Neutral Citation Number: [2019] EWCA Civ 1841

Case No: C1/2018/2531/PTA

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mrs Justice Andrews
C1/2018/2531

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2019

Before :

LORD JUSTICE UNDERHILL
and
LADY JUSTICE SIMLER

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Between :

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|---|---|
| ROGER KEARNEY | Appellant |
| - and - | |
| THE CHIEF CONSTABLE OF HAMPSHIRE POLICE | Respondent |

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Philip Rule (on the preliminary question of jurisdiction) and Mr Mark Harries QC (appearing on the substantive application) (instructed by Hackett & Dabbs LLP) for the Appellant
Matthew Holdcroft (instructed by Office of the Force Solicitor for Hampshire Police) for the Respondent

Hearing dates: 16 July 2019

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# Approved Judgment

Lady Justice Simler :

## Introduction

1. The Appellant, Roger Kearney, has been seeking to challenge by judicial review, the failure or refusal by the Chief Constable of Hampshire Police, the Respondent, to disclose original CCTV footage said to be relevant to his appeal against his conviction for murder. Andrews J refused permission to apply for judicial review. She held the application was totally without merit ("TWM") so that the Appellant was not entitled to renew his application at an oral hearing.

2. This appeal is a challenge to those decisions (to use a neutral term for reasons that will appear below), but a preliminary jurisdictional question arises as to whether the proposed appeal is "from a judgment of the High Court in any criminal cause or matter" so that s.18(1)(a) of the Senior Courts Act 1981 applies to restrict the Court of Appeal's jurisdiction to consider it.

3. It is common ground that if the court has no jurisdiction to hear the appeal, then, subject to a point of law of general public importance first being certified, the only route of appeal from the Administrative Court is or would be to the Supreme Court with permission granted either by the Administrative Court or by the Supreme Court itself. On the other hand, if the court does have jurisdiction, the question whether permission to appeal should be given must then be determined.

## Background facts

4. The background against which the jurisdictional question arises can be summarised as follows. The Appellant was convicted of the murder of Paula Poolton who was killed in October 2008. There was no forensic evidence linking him (or any other individual) to this murder, as was made clear to the jury. His conviction was based on many strands of circumstantial evidence of varying degrees of strength and cogency. One of these strands was the prosecution and defence CCTV experts' interpretation of CCTV footage relied on by the prosecution to show the probability that the vehicle captured in various frames between 21.30 (when he left home and drove to meet the victim), 21.40 (when she was captured on CCTV at Tesco), and 22.26 (when her phone stopped responding to calls/texts) and he continued to his work, arriving late and completing his shift, was the motor car driven by the Appellant, albeit there was no positive evidence identifying that vehicle by its registration number since no registration plate was visible.

5. Following his unanimous conviction on 11 June 2010, the Appellant applied for permission to appeal but was refused permission by Evans J (on the papers) by a decision of 18 November 2010. An application to renew to an oral hearing was made but withdrawn by the Appellant before the hearing. That withdrawal brought the criminal appeal proceedings to an end.

6. Subsequently, in December 2012 the Appellant made an application to the Criminal Cases Review Commission ("the CCRC") to refer his conviction to the Court of Appeal Criminal Division. To support his application to the CCRC, the Appellant requested (for the first time) the original CCTV footage from which extracts were produced by

the prosecution at his trial and assembled in a compilation disc played to the jury at trial. It is his case that the original footage is relevant to the question whether or not he left home in sufficient time to have committed the murder before he arrived at his place of work that evening. It is therefore relevant to the safety of his conviction and his alibi for the relevant time. The Appellant has obtained a preliminary report from an expert expressing a positive view on this question but he has asked to see the original CCTV footage given issues as to the quality of the compilation footage.

7. The Respondent originally expressed her willingness to disclose the material to the CCRC, but declined to disclose it to the Appellant directly.

8. The CCRC however, made clear that they did not propose to instruct their own expert to examine the footage. As the CCRC explained, it gave careful consideration to each of the submissions made on behalf of the Appellant regarding the CCTV evidence and considered whether any further work should be undertaken. It did not identify any work that it considered could potentially lead to a finding that would undermine the safety of the Appellant's conviction. In particular, it observed that both trial experts identified other vehicles which they considered presented in a similar way to the vehicle said to have been driven by the Appellant at the material time. Where there was a possibility that the captured image was of an alternative vehicle, this was highlighted. The CCRC found no evidence to suggest that the trial experts had not undertaken thorough and fully considered examinations of the material in question. Moreover, there were agreed sightings of the Appellant's car captured on the CCTV footage and the CCRC concluded that even if other vehicles indistinguishable to the Appellant's vehicle were captured on CCTV around the murder scene, outside the original timeframes, this would not significantly undermine the significance of the agreed sightings. For these and other reasons, the CCRC did not delay their decision on the Appellant's case to await disclosure of the original CCTV footage.

9. By a decision dated 31 October 2017, the CCRC concluded that there are no grounds to refer the Appellant's conviction to the Court of Appeal and declined to do so. By that time, the CCRC had undertaken its own enquiries and instructed further DNA testing but ultimately, had not been able to identify any new evidence or a new argument which it considered would give rise to a real possibility that the Court of Appeal would quash the Appellant's conviction. The CCRC gave comprehensive and cogent reasons for its adverse decision on the Appellant's prospects of success in an appeal against conviction.

10. Notwithstanding the CCRC's decision, and supported by a charity called "Inside Justice", the Appellant has continued to seek disclosure of the original CCTV footage. The Respondent has maintained her refusal to disclose the material to the Appellant, ultimately concluding that it is not required for a legal purpose because of the CCRC's disengagement. Further, and in any event, the Respondent concluded that it would be disproportionate to disclose the material in the particular circumstances.

