

CASE COMMENTARY

WHAT'S IN A NAME?

Re Guardian and News Media Ltd in HM Treasury v Mohammed Jabar Ahmed [2010] UKSC 1

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INTRODUCTION

In this case the newly constituted Supreme Court adjudicated upon anonymity orders granted in respect of the appellants, who had been the subjects of asset-freezing orders imposed under anti-terrorism legislation. The complex set of facts gave the Court the opportunity to consider the influence of the competing rights under articles 8 and 10 of the European Convention on Human Rights (ECHR) upon the pressing issue of restrictions on reporting of publicly conducted legal proceedings. The decision of the Court constitutes a reassertion of the importance of press freedom, underpinned by article 10, as an essential component of open justice.

FACTS

The appellants were five men upon whom the Administrative Court had imposed asset-freezing orders in 2007.¹ At the time the court had added anonymity orders, which required that the names of the appellants be replaced with single initials in all reports of the proceedings. These “blanket bans” were continued during the subsequent legal proceedings which challenged the asset-freezing orders (the “substantive case”). At the later stages of these appeals, the press and media (“the press”), along with HM Treasury, requested that the anonymity orders be set aside. In the substantive case it was held by the Supreme Court that the executive had exceeded its powers in imposing limitations on the freedom of the individual on the grounds of “reasonable suspicion”, without Parliamentary scrutiny. The asset-freezing

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¹ The asset-freezing orders were imposed under article 4 of the Terrorism (United Nations) Order 2006.

orders were thereby quashed.² The issue of anonymity was considered separately but in parallel with the hearing on the substantive issue.

In the case of two of the appellants (known as G and HAY), their names as persons under freezing orders were already in the public domain due to a list published by the Bank of England in 2005 and they had been further identified in various press reports. At the outset of the substantive case, the anonymity order had been lifted in respect of the former, Mohammed al-Ghabra. It had not yet been removed in the case of HAY, who additionally had brought a successful action for wrongful imprisonment in which he was identified: *Youssef v Home Office*.³ In *Re Guardian* the Court noted that no evidence had been produced of harm, social or physical, having occurred to either of these appellants or their families due to their identities becoming known. On this basis, the Court lifted HAY's anonymity order and declared that it would pursue no further discussion of anonymity in respect of G and HAY.

This left the Supreme Court to consider the cases of three brothers A, K and M, who were still anonymous, their identities having been ordered to be kept confidential at the (non-specific) request of the Treasury with "presumed input by the security services".⁴ Although the Treasury no longer regarded reporting restrictions to be necessary when fresh directions were made in respect of the appellants under the new Terrorism Order 2009, the restrictions were to be continued "in the interests of justice" until the matter could be determined by the Supreme Court; that is, whether an order whereby the disclosure of the appellants' identities would be lawful.

A and K had left their addresses, were not in contact with their solicitors and it was unknown whether they were still in the UK. Therefore the court had heard no compelling arguments as to the effect of revealing their identities. However revealing their identities would indirectly identify their brother, M, and so it was the potential impact on M and his family, upon which the appeal focused. He was living with his ex-wife and their five children and it was argued on his behalf that revealing him as one of those who was challenging the freezing orders would affect their relationships with Muslim community, due to their fear of being associated with family. Further concern was expressed about potential "serious damage to his reputation in circumstances in which he has not been charged with, or convicted of, any criminal offence and so has no opportunity to challenge the substance of the allegations against him."⁵

² *Her Majesty's Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2.

³ [2004] EWCA 1884 (QB).

⁴ The anonymity orders were imposed according to article 6 of the Terrorism Order 2006, which provides for "Confidentiality".

⁵ [2010] UKSC 1 at para [21].

In its first reported decision, Lord Rodger delivered a judgment on behalf of a unanimous 7-person Supreme Court, strongly endorsing the principle of “open justice”. When balancing ECHR article 8 rights to privacy against article 10 rights to freedom of expression, the Court concluded that an insufficient degree of potential impact upon the former had been established, and that it was outweighed by an important general public interest in knowing the identity of those challenging freezing orders. The full names of the remaining three appellants (anonymity already having been lost for Youssef and Mohammed al-Ghabra) were ordered to be available for publication, both in the instant case and in the substantive action against the freezing orders themselves.

