Neutral Citation Number: [2024] EWHC 2969 (KB)

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**A DISTRICT REGISTRY**

Date: 22 November 2024

**Before** :

**THE HONOURABLE MR JUSTICE NICKLIN**

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**Between :**

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| **PMC**<br>**(a child by his mother and litigation friend FLR)** | **Claimant** |
| **- and -** | |
| **A Local Health Board** | **Defendant** |

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**Leslie Keegan** (instructed by **Hugh James**) for the **Claimant**
**TT** (of **In-house NHS Legal Services**) for the **Defendant**

Hearing date: 6 November 2024

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# Approved Public Judgment

This judgment was handed down remotely, in public, at 10.00am on Friday 22 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mr Justice Nicklin :**

1. This judgment is divided into the following sections:



(1) This is a redacted version of a judgment that was handed down in private at the same time. The redactions have been necessary to withhold the identity of the Claimant and remove information that is likely to identify him pending an appeal against the decision. This public judgment can be published freely.

(2) I have ordered that the judgment handed down in private must not be published pending appeal.

(3) The following **reporting restrictions** have been imposed, pending appeal:

> "Pursuant to s.39 Children & Young Persons Act 1933 (and subject to that section), no report of the Public Judgment or any appeal may include: (a) the name, address or school of the Claimant; (b) any particulars calculated to lead to the identification of the Claimant; and/or (c) a picture that is or includes any picture of the Claimant."

2. This is a claim for clinical negligence. This judgment concerns an application, made on 1 November 2024, for the Claimant (and his litigation friend) to be anonymised.

## A: Background

3. The Claimant was born in 2012 at one of the Defendant's hospitals. It is the Claimant's case that, after his birth, he developed several problems, including a large intraventricular haemorrhage ("IVH"). As a foetus, it is alleged that the Claimant was subject to a period of prolonged partial asphyxia prior to birth, probably followed by a period of acute asphyxia during the second stage of labour. The Claimant's claim is that the IVH led directly to him developing cerebral palsy.

4. Before the present claim was issued, a letter of claim was sent on 23 October 2013. In 2016, the Defendant admitted liability for negligence in the care of the Claimant and his mother, and that, but for such breach of duty, the IVH would have been avoided. Substantial interim payments have been made by the Defendant before issue of the Claim.

5. The Claim Form was issued on 28 March 2023 in the Royal Courts of Justice. It sought damages of more than £10m. Particulars of Claim followed, dated 10 July 2023. A schedule of loss accompanying the Particulars of Claim sought damages of around £2.6m (assessed at 17 April 2023 and excluding some future losses that remained to be quantified). An Acknowledgement of Service was filed on 4 August 2023.

6. By consent, judgment on liability was entered on 8 November 2023. On 20 November 2023, the Court approved the interim payments that had been made before the commencement of the proceedings, and a further sum to be paid within 28 days of the order.

7. On 17 January 2024, again by consent, the Court ordered the transfer of the claim to a District Registry. Directions were given towards a quantum only trial, which has been fixed for 10 days from 1 December 2025.

8. There have been no prior hearings in the claim, the various orders having been made (largely by consent) without a hearing. No previous application has been made for anonymity for the Claimant.

## B: Anonymity Application

9. On 1 November 2024, the Claimant's solicitors issued an Application Notice. Section 3 of the Application Notice stated:

> "The Claimant requests that the Court make an anonymity order in this case. The Claimant encloses a draft order which is in the standard format using PF10.
>
> The Claimant is a child, currently 12 years of age, and the claim is brought by his mother and litigation friend. The Claimant is unlikely to have capacity to conduct proceedings or manage his property and affairs on reaching adulthood. The Court is asked to make an anonymity order in this case to protect the Claimant's right to private and family life. Publication of the circumstances giving rise to the claim, publication of any interim payments received on account of damages and publication of any settlement award would involve injustice in the form of an interference with the article 8 rights of the Claimant and his family. The Court is therefore asked to make the anonymity order now, ahead of the claim being settled."

10. A draft order was provided with the Application Notice. It was substantially in the form of the current version of PF10 (a standard form headed "Anonymity and prohibition of publication order"). The terms of the order that was sought are set out in Annex 1 to this judgment. Paragraph 4 of the draft order also sought general restrictions on non-party access to unredacted documents from the Court's records.

11. Section 10 of the Application Notice set out the evidence upon which the Claimant relied in support of the application. Under a heading, "*Request for an anonymity order*", the Claimant's solicitors stated:

> "The Claimant's solicitor was contacted on 31 October 2024 by a journalist from [Media Party 1 ("MP1")]. He explained that he had access to a copy of the Particulars of Claim and would like to publish a news article about the Claimant's case. He indicated that it would be better if he could liaise with the family about this and seek their involvement in the article. The Claimant's solicitor spoke to the journalist again on 1 November 2024 and he confirmed their intention to publish a piece within the near future.
>
> The Claimant's solicitor has discussed the position with the Claimant's litigation friend. The Claimant's litigation friend does not wish to engage with the media regarding the claim, the circumstances of the claim or the value of the claim. The Claimant's litigation friend wishes for the Court to make an anonymity order to protect the identity of the Claimant. The Claimant is a child. The interim payments that have been received to date have been managed by the Claimant's professional property and affairs deputy, appointed by the Court of Protection. The Claimant's injuries are severe, and he remains vulnerable to exploitation. The Claimant and his family have a right to respect for their private and family life and it is recognised that this right means that the media and others can be prevented from interfering in someone's life."

12. Under the heading, "*Previous press articles*", the following was stated:

> "The Claimant's mother has previously engaged with [MP1]. From research carried out online it appears that she has engaged in two different articles. The articles comment on the Claimant's injuries, his difficulties and how well he is doing in the circumstances. In the second article the family talk about the support they have received... The articles do not comment on or discuss the litigation and the Claimant's litigation friend does not wish to be involved in any media opportunities to discuss the claim or the potential value or settlement of the claim."

13. Two articles from MP1 were attached to the Application Notice. I deal below with the relevant media coverage relating to the Claimant and the claim.

14. The Application Notice sought an immediate interim anonymity order, without notice to MP1, pending hearing of the application "*to prevent details of the claim being published before the Court has had the opportunity to hear from all parties*".

15. The Application Notice stated that the Defendant's position was neutral regarding the anonymity application, a position that has been maintained by the Defendant.

16. Preparing for the hearing, I searched Westlaw databases to see what, if anything, was available in relation to the proceedings. I discovered that, in a section headed "*Dockets*",

it is possible to search for details of pending cases. A search of this case returned the following information, which is available to relevant subscribers of the Westlaw service:

(1) the Claimant's surname, and the full name of the Claimant's litigation friend;

(2) the date and brief details of orders made in the proceedings; and

(3) the date of filing of statements of case.

17. The availability of this information is almost certainly a direct result of the publication of this information on the Court's electronic filing system (CE-File), which is also publicly available, and the availability of relevant documents from the records of the Court, under CPR 5.4C(1), following the filing of the Acknowledgement of Service.

18. In support of the anonymity application, the Application Notice referred to the Court of Appeal's decision in ***JX MX -v- Dartford & Gravesham NHS Trust*** **[2015] 1 WLR 3647** and to the decision of Martin Spencer J in ***PQ -v- Royal Free London NHS Foundation Trust*** **[2020] EWHC 1662 (QB)**.

## C: Directions for a hearing

19. The Application Notice was referred to me, urgently, following receipt by the Court, and I made an order, on 1 November 2024, listing the application for hearing on 6 November 2024. I required the Application Notice and evidence in support to be served immediately on *MP1* and gave directions for the filing of further evidence by the Claimant, dealing with the extent to which there had been previous hearings in the claim in open court and any further media coverage that there had been, and any evidence in response by the Defendant and MP1.

20. I refused to grant an interim anonymity order pending the hearing on the grounds that, if granted, the order was likely to affect the exercise of the Convention right to freedom of expression by MP1 and thereby engaged s.12 Human Rights Act 1998. As such, and because MP1 had not been notified of the Application, no such order could be granted unless either (a) the Court was satisfied that the applicant has taken all practicable steps to notify MP1; or (b) that there are compelling reasons why MP1 should not be notified. Neither of those conditions appeared to me have been met.

## D: Further evidence from the Claimant and the position of MP1 and MP2

21. In compliance with my order of 1 November 2024, Carys Lewis, a solicitor with the Claimant's solicitors, filed a witness statement dated 4 November 2024.

22. In respect of whether there had been previous hearings in open court, Ms Lewis confirmed that, to her knowledge, there had been no such hearings and that all orders had been made following the consent of both parties.

23. In relation to further media coverage, Ms Lewis located and exhibited several further media publications beyond the two that had been identified in the Application Notice. The media reports that have been published are set out in Annex 2 to this judgment. The more recent coverage shows that wider concerns about the standards of maternity care at the Defendant's hospitals have kept the Claimant's story alive in media articles.

The two articles, published in 2020 and 2021, have used the Claimant's plight as an example of the human cost of medical negligence. In the MP2 news report from 2020, details of the Claimant's case were included and a solicitor, identified as representing the Claimant, gave an interview to the BBC referring to compensation payments in negligence claims that could run into substantial sums for the cost of ongoing care. The leader of the local council was quoted as saying that it was "*an absolute scandal*" that no one from the health board had been held accountable for the Defendant's maternity service failings. In the 2021 MP2 coverage, the Claimant's case was again mentioned in an article that reported the conclusions of an independent review. The Claimant has featured prominently in all the media publications, indeed, for most of them he has been the focus. These were not passing references in articles having a wholly different focus. As a result of this media coverage, the Claimant is likely to be readily identifiable, particularly in his local area, as a very high-profile victim of medical negligence.

24. On 4 November 2024, the Court received a letter from the Acting Editor of MP1, dated 1 November 2024. The Acting Editor indicated that MP1 did not oppose an order that protected the identity of the Claimant and his family, but he was concerned that any order should not prevent reporting of the name of the hospital, future phases of the litigation or any ultimate settlement in the claim or the name of the hospital. The Acting Editor relied upon the observations of the Court of Appeal ***JX MX*** [32] about the need to ensure that any derogations from open justice are kept to a minimum. He concluded:

> "We submit that there is a public interest in understanding the impact that problems at the [hospital] have had on the lives of those affected. And there is also a public interest in understanding the court processes that have followed and any award for compensation."

25. On 5 November 2024, the Court has also received a short submission from MP2 in response to the Application:

> "[MP2] does not wish to challenge the request made by the claimant and his litigation friend to protect the claimant's anonymity in this case.
>
> We would however echo the request made by [MP1], for any relevant order which may be imposed to not prevent or restrict reporting of the fundamental details made reference to in court, due to the considerable public interest in the nature and outcome of the case."