11. By a judicial review claim form filed on 18 July 2018, the Appellant sought to challenge the refusal of post-conviction disclosure on public law grounds. The application was resisted. By a decision (again, using a neutral term) made on the papers, dated 11 October 2018, Andrews J refused permission to apply for judicial review and certified the application as TWM. The judge gave full reasons, concluding that there is no obligation on the Respondent in circumstances such as this to disclose material to assist

the Appellant in an attempt to persuade the CCRC to change its mind. She observed that the Respondent fully complied with all her legal post-conviction disclosure obligations: the material requested was not new and it was rational for the Respondent to conclude that it is not material which might cast doubt on the safety of the conviction and that its disclosure would entail a disproportionate allocation of police resources. There was no prospect of establishing that the ongoing refusal is a disproportionate interference with the Appellant's human rights. The judge's certification of the application as TWM meant that the Appellant could not request that the decision to refuse permission should be reconsidered at an oral hearing.

## The legal framework

12. It has long been the case that appeals from the High Court in criminal causes or matters lie to the Supreme Court (and before its creation to the Judicial Committee of the House of Lords) and not to the Court of Appeal. This flows from successive statutory provisions, now found in s.18(1) of the Senior Courts Act 1981 ("the SCA") which provides:

> "18. – Restrictions on appeals to Court of Appeal
>
> (1) No appeal shall lie to the Court of Appeal –
>
> (a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter;
>
> (b) from any order of the High Court or any other court or tribunal allowing an extension of time for appealing from a judgment or order;
>
> (c) from any order, judgment or decision of the High Court or any other court or tribunal which, by virtue of any provision (however expressed) of this or any other Act, is final."

It is common ground that the relevant provision here is s.18(1)(a) SCA and that there is no exception provided by the Administration of Justice Act 1960 ("the AJA") that is relevant to this case.

13. Section 151(1) SCA defines "cause" as meaning "any action or any criminal proceedings" and "matter" as meaning "any proceedings in court not in a cause."

14. Section 1 AJA provides:

> "1. – Right of appeal.
>
> (1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor, -
>
> (a) from any decision of the High Court in a criminal cause or matter; …"

15. The restriction on appeals to the Court of Appeal contained in s.18 SCA was considered in R (McAtee) v Secretary of State for Justice [2018] EWCA Civ 2851, [2019] 1 WLR 3766, where the Court of Appeal considered a number of earlier authorities in light of

R (Belhaj and another) v DPP and another (No.1) [2018] UKSC 33, [2018] 3 WLR 435.

16. McAtee concerned a judicial review challenge to the requirement to be subject to an indeterminate licence for a minimum period of ten years without any right of review (under the regime known as "IPP"). The claimant in that case sought a declaration that his IPP licence was incompatible with his Article 8 Convention rights. At paragraph 41, this court extracted the following principles, some overlapping, from the decision of the Supreme Court in Belhaj:

> "(1) For the purposes of s.18 of the Senior Courts Act 1981 a broad meaning is to be given to the phrase "criminal cause or matter".
>
> (2) The phrase applies with regard to any question raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises.
>
> (3) A decision on a matter which is collateral to the exercise of criminal jurisdiction will not necessarily be a decision in a "criminal cause or matter."
>
> (4) A "matter" is wider than a "cause."
>
> (5) It is necessary to focus on the nature and character of the underlying litigation in which the matter arises.
>
> (6) Judicial review is not to be regarded as inherently a civil proceeding. It depends on the subject matter whether or not it is so in any given case."

17. At paragraphs 47 and 49 (there is no paragraph 48) the court observed:

> "47. While the Supreme Court in *Belhaj* has affirmed the approach taken nearly 130 years ago in *ex parte Woodhall* and has endorsed a broad meaning for the words "criminal cause or matter", we make clear that, where this particular jurisdictional issue arises, a careful individual appraisal remains necessary by reference to the circumstances of each case. It certainly is not the law that just because the underlying proceedings are criminal in nature that any decision or step thereafter taken which has some sort of connection with those criminal proceedings is necessarily of itself a criminal cause or matter. That is made clear by Lord Sumption in *Belhaj* (at [20]) and in his approval of the approach and decision taken in *Guardian News.*
>
> 49. It is, in my view, accordingly salutary that there should not be an over-expansive interpretation of the phrase "criminal cause or matter" and neither should there be an over-expansive approach to addressing the jurisdictional issue. After all, while some cases in the Divisional Court or Administrative Court are at a second level of judicial decision making – for example, appeals by way of case stated – many are not (the present case is an example). If a case is a criminal cause or matter then the only route of appeal is to the Supreme Court. Not only is that complex and expensive for litigants but also (and importantly) such an appeal is only possible if the court has first certified that a point of law of general public importance arises. That is a high bar to cross; many, indeed most, cases are not

> likely to be able to cross it. Moreover, for those relatively few cases which do raise an important point of law, the Supreme Court will then be required to deal with them without what one would hope would be considered the benefit of the decision and reasoning of a three judge constitution of the Court of Appeal."

18. Nonetheless, the court concluded that McAtee's case fell clearly on the criminal side of the line. The fact that a declaration of incompatibility was sought, did not by itself mean the case was not a criminal cause or matter since that would be to allow form to triumph over substance. Such a declaration was sought entirely on the basis that if granted, it could result in an alteration to the licence provisions to which the claimant was subject as a fundamental part of his sentence. The statutory licensing regime was part and parcel of the sentence so that a challenge to it is a criminal cause or matter. Accordingly the court concluded that it had no jurisdiction to entertain the application in that case.

