to enter and search.

(3) An application for such a warrant shall be made ex parte and supported by an information in writing.

(4) The constable shall answer on oath any question that the justice of the peace or judge hearing the application asks him.

(5) A warrant shall authorise an entry on one occasion only unless it specifies that it authorises multiple entries. …"

4. Section 59 of the CJPA provides for circumstances where property seized under a warrant or purported warrant would otherwise fall to be returned - as for example where the search and seizure warrant was for some reason invalid - but where, if the property were returned, it would immediately become appropriate to issue a fresh warrant in pursuance of which it would be lawful to seize the property. Section 59 provides that in such circumstances the court may order the retention of the property seized.

Factual background

5. The appeal arises from the issue on 16 June 2014 by St Albans Magistrates' Court (JL Grimsey JP) of two search and seizure warrants in respect of London addresses at 22 Leys Gardens, Barnet and Unit 5, Island Blue Ltd, Overbury Road, Harringay (said to be addresses at which the appellant Mr John Haralambous respectively lived and was suspected to have a business interest) and from their execution on 26 June 2014 by entry and seizure of a number of items. The warrants were issued following an *ex parte* application by the second respondent, the Chief Constable of the Hertfordshire Constabulary, under section 8 of PACE. The appellant was also arrested on 26 June 2014 and bailed. Any further investigation

by the police of any matter to which such warrants and arrest related has been suspended pending the outcome of these proceedings.

6. The appellant sought disclosure of, inter alia, the written application for the warrants, and was on 16 September 2014 provided with what the second respondent informed him on 17 September 2014 was a redacted copy. On 18 September 2014 the appellant applied to the St Albans Magistrates' Court for an unredacted version, relying on the procedure in *Commissioner of Police of the Metropolis v Bangs* [2014] EWHC 546 (Admin). The application was heard in the Luton Magistrates' Court on 23 September by District Judge Mellanby. The appellant was provided from the court's file with JL Grimsey's written statement dated 16 June 2014 of reasons for issuing the warrants, namely "because of the substantial evidence that linked all the subjects together and the addresses", and was informed that the evidence, which was being withheld, consisted of two closely typed pages. On 25 September 2014 District Judge Mellanby issued her open reasons for refusing the application for disclosure of the redacted and withheld information, and on the next day she handed the second respondent a closed judgment.

7. By a first judicial review claim issued on 26 September 2014 (CO/4505/2014), the appellant sought return of the material seized on 26 June 2014 on the basis that the warrants, entries, searches and seizures, were unlawful for a range of reasons. These included alleged deficiencies in the terms in which the application could be seen to have been expressed. They also included the appellant's central contention that the information disclosed to him showed no basis on which lawful search warrants could have been issued, and that it had not been and was not permissible for reliance to be placed on the withheld information.

8. By a consent order signed on 27 March and sealed on 6 May 2015, the second respondent agreed that the warrants should be quashed. Prior to so doing the second respondent on 23 March 2015 served a protective application for retention of the seized material under section 59 of the CJPA. On 9 June 2015 HHJ Bright QC sitting in the St Albans Crown Court ruled that the second respondent was entitled to rely on the withheld information in support of its section 59 application, and on 11 June 2015, in the light of this ruling, the parties agreed and HHJ Bright QC made an order authorising retention of the seized material under section 59.

9. By a second judicial review claim issued on 26 June 2015 (CO/3114/2015), the appellant sought the return of the seized material on the grounds that the section 59 order should be quashed, since it was impermissible to rely on the withheld information in its support. In response to an application by the second respondent for directions to allow the Divisional Court, should it wish, to see the withheld information in an *ex parte* hearing, the appellant accepted that, if HHJ Bright QC had been entitled to have regard to the withheld information, then the lawfulness of

his ruling was not in issue; the only issue was whether he was so entitled; and only if he was not, did the section 59 order fall to be quashed. Collins J on 20 January 2016 left it to the Divisional Court to decide at the hearing whether it should see the withheld information.

10. The Divisional Court decided not to hold an *ex parte* hearing and that it did not need to consider the withheld information. It gave judgment on 22 April 2016 dismissing the appellant's claim for judicial review: [2016] 1 WLR 3073. It held that it was open to a magistrate issuing a search and seizure warrant and a court deciding an application under section 59 to consider material which had in the public interest to be withheld from disclosure. It evidently took the same view in relation to a magistrates' court hearing an application for disclosure pursuant to the procedure indicated in *Bangs* (para 6 above), although it wrongly referred to that procedure as one for challenging the issue or execution of a warrant. It is common ground between the parties before the Supreme Court that magistrates' court decisions to issue a search and seizure warrant and Crown Court orders under section 59 are challengeable only by judicial review, which is the means the appellant correctly adopted. Finally, the Divisional Court noted that it had been no part of the argument before it that, if HHJ Bright QC had been correct to decide that the appellant should be denied access to the withheld information, his decision should still be quashed. It referred to *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin); [2013] EWHC 1426 (Admin) (Ouseley J) as providing possible support by analogy for a rejection of any such argument.

The issues

11. In the light of the above, the parties have agreed that the Supreme Court should address five issues, which I can slightly rephrase as follows:

> (i) How far can a magistrates' court, on an *ex parte* application for a search and seizure warrant under sections 8 and 15(3) of PACE, rely on information which in the public interest cannot be disclosed to the subject of the warrant?
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> (ii) In proceedings for judicial review of the legality of a search warrant, issued *ex parte* under sections 8 and 15(3) of PACE:
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> > (a) is it permissible for the High Court to have regard to evidence (upon which the warrant was issued) which is not disclosed to the subject of the warrant?

(b) If a magistrates' court is permitted to consider evidence not disclosable to the subject of the warrant, but the High Court is not, does it follow that the warrant must be quashed in circumstances where the disclosable evidence is insufficient, on its own, to justify the warrant?

(iii) Is there jurisdiction in a Crown Court to rely on evidence not disclosable to the subject of the warrant in an application made *inter partes* to retain unlawfully seized material under section 59 of the CJPA?

(iv) In proceedings for judicial review of an order, made *inter partes*, for retention of unlawfully seized material under section 59 of the CJPA, is it permissible for the High Court to have regard to evidence (upon which the warrant was issued) which is not disclosed to the subject of the warrant?

(v) Do the principles concerning irreducible minimum disclosure apply to proceedings concerning search warrants?

The assumption behind these questions is that no express Parliamentary authorisation exists for the operation of a closed material procedure at any stage. The appellant's case was that the Justice and Security Act 2013 has no application, because proceedings relating to a search warrant or under section 59 of the CJPA are criminal in nature, not civil. The second respondent took no issue with this, but the Secretary of State for the Home Department as intervener suggested an alternative basis on which the 2013 Act would not apply (namely that it applies only where disclosure would be damaging to the interests of "national security"). No detailed submissions were addressed to these points, and the Court is content simply to proceed on the basis of the common ground that, for one reason or another, the 2013 Act does not apply. In the absence of any such express statutory authorisation, the appellant's submission is that the common law principle in *Al Rawi* applies to preclude any form of closed material procedure.

12. Although the agreed issues refer to the person who is "the subject of the warrant", this does not reflect the actual language or effect of sections 8 and 15 of PACE. The subject of any warrant under those sections is premises, falling into one of two categories. The first category consists of specific premises, specified in the application. The present warrants fall into that category. The second category consists of "any premises occupied or controlled by a person specified in the application". The pre-conditions to issue of a warrant set out in section 8(3) also refer to any "person entitled to grant entry to the premises" as well as to any "person entitled to grant access to the evidence" - who may or may not be the same or different persons. Again that does not mean that the warrant is addressed to any such

person. There are, of course, likely to be persons whose interests are affected by the operation of a search and seizure order. Very often they will be persons occupying the relevant premises and in possession of the property seized. Sometimes there may be persons with privacy or confidentiality rights in respect of property seized. But this will not necessarily be the case. A search and seizure warrant may have as its aim and effect to obtain material relating to some third person with no proprietary, possessory or other interest in the material seized at all. The material may assist the investigation, and very possibly provide evidence against the third person. The occupier of the premises or person in possession of the material before its seizure may not make any challenge to the warrant or its execution. It is not clear that the third person would necessarily have any basis for doing so.