## E: Anonymity and reporting restrictions: the law

### (1) Open Justice

26. The starting point is open justice; that the administration of justice takes place in public, and the public have the right to attend all hearings held in open court. Allied to this is the corresponding right to publish reports of those proceedings. Historically that role that was discharged by the press, but is now one embraced by many others who publish reports of proceedings in many different forms, e.g. articles published on blogs, academic commentary, and on social media.

27. Consistent with the open justice principle, the general rule is that the names of the parties to the proceedings will be made public; in the documents from the Court's

records that are required to be open to public, in the hearings that take place in open court and in the orders and judgments of the Court. There is no general exception for cases where private matters are in issue, or where a party would prefer that his/her name or details of the proceedings were not revealed: ***Scott -v- Scott*** **[1913] AC 417, 463** *per* Lord Atkinson; ***R -v- Evesham Justices ex parte McDonagh*** **[1988] QB 553**, **562A-C**; ***R -v- Legal Aid Board, ex parte Kaim Todner (A Firm)*** **[1999] QB 966, 978g**. Ordinarily, "*the collateral impact that [the Court] process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*": ***Khuja -v- Times Newspapers Ltd*** **[2019] AC 161** [34(2)] *per* Lord Sumption.

28. In civil proceedings, the Claim Form and all other statements of case must be headed with the title of the proceedings, including the full name of each party and include an address at which each party resides or carries on business: CPR PD 16 §§2.1-2.2, 2.4 and 3.3(3). Under CPR 5.4C(1), unless, exceptionally, the Court makes a different order, once the conditions in CPR 5.4C(3) are satisfied, statements of case (and orders of the Court) will then become available to non-parties and their contents available to be published under a reporting privilege: s.15 and Schedule 1, paragraph (5) Defamation Act 1996. Several further statutory reporting privileges are provided to promote the free and unfettered reporting of the proceedings of Courts and Tribunals sitting in public: ss.14-15 and Schedule 1, paragraph (2) Defamation Act 1996. These reporting privileges are fundamental to the principle of open justice: ***Attorney General -v- Leveller Magazine Ltd*** **[1979] AC 440, 450A-B** *per* Lord Diplock.

29. Any order the effect of which is to withhold the name of a party in court proceedings (or otherwise restricts the publication of what would be the normally reportable details of a case) is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large: ***JIH -v- News Group Newspapers Ltd*** **[2011] 1 WLR 1645** [21]; ***In re Guardian and Media Ltd*** **[2010] 2 AC 697** [63].

30. Any derogation from, or restriction upon, open justice is exceptional and must be based on necessity. Any restriction on the public's right to attend court proceedings, and the corresponding ability to report them, must be shown, by "*clear and cogent evidence*" to fulfil a legitimate aim, be necessary and proportionate: ***R (Marandi) -v- Westminster Magistrates Court*** **[2023] 2 Cr App R 15** [16]; ***R -v- Sarker*** **[2018] 1 WLR 6023** [29]; ***JIH*** [21]. These principles apply "*across the board*" (i.e. in all Courts and Tribunals), including in cases where rights under Article 8 of the Convention are engaged: ***Marandi*** [17]. In civil proceedings, except in cases where statute grants automatic restrictions, there is no presumption of anonymity for any category of case or litigant; in each case the order must be shown to be necessary.

31. In cases where the derogation from open justice is sought on the basis of an argued interference with another qualified Convention right, the task of the Court was stated by Lord Steyn in ***In re S*** **[2005] 1 AC 593** [17]:

> "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

> For convenience I will call this the ultimate balancing test…" (emphasis in original)

32. When deciding whether the applicant has satisfied the burden of demonstrating that the relevant derogation from open justice is necessary, the Court must carefully scrutinise the evidence and ascertain the facts (if necessary, by resolving any relevant factual dispute).

    (1) In ***Griffiths -v- Tickle*** **[2022] EMLR 11**, Dame Victoria Sharp P noted that the assessment of engaged Convention rights, under ***In re S***, requires:

> "… [an] '*intense focus*' must be brought to bear on the particular facts of the case. As Sir Mark Potter, P, memorably put it, the ***Re S*** approach '*is not a mechanical exercise to be decided on the basis of rival generalities*': ***A Local Authority -v- W*** **[2006] 1 FLR 1** [53]".

    (2) In ***Marandi***, Warby LJ described the process as follows [43(6)]:

> "… The cases all show that this question is not to be answered on the basis of '*rival generalities*' but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why '*clear and cogent evidence*' is needed. This requirement reflects both the older common law authorities and the more modern cases. In ***Scott -v- Scott*** at p.438 Viscount Haldane held that the court had no power to depart from open justice '*unless it be strictly necessary*'; the applicant 'must make out his case strictly, and bring it up to the standard which the underlying principle requires'. ***Rai*** (CA) is authority that the same is true of a case that relies on Article 8. The Practice Guidance is to the same effect and cites many modern authorities in support of that proposition. These include ***JIH -v- News Group Newspapers Ltd*** **[2011] 1 WLR 1645** where, in an often-cited passage, Lord Neuberger of Abbotsbury said at [22]:
>
> > 'Where, as here, the basis for any claimed restriction ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule …'

33. Although now over a decade old, the fundamental principles of open justice remain clearly and succinctly set out in the Master of the Rolls' ***Practice Guidance (Interim Non-Disclosure Orders)*** **[2012] 1 WLR 1003** ("***Practice Guidance***"):

> [9] Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r 39.2 and ***Scott -v- Scott*** **[1913] AC 417**. This applies to applications for interim non-disclosure orders: ***Micallef -v- Malta*** **(2009) 50 EHRR 920** [75]; ***Donald -v- Ntuli (Guardian News & Media Ltd intervening)*** **[2011] 1 WLR 294** [50].
>
> [10] Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: ***R -v- Chief Registrar of Friendly Societies, ex parte New Cross Building Society*** **[1984] QB 227, 235**; ***Donald -v- Ntuli*** [52]-[53]. Derogations

should, where justified, be no more than strictly necessary to achieve their purpose.

[11] The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: ***M -v- W*** **[2010] EWHC 2457 (QB)** [34].

[12] There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: ***Ambrosiadou -v- Coward*** **[2011] EMLR 419** [50]-[54]. Anonymity will only be granted where it is strictly necessary, and then only to that extent.

[13] The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: ***Scott -v- Scott*** **[1913] AC 417, 438-439, 463, 477**; ***Lord Browne of Madingley -v- Associated Newspapers Ltd*** **[2008] QB 103** [2]-[3]; ***Secretary of State for the Home Department -v- AP (No.2)*** **[2010] 1 WLR 1652** [7]; ***Gray -v- W*** **[2010] EWHC 2367 (QB)** [6]-[8]; and ***JIH -v- News Group Newspapers Ltd (Practice Note)*** **[2011] 1 WLR 1645** [21].

[14] When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in ***JIH***.

## (2) Justifications for derogations from open justice

34. Before turning to consider the specific topic of reporting restrictions, it is important to identify the occasions on which derogations from open justice are justified as being necessary. As the authorities make clear, derogations from open justice, including orders for anonymity (and corresponding reporting restrictions), can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests.

35. The first category of case is where, without the relevant order being made, the administration of justice would be frustrated: ***Scott -v- Scott*** **[1913] AC 417**, **437-438** *per* Viscount Haldane LC):

> "... the exceptions [to the principle of open justice] are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be

> to secure that justice is done ... As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration ..."

36. In the first category fall cases – such as claims for breach of confidence – in which, unless some derogation is made from the principles of open justice, the Court would, by its process, effectively destroy that which the claimant is seeking to protect. Depending upon the particular facts, the Court may need either to anonymise the party/parties, or (if named) to withhold the protected information from proceedings in open court and in any public judgment: see discussion in ***Khan -v- Khan*** **[2018] EWHC 241 (QB)** [81]-[93].

37. The second category – protection of the legitimate interests of others – was recognised in ***In re S***, ***A Local Authority -v- W*** and ***A -v- BBC*** **[2015] AC 588**, and explained by Lord Sumption in ***Khuja*** [29]-[30]. These are cases where, if the derogation from open justice is not granted, the Court's process will represent an interference with a Convention right that, for any qualified right, cannot be justified as necessary.

38. Where a party to the litigation (or a witness) seeks an anonymity order (and reporting restrictions) on the grounds that identifying him/her will interfere with his/her Convention rights, then the Court will have to carry out the intense focus upon the engaged rights required by ***In Re S*** (see [31] above): ***RXG -v- Ministry of Justice*** **[2020] QB 703** [25] and ***XXX -v- Camden LBC*** **[2020] 4 WLR 165** [20]-[21]. Nevertheless, when assessing the weight of the engaged rights in the context of derogations from open justice, the Court must attach significant weight to the principles of open justice.

39. Those who make applications for anonymity may argue that prohibiting publication of the name of a party, or particular information that would otherwise be available to be reported, would not substantially harm the public interest in open justice, but that failure to withhold the information would interfere with the privacy interests of the applicant. The Court may then be invited to carry out a 'balance' between the harm to the identified Article 8 interest and the limited harm that, it is submitted, would be caused to open justice were the name or information to be withheld. In ***R (Rai) -v- Winchester Crown Court*** **[2021] EWHC 339 (Admin)**, for example, the Claimant submitted that publication of her address in reports of criminal proceedings in which she was the defendant did not "*'add to the story' in any meaningful public interest way*". The Divisional Court rejected the submission, and explained [48]:

> "Neither Convention jurisprudence, nor any domestic authority, requires the Court to weigh the value of a particular piece of information that is disclosed in open court proceedings and assess the contribution it makes to a debate of public interest. By definition, everything that is disclosed in open court proceedings (and the subsequent reporting of it) is a matter of public interest. Mr Bunting made a telling submission when he asked how the value of information disclosed in court proceedings was to be judged: was it the value put on it by lawyers; the parties, editors of newspapers, or the public generally? The answer is that, with accurate reporting of court proceedings, no justification is required as to what is selected for publication (subject to a requirement of fairness if what is published

> is defamatory); the value is for the individual publisher to assess. This principle is more important now than ever. Today, citizens have access to platforms of mass communication that thirty years ago were available only to a limited number of media organisations."

40. Lord Woolf CJ warned of the dangers in this approach in ***Kaim Todner*** at **977C-G**:

> "The fact that the outcome [of an anonymity application] usually depends upon the assessment of the judge of the particular circumstances of a case explains why no consistent pattern can be identified by examining the cases where courts have made or declined to make an exception to the general rule. Furthermore in many of the cases the question will have been resolved in a summary manner, there being no objection from the other party, to anonymity. Sometimes the importance of not making an order, even where both sides agree that an inroad should be made on the general rule, if the case is not one where the interests of justice require an exception, has been overlooked. Here a comment in the judgment of Sir Christopher Staughton, in ***R -v- Westminster City Council ex parte P*** **(1999) 31 HLR 154, 163**, is relevant. In his judgment, Sir Christopher Staughton states: 'When both sides agreed that information should be kept from the public that was when the court had to be most vigilant.' The need to be vigilant arises from the natural tendency for the general principle 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. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.
>
> Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it."