THE DECISION

Lord Rodger began by indicating the extent of the recent growth of restrictions on the press freely to report judicial proceedings, repeating counsel’s reminder to the court that, “Your first term’s docket reads like alphabet soup.”⁶ Further illustrating what he regarded as “an efflorescence of anonymity orders” Lord Rodger recounted calculations that in 8 out of 58 appeals heard by the House of Lords in 2007 at least one of the parties appeared under an initial and in 2008 it was 15 out of 74.⁷ He then went on to allege that the lower courts had granted anonymity orders “without any very prolonged consideration and without explaining their thinking...” and recalled the warning of Sir Christopher Staughton in *Ex P* that “when both sides agreed that information should be kept from the public, that was when the court had to be most vigilant.”⁸ The context of the decision was, therefore, one in which such “blanket anonymity orders” were not to be granted save in the most compelling circumstances.

Open Justice

Open justice has been described as “one of the oldest principles of English law going back before Magna Carta.”⁹ Its two main manifestations are public attendance at hearings, and the free reporting of these hearings. Confidence in

⁶ *Ibid*, at para [1].

⁷ My own calculations indicate that in 2009, the comparable figure was 12 out of 49.

⁸ Unreported, *The Times* March 31, 1998.

⁹ *LNS v Persons Unknown* [2010] EWHC 119 (QB). See also: “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.” Jeremy Bentham, quoted in G Nettheim “The Principle of Open Justice” (1984-6) 8 *University of Tasmania Law Review* 28.

the legal system is partially founded upon justice being “seen to be done” and, given obvious practical difficulties with widespread first-hand observation, press reports have a crucial role in ensuring transparency.

Article 6 of the European Convention on Human Rights (ECHR) sets out the fundamental entitlement of a defendant to a “fair and *public* trial”. I have italicised the latter aspect, which is qualified by acknowledgement that exclusion of the press or the public may be required “...in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”¹⁰

The court reviewed the historical background to the relationship between the press and the courts. Restrictions on open hearings and publication were rejected in the 19th century in divorce cases but ultimately Parliament began to intervene in 1926 with the Judicial Proceedings (Regulation of Reports) Act according to which restrictions could be placed, not upon details revealing identity, but regarding matters publication of which would potentially cause injury to public morals. Further statutory provision restricting publicity include section 1 Sexual Offences (Amendment) Act 1992, where non-disclosure of the complainant’s name is automatic; and the Official Secrets Act 1920 section 8(4), the Children and Young Persons Act 1933 section 39 (pertaining to children involved in criminal proceedings) and the Youth Justice and Criminal Evidence Act 1999 sections 44-46. In these last three cases anonymity is a matter of judicial discretion.

The non-statutory restrictions were previously within the inherent jurisdiction of High Court, but since the Human Rights Act 1998 (HRA) came into force in 2000, the power to make orders of this kind is one of the ways in which the UK fulfils its positive obligations under section 6 according to which public authorities, such as the courts, to must act compatibility with Convention rights. In extreme cases, when physical safety is an issue, articles 2 and 3 of the ECHR may be engaged. Lady Justice Hale in *Venables and Thompson v NGN* made an exceptional anonymity order in favour of the killers of James Bulger.¹¹ In our case the concern was about the lesser evil of harm to reputation and therefore the focus was upon the frequently competing rights of article 8, which sets out the right to privacy and family life and the

¹⁰ ECHR art 6(1).

¹¹ [2001] 2 WLR 1038. This included press restrictions but not solely in terms of reporting court proceedings; the injunction was *contra mundum*, and prohibited revealing any facts which would identify the subjects. The complex implications of such a decision has been seen in the controversy regarding anonymity following the recall of Jon Venables to prison following reported breach of his conditions of licence.

article 10, the right to freedom of expression. A court may be acting unlawfully if, by permitting publication of his identity, it infringed a party's article 8 right to a private and family life. Additionally under article 8 there may also be a positive duty for the court to go farther and, through blanket orders, require others, such as the press and journalists, to respect the applicant's private and family life. Whether acting under either negative or positive obligations the courts must strike a fair balance between competing needs of the individual and the community.

The community's competing needs are embodied in the article 10 right to freedom of expression. This is compromised when the courts prohibit the reporting of the names of the parties to proceedings which, despite being heard in open court by those present, are forbidden to be reported to the wider public. Article 10(2) stipulates that such restrictions are permitted when necessary in a democratic society for the protection of reputation or rights of others. As will be seen below, the courts have established that the balancing of the competing demands of articles 8 and 10 will be accomplished by invoking the principle of proportionality.