13. The appellant's primary case, advanced by Mr Mark Summers QC, is that it is not permissible for a magistrate or court, at any of the stages identified in issues (i) to (iv), to have regard to or rely on material which will on public interest grounds have to be withheld from a person affected by the order made. Alternatively, if it is legitimate for a magistrate on a section 8 application and/or a Crown Court judge on a section 59 application to have regard to and rely on material so withheld, there is no basis on which a court can, consistently with *Al Rawi*, do so on a judicial review challenge to the warrant or the section 59 order. Mr Summers invites the Supreme Court, when considering these issues, to start with the end position as it exists on an application for judicial review. If material has on public interest grounds to be withheld from the applicant then, it cannot, he submits, have been legitimate for it to be deployed at any earlier stage. Finally, if these submissions are not accepted, Mr Summers submits that neither a section 8 nor a section 59 order can withstand challenge by a person affected, unless that person has been supplied with the "gist" of the information relied upon to obtain it.

14. Mr Martin Chamberlain QC for the second respondent and Mr James Eadie QC for the Secretary of State for the Home Department, as intervener, advance a contrary case at each stage. In their submission, both the magistrate under section 8 and a court under section 59 are entitled to rely on material which will have to be withheld from disclosure to a person affected. A court on judicial review is either entitled to adopt a similar procedure or, if it cannot, must simply assume that the material withheld justified the orders made under section 8 and/or 59. Further, although a search and seizure warrant involves an invasion of private property, the invasion does not, in their submission, equate with the infringements of liberty involved in previous cases, involving for example detention or a control or asset freezing order, where "gisting" of the substance of the material relied on has been regarded as essential. In considering the issues, Mr Chamberlain and Mr Eadie invite the Court to start with the initial application for a warrant and follow the process through each of the potential subsequent stages. There is in my opinion a logic in this last submission, since it means considering the statutory scheme from the ground up. It also takes the same starting point as the agreed issues. But I agree that

it is important to review any conclusions reached about the earlier stages of the process in the light of whatever analysis is adopted of its later stages.

Issue (i) - the issue of a warrant

15. In order for a magistrate to be able to issue a warrant under section 8(1) read with section 15(3) and (4), all that is required is that he or she be satisfied, from the information contained in the constable's application and from the constable's answers on oath to any questions put, that "there are reasonable grounds for believing" the matters set out in section 8(1)(a) to (e). Nothing in the language of these sections suggests that the material giving rise to such grounds must be of any particular nature, or take any particular form, or itself be admissible in evidence at any trial that might be envisaged. In the context of a procedure designed to be operated speedily by a constable at an early stage in a police investigation, that is unsurprising. It is also clear, and common ground, that the statutory scheme of sections 8 and 15 of PACE is designed to operate *ex parte*. Section 15(3) makes express provision to that effect, and the pre-conditions to the operation of the scheme, set out in section 8(3), underline the point. The execution of the warrant for search and seizure may lead to the obtaining of material that may itself either be, or lead in due course to the obtaining of, evidence. Such evidence will only be capable of being deployed at any trial of any person who may be charged with any offence if it is disclosed: *R v Davis* [2008] AC 1128. But the statutory scheme of sections 8 and 15 operates at a stage preliminary to any trial and before any issue of guilt or innocence is joined with any particular person.

16. The issue and execution of a search and seizure warrant does involve a statutorily authorised invasion and taking by the state of private property. Again not surprisingly, the courts have developed ancillary principles and protections. In *R (Cronin) v Sheffield Justices* [2002] EWHC 2568 (Admin); [2003] 1 WLR 752, the court addressed a number of issues that had been raised with reference to article 8 of the European Convention on Human Rights, and then noted that a question had also arisen as to whether there was any "lawful justification" for supplying to a citizen whose home had been entered pursuant to a search warrant a copy of the relevant information on which the warrant was based. As to this, Lord Woolf CJ said (para 29):

> "Information may contain details of an informer which it would be contrary to the public interest to reveal. The information may also contain other statements to which public interest immunity might apply. But, subject to that, if a person who is in the position of this claimant asks perfectly sensibly for a copy of the information, then speaking for myself I can see no objection to a copy of that information being provided. The

> citizen, in my judgment, should be entitled to be able to assess whether an information contains the material which justifies the issue of a warrant. This information contained the necessary evidence to justify issuing the warrant."

17. In *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin); [2006] 1 WLR 1316 ("*EFT*"), the court set out ten general conclusions regarding warrants. It described the grant and execution of a search and seizure warrant as "a serious infringement of the liberty of the subject, which needs to be clearly justified" (para 24(1)). Its last two conclusions were as follows:

> "(9) The remedy which is available to a person or persons affected by a warrant is to seek judicial review. It is an adequate remedy because the statutory provisions have to be read in the light of those articles of the European Convention which are now part of English law. In fact, ... if the statutory provisions are satisfied the requirements of article 8 of the Convention will also be satisfied, and at least since the implementation of the Human Rights Act an application for judicial review is not bound to fail if, for example, the applicant cannot show that the Director's decision to seek a warrant in a particular form was irrational, but in deciding whether to grant permission to apply for judicial review the High Court will always bear in mind that the seizure of documents pursuant to a warrant is an investigative step, perhaps best reconsidered either at or even after the trial.
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> (10) Often it may not be appropriate, even after the warrant has been executed, to disclose to the person affected or his legal representatives all of the material laid before the district judge because to do so might alert others or frustrate the purposes of the overall inquiry, but the person affected has a right to be satisfied as to the legality of the procedure which led to the execution of the warrant, and if he or his representatives do ask to see what was laid before the district judge and to be told about what happened at the hearing, there should, so far as possible, be an accommodating response to that request. It is not sufficient to say that the applicant has been adequately protected because discretion has been exercised first by the Director and then by the district judge. In order to respond to the request of an applicant it may be that permission for disclosure has to be sought from an investigating authority abroad, and/or that what was produced or said to the district judge can only be disclosed in an edited form, but judicial

> control by way of judicial review cannot operate effectively unless the person or persons affected are put in a position to take meaningful advice, and if so advised to seek relief from the court. Furthermore it is no answer to say that there is no general duty of disclosure in proceedings for judicial review."

18. In *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), the court had before it claims judicially to review two warrants issued by HHJ Stephens QC on an *ex parte* application under section 9, read with Schedule 1 paragraph 12 to PACE. The warrants authorised HMRC to search premises occupied by the two claimants and seize documents there. Until the morning of the hearing, HMRC maintained that it could not disclose the information on the basis of which the warrants had been issued, for fear of prejudicing the continuing investigation which was not confined to the claimants. However, on the morning of the hearing HMRC provided a document giving the "gist" of its case, and a redacted transcript of the hearing before HHJ Stephens QC. Gross LJ made five numbered observations, including these:

> "27.(2) When an application for judicial review is launched seeking to quash the grant of a search warrant, it is, again, in some respects, akin to the 'return date' for *Marevas, Anton Pillers* and *Restraint Orders*. Ordinarily, the expectation will be that the party challenging the grant of the warrant must be entitled to know the basis upon which the warrant was obtained.
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> 28.(3) By their nature, criminal investigations are such that there will be occasions when, for good reason, HMRC (or other authorities as the case may be) will not be able to divulge the full information or the full contents of the discussion before the judge who granted the warrant. There is an important public interest in combating economic crime, and HMRC's proper efforts to do so should not be undermined.
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> …
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> 30.(5) Where full disclosure cannot be given (and there will be cases where it cannot be), HMRC should, if at all possible, and again unless there is good reason for not doing so, make available, and in a timely fashion, a redacted copy or at least a note or summary of the information and the hearing before the judge, where appropriate, backed by an affidavit."