41. Whilst, in a very broad sense, in assessing the engaged convention rights on any application for a derogation from open justice, the Court is carrying out a 'balance' between them, the scales do not start evenly balanced. The Court must start from the position that very substantial weight must be accorded to open justice. Any balance starts with a very clear presumption in favour of open justice unless and until that is displaced and outweighed by a sufficiently countervailing justification. That is not to give a presumptive priority to Article 10 (or open justice), it is simply a recognition of the context in which the ***Re S*** 'balance' is being carried out.

42. The names of people who are involved in court proceedings are a very important dimension of open justice, not just for the reasons identified by Lord Woolf in that passage from ***Kaim Todner***, but also because names are inherently important. Lord Rodger posed the question "*What's in a name?*" in ***In re Guardian News and Media Ltd*** **[2010] 2 AC 697** and answered it as follows:

[63] What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: ***News Verlags GmbH & Co KG -v- Austria*** **31 EHRR 246** [39]... More succinctly, Lord Hoffmann observed in ***Campbell -v- MGN Ltd*** **[2004] 2 AC 457** [59], "judges are not newspaper editors". See also Lord Hope of Craighead in ***In re BBC*** **[2010] 1 AC 145** [25]. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

[64] Lord Steyn put the point succinctly in ***In re S*** **[2005] 1 AC 593** [34], when he stressed the importance of bearing in mind that

> "from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

*Mutatis mutandis*, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer.

[65] On the other hand, if newspapers can identify the people concerned, they may be able to give a more vivid and compelling account which will stimulate discussion about the use of freezing orders and their impact on the communities in which the individuals live. Concealing their identities simply casts a shadow over entire communities.

43. Finally, in ***R (Rai) -v- Winchester Crown Court*** **[2021] EMLR 21**, the Court of Appeal rejected the submission that, when assessing an application for an anonymity order (and corresponding reporting restrictions), the Court should adopt a simple balancing exercise between information sought to be withheld and open justice. Dismissing an appeal from the decision of the Divisional Court, Warby LJ explained:

[24] The point can be illustrated by reference to ***In re Trinity Mirror plc*** **[2008] QB 770**. Raymond Cortis pleaded guilty in the Crown Court to offences of

child pornography, then applied for an order restraining his identification on the grounds that publicity would represent an unwarranted interference with the Article 8 rights of his children. The Judge granted the order, having found that the proper balance between the rights of these children under article 8 and the freedom of the media and public under article 10 should be resolved in favour of the interests of the children. An appeal succeeded on the basis that section 11 did not apply as the applicant's name had already been made public and the Crown Court had no other jurisdiction to make such an order. As Sir Igor Judge P put it, giving the judgment of the court at [31]: "*The court with jurisdiction to make this order, if it were ever appropriate to be made, is the High Court*." But the Court went on at [32]-[33] to express its disagreement with the judge's conclusion on the right balance between the Convention rights, saying this:

> "In our judgment it is impossible to over emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime. Moreover the principle protects his interests too, by helping to secure the fair trial which, in Lord Bingham of Cornhill's memorable epithet, is the 'defendant's birthright'. From time to time occasions will arise where restrictions on this principle are considered appropriate, but they depend on express legislation, and, where the court is vested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case.
>
> … If the court were to uphold this ruling so as to protect the rights of the defendant's children under article 8, it would be countenancing a substantial erosion of the principle of open justice, to the overwhelming disadvantage of public confidence in the criminal justice system, the free reporting of criminal trials and the proper identification of those convicted and sentenced in them. Such an order cannot begin to be contemplated unless the circumstances are indeed properly to be described as exceptional."

[25] These are the principles that apply when section 11 is invoked. The section is – in the words of ***In re Trinity Mirror*** – "*express legislation*" which vests the court with discretion to impose "*restrictions*" on the normal operation of the open justice principle, by preventing the public from getting to know information that is put before the court. It is worth noting that not only were these observations made in express reference to Article 8, the Court also considered and referred to both ***In re S*** and ***A Local Authority -v- W***, both cases where the privacy rights of children were relied on to seek anonymity for those accused of crime.

[26] The central problem with [Counsel for the claimant's] submissions on the law, so it seems to me, is that he focuses exclusively on the general methodology for resolving conflicts between Articles 8 and 10 that is prescribed in paragraph [17] of ***In re S***, without regard to what Lord Steyn went on to say about the application of that methodology. Neither Article 8

nor Article 10 has priority *as such.* But where the open justice principle is engaged the weight to be attributed to the Article 10 right to impart and receive information is considerable. Lord Steyn made this clear at a number of points in his judgment in ***In re S***, beginning at [18], where he identified "*the general rule*" that "*the press, as the watchdog of the public may report everything that takes place in a criminal court*", adding that "*in European and in domestic practice, this is a strong rule. It can only be displaced by unusual or exceptional circumstances*".

[27] This does not mean that a fact-sensitive approach is not required. As Lord Steyn went on to say, "*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.*" The "*strong rule*" referred to by Lord Steyn reflects the fact that not all kinds of speech are of equal value. The jurisprudence shows there is a hierarchy or scale, with political speech towards the top end, via what Baroness Hale has called "*vapid tittle-tattle*", down to hate speech (to the extent this is protected by the Convention). Speech involving the communication to the public of information about what takes place in a criminal court ranks high in this scale of values. The fact-sensitive investigation must start with that recognition. The point is reflected in paragraph [30]-[31], where Lord Steyn emphasised the importance of the freedom of the press to report the progress of a criminal trial without restraint, and at [37], where Lord Steyn approved the Convention analysis of Hedley J at first instance, in these terms:

> "Given the weight traditionally given to the importance of open reporting of criminal proceedings it was… appropriate for him, in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it."

As appears from ***In re S*** [11], Hedley J had begun by recognising "*the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges and the inevitable price that involves in incursions on the privacy of individuals*".

[28] In my judgment, none of the later authorities relied on by [the Claimant's counsel] serves to undermine or qualify the authority of these passages from ***In re S***, or to refine or add to what was said by Lord Steyn in a way that helps the argument for the appellant. On the contrary, the cases relied on contain several reaffirmations of the same approach.

(1) In ***A Local Authority -v- W*** [53], Sir Mark Potter P observed that Lord Steyn, having identified the methodology with its "*intense focus*", had "*strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test*".

(2) In ***A -v- BBC*** [56-57], Lord Reed said:

> "It is apparent from recent authorities at the highest level ... that the common law principle of open justice remains in

> vigour, even when Convention rights are also applicable … the starting point in this context is the domestic principle of open justice… Its application should normally meet the requirements of the Convention".

(3) In ***Khuja*** [23], Lord Sumption pointed out that

> "… in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading 'private and family life', part company with principles … which have been accepted by the common law for many years … and are reflected in a substantial and consistent body of statute law as well as the jurisprudence on article 10 …"

44. Reflecting these principles, it is always important to remember that it is not for the media, or the public, to justify why the name of someone involved in legal proceedings should be freely available (and able to be published); it is for those seeking the derogation from open justice that would prevent it to show why it must be withheld.

## (3) Anonymity Orders

45. When approaching the jurisdiction and legal principles governing 'anonymity orders' (i.e. an order that anonymises a party, witness or other person), it is important to appreciate that they have two distinct parts:

(1) an order that withholds the name of the relevant party, witness or other person in the proceedings, and permits and directs that the withheld name is to be replaced with another name or cipher that will protect the identity of the relevant person (usually a three-letter cipher e.g. "XPZ") ("a withholding order"); and

(2) an order that prohibits publication of the withheld information or any other information that would be likely to identify of the person the Court has directed should be anonymised ("a reporting restriction order").

46. In any discussion of 'anonymity orders' it is essential to understand that they have these two distinct elements.

### (a) Withholding orders

47. The nature of a withholding order (and the fact that it is not, itself, a reporting restriction order) was explained by Tugendhat J in ***CVB -v- MGN Ltd*** **[2012] EMLR 29**:

> [47] … [a withholding] Order by itself is not an injunction of any kind, and is not an 'interim remedy' under CPR Pt 25. It is permissive only. This view is supported by the observations of Henderson J in ***HMRC -v- Banerjee*** **[2009] EWHC 1229 (Ch)** [39].
>
> [48] The practical effect of a [withholding] Order is that the defendant, or anyone else who happens to know the identity of the claimant, if they do disclose to the public the identity of the party who is referred to in the title to the action, is unlikely by that fact alone to be committing a contempt of court or interfering with the administration of justice…

48. Withholding orders, together with the power of the Court to sit in private, are part of the general powers of the Court to regulate its proceedings: ***Khuja*** [16]. Whilst these powers must be exercised consistently with the principles of open justice, they are not derived from statute.

49. If a withholding order is made, this will usually prevent the withheld name being *discovered* as a result of the proceedings. However, such an order, on its own, will not prevent the relevant person being publicly identified if his/her identity is known or can be discovered. For that reason, it is unusual for the Court to make (or to be asked to make) a withholding order without also imposing a reporting restriction. In ***Lupu -v- Rakoff*** **[2020] EMLR 6** [41], I said: "*Either there is a justification for withholding the Claimants' names from the public in these proceedings or there is not. If there is not, the Court should not artificially place obstacles in the way of reporting of the case by adopting measures that simply make it more difficult for the media to report information upon which the Court has placed no restriction.*" An example where the Court might decide to make only a withholding order is where automatic statutory reporting restrictions would mean that there was no need for the Court to impose a further order (e.g. a person whose identity is protected under s.1 Sexual Offences (Amendment) Act 1992).

50. If the Court intends to prohibit publication of the name (or other identifying material) that is subject to the withholding order, then, providing it has jurisdiction to do so, it must also impose a separate reporting restriction order.

**(b) Reporting restriction orders**

51. The first thing to note is that – in contrast to the Court's wide powers to regulate its own process – there is no inherent common law power to grant reporting restrictions orders. Lord Sumption explained in ***Khuja***:

> [16] … restrictions on the reporting of what has happened in open court give rise to additional considerations over and above those which arise when it is sought to receive material in private or to conceal it behind initials or pseudonyms in the course of an open trial. Arrangements for the conduct of the hearing itself fall within the court's general power to control its own proceedings. They may result in some information not being available to be reported. But in Convention terms they are more likely to engage article 6 than article 10. Reporting restrictions are different. The material is there to be seen and heard, but may not be reported. This is direct press censorship.
>
> …
>
> [18] The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in legislation: ***Independent Publishing Co Ltd -v- Attorney General of Trinidad and Tobago*** **[2005] 1 AC 190**.

In ***Independent Publishing Co Ltd -v- Attorney General of Trinidad and Tobago*** the Privy Council concluded, in the context of reporting restrictions, "*if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law*": [67] *per* Lord Brown.

