Trinity Term
[2018] UKSC 33
On appeal from: [2017] EWHC 3056 (Admin)

JUDGMENT

Belhaj and another (Appellants) *v* Director of Public Prosecutions and another (Respondents)

before

Lady Hale, President
Lord Mance
Lord Wilson
Lord Sumption
Lord Lloyd-Jones

JUDGMENT GIVEN ON

4 July 2018

Heard on 22 March 2018

Appellants
Ben Jaffey QC
Helen Law
(Instructed by Leigh Day & Co)

1st Respondent
John McGuinness QC
Tom Little QC
(Instructed by The Government Legal Department)

2nd Respondent
James Eadie QC
Ben Watson
James Stansfeld
(Instructed by The Government Legal Department)

Respondents:
(1) Director of Public Prosecutions
(2) Secretary of State for Foreign and Commonwealth Affairs

LORD SUMPTION (with whom Lady Hale agrees)

1. The factual background to this appeal is set out in the judgments of this Court in *Belhaj v Straw* [2017] AC 964. In short summary, the first Appellant, Mr Belhaj, was a political opponent of the government of Colonel Gadaffi in Libya. He and his wife Ms Boudchar (the second Appellant) contend that they were abducted and maltreated by agents of Malaysia, Thailand and the United States, and eventually "rendered" to the Libyan authorities, by whom they were imprisoned, tortured, and subjected to other serious maltreatment. The Appellants allege that this was done with the connivance of the British Secret Intelligence Service and in particular that of Sir Mark Allen, who is said to have been a senior officer of that service. We make no finding about that, any more than the courts below did. Her Majesty's Government has neither confirmed nor denied that Sir Mark was involved in these events, and references to him in this judgment should be read in that light. In parallel proceedings, the Appellants have sued the British Government for damages. The present appeal arises out of an investigation commenced by the Metropolitan Police in 2012 into possible criminal offences committed in the course of this history.

2. On 9 June 2016, the Director of Public Prosecutions announced her decision not to bring any prosecutions. That decision was based on a decision of Ms Hemming, a senior prosecutor at the Crown Prosecution Service and on detailed advice given to Ms Hemming by First Senior Treasury Counsel that there was insufficient evidence to prosecute for any offence subject to the criminal jurisdiction of the United Kingdom. In communicating her decision to the Appellants' representatives, Ms Hemming pointed out that "the security marking of the potential evidence in this case is such that I am unable to provide you with a summary of the material submitted to us." The Appellants applied for an internal review of the decision under the Victims' Right of Review procedure. The case was accordingly referred to another senior CPS prosecutor, Mr Gregor McGill, who reached the same conclusion for substantially the same reasons.

3. On 20 October 2016, the Appellants issued the present proceedings, seeking judicial review of the failure to prosecute Sir Mark Allen. The application is made on three grounds: misdirection in law, procedural unfairness and inconsistency with the evidence. Only the last of these grounds is relevant to the present issues. The Appellants contend that it is irrational because, they say, the material in the public domain is alone enough to make good the elements of the relevant offences. The Director takes issue with this. She says that the Appellants' contention is based on the very limited documentation available to them, whereas the decision not to prosecute was supported by an examination of some 28,000 pages of statements, exhibits and other documents which were considered by the CPS and Treasury Counsel but could not be disclosed to Appellants because of its classification ("TOP

SECRET - STRAP 2"). The Appellants' response is that neither the decision itself nor the Director's evidence in support of it adequately discloses her reasoning on this question.

4. The issue on this appeal is whether on the hearing of the application for judicial review, it would be open to the Court to receive closed material disclosed only to the court and a special advocate but not to the Appellants. As will appear, this depends on whether the judicial review proceedings are "proceedings in a criminal cause or matter".

5. Closed material procedure is a derogation from ordinary principles of forensic justice because it necessarily limits the ability of a litigant or a defendant in criminal proceedings to deploy his case. The degree of limitation will depend on the arrangements made to represent his interests in some other way, although no one suggests that these arrangements can entirely make good the adverse effect on him. There are nonetheless cases in which, notwithstanding that closed material procedure represents imperfect justice, the alternative is no justice at all. For that reason, the European Court of Human Rights has held that closed material procedure may be justified in some cases. In *A v United Kingdom* (2009) 49 EHRR 29, para 205. the Court observed that

> "… even in proceedings under article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v Netherlands* (1996) 22 EHRR 330, para 70; *Van Mechelen v Netherlands* (1998) 25 EHRR 647; para 58, Reports 1997-III; *Jasper v United Kingdom* [GC] (2000) 30 EHRR 441, paras 51-53; *SN v Sweden*, No 34209/96, para 47, ECHR 2002-V; and *Botmeh and Alami v United Kingdom* (2008) 46 EHRR 31, para 37."

The Strasbourg court in that case held that the use of closed material procedure before the Special Immigration Appeals Commission could be consistent with the Convention, provided that it was strictly necessary in the interests of national security. It considered that the interests of the complainant were sufficiently protected by the use of a special advocate, in those cases where the defendant was

given enough information about the allegations against him to enable him to give meaningful instructions to the special advocate. More recent Strasbourg jurisprudence has softened the latter requirement in a case where, even in the absence of such disclosure, resort to closed material procedure was proportionate and the proceedings as a whole were fair: *Kennedy v United Kingdom* (2011) 52 EHRR 4, paras 184-187, as applied in *Tariq v Home Office (JUSTICE intervening)* [2012] 1 AC 452.

6. However, the mere fact that the use of closed material procedure may represent a fair balance between national security and the demands of procedural justice does not mean that the courts have power to adopt it. The rule at common law is that, with very limited exceptions, no material can be put before the court in litigation, civil or criminal, without being disclosed to the parties. The rule was reaffirmed for criminal cases in *R v Davis* [2008] 1 AC 1128 in the special context of the anonymisation of witness evidence. In civil proceedings it was reaffirmed in *Al Rawi v Security Service (JUSTICE intervening)* [2012] 1 AC 531, which concerned the use of closed material procedure in the context of allegations somewhat similar to those made by the Appellants in the present case. These decisions are authority for the proposition that the adoption of closed material procedure is not within the inherent jurisdiction of the courts and requires specific statutory authority. Closed material procedure has been authorised by statute for proceedings before certain specialised tribunals. It was authorised in proceedings before the SIAC by sections 5 and 6 of the Special Immigration Appeals Commission Act 1997, and provision was made for its use by the Investigatory Powers Tribunal under section 69(4) of the Regulation of Investigatory Powers Act 2000. However, until the enactment of the Justice and Security Act 2013, the High Court had no general statutory power to receive closed material.

7. The background to the Act of 2013 is explained in the Justice and Security Green Paper Cm 8194/2011. There had been a growing number of cases in which civil claims for damages had been brought against the Government or the security agencies or their personnel, which were untriable except at unacceptable cost to the national interest, because of the disclosure of secret material that would have been required. The Government had been obliged to buy off these claims in order to avoid that damage. This was seen as unsatisfactory, because it was costly and deprived the public of answers which litigation might have provided. A more general authorisation of closed material procedure was conceived to be a way of enabling substantial justice to be done on the basis of a full examination of any relevant secret material, even if it was not in all respects seen to be done.