**The arguments advanced by the parties**

19. Mr Philip Rule of counsel, who has made submissions on the preliminary question of jurisdiction on behalf of the Appellant, advances four principal arguments to found this court's jurisdiction to consider his appeal, in summary as follows. First, he submits the decision of Andrews J in the Administrative Court is not a "judgment … in a criminal cause or matter" because the Appellant's case is properly collateral to any criminal cause or matter and not within it, just as the proceedings in R (Guardian News and Media Ltd) v City of Westminster Magistrates Court [2011] EWCA Civ 118, [2011] 1 WLR 3253, were truly collateral. It is mere happenstance that the relevant police force has the documents he seeks. They could have been held by a local authority and therefore at an even further remove from any criminal proceedings. Further, the judicial review proceedings involve different parties to those who would be involved in any relevant criminal cause or matter, and a decision of an executive officer (not a court) in relation to disclosure obligations, which is well within the supervisory jurisdiction of the courts and is the subject of the public law review challenge. There are no extant criminal proceedings (and so no underlying criminal litigation), and the Appellant is many steps away from reaching even the first stage of any future criminal appeal, which is at this stage no more than a speculative possibility.

20. Nor, he submits in any event, is the decision below a "judgment". Consistently with what Mr Rule submits is the recognised distinction in criminal proceedings between a judgment (the pronouncement in court) and order (the formal paper order that follows), s.18(1) SCA is careful to distinguish between what is a "judgment" and what is merely a decision or order. Section 18 (1)(a) makes clear that the prohibition relates only to judgments.

21. The second and third arguments advanced are overlapping. Mr Rule submits that if a literal construction of s.18(1)(a) SCA produces the result contended for by the Respondent, the court is bound to construe the words in that section ("judgment" and/or "criminal cause or matter") restrictively and give them as narrow a meaning as possible consistently with the fundamental right to access to justice whether at common law or by reference to Article 6 of the Convention and ss.3 and/or 6 of the Human Rights Act 1998. Mr Rule relies on the judgment of the Supreme Court in R (UNISON) v Lord Chancellor [2017] UKSC 51, [2017] 3 WLR 409, especially at paragraphs 76-85, and submits the right of access to justice applies to appeal rights, particularly where a first

instance decision is made without oral argument, and is infringed where the means of correcting error in the functioning of the system is lost. Here, he complains that a single judge alone has considered this case on the papers, without an oral hearing because of the TWM certification (pursuant to CPR 54.12(7)). In those circumstances, to be deprived of any right of appeal to the Court of Appeal, particularly in the context of disclosure obligations concerning material with potential bearing on a miscarriage of justice, is an unjustified restriction on the Appellant's access to justice. Mr Rule relies on the safeguards in the TWM process which have been held to include the ability for a claimant to access an appeal to the Court of Appeal (see for example, the observations of Maurice Kay LJ Grace v SSHD [2014] EWCA Civ 1091, [2014] 1 WLR 3432) but submits this safeguard would not be available here on the Respondent's approach. The Appellant has also been deprived of the opportunity available under CPR 52.8(5) of this court itself giving permission to apply for judicial review and/or hearing the judicial review itself. Those implications have not been adequately considered, and Parliament could not have intended those consequences to follow from the general terms of the relevant CPR rules. To deny the Appellant a right of appeal against both decisions is either ultra vires the primary legislation or contrary to the legislative purpose, and so there must be an interpretation that is consistent with the common law rights of effective access to the courts. He submits that the proper conclusion is therefore that this court does have jurisdiction to consider this appeal and/or the criteria by which to certify any case as TWM must be restricted.

22. Thirdly, even if the proceedings do constitute a criminal cause or matter, the Appellant contends that a convicted person has a recognised common law right to disclosure of information casting doubt on the safety of his conviction so that these proceedings concern the determination of his civil rights and engage Article 6 of the Convention. While he accepts that Article 6(1) does not guarantee a right of appeal from a first instance decision, Mr Rule submits that where domestic law provides such a right, it must be operated in a way that is compatible with the Convention. To act compatibly in these circumstances, the court ought to construe the legal framework in accordance with ss.3 and/or 6 of the Human Rights Act 1998 as not excluding a right of appeal to this court. Mr Rule also relies on the additional possibility of a freestanding right of appeal being recognised as available under s.9 of the Human Rights Act 1998 where Article 6 would otherwise be violated, to remedy the unfairness otherwise created by s.18(1) SCA, as discussed in CGU International Insurance Plc v AstraZeneca Insurance Co Ltd [2006] EWCA Civ 1340, [2007] Bus LR 162.

23. Fourth and finally, Mr Rule contends in the further alternative that, uniquely in this case, any changed approach to the jurisdiction of the courts understood at the date of the decision of Andrews J ought not to be applied retrospectively to deny any prospect of review of that decision. Andrews J would have understood that if shown to be plainly wrong, her decision could be set aside by the Court of Appeal. She would not have understood that no potential for reconsideration by this court was available.

24. The Respondent resists those submissions. First, Mr Matthew Holdcroft who appears for the Respondent, contends the decision of Andrews J was a judgment in a criminal cause or matter on the ordinary construction of s.18(1)(a) SCA. He relies on the need to focus on the nature and character of the underlying litigation in which the matter arises (the fifth principle stated in McAtee). Here the underlying purpose of the

Appellant's application is to challenge his criminal conviction. There is no other collateral purpose.