19. Davis J addressed the same subject, saying:

> "77. It must not be overlooked that an order issuing a warrant of the kind sought and granted in this case is, by its very nature, highly intrusive. Hence indeed the stringent pre-conditions under the 1984 Act Parliament has stipulated should be fulfilled before such an order may be made. Further, such orders are ordinarily, as here, sought on an *ex parte* basis: a reversal of course (albeit on well established grounds) of the usual rule that a party is entitled to be heard before any order is granted against him. Those two considerations seem to me to indicate that the prima facie starting point should be for HMRC to give, where requested, to the person who may be aggrieved at the issuing of the warrant and who may wish to challenge it, as much relevant information as practicable, provided it is not prejudicial to the investigation, as to the basis on which the warrant was obtained from the Crown Court.
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> 78. It is of course relatively easy to envisage that there may be many cases where it could indeed be prejudicial to the investigation, prior to any charging decision, to disclose parts of the information and other materials deployed before the Crown Court judge in seeking the warrant. Non-disclosure in such circumstances can be justified. In the present case for example, we are told that a 59-page information and three supporting folders of materials were placed before the judge. Those have not thus far, in their full terms, been disclosed to Mr Gittins, and indeed Mr Jones QC did not seek to say they should have been, at all events at this stage. But, to repeat, it is not legitimate to move, without additional justification, from a position whereby it can properly be said that not all the materials placed before the Crown Court judge should be disclosed, to a position whereby it can be said that the recipient of the warrant is to be told nothing at all as to the basis on which the warrant was sought.
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> 79. In my view, therefore, in each case where a request for such information is made by the person the subject of a warrant of the kind made here, HMRC should consider such requests on a individuated basis. Specifically, HMRC should assess what materials and information relied on before the Crown Court can properly be disclosed, with or without editing, and whether by way of summary or otherwise, without prejudicing the criminal investigation. It would be wrong simply to hide

> behind an asserted general policy as a justification in itself for declining to give any information. Indeed, I suspect that, while there perhaps may be cases where declining to give any information at all may be justified in particular circumstances, such a situation is likely to be an exception. Certainly it should not be taken as a norm. Where such a situation is said by HMRC to arise, then HMRC should be prepared to justify it. It is indeed, as I see it, salutary that that should be so."

It is clear (from paras 78 and 79 in particular of his judgment) that Davis J contemplated that there could be put before, and relied on by, the circuit judge information, some or even all of which would have to be withheld on public interest grounds from a person affected by, and wishing by judicial review to challenge, the warrants.

20. In *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin); [2014] 2 Cr App R 12, paras 17-18, the court emphasised that a decision to claim on public interest grounds to withhold information placed before a magistrate to obtain a warrant should be taken by a Chief Constable and was required to be sanctioned by the court.

21. Finally, in *Bangs* (para 6 above), the court held that, where the police were objecting to the disclosure to a person affected of information relied upon before a magistrate to obtain a search and seizure warrant, the magistrates' court was not *functus officio*, and any challenge to the withholding was an issue for the magistrates' court (para 28). The court acknowledged that the public interest might demand that some or all of the material relied on to obtain the warrant not be disclosed (para 25). Referring to *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38; [2014] AC 700, it also noted that the applicant might have to be excluded from parts, in some cases substantial parts, of the hearing and reasoning given on the disclosure application (para 35).

22. In the authorities cited in paras 15 to 21 above, the procedure, whereby information put before and used by the magistrate is withheld from any person affected, is frequently referred to as a PII (public interest immunity) procedure. Conventionally, a PII procedure exists when a court assesses whether material should be disclosed to the other party, in which case it will be known on all sides, or should in the public interest be withheld from use by anyone, including the court: see *Al Rawi v Security Service* (para 1 above), paras 100-104; *R (British Sky Broadcasting Ltd) v Central Criminal Court* [2014] UKSC 17; [2014] AC 885, para 32. The procedure will then include an assessment of the significance of the material in the context of whatever decision is in issue (here, the issue of the warrant) and any challenge to it. However, I understand some of the dicta in the above authorities

in a different sense. They contemplate that the magistrate in the case of an *ex parte* application for a warrant under section 8 of PACE, or the Crown Court judge, in the case of such an *ex parte* application under section 9 of PACE, will or may have been persuaded by material some, or even all, of which will at the later stage of a claim for disclosure under the principle in *Bangs* or for judicial review of the issue of the warrant, have to be withheld from the applicant on public interest grounds: see eg *EFT*, para 10, G*ittins*, paras 65-66 and *Bangs*, para 25. The authorities do not directly address the question of what a court hearing a judicial review application can or should do if it appears that the material withheld is likely to be decisive for a consideration of the legitimacy or otherwise of the issue of the warrant.

23. That question was however considered in *Competition and Markets Authority v Concordia International RX (UK) Ltd* [2017] EWHC 2911 (Ch), in a judgment handed down by Marcus Smith J shortly after the hearing of this appeal in the Supreme Court. The judgment was helpfully sent by him to the Supreme Court, and we invited and received the parties' submissions on it. The issue arose in *Concordia* in the context of a search warrant issued *ex parte* under section 28 of the Competition Act 1998. Section 28 can itself be regarded for present purposes as broadly paralleling section 8 of PACE. But the relevant Practice Directions provide not only that a warrant under section 28 must be served as soon as possible on the occupier or person appearing to be in charge of the premises (PD paras 7.3 and 8.1), but also that such occupier or person may apply to vary or discharge the warrant to the judge who issued the warrant or, if he is not available, another High Court judge (para 9). Concordia applied accordingly, but the Competition and Markets Authority ("CMA") maintained that it could not, for public interest reasons, disclose all the information on the basis of which it had persuaded the judge to issue the warrant in its final form.

24. In the course of a careful analysis of the possibilities, Marcus Smith J:

(i) rejected a submission that, if the CMA was to be permitted to resist the challenge, it must disclose the full material;

(ii) considered that the Supreme Court's judgment in *Al Rawi* precluded a "closed material procedure", whereby the material withheld could be seen by the court, but not by Concordia;

(iii) rejected the CMA's case that some form of confidentiality ring could be established, to allow disclosure to Concordia's counsel, without disclosure to Concordia; and

(iv) in these circumstances held that "Concordia's application to vary or partially revoke the warrant must be determined on the basis of such material as is not protected by public interest immunity" (para 71).

In so concluding, Marcus Smith J recognised that the "excluded material may constitute the difference between the section 28 warrant being upheld or varied/revoked" (para 70). The question on this appeal is whether the conclusions he reached are correct, at least in the context of a search and seize warrant issued under section 8 of PACE.