52. It is right to acknowledge that, in ***Wolverhampton City Council -v- London Gypsies and Travellers*** **[2024] 2 WLR 45** [34], the Supreme Court suggested that reporting restrictions "*may be made under common law powers or may have a statutory basis*". This observation was not part of the *ratio* of the decision and was included in a section simply giving a summary of an area of reporting restrictions as an example of *contra mundum* orders that the Court can make. The suggestion that there is a common law power to impose reporting restrictions was not the point in issue in ***Wolverhampton*** and it conflicts with ***Khuja*** (which was not cited to, or considered, by the Court in ***Wolverhampton***), in which the Supreme Court was directly considering the issue of reporting restrictions and the basis on which they can be imposed. In those circumstances, I shall follow ***Khuja*** as the statement of the law, which I also believe to be correct.

53. Therefore, before granting any form of reporting restriction order, the Court must first identify the statutory basis upon which it is to be made.[1]

54. There are several examples of statutory provisions under which reporting restrictions can be made, but not all of them are available to all Courts and Tribunals; some are jurisdiction specific. For example, s.39 Children & Young Persons Act 1933 gives a Court the power to impose reporting restrictions in respect of a child or young person in proceedings in any Court *except* criminal proceedings. The power to impose reporting restrictions in respect of a child or young person in criminal proceedings (other than a Youth Court) is now provided under s.45 Youth Justice and Criminal Evidence Act 1999. Some statutory reporting restrictions are automatic; others must be imposed by the Court or Tribunal. Some statutory reporting restrictions last for the relevant person's lifetime (e.g. s.1 Sexual Offences (Amendment) Act 1992 and s.45A Youth Justice and Criminal Evidence Act (child witnesses)); others are time limited (e.g. postponement orders under s.4(2) Contempt of Court Act 1981 and reporting restrictions in respect of children and young persons – made under s.39 of the 1933 Act, s.45 of the 1999 Act or in the Youth Court – which automatically come to an end when the child/young person becomes 18). When a Court sits in private, limited reporting restrictions are automatically imposed under s.12 Administration of Justice Act 1960.

55. Even if a statutory basis to make a reporting restriction is found, applications for orders seeking to restrict reporting of court proceedings may nevertheless be refused on the ground that, having regard to the way that the proceedings have been conducted, in open court, with no restriction on access to the parties names, or because of other material lawfully available in the public domain, it is simply "*too late*" to seek anonymity: ***Khuja*** [34(1)] *per* Lord Sumption. It is Canute-like to suggest that the Court can, or should, attempt – by belated imposition of reporting restrictions – to erase the name of a claimant from the public domain in circumstances such as these (c.f. s12(4)(a) Human Rights Act 1998). In many cases, it would be an affront to open justice even to try. This simply reflects reality. If reports have been published about the parties and/or the proceedings – lawfully published at the time – then there are likely to be very real practical and legal difficulties (and in many cases an impossibility) in seeking to impose

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[1] Reporting restrictions can additionally be imposed as part of by injunction (a) in support of a civil claim (see ***Practice Guidance***, where paragraph 6(b) of the Model Order imposes reporting restrictions as part of the injunction to enforce the anonymity granted in paragraph 3); or (b) (exceptionally) under the *Venables* jurisdiction: see [84] below.

anonymity. If a party to litigation has not taken steps to seek a withholding order and corresponding reporting restrictions at the outset of the proceedings, s/he is highly likely to find that – whether for want of jurisdiction to make the order or on the basis that the Court refuses to make an order – it is simply too late to do so once his/her name has become embedded in the public domain as a result of the natural (and entirely predictable) incidence of reporting of court proceedings.

56. The extent to which the information now sought to be withheld is already available in the public domain is a highly material fact that must be considered on any application for a withholding order and/or a reporting restriction order. In my judgment, applicants for anonymity orders have a duty to ensure that the Court is fully appraised of the extent to which the material sought to be protected has been published and is available in the public domain (see further [151]-[152] below).

57. The reason to which material is already available in the public domain is because the Court, and the party seeking the reporting restriction order, must specifically consider whether the effect of the order, if granted, would be either to require third parties to remove publications from online platforms or (as I will explain – see [59] below) would represent a significant restriction on future reporting of the proceedings (on an anonymised basis). A reporting restriction order is supposed to be prospective, not retrospective. Someone who has published, and continues to publish online, quite lawfully, a report of proceedings has a legitimate expectation that s/he will not suddenly find that, without having been given any notice of the application to the Court, the continued online publication is now in breach of a reporting restriction order that the Court has made.

58. A reporting restriction order that would have retrospective effect on existing publications must be recognised for what it is: it is effectively a mandatory injunction requiring the person to cease publishing something that, up to the point of the Court's order, it had been perfectly lawful to publish. Cast in those terms, the very serious Article 10 implications are obvious.

59. Even if the Court takes care to prevent the reporting restriction order from having retrospective effect (for example by including a public domain proviso that excludes pre-existing publication from the scope of the order), in some cases the pre-existing publicity which remains available in the public domain will mean that it will be very difficult to publish further reports of the proceedings (even on an anonymised basis) without breaching the reporting restriction order. The risk arises from the risk of jigsaw identification. If, as is standard, the reporting restriction order prevents not only publication of the name of the anonymised person, but also publication of any details that are likely to identify him/her, then pre-existing media reports may mean that reporting, again, facts that have been previously reported now carries a risk that this further report, albeit anonymised, will identify the anonymised party. In most cases the earlier – unanonymised – reports are likely to have captured the salient and noteworthy facts of the case. In the worst cases, the effect of jigsaw identification will mean that the practical effect of the reporting restriction will require the publisher to make a stark choice. If the pre-existing publicity is to remain available, the reporting restriction order will place significant limits on what can be included in future reports of the proceedings, even on an anonymised basis. If the publisher wants to publish a full report of the proceedings (on an anonymised basis), then (if that option is available) s/he/it will have to remove the previously published material that would give rise to the jigsaw

identification. In either event, the effect of the reporting restriction order is a serious interference with the Article 10 rights of publishers and the public. In cases where there has been earlier reporting, the risks arising from jigsaw identification from pre-existing publicity must be fully considered in any balancing process by the Court *before* any reporting restriction is granted.

**(i) s.11 Contempt of Court Act 1981**

60. Generally, in civil proceedings, the conventional statutory jurisdiction under which a reporting restriction is made to enforce the anonymisation of a party (or other person, e.g. a witness), following a withholding order, is s.11 Contempt of Court Act 1981. The section provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

61. The first thing to note, about s.11, is that it does not itself confer free-standing a power to grant a reporting restriction order. The power to do so is contingent upon the Court having first *independently* exercised a power it has to withhold information from public in proceedings. Once a court has withheld the name or information, s.11 provides an ancillary statutory power to impose a reporting restriction order which then prohibits publication of the withheld name or information: ***In re Guardian News and Media Ltd* [2010] 2 AC 697** [31]; ***A -v- BBC*** [59].

62. The second thing to note is that the power to impose a reporting restriction order under s.11 is *prospective* not *retrospective.* A court can only exercise the power under s.11 to impose a reporting restriction order prohibiting the publication of a name (or other information) in connection with the proceedings if it has first deliberately exercised its power to direct that the name (or other information) is to be withheld from the public in those proceedings: ***In re Trinity Mirror plc*** [19].

63. It is therefore an essential pre-condition to the making of reporting restriction order under s.11, prohibiting the identification of a party or witness, that his/her name must have been withheld throughout the proceedings: ***R (Press Association) -v- Cambridge Crown Court* [2013] 1 WLR 1979** [14]. If the name (or information) has not been withheld, *a fortiori* if the name has been used in proceedings in open court or otherwise published by the Court (e.g. in Court lists or documents relating to the proceedings made available to non-parties under CPR 5.4C(1)), then there is no jurisdiction to make an order under s.11: ***R -v- Arundel Justices ex parte Westminster Press Ltd* [1985] 1 WLR 708, 710H-711C**. In this respect, the terms of s.11 reflect the likely reality: if the name has not been withheld, it is usually too late to seek to impose any sort of anonymity by reporting restrictions; the impossibility of putting the genie back in the bottle.

### (ii) s.39 Children & Young Person Act 1933

64. As noted above, for civil proceedings concerning children, a statutory power to grant reporting restrictions is provided in s.39 Children & Young Person Act 1933. The section (as amended) provides:

> "(1) In relation to any proceedings, other than criminal proceedings, in any court, the court may direct that the following may not be included in a publication —
>
> (a) the name, address or school of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein:
>
> (aa) any particulars calculated to lead to the identification of a child or young person so concerned in the proceedings;
>
> (b) a picture that is or includes a picture of any child or young person so concerned in the proceedings;
>
> except in so far (if at all) as may be permitted by the direction of the court.
>
> (2) Any person who includes matter in a publication in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale.
>
> (3) In this section—
>
> 'publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall be taken to be so addressed), but does not include a document prepared for use in particular legal proceedings;
>
> 'relevant programme' means a programme included in a programme service within the meaning of the Broadcasting Act 1990."

65. Any reporting restriction order made under s.39 automatically expires once the person protected by the order reaches 18 years-old: ***R (JC and RT) -v- Central Criminal Court*** **[2014] 1 WLR 3697** [39].

66. Although not expressed to be a basis upon which the order was sought by the Claimant, at the hearing Mr Keegan adopted this as a fall-back position if the Court found that there was no other statutory jurisdiction under which to make the anonymity order sought. The Court has jurisdiction to make an order under s.39 because the Claimant is a child. I will address below whether the Court should make the order sought.

### (iii) CPR 39.2(4)?

67. The draft order sought by the Claimant relied upon CPR 39.2(4) as the basis for the order. It is necessary to consider whether that provision in the Civil Procedure Rules

provides a statutory power to grant a reporting restriction order. In my judgment it does not.

68. CPR 39.2(4) provides:

> "The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person."

69. The terms of this rule closely mirror the established bases on which the Court is justified in granting any derogation from open justice, as explained in the earlier parts of this judgment.

70. The first thing to note about this rule is that it plainly does not expressly convey any power to grant reporting restrictions. Such a power could only be read into the rule by implication. Given the importance of a reporting restriction order, its effect on non-parties, and the potential consequences of breach, if the rule were providing a statutory power to impose reporting restrictions, I would expect it to say so expressly. It does not. Further, it would also be odd that the reporting restriction power conveyed by the rule was limited to anonymity. In some instances, the need to derogate from open justice relates to withholding information from proceedings in public, rather than withholding a name.

71. In my judgment, the meaning of CPR 39.2(4) must be assessed in the context of Part 39 as a whole. As its title suggests, Part 39 contains "*miscellaneous provisions relating to hearings*". That might be thought to be an unlikely place to find a power to grant reporting restrictions.

72. CPR 39.2 is headed "*General rule – hearing to be in public*". Sub-rules (1) to (3) concern the general rule that hearings must be in public, unless the Court decides that it must be held in private. These sub-rules reflect the principle of open justice and the power of the Court to control its own proceedings: see ***Khuja*** [16] (quoted in [51] above). Sub-paragraph (4) reflects the position that the Court *must* grant anonymity if it considers non-disclosure of the relevant person's name to be necessary (Prior to 6 April 2019, the wording of CPR 39.2(4) suggested that anonymity was a matter of discretion). Again, that reflects the underlying law.

