If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 288 (Admin)

CO/5081/2017

Royal Courts of Justice
Wednesday, 16 January 2019

Before:

LORD JUSTICE BEAN
MRS JUSTICE SIMLER

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
TERENCE PATRICK EWING — Claimant

- and -

CROWN COURT AT ISLEWORTH — Defendant

- and -

(1) DIRECTOR OF PUBLIC PROSECUTIONS
(2) HM COURTS AND TRIBUNAL SERVICE — Interested Parties

THE CLAIMANT appeared in Person.
MR L MABLY QC and MR H FLANAGAN (instructed by the Government Legal Department) appeared on behalf of the Defendant and the Second Interested Party.
THE FIRST INTERESTED PARTY was not present and was not represented.

J U D G M E N T

LORD JUSTICE BEAN:

1 On 2 August 2017, in court 10 at the Crown Court at Isleworth, an appeal was being heard by Mr Recorder Hill-Smith and two lay justices. The case was in its fourth day. Dr Sheida Oraki was appealing against conviction for obstructing a police officer in the execution of his duty. Her son, Mr Ramtin Oraki, was appealing against a conviction on a similar count and one of assaulting a police officer.

2 The present claimant, Mr Terence Ewing, had been observing much of the case. He was neither a party to it nor a witness in it, but a supporter of the appellants. At about 3 p.m. on 2 August, he left court. He returned at 5.15 p.m. when the case was still going on. The recorder was delivering the court's judgment on the appeal. We have a transcript of his ruling which runs to 10 pages. Only when the recorder had finished giving that judgment was the claimant permitted to re-enter the court.

3 Although the facts of the Oraki case itself, and indeed the Crown Court's decision on the appeals, are not relevant, we note for the record that Dr Sheida Oraki's appeal against conviction was dismissed. Mr Ramtin Oraki's appeal against the assault conviction was allowed. His appeal against the obstruction conviction was dismissed, but he appealed by way of case stated to this court, which quashed the conviction: see the reported judgment at [2018] 2 WLR 1725.

4 We have witness statements from the claimant and from Ms Harpreet Dale, Director of Operations for the Harrow and Isleworth Crown Courts, as to the exact facts of what occurred outside court 10 on 2 August. There are very small differences of fact, but they are, as we see it, of no significance to the point which we have to determine, which was whether the claimant's exclusion was lawful.

5 Mr Ewing is a vexatious litigant who has to obtain the permission of a High Court judge to issue proceedings, pursuant to section 42 of the Senior Courts Act 1981. It is not suggested that that was the reason why he was excluded from the court or that any other member of the public would have been treated differently. It did mean that he had to obtain leave under section 42, as he did successfully in *R (on the application of Ewing) v Cardiff Crown Court* [2016] 4 WLR 21. Such leave was granted by Supperstone J on 11 January 2018. So the claim was issued, and permission for judicial review was granted by Walker J on the papers on 23 April 2018.

6 The Director of Public Prosecutions ("DPP") and HM Courts & Tribunals Service ("HMCTS") were added as interested parties. The DPP has played no active part in the proceedings. Mr Mably QC and Mr Flanagan have represented both the defendant Crown Court and HMCTS.

7 In granting permission, Walker J observed:

> "An usher can tell those who enter a courtroom while proceedings are underway that they must do so quietly. If they enter quietly then it is difficult to see how they will disrupt proceedings of whatever kind."

8 He granted a protective costs order in this case.

9 HMCTS filed two witness statements: one was that of Ms Dale, to which I have already referred; the other was of HMCTS's Director of Operations at a national level, Mr Guy Tomkins. He stated:

> "I am aware of the etiquette and/or practices that are adopted in Crown Court Centres across the jurisdiction of England and Wales in relation to movement into and around courtrooms during certain important or formal parts of criminal proceedings. I understand that the picture is broadly as follows.
>
> Whilst the precise details may vary, the general approach is that at important or formal parts of criminal proceedings, there should be no distraction in the court room caused by members of the public moving around. In a significant number of Crown Courts, as a matter of routine an usher is placed by the door to prevent or deter entry and exit. Alternatively this may be done by way of a sign indicating no entry.
>
> The approach varies between courts. Many do not adopt the practice routinely. Some courts adopt a more flexible approach of an usher being stationed by the door on the direction of a judge in a particular case. Further, there is variation in the points in proceedings to which it is applied, but it particularly includes arraignment, taking of oaths, summing-up, verdict, judgment and sentencing.
>
> I understand that the reasons why courts adopt this practice include the following:
>
> a. To avoid distracting the jury and/or judge during important points in the proceedings when particular concentration is required;
>
> b. To avoid distractions during sensitive moments in the proceedings where it is of paramount importance that the defendant and those in the public gallery (which may include family members and victims) can focus on and hear what the judge is saying;
>
> c. To prevent distractions and disturbances which would be detrimental to the dignity and solemnity of proceedings;

d. In the interests of the proper administration of justice, which could be harmed by such distractions and disturbances."