25. The current Criminal Procedure Rules, as amended since the events giving rise to the present proceedings, contain provisions reflecting and regulating the procedure contemplated in the authorities discussed in paras 15 to 21 above. They expressly permit information to be placed before a magistrate under section 8 of PACE (rule 47.26(4)), in circumstances to which rule 5.7 (see below) applies, marked to show that it is only for the magistrate or court and not to be supplied to anyone else, and accompanied with an explanation as to why it is withheld. They go on to provide a number of safeguards. An application for a search warrant cannot be dealt with without a hearing (rule 47.25(1)). The applicant officer must confirm on oath or affirmation that the application discloses all information material to the decision the court must make, that the contents of the application are true, and that he has disclosed anything known or reported to him which might reasonably be considered capable of undermining any of the grounds (rules 47.25(4) and (5) and 47.26(3) and (5)). He must also answer any questions on oath or affirmation (rule 47.25(5)). An application must also include a declaration by an officer senior to the applicant that the senior has reviewed and authorised it (rule 47.26(5)(b)). The hearing, however, is required to be in private unless the court otherwise determines, and in the absence of any person affected by the warrant, including any person in occupation or control of the premises (rule 47.25(1)). Rule 5.7 makes detailed provision for circumstances in which information is sought by a party or person about the grounds on which an order was made, or a warrant issued, in his absence, and the person who applied for the order or warrant objects to the supply of the information requested. The notice of objection must in this situation mark the material to the disclosure of which the objection relates to show it is only for the court and give an explanation why it has been withheld (rule 5.7(8)). The hearing which follows may take place, wholly or in part, in the absence of the party or person applying for information, and in the event the general rule (though the court may direct other arrangements) is that the court will consider representations first by the party or person applying for information and then by the objector in the presence of both, and then further representations by the objector, in the absence of that party or person (rule 5.7(9)). Rule 47.39 (introduced by SI 2017/144) also contains in relation to applications under section 59 of the CJPA provisions regarding the marking of information to show that, unless the court otherwise directs, it is only for the court,

accompanied with an explanation as to why it has been withheld, together with provisions mirroring those in rule 5.7(9).

26. These provisions contemplate that the magistrate on an application for a warrant under section 8 or for disclosure, or the Crown Court under section 59 of the CJPA, will be able to see and rely on information which in the public interest cannot be disclosed to a person affected by the relevant order who would otherwise be entitled to disclosure of the information. Mr Summers submits that these provisions were in that respect *ultra vires*. One may surmise that this submission is made on the basis that the general power under section 69 of the Courts Act 2003 to make rules of procedure governing the practice and procedure in the criminal courts cannot tacitly authorise a departure from so fundamental a principle as the administration of open, *inter partes* justice. I express no view on that submission. It falls away if the statutory scheme of PACE and the CJPA itself permits the relevant magistrate or court to have regard to material which cannot on public interest grounds be disclosed to a person affected by a warrant or order.

27. In my opinion, the statutory scheme of sections 8 and 15 of PACE does so permit. Read in terms, it involves, as indicated in paras 12 and 15 above, a purely *ex parte* process, directed to premises, rather than any particular person. It is a process designed to be operated speedily and simply, on the basis of information provided by a constable satisfying a magistrate that there are reasonable grounds for believing the matters stated in section 8(1). There is nothing in the statutory scheme which expressly restricts the information on which the magistrate may act. Parliament made no express provision for the information on which the warrant was sought to take any particular form or to be disclosed, even after the issue of the warrant, to any person affected. It would in many cases clearly be impracticable to expect such disclosure, for example where the information came from an informer, and in particular where it came from an informer whose identity could readily be identified from the nature of the information. I note, in parenthesis, that the police may well be under a duty, for example under articles 2 and 3 of the Human Rights Convention, to protect the safety of such an informer. Another area where disclosure to a person affected would clearly be impracticable would be where it would reveal the particular lines or methods of investigation being or proposed to be followed, in a way which would or could undermine their continuing usefulness in relation to other aspects of, or other persons potentially involved in, the investigation. The rules which I have summarised in para 25 above make very clear that the police owe a duty of candour towards the magistrate when seeking a warrant, and may well have to disclose such information, eg because it is material, or if asked by the magistrate. The suggestion that the police should in such a case simply refrain from seeking or further seeking a warrant would limit use by the police of important sources of information and the efficacy of police investigations. It is no doubt sensible practice for applicant officers to adopt, where practicable and where time permits, the permissive rule 47.26(4) procedure and to identify information which they contend

ought not to be supplied to anyone but the court. That may reduce the risk of accidental disclosure, and no doubt a magistrate considering an application would, where this is done, bear in mind that there is information which a person affected might never be able to test. But there is no suggestion, or I think likelihood, that the scheme intended the constable or magistrate at this early stage, when speed is often of the essence, to try to form a definitive view as to what the public interest might ultimately prove to require. That is an exercise which in accordance with the rules falls to be undertaken at a later stage by a magistrate under the procedure in *Bangs* and/or a Crown Court under section 59 of the CJPA. The effect of the statutory scheme and the rules is that an application for a warrant under section 8 can be made and granted on the basis of all the relevant information available to the applicant, even though some of it may not at any stage be capable of being disclosed to a person affected. The courts and the rule-makers, in developing ancillary principles and protections for persons affected, have been careful to qualify them, by reference to the public interest, so as not to undermine the efficacy of the scheme. That would be the effect of the appellant's case.

28. This conclusion is also consistent with and in my view supported by consideration of authority, decided before PACE, on the operation of a search and seizure warrant issued under section 20C of the Taxes Management Act 1970: *Inland Revenue Comrs v Rossminster Ltd* [1980] AC 952. Section 20C enabled the appropriate judicial officer (*in casu*, the Common Serjeant) to issue such a warrant:

> "[i]f … satisfied on information on oath given by an officer of the board that … there is reasonable ground for suspecting that an offence involving any form of fraud in connection with, or in relation to, tax has been committed and that evidence of it is to be found on premises specified in the information ..."

A warrant was issued and executed in relation to specified premises, including those of Rossminster Ltd, a banking company. No information was given to Rossminster Ltd about the precise nature of the alleged fraud, or when or by whom it was committed. Rossminster Ltd applied for judicial review to have the warrant quashed and the documents which had been seized delivered up.

29. The House recognised the invasive nature of the warrant. Lord Wilberforce said that he could "understand very well the perplexity, and indeed indignation, of those present on the premises, when they were searched" (p 998H), and suggested that the statutory scheme called for a fresh look by Parliament. But, as the majority pointed out, the House was not concerned with unauthorised executive action, as in *Entick v Carrington* (1765) 2 Wils 275, but with an issue involving the construction and application of a statutory scheme. As to this, the majority members were agreed that there was no basis either for reading into section 20C or for deriving from the

general law any requirement to give particulars of the offences suspected: see eg p 999A-C, per Lord Wilberforce, p 1005E, per Viscount Dilhorne, p 1010B-C, per Lord Diplock and p 1024A-B, per Lord Scarman. (Lord Salmon dissented.)

30. In this connection, Lord Wilberforce said (p 999A-C) that:

> " … on the plain words of the enactment, the officers are entitled if they can persuade the board and the judge, to enter and search *premises* regardless of whom they belong to: a warrant which confers this power is strictly and exactly within the parliamentary authority, and the occupier has no answer to it. I accept that some information as regards the person(s) who are alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the board and the judge. But the occupier has no right to be told of this at this stage, nor has he the right to be informed of the 'reasonable grounds' of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers investigations into possible criminal offences."

31. The reference to a general public interest immunity covering investigations into possible criminal offences may need qualification. Indeed, in the judgment of the Divisional Court in *Rossminster*, which was approved by the House of Lords, Eveleigh LJ suggested a more focused approach, depending on the particular circumstances: [1980] AC 952, 961D-E. A specific public interest is however accepted or assumed to exist in relation to withholding of the material not disclosed to the appellant in this case. As to the words in the passage cited "at this stage", Lord Wilberforce went on to note, with reference to a statement by Lord Reid in *Conway v Rimmer* [1968] AC 910, 953-954, that, after a verdict or a decision not to take proceedings, "there is not the same need for secrecy" (p 999D-E) and "the immunity which exists at the stage of initial investigation will lapse" (p 1001A). However, where, at the stage which the present investigation has reached (pending the outcome of the present appeal), it is accepted that there is a current and continuing public interest in withholding information relied on for the issue of the warrant, that qualification has no application. The interests of other investigations, current or future, may also require the withholding of information in some circumstances.

32. The analogy between a section 20C warrant and a warrant to search premises and seize stolen goods at common law (later the subject of section 42 of the Larceny Act 1916) was referred to by Lord Diplock and Lord Scarman at pp 1010H and 1023H-1024A in the *Rossminster* case. The approach to a section 20C warrant can fairly be assumed to have been in the mind of those drafting and enacting section 8

of PACE to crystallise the statutory position relating to ordinary search and seizure warrants.