73. The wording of the rule does not make clear whether an order that "*the identity … shall not be disclosed*" extends beyond making a withholding order. To the extent that it embraces both a withholding order and a reporting restriction order, the power to make both orders is actually to be found elsewhere. For the former, it is to be found in the rules that enable the Court to make an order permitting a party to withhold their name from documents and its general power to control its own proceedings including withholding the name from proceedings in open court, judgments and orders. For the latter, it is to be found in the regime of reporting restrictions provided under various statutes.

74. In ***Khuja***, Lord Sumption's insistence that a statutory basis must be found before the Court can impose reporting restrictions was, in part, based upon a recognition of the extent to which Parliament had carefully legislated to provide specific and limited instances where reporting restrictions could be imposed. This legislative restraint is a

recognition by Parliament of the importance of open justice. After reviewing the examples of the statutory regime of reporting restrictions, he observed:

> [18] … The dependence of this area of law on statute and the extent of statutory intervention mean that it is fair to speak of a statutory scheme occupying the ground to the exclusion of discretions arising from the common law or the court's inherent powers. Lord Steyn made this point with the concurrence of the rest of the Appellate Committee in ***In re S***, at p.604:
>
> > "Given the number of statutory exceptions, 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, further exceptions to the general principle of open justice."

Unless it has done so through the delegated legislation of the CPR, Parliament has never provided to the Court a general statutory power to impose reporting restrictions.

75. Further, if CPR 39.2(4) conveys a statutory power to impose reporting restrictions prohibiting the identification of a party to civil litigation, then it is a power that renders all other statutory powers to impose reporting restrictions in civil proceedings otiose. Given the care that Parliament has taken when granting a power to grant reporting restrictions (which has historically been sparing), including prescribing the specific circumstances in which they can be granted, the penalties for breach (whether as a criminal offence or contempt of court), and the circumstances in which the restrictions cease to have effect, that would be a very surprising outcome.

76. Indeed, if CPR 39.2(4) is a statutory power under which reporting restrictions can be granted, then:

(1) s.11 Contempt of Court Act 1981 would be rendered wholly redundant, so far as civil proceedings are concerned. So too the important pre-requisite, under s.11, that, before reporting restrictions could be imposed, the Court must have withheld the name from the public had been dispensed with; and

(2) the power to grant reporting restrictions in respect of children and young persons under s.39 Children & Young Persons Act 1933 would also be redundant. s.39 was amended as recently as the Criminal Justice and Courts Act 2015. The effect was to remove criminal proceedings from its scope. If CPR 39.2(4) is a statutory power under which reporting restrictions can be granted, then the limitation that orders made under s.39 expire when the subject reaches 18 has effectively been dispensed with in civil proceedings.

77. For these reasons, I hold that CPR 39.2(4) is not a statutory power under which the Court can grant a reporting restriction order. CPR 39.2(4) proceeds on the basis that the *power* to order anonymity (by withholding order and reporting restriction order) is to be found elsewhere. The rule does not itself provide the requisite statutory basis under which to *impose* a reporting restriction. If a reporting restriction order is to be made, the Court must find the statutory power to do so elsewhere.

## (iv) s.6 Human Rights Act 1998 (and s.37 Senior Courts Act 1981)?

78. The draft order sought by the Claimant also relies upon s.6 as the basis for the order. This raises the question of whether s.6 can provide the necessary statutory power under which to grant a reporting restriction. My conclusion is that, although imposing potentially an important duty upon the Court, s.6 does not, itself, confer any power to make reporting restrictions.

79. s.6 Human Right Act 1998 provides (so far as material):

> **"Acts of public authorities**
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section 'public authority' includes a court or tribunal.
>
> …
>
> (6) 'An act' includes a failure to act but does not include a failure to—
>
> (a) introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b) make any primary legislation or remedial order."

80. Mr Keegan did not address the issue of whether s.6 grants a power to impose reporting restrictions.

81. The argument that is occasionally raised is that the power to grant reporting restrictions arises from the obligation imposed by s.6 upon the Court not to act incompatibly with a Convention right.

82. There can be no dispute that s.6 imposes a duty upon the Court, as a public authority, not to act incompatibly with Convention rights: ***R (Agyarko) -v-Secretary of State for the Home Department*** **[2017] 1 WLR 823** [5]. In most cases, the Court will satisfy this duty by using the powers it has to act compatibly with Convention rights. In the context of reporting restrictions, the interesting question is whether, if a Court or Tribunal can find no express statutory *power* under which to impose a reporting restriction order, in circumstances where a failure to grant such an order would be to act incompatibly with Convention rights, it is nevertheless empowered by s.6 to grant such a reporting restriction order. I am doubtful that it is. In its terms, s.6 does not grant any power; it imposes a duty.

83. What is the Court to do if, compelled by s.6 not to act incompatibly with a Convention, it decides that a reporting restriction order must be imposed, but can find no other statutory power which enables it to do so? In such a case, s.6 will compel recourse to s.37 Senior Courts Act 1981, under which the High Court is granted a wide power to grant injunctions. If a Court or Tribunal lacks a specific statutory power under which a reporting restriction order can be granted, then ultimately it is to the High Court's power to grant an injunction to which the applicant for the reporting restriction must turn. This was the conclusion that Sir Igor Judge P reached in ***In re Trinity Mirror plc*** [22], [31]. In that case, the jurisdiction of the Crown Court to grant a reporting restriction under s.11 was unavailable because the defendant's name had not been withheld in the proceedings. His remedy, if he was entitled to one, was to apply to the High Court for an injunction (the Crown Court having no general power to grant reporting restrictions by injunction: ***In re Trinity Mirror*** [30]).

84. Therefore, my conclusion is that, whilst s.6 imposes an undoubted duty, it provides no power. If the Court concludes that it is compelled by the engaged Convention rights to impose reporting restrictions, but has no other available power under which to do so, then s.37 can provide the power, for the High Court, to impose the required reporting restriction as an injunction. That is effectively the basis upon which the exceptional *Venables* jurisdiction came to be established as the basis upon which the Court – being compelled to act – granted, effectively, a reporting restriction order *contra mundum*: see discussion of the *Venables* jurisdiction in ***RXG*** [24]-[35].

85. To be clear, it should not be thought that s.37 represents a readily available and free-standing basis enabling the High Court to fashion reporting restrictions by injunction. Whilst the jurisdiction to grant an injunction under s.37 is very wide, the exercise of the jurisdiction, although not set in stone, is subject to well-established limitations: see discussion in §§1-09–1-21 *Injunctions* (14th edition, Sweet & Maxwell, 2022).

86. First, the usual rule is that an injunction only operates between the parties to the proceedings: ***Attorney-General -v- Times Newspapers Ltd*** **[1992] 1 AC 191, 224** ("***Spycatcher***"). Types of injunction, which go beyond the immediate parties to the litigation, include freezing orders, internet blocking orders and *Norwich Pharmacal/Bankers Trust* orders, but these are granted where the Court is satisfied that they are required in aid of the administration of justice in proceedings whether actual or contemplated. As explained by the Supreme Court in ***Wolverhampton*** [167], *contra mundum* orders, representing a "*novel exercise of an equitable discretionary power*" and an exception to the usual *inter partes* rule, are only likely to be justified if there is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights which is not adequately met by any other measures available to the applicant and subject to strict safeguards.

87. Some interim injunctions can effectively prohibit conduct by non-parties if the purpose of the order is to protect the position pending the Court's determination in the claim and a non-party deliberately does an act that frustrates the administration of justice: the so-called *Spycatcher* principle: ***Attorney-General -v- Times Newspapers Limited*** at

p.223-224; ***Attorney-General -v- Newspaper Publishing Plc*** **[1988] Ch 333, 375, 380**.[2] In ***Attorney-General -v- Punch Ltd*** **[2003] 1 AC 1046** Lord Nicholls explained [4]:

> "… It is a contempt of court by a third party, with the intention of impeding or prejudicing the administration of justice by the court in an action between two other parties, himself to do the acts which the injunction restrains the defendant in that action from committing if the acts done have some significant and adverse affect on the administration of justice in that action: see Lord Brandon of Oakbrook in ***Spycatcher*** **203D, 206G-H**, and, for the latter part, Lord Bingham of Cornhill CJ in ***Attorney General -v- Newspaper Publishing plc*** **[1997] 1 WLR 926, 936**. Lord Phillips MR **[2001] QB 1028** [87] neatly identified the rationale of this form of contempt:
>
> > 'The contempt is committed not because the third party is in breach of the order - the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted.'"

88. Second, injunctions are usually granted on the basis that the claimant has demonstrated that the defendant has committed (or threatens to commit) a civil wrong which does (or if committed, would) give rise to a cause of action, although, as the Supreme Court in ***Wolverhampton*** noted [43], "*it is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action.*"

89. Reporting restrictions, imposed by way of an injunction, would be both *contra mundum* order and (usually) without an underlying cause of action. Such an order would therefore represent (1) a departure from two of the key principles under which injunctions have historically been granted, and (2) an exceptional order for the civil court to grant. The only precedents for such an order are the *Venables* jurisdiction and the rare instances – of which ***A Local Authority -v- W*** **[2006] 1 FLR 1** is an example – where an injunction has been granted to prevent the identification of a defendant in criminal proceedings. Those are both cases where the Court has been *compelled* to act lest it be in breach of the duty to act compatibly with the Convention rights (see [82] above).

90. Further a reporting restriction imposed by an injunction would, by definition and purpose, restrict freedom of expression under Article 10. As expressed by Lord Sumption from ***Khuja***, such orders represent "*direct press censorship*" [16]. Lord Sumption referred to "*press*" censorship, but people beyond the conventional media – and the public generally – would be affected by such an order.

91. It has been clearly established in ***A –v- BBC*** [66]-[67] that the requirements of s.12(2) Human Rights Act 1998 do not apply to applications for reporting restriction orders, thereby relieving an applicant from giving notice of the application. That, however, is in the context of applications that will impose restrictions *prospectively*. Where there is existing media coverage, and the order, if granted, would

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[2] The paradigm example of an interim injunction to which the ***Spycatcher*** principle applies is an interim non-disclosure order to prohibit publication of certain information. In ***Spycatcher*** itself, Lord Brandon (206A-C) identified an interim injunction to prohibit trespass as one that did *not* engage the principle. An interim injunction to prohibit trespass on A's land by B would not prohibit trespass on the same by C, even if s/he had knowledge of the terms of the injunction that had been granted against B.

have *retrospective* effect, it is possible to identify publishers who will be directly affected if the order is granted. As such, and whether or not s.12(2) would strictly apply in those circumstances (and, without deciding the point, my provisional view is that s.12(2) would apply), there are compelling reasons why those publishers should be notified of the application because, if granted, the order will require them to modify the existing publication or cease publishing it altogether: see ***Practice Guidance*** [12] and ***X & Y -v- Persons Unknown*** **[2007] EMLR 290** [10]-[12]. As already noted (see [58] above), a reporting restriction order that has retrospective effect is effectively a mandatory injunction. Even if the order would not affect an existing publication, the Court should still give careful thought – where exceptionally an application is made for a reporting restriction order under s.37 – to requiring notice to be given to the media generally using the Injunctions Alert Service of the Press Association (see ***Various Claimants -v- Independent Parliamentary Standards Authority*** **[2022] EMLR 4** [13]-[15]). The vulnerability to error in an adversarial system where an unopposed application is made for reporting restrictions is well recognised.

