Neutral Citation Number: [2021] EWHC 3219 (Admin)

Case No: CO/4200/2019

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30/11/2021

Before

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

SAIFULLAH GHARAB YAR

Cla

-and-

SECRETARY OF STATE FOR DEFENCE

Defe

-and-

BRITISH BROADCASTING CORPORATION

Applicant

- -

Richard Hermer QC (instructed by **Leigh Day**) for **Claimant** (written submissions only)

Steven Gray and John Bethell (instructed by the **Government Legal Department**) for the **Defendant**

Luke Browne (instructed by **BBC Litigation Department**) for the **Applicant**

Hearing date: 11 November 2021

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. By an Application Notice dated 18 August 2021 the British Broadcasting Corporation ("the BBC") applies to obtain copies of three witnesses statements filed by the Secretary of State for Defence in proceedings between him and Saifullah Ghareb Yar.

2. Mr Saifullah's claim arises from events that took place in February 2011 when four members of his family were killed by British armed forces operating as part of the International Security Assistance Force in Afghanistan. Mr Saifullah's claim, brought by way of application for judicial review under CPR Part 54, is that those deaths should have been the subject of investigation by reason of article 2 of the European Convention on Human Rights ("the ECHR"), and that no sufficient investigation was undertaken. The Secretary of State contends both that the events that took place in February 2011 were outside the scope of the Convention ratione loci, and that, in any event, an investigation that did take place was sufficient to discharge any obligation that did arise under ECHR article 2.

3. The BBC's application is that the three statements requested should be provided either pursuant to CPR 5.4C(2) which is the court's power to order copies of documents be provided to non-parties from the court record, or by an order in exercise of the court's inherent jurisdiction requiring copies of the statements be provided to the BBC. The Secretary of State does not oppose the BBC's application so far as it concerns a witness statement made by Ben Sanders dated 18 September 2020; he has agreed to provide a copy of the statement to the BBC and no order of the court is required. The Secretary of State opposes the BBC's application for copies of the other two statements: (a) of Colonel Robert Morris dated 6 November 2020; and (b) and of Sir Jonathan Murphy, also dated 6 November 2020. Those statements were served pursuant to an Order sealed on 23 July 2020 requiring the Secretary of State to file open evidence in response to Mr Saifullah's claim.

B. Decision

(1) The position, in principle

4. So far as concerns the high-level principles applicable to this application it is not necessary to look further than the decision of the Court of Appeal in R(Guardian News and Media Ltd) v City of Westminster Magistrate's Court [2013] QB 618, and the decision of the Supreme Court in Dring v Cape Intermediate Holdings Ltd [2020] AC 629. The court's power to require documents used for the purposes of litigation to be provided to non-parties, whether by virtue of an inherent jurisdiction (i.e., at common law) or as regulated by provisions in the CPR, is an expression of what is commonly referred to as the open justice principle. Open justice is the means by which public confidence in the integrity of the judicial process is maintained. In his judgment in Guardian News and Media Toulson LJ described the function of the principle in this way:

"1. … open justice lets in the light and allows the public to scrutinise the workings of the law, for better or worse…

2. … it is not only the individual judge who is open to scrutiny but the process of justice…"

and at paragraph 79 he said this:

"The purpose [of the open justice principle] is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators."

In her judgment in Dring, Baroness Hale said this:

“42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly …

43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence educed in support of the parties’ cases.”

5. In his submissions for the BBC in support of this application, Mr Browne placed emphasis on Lady Hale’s acceptance that the open justice principle may have purposes in addition to the two she described. He submitted that another relevant purpose of the open justice principle was to make information available for “proper” or “serious” journalistic activity. He suggested that the judgment of Calver J in Goodley v The Hut Group [2021] EWHC 1193 (Comm) was authority for this proposition.