33. Mr Summers submits that the *Rossminster* case is the product of an earlier era. It is true that it was decided both before the Convention rights were domesticated by the Human Rights Act 1998 and before the decision in *Al Rawi*. But PACE itself was also enacted in the same era, not long after the decision in *Rossminster*. There may be other aspects of the decision in *Rossminster* which require reconsideration in the light of subsequent developments. But on the present issue - whether the scheme of PACE contemplates that a magistrate on an application for a warrant under section 8 or for disclosure under *Bangs*, or the Crown Court on an application under section 59 of the CJPA, may rely on material which will have to be withheld from a person affected - the judgment in *Rossminster* is in my view very relevant background to a proper understanding of the scheme. As in *Rossminster*, so under section 8, it must have been envisaged that the warrant might be issued on the basis of information which could not in the public interest be disclosed to persons affected - at least until some future date after the investigation was over, or perhaps (as when it relates to an informer) for ever. It is of course the case that the issue and execution of a search and seizure warrant may, to a greater or lesser degree, involve interference with someone's real or personal property, possessory or other interests. But there is no change in substantive property or possessory rights and any invasion of privacy interests is limited and in the general public interest; such interference as there is only occurs in the interests of the investigation of serious (indictable) offending.

34. It is also relevant that the statutory procedure under section 8 is subject to a number of protections, expressed or inherent in the statutory language and in the current rules summarised in para 25 above. It only applies when a magistrate is on reasonable grounds satisfied by a constable that an indictable offence has been committed. A constable, when seeking *ex parte* to satisfy the magistrate that the requirements of section 8 are met, owes a duty of candour, meaning that the information on which he or she relies must constitute a fair and balanced presentation of the circumstances on the basis of which a warrant is sought: compare for example *In re Stanford International Bank Ltd* [2010] EWCA Civ 137; [2011] Ch 33, esp at paras 82-83 and 88, per Morritt C and para 191, per Hughes LJ. A further point is that the material sought must "not consist of or include items subject to legal privilege, excluded material or special procedure material" (section 8(1)(d)). Excluded material refers, in summary, to personal records which a person "has acquired or created in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office and which he holds in confidence", as well as human tissue taken in a medical context and held in confidence and journalistic material held in confidence (section 11 of PACE). Special procedure material includes other journalistic material (section 14(1)), as well as "material … in the possession of a person who … acquired or created it in

the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office" (section 14(2)). Under Schedule 1 to PACE, only a Crown Court judge can make an order relating to special procedure material. There are two possibilities. One involves seeking a production order under Schedule 1 paragraph 4; such an order can under paragraph 2 be obtained under conditions which include conditions broadly mirroring those applicable under section 8(1)(a) to (d) (Schedule 1 paragraphs 2 and 3); but Schedule 1 paragraph 7 provides that:

> "An application for an order under paragraph 4 above that relates to material that consists of or includes journalistic material shall be made inter partes."

The other possibility is to seek a search and seizure warrant, which may be sought *ex parte*, again under conditions mirroring section 8(1)(a) to (d), provided that one of certain further conditions is satisfied (Schedule 1, paragraphs 12(a)(ii) and 14), namely:

> "(a) that it is not practicable to communicate with any person entitled to grant entry to the premises …;
>
> (b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;
>
> (c) [presently irrelevant];
>
> (d) that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation."

35. The Supreme Court has determined that, on an *inter partes* application for a production order in relation to journalistic material under Schedule 1 paragraph 4, a Crown Court judge is not entitled to conduct part of the proceedings *ex parte* and to hear during that part, and to have regard in his decision to, information withheld from the other party to the application: *R (British Sky Broadcasting Ltd) v Central Criminal Court* [2014] UKSC 17; [2014] AC 885. But, in the course of a judgment with which the whole Court agreed, Lord Toulson contrasted the case before the Court there with the general position when use is made *ex parte* of the court's procedural powers to obtain evidence. He said:

> "28. As a general proposition, I would agree with the Commissioner's argument that the court should not apply the *Al Rawi* principle to an application made by a party to litigation (or prospective litigation) to use the procedural powers of the court to obtain evidence for the purposes of the litigation from somebody who is not a party or intended party to the litigation. This is because such an application will not ordinarily involve the court deciding any question of substantive legal rights as between the applicant and the respondent. Rather it is an ancillary procedure designed to facilitate the attempt of one or other party to see that relevant evidence is made available to the court in determining the substantive dispute. Applications of this kind, such as an application for a witness summons in civil or criminal proceedings, are typically made ex parte.
>
> 29. However, the present situation is different. Compulsory disclosure of journalistic material is a highly sensitive and potentially difficult area. It is likely to involve questions of the journalist's substantive rights. Parliament has recognised this by establishing the special, indeed unique procedure under section 9 and Schedule 1 for resolving such questions.
>
> 30. Ultimately the issue in this appeal is a short one. It turns on the meaning and effect of paragraph 7 of Schedule 1. Parliament recognised the tension between the conflicting public interests in requiring that an application for a production order shall be made 'inter partes'. The Government had originally proposed that a production order might be made ex parte, but that proposal met opposition and was dropped. When an application for a production order is made, there is a lis between the person making the application and the person against whom it is made, which may later arise between the police and the suspected person through a criminal charge. Equal treatment of the parties requires that each should know what material the other is asking the court to take into account in making its decision and should have a fair opportunity to respond to it. That is inherent in the concept of an 'inter partes' hearing."

36. In these paragraphs, Lord Toulson identified two categories of situation. The first, addressed in para 28, was focused on use of the court's procedural powers, typically on an *ex parte* basis, to obtain evidence for the purposes of the litigation "from somebody who is not a party or intended party to the litigation". The second, contrasted in paras 29 and 30, concerned the *inter partes* procedure which applies

under Schedule 1 paragraph 7 when journalistic material is sought. Lord Toulson noted that it had been a deliberate decision by the Government to drop its original proposal for an *ex parte* procedure, after this had met opposition. In the result there was "a lis between the person making the application and the person against whom it is made" ie typically the journalist, "which may later arise between the police and the suspected person through a criminal charge". An *ex parte* application for a search warrant under section 8 of PACE falls naturally into an extended conception of the former category, rather than into the second category. There is no necessary proprietary or personal link between premises sought to be searched or material sought to be seized by a warrant under section 8 and any particular individual who may be being investigated. In the present case, there was a factual link, in that the underlying investigation related to, amongst others, the appellant. But the warrant was directed to the premises and material on it, not to the appellant. The procedure did not create any "lis" between the police or prosecution service and him, even if such a lis might later arise. The search warrant was, in Lord Toulson's terms, "an ancillary procedure" designed to enable the police to fulfil their role of investigating suspected criminality.

37. For all these reasons, and subject to review in the light of the answers to subsequent issues, the answer to issue (i) is in my opinion that the statutory scheme entitles a magistrates' court, on an *ex parte* application for a search and seizure warrant under sections 8 and 15(3) of PACE, to rely on information which in the public interest cannot be disclosed to the subject of the warrant.

Issue (iii) - the position under section 59

38. It is convenient to take issue (iii) before issue (ii). The question under issue (iii) is in substance whether a Crown Court, on an application made *inter partes* under section 59 of the CJPA to retain unlawfully seized material, can operate a closed procedure to have regard to information which for public interest reasons is not disclosable.

39. This issue involves consideration of the interplay between the *ex parte* procedure for issue of a search and seizure warrant under section 8 and the *inter partes* procedure for authorising retention under section 59 of property seized but otherwise falling to be returned. Section 59(7) provides that retention may be authorised on the grounds that:

> "(if the property were returned) it would immediately become appropriate … to issue, on the application of the person who is in possession of the property at the time of the application

> under this section, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property ..."