10 Ms Dale stated:

"As far as I am aware, it is the practice in all London courts for the Usher to stand at the door when the Defendant is being arraigned, a verdict is being taken and when a sentence or judgment is being passed. All court staff, members of the Bar, journalists and members of the public have always respected this and this is the first time it has ever been an issue in my experience.

Ultimately, the Judge is in charge of his/her courtroom and decisions to exclude or prevent someone from entering a courtroom are taken based on the court etiquette set out above. If not acting in pursuance of this practice, court staff would only take a decision to exclude or prevent someone from either entering the building or a courtroom with authority from very Senior Managers after consultation. Court-based managers may have to take such decisions if someone has been or is being abusive, violent or is intoxicated.

Courtroom doors are heavy, wide and situated in direct view of the Judge, witnesses and the Jury and close to the dock. Whenever a person opens the door to enter, no one in court can avoid hearing and/or seeing the doors open and consequently looking at the door thus causing a distraction.

At both my courts [Harrow and Isleworth] the Judges expect the Usher to be standing at the door and they have brought it to my attention if this etiquette isn't observed and parties consequently get distracted. This usually happens when we are short staffed and the Clerk is managing the courtroom on their own.

Subsequent to the event involving Mr Ewing, I am aware that there remains a general view from the Judges at my Courts that following the etiquette is valuable in preventing distractions during critical points, which can impact on the concentration and the dignity of the Court process."

11 At this stage, I would make these observations. Firstly, there has been no suggestion that Mr Ewing was excluded by specific direction of the recorder in the Oraki case, nor that he had been disruptive or seemed likely to be disruptive.

12 Secondly, etiquette is, in my view, not an appropriate word for what we are considering. Earlier in her witness statement, Ms Dale referred to her training as a young court clerk when she started about court etiquette; for example, that she was expected to bow to the court crest when entering or leaving the courtroom. Of course, that is properly described as a matter of etiquette. There is nothing in statute, rules or Practice Directions requiring a court clerk or lawyer or anyone else to bow. But what we are concerned with here should be described as either a policy or a practice. It does not seem to me to matter which.

13 Thirdly, the origin of the practice described at Isleworth and Harrow is not clear. I do not know whether it was a decision of the resident judge at the time, a previous resident judge, the judges collectively; all that remains far from clear.

14 In his submissions before this court, Mr Louis Mably QC submitted that the present case was not one of interference with the open justice principle. The claimant, he observed, had a right to attend the proceedings and for most of the hearing of the appeal apparently had exercised it. If he had been present at the start of the recorder's judgment on the appeal against conviction, he, Mr Ewing, would plainly have been allowed to remain to the end. The only restriction imposed was that he could not enter or re-enter while judgment was being given. If and insofar as there was any interference with the open justice principle, Mr Mably submitted that it was *de minimis* and in the interests of justice.

15 He argued that no one has an untrammelled right of access to the courts. The Crown Court has an inherent power to regulate its own proceedings so that at critical moments in the criminal process the court is free from distraction. He adopted as examples of such critical moments the list given by Mr Tomkins in his witness statement of arraignment, oath-taking (whether by a juror or a witness), summing-up, the delivery of a verdict, the giving of a judgment and sentencing. He submitted that a judgment given in the Crown Court on an appeal against conviction, being a case of a decision on a rehearing, is effectively to be equated to a jury delivering its verdict, and similarly if the judgment had been on an appeal against sentence that would have been equivalent to a judge passing sentence. He submitted that it is essential that a defendant should have the opportunity to listen to this critical decision being delivered without any form of distraction. The delivery of a judgment of this kind was a moment of particular solemnity and dignity.

16 When it was pointed out by this court in argument that when in this building judges are giving the decision of a Divisional Court or the Court of Appeal Criminal Division on an appeal in a criminal matter, which may in the CACD be as serious as an appeal against conviction in a murder case, members of the public are free to come and go during delivery of the judgment in ordinary circumstances, Mr Mably responded that an appeal of that kind, not being one by way of rehearing, is not to be equated to a jury delivering its verdict and so it is rational that a different practice should apply.

17 In his submissions, Mr Ewing said that he had had difficulty in discovering whether there was a policy at all and, if so, how it came into being and who formulated it. He argued that any restriction on the right of the public to come and go freely during a criminal trial can only be lawful if it is set out either in primary legislation, the Criminal Procedure Rules or a Practice Direction given by the Lord Chief Justice. He also submitted that it cannot be lawful in this respect for different Crown Courts to adopt different policies.

18 At this point, I should mention, although only very briefly, rule 6 of the Criminal Procedure Rules. Although headed "reporting, etc. restrictions", it includes the powers of the court to impose a restriction on public access to what otherwise would be a public hearing (see rule 6.4(1)(a)(ii)). This is a power which the court may exercise on its own initiative (see rule 6.4(2)(b)). I doubt whether that rule is applicable to the kind of decision to exclude a member of the public or members of the public generally from entering a courtroom at a particular moment, but whether it does or it does not, it can, in my view, neither add to nor subtract from the inherent jurisdiction which plainly exists.