6. I think this submission goes too far. The open justice principle does not need to be over-complicated. The point of importance, the foundation of the judgments in both the Guardian News and Media case and the Dring case, is that courts should ordinarily work in public. In her judgment in Dring, Baroness Hale’s identification of the “principal purposes” of the open justice principle was simply for the purposes of exposition. Her “principal purposes” are not and should not be approached as if they are mutually exclusive. Public understanding of the justice system and how it works is the premise for public scrutiny of the judicial system. Both go to explain why, absent special circumstances, the court’s work should be carried out in public, and it would be artificial to try to separate one from the other (see and compare the point made by Toulson LJ at paragraph 77 of his judgment in Guardian News and Media). Similarly, attempts to create a list of additional “principal purposes” of the open justice principle will create more heat than light, and may result only in successive exercises in special pleading. For example, the BBC’s submission in this case does not identify any additional further purpose that the open justice principle serves, rather, it merely elides one possible consequence of open justice – the opportunity for journalistic endeavour – with the principle itself.

7. Historically, court procedures that were essentially oral were sufficient to give effect to the public interest that the open justice principle protects: evidence and argument was presented orally, and judgments were delivered in the same way. Public hearings permitted the public to observe this process and report on it to others, including by journalistic reporting. The move from an entirely (or largely) oral process to one in which, while hearings remain the means by which issues are decided, writing and documents are the mainstays of how hearings are conducted, renders hearings less intelligible unless the public has access to the documents used. This pointed the Court of Appeal in Guardian News and Media to the following conclusion, per Toulson LJ at paragraphs 83 and 85.

“83. The courts have recognised that the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public. This calls for counter measures. In SmithKline Beecham Biologicals SA v Connaught Laboratories Inc Lord Bingham referred to the need to give appropriate weight both to efficiency and to openness of justice as the court’s practice develops. He observed that public access to documents referred to in open court might be necessary. In my view the time has come for the courts to acknowledge that in some cases it is indeed necessary. It is true that there are possible alternative measures. A court may require a document to be read in open court, but it is not desirable that a court should have to take this course simply to achieve the purpose of open justice. A court may also

declare that a document is to be treated as if read in open court, but that is merely a formal device for the exercise of a power to allow access to the document. I do not see why the use of such a formula should be required. It may have the advantage of ensuring that other parties have an opportunity to comment, but that can equally be achieved if, in a case such as the present, the applicant is required to notify the parties to the litigation of the application.

…

85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle …"

This statement of the general position was accepted by the Supreme Court in Dring: per Baroness Hale at paragraph 44.

8. In the premises, when all other matters are equal, requests by non-parties for copies of documents that have been placed before a judge or referred to in proceedings in some material way in open court ought to be allowed. However, the specific circumstances of each application must be carefully considered to determine whether the default position should be reflected in the final order on the application. Toulson LJ's "default position" is just that, no less but no more.

9. As to which specific circumstances may be material, both Guardian News and Media and Dring are authority for the proposition that the reasons for the request could be relevant to whether the court's final decision on the application corresponds to the "default position". In Dring the court stated, "it is for the persons seeking access to explain why he seeks it and how granting him access will advance the open justice principle". Both courts also assumed that in this regard, journalists would be better placed than others: see Guardian News and Media per Toulson LJ at paragraph 85; and Dring per Baroness Hale at paragraph 45. Both judgments are binding on me. Nevertheless, some care is required. First, the premise of the open justice principle is that it is in the public interest for those who are not parties to proceedings to have access to documents used in court so as to better understand the proceedings. This purpose is pursued regardless of whether the person making the request is a journalist. Second, it seems optimistic (or possibly unrealistic) to assume that in every instance where the request is made by a journalist the objective of the open justice principle will be better or more affectively achieved through material that the journalist might publish, other than in the loosest sense. Although a court ordering provision of a document to a journalist (or any other person) might in principle impose conditions on the use that could be made of the information (for example, in exercise of the power at CPR5.4C(4)), in practice it would be invidious for any court to attempt to use that power to distinguish between journalistic purposes that further the open justice principle and those that might not, let alone to encourage how the former might be pursued.