8. Part 2 of the Justice and Security Act 2013 authorised the use of closed material procedure in civil proceedings on certain conditions. The first step in the statutory procedure is an application to a court seized of "relevant civil proceedings" for a "declaration that the proceedings are proceedings in which a closed material

application may be made to the court": section 6(1), (2) of the Act. Section 6(3)-(5) provide:

> "(3) The court may make such a declaration if it considers that the following two conditions are met.
>
> (4) The first condition is that -
>
> (a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or
>
> (b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following -
>
> (i) the possibility of a claim for public interest immunity in relation to the material,
>
> (ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,
>
> (iii) section 17(1) of the Regulation of Investigatory Powers Act 2000 (exclusion for intercept material),
>
> (iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.
>
> (5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration."

"Relevant civil proceedings" are defined by section 6(11) as

> "any proceedings (other than proceedings in a criminal cause or matter) before -
>
> (a) the High Court,
>
> (b) the Court of Appeal,
>
> (c) the Court of Session, or
>
> (d) the Supreme Court."

"Sensitive material" is defined in the same subsection as

> "material the disclosure of which would be damaging to national security."

9. The making of a section 6 declaration is the necessary precondition for an application under CPR Part 82, made under powers conferred by section 8 of the Act. Part 82.6 provides for the court to sit in private and in the absence of any party and his legal representatives, inter alia for the purpose of securing that information is "not disclosed where disclosure would be damaging to the interests of national security." The Act and rules made under it contain a number of safeguards. First, section 7 requires the court to keep a section 6 declaration under review and to revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings. A formal review must in any event be conducted once pre-trial disclosure has been completed: section 7. Secondly, the law officers may appoint a special advocate under section 9, and generally will. Thirdly, section 14(2)(c) provides that nothing in sections 6 to 13 "is to be read as requiring a court or tribunal to act in a manner inconsistent with article 6 of the Human Rights Convention". Fourthly, the Secretary of State is required by section 13 to appoint a reviewer to review and report on the operation of these provisions.

10. The parallel proceedings *(Belhaj v Straw)* brought in support of the Appellants' claim to damages are unquestionably "relevant civil proceedings". Popplewell J, to whom they have been assigned, has made a section 6 declaration in relation to them. In his judgment on the application for the declaration, he said, [2017] EWHC 1861 (QB), para 60(5)-(6):

> "Whilst this is a matter for more detailed consideration at the section 8 stage, it appears to me to be very unlikely that the material could be put into open or made available to the claimants or their legal representatives in a way which would better promote a fair and effective trial than a closed material procedure. As I have observed, much of the material can only properly be understood and weighed in the context of a substantial part of the material as a whole, such that gisting is unlikely to provide a realistic solution in most instances. Sittings in private and/or the use of confidentiality rings are unlikely to provide a satisfactory solution, both because of the risk of disclosure, even inadvertent, and because of the hobbling effect on the conduct of the claimants' case if, as is almost inevitable, they were themselves to be excluded from the confidentiality ring … These claims are brought not only against the Government, but against two named individuals who both wish to have a real and fair opportunity to defend themselves, but who cannot do so unless there is a closed material procedure."

That judgment has not been appealed.

11. In the judicial review proceedings, the Appellants' application for permission to apply for review came before Jeremy Baker J on paper. He ordered that it should be adjourned to a rolled up hearing at which both permission and the substantive claim would be considered. The Secretary of State for Foreign and Commonwealth Affairs then applied for a section 6 declaration. His application concerned a narrower range of material than that covered by Popplewell J's declaration in the civil action. It related in practice to three documents: the full decision letters of Ms Hemming and Mr McGill and the advice of Treasury Counsel. It is clear from the letters in which the CPS decisions were communicated to the Appellants that the analysis of the evidence in those three documents was substantially based on secret material. However, the Secretary of State's application was met with a challenge to the court's jurisdiction on the ground that the judicial review proceedings were "proceedings in a criminal cause or matter."

12. The Divisional Court (Irwin LJ and Popplewell J) dealt with that challenge as a preliminary issue [2017] EWHC 3056 (Admin). They held that the present proceedings were not "proceedings in a criminal cause or matter". Their reasons can fairly be summarised in two propositions. First, proceedings by way of judicial review of a prosecutorial decision do not decide criminal liability. They are a means of holding the executive, in the form of the prosecuting authorities, to account. Such proceedings should properly be categorised as civil, even if their subject matter is a potential criminal prosecution. Secondly, the alternative to closed material

procedure was likely to be a successful application by the Secretary of State for public interest immunity, with the result that the sensitive material would be entirely removed from the scrutiny of the court, instead of being available on the basis of limited disclosure. That was an outcome which would probably be unjust to one or other party. The Divisional Court certified the following point of public importance suitable for consideration by this court:

> "Does a case where claimants seek judicial review of a decision by the Director of Public Prosecutions not to prosecute an individual constitute 'proceedings in a criminal cause or matter', within the meaning and for the purposes of section 6(1) and 6(11) of the Justice and Security Act 2013? As a consequence, is there jurisdiction in such a case to entertain an application for a declaration under section 6 of that Act, that a closed material application may be made to the court?"

13. Mr Jaffey QC, who appeared for the Appellants, took it as his starting point that closed material procedure represents a curtailment of fundamental common law rights. Therefore, it was said, in accordance with the principle of legality, any statutory provision relied upon as authorising it should be given the narrowest possible construction: *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 (Lord Hoffmann). The principle is that general or ambiguous words cannot normally be taken to authorise a curtailment of fundamental rights because "there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process." Parliament must "squarely confront what it is doing and accept the political cost."

14. Valuable as that principle is, I do not think that it helps to resolve the question at issue on this appeal. The Justice and Security Act 2013 made significant and acknowledged inroads into the common law principle as applied to "relevant civil proceedings". It did this, subject to specific safeguards, on the ground that the interests of justice might well require the withholding of evidence from a party if the dispute cannot otherwise be tried fairly and consistently with the demands of national security. As the House of Lords held in *Al-Rawi*, the existence and extent of the court's jurisdiction to adopt closed material procedure is a matter for Parliament. That involves a balance between the potentially conflicting interests of national security and justice, which Parliament has drawn in the Act of 2013 by authorising the procedure subject to the statutory safeguards. This leaves little scope for any presumption that Parliament does not intend to curtail fundamental common law rights. Parliament plainly did intend to curtail them in what it conceived to be a wider public interest. The only questions are on what conditions and in what proceedings. Those questions must be answered on ordinary principles of construction, without presumptions in either direction. In *R (Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2016] 3 All ER 837, para 58,

Richards LJ, delivering the only reasoned judgment in the Court of Appeal, put the point in terms on which I cannot improve:

> "The 2013 Act is one of those in which Parliament has stipulated that a closed material procedure may be permitted by the court. It represents Parliament's assessment of how, in relevant civil proceedings, the balance is to be struck between the competing interests of open justice and natural justice on the one hand and the protection of national security on the other, coupled with express provision in section 14(2)(c) to secure compliance with article 6. It is certainly an exceptional procedure, and in the nature of things one would expect it to be used only rarely, but the conditions for its use are defined in detail in the statute. In the circumstances there is, in my judgment, no reason to give the statutory provisions a narrow or restrictive construction, save for any reading down that may be required, in accordance with the terms of the statute itself, for compliance with article 6. Subject to that point, the provisions should be given their natural meaning and applied accordingly."