25. He places particular reliance on R (Nunn) v Chief Constable of Suffolk Police [2014] UKSC 37, [2015] AC 225 where the court acknowledged the existence of criminal cases involving miscarriages of justice but held that it did not follow from such cases that the law ought to impose a general duty on police forces holding archived investigation material, to respond to every request for further inquiry made on behalf of those disputing the correctness of their convictions. The court held there is no such duty. Just as the duty of disclosure pending appeal is limited to material that can be demonstrated to be relevant to the safety of the conviction, after appellate rights afforded by the system are exhausted, the continuing disclosure obligations are also limited. There is a public interest in finality of proceedings, and after the conclusion of proceedings, the disclosure obligation arises where material comes to light that might afford arguable grounds for contending that the conviction was unsafe.

26. Mr Holdcroft relies on the similarity of the issue in Nunn to that which arises in this case and although the question of criminal cause or matter was not explicitly addressed in Nunn, the appeal went directly to the Supreme Court and provides implicit support for treating this application as a criminal cause or matter.

27. Secondly, the Respondent submits that Andrews J's decision is a "judgment" within the meaning of paragraphs 6.1 and 6.2 of Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 which identify "categories of judgment" as including "decisions on applications that only decide that the application is arguable". Furthermore, the Respondent submits that s.18(1)(a) SCA must be read together with s.1 AJA so that whether her decision is described as a decision, order or judgment does not impact upon the fact that an appeal only lies to the Supreme Court.

28. As for the alternative arguments based on rights of access to justice, Mr Holdcroft contends that the Appellant has in fact enjoyed unimpeded access to justice having received a fair trial and had available to him the opportunity to appeal to the Court of Appeal (Criminal Division) and the benefit of consideration by the CCRC. Moreover, he submits that reliance on CPR 52.8(2) is misconceived. The CPR cannot circumvent the clear and unambiguous language of two statutes whose intent is clear. The degree of intrusion on the right of access to the court is clearly delineated and is reasonably necessary to fulfil the legislative objective. There is no warrant for interpreting the words judgment or criminal cause or matter any differently. Finally, Mr Holdcroft disputes that the Appellant is in a unique situation and submits there is no changed approach to the court's jurisdiction to deal with cases such as this.

## Discussion and conclusions

29. Despite his clear and well-structured arguments, I do not accept the submissions made by Mr Rule and have concluded that the decision of Andrews J falls clearly on the wrong side of the jurisdictional line so far as the Appellant is concerned, and is a judgment in a criminal matter. Accordingly, by reason of the provisions of s.18(1) SCA this court has no jurisdiction to hear this appeal. My reasons are as follows.

30. The words "judgment … in any criminal cause or matter" now contained in s.18(1) SCA first appeared in s.47 of the Supreme Court of Judicature Act 1873. This provided:

> "47. Provision for Crown cases reserved.
>
> The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of "the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the Judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the Judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said Judges under the said Act of the eleventh and twelfth years of Her Majesty's reign."
>
> (Emphasis added).

31. In an early case in which the phrase was interpreted, The Queen, On the Prosecution of Hargraves and Others v Steel and Others (1876) 2 QBD 37, the Court of Appeal held that a costs order fell within the meaning of "judgment" because it was a consequence of the judgment in the case:

> "the general right of appeal given by s.19 from any judgment of the High Court is excepted in any criminal cause or matter; that the costs were the consequence of the judgment, and were within the exception; and that the Court of Appeal had no jurisdiction."

32. In ex parte Alice Woodhall (1888) 20 QBD 832 the Court of Appeal applied the provisions of s.47 of the 1873 Act to a "decision by way of judicial determination", suggesting that the two terms were used interchangeably, and the term "judgment" was intended to be broadly interpreted as including orders and decisions:

> "I think that the clause of s.47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises."

33. In 1925, s.47 of the 1873 Act was replaced by s.31 of the Supreme Court of Judicature (Consolidation) Act 1925 in the following terms:

> "31.— Restrictions on appeals.
>
> (1) No appeal shall lie—
>
> > (a) except as provided by the Criminal Appeal Act 1907, or this Act, from any judgment of the High Court in any criminal cause or matter;

> (b) from an order allowing an extension of time for appealing from a judgment or order;
>
> (c) from an order of a judge giving unconditional leave to defend an action;
>
> (d) from the decision of the High Court or of any judge thereof where it is provided by any Act that the decision of any court or judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final."

34. Section 31(1)(a) of the 1925 Act was amended by s.1 AJA, which used the term "decision" rather than "judgment":

> "1.— Right of appeal.
>
> (1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor,—
>
> (a) from any decision of the High Court in a criminal cause or matter ..".

35. Section 18 of the Supreme Court Act 1981 replaced s.31 of the 1925 Act. This Act was renamed the Senior Courts Act 1981 ("the SCA"), however the wording of s.18 remained unchanged. For convenience it is set out again:

> "18.— Restrictions on appeals to Court of Appeal.
>
> (1) No appeal shall lie to the Court of Appeal—
>
> (a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter;
>
> (b) from any order of the High Court or any other court or tribunal allowing an extension of time for appealing from a judgment or order;
>
> (c) from any order, judgment or decision of the High Court or any other court or tribunal which, by virtue of any provision (however expressed) of this or any other Act, is final."
>
> (Emphasis added)

36. The distinction sought to be drawn by the Appellant between a "judgment" on the one hand and a mere decision or order on the other is not supported by the legislative history, or any judicial decision drawn to the court's attention. Although it is true that s.18(1)(b) and (1)(c) SCA are more specific in their references to orders and decisions (the former in terms of "any order of the High Court… allowing an extension of time for appealing from a judgment or order" and the latter in terms of "order, judgment or decision of the High Court… which, by virtue of any provision (however expressed) of this or any other Act, is final") there is no consistency in the use of the different terms in s 18(1) SCA or its predecessor sections, and no clearly delineated distinction between judgments and orders exists in the context of criminal proceedings. In the circumstances, I do not read these provisions as intended to have discriminating effects in this context. Rather it seems to me that the terms "decision", "order", and

"judgment" are used to an extent interchangeably in order to achieve the result that any judicial determination of any question raised in or with regard to criminal proceedings is covered, and that Parliament can be presumed to have legislated in the knowledge of, and having regard to, the judicial decisions referred to above: see Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] UKHL 3, [1933] AC 402 at 411.