10. Take the present case as an example. In this application Mr Browne has emphasised that the request is made in pursuit of "proper journalistic purposes". The BBC's application is supported by a witness statement made by Hannah O'Grady, a producer who works in the BBC Panorama Current Affairs Department. She explains that in 2019 the BBC made and broadcast a programme reporting on allegations of unlawful killings in Afghanistan at the hands of British armed forces. This programme included consideration of the investigations by the Royal Military Police into the events that are the starting point for Mr Saifullah's claim against the Secretary of State. Ms O'Grady was also one of the authors of an article published on the BBC website on 1 August 2020 reporting the events that prompted Mr Saifullah's claim and the complaints raised in these proceedings. From the evidence I have seen there is no room to doubt that Ms O'Grady is a serious and responsible journalist. She has

reported on, and wishes to use the statements requested to continue to report on, the allegations of unlawful killings. Although it is true that one aspect of that issue is before the court in these proceedings (i.e. the sufficiency of the investigation undertaken into the events of February 2011 when Mr Saifullah's relatives were killed) it would be unrealistic to assume that Ms O'Grady's reporting will focus on the way in which the court conducts the proceedings before it. The realistic expectation is that, like any journalist, Ms O'Grady will "follow the story". The story here is the allegation that Afghani men were unlawfully killed by British soldiers. That is why the requests for the witness statements have been made; any reporting directly relevant to the advancement of the open justice principle would be entirely incidental. None of this should be taken as any criticism either of Ms O'Grady or of the BBC's application; it is not. Rather it recognises only that it would be unrealistic to assume the advancement of public interest journalism and the open justice principle are one and the same. All this being so, it seems to me that in most instances the primary relevance of the fact that the person requesting documents is a journalist seeking the material in pursuit of her work, will be as counter to any claim that the documents were sought for some purpose that would harm the legitimate interests of others, whether parties to the litigation or other non-parties.

11. Apart from this, the other matter that may affect the outcome otherwise produced by the default position will be the possibility of prejudice consequent on disclosure; either prejudice to one or both of the parties to the claim; or to other non-parties; or to some identifiable public interest.

(2) The BBC's application

12. The BBC's submission in this application is straightforward. The statements of Colonel Morris and Sir Jonathan Murphy have been served in these proceedings and have been referred to and relied on in open court. Thus, the default position applies. There is no relevant prejudice either to the Secretary of State or otherwise. The Claimant does not object to the BBC's application. Thus, goes the submission, provision of the statements should follow, whether pursuant to CPR 5.4C because the witness statements have been filed and are documents from the court record, or in exercise of the court's inherent jurisdiction. Mr Gray's submission for the Secretary of State is that an application to be provided with copies of these statements before the final hearing of Mr Saifullah's claim is premature.

13. The statements were in the court bundle for an interlocutory hearing originally listed for 28 January 2021 which took place on 10 March 2021, before me. Ms O'Grady's evidence is that the statements were referred to in the course of that hearing. I have reviewed the transcript of the hearing. The primary purpose of the March 2021 hearing was to consider Mr Saifullah's application to re-open the decision of Mr Justice Jay refusing permission to apply for judicial review on some grounds, and his contention (Application Notice dated 4 November 2020) that the Secretary of State had not complied with an Order I made (sealed 29 July 2020). The primary focus for submissions at the hearing was the witness statement of Ben Sanders dated 18 September 2020. (The statement the Secretary of State has agreed to provide to the BBC.) That statement explained the circumstances leading to the Secretary of State's decision to concede part of Mr Saifullah's claim and withdraw his pleaded case to the contrary. From the transcript, there is only one reference that I can see to either of the statements that are the subject of the application now before me. That was to Sir Jonathan Murphy's statement, in submissions made by counsel for Mr Saifullah. It was only a passing reference. Be that as it may, both statements were referred to in the course of hearings on 9 and 10 November 2021, on the occasion of Mr Saifullah's application for specific disclosure.