RE S AND "BBC"

Two recent cases illustrate prevailing judicial attitudes to the relationship between article 8 and article 10. In *Re S (A Child) (Identification: Restrictions on Publication)*¹² a request was made on behalf of a child for an injunction against naming the defendant in a murder trial, in which his mother was charged with the murder of his brother. The situation was not covered by section 39 of the Children and Young Persons Act 1933, the child not being "a child concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings were taken, or as being a witness therein." The outcome was in favour of open justice despite claims that publicity regarding the child could lead to risks to his health and well-being.

Lord Steyn said in his leading speech: "...the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8."¹³ But exceptions should be rare: "...it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances,

¹² [2004] UKHL 47.

¹³ *Ibid*, at para [18].

further exceptions to the process of open justice.”¹⁴ He cited *R v Legal Aid Board e p Kaim Todner*, where Lord Woolf said, “The need to be vigilant arises from the natural tendency for the general principles to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing.”¹⁵ In a judgment which invoked the balancing of articles 8 and 10, according to the principle of proportionality, the House of Lords in *S* declined to grant an injunction against publication revealing identity. According to Lord Steyn:

“A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.”¹⁶

Any account of the trial would be “very much disembodied” and with a lesser impact on the audience, if it did not the reveal of the identity of the defendant.

Subsequently the House of Lords confronted similar issues in *Atty-Gen Ref No 3 of 1999: Application by the BBC to set aside or vary a reporting restriction order* (hereafter *BBC*).¹⁷ In 1999 “D” had been acquitted of rape, a matter that was freely reported according to the principle of open justice. However one year later an Attorney General’s reference was made challenging this acquittal and this hearing was accompanied by an anonymity order (imposed by the Court of Appeal upon a statutory basis later doubted by the Law Lords). Some nine years later, a BBC programme challenged this anonymity order. Under section 78 of the Criminal Justice Act 2003, which changed the law on double jeopardy, the BBC intended to reveal “new and compelling evidence” that D’s DNA matched that at the crime scene as part of a press campaign for a re-trial.

¹⁴ Ibid, at para [20].

¹⁵ [1999] 1 QB 966, at 977.

¹⁶ [2004] UKHL 47, at para [31].

¹⁷ [2009] UKHL 34.

The link that his DNA sample provided was held to be information in respect of which D had a reasonable expectation of privacy, thereby engaging article 8. However the proposed BBC programme on “controversial acquittals” raised matters of general public interest, including the issues of indiscriminate storage of DNA and reform of the abolition of double jeopardy rule. It will be seen that this quality of “general public interest” is one which lends particular “article 10 weight” to any calculation of proportionality. Here, this debate would lose cogency if it could not be linked to facts and circumstance of actual cases. In conclusion, although it was acknowledged that there would be a significant interference with D’s article 8 rights, denial of anonymity was ultimately proportionate to the need, in a democratic society, for the public to be aware of controversial matters of criminal justice.

The significant aspects of the anonymity orders in *Re Guardian* were: firstly, that the applicants were attempting to block their identification in reports concerning basic facts the truth of which they did not dispute: that they had been the subjects of asset-freezing orders. Secondly, these “blanket bans” were so extensive in their reach (enforceable against even those writing in sympathy with the appellants) that they required justification under article 10(2) as necessary in a democratic society in order to ensure protection of M’s article 8 rights to a private and family life.¹⁸ Lord Rodger reiterated that the anonymity orders under consideration imposed not only self-constraints on the courts but were “sweeping” in their effect upon the press.

The subject matter under debate was a key determinant in the Court’s approach. The asset-freezing orders in the substantive case were executive orders under the terrorism legislation and the appeals challenging them take the form of judicial review.¹⁹ The foundations of the orders, however, are closely allied to criminal matters and it is clear that the principles underlying this anonymity case belong to the branch of privacy law which includes *S* and *BBC*. It has more differences than similarities to “celebrity privacy” situations (discussed below), which do not directly concern the principle of open justice.

EUROPEAN INFLUENCES

M’s application set out the ways in which he felt that publicity would seriously affect his private life, including the loss of contact for himself and his family with their local Muslim community, and “serious damage to his reputation.” (As noted, no allegations were made of risk of physical violence in relation to any of the applicants.) According to the European Court of Human Rights (ECtHR) the “rights of others”, which according to article 10(2) might justify interference with freedom of expression, include article 8

¹⁸ UKSC 2010 1 at para [47].