37. That conclusion is reinforced by the need to read s.18(1) SCA together with s.1(1) AJA which makes clear that appeals lie "from any decision of the High Court in a criminal cause or matter" to the Supreme Court, and not the Court of Appeal, the clear purpose of s.18(1) SCA being to prevent certain High Court decisions being appealed to the Court of Appeal, whether they take the form of orders or judgments.

38. A similar argument to that advanced by Mr Rule in this case was rejected by the House of Lords in Government of the United States of America v Montgomery and another [2001] UKHL 3, [2001] 1 WLR 196. The case concerned an appeal from restraint orders made by Collins J in the High Court under s.77 of the Criminal Justice Act 1988 against two appellants. The orders restrained them from disposing of various assets and required the disclosure of financial information to support confiscation orders which had been made by a Federal District Court in the United States against one of the appellants and her former husband, following the conviction of the latter in 1984 for fraud against the Government of the United States. At paragraph 13 Lord Hoffmann said:

> "13. Mr Mitchell QC, who appeared for the US Government, submitted that whether the restraint order had been made in a criminal cause or matter or not, it was an "order" and not a "judgment" within the meaning of section 18(1)(a). In civil procedure there was a distinction between judgments and orders, which was discussed by Lord Esher MR in Onslow v Commissioners of Inland Revenue (1890) 20 QBD 465. Put shortly, a judgment was a decision obtained in an action. Other decisions of the court were orders. But this distinction is impossible to transpose into criminal procedure. Ever since the phrase "judgment of the High Court in any criminal cause or matter" first appeared in section 47 of the Judicature Act 1873, it has been uniformly interpreted as applying generally to all orders made in a criminal cause or matter: see R v Steel (1876) 2 QBD 37; Ex parte Alice Woodhall (1888) 20 QBD 832. I would therefore reject this submission."

That conclusion is binding on this court.

39. For all these reasons the word "judgment" is interpreted broadly and encompasses any decision or order by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises.

40. Turning to the phrase "criminal cause or matter", the courts have repeatedly declined to provide an exhaustive definition of what is or is not a criminal cause or matter. But since the decision in ex parte Woodhall (1888) 20 QBD 832 it has been necessary to have regard to the underlying subject matter of the proceedings to determine whether

something is a criminal cause or matter. The mere fact that the decision under challenge is a decision of an executive officer challenged on public law grounds in judicial review proceedings, which are themselves civil proceedings, does not mean that they are not proceedings in a criminal cause or matter. That approach was endorsed by the Supreme Court in Belhaj, where, albeit by reference to s.6 of the Security and Justice Act 2013, Lord Sumption JSC said in the context of judicial review claims:

> "…in its ordinary and natural meaning "proceedings in a criminal cause or matter" include proceedings by way of judicial review of a decision made in a criminal cause…" (paragraph 15).

41. At paragraph 17 Lord Sumption discussed the fact that although the High Court has only a very limited original criminal jurisdiction, it has an extensive supervisory criminal jurisdiction by way of review of decisions made in the course of criminal proceedings or in relation to prospective criminal proceedings, mainly but not only in cases where there is no statutory avenue of appeal. He continued:

> "It follows that judicial review as such cannot be regarded as an inherently civil proceeding. It may or may not be, depending on the subject matter. What is clear is that it is an integral part of the criminal justice system, whose availability is in many cases essential to the fairness of the process and its compliance with Article 6 of the Human Rights Convention. It is against this background that one must construe the phrase "proceedings in a criminal cause or matter" as it appears in s.6(11) of the Justice and Security Act 2013."

42. Further at paragraph 20 (with which Lady Hale PSC agreed) Lord Sumption essentially aligned the position under s.6 of the 2013 Act with the position relating to rights of appeal. In that regard he said a "cause" is "a proceeding, civil or criminal, actual or prospective, before a court"; and a "matter" is something wider, namely "a particular legal subject-matter, although arising in different proceedings". He continued:

> "That is why a "criminal cause or matter" in the Judicature Acts extends to a judicial review in the High Court of a decision made in relation to actual or prospective criminal proceedings: see R (Aru) v Chief Constable of Merseyside Police …The reality of the Appellants' application is that it is an attempt to require the Director of the Public Prosecutions to prosecute Sir Mark Allan. That is just as much a criminal matter as the original decision of the Director not to prosecute him. I find it difficult to conceive that Parliament could have intended to distinguish between different procedures having the same criminal subject-matter and being part of the same criminal process. This would have been a strange thing to do. But if the draftsman had intended it, he could have achieved it easily enough, for example by omitting the reference to a "matter".

That approach applies equally here.