92. In the context of reporting restrictions, in my judgment, an injunction under s.37, the purpose of which is to impose reporting restrictions, should only be granted if the applicant satisfies the Court (a) that there is no other jurisdiction available under which the Court can grant the reporting restriction sought; and (b) by clear and cogent evidence, that, without the order being made, the Court will be in breach of the duty not to act incompatibly with a Convention right under s.6 Human Rights Act 1998; and (c) that the ***In re S*** parallel analysis leads to the conclusion that such an order should be granted. If the order would affect an existing publication, the Court should normally require the relevant publisher to be notified of the application and given an opportunity to make submissions. Arguably giving notice in such a case is required by s.12(2) Human Rights Act 1998.

93. In cases where the reporting restriction is sought *after* the litigation has been pending before the Court for some time and has progressed through several phases, *a fortiori* where the information now sought to be withheld has been published and is now lawfully in the public domain, it is likely to be very difficult (if not impossible) for the applicant seeking the reporting restriction to satisfy (b). In many cases where the qualified Convention right relied upon is Article 8, this will simply reflect reality. Once the name of a party has been published in connection with the litigation, it will usually be too late to seek any sort of anonymity. Extreme cases, where the applicant demonstrates that, without a reporting restriction being imposed, there is a credible risk of serious harm reaching the required threshold to engage Articles 2/3, may compel the Court to grant orders that even require existing lawfully published material about the proceedings to be removed from online platforms, but such orders will be wholly exceptional.

### (4) The Court of Appeal decision in *JX MX*

94. In his written submissions, and unsurprisingly, Mr Keegan has substantially based his argument in support of the Claimant's application upon the decision of the Court of Appeal in ***JX MX -v- Dartford & Gravesham NHS Trust*** **[2015] 1 WLR 3647**. For nearly 10 years, this has been the main authority upon which reliance is placed to support the making of applications for anonymity orders in cases where the Court is asked to approve a settlement of a civil claim under CPR 21.10.

95. In ***JX MX***, Tugendhat J refused to grant an anonymity order sought by a claimant at an approval hearing under CPR 21.10: **[2013] EWHC 3956 (QB)**. He granted an order prohibiting the publication of the address at which the claimant and her family lived: [4]. The basis of the Judge's decision was that the claimant had not demonstrated, on the evidence relied upon, that the derogation from open justice that an anonymity order would represent, was necessary: [21]. It is perhaps important to note that the Judge did not consider the issue of the jurisdiction to make the order sought and he did not refer to CPR 39.2(4). The Judge granted permission to appeal and anonymised the claimant pending appeal.

96. The Court of Appeal reversed the Judge's decision and upheld the anonymity order. It is clear from the decision, and the headnote, that the Court of Appeal disagreed with Tugendhat J's assessment of the necessity for an anonymity order. The Court did not directly address and resolve – because it was not an issue on the appeal – the issue of the jurisdiction to make the order sought, and in particular the jurisdiction to make any reporting restriction order. The Court of Appeal did not therefore consider the authority of ***Independent Publishing Co Ltd -v- Attorney General of Trinidad & Tobago*** **[2005] 1 WLR 190** and the later decision of ***Khuja*** – which endorsed the principle that a statutory jurisdiction was required to grant a reporting restriction order – was not available to the Court.

97. It is necessary to look at the judgment carefully to establish the principle(s) for which it is authority. The claimant, a child, had brought a claim for personal injury alleging negligence on the part of the defendant NHS trust. It appears that the Claim Form had been issued without anonymising the claimant. In the course of proceedings, the defendant agreed to settle the claim on the basis of payment of a very substantial sum in damages, made up of both a lump sum and periodic payments. As the claimant was a child, an application was made to the Court under CPR 21.10 to approve the settlement. Moore-Bick LJ identified the issue as being "*the exercise of the court's power to withhold from the public the names of parties to litigation, a practice commonly referred to as 'anonymisation'*": [2]. That might suggest that the Court's attention was on the Court's power to make a withholding order, rather than upon any reporting restriction order, but subsequent passages cast doubt on that (see [101] and [104] below).

98. The Court referred to the principles of open justice ([5]-[9]), noted that these principles "*are reflected in*" CPR Part 39 ([10]) and that the principles that informed the decision whether to sit in private also applied to "*withholding by anonymisation of the identity of a witness*": [11]. The only reference to CPR 39.2(4) is in the final sentence of [11]. The Court considered the derogation to open justice that had historically been justified for children – and those who lack capacity – who are involved in proceedings: [13]-[16], noting the recognition of their special interests in CPR 39.2(3)(d): [15]. The Court acknowledge the importance to open justice of the identity of the parties ([17]) before saying this:

> "Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary and if so what is the minimum required for that purpose."

99. The acknowledgement that orders that prevent and restrict publication of a party's name are derogations from open justice is uncontroversial. But the Court does not differentiate between withholding orders which *restrict* the availability of the party's name (because the Court does not itself provide it) and orders that *prohibit* publication of the name (and other details likely to lead to the party's identification).

100. The parties' submissions are set out in [21]-[24]. Apart from the submissions of the Press Association, which were recorded as suggesting that an order under s.39 Children and Young Persons Act 1933 "*was more appropriate than an anonymity order*", no other submissions addressed the issue of the jurisdiction to make reporting restrictions; there was no consideration of s.11. Referring to a s.39 order as being more appropriate than an anonymity order perhaps shows some confusion over the terminology. For all practical purposes, a s.39 order *is* an anonymity order, albeit one that (a) does not require an anterior withholding order, and (b) automatically expires when the child/young person reaches 18 (both points of difference from restrictions imposed under a s.11 order).

101. In [25], Moore-Bick LJ stated that the issue on the appeal was "*whether any report of the approval proceedings should be anonymised, so that, in conjunction with the judge's order that her address not be disclosed, the claimant's identity will be protected indefinitely.*" That was different from the characterisation of the issue in [2], but the language used clearly demonstrates that the Court must have thought the issue included whether reporting restrictions should be imposed.

102. In [26]-[27], the Court held that Tugendhat J had been right that the test for a derogation from open justice was necessity. Disagreeing with the Judge on whether the claimant had demonstrated such a necessity, the Court said:

> [28] The judge did not, of course, have the benefit of the very full submissions that have been addressed to us. Had he done so, we think it likely that he would have concentrated less on the existence of specific risks of tangible harm to the claimant and her family, such as theft of equipment, exploitation by unscrupulous carers and unwanted attention from those seeking to obtain a share of the claimant's assets, and more on the invasion of the family's privacy which a report of the approval hearing would involve if the claimant's identity became public. It may be difficult for a claimant's parents or litigation friend to put into words the effect that an invasion of privacy is likely to have on the family's life and whatever fears are expressed may not in the end be realised. For that reason statements which attempt to deal with such matters may well appear to be formulaic, but we do not think that the importance of maintaining the family's privacy should be underestimated as a result.
>
> [29] Although, as we have indicated, we do not think that approval hearings lie outside the scope of the principle of open justice, we think there is force in the argument that in the pursuit of justice the court should be more willing to recognise a need to protect the interests of claimants who are children and protected parties, including their right and that of their families to respect for their privacy, in relation to such proceedings. Such a willingness is reflected both in the Family Procedure Rules and in the Court of Protection Rules. It might be thought that approval hearings, whether involving children or protected parties, are comparable in nature and deserve to be viewed in a

similar light, although it has not been suggested that in general such hearings should be held in private. The function which the court discharges at an approval hearing is essentially one of a protective nature, as it was when it exercised the function of *parens patriae* on behalf of the Crown in relation to wards of court and lunatics. The court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries. The public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity.

[30] By virtue of article 14 of the Convention children and protected parties are entitled to the same respect for their private lives as litigants of full age and capacity (who are free to settle their claims without resort to the court), subject only to the need to ensure that their interests are properly protected. In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature. In our view that is an important matter which the court is bound to take into account when deciding whether anonymity is necessary in order to do justice to such a claimant, notwithstanding the public interest which is served by the principle of open justice. Withholding the name of the claimant mitigates to some extent the inevitable discrimination between these different classes of litigants. In some cases it will be possible to identify a specific risk of dissipation of the sum awarded as damages when the claimant reaches the age of majority (as was the case, for example, in ***JXF -v- York Hospitals***). If such a risk exists it will provide an additional argument in favour of anonymisation. Although a fear of intrusive Press interest is sometimes said to provide grounds for relief, we accept Mr. Dodds's submission that in general the Press seeks to act responsibly in reporting matters of this kind.

[31] Mr. Barr reminded us that the range of settlements that come before the court for approval is very wide and submitted that we should be cautious about accepting Mr. Weir's submission that anonymity orders should generally be made in such cases. He suggested that we should go no farther than to hold that each case should be considered on its own merits. In our view he was right to counsel caution, but, ultimately we have been persuaded that, although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives. In some cases it may be possible to identify specific risks against which the claimant needs to be protected and if so, that will provide an additional reason for derogating from the principle of open justice, but we do not think that it is necessary to identify specific risks in order to establish a need for protection. The circumstances giving rise to the settlement will inevitably differ from case to case, but the interference with the right to private and family life will be essentially the same in almost all cases. It is sufficient in our view that the publication of the circumstances giving rise to the

> settlement would, in the absence of relief, involve injustice in the form of an interference with the article 8 rights of the claimant and his or her family.

103. The Court then turned to consider the form of order that should be made.

> [32] The task is then to decide what form of order will provide the necessary protection while at the same time ensuring that the derogation from the principle of open justice is kept to a minimum. We are not persuaded that in the case of a child an order under section 39 of the Children and Young Persons Act 1933 is adequate for that purpose, both for the reasons articulated by Tugendhat J. in ***MBX -v- East Sussex Hospitals*** and because such an order ceases to have effect when the child reaches the age of majority: see ***R (JC and RT) -v- Central Criminal Court***. In any event, no such order is available in the case of an adult protected party. An anonymity order, however, (by which we mean an order prohibiting the publication of the claimant's name and address and a restriction on access by non-parties to documents in the court records) seems to us to provide a reasonable degree of protection both against an unwarranted invasion of privacy and an interference with the right to family life and against such other risks as there may be, whether of dissipation of assets or otherwise.