15. In my opinion, the Appellants are entitled to succeed on this appeal because 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, and nothing in the context or purpose of the legislation suggests a different meaning.

16. The first point to be made is perhaps the most obvious one, namely that although the High Court has only very limited original criminal jurisdiction, it has an extensive criminal jurisdiction by way of review. It is a feature of English criminal procedure that many decisions made in the course of criminal proceedings or in relation to prospective criminal proceedings are subject to judicial review in the High Court, mainly but not only in cases where there is no statutory avenue of appeal. The High Court's review jurisdiction extends in principle to the exercise of any official's functions in relation to the criminal process. These include police decisions to investigate or charge (*R v Comr of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118) or to administer cautions (*R (Aru) v Chief Constable of Merseyside Police* [2004] 1 WLR 1697); decisions of prosecutors whether or not to prosecute (*R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE Intervening)* [2009] 1 AC 756, para 30), or of the Director of Public Prosecutions whether to consent to a prosecution (*R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326); and decisions of the Attorney General whether to take over a prosecution or enter a *nolle prosequi* (*Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343). It also exercises

an analogous jurisdiction by way of writ of *habeas corpus* over the detention of suspects. The High Court's supervisory jurisdiction over the criminal process is not limited to the decisions of officials. It extends to the decisions of magistrates' courts and to those of the Crown Court other than in relation to trial on indictment. For this purpose the Crown Court, although a superior court of record, is treated as if it were an inferior tribunal: see sections 28(2) and 29(3) of the Senior Courts Act 1981. The categories of case giving rise to judicial review of the Crown Court include a variety of orders held not to have been made in relation to trial on indictment, such as orders in proceedings against a person found unfit to plead, orders binding over an acquitted defendant; or orders made in the exercise of the Crown Court's appellate jurisdiction. The main categories are reviewed by Lord Browne-Wilkinson in *R v Manchester Crown Court, Ex p Director of Public Prosecutions* [1993] 1 WLR 1524, 1530. The High Court's powers of review have also been held to extend to any excess of jurisdiction by the Crown Court, even in relation to a trial on indictment: *R v Maidstone Crown Court, Ex p Harrow London Borough Council* [2000] QB 719. 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 section 6(11) of the Justice and Security Act 2013.

17. The phrase itself is of some antiquity. It has been used since the Supreme Court of Judicature Act 1873 to define a category of appeals which were excluded from the jurisdiction of the Court of Appeal. Under section 47 of that Act, there was no relevant right of appeal to the Court of Appeal from a decision of the High Court "in a criminal cause or matter". The corresponding provision today is section 18(1)(a) of the Senior Courts Act 1981. Section 151 of the 1981 Act, which substantially reproduces the relevant definitions in section 100 of the Act of 1873 and section 225 of the Supreme Court of Judicature (Consolidation) Act 1925, provides that "cause" means "any action or any criminal proceedings", and "matter" means "any proceedings in court not in a cause". Thus defined, these words have been held to refer to the proceedings which supply the subject matter of the relevant decision: *Ex p Alice Woodhall* (1888) 20 QBD 832. The phrase, in the words of Lord Esher MR, at p 836 of the report of that case

> "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."

This decision was approved by the House of Lords in *Provincial Cinematograph Theatres Ltd v Newcastle upon Tyne Profiteering Committee* (1921) 90 LJ (KB)

1064, in particular at pp 1067-1068 (Lord Birkenhead LC). Accordingly, in the former case the phrase embraced a decision concerning acts preliminary to criminal proceedings, including *habeas corpus* applications in extradition proceedings; and in the latter decisions concerning the resolution of a local authority to prosecute for profiteering under wartime regulations. These authorities, and others to the same effect have been carefully analysed by the Divisional Court and the exercise need not be repeated here. Their effect is sufficiently stated in the speech of Lord Wright in *Amand v Secretary of State for Home Affairs* [1943] AC 147. The case concerned a Dutch serviceman who had been arrested for desertion and brought before a magistrate who ordered him to be handed over to the Dutch military authorities under the Allied Forces Act 1940. An application for *habeas corpus* was rejected by a Divisional Court. The Court of Appeal held that they had no jurisdiction to entertain an appeal from the Divisional Court. Lord Wright said, at pp 159-160:

> "The words 'cause or matter' are, in my opinion, apt to include any form of proceeding. The word 'matter' does not refer to the subject-matter of the proceeding [before the Divisional Court], but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause'. In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter."

In other words, the "matter" before the Divisional Court was the order made by the magistrate to hand the Appellant over to the Dutch military authorities. Lord Wright went on, at p 162, to say:

> "The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal."

In other words, Lord Wright was treating the proceedings in the Divisional Court as an integral part of the "matter" before the magistrate. Since the latter was criminal in nature, so too was the former. Clearly, the principle thus stated has its limits. A decision on an application collateral to the exercise of criminal jurisdiction, such as an application for the release of documents referred to in court, will not necessarily itself be a decision in a "criminal cause or matter". On that ground, the Court of Appeal held in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2011] 1 WLR 3253 that an application for judicial review of a court's refusal to provide the press with copies of documents referred to at a hearing of a criminal cause or matter was not a criminal cause or matter.

18. The Director and the Secretary of State accept, as they must, that these decisions are unimpeachable authority for the proposition that the application for judicial review is a proceeding in a criminal cause or matter *for the purpose of any right of appeal*. Indeed, that is the basis on which the present question comes before us on appeal from the Divisional Court, instead of going to the Court of Appeal. The question is whether the decisions on rights of appeal are germane to the definition of "relevant civil proceedings" in the Justice and Security Act 2013.

19. In *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, the House of Lords held that

> "It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

per Viscount Buckmaster at p 411; cf Lord Russell of Killowen at pp 441-442, Lord Macmillan at p 446. The effect of this principle is to treat certain hallowed formulae as terms of art, to be applied like statutory definitions, on the footing that Parliament must have intended to adopt them. The reason for Lord Buckmaster's reference to a "similar context" is connected with his reference to words "of doubtful meaning". The assumption is that the words are not self-explanatory and have derived the meaning given to them on the earlier occasion from their statutory context. Hence the probability that Parliament intended, when it later used the same doubtful expression in the same statutory context, that the meaning would be supplied from the existing judicial dictionary. In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (No 2)* [2013] QB 618, doubts were expressed in the Court of Appeal about the force and value of the principle. But it is well established, and was recently endorsed by this court in *R (N) v Lewisham London*

Borough Council [2015] AC 1259, para 53 (Lord Clarke). It remains good law, provided that one bears in mind that it is no more than a presumption, even in cases where the statutory context is similar in both enactments. The *Barras* principle is therefore of little assistance in construing the phrase "criminal cause or matter" in the very different context of the Justice and Security Act 2013.