¹⁹ *Ibid*, at para [37].

rights. *Petrina v Romania* confirmed that protection of a person’s reputation is a right that, as an element of private life, falls within the scope of article 8.²⁰ This followed the decision in *Pfeifer v Austria* which held that “a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity.”²¹ In *Karako v Hungary* the ECtHR, after confirming that reputation was covered by article 8, concluded that there are escalating degrees of interference: the lowest involving “mere” reputation up to those which are held to undermine personal integrity and which will be regarded most seriously.²² The *BBC* case²³ refers to Lord Hoffmann’s characterisation of a person’s reputation as an “immortal part of himself”. Further afield, in the UN’s International Covenant on Civil and Political Rights, “Unlawful attacks on...honour and reputation” are included with privacy, family home or correspondence in the protections provided by article 17.²⁴

The Court undertook a comparative exercise which revealed a considerable use of anonymity of court proceedings in European jurisdictions, particularly in Germany where courts themselves do not mention the names of parties, possibly to reinforce appearances of impartiality, despite the fact that the press and wider public may know of and use the relevant names. In contrast, in the present case, the actions themselves have been heard in public, with anonymity not enforced against those in attendance save for the court attempting to control the actions of the press.

Balancing Articles 8 and 10

An early opportunity for the House of Lords to explore the interaction between articles 8 and 10 was provided by the case in which the model Naomi Campbell sued Mirror Group Newspapers due to its disclosure of “private information” concerning her attendance at Narcotics Anonymous.²⁵ In holding that neither article 8 or article 10 had automatic priority, or even a presumption in its favour, Lord Hoffmann was of the opinion that both provisions reflect “important civilised values”.²⁶ Often there will not be a

²⁰ Appl no 78060/01, October 14 2008 at para [19].

²¹ (2007) 48 EHRR 175, 183 at para [35].

²² Appl no 39311/05, April 28 2009.

²³ [2009] UKHL 34 at para [7], as described in *Jameel (Mohammed) v Wall Street Journal Europe Spr* [2007] 1 AC 359 at para [91].

²⁴ “1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2) Everyone has the right to the protection of the law against such interference or attacks.”

²⁵ *Campbell v MGN Ltd* [2004] UKHL 22.

²⁶ *Ibid*, at para [55].

conflict between the two, but such conflict would arise in situations in which one was necessarily compromised by protecting the values underlying the other. The extent of compromise of the one must be measured in proportion to the extent of need evoked by the other. “Proportionality” was said by Lord Steyn in *S* to provide the “ultimate balancing test”.²⁷

THE PRESS PERSEPECTIVE

In *Re Guardian*, Lord Rodger expressed one argument, which favoured article 10, in terms of concern for the journalist enterprise itself. “What’s in a name? ‘A lot’, the press would answer.” Under anonymity, the appellants would appear “disembodied”, while identification would make “more vivid and compelling” accounts of “wrongs done to them”.²⁸ Without the use of names, the papers will be less likely to publish accounts due to lack of human interest and so less likely to stimulate informed debate on freezing orders. As we have seen in the *BBC* case, this point is not new to the debate, and would be repeated, for example, in opposing John Terry’s recent attempt to conceal the less reputable aspects of his love life.²⁹ It would appear that stimulation of debate was something, which the appellants in *Re Guardian* had been prepared to forego in favour of personal protection, so they understandably regarded this argument as spurious. Regarding the potential impact on *M*’s family, it had already been acknowledged in *S* that impact on non-parties could in future be taken into consideration.³⁰ The Court noted the obvious point that such impact was speculative or anticipatory in nature.

Lord Rodger also felt that the anticipation of a damaging impact was founded upon assumptions made about public reactions to stories which would name the appellants, ie that those upon whom freezing orders had been imposed were at best disreputable and at worst guilty of terrorism, despite the reality that they had not been convicted. Effectively the action claimed that the press should be prevented from publishing the truth for fear that readers might misinterpret it. The Lords’ approach here was reminiscent of that in the defamation case of *Lewis v Daily Telegraph*³¹ in which the City of London Fraud Squad was reported to be inquiring into the affairs of a company. The plaintiffs had claimed that this was defamatory of them because it implied guilt. The truth that there was such an investigation, based upon suspicion, could not be denied but it was the innuendo of guilt which the House of Lords rejected. According to Lord Devlin, “If the ordinary sensible man was capable

²⁷ [2004] UKHL 47, at para [17].

²⁸ [2010] UKSC 1, at paras [63-65].

²⁹ *LNS v Persons Unknown* [2010] EWHC 119 (QB) at para [62].

³⁰ [2004] UKHL 47 at para [32].