In ***MBX -v- East Sussex Hospitals*** **[2013] 1 FLR 1152**, Tugendhat J considered that the power under s.39, in terms that were then in force, did not restrict publication beyond newspaper and television reports. It did not restrict, for example, social media or other internet publication. That lacuna was filled by amendments made to the section by Criminal Justice and Courts Act 2015, which enabled an order under s.39 to impose restrictions on publications generally.

104. In [32], the words in parentheses do suggest that the Court of Appeal was intending to impose a reporting restriction. Although the Court clearly decided that restrictions imposed under s.39 would be insufficient (and such an order would not be available for an adult protected party), the Court did not go on to identify the alternative jurisdiction under which a reporting restriction could be made. It may be that the Court considered that CPR 39.2(4) was the basis for the jurisdiction, but they did not address the point.

105. The Court's concluding paragraphs also shed some light on the approach (emphasis added):

> [34] In our view the court should recognise that when dealing with an approval application of the kind now under consideration it is dealing with what is essentially private business, albeit in open court, and should normally make an anonymity order in favour of the claimant without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so. Such an order should be drawn in terms that **prohibit publication** of the name and address of the claimant and his or her immediate family and also (if not already covered) the name of his or her litigation friend. The court must also recognise, however, that the public and the Press have a legitimate interest both in observing the proceedings and making and receiving a report of them. Accordingly, the Press should be given an opportunity to make submissions before any order is made **restricting publication of a report of the proceedings**, but for obvious reasons it will be unnecessary to notify the Press formally that an application

> for an anonymity order will be made. If the Press or any other party wishes to contend that an anonymity order should not be made, it will normally be necessary for it to file and serve on the claimant a statement setting out the nature of its case.
>
> [35] With that in mind we suggest that the following principles should apply:
>
> (i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;
>
> (ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;
>
> (iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised (an "anonymity order");
>
> (iv) the judge should invite submissions from the parties and the Press before making an anonymity order;
>
> (v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;
>
> (vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;
>
> (vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing.

106. The words in bold in [34] are the clearest indication that the Court *was* considering a form of order that included a reporting restriction. However, as noted, the Court of Appeal did not identify the jurisdiction to make such an order. ***Khuja*** is unambiguous authority for the principle that a reporting restriction order must have a statutory basis. For the reasons I have explained ([67]-[77]), I do not consider that CPR 39.2(4) provides a statutory basis upon which to impose a reporting restriction. The Court of Appeal in ***JX MX*** did not address or resolve the question of the statutory jurisdiction to make a reporting restriction order. It was not argued, and the point was not decided. The decision appears to have proceeded on an assumption that there is such jurisdiction, but without identifying it.

107. I acknowledge that the Court of Appeal had the benefit of oral submissions from Leading Counsel for the Claimant, the Personal Injury Bar Association, as interveners, and an advocate to the Court. The Press Association provided written submissions as a

second intervener. The Defendant did not attend the appeal and was not represented. Nevertheless, I am satisfied that the decision is silent on the statutory basis under which the Court imposed any reporting restriction, which is one of the issues that I must resolve on this application.

108. I am concerned that there are also several wider issues with the judgment in ***JX MX***. The Court's suggestion ([35(i)]) that the approval hearing should be listed by the Court under the names in which the proceedings were issued would, if the practice were followed, have very serious implications for the availability of any reporting restriction order made under s.11 Contempt of Court Act 1981. The simple act of publishing the cause list – which these days is published not only outside in the precincts of the Court and outside the courtroom in which the hearing is to take place, but also online by both HMCTS and third-party publishers – would mean that the Court itself would have published precisely the information that the party is seeking to withhold. Yet, withholding the name is an essential pre-requisite for any reporting restrictions to be imposed under s.11 Contempt of Court Act 1981. This suggestion, in [35(1)], is perhaps the clearest indication that the issues and argument in ***JX MX*** did not include an analysis of the circumstances in which the Court can make a reporting restriction order under s.11. Had this issue been considered, it is unlikely that the Court would have made this recommendation as to the future practice to be adopted.

109. Several passages of the decision in ***JX MX*** also appear to me not to be consistent (and, in places, to conflict) with the very clearly established principles of open justice.

110. Although the Court of Appeal stated that derogations from open justice "*must be justified strictly on the grounds of necessity*" [27], the Court went on to hold that "*although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives*" and that is would usually be unnecessary to "*identify specific risks in order to establish a need for protection*" [31]. This approach appears to me to conflict with the well-established principle that in each case, where a derogation from open justice is sought, the Court must determine the issue by applying an intense focus to the individual facts, not on the basis of "*rival generalities*": see [31] above.

111. In [34], the Court of Appeal held that the Court:

> "… should recognise that when dealing with an approval application of the kind now under consideration it is dealing with what is essentially private business, albeit in open court, and should normally make an order in favour of the claimant without the need for a formal application, unless it is satisfied that it is unnecessary or inappropriate to do so…"

The Court clearly thought that such an approach was desirable in the interests of "*consistency*" [33]. Again, and with respect, this statement is difficult to reconcile with the authorities on the approach to be adopted when derogations from open justice are sought; indeed, the Court appears to have given a presumptive priority to the Article 8 rights that favoured anonymity which, I would suggest, is inconsistent with both the first issue in ***In Re S*** (no presumptive priority, see [31] above) and the need to make a fact-specific assessment in every case. In any event, at an approval hearing, there are

other ways of resolving the tension between any engaged Article 8 rights of a claimant that stop short of anonymity (e.g. making targeted orders withholding particular information from any hearing in open court).

112. In the final sentence of [34], the Court of Appeal stated:

> "If the press or any other party wishes to contend that an anonymity order should not be made, it will normally be necessary for it to file and serve on the claimant a statement setting out the nature of its case."

and in [35(v) and (vi)] added:

> "… unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family. [If] the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to the conclusion…"

113. The final sentence of [34] effectively reverses the position that has been clearly established in the open justice authorities I have set out earlier in the judgment. It is for the person seeking the derogation from open justice to demonstrate, with clear and cogent evidence, why such a restriction is necessary, not for the media (or anyone else) to show that the order should not be made. The suggestion, in the quoted section of [35], again reverses the burden, and the suggestion that a Judge need only give a judgment if s/he refuses to grant anonymity reinforces the impression that the Court has (in my view wrongly) given a presumptive priority to anonymity. I would suggest that a judgment would be required on the anonymity application whatever the result (not least for the purposes of any appeal). If granting the order, the Judge must explain why s/he has been satisfied that the applicant has demonstrated, to the required standard, that the derogation from open justice is both necessary and proportionate.

114. Finally, and perhaps because the issue did not arise for decision in ***JX MX***, the Court of Appeal decision does not deal with the very important issue of the extent of pre-existing publication of the name of the claimant in cases where the name has not previously been withheld by the Court and is sought, belatedly, to be anonymised at a later stage in the proceedings. In cases where anonymity is not sought at the outset of the proceedings, this is likely to be a very real issue on the issues of both (a) whether an anonymity order (with reporting restrictions) can and should be granted at all; and (b), if so, in what terms (see [55]-[59] above).

## F: Submissions

115. In his skeleton argument, Mr Keegan recognised that articles had been published that identified the Claimant, the disabilities that he has faced since birth, and the prospect of subsequent litigation. These articles remained available online. Nevertheless, the application for anonymity was made because of concern that there "*should not be publicity which names [the Claimant] or his family in relation to the assessment of damages proceedings*". The Application was prompted by the fact that the Claimant's solicitor had been contacted on, 31 October 2024, by a journalist from MP1 who had obtained a copy of the Particulars of Claim and wanted to publish a further article about the Claimant's case.

116. Mr Keegan submitted that the issues were:

(1) whether there is a need to establish a statutory basis for the order that is sought;

(2) whether the balance is in favour of preserving the ECHR Article 8 rights of the Claimant to private and family life by a very limited derogation from the principle of open justice resulting in the damages proceedings being anonymised, so that the Claimant's name, address and his identity will be protected; and

(3) whether the order sought does not entirely prevent the reporting of any settlement ultimately awarded in this case, the name of the hospital and the reasons for awarding that settlement.

117. In relation to his first identified issue, I understood Mr Keegan to rely upon ***JX MX*** as authority for the proposition that it was not necessary to establish a statutory basis for a reporting restriction. He seeks to distinguish the clear statements in ***Khuja*** on the basis that these apply only to reporting restrictions in criminal cases.

118. On the second issue, whilst acknowledging the importance of open justice, Mr Keegan nevertheless argued – based on passages from ***Scott -v- Scott***, ***A -v- BBC*** and ***JX MX*** – that there are occasions on which the principle of open justice must give way to the need to do justice in a particular case. The Claimant is a child and therefore falls within the well-recognised category where derogations from open justice are recognised to be appropriate. Although not at the stage of seeking the Court's approval of a settlement under CPR 21.10, the Claimant is seeking an order to protect his anonymity in advance of any hearing of the trial on the award of damages. Mr Keegan argues that he is not seeking that phase of the litigation to be heard in private, but that he be anonymised. At the hearing, Mr Keegan identified what he argued would be the substantial interference with the Claimant's Article 8 rights if, without granting anonymity, details of his medical condition and the ongoing support that he needs were to be made public.

119. Mr Keegan properly recognised that the fact that neither MP1 nor MP2 sought to oppose anonymity did not relieve the Court of the obligation of satisfying itself that the order sought was necessary and proportionate, and that there was jurisdiction to make the order. On the point as to jurisdiction, as noted above, at the hearing, and as a fall-back position, Mr Keegan relied upon s.39 as supplying the necessary jurisdiction to make the order sought.

120. He submitted that, were the order to be made in the terms sought, it would pose no difficulty for MP1 and MP2 in reporting any subsequent proceedings or ultimate settlement. I put to Mr Keegan that, if made by the Court, the terms of the order – particularly the definition of "*publication*" – would mean that, to be able fully to report subsequent stages of the proceedings, both *MP1* and MP2 would face having to anonymise their earlier reports so as to comply with the restrictions imposed by the Court. Westlaw would be required immediately to remove the name of the Claimant and his litigation friend from the information that is published in the "*Dockets*" section of its website. Mr Keegan appeared to accept that this would be the effect of the order, but it was a sufficient safeguard for the rights of the media organisations (and Westlaw) that they could apply to the Court to vary the order. Ultimately, Mr Keegan accepted that, if the Court considered that the pre-existing media reports and material published

by Westlaw should be excluded from the scope of the order, then the Court could include a public domain exception which would mean no amendments would be required to the existing reports. I deal below whether this provides a solution in this case.

121. After the hearing, the Claimant's solicitors contacted Westlaw, regarding the Dockets section of its website, to ask whether, if the Court were to make an anonymity application, Westlaw would then anonymise information that had been previously published about the case (see [16] above). In an email, on 8 November 2024, the Manager of Content Operations for Thomson Reuters confirmed:

> "… We look for new anonymity orders daily and recently started updating cases on Westlaw Dockets when an order is issued. Assuming that the court has also updated the public docket, this will permanently remove party names from the docket."