20. I nevertheless reach the same conclusion about the meaning of "proceedings in a criminal cause or matter" in the Justice and Security Act as Lord Esher and Lord Wright (among others) did when construing the statutory restrictions on the right of appeal. I do so because I think that their reasoning reflected the natural meaning of the words. Their reasoning was not primarily based on any special feature of the Judicature Acts. In *Ex p Alice Woodhall*, Lord Esher referred to the undesirable results of large numbers of appeals to the Court of Appeal in cases involving the prerogative writs which had arisen out of acts of inferior tribunals which were criminal rather than civil in nature. But the real basis of the decisions on appeals was that the phrase "criminal cause or matter", read as a whole, spoke for itself. A "cause" is a proceeding, civil or criminal, actual or prospective, before a court. A "matter" is something wider, namely a particular legal subject-matter, although arising in a different proceeding. 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*, *supra*. And it is why, as Mr Eadie QC, who appeared for the Secretary of State, felt bound accept, that even for the purpose of section 6 of the Act of 2013 a judicial review of an extradition order would be a proceeding in a criminal cause or matter. On that footing it seems to me to be impossible to contend that this judicial review was anything else. The reality of the Appellants' application is that it is an attempt to require the Director of Public Prosecutions to prosecute Sir Mark Allen. 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".

21. The Divisional Court in the present case appear to have accepted this as a matter of language. But they considered that the statutory context of the phrase in the Act of 2013 and the purpose of that Act pointed to a different conclusion. I do not doubt the importance of context in construing statutes, but I think that they adopted the wrong approach to this question. Having decided that closed material procedure served the interests of justice better than any alternative procedure likely to be available in a case involving sensitive material, they concluded that the purpose of the Act required the narrowest possible meaning to be given to the exception for criminal causes or matters. I think that the real question is not what is the purpose of authorising closed material procedure, the answer to which is clear enough. The

real question is what is the purpose of distinguishing in this context between proceedings in criminal causes or matters and other proceedings.

22. The explanation of the distinction given in the Green Paper appears in a section at p 7 headed "Criminal vs Civil: Why criminal proceedings are out of the scope of this Paper". This is relevant not as guide to the meaning of the words of a Bill which had not yet been published, but as evidence of the mischief behind the distinction between civil and criminal causes or matters. The difference between them lay in the degree of control exercisable by the executive in criminal cases. The Green Paper pointed out that the right to a fair trial under article 6 of the Human Rights Convention imports more onerous requirements in criminal cases, and "the rules concerning the use and protection of sensitive evidence are different to those in civil cases." These words are a reference, as the text goes on to explain, to the rule that although the prosecution may choose to rely only on material whose disclosure would be consistent with the national interest, it must disclose any potentially exculpatory unused material. The prosecution may seek to limit the disclosure of unused material by the issue of a public interest immunity certificate, followed by an application for permission not to disclose it. But if that application fails, the state can as a last resort avoid disclosure by withdrawing the prosecution and allowing the defendant to be discharged. By comparison, in civil claims, where the government is a defendant, there is no possibility of withdrawal, so that the ability to protect sensitive material is entirely dependent on PII claims. There is no reason to doubt that this was indeed the rationale for the distinction between civil and criminal proceedings in section 6 of the Act. But it is not a rationale which requires closed material procedure to be available in an ancillary judicial review of a decision made as an integral part of the criminal justice process, when it would not be available for an actual trial. The executive can dispose of proceedings of either kind by withdrawing the prosecution.

23. It is true that this assumes that the prosecution is duly launched. It does not take account, at any rate in terms, of the peculiar combination of factors which happens to be present in this case: ie (i) a decision by an independent prosecuting authority declining to prosecute; (ii) on the ground that there is insufficient evidence to warrant a prosecution; (iii) for reasons which cannot be disclosed without compromising secret material; (iv) followed by a third party challenge to the adequacy of those reasons by way of judicial review. However, I do not think that the rival interpretations of the Act advanced on this appeal can sensibly be tested by reference to this scenario. There is an obvious artificiality about claims made on that basis which makes it difficult to treat them as any part of the mischief against which the Act was directed. It is one thing for a court to say that a decision not to prosecute is based on a misdirection of law. It is not disputed that the legal basis of the two decisions of the Crown Prosecution Service is apparent from the letters in which the decision was communicated to the Appellants. It is quite another for a court to review the evidential material available to the prosecution with a view to requiring it to put forward as its own evidence secret material which it considers it to be

contrary to the national interest to deploy. In the absence of its deployment by the prosecution, secret material could be relevant only on the footing that it was unused material potentially exculpatory of the defendant, something which was clearly the main concern of the promoters of the Bill but would be entirely inconsistent with the Appellants' case on the proposed judicial review. On the assumption, which may or may not be justified, that this logical difficulty can be surmounted, the state's obvious response, as Mr Eadie acknowledged, is a contents claim to public interest immunity. A claim to public interest immunity may well fail if the court considers that the balance of the public interest required its disclosure in the interest of the defence. But Parliament seems unlikely to have had in mind the rather fanciful risk that the Court would reject a PII claim on the ground that disclosure was necessary in the interests of the prosecution, least of all in a case where the prosecutor considered a prosecution to be unjustified anyway.

24. I therefore see no reason to regard the statutory context or purpose as calling for any narrower view of "criminal cause or matter" than the words themselves suggest. I would accordingly allow the appeal, and declare that the present proceedings are proceedings in a criminal cause or matter for the purpose of section 6 of the Justice and Security Act 2013.

LORD MANCE:

25. This is a finely balanced case, as is evident from the judgments written in favour of allowing the appeal by Lord Sumption with whom Lady Hale agrees, and in favour of dismissing it by Lord Lloyd-Jones with whom Lord Wilson agrees. I have come down in favour of allowing the appeal.

26. I do so essentially for the same reasons as Lord Sumption. A challenge by judicial review to a decision to prosecute would seem to me to fall naturally within the concept of "proceedings in a criminal cause or matter"; and so too a challenge to a decision not to prosecute, the whole point of which would be to lead to a prosecution. Mr James Eadie QC for the Crown accepted, rightly, that an extradition hearing, to decide whether or not to surrender a person wanted for trial abroad, would be a proceeding "in a criminal cause or matter". Like Lord Sumption, I find it difficult to see how a distinction could sensibly exist between such a case and the present.

27. In considering the correct construction of the concept of "proceedings in a criminal cause or matter", it is appropriate to look at the rationale for the distinction between proceedings which are civil in nature and which are in a criminal cause or matter.

28. The primary purpose of introducing a closed material procedure in civil proceedings was to avoid situations in which there was relevant material which could not on public interest grounds be disclosed, with the result that one party (commonly the Crown) would be effectively unable to advance its case or the court might simply conclude that the whole case had become un-triable (*Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 WLR 1786).

29. The position in relation to criminal proceedings is different, for reasons explained in the Green Paper. While the Green Paper referred simply to "criminal proceedings" as outside the scope of any proposed legislation, the exclusion as introduced was expanded to extend to "proceedings in a criminal cause or matter". The expansion must have been deliberate. But there is no reason to think that the rationale changed when the language of the exclusion was expanded.