43. The reality of the Appellant's application for judicial review is that it forms part and parcel of an attempt to reopen his appeal against conviction. The application is preliminary to and in that sense "an integral part of" criminal proceedings, namely the appeal the Appellant hopes ultimately to pursue. The very rights he seeks to exercise, post-conviction and appeal disclosure obligations of the police, are parasitic on criminal proceedings. The duty he complains has been wrongly exercised only arises as a

consequence of the criminal proceedings for murder. The suggestion that it is the police who simply happen to have the material, and mere happenstance, is untenable. If the disclosure application concerned material held by a different body, altogether different disclosure obligations would be involved, and the basis for any judicial review application would be different. In short, different proceedings would be involved. The only reason the Appellant requires the original CCTV footage is so that it can be deployed to support an appeal against his murder conviction. The fact that no appeal has yet been lodged is beside the point. Proceedings brought prior to initiating an appeal, or post-conviction, are both encompassed within it.

44. The order relied on by Mr Rule made in R (Stone) v Chief Constable of the Kent Constabulary (C1/2013/1702) which was simply an order refusing permission to appeal on the papers, cannot be regarded as binding, nor in light of McAtee is it persuasive given the limited information available in relation to it. The case concerned a post-conviction judicial review challenge based on a legitimate expectation said to arise from an initial agreement by police to disclose forensic evidence thought to go to the safety of conviction. The High Court held that the initial agreement to disclose was due to the fact that the police had been misled. In a 2013 order Aikens LJ noted that "*the refusal of Kent Police to give access to papers"* was the *"proper province for potential judicial review proceedings and is very far removed from either the past or any hypothetical future criminal proceedings*". However, the full facts and arguments of this case are not known and detailed reasons for the finding that the Court of Appeal did have jurisdiction were not articulated and cannot now be identified.

45. I accept as the Appellant has submitted, that none of the binding authorities is concerned with a case where the judicial review is concerned with obtaining disclosure for the purpose of defending criminal proceedings or bringing an appeal. Nunn was such a case but is not a binding authority because the question whether the judicial review application was a criminal cause or matter was assumed and not determined in the proceedings. But to my mind Nunn is highly persuasive given that the nature of the claim was identical to the Appellant's claim (involving as it did a judicial review of the refusal of the prosecuting police force to disclose materials for the purpose of a potential appeal against conviction) and both parties and the Supreme Court proceeded on the basis that the appeal lay directly to the Supreme Court from the decision of the Divisional Court, and by necessary implication involved a criminal cause or matter.

46. I do not regard this conclusion as surprising: the connection with the criminal process could hardly be closer. Not only is the sole purpose of the judicial review application to obtain material for the purposes of a criminal appeal but the Respondent is the police force responsible for the prosecution, and the legal basis for the claim is the common law duty of disclosure owed by a prosecutor post-conviction and appeal, as recognised in Nunn.

47. The case of R (Guardian News and Media Ltd) v City of Westminster Magistrates Court [2011] EWCA Civ 1188, [2011] 1WLR 3253 is very different. It concerned extradition proceedings brought by the Government of the United States of America relating to two individuals accused of bribery. In the course of the extradition hearing held in public in the Magistrates Court (and accepted by all to be criminal proceedings), certain documents were referred to but not read out in an open hearing. Guardian News and Media Ltd ("GNML") sought disclosure of the documents, not for the purpose of the extradition proceedings or prosecuting the appeal, but so that they could be publicly

reported by it. The application was refused by the district judge and GNML sought judicial review of the decision and appealed by way of case stated. The Divisional Court dismissed the claim and the appeal. The Court of Appeal (Lord Neuberger MR, Jackson and Aikens LJJ) granted permission to appeal to the Court of Appeal, concluding that the application made by a non-party to the criminal proceedings, was wholly collateral to the extradition proceedings and that the district judge's order involved no exercise of his criminal jurisdiction, and nor did it have any bearing on the extradition proceedings themselves. It therefore held that the Divisional Court's judgment was not made in a criminal cause or matter within s.18(1)(a) SCA.

48. It is also true, as Mr Rule submits, that the authorities on the meaning of "criminal cause or matter" have given rise to uncertainty and, as Lord Neuberger recognised in Guardian News, a degree of incoherence. However, the fact that the boundaries of the definition of "criminal cause or matter" have been difficult to identify, and that in some cases it is difficult to determine whether given proceedings are a "criminal cause or matter" does not mean the same difficulty arises in all cases. In this case the position is clear: the proceedings in the Administrative Court in this case are integral to the Appellant's future appeal against conviction. The proceedings were directed at obtaining archived evidence held by the prosecuting police authority, in reliance on post-conviction and appeal disclosure obligations, and purely for the purpose of being deployed to support such an appeal. They had no other object and although arising in different proceedings, had a criminal subject-matter.

49. I turn to consider the alternative arguments advanced by Mr Rule by reference to the important right of access to justice. The Appellant's essential complaint is that the denial of a right of appeal coupled with the denial of a right to an oral renewal hearing in the High Court because his application was certified as TWM, is contrary to the fundamental common law right of access to justice and his Article 6 Convention rights. One or other, at least, is required to ensure that a claim is not considered solely by a single judge on the papers. Leaving to one side the fact that the Appellant has the right to seek permission to appeal from the Supreme Court albeit only having first been granted a certificate from the High Court (which in reality he would not have got), I take each point in turn, recognising that his argument depends on the combination of these two points.