19 There is no controversy about the existence and the importance of the open justice principle. It has often been described as a fundamental principle of the common law. In its application to the importance of the public being allowed to be present at criminal trials, the rule was stated in resounding terms as long ago at 1829 by Bayley J in *Daubney v Cooper* (1829) 10 B&C 237, cited by Leggatt J in *R (O'Connor) v Aldershot Magistrates' Court* [2017] 1 WLR 2833 at [27]:

> "... we are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose – provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed – have a right to be present for the purpose of hearing what is going on."

20 A great deal has changed in the criminal law and in criminal procedure since 1829, but that principle remains unaltered, although, as Leggatt J observed in *O'Connor* at [29], "The right to attend a public court hearing and to enter the court building for that purpose is not unqualified." He noted, for example, that the court has an inherent power to restrict public access to the courtroom where it is necessary to do so in the interests of justice, for example to prevent disorder.

21 The present case is not one about the court sitting in private. While the recorder was giving his judgment on the Oraki appeal, the courtroom was open to the public, including to Mr Ewing. This is also not one of those cases where a courtroom is so hard to find or is behind a locked door or is so small that there is effectively no public access: see, for example, *R v Denbigh Justices ex parte Williams* [1974] 1 QB 759. Nor is it a case about section 53 of the Courts Act 2003 dealing with the powers and duties of court security officers. It was originally suggested in the defendant's pleaded case that this section was relevant, but Mr Mably rightly accepts it is not. There was no court security officer involved in the incident presently under review, and the policy was one, as I have observed, apparently introduced by a decision of the circuit judges or at least the resident judge at the relevant court.

22 It is also important to note that this is not a case about a decision of an individual judge dealing with a situation on the spot, for example where members of the public have been interrupting the proceedings or distracting the participants by frequent leaving and re-entering of the court, possibly in large groups. As I have noted, there is no evidence that the recorder told the court staff to exclude Mr Ewing or anyone else. The attack is on the policy or practice pursuant to which he was excluded.

23 I agree with Mr Mably that there are some moments in a criminal trial where, as a matter of policy, it is reasonable and lawful for members of the public to be stopped from entering the courtroom or moving about. Arraignment, the empanelling and swearing in of a jury, a

witness taking the oath or making affirmation, the return of verdicts by the jury and the passing of sentence by the judge are all, in my view, in this category. These are sensitive moments, generally of brief duration, when it is necessary for the court to be still so that the process can take place without distraction and in a manner which preserves the dignity and solemnity of the proceedings. But I doubt whether any general policy or blanket policy which goes further than that could be justified. I cannot accept Mr Mably's submission that a Crown Court judge giving a reasoned ruling on an appeal against conviction is to be treated in the same way as the foreman of a jury returning a verdict. Even more unacceptable to me is the suggestion in Mr Tomkins's witness statement that it would be lawful for a Crown Court to have a policy that nobody should be allowed to enter or leave the court at any stage during a judge's summing-up.

24 There is force, as I see it, in Mr Ewing's criticism that the policy is not accessible, not published and of uncertain authorship. However, even assuming that it had been published and authorised, I would regard it as unsustainable to have a general policy or practice under which no one could enter or leave the court during the summing-up or during the delivery of a ruling on a point of law or a judgment on an appeal other than the passing of sentence.

25 I do not think it is necessary, and perhaps not appropriate, for us to say whether there should be a published policy, but if there is to be one it seems to me that it should take the form of nationally applicable guidance given by the Senior Presiding Judge of England and Wales. It should only be justifiable to have local policies where the exigencies of a particular courtroom or building make special arrangements necessary. Even then, it seems to me that if a courtroom is so physically cramped that it is impossible for members of the public to enter or leave without causing serious disruption to the proceedings, then such a room is not fit for use in jury trials.

26 Accordingly, I would allow this application for judicial review and declare that the exclusion of Mr Ewing from court 10 at the Isleworth Crown Court on 2 August 2017 was unlawful.

27 Mr Ewing's pleadings include a claim for damages and reference to Articles 10 and 14 of the European Convention on Human Rights. In my view, Article 10 adds nothing to the common law position on the claim and we did not therefore ask for argument from either side on it. But if and insofar as there was any breach of the claimant's Article 10 rights in the present case, then the contents of this judgment are, in my view, just satisfaction and this would not be the case for an award of damages.

28 MRS JUSTICE SIMLER: I agree.

MR EWING: My Lord, there is simply -- I have served a schedule of costs limited to £500 which I can hand up for your Lordship and your Ladyship.

LORD JUSTICE BEAN: Mr Mably, is there any issue about that?

MR MABLY: There is no issue.

LORD JUSTICE BEAN: Very well. We direct that the second interested party should pay the claimant's costs summarily assessed at £500.

MR EWING: I am obliged, my Lord.

LORD JUSTICE BEAN: Thank you all for your assistance.

_____

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

Transcribed by ***Opus 2 International Ltd.***
(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

This transcript has been approved by the Judge.