14. Notwithstanding that the two witness statements have been referred to in open court, I do not accept the BBC's submission either that Toulson LJ's default position applies, or that on the assumption it does the open justice principle (whether realised in exercise of the court's inherent jurisdiction or the power at CPR 5.4C), requires copies of the witness statements be provided to the BBC.

15. Both the Guardian News and Media case and the Dring case concerned requests for documents made after a final hearing had taken place. In Guardian News and Media, the extradition hearing had occurred and judgment was pending; in Dring the trial had taken place, judgment had been reserved, albeit the parties then agreed terms removing the need for any judgment to be handed down. That is not the position here. The statements of Colonel Morris and Sir Jonathan Murphy were filed and served in anticipation of the final hearing of Mr Saifullah's application for judicial review. The final hearing of that claim is still some months away. In all proceedings governed by CPR Part 54 the rules require filing and service of evidence earlier in the life of the claim than is required in claims governed by CPR Part 7. Claimants are required to file the evidence they rely on with the Claim Form; defendants must file evidence in response within 35 days of the decision granting permission for the claim to proceed. In this case the time-lag between service of evidence and the final hearing has been increased because the proceedings are subject to a closed material procedure under the provisions of the Justice and Security Act 2013. A closed material procedure builds in additional steps to decide whether (in this case) material disclosed by the Secretary of State should be provided to Mr Saifullah or only to Special Advocates appointed by the Attorney General to represent his interests in respect of material that cannot be disclosed to him without damaging the interests of national security. In this case those steps have been completed only in relation to part of the material the Secretary of State is to disclose. I gave directions in respect of the remaining part on 12 November 2021, the day after I heard the BBC's application. Thus, the final hearing of Mr Saifullah's claim for judicial review is still some months away.

16. That being so, there are similarities between the position on this application and the situation before the court in Blue v Ashley [2017] 1 WLR 3630. In that case an application under CPR 5.4C(2) was made for witness statements that had been filed in anticipation of a trial. Leggatt J refused the application. He accepted that the court had the power to grant the application; he accepted that when exercising that power, the court should be guided by the open justice principle as explained by the Court of Appeal in the Guardian News and Media case. The material part of Leggatt J's reasons is as follows:

"12. It is one thing to conclude, however, as I do, that the court has power to direct that a non-party should be given access to witness statements before a trial, and another to decide that the power ought to be exercised in a given case. There are, in my view, good reasons why the court should not generally make witness statements prepared for use at a trial publicly available before the witnesses give evidence. Those reasons follow from the role that witness statements play in the litigation process.

The role of witness statements

13. Historically in civil cases (as it still is today in criminal proceedings) the giving of evidence by witnesses at a trial was an entirely oral process. First, counsel for the party calling the witness would ask questions to elicit evidence from the witness "in chief". Then counsel for the opposing party would cross-examine the witness. Traditionally, the parties to the litigation and their counsel would have no notice of what witnesses of fact called by opposing parties were going to say in evidence until they

said it. That began to change after provision for written witness statements was first introduced in certain parts of the High Court, including the Commercial Court, in 1986. Under the modern CPR parties are required to serve witness statements in advance of a trial. A witness statement is defined in the Rules as “a written statement signed by a person which contains the evidence which that person would be allowed to give orally”: see CPR r 32.4. The purpose of requiring such statements to be served is twofold. First, it enables parties to prepare for trial with notice of the evidence which the other side may adduce. This avoids unfair surprise and enables rebuttal evidence to be obtained where necessary and cross-examination to be better prepared. It also allows each party to make a fuller assessment of the strength of the other party's case, which may facilitate settlement. The second purpose of witness statements is to make the trial process more efficient by saving the time that would otherwise be taken up by oral evidence given in chief. Instead of such oral evidence, the witness is simply asked to identify their statement and confirm their belief that its contents are true.