40. Section 59(7) accordingly requires the Crown Court, when deciding whether to authorise retention, to put itself in the shoes of a hypothetical magistrates' court being asked, immediately after the return of the property, to issue a fresh warrant with a view to seizure of the property. In the light of the answer given to issue (i), such a magistrates' court would have been entitled on the hypothetical *ex parte* application made to it for such seizure to have regard to information placed before it by the constable which on public interest grounds could not be disclosed to others. The Crown Court could not fulfil its role without having regard to such information. But if it did so *inter partes* that would involve disclosing the information in a way which the public interest would preclude (and which the hypothetical magistrate would not do).

41. The statutory scheme of PACE and the CJPA must have been intended to be coherent, and Parliament must be taken in these circumstances to have contemplated that the Crown Court would, so far as necessary, be able to operate a closed material procedure, to ensure that it could have regard to material which would have been put before the hypothetical magistrates' court and withheld from disclosure there, without contravening the public interest by disclosing such material on the section 59 application.

42. In *Bank Mellat v HM Treasury (No 2)* this court was faced with a situation where there was no express provision for it to operate a closed material procedure on an appeal, although such a procedure had been provided for and applied in the courts below. The Supreme Court, by a majority, held a power to hold a closed material procedure to be implicit in the statutory provisions. These gave it a power to hear appeals against "any" order or judgment of the Court of Appeal (section 40(2) of the Constitutional Reform Act 2005 - "CRA") and a power to "determine any question necessary … for the purposes of doing justice in an appeal to it under any enactment" (section 40(5) CRA). The Court also took into account that an appeal to it against a wholly or partially closed judgment could not otherwise be effective. The situation now before the Court presents an analogy. Section 59 postulates that the Crown Court will be able to put itself into the shoes of a hypothetical magistrates' court. This will not work, unless the Crown Court can operate, so far as necessary, the same closed procedure as the magistrates' court could and would have done.

43. For these reasons, the answer I would, subject to review in the light of the answers to issues (ii) and (iv), give to issue (iii) is that a Crown Court, on an application made *inter partes* under section 59 of the CJPA to retain unlawfully

seized material, can operate a closed procedure to have regard to information which for public interest reasons is not disclosable.

Issues (ii) and (iv) - the position regarding closed material on judicial review

44. It is convenient to take these two issues together, as they raise essentially the same point. Judicial review is the means by which a person affected may challenge either the issue of a search and seizure warrant or an order under section 59 authorising the retention by the police of property seized which would otherwise fall to be returned. In the light of the conclusions already provisionally reached, the magistrate may issue such a warrant and the Crown Court may make an order under section 59 taking into account material which is "closed", ie withheld from by any person affected. What is the position on a judicial review of the magistrate's or Crown Court's decision?

45. Mr Summers's answer to this question is that judicial review must on any view be subject to the principle in *Al Rawi*, that the court on judicial review cannot adopt a closed procedure and, further, that this undermines the conclusions already expressed in respect of issues (i) and (iii) above about the permissibility of a closed procedure by a magistrate issuing a warrant or a Crown Court considering a section 59 application. He also submits that, even if he is wrong on this last point, the inability of the court on judicial review to conduct a closed material procedure and to look at material withheld from the claimant must mean that the warrant or section 59 order is set aside, if the material disclosed does not itself justify the warrant or order. The commencement of judicial review proceedings would, in that situation, ensure the setting aside of a warrant or order which had itself been properly issued. In this connection, Mr Summers relies on and maintains the correctness of the fourth pillar of Marcus Smith J's reasoning in *Concordia*, set out in para 24(iv) above.

46. Mr Chamberlain's and Mr Eadie's answers are to the opposite effect. They submit that, whatever the position regarding judicial review, there is no reason to disturb the scheme as it was in their submission intended to operate before a magistrate and the Crown Court. If the court on judicial review is required under *Al Rawi* to forego any sort of closed material procedure, there will be no basis upon which any person affected can complain that the issue of the warrant, or the making of the section 59 order, was not justified by material before the magistrate or Crown Court. However, their primary case in this situation is that, if the magistrate or Crown Court can rely on material withheld from a person affected, the court on a judicial review can and should fashion its procedures to be able to do so also.

47. The *Rossminster* case is of relevance to these issues. In *Rossminster*, the material which had been before the judge when he issued the warrant was not before

the courts on judicial review. The Divisional Court held that in these circumstances there was "simply … not the evidence … to enable this court to say that the judge exercised his discretion improperly": p 961F. That conclusion was upheld by the House: see per Lord Wilberforce, p 998F-G, Viscount Dilhorne, p 1006H, applying the maxim *omnia praesumuntur rite esse acta* and Lord Diplock, p 1013F-G, stating that:

> "Where Parliament has designated a public officer as decision-maker for a particular class of decisions the High Court, acting as a reviewing court under Order 53, is not a court of appeal. It must proceed on the presumption *omnia praesumuntur rite esse acta* until that presumption can be displaced by the applicant for review - upon whom the onus lies of doing so. Since no reasons have been given by the decision-maker and no unfavourable inference can be drawn for this fact because there is obvious justification for his failure to do so, the presumption that he acted intra vires can only be displaced by evidence of facts which cannot be reconciled with there having been reasonable cause for his belief that the documents might be required as evidence or alternatively which cannot be reconciled with his having held such belief at all."

Lord Scarman also said that there was no reason to suggest, nor was it possible to suggest, that the Common Serjeant had "failed in his judicial duty" and it was therefore necessary to approach the case on the basis that he did satisfy himself upon the relevant matters: pp 1022H-1023C-D. All the members of the majority in the House emphasised the importance attaching to the Common Serjeant's fulfilment of this judicial duty, but their decision meant that the prospects of a successful judicial review were much reduced.

48. The approach taken in *Rossminster* was therefore (i) to treat the onus as being on the applicant for judicial review to establish that the warrant should be quashed and (ii) to treat the applicant as unable to satisfy this onus, in circumstances where the original decision-maker had access to material withheld on public interest grounds from the person affected seeking judicial review; (iii) this result followed from the application of the maxim *omnia praesumuntur rite esse acta*. The same approach was followed and applied by the House in *R v Inland Revenue Comrs, Ex p T C Coombs & Co* [1991] 2 AC 283, in an application judicially to review a notice served by an inspector of taxes under section 20 of the Taxes Management Act 1970, requiring T C Coombs & Co to deliver or make available for inspection documents in their possession relevant to the tax liability of the taxpayer, their former employee. The notice was given with the consent of a commissioner, who, under section 20(7), was to give such consent only upon being satisfied in all the circumstances that the inspector was justified in proceeding under the section. The Revenue deposed that

the information, which had led it to believe that documents in T C Coombs' possession might contain information relevant to the taxpayer's tax liability, could not be disclosed on grounds of confidentiality, but had been fully laid before the commissioner. The House, taking its guidance from Lord Diplock's approach in *Rossminster*, held that, as "Parliament designated the inspector as the decision-maker and … the commissioner as the monitor of the decision … [a] presumption of regularity applied to both" (p 302).

49. The same approach was taken by the Privy Council in *Attorney General of Jamaica v Williams* [1998] AC 351. The case involved the issue by a magistrate of a search and seizure warrant under a statutory power in section 203 of the Customs Act, where any officer had "reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating [thereto] are harboured, kept or concealed in any house or other place in the island". The context was a customs investigation into possible fraudulent importation of motor vehicles by the applicants, a company and its majority shareholder. On the applicants' constitutional challenge to the issue of the warrant, no evidence was put before the court showing any such reasonable cause, on the basis that it would have been contrary to the public interest to disclose such evidence to the applicants at that time. Applying the approach in *Rossminster*, the Board said that it "cannot be assumed against the Crown that they did not have reasonable grounds for taking the documents which they did" (p 363F-G), and that (p 365E-F):

> "Although the courts may sometimes feel frustrated by their inability to go behind the curtain of the recital that the justice was duly satisfied and to examine the substance of whether reasonable grounds for suspicion existed (a frustration articulated by Lord Scarman in *R v Inland Revenue Comrs, Ex p Rossminster Ltd* [1980] AC 952, 1022) their Lordships think that it would be wrong to try to compensate by creating formal requirements for the validity of a warrant which the statute itself does not impose. In so doing, there is a risk of having the worst of both worlds: the intention of the legislature to promote the investigation of crime may be frustrated on technical and arbitrary grounds, while the courts, in cases in which the outward formalities have been observed, remain incapable of protecting the substance of the individual right conferred by the Constitution."

