Neutral Citation Number: [2020] EWHC 181 (Fam)

Case No: FD19P00674

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2020

Before :

MRS JUSTICE LIEVEN

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Between:

MANCHESTER UNIVERSITY NHS FOUNDATION TRUST — **Applicant**

and

(1) MIDRAR NAMIQ — **First Respondent**

and

(2) MR KARWAN MOHAMMED ALI — **Second Respondent**

and

(3) MS SHOKHAN NAMIQ — **Third Respondent**

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Mr Neil Davy (instructed by **Hill Dickinson LLP**) for the **Applicant**
Ms Maria Stanley (instructed by **CAFCASS**) for the **First Respondent**
Mr Bruno Quintavalle (instructed by **Barlow Robbins**) for the **Second and Third Respondents**

Hearing dates: **20, 21 and 22 January 2020**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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The Honourable Mrs Justice Lieven DBE :

1. This is an application for a reporting restriction order (RRO) limiting the reports on the naming of the clinicians and nursing staff at the treating hospital. I have dealt with the substantive issues relating to this case in the main judgment and I will not repeat any of that information.

2. MacDonald J granted an RRO prohibiting the naming of any of the treating staff, when the application came before him on 19 December 2019 and I have continued that order up to the end of the hearing. The Trust applies for the order to be continued, the parents both oppose it through Mr Quintavalle, and the Guardian (Mr Power) does not oppose it. Mr Farmer on behalf of the Press Association put before me written submissions opposing the order and also making some specific points which I will refer to below.

3. These are proceedings in the Family Division concerning a child. As such, Rule 27.10 of the Family Procedure Rules 2010 provides that the present proceedings should be heard in private unless the Court directs otherwise or another enactment directs otherwise. Pursuant to Section 12(1)(a)(i) of the Administration of Justice Act 1960, publication of information relating to such private proceedings would amount to contempt of court.

4. I took the view, and all parties agreed to this, that given the importance of transparency in the family courts and the level of public interest in cases concerning the end of life, particularly in young children, the case should be heard in open court subject to an appropriate RRO. The parents wished for Midrar's name to be published, and given the facts of the case, the Guardian did not oppose this. There was no application that the name of the hospital or the NHS Trust should not be disclosed. The sole issue is therefore the naming of the healthcare professionals who are, and have been, involved in the treating of Midrar. I note at this point that there is one clinician, Dr Y, who is from a different hospital has not been treating Midrar but who was asked to examine him and the notes in order to give an independent opinion in the hope of reaching agreement with the parents. Although Dr Y is not actually a treating clinician he was not instructed as an independent expert in the litigation. I have taken the view that he should be treated in the same way as the professionals who have been treating Midrar.

5. The Trust have submitted a witness statement from Dr G supporting the making of the RRO. She refers to the fact that staff and herself have been psychologically affected by maintaining care for Midrar where death by neurological criteria was first confirmed on 1.10.19. She also sets out the staff are concerned about being at the centre of a media storm, and potential disruption to staff, patients and their families. She also raises a worry about staff being discouraged from expressing honestly and sincerely held views, and the potential of dissuading experts from becoming involved in these controversial cases.

6. The Father's position is that openness is important for public confidence, and that it aids accountability. Mr Quintavalle argues that Dr D's position is akin to that of an expert. He also refers to the fact that there has in this case been no harassment of staff, and the parents have maintained a polite relationship with staff.

7. I also had written submissions from Mr Farmer on behalf of the Press Association. He resists the RRO and argues that the grounds set out by Dr G are insufficient to override Article 10 rights. He argues that many people may find it traumatic to be named in a

press report, but that is not a good ground to grant anonymity. He also makes detailed points about the terms of the order, which can be dealt with by changes to the terms of the order.

8. I start with the Practice Guidance issued in 2014 on Transparency in the Family Courts: Publication of Judgments. This stresses the importance of greater transparency in the family courts in order to improve openness, public understanding and confidence in the family justice system. I entirely agree with this sentiment and I have made clear throughout my involvement in the case that the hearings would be in public and the judgment would be published. That does not mean however, that the professionals involved should necessarily have their names published.