14. It is, however, important to notice that it is only when a witness is called to give oral evidence in court that their statement becomes evidence in the case: see CPR r 32.5. Until then, its status is merely that of a statement of the evidence which the witness may be asked to give. Thus, it quite often happens that a party serves a witness statement from a person who is not in the event called to give oral evidence at the trial. In that event the person's statement may be admissible as hearsay evidence and may then be admitted in written form; or the statement may not be put in evidence at all—in which case it never becomes part of the material on which the case is decided.

15. When a witness statement forms part of the evidence given at a trial, the principle of open justice requires that a member of the public or press who wishes to do so should be able to read the statement—in just the same way as they would have been entitled to hear the evidence if it had been given orally at a public hearing in court. That is the rationale for the right of a member of the public under CPR r 32.13 to inspect a witness statement once it stands as evidence-in-chief during the trial, unless the court otherwise directs. But there is no corresponding right or reason why a member of the public or press should be entitled to obtain copies of witness statements before they have become evidence in the case. Conducting cases openly and publicly does not require this. Nor is it necessary to enable the public to understand and scrutinise the justice system. The advance notice that a witness statement provides of what evidence its maker, if called as a witness, will give is provided for the benefit of opposing parties (for the reasons I have indicated), not the public. The trial is an event which must (save in exceptional circumstances) be conducted in public so that justice can be seen to be done. But preparations by the parties for the trial for the most part are not, and do not need to be, public.

16. I also accept the argument made by Mr Speker on behalf of Mr Ashley that there are positive reasons why it is generally undesirable for witness statements to be made public before such statements are put in evidence at a court hearing. A witness statement may contain assertions which are defamatory of another party and the truth of which is disputed. When such assertions are made by a witness in evidence given in court, the witness is protected by immunity from suit. As explained by Lord Wilberforce in Roy v Prior [1971] AC 470, 480:

“The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.”

The safeguards referred to by Lord Wilberforce do not apply to statements made by a prospective witness which have not been given in evidence. Yet if such statements were made public pursuant to an order of the court, a person who complained that a statement contained assertions that were untrue and defamatory of him would have no recourse against the author of the statement, who would not be responsible for its publication, nor against the publisher (who would be protected by qualified privilege unless the publication was malicious) and at the same time would also lack the opportunity for rebuttal and correction provided by the trial process. That does not strike a fair balance between the relevant interests. In addition, fair and accurate reporting of proceedings is promoted if a witness statement is put into the public domain only when it becomes evidence and its contents can also be tested and contested in a public trial."

17. I consider the main part of these reasons applies with equal force to the present application. Mr Browne submits that CPR Part 54 proceedings are materially different than CPR Part 7 proceedings: CPR Part 54 proceedings are a modification of CPR Part 8 proceedings; they are not concluded by a "trial", but by a "hearing"; the provisions of CPR Part 32 on evidence at trial are formulated with Part 7 proceedings in mind, not Part 54 proceedings; by CPR 54.15 written evidence may be relied on in proceedings if it has been served either in accordance with rules within Part 54 or with the permission of the court; in Part 54 proceedings evidence is ordinarily taken in the form of written witness statements, there is no cross-examination of witnesses on their statements without permission of the court, and it is rarely necessarily for permission to cross-examine to be given (see CPR PD54A, paragraph 10.3).