50. *Rossminster* dates from a period when the principles governing judicial review were at a relatively early stage of development. The line of authority discussed in paras 47 to 49 dates from a period prior to the domestication of the Convention rights and prior to the emergence of the line of cases on disclosure discussed in paras 15 to 20 above. It is clear from the judgment in the first of such

later cases, *Cronin*, that the recently domesticated Convention rights were very much in Lord Woolf's mind. Mr Summers submits that the Supreme Court should now therefore take a very different approach.

51. As noted already, and although this is not their preferred solution, Mr Chamberlain and Mr Eadie invite the Court, if necessary, to follow and apply the *Rossminster* line of authority under section 8 of PACE. There are also two later decisions which could be said to lend support to its continuing existence. First, in *Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 WLR 1786, the Court of Appeal held that a claim by a police informer for payment for information and assistance to the police was un-triable because a fair trial of the issues would require the police to disclose, and the court to investigate and adjudicate upon, sensitive information which should in the public interest remain confidential to the police. The public interest in withholding the evidence outweighed the countervailing public interest in having the claim litigated. Although this conclusion was reached on the basis that the case was un-triable, rather than on the basis of any assumption as to the correctness of the police's defence, the effect, that the claim failed, was the same. Second, in *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), claims were made against the Home Secretary for refusal to grant the applicants naturalisation on the grounds that they were not of good character. The Home Secretary declined to give further reasons or disclose documents on which she had relied, explaining that to do so would be harmful to national security. Ouseley J held, on applications for judicial review of the refusals, that it was not open to the court to hold a closed material procedure, and that, if the Home Secretary gave evidence that, having considered the applicants' representations, there were good reasons and a sound basis for her decision, which she could not disclose, it would be impossible for the court to say that she was wrong on that, and the claims would fail. There was no second possibility that the Home Secretary must lose, or that the court should assume what it knew to be false, viz that no relevant evidence was being withheld. This is an approach effectively identical to that taken in the *Rossminster* line of authority. On the other hand, in the still more recent judgment in *Concordia*, para 70, Marcus Smith J considered that the exclusion from consideration by the court of material which had properly been considered *ex parte* when the warrant was granted, but which had on public interest grounds to be withheld on an *inter partes* challenge, could well lead to a validly issued warrant being quashed. While the CMA is recorded as having argued to the contrary by reference to the presumption of regularity (para 43), and the Supreme Court is informed that its written case referred to both *Rossminster* and *Ex p T C Coombs*, Marcus Smith J's judgment does not specifically address the *Rossminster* line of authority.

52. The result reached in the *Rossminster* line of authority is unattractive, in that it is in some circumstances capable of depriving judicial review of any real teeth. For this reason, Mr Chamberlain and Mr Eadie make their primary submission that

the court on judicial review of a warrant under section 8 of PACE or of an order under section 59 of the CJPA can adopt a closed material procedure. Such a review would mirror that which, as I have already provisionally concluded, is open to the magistrate for a warrant under section 8 or for disclosure under *Bangs* or to the Crown Court on an application under section 59 of the CJPA. That is its attraction. Judicial review should be effective and able to address the decision under review on the same basis that the decision was taken. The *Rossminster* line of authority involves an awkward mismatch between the bases of the original and reviewing decisions. So too does the reverse approach taken by Marcus Smith J in *Concordia*.

53. However, in *Al Rawi* the Supreme Court said that a closed material procedure is inadmissible, without Parliamentary authorisation, in judicial review as it is in any ordinary civil claim: see eg paras 39 and 62, per Lord Dyson. The two "narrowly defined" exceptions which it recognised as existing related to: (i) cases where "the whole object of the proceedings is to protect and promote the best interests of a child [and] disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the whole object of the exercise" (para 63, quoting Lady Hale in *Secretary of State for the Home Department v MB* [2008] 1 AC 440, para 58); and (ii) cases where the whole object of the proceedings is to protect a commercial interest, and where full disclosure would render the proceedings futile (cases in which a "confidentiality ring" is commonplace) (para 64).

54. The situation in which a court is placed on a claim for judicial review in the present context can be compared with that which the Supreme Court faced in *Bank Mellat*. In that case, the courts below had express power to conduct a closed material procedure, under Part 6 of the Counter-Terrorism Act 2008 ("the 2008 Act"). The Supreme Court had none. But the majority derived from the statutory language governing appeals to it and a close consideration of the consequences of the various alternative analyses a conclusion that the Supreme Court was also able to conduct a closed material procedure (paras 37 to 44). The statutory language governing appeals consisted of section 40(2) of the CRA, stating that "an appeal lies to the court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings", read with section 40(5), giving the Supreme Court "power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". If a closed material procedure was not permissible, the alternative analyses were that (a) the appeal could not be entertained (compare *Carnduff v Rock*) or (b) the Supreme Court could consider the closed material in open court, or (c) the Court could determine the appeal without looking at the closed material (compare *Concordia*), or (d) the Court would be bound to allow the appeal or (e) the Court would be bound to dismiss the appeal (compare *Rossminster*). Lord Neuberger, speaking for the majority, said that analysis (a) ran contrary to section 40(2), analysis (b) would wholly undermine Part 6 of the 2008 Act, analysis (c) "would be self-evidently unsatisfactory and would seriously risk

injustice, and in some cases it would be absurd" and each of analyses (d) and (e) was "self-evidently equally unsatisfactory".

55. Each of the alternative possibilities to a closed material procedure identified by Lord Neuberger in *Bank Mellat* exists by analogy in relation to judicial review (as Marcus Smith J's judgment in *Concordia* illustrates); and, when so applied, each can be seen to be as unsatisfactory in relation to judicial review as in relation to an appeal in *Bank Mellat*.

56. Judicial review is not generally an appeal, certainly not in terms or under conditions making it a precise homologue of an appeal to the Supreme Court under section 40(2) of the CRA: see eg the discussion, albeit in a very different context, in *General Medical Council v Michalak* [2017] UKSC 71; [2017] 1 WLR 4193. It is in origin a development of the common law, to ensure regularity in executive and subordinate legislative activity and so compliance with the rule of law, but it is regulated now by the Senior Courts Act 1981. Section 31(1) of the 1981 Act defines an application for judicial review as an application for a mandatory, prohibiting or quashing order (or for a declaration or injunction in some public law contexts), and section 31 also provides:

> "(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition -
>
> (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
>
> (b) substitute its own decision for the decision in question.
>
> (5A) But the power conferred by subsection (5)(b) is exercisable only if -
>
> (a) the decision in question was made by a court or tribunal,
>
> (b) the decision is quashed on the ground that there has been an error of law, and

> (c) without the error, there would have been only one decision which the court or tribunal could have reached."