9. My attention has been drawn to two decisions of Sir James Munby when he was the President *Re J (A Child) [2013] EWHC 2694* (Fam), and *A v Ward [2010] EWHC 16* (Fam). In *re J* at [31-34] the President said;

> *31.The compelling need for transparency in the family justice system is demanded as a matter of both principle and pragmatism. So far as concerns principle I can do no better than repeat what Lord Steyn said in R. v Secretary of State for the Home Department Ex p. Simms [2000] 2 A.C. 115, 126, where, having referred to Holmes J.'s dissenting judgment in Abrams v United States (1919) 250 US 616, he continued: "freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. ... It facilitates the exposure of errors in the ... administration of justice of the country."*
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> *32.This takes me on to the next point. It is vital that public confidence in the family justice system is maintained or, if eroded, restored. There is a clear and obvious public interest in maintaining the confidence of the public at large in the courts. It is vitally important, if the administration of justice is to be promoted and public confidence in the courts maintained, that justice be administered in public—or at least in a manner which enables its workings to be properly scrutinised—so that the judges and other participants in the process remain visible and amenable to comment and criticism. This principle, as the Strasbourg court has repeatedly reiterated, is protected by both Article 6 and Article 10 of the Convention. It is a principle of particular importance in the context of care and other public law cases.*
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> *33.In relation to the pragmatic realities, I repeat what I said in A v Ward [2010] EWHC 16 (Fam) ; [2010] 1 F.L.R. 1497 , [133]: "... the law has to have regard to current realities and one of those realities, unhappily, is a decreasing confidence in some quarters in the family justice system – something which although it is often linked to strident complaints about so-called 'secret justice' is too much of the time based upon ignorance, misunderstanding, misrepresentation or worse. The maintenance of public confidence in the judicial system is central to the values which underlie both Art 6 and Art 10 and something which, in my judgment, has to be brought into account as a very weighty factor in any application of the balancing exercise."*

34.The family lawyer's reaction to complaints of "secret justice" tends to be that the charge is unfair, that it confuses a system which is private with one which is secret. This semantic point is, I fear, more attractive to lawyers than to others. It has signally failed to gain acceptance in what Holmes J. famously referred to as the "competition of the market": Abrams v United States (1919) 250 US 616, 630. The remedy, even if it is probably doomed to only partial success, is—it must be—more transparency; putting it bluntly, letting the glare of publicity into the family courts.

10. *Re J* was a care case where the issue was the publication of information on social media. Therefore, although the generality of the comments set out above are highly relevant, the specific issue in this case was not addressed. In *A v Ward* the Court was dealing, amongst other things, with an application for an RRO in relation to the treating clinicians. Sir James said at [180-183];

180.In particular, the arguments founded upon the fear of being exposed to targeting, harassment and vilification, with consequent risk to families and careers, and the consequentially disadvantageous effects all this may have on the child protection and family justice systems, are, broadly speaking, about as valid but certainly no more valid than in the other two cases. Again here, as there, the evidence is, by and large, general rather than specific and as striking for what it does not say as for what it does. One can sympathise with conscientious and caring professionals who cannot understand why they should be at risk of harassment and vilification for only doing their job – and a job, moreover, where participation in the forensic process is not, as it were, part of the 'job specification' as in the case of social workers and expert witnesses. But the fact is that in an increasing clamorous and decreasingly deferential society there are many people in many different professions who, however much they might wish it were otherwise, and however much one may deplore the fact, have to put up with the harassment and vilification with which the Internet in particular and the other media to a lesser extent are awash. And the arguments based upon the risk of unfounded complaints being made to the GMC has, as it seems to me, no more weight in the case of the treating clinicians than in the case of the expert witnesses.

181.The question, at the end of the day, is whether having regard to all the evidence and other material before the court, the balance comes down in favour of conferring anonymity. And the fact is that in the case of the treating clinicians, as in the case of both the expert witnesses and the social workers, the claim for injunctive relief here is not being put by reference to the particular circumstances or particular vulnerabilities of specific individuals. On the contrary, the treating clinicians disavow any concerns in relation to Mr and Mrs W. The claim in all three cases is, in reality, a 'class' claim, that is, a claim that any professional who falls into a certain class – and in the case of both the social workers and the treating clinicians the membership of

> *the class is very large indeed – is, for that reason, and, truth be told, for that reason alone, entitled in current circumstances to have their identity protected, in plain language to have their identity concealed from the public. That is a bold and sweeping claim, to be justified only by evidence and arguments more compelling than anything which Mr Lock or his clients have been able to put before me.*
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> *182.There is a further consideration to be borne in mind in the case of the treating clinicians. Typically, as in this case, their involvement with their patient will have begun and ended before there are any proceedings on foot. And in many cases, even where there may at some stage be suspicion, there will never in fact be any proceedings. Is a distinction to be drawn between those treating clinicians involved in a case which ends up in court and those involved in a case which does not? And if so, on what rational basis, for their involvement in each case may be precisely the same? And if no such distinction is to be drawn, are the courts to be faced with claims for contra mundum orders in cases where there has been no judicial intervention of any kind at all, merely because a treating clinician is faced with an argumentative parent who he fears is threatening to go to the media?*
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> *183.Be that as it may, in the circumstances of this case, and in the light of all the evidence and other material before me, I am wholly unpersuaded that any proper case has been made out for affording the treating clinicians anonymity. ...*