30. The rationale as explained in the Green Paper was, in substance, that "criminal proceedings" were outside the scope of the proposal because evidence relied on for conviction was never kept secret from an accused in criminal proceedings: "The evidence that the prosecutor uses in court to secure a conviction is never withheld from the accused". Further: "The prosecutor is required to disclose to the accused all relevant material obtained in an investigation (whether or not it is admissible as evidence) that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused …". Later, the Green Paper explained that criminal proceedings involve an accusation by the state, generally in respect of "wrongs which affect the public as a whole, so that the public has an interest in their detection and punishment".

31. In criminal proceedings, the position in relation to sensitive public interest material is addressed by the Public Interest Immunity ("PII") procedure, whereby a judge is shown the material in the absence of the accused. The procedure ensures that the Crown must either disclose potentially exonerating material or withdraw the proceedings: see the discussion in *Al Rawi v Security Service (JUSTICE intervening)* [2011] UKSC 34; [2012] 1 AC 531 and *Tariq v Home Office (JUSTICE intervening)* [2011] UKSC 35; [2012] 1 AC 452.

32. Judicial review proceedings challenging decisions whether or not to prosecute are not common. In the case of decisions to prosecute, a more appropriate forum for any challenge is usually the criminal process itself, in which the court has power to halt proceedings if they constitute an abuse. Nevertheless, challenges by potential defendants by way of judicial review to decisions to prosecute are probably more familiar than challenges by victims, interest groups or others by way of judicial review to decisions not to prosecute. In the present case, the challenge is to the Crown's decision not to prosecute, and the Crown seeks, while the applicants oppose, a closed material procedure in relation to a challenge to a decision not to

prosecute. It is relevant to consider the applicability in this context of the rationale for introducing a closed material procedure in civil proceedings, while excluding proceedings in a criminal cause or matter.

33. The rationale for the exclusion from the closed material procedure of "proceedings in a criminal cause or matter" is readily applicable or transposable to the context of a challenge by judicial review to a decision to prosecute. If there is material which could potentially exonerate a defendant, it should either be disclosed in the judicial review proceedings or, if the Crown is unwilling to disclose for public security reasons, the Crown should withdraw the charge. If there is material which could potentially incriminate the defendant but cannot, for public security reasons, be disclosed at trial, there would be no point in a closed material hearing to enable it to be deployed during the judicial review proceedings, when it could not subsequently be used at trial. There is no basis on which to detect or impute any Parliamentary intention to provide for a closed material procedure in this context.

34. What then about the present context, the less familiar situation of a challenge by alleged victims by judicial review to a decision not to prosecute? The rationale stated in the Green Paper for the exclusion of any closed material procedure in "proceedings in a criminal cause or matter" was to protect the rights of the accused, not to facilitate the pursuit of criminal proceedings against them. If it had been the applicant who was seeking a closed material procedure with a view to identifying further incriminating material, there would seem no real point in such a procedure during judicial review proceedings, if this material could not for PII reasons be disclosed and used at trial. Nor can Parliament sensibly be taken to have had in mind the remote possibility that a closed material procedure might identify incriminating material, which was not the subject of PII immunity and on which the Crown had either not thought to rely, or the significance of which the Crown had failed sufficiently to appreciate.

35. Here, however, it is the Crown which seeks a closed material procedure in relation to a third party challenge by alleged victims to a decision not to pursue charges. It does so on the basis that such a procedure it would enable the court to evaluate the decision in the light of all the available evidential material. The suggestion is presumably that there is or may be sensitive material, which cannot for public interest reasons be disclosed but which points away from the pursuit of any criminal charge. In criminal proceedings, the Crown can address this problem by simply refraining from pursuit of any charge, which will render irrelevant any complaint by any potential defendant about non-disclosure of the material. It is less obvious how the Crown, having decided not to prosecute, can address a third party complaint that the material available does not appear on its face to justify its decision not to pursue a charge against a potential accused.

36. One possibility, not explored in submissions, is that, since there is sensitive material on the basis of which the Crown had taken its decision not to prosecute but which cannot, on public interest grounds, be disclosed, the Crown would be entitled to the benefit of the presumption or regularity of its decision: see *R (Haralambous) v Crown Court at St Albans (Secretary of State for the Home Department intervening)* [2018] UKSC 1; [2018] 2 WLR 357, paras 47 to 52, citing inter alia *R v Inland Revenue Comrs, Ex p Rossminster Ltd* [1980] AC 952 and *R v Inland Revenue Comrs, Ex p T C Coombs & Co* [1991] 2 AC 283.

37. Be that as it may, I do not consider that the relatively unusual situation which exists in the present case can serve as a reliable guide to Parliament's presumed intention when introducing the exception of "proceedings in a criminal cause or matter". In my opinion, the present proceedings seeking judicial review are "in a criminal cause or matter" according to the natural sense of that phrase; and no real support is obtained for a narrower interpretation from a consideration of the rationale behind the introduction of a closed material procedure in civil proceedings and behind its exclusion in "proceedings in a criminal cause or matter".

LORD LLOYD-JONES: (dissenting) (with whom Lord Wilson agrees)

38. I would have dismissed this appeal for the following reasons.

Interpretation - The principle of legality

39. On behalf of the Appellants, Mr Jaffey QC submits that closed material procedures are a serious curtailment of the fundamental rights to open and natural justice. He places at the forefront of his submissions the following observations by Lord Dyson in *Al-Rawi v Security Service (JUSTICE intervening)* [2012] 1 AC 531, paras 47-48:

> "In my view, it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far. It is controversial precisely because it involves an invasion of the fundamental common law principles to which I have referred. …
>
> The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is

> better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined situations and has required the making of detailed procedural rules to give effect to the legislation."

Relying on Lord Hoffmann's speech in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, Mr Jaffey submits that Parliament cannot be taken to have intended to abrogate fundamental rights with ambiguous, rather than express language. He submits that the principle of legality applies to the present case with the result that the courts should presume that, in the absence of clear express language or necessary implication, the use of general words is nevertheless intended to be subject to the basic rights of the individual. As a result, he submits, the words "proceedings in a criminal cause or matter" in section 6, Justice and Security Act 2013 should, if necessary, be given an expansive meaning so as to reduce the scope of availability of the closed material procedure.

40. I readily accept that to hold a closed material hearing is a restriction of the common law principles of open justice and natural justice. As this court made clear in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 (per Lord Neuberger PSC, at paras 2-4, with whom Baroness Hale, Lord Clarke, Lord Sumption and Lord Carnwath JJSC agreed), a closed hearing offends the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society, and, by denying a party a right to know the full case against him and the right to test and challenge that case fully, is even more offensive to the fundamental principle of natural justice. While these principles may, exceptionally, be required to yield if justice cannot otherwise be achieved, claims that adherence to these principles is not attainable in particular circumstances will always require the most intense scrutiny.