³¹ [1964] AC 234.

of thinking that where ever there was a police inquiry there was guilt, it would be impossible to give accurate information about anything...”³² Unlike the plaintiff in *Lewis*, the appellant M will not have the chance to challenge the substance of the implied allegation against him as he will not be brought to trial and so suspicions, which may be unfounded, are more likely to persist.

Lord Hoffmann, in *Re S*, had followed *Campbell* in describing the element of public interest in the publication as a key element giving weight to freedom of expression. To constitute a “positive general interest supporting disclosure” was said in the important ECtHR case of *von Hannover* to require something more substantial than lightweight “infotainment”.³³ In *Re Guardian* the Supreme Court relied on these precedents to take a strong stand on the importance of transparency or “open justice” in matters of “general public interest.” “The legitimate interest of the public is wider than that of judges *qua* judges or lawyers *qua* lawyers. The public has a legitimate interest in not being kept in the dark about who are challenging the TOs and the AQOs.”³⁴ To make an informed judgement the public need to know more, such as the fact that HAY has already successfully sued Home Secretary for wrongful detention. In order to debate the merits of the system, identification would enable the public to see how it “affects different people in different situations”.³⁵ This is an “important public matter” not some trivial aspect of an individual’s private life and “publication of M’s identity would make a material contribution to a debate of general public interest.”³⁶ Regarding the appellants themselves, “It is unusual, to say the least, for individuals to enter a debate, using highly charged language and accusing the Government of dishonouring a pledge, but at the same time to insist that they should have the right to hid behind a cloak of anonymity.”³⁷ In view of the conclusion that the potential effect on M’s private and family life was “very general, and for that reason, not particularly compelling” the Court’s application of proportionality required that the full names of the five appellants were made explicit in both this and the substantive case. The decision was accompanied by an acknowledgment that nothing is risk free, although the apparent lack of impact to date consequential upon the earlier naming of Mr al-Ghabra supported a view that the risk would be a minor one. Most appropriately, the

³² *Ibid*, at 286.

³³ *Von Hannover v Germany* (2005) 40 EHRR 1. Here Princess Caroline of Monaco won a case concerning paparazzo surveillance in a semi-public place.

³⁴ [2010] UKSC 1 at para [68]. “TO” refers to the Terrorism Orders 2006 and 2009 and “AQO” refers to the Al-Qaeda and Taliban (United Nations Measures) Order 2006.

³⁵ [2010] UKSC 1 at para [69].

³⁶ *Ibid*, at paras [73-75].

³⁷ *Ibid*, at para [71].

Press Complaints Commission should deal with any transgressions by the press.³⁸

COMMENT

It is arguable that *Re Guardian* indicates that the Supreme Court, at the outset of its new incarnation, is intent on reasserting the beneficial essence of the principle of open justice. Although, as we have seen, the terrorism legislation and related jurisprudence fall within the realm of administrative law, they are closely allied to the criminal law in substance. However the Supreme Court did not in any way confine its position on anonymity to criminal cases connected to terrorism and reserved its opinion on control order anonymity. The Court's perspective was that the purpose of the freezing order is public and thus it constitutes "an important public matter." Additionally, open justice as a value is given an intrinsic weight that many personal matters do not have. There is a contradiction implicit in this outcome because it appears that the more serious the (possibly implied) allegation which leads its individual subject to seek secrecy, the more likely there is to be a justifiable public interest generated, which may then make secrecy unsustainable.

Admittedly it is based upon a relatively narrow point (the reporting of legal proceedings), but both in tone and in substance this decision of the Supreme Court may be indicative of a new stance towards the weighting of freedom of expression against privacy. The Court goes further than merely applying a restrictive interpretation of reputation in the context of article 8: when there is a held to be high degree of general public interest in a case being reported then this can only be matched or overridden by a serious threat to personal integrity.

It has been noted that *Re Guardian* was shortly followed John Terry's failed attempt to prevent revelation of his extra-marital affair and the resurgence of public debate over the recall to prison of Jon Venables, who has been beneficiary of wide-ranging press restrictions. We see, then, that pleas for anonymity come from a wide range of sources and motivations and it is interesting to speculate whether such pleas are symptomatic of a some significant social trend or, more simply are a reflection of eagerness to test the boundaries of developing privacy rights under the Human Rights Act in the face of pervasive media scrutiny.

³⁸ An online search revealed very limited subsequent publicity given to personal information about the men, beyond their names and a summary of the suspicions about them. *The Daily Mail* published a photo of Mr al-Ghabra on October 28 2009.