50. First, the fact that the Appellant has no right to an oral hearing in the High Court is the consequence of CPR 54.12(7). The lawfulness and/or validity of that rule is not challenged by Mr Rule in these proceedings as in itself an unjustified restriction on access to justice, although I accept that if it were material to his case on jurisdiction, this court could consider whether it is unlawful. Viewed in isolation, however, I do not consider that it is. Access to justice does not entail that a litigant has an absolute entitlement to an oral hearing, and certainly not in a case where a judge makes a carefully reasoned decision that there is no rational basis on which the claim could succeed so that it is bound to fail and accordingly, totally without merit. As this court held in R (Grace) v Secretary of State for the Home Department [2014] EWCA Civ 1091, [2014] 1 WLR 3432, the purpose of CPR 54.12(7) is to limit the unjustified burden placed on public authorities and the courts, of hopeless applications for judicial review that are bound to fail. In most cases there are two safeguards, both present in Grace, identified as sufficient to ensure that the TWM procedure does not detract from the important judicial review jurisdiction: first, that no judge would certify an

application as TWM unless confident after careful consideration on the papers, and recognising the serious consequences that follow, that the application was bound to fail; and secondly, the claimant would still have access to an appeal to the Court of Appeal, and therefore to an independent and careful consideration of the application by a more senior judge. The court did not have to address the question whether one of those safeguards would have been sufficient without the other.

51. Mr Rule submits that the difficulty with a TWM certification arises in a case involving a criminal cause or matter because the twin safeguards are not then available. It is only in such a case that he submits accordingly, that CPR 54.12 (7) should be interpreted as requiring an oral hearing. But this approach renders meaningless the TWM scheme whose whole purpose is to avoid an unjustified oral hearing in a claim considered by a senior judge to be devoid of any rational basis on which it could succeed, and therefore bound to fail.

52. Secondly, the fact that there is no right of appeal to the Court of Appeal in a criminal cause or matter is the consequence of primary legislation, namely s.18 (1) SCA. Any challenge to s.18 (1) itself would require the Appellant to bring proceedings for a declaration of incompatibility and the Lord Chancellor would have to be a party. Moreover, it is common ground that Article 6 of the Convention does not confer or require a right of appeal in any particular case. Mr Rule submits that s.18(1) should be read as not excluding an appeal to the Court of Appeal in a case that is arguably a criminal cause or matter where there has only been a paper consideration of the application for judicial review. In other words, an appeal in such a case would only be excluded following a judgment or order made at or after an oral hearing. But that is unprincipled because it puts a claimant in a better position following a paper rejection of his or her claim than he or she would have been after an oral hearing in the High Court, and is an irrational approach.

53. The arguments advanced by the Appellant in relation to CPR 52.8 (5) are also untenable. The rule provides:

> "52.8(5). On an application under paragraph (1) or (2), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review."

It follows from this wording that the Court of Appeal may only exercise its power under CPR 52.8(5), as an alternative to granting permission to appeal, if there has been an application for permission to appeal; and that necessarily entails an application for permission to appeal which the Court of Appeal has jurisdiction to entertain. Consequently, if there is no jurisdiction to grant permission to appeal then the court also has no jurisdiction in the alternative to grant permission to apply for judicial review under sub-rule (5).

54. In reality, the only avenue available to the Appellant is to invite this court, as Mr Rule does, to give a restricted meaning to the words "judgment …. in a criminal cause or matter" in order to avoid what he says is the denial of access to justice arising from the combination of circumstances in the present case. However, I do not consider there has been any such denial here. Rather, the Appellant has had considerable access to justice in this case. First, he has had the benefit of rights of appeal to the Court of Appeal (Criminal Division) potentially comprising two stages: first a paper application

and consideration; and secondly a renewed application made orally to the full court. That he chose to abandon his application for an oral hearing was a matter of strategic choice and not a denial of access to justice. Furthermore, he has had the benefit of specialist consideration of a further appeal to the Court of Appeal (Criminal Division) by the CCRC. Likewise, that the CCRC concluded that his appeal did not qualify for a referral is not a denial of access to justice but reflects the exercise of access to justice rights. He has also had access to the Administrative Court on his application for judicial review and has had a careful determination on the merits of his claim, albeit on paper only because the application was totally without merit.

55. While I recognise that it is unusual (and not altogether satisfactory) for a judicial review claim to be determined by a single judge on the papers without recourse to either an oral hearing or an appeal, this situation is likely to occur in a rare combination of circumstances involving a claim considered to be TWM and a High Court decision made in a criminal cause or matter. The right to access justice does not entitle an individual to re-litigate the same subject matter repeatedly, still less where his claim is judged to be totally without merit on its first consideration. Moreover, in criminal proceedings, the CCRC can always be invited to reopen an appeal if a proper basis for doing so emerges, and if the CCRC fails to do so, that decision can itself be challenged on judicial review.

56. For all these reasons, there is no basis for concluding that the denial of an oral reconsideration in a judicial review claim that is totally without merit and/or an appeal where the case concerns a judgment in a criminal cause or matter amounts to an unjustified or disproportionate restriction or denial of access to justice rights in the circumstances of this case.

57. Nor do I consider that there is any substantial defect in the fairness of the process below, or such unfairness in the TWM certification or the determination of the judge that could begin to justify the exercise of a residual jurisdiction to enable this court to review the decision of Andrews J on appeal notwithstanding s.18(1) SCA, such as was discussed in AstraZeneca. The test adopted by this court in that case was that there had to be such unfairness in the process as to amount to a breach of Article 6 of the Convention before the residual jurisdiction could be invoked. Further, as this court emphasised at paragraph 100, it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced since the courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument that subverts or undermines the relevant statutory scheme. For the reasons already given, there is no such unfairness here.

58. Finally, I do not accept the arguments based on the Appellant's unique situation. The question whether or not to certify an application as TWM is an objective question that depends on a determination that the application was bound to fail. As this court observed in Wasif v SSHD [2016] EWCA Civ 82, [2016] 1 WLR 2793, repeating the observations of Maurice Kay LJ at paragraph 15 of his judgment in Grace,

> "no judge will certify an application as TWM unless confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case".