41. I am, however, unable to accept that the principle of legality has any application to the specific issue raised on this appeal. In *Al-Rawi* this court made clear that it was for Parliament and not the courts to determine whether, and if so to what extent and with what safeguards, closed material procedures should be permitted in order to accommodate the competing public interests. Part 2 of the Justice and Security Act 2013 is one of the instances in which Parliament has sought to perform this difficult exercise. It necessarily involves an attempt to balance competing interests which are, ultimately, irreconcilable. It comprises a detailed series of provisions which incorporate a number of important safeguards. A court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court (section 6(1)). The court may make such a declaration only if it is satisfied that a party to the proceedings would be required to disclose sensitive material or would be so required but for specific matters ("the first condition") (section 6(4)) and that it is in the

interests of the fair and effective administration of justice in the proceedings to make a declaration ("the second condition") (section 6(5)). "Sensitive material" is defined in section 6(11) as material the disclosure of which would be damaging to the interests of national security. The court must not consider an application for a declaration by the Secretary of State unless satisfied that the Secretary of State has, before making the application, considered whether to make or to advise another person to make a claim for public interest immunity in relation to the relevant material (section 6(7)). The effect of section 6(1) and 6(11) is to exclude "proceedings in a criminal cause or matter" from the closed material procedure. Where a court has made a declaration under section 6 it must keep the declaration under review and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings (section 7(2)). The court must undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed and must revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings (section 7(3)). Section 14(2)(c) provides that nothing in the statutory provisions establishing the closed material procedure is to be read as requiring a court or tribunal to act in a manner inconsistent with article 6 ECHR.

42. In my view, this approach by the legislature leaves no scope for the application of the principle of legality. A restrictive interpretation to general words lest, as Lord Hoffmann put it in *Simms* (at p 131), "the full implications of their unqualified meaning may have passed unnoticed in the democratic process", would be inappropriate here. On the contrary, the elaborate scheme of Part 2 of the Justice and Security Act 2013 demonstrates that Parliament was fully aware of the implications for civil liberties of the exercise it was attempting to perform. This is Parliament's assessment of the appropriate balance. There is, therefore, no call for a narrow or restrictive interpretation of these provisions, subject to the express provision in section 14(2)(c) requiring them to be read in a manner consistent with article 6 ECHR. Appropriate safeguards are already built into the structure of the legislation. (*R (Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687; [2016] 3 All ER 837 per Richards LJ, at para 58.) As Popplewell J observed in the parallel civil proceedings brought by Mr Belhaj and Mrs Bouchar, *Belhaj v Straw* [2017] EWHC 1861 (QB) at para 26:

> "A closed material procedure is in Parliament's view one which serves the fair and effective administration of justice, and for that reason consideration of the second condition cannot turn on the aspects of the process which are necessarily part of the incursion into the principles of public and natural justice which are inherent in the closed material procedure itself; consideration must focus on the particular nature of the proceedings and sensitive material in question."

(See also *McGartland v Attorney General* [2015] EWCA Civ 686, per Richards LJ at para 35; *F v Security Service* [2013] EWHC 3402 (QB); [2014] 1 WLR 1699 per Irwin J at paras 36 and 41; *Abdulbaqi Mohammed Khaled v Secretary of State for Foreign and Commonwealth Affairs* [2017] EWHC 1422 (Admin) per Jay J at para 25.)

43. The exclusion by section 6(1) and 6(11) of "proceedings in a criminal cause or matter" from the closed material procedure is intended by Parliament to operate as a safeguard. It will be necessary at a later point to consider how wide a reading of those words is required or effective to achieve that purpose. I am, however, unable to accept that the principle of legality can require a broad reading of this exception so as to restrict the scope of the procedure which is, in itself, Parliament's proposed solution to the problem.

Interpretation - the Barras principle

44. The Appellants also rely on the principle of interpretation known as the Barras principle which, they submit, has the effect that where Parliament uses a word or phrase in legislation and it has received a clear judicial interpretation, it will be assumed that when the legislator subsequently chooses to use the same word or phrase in a similar context it is intended to have the same meaning. The principle takes its name from *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 where Viscount Buckmaster stated at p 411:

> "It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

45. This approach was endorsed, obiter, by a majority of the Supreme Court in *R (N) v Lewisham London Borough Council* [2014] UKSC 62; [2015] AC 1259. Lord Hodge (with whom Lord Wilson, Lord Clarke of Stone-cum-Ebony and Lord Toulson JJSC agreed) stated (at para 53):

> "It suffices for me to say that where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established: *Barras v*

> *Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 411-412, Viscount Buckmaster. Applying that in the present case, one can readily conclude, as I have, that the word 'dwelling' in the phrase 'let as a dwelling' in the [Protection from Eviction Act 1977] must bear the same meaning as it had in section 31 of the Rent Act 1965 and in the phrase 'let as a separate dwelling' in the Rent Acts."

(Cf Lord Carnwath at paras 83-88; Baroness Hale at para 167.)

46. Lord Neuberger (at paras 142-147) accepted that, if Parliament has re-enacted a statutory provision in identical words after it had been interpreted as having a certain meaning by the courts of record, there is some attraction in the notion that the Parliamentary intention was that the provision should have that meaning. However, he stated that he was far from convinced that the principle can be regarded as correct, at least in the absence of some additional factor in favour of maintaining the interpretation previously adopted. Here he referred to observations in *Farrell v Alexander* [1977] AC 59 and *A v Hoare* [2008] 1 AC 844. I share the reservations expressed by Lord Neuberger but, as will become apparent, it is unnecessary to come to a concluded view on this point in the present case.

47. Mr Jaffey, on behalf of the appellants, draws attention to a line of judicial authority on routes of appeal in which the courts have interpreted the words "criminal cause or matter" in a succession of statutes starting with the Supreme Court of Judicature Act 1873. By section 4 of the 1873 Act, the Supreme Court was constituted in two divisions, the High Court of Justice and the Court of Appeal. Section 47 which addressed the business of the High Court provided in relevant part that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter". Section 100 included the following definitions:

> "'Cause' shall include an action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.
>
> …
>
> 'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.
>
> …

> ‘Matter’ shall include every proceeding in the Court not in a cause.”

This line of authority has been addressed in considerable detail in the judgment of the Divisional Court. It is not necessary to do so here as it is clear that, under the relevant legislation relating to routes of appeal including the current provision in section 18(1)(a), Senior Courts Act 1981, proceedings such as the instant proceedings would be classified as proceedings in a criminal cause or matter. Indeed, that is the basis on which the Supreme Court has heard this appeal from the Queen’s Bench Division, Divisional Court. For present purposes it is sufficient simply to refer to the following examples of the application of the words in that context.

1) In *Ex p Pulbrook* [1892] 1 QB 86 a judge in chambers gave permission pursuant to the Law of Libel Amendment Act 1888 to bring proceedings for criminal libel. The proposed defendant sought to appeal. This raised the question whether the order was made in “criminal proceedings” within the Rules of the Supreme Court. The Divisional Court, referring by analogy to section 47 of the 1873 Act, considered that the permission was granted in a criminal cause or matter within the meaning of that provision.