57. Although there are differences between judicial review and an appeal in the normal sense of that word, many of the considerations which were of weight in *Bank Mellat* on an appeal from lower courts conducting closed material procedures are also of weight in relation to judicial review of lower courts conducting such procedures. In *Bank Mellat*, a determination by the Supreme Court on a basis different from that required and adopted in the courts below would have been self-evidently unsatisfactory, risk injustice and in some cases be absurd. So too in the present context it would be self-evidently unsatisfactory, and productive potentially of injustice and absurdity, if the High Court on judicial review were bound to address the matter on a different basis from the magistrate or Crown Court, and, if it quashed the order, to remit the matter for determination by the lower court on a basis different from that which the lower court had quite rightly adopted and been required to adopt when first considering the matter. Moreover, subsections (5) and (5A), read together, only work on the basis that it is open to the High Court to consider and, where appropriate, itself give effect to the decision which the lower court or tribunal should have reached, if there is only one such decision which it could have reached. If the High Court cannot by a closed material procedure have regard to closed material, those subsections will not work.

58. Since the events giving rise to the present litigation, section 31 has also been amended by the introduction of subsections (2A) and (3C) by section 84(1) and (2) of the Criminal Justice and Courts Act 2015. Subsection (2A) provides that the High Court must refuse relief on an application for judicial review "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (unless the court considers under subsection (2B) that it is appropriate to disregard this requirement for reasons of exceptional public interest). Subsection (3C) provides that, when considering whether to grant leave for judicial review, the High Court "may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred". These subsections again postulate that the High Court will be considering the outcome on the same basis as the lower court or tribunal.

59. In the light of these statutory provisions and of an analysis of the alternative possibilities paralleling that undertaken in *Bank Mellat*, I consider that the only sensible conclusion is that judicial review can and must accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review. The Supreme Court, when it referred in passing to judicial review in *Al Rawi*, was not directing its attention to this very special situation. If it had done so, it might also have seen a

similarity between this situation and the two exceptions which it did identify, where inability to adopt a closed material procedure would render the whole object of the proceedings futile and where the interests of third parties (such as informers) are potentially engaged. Be that as it may be, I consider that the scheme authorised by Parliament for use in the magistrates' court and Crown Court, combined with Parliament's evident understanding and intention as to the basis on which judicial review should operate, lead to a conclusion that the High Court can conduct a closed material procedure on judicial review of a magistrate's order for a warrant under section 8 PACE or a magistrate's order for disclosure, or a Crown Court judge's order under section 59 of the CJPA. I add, for completeness, that, even before judicial review was regulated by statutory underpinning, I would also have considered that parallel considerations pointed strongly to a conclusion that the present situation falls outside the scope of the principle in *Al Rawi* and that a closed material procedure would have been permissible on a purely common law judicial review.

Issue (v) - minimum disclosure and gisting

60. Issue (v) is whether the principles concerning minimum disclosure, if necessary by gisting, apply to proceedings concerning search warrants. It is clear that the use of a closed material procedure is not itself contrary to Convention rights: see *Tariq v Home Office* [2011] UKSC 35; [2012] 1 AC 452. The contrary has not been suggested on the present appeal. The authorities also include dicta suggesting that in some, rare cases no disclosure at all of the relevant closed information may be required at common law (see *Gittins*, para 79, per Davis J). Is this the case, or does article 6 of the Convention apply to require a person affected by a search warrant or order under section 59 to know at least the gist of the case made out to justify the relevant order?

61. As a matter of principle, open justice should prevail to the maximum extent possible. Any closed material procedure "should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case": *Tariq v Home Office*, para 67; and should, of course, be restricted as far as possible. Further, the nature of the issue may require, as a minimum, disclosure of the "gist" of the closed material, to enable the person from whom it is withheld to address the essence of the case against him: *A v United Kingdom* (2009) 49 EHRR 625, *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 (a control order case). This will be so, where the issue affects the liberty of the person (*A v United Kingdom*, and *Sher v United Kingdom* (2015) 63 EHRR 24, para 149) or has an equivalent effect, as a control order or freezing order can do (*AF (No 3)*; *Tariq v Home Office*, paras 26-27; and see, in the European Court of Justice, *Kadi v Commission of the European Communities* (Case T-85/09) [2011] 1 CMLR 24, paras 129-177).

62. On the other hand, it is established by decisions of both the European Court of Human Rights and the Supreme Court that there are circumstances where it may in the public interest be legitimate to withhold even the gist of the material relied on for a decision which a person affected wishes to challenge. The relevant caselaw is analysed in *Tariq v Home Office*, paras 27-37. This approach has been applied in the European Court of Human Rights to material allegedly making a person a security risk unsuitable for permanent employment which would entail him having access to a naval base (*Leander v Sweden* (1987) 9 EHRR 433), to security material allegedly making a person unsuitable for employment with the central office of information (*Esbester v United Kingdom* (1994) 18 EHRR CD72), and to material explaining the meaning of a statement by the Investigatory Powers Tribunal that "no determination had been made in his favour" in relation to a complainant in respect of complaints that his communications were being wrongly intercepted - a statement which could mean either that there had been no interceptions or that any interceptions taking place had been lawful (*Kennedy v United Kingdom* (2010) 52 EHRR 4). The approach in these cases was applied domestically by the Supreme Court in *Tariq v Home Office*. The complainant's security clearance was withdrawn and he was suspended from his work as a Home Office immigration officer, after the arrest of close family members in the course of a suspected terrorism investigation. A closed material procedure was held, with a special advocate, under rule 54 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861). The majority concluded that there was no invariable rule that gisting must always occur. It depended on balancing the nature and weight of the circumstances on each side: see in particular para 25.

63. In the cases mentioned in para 62, the courts were well aware that the complaints made involved significant personal interests. Employment and citizenship are undoubtedly important to personal identity and well-being; and the withholding of information had a continuing effect on the complainants' substantive position. Nonetheless, the circumstances did not give rise to a right to gisting, when important countervailing interests of state security made it impossible to disclose the information without undue prejudice. The circumstances were not regarded as impacting the person affected to the same extent as loss of personal freedom, or a control or freezing order.

64. The issue of a warrant authorising a search of premises and seizure of documents involves a short-term invasion of property. Such a warrant is, as I have pointed out, not specifically directed at, or necessarily even linked with, anyone occupying the premises or having any proprietary or possessory interest in the documents. Save that the taking of documents for so long as is required for the limited purposes of an investigation necessarily affects possession, such a warrant does not affect the substantive position of anyone who does occupy the premises or have any proprietary, possessory or other interest in any documents found therein. All it may do is provide information, and maybe direct evidence, of potential use in

a current investigation into an indictable offence which the magistrate or Crown Court is satisfied that there are reasonable grounds for believing has been committed. If the investigation leads to criminal proceedings, any person affected will enjoy all the normal safeguards. Subject to any PII ruling in the conventional sense (in which case the material will not be disclosed or used at trial), there will be full disclosure. All material evidence relied on to establish guilt will be before the court openly, without any form of anonymity attaching to the witness or any restriction on questioning which might lead to a witness's identification, unless under the strict statutory conditions of court-ordered anonymity pursuant to Part 3 of the Coroners and Justice Act 2009 introduced subsequent to the House of Lords decision in *R v Davis* [2008] AC 1128. Any complaint about the propriety of use of any material seized will be capable of being raised and submitted to the court's decision under section 78 PACE.

65. In my judgment, it cannot be axiomatic in this context that even the gist of the relevant information must be supplied to any person (such as the occupier or some other person claiming some proprietary, possessory or other interest in the documents) claiming to be affected by, and wishing to object to, the warrant or the search and seizure. Every case must of course be considered in the light of its particular circumstances. But, as a general proposition, I answer issue (v) in the negative.

Conclusions

66. Having addressed the individual issues in turn, I have also stepped back to consider whether the discussion in respect of the issues considered later (particularly (ii) and (iv)) necessitates or gives reason to revise the answers reached in respect of the issues considered earlier. In my opinion it does not. On the contrary, the answers which I reached in respect of each of the issues in turn appear to me to lead to a scheme which is both coherent and workable, as well as corresponding with Parliament's presumed intentions.

67. The issues put before the Supreme Court have ranged wider than those argued or decided below. But it follows from the answers that I have reached that the appellant's appeal should be dismissed.