11. Ultimately, in all these cases, the matter comes down to a balance between competing interests. There is an undoubted, and critical importance, in open justice and transparency of the court system. There is also a critically important public interest in the freedom of the press to report without restriction, protected by article 10 ECHR. There is a more specific public interest on the facts of this and similar cases, in the public understanding what is happening in these sensitive cases, and the very difficult factual and human issues involved. Often, there is an important public interest in protecting the identity of the child and the wider family. However, in this case the parents have waived their and Midrar's confidentiality, and the Guardian raises no objection to this.

12. However, there are competing interests. Firstly, that of the treating professionals to their private life (protected by article 8). Secondly, there is a strong public interest in professionals who are doing a difficult and extremely important job (the care of critically ill children) in being able to do that job without feeling that their privacy and their ability to work is being jeopardised. Not least, the public interest lies in ensuring that appropriately qualified people do not avoid these type of cases because of the fear of becoming the target of hostile comment, and that comment even extending to their families.

13. My task is to balance those interests. In my view the public interest in open justice is very largely protected in the present case by the fact that the proceedings are in public and the judgment is in public. Further, relevant to the facts of this case is that the

Hospital is named, as is the child. There is therefore no question of secret justice, or the public not being fully informed as to what is happening to Midrar and in the proceedings generally.

14. It is, in my view, difficult to see why either open justice or the public interest is harmed, save to a minimal degree, by the anonymisation of the treating professionals. This is not a medical negligence case, and although the Father has made allegations about the treatment, those are not substantiated by evidence and not pursued by Mr Quintavalle. On the other side of the balance, I do take into account the fact that this is not a case where there have been (so far as I am aware) hostile comments either in the press or social media about the hospital staff, and there has not been any harassment towards them. There has been some, but not extensive, press comment, although it is not possible to know whether this will increase or decrease after the judgment. However, these type of cases concerning the treatment of very ill young children, raise very strong views and there is a well documented history of hostile and distressing comments about treating staff in other cases. I also note that the Father has made some very damaging, and wholly unevidenced, allegations against staff. I do not consider it appropriate to wait until such hostile comment, or worse, arises and then decide that an RRO should be granted. That is to shut the door after the horse has bolted.

15. I accept Mr Farmer's point that many people may find it traumatic to be named in the press in the course of litigation, and that is no ground to grant anonymity. However, the position of treating professionals is somewhat different. There is a significant public interest in allowing them to get on with their jobs, and in minimising the disturbance to them and their other patients whilst they are providing that care.

16. These cases are necessarily fact specific and I do not purport to set down general guidance. I do however somewhat differ from the views expressed by the President in *A v Ward* as set out above. This may be because the facts of the case differ. In my view there is an important distinction between professionals who attend court as experts (or judges and lawyers), and as such have a free choice as to whether they become involved in litigation, and treating clinicians. The latter's primary job is to treat the patient, not to give evidence. They come to court not out of any choice, but because they have been carrying out the treatment and the court needs to hear their evidence. This means they have not in any sense waived their right to all aspects of their private life remaining private. In my view there is a strong public interest in allowing them to get on with their jobs without being publicly named. I do not agree with the President that such clinicians simply have to accept whatever the internet and social media may choose to throw at them. I note that the President's comments were made before the well publicised cases of *Gard* and *Evans*, and perhaps at a time where the risks from hostile social media comment were somewhat less, or at least perceived to be less. There may well be cases where the factual matrix makes it appropriate not to grant anonymity and each case will obviously turn on its own facts. But in my view the balance in this case falls on the side of granting the order.

17. I do not accept Mr Quintavalle's argument that it is only appropriate to grant an RRO if each and every person covered has been asked whether they wish for their article 8 rights to be protected and evidence produced. In the present case there are some 360 individuals set out in the annex to Dr G's third witness statement. Midrar has been in the Hospital for four months and inevitably large numbers of people will have treated

him, new members of staff may be coming onto the ward at any time. Mr Quintavalle's submission is slightly disingenuous because it would in practice make an RRO in a case such as this unworkable. It would be wholly disproportionate for evidence to have to be produced in respect of each member of staff. I take the view that it is a reasonable assumption that members of staff treating Midrar will want their privacy protected. If, for whatever reason they do not, then they are free to raise that with the Trust, and if necessary apply to the court.

18. For these reasons I extend the RRO in the same terms as it currently stands to cover the treating clinical and nursing staff.