2) In *Provincial Cinematograph Theatres Ltd v Newcastle Upon Tyne Profiteering Committee* (1921) 90 LJ (KB) 1064 the Committee took a decision to institute criminal proceedings against the appellants for breach of regulations. The appellants attempted unsuccessfully to challenge that decision by certiorari. On appeal to the Court of Appeal that court held that the judgment under appeal had been delivered in a criminal cause or matter and that no appeal lay to the Court of Appeal by virtue of section 47 of the 1873 Act. The House of Lords upheld the Court of Appeal. Approving *Pulbrook*, Lord Birkenhead LC observed (at p 1067) that, although such an order is not necessarily followed by any proceedings, it had rightly been held that no appeal lay against the order to the Court of Appeal because it had been made in a criminal matter.

3) In *Amand v Home Secretary* [1943] AC 147 the House of Lords held that an application for habeas corpus, following the detention in England of a national of the Netherlands for being absent without leave from the Netherlands military, was an application in a criminal cause or matter within section 31(1)(a), Supreme Court of Judicature (Consolidation) Act 1925 and that, accordingly, the Court of Appeal had no jurisdiction to hear the appeal.

4) In *R (Aru) v Chief Constable of Merseyside Police* [2004] 1 WLR 1697 the Court of Appeal held that an official caution was a criminal matter within

section 18(1)(a), Supreme Court Act 1981 and that the Court of Appeal had no jurisdiction to hear an appeal in judicial review proceedings challenging the caution.

5) Challenges by way of judicial review to decisions to prosecute or not to prosecute are heard by a Divisional Court and then, as a criminal cause or matter, any appeal lies directly to the House of Lords. (*R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; *R (Corner House Research) v Director of Serious Fraud Office* [2009] 1 AC 756. See also *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800.) Although in none of these cases was any point taken on jurisdiction, this well-established usage is clearly correct.

48. Nevertheless, in my view the fact that the present proceedings are proceedings in a "criminal cause or matter" within section 18(1)(a), Senior Courts Act 1981 and previous legislation concerning routes of appeal does not assist the Appellants on this appeal for two reasons.

49. First, the principle enunciated by the House of Lords in *Barras* applies only where, following a clear judicial interpretation of a word or phrase in an earlier statute, a later statute incorporates the same word or phrase in a similar context. This was expressly stated by Viscount Buckmaster in his formulation of the principle (at p 411) cited above. (See also Viscount Buckmaster at p 410; Lord Macmillan at p 446.) This presumption of interpretation applies where the same language is used in a subsequent statute dealing with the same subject matter. I also note that in *Barras* the circumstances which supported the presumption were particularly strong. The Merchant Shipping (International Labour Conventions) Act 1925 provided that a seaman should be entitled to receive wages in certain circumstances where his service was terminated by reason of "the wreck or loss of a ship" on which he was employed. The stated purpose of the Act was to give effect to a draft international convention, scheduled to the statute, which provided that the indemnity against unemployment arose only where unemployment resulted from "the loss or foundering" of the vessel. At the time of the passing of the 1925 Act seamen enjoyed wider and more extended rights under the Merchant Shipping Act 1894 in case of "the wreck or loss of the ship", as judicially interpreted, than under the draft convention. As Viscount Buckmaster observed, at p 412, the conclusion was plain that the Act, while intending to embody the draft convention, did not intend to restrict or limit the rights which seamen already enjoyed under the 1894 statute.

50. The context of the authorities on routes of appeal and the present context are so very different that I find it impossible to derive any assistance from those authorities. Moreover, it is apparent that there were strong reasons for giving the phrase in question a particularly broad meaning in the former context. As Irwin LJ

observed in the Divisional Court in the present case (at para 75), historically the caution shown in interpreting these words must initially have been governed by the desire to avoid blurring the lines of appeal and encroaching upon longstanding, discrete criminal jurisdiction, recently subject to statutory reorganisation and reform. Furthermore, there was an understandable reluctance on the part of a civil court to entertain anything akin to an appeal in a criminal matter. Thus in *Ex p Alice Woodhall* (1888) 20 QBD 832 we find the following statement in the judgment of Lord Esher MR (at p 835):

> "The result of all the decided cases is to shew that the words 'criminal cause or matter' in section 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this court being constituted for the hearing of appeals in civil causes or matters."

(See also *Ex p Schofield* [1891] 2 QB 428 per Lord Esher MR at pp 430-431; *Ex p Pulbrook* per Mathew J at p 89.)

51. Secondly, it is clear that the phrase "criminal cause or matter" need not have one meaning but may be interpreted differently depending on its statutory context. In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 1188; [2011] 1 WLR 3253 a district judge had refused an application by the applicant newspaper that it be provided with copies of documents referred to but not read out in an open hearing in extradition proceedings. The applicant 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) granting permission to appeal to the Court of Appeal, considered that the application had been wholly collateral to the extradition proceedings and that the district judge's order had not involved an exercise of his criminal jurisdiction nor had it any bearing on the extradition proceedings. Accordingly, it held that the Divisional Court's judgment had not been made in a criminal cause or matter within section 18(1)(a) of the Senior Courts Act 1981. In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (No 2)* [2012] EWCA Civ 420; [2013] QB 618, the question arose whether the previous decision had any impact on the powers of the Criminal Procedure Rule Committee which under section 68 and 69 of the Courts Act 2003 are limited to making rules in relation to the Crown Court and the Magistrates' Court when they are dealing with "any criminal cause or matter". Hooper LJ concluded (at para 106):

> "Mr Perry, rightly in my view, said that the words 'any criminal cause or matter' must have a different meaning in section 68 of the Courts Act 2003 than they do in section 18(1) of the Senior

> Courts Act 1981. To give the words 'any criminal cause or matter' in section 68 a narrow meaning would lead to the undesirable result that issues such as those dealt with in Part 5 of the Criminal Procedure Rules (and in other parts of the Rules) would have to be the subject of rule-making by some other body. That cannot have been the intention of Parliament: …"

Lord Neuberger MR agreed (at para 110):

> "I agree with what is said in para 106 that 'criminal cause or matter' in section 68(b) of the Courts Act 2003 does not necessarily have the same meaning as the identical expression in section 18(1) of the Senior Courts Act 1981, and that, if the expression in the 1981 Act has the meaning ascribed to it in the earlier decision in this case …, then it has a different meaning in the 2003 Act."

(See also *Al Fawwaz v Secretary of State for the Home Department* [2015] EWHC 468 (Admin) per Wyn Williams J at para 6.) If the basis of the *Barras* principle is that Parliament must be assumed to be aware of authoritative judicial decisions defining a particular word or phrase, it must, as a result of *Guardian News (No 2)*, have been aware prior to the enactment of the Justice and Security Act 2013 that "criminal cause or matter" need not have one meaning but may be interpreted differently depending on its statutory context. To my mind, this is fatal to the Appellants' reliance on the *Barras* principle.