59. As the court explained, the value of an oral renewal hearing lies in the opportunity it affords for a claimant to address perceived weaknesses in his or her claim which have led the judge to refuse permission on the papers. The judge should only certify the application as TWM if satisfied that in the circumstances of the particular case a hearing could not serve such a purpose. Where there is any real doubt, the claimant should get the benefit of it. Given that the question whether the application was a "criminal cause or matter" did not arise at the stage at which Andrews J was dealing with this matter, it is not possible to determine whether she appreciated that it was such a case and if so the consequences. But that is neither here nor there; whether the application was TWM is an objective question and I have no reason to doubt that she carefully considered whether the claim was truly bound to fail, recognising the seriousness of the consequences of that conclusion before making it.

60. For all these reasons, I am satisfied that decision of Andrews J refusing the application for judicial review is a judgment in a criminal cause or matter within the meaning of s.18(1)(a) SCA. That provision does not have the restricted meaning contended for by the Appellant, notwithstanding the particular consequences for this Appellant, and there is no other proper basis for restricting the effect or application of s.18(1)(a) SCA in this case. In my judgment this court has no jurisdiction to consider this appeal.

**Lord Justice Underhill**:

61. I agree that this appeal should be dismissed on the basis that this Court has no jurisdiction to entertain it because Andrews J's decision to refuse permission to apply for judicial review was "a judgment ... in [a] criminal cause or matter" within the meaning of s.18(1)(a) of the Senior Courts Act 1981. My reasons are substantially the same as Simler LJ's, but I will briefly state them in my own words.

62. As to whether Andrews J's decision constituted a "judgment", Lord Hoffmann at paragraph 13 of his speech in Montgomery holds that that term applies generally to all orders made in a criminal cause or matter. That seems to me the end of the matter, although I also agree with the points made by Simler LJ at paragraphs 36-37 of her judgment.

63. As to whether that judgment was made was "in [a] criminal cause or matter", it has long been established that that phrase may cover not only decisions made in the course of criminal proceedings themselves but also decisions made by officials in relation to the criminal process, including prospective criminal proceedings. That is stated in terms by Lord Sumption at the start of paragraph 16 of his judgment in Belhaj and he goes on in that paragraph to give a number of examples. It is true that none of those examples specifically concerns a decision by a chief constable of a police force responsible for a prosecution about the disclosure of documents sought for the purpose of an intended appeal following that prosecution; but I can see no reason why such decisions should be regarded as being of any different character. The duty of disclosure relied on by the Appellant depends entirely on the involvement of the Hampshire police in the prosecution, and the availability of judicial review to challenge such a decision is, to use Lord Sumption's language at the end of paragraph 16, "an integral part of the criminal justice system". That seems to me self-evident and is no doubt why neither the parties nor the Supreme Court in Nunn, which is precisely such a case, believed that an appeal lay to this Court.

64. I do not believe that that analysis is affected by the fact that Andrews J's certification of the Appellant's application as "totally without merit" meant that he was not entitled to an oral hearing in the Administrative Court. I agree with what Simler LJ says at paragraphs 51-53 of her judgment. As she says at paragraph 54, the only way that the Appellant can realistically deploy the point is to contend that s.18(1)(a) should be interpreted differently in cases where there has been no oral hearing at first instance. There is no warrant for that distinction in the language of the provision itself, and it could only be advanced on the basis that it was nevertheless required in order to avoid a breach of Article 6 of the Convention.

65. As to that, I am far from sure that such an interpretation would be possible even having regard to the strength of the interpretative obligation under s.3 of the Human Rights Act 1998. But I am not persuaded that the unavailability of both a right to an oral renewal hearing and a right to seek permission to appeal from this Court involves any breach of the Appellant's Article 6 rights in any event. The full review of the Strasbourg case-law in the speech of Lord Hope in R (Dudson) v Secretary of State for the Home Department [2005] UKHL 52, [2006] 1 AC 245 – see paragraphs 27-34 (pp. 256-9) – makes it clear that Article 6 does not require an oral hearing of every application made in the context of criminal proceedings, and more particularly of a criminal appeal. As he put it at paragraph 34 (page 259 E-F):

> "The application of the article to proceedings other than at first instance depends on the special features of the proceedings in question. Account must be taken of the entirety of the proceedings of which they form part, including those at first instance. Account must also be taken of the role of the person or person conducting the proceedings that are in question, the nature of the system within which they are being conducted and the scope of the powers that are being exercised. The overriding question, which is essentially a practical one as it depends on the facts of each case, is whether the issues that had to be dealt with at the stage could properly, as a matter of fair trial, be determined without hearing the applicant orally."

The same principles must, I think, apply equally to the question of whether Article 6 requires that there be a right of appeal against the refusal of an application made in the context of an appeal: what fairness requires depends on the circumstances of the particular case. In the present case, as Simler LJ says at paragraph 54, the Appellant has not only had a full trial and a right of appeal against his initial conviction (albeit not pursued) but the benefit of a full review of his case by the CCRC which has concluded (in effect) that the disclosure which he now seeks cannot assist an appeal. It is also important that the reason why he was not entitled to an oral renewal was that a High Court Judge has reached a fully-reasoned conclusion that his claim is totally without merit. In those circumstances I cannot see that the absence of a right of appeal from her decision constitutes a breach of Article 6.

66. I accept that it is very unusual in our system to encounter a judicial decision, made without a hearing, which cannot either be reviewed at an oral hearing or be the subject at least of an application for permission to appeal, and that fact has given me some pause. But I see no escape from the conclusion that that is the effect of the particular

rules and statutory provisions in play in the present case; and I do not believe that it gives rise to any injustice in the circumstances of the present case.