18. These are certainly points of difference between CPR Part 7 proceedings and proceedings under CPR Part 54. But I do not consider these differences are material when it comes to what is necessary to give effect to the open justice principle. There is no relevant difference in the function fulfilled by witness statements filed in judicial review proceedings and those filed in proceedings governed by CPR Parts 7 and 32. Statements and filed are served in advance of the hearing in order to allow the parties to prepare for the final hearing. Although at a final hearing statements are not formally adopted in the way required under CPR 32.5, it is still the case that it is only from the beginning of the relevant hearing that the statement is considered and used by the court for the purposes of any determination. Thus, whether, formally, the effect of CPR 54.15 is that statements become evidence in the case at the point of filing is a moot point, and the answer to it does not bear upon the objective of the open justice principle. That objective, as explained in the case law, is not engaged until the court is called on to consider the evidence for the purpose of deciding issues in the case. Practical considerations also support the conclusion that the open justice principle does not require disclosure of witness statements simply because they have been filed at court. Even though a witness statement may have been filed there can be no certainty that it will be used for the purposes of any decision taken by a court: for example, the statement might be withdrawn before any hearing, or the claim itself may be withdrawn or compromised.

19. Similarly, the fact that in Part 54 proceedings those who make witness statements are cross-examined rarely, and only with the permission of the court, says nothing that is relevant. That different approach to cross-examination reflects only the nature of claims for judicial review: it is only rarely in such claims that the court needs to determine disputed facts, and the primary purpose of statements (which will often include hearsay evidence) is to put before the court the circumstances relevant to the court's decision on issues of law or about its application.

20. This leaves for consideration the significance of the use made of the two witness statements in the proceedings to date. I do not consider that the BBC's reliance on references to the witness statement

either at the March 2021 hearing or the November 2021 hearing makes good its submission on this application. At the March 2021 hearing no more than passing reference was made to one of the witness statements now requested, and there was no reference at all to the other. The reference that was made to Sir Jonathan Murphy's statement was not material to the actual applications decided by the court on that occasion. That reference in that context does not give rise to any requirement for the statement to be disclosed to satisfy the open justice principle.

21. More extensive references were made to both statements at the November 2021 hearing which considered Mr Saifullah's application for specific disclosure. However, each statement was used for only one specific purpose. Applications for specific disclosure in judicial review claims are rare. Specific disclosure is granted only to the extent that disclosure of documents is necessary for the fair determination of issues in the claim: see Tweed v Parades Commission [2007] 1 AC 650. When applying this standard, the court considers the extent of the evidence already available – i.e., the witness statements and exhibits already filed. Thus, at the November 2021 hearing the court did not consider the statements for the purposes of considering either the truth of their contents or whether they were sufficient or not to support any contention made by the Secretary of State in his defence to Mr Saifullah's judicial review claim. The statements were considered only to identify the scope of the evidence already filed in the proceedings so as to decide whether further evidence was required for the fair determination of the substantive issues in the case. In this case, that was a necessary interlocutory step in the proceedings. All this being so, the use made of the witness statements to date has not been such as to establish the conditions for Toulson LJ's default position to arise.

22. This context also points to the reason why the open justice principle does not justify or require disclosure of the two witness statements at this time, even if I am wrong in my conclusion that the conditions for the default position have not come to pass. There has not yet been a hearing of the substantive issues in Mr Saifullah's claim. When that hearing takes place, the open justice principle may require that statements relied on be provided to non-parties so they may follow and understand the proceedings. But the principle that gives rise to that need does not either require or justify advance disclosure of evidence in anticipation of a final hearing. Absent the final hearing there is no principle of public policy that requires early disclosure to non-parties of documents prepared for the purpose of that hearing, even if the non-party is a journalist. The parties to proceedings gather documents and prepare witness statements in aid of the court's resolution of the legal dispute between them, not as a resource for journalistic endeavour. Prior to any relevant hearing, the relevant public interest is one which permits the parties the space to identify and prepare documents relevant to the issues the court is called on to decide and file them at court. There is no strong generic public interest that at this stage, such documents should be provided to non-parties in aid of permitting scrutiny or public commentary. At this stage, the open justice principle should not provide the means for journalistic preview of what is yet to happen in court.

23. For these reasons, the BBC's application, so far as it concerns the request to be provided with copies of the witness statements of Colonel Morris and Sir Jonathan Murphy, is refused.