Interpretation in the context of Justice and Security Act 2013

52. Considering the words "proceedings in a criminal cause or matter" in their natural meaning and usage, it seems to me that "cause" is appropriate to cover criminal proceedings which will result in a conviction or acquittal of a criminal offence. The use of "matter" in the alternative may extend the scope of the exclusion beyond that to ancillary applications in such criminal proceedings, such as applications for disclosure, and to extradition proceedings which do not in themselves result in a conviction or acquittal but may be considered analogous to committal proceedings. In my view, however, these words in their natural meaning do not extend to include this judicial review. This is a public law challenge to a decision as to whether to initiate criminal proceedings. It involves the scrutiny of the legality of the decision on public law grounds and the application of principles of judicial review. The application is made and heard in the Administrative Court. It is extraneous to the criminal process. Even if it were to succeed, further steps

would have to be taken before criminal proceedings might begin. It is at, at least, one remove from proceedings in a criminal cause or matter.

53. It is, therefore, necessary to consider the words in the context of this particular statute and to consider the purpose of the exclusion of "proceedings in a criminal cause or matter" from this closed material procedure. Here, it is permissible to refer to the Justice and Security Green Paper Cm 8194/2011, which preceded the Justice and Security Act 2013 and to the Explanatory Notes to the Bill and the Act in order to cast light on the contextual setting and in order to give a purposive interpretation of the legislation (*Fothergill v Monarch Airlines* [1981] AC 251 per Lord Diplock at p 281; *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956 per Lord Steyn at para 5). The Green Paper states that its proposals are aimed to "better equip our courts to pass judgment in cases involving sensitive information" and to "protect UK national security by preventing damaging disclosure of genuinely national security sensitive material" (Foreword). An indication of the purpose of the specific exclusion of proceedings in a criminal cause or matter from the new procedure is provided by the following passage (at p 7):

> "Criminal vs Civil: Why criminal proceedings are out of scope for this Paper Civil and Criminal proceedings in England and Wales are fundamentally different. In civil cases, the courts adjudicate on disputes between parties under the civil law. In criminal cases, it is usually the state which prosecutes individuals for the commission of criminal offences; where defendants are convicted, they face criminal sanctions including imprisonment. Due to the understandably more onerous requirements of the right to a fair trial in criminal cases, the rules concerning the use and protection of sensitive evidence are different to those in civil cases.
>
> Criminal proceedings have the strictest requirements under article 6 of the ECHR regarding the disclosure of sensitive material. Long-standing procedures, generally supported by all parties, are in place:
>
> • The evidence that the prosecutor uses in court to secure a conviction is never withheld from the accused. …"

The passage then refers to disclosure to an accused of all relevant material, the use of public interest immunity procedures, the power of the court to overrule a public

interest immunity certificate and the discretion which would permit a prosecutor to withdraw a prosecution rather than disclose sensitive material. It then states:

> "In civil claims, as [Her Majesty's Government] is a defendant, there is no possibility of withdrawing from the case, so the ability to protect sensitive material is entirely dependent on PII claims."

In addition, a glossary (at p 68) which distinguishes civil and criminal proceedings, reinforces the view that the purpose of the exclusion is to prevent its use in criminal proceedings:

> "Civil proceedings
>
> For the purposes of this Green Paper any court or tribunal proceedings which are not criminal in nature are referred to as civil proceedings. Civil proceedings include, but are not limited to, areas such as public law (ie judicial review), negligence, family law, employment law, property law and commercial law.
>
> By contrast, criminal proceedings involve an accusation by the state (or in England, Wales and Northern Ireland, occasionally by way of private prosecution) that the accused has committed a breach of the criminal law which, if proved, would lead to conviction and the imposition of a sentence. Crimes are generally wrongs which affect the public as a whole, so that the public has an interest in their detection and punishment."

It then concludes with the statement that:

> "The proposals outlined in the Paper do not affect criminal proceedings" (at p 68)."

54. The Explanatory Notes to the Justice and Security Bill, clause 6(7) provided:

> "51. Subsection (7) defines 'relevant civil proceedings'. This sets the range of civil proceedings in which a declaration under subsection (1) may be made. 'Relevant civil proceedings' are

> defined as proceedings in the High Court, the Court of Appeal or the Court of Session which are not criminal proceedings."

The Explanatory Notes to the Justice and Security Act 2013 simply states:

> "67. Section 6 enables certain courts hearing civil (but not criminal) proceedings, namely the High Court, the Court of Appeal, the Court of Session or the Supreme Court, to make a declaration that the case is one in which a closed material application may be made in relation to specific pieces of material."

55. I see the force of the point that if the full extent of the intention of Parliament had been that the new procedure should not affect criminal proceedings, it would have been open to it simply to exclude the use of this closed material procedure in "criminal proceedings". Nevertheless, the Green Paper provides two compelling reasons why the new procedure should not be available in proceedings which may result in a conviction or an acquittal. First, the objections to a person being convicted of a criminal offence on the basis of secret evidence which has not been disclosed to him or his legal representatives are obvious. Secondly, the obligations of the United Kingdom under article 6 ECHR are more onerous in their application to criminal proceedings which may result in a conviction or acquittal. However, neither of these reasons has any application here and neither would justify denying the use of the new procedure in the present application for judicial review of the Director's decision. The Green Paper also draws attention to the fact that the Director has control over a criminal prosecution with the result that it is open to her to choose to discontinue a prosecution rather than disclose sensitive national security material. By contrast, the Director is the defendant in this judicial review and therefore has a responsive role; she has no power to withdraw these proceedings in order to prevent the disclosure of such material. Moreover, no reason of principle has been advanced as to why the closed material procedure should not be available when the Administrative Court hears the present application for judicial review. On the contrary, it is apparent that the conflict between the principles of open justice and natural justice, on the one hand, and the need to protect national security on the other, arises in a particularly acute form in judicial review proceedings to which the application of the detailed compromise drawn by Parliament in Part 2 of the Justice and Security Act 2013 is particularly appropriate.

56. I should add that I do not share Lord Mance's view that the rationale for the exclusion from the closed material procedure of "proceedings in a criminal cause or matter" is readily applicable or transposable to the context of a challenge by judicial review to a decision to prosecute, a hypothesis which he uses as a stepping stone to his conclusion. If there is material which is potentially incriminating, a closed

material procedure would be pointless, as he accepts, as it could not be used at trial. If, on the other hand, there is material which is potentially exculpatory, a closed material procedure would be equally pointless because it would have to be disclosed at trial or the prosecution abandoned. This does not suggest any need to exclude the closed material procedure in a judicial review of a decision to prosecute in order to achieve the objective of the exclusion. On the other hand, as the present case shows, there may well be purpose in making the closed material procedure available in a challenge to a decision not to prosecute and the rationale for exclusion has no application here.

57. I accept the submission of Mr James Eadie QC that the core concern which lies behind this provision is that this closed material procedure should not be available in any case where criminal guilt is being decided. The present proceedings, however, are at, at least, one remove from a criminal cause or matter and the court is performing the function of determining the legality of the conduct of the decision maker. (See the observations of Wyn Williams J in *Al Fawwaz*, at para 7, to similar effect.) These proceedings do not fall within the purpose of the exclusion. Here, proceedings challenging a decision not to prosecute are not themselves proceedings in a criminal cause or matter for the purpose of section 6 Justice and Security Act 2013. Accordingly, I would have dismissed this appeal.