122. As this judgment covers a large number of authorities which I could not consider with Mr Keegan at the hearing, I offered the opportunity to make any further submissions on the law once Mr Keegan had seen the draft judgment. That opportunity has been taken and I have received further written submissions, which I have considered.

123. A new point, raised in those written submissions, is the impact of Article 14 of the ECHR (protection from discrimination). The point was discussed in ***JX MX*** [30] (quoted in [102] above). The only point at which there is an arguable engagement of the Article 14 right is at the point at which a child, or protected party, is required to obtain approval of the Court for any settlement under CPR 21.10. By default, those proceedings presently take place in open court (although, arguably, the nature of the hearing and the matters likely to be canvassed at it would appear to fall within CPR 39.2(3)(c) and (d)[3]). The difference of treatment is that, whilst adults who are not protected parties can settle litigation, without a public hearing, on terms that remain confidential, children and protected parties cannot do so if the approval hearing takes place in public. I acknowledge that argument, but the short point is that it does not arise in this case because the claim has not reached the point of an approval hearing. There is no inequality of treatment between the Claimant and any other litigant pursuing a civil claim. The open justice principles apply to the Claimant's claim – and any trial that takes place – in the same way they apply to all other claims.

## G: Decision

124. As to the point on the need for a statutory jurisdiction, I reject Mr Keegan's submission that ***Khuja*** is limited to reporting restrictions made in criminal courts. That, of course, is how the issue presented for decision in that case, but Lord Sumption's analysis is not limited to the criminal jurisdiction. The principles of open justice apply in all Courts and Tribunals, whatever jurisdiction is being exercised. How the Court ultimately resolves any tension between those principles will necessarily be informed by nature of the proceedings, but the principles I have set out earlier in the judgment – particularly

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[3] If an approval hearing were held in private, the Court could nevertheless mitigate the impact on open justice by nevertheless giving a short judgment briefly explaining the Court's decision (cf. the practice in relation to other hearings that are required to be held in private, but where the Court gives a public explanation that gives as much information as is consistent with protecting the matters that need to be protected: see ***Practice Guidance*** [45] discussed in ***Giggs -v- News Group Newspapers Ltd*** **[2013] EMLR 5** [93]-[94].

the need for derogations from open justice to be shown to be necessary and convincingly established by clear and cogent evidence – are constant. It may be comparatively easier in some cases – for example where high order Article 8 rights are engaged – to provide such convincing justification for the derogation sought – but the framework is the same. So too the need to demonstrate a statutory basis for any reporting restriction order.

125. For the reasons I have explained (see [67]-[93]) above), I have rejected CPR 39.2(4) and s.6 Human Rights Act 1998 as providing the necessary statutory basis to grant the order sought, and this is not one of the exceptional cases that the court would fashion a reporting restriction by granting an injunction under s.37 Senior Courts Act 1981. ***JX MX*** is not authority for the proposition that reporting restrictions can be granted under CPR 39.2(4), and the Claimant is not in the position of applying for the Court's approval of a settlement under CPR 21.10. The Court has not reached the stage of "*dealing with what is essentially private business, albeit in open court*": ***JX MX*** [34]. A trial on damages has been fixed for December 2025. Unless the Court exceptionally makes a different order, the remaining phases of this litigation will take place in open court and be resolved by a public judgment. Finally, ***JX MX*** does not assist with how the Court should resolve the issue of pre-existing publicity about the case when considering any application for anonymity and a reporting restriction (see [114] above), which is central to the decision I must make.

126. I am satisfied that, because the Claimant is a child, there is jurisdiction to make an order under s.39. Mr Keegan has confirmed that the Claimant would seek an order on this basis. Although the failure to make the application to withhold the Claimant's name at the outset of the proceedings does not extinguish the jurisdiction to make a reporting restriction under s.39 (as it does under s.11), the Court must nevertheless consider the issues of necessity and proportionality before making any order.

127. The issue for decision is whether, applying the intense focus required by ***In re S***, the Court should grant an order in the terms sought by the Claimant or in some other terms. The decision on this issue embraces consideration of the impact of the terms of any order on the two media organisations (and Westlaw), which Mr Keegan identified as his third issue. The Court must also consider the impact that the order would have on others who may wish to report on the proceedings and the public's right to receive information about the proceedings which lies at the heart of open justice. Finally, as part of the parallel analysis, the Court must consider the important issue of proportionality. Could a less restrictive order be made – stopping short of anonymity – that would secure the legitimate aim of protecting the Claimant's Article 8 rights?

128. The factors which favour granting anonymity are that the Claimant is a child (and that the Courts recognise that derogations from open justice may be necessary to protect their interests – see ***JX MX*** [8], [29]-[30]); and that the remaining phases of the litigation (whether a trial on quantum or settlement with an approval hearing) are likely to involve consideration of intensely private and medical information. In the evidence, it was claimed that the Claimant was "*vulnerable to exploitation*" (see [11] above). This was not a point relied upon by Mr Keegan at the hearing, but in the further written submissions it was suggested that the Claimant "*may also need safeguarding from those who would seek to gain access to the funds he will receive by way of compensation*".

129. The nature of the Claimant's alleged vulnerability to exploitation has not been explained, and no evidence was provided to support or substantiate this claim. Based on the evidence submitted, whilst I accept that the Claimant is vulnerable because of his age and disabilities, I am not persuaded that he is at any real risk of exploitation. Insofar as this suggests that someone might seek to exploit him financially, the risk of that happening must be somewhere between very remote and non-existent. The interim payments that have been made by the Defendant for the benefit of the Claimant (and any further payments that are made in the future) will be managed by the Claimant's professional property and affairs deputy, appointed by the Court of Protection. Overall, the evidence that the Claimant is at any risk of exploitation, if he is not granted anonymity, is vague and general and is little better than assertion; it is the antithesis of "*clear and cogent*".

130. The factors that militate against the grant of anonymity are the significant weight to be attached to open justice and the need to demonstrate, by clear and cogent evidence, sufficiently weighty countervailing factors which convince the Court that anonymity is necessary. The pre-existing media coverage of the Claimant and the claim, and the fact that the earlier phases of the litigation have been conducted without any anonymity order having been sought or granted enhance the weight to be attached to the Article 10 rights. The practical consequence of these two matters is that there now exists in the public domain – readily available online – material that would undermine (and might render ineffective) any anonymity order that the Court were to grant now.

131. The fact that MP1 and MP2 do not oppose the grant of anonymity is a neutral factor. I fear that both organisations have failed to appreciate the full implications of the order sought by the Claimant, if granted, would have on both their past and future coverage of the claim. Unless MP1 and MP2 remove their previously published articles, their continued publication and the risk of jigsaw identification would place severe restrictions on their ability to report fully the remaining phases of the litigation.

132. In my judgment, the factors upon which the Claimant relies in support of his application for anonymity are very weak. They do not provide the clear and cogent evidence that demonstrates that it is necessary to displace the usual principles of open justice, which include the identification of the Claimant in the usual way. On the contrary, the amount of material about the Claimant and the claim that is available in the public domain – most of it placed there voluntarily as a result of interviews by the Claimant's side or as a result of conduct of the proceedings without any anonymity order having been granted – makes any effort to anonymise him at this stage both unjustifiable and futile. It is simply too late for anonymity in this claim. I note, from the Application Notice, that the Claimant's mother "*does not want to engage with the media regarding the claim, the circumstances of the claim or the value of the claim*". That is, of course, her choice. But it does not affect the fact that historically she, and a solicitor acting on behalf of the Claimant, have been quite willing to speak to the media about the Claimant and to share substantial information which has led to the publication of the articles in Annex 2.

133. Before the issue of the Claim the Claimant's mother shared a great deal of personal information about the Claimant with the media. In many respects this was a perfectly natural thing for her to have done. Showing great warmth and generosity, in the months after the Claimant's birth, the local community was moved to show its support for the Claimant and his mother by fundraising for them. I should make very clear that I am absolutely not criticising the Claimant's mother's decision to share publicly

information about them, but the decision to release so much information into the public domain through media reports has an inevitable impact on the extent to which it is possible, years later, whether legally or as a matter of practicality, to secure any meaningful anonymity for the Claimant in this claim.

134. When the claim was issued back in March 2023, no application was made for any derogation from open justice, whether in terms of anonymity or limiting the publicly available information about the claim. If there was a concern that the litigation was going to expose intensely private matters regarding the Claimant's disability and the support he now requires, then those risks were present as soon as the claim was first issued without seeking any derogations from open justice. If it was believed that the Claimant could demonstrate that such derogations were necessary, an order should have been sought when the claim was issued. At that point, the Claimant could additionally have relied upon s.11 Contempt of Court Act 1981 as the basis for the application for a reporting restriction. Whether or not a claimant can persuade the Court that an anonymity order ought to be granted at the commencement of the proceedings is a matter of applying the principles I have identified. The extent of media coverage prior to the issue of the claim in this case would have meant that an application for anonymity would not have been straightforward, even if made at the point of issue.

135. Since the issue of the Claim, without any derogations from open justice being sought or ordered, the litigation has progressed in the ordinary way. That has led, predictably and inevitably, to the following:

(1) Once the Acknowledgement of Service was filed by the Defendant in August 2023, the statements of case – that is the Claim Form and Particulars of Claim – and the orders made in the proceedings became available to be obtained by a non-party from the court's records pursuant to CPR 5.4C(1). As required by the relevant provisions of the CPR (see [28] above), the statements of case and orders have contained the name of the Claimant and his mother and the Claim Form has included his address.

(2) The Particulars of Claim, particularly in the section headed "*Particulars of Injury*", contained extensive details of the Claimant's disability and the issues he confronts. Much of the information that Mr Keegan identified at the hearing as being the information that the application was designed to protect appears in this section of the Particulars of Claim. This statement of case has been open to public inspection since August 2023. At least one journalist has exercised the right to obtain a copy of the Particulars of Claim pursuant to CPR 5.4C(1) and has indicated an intention to publish an article about the claim. To the extent that the Particulars of Claim contained information that was private or confidential, any privacy or confidentiality was effectively destroyed by (1) its inclusion in Particulars of Claim without the Claimant having been anonymised; and (2) its supply to a non-party under 5.4C(1). Having not sought anonymity, it was open to the Claimant to include private and/or confidential information that he wanted to protect in the litigation in a Schedule to the Particulars of Claim. That, at least, would have stopped the information becoming publicly available under CPR 5.4C(1). There is no right to obtain a schedule to Particulars of Claim under the rule. A non-party wishing to obtain a document that has been filed with a statement of case must make an application to the Court to obtain it from the court's records under CPR 5.4C(2).

136. Beyond the recent contact from a journalist (see [11] above), the only other thing that had changed since the issue of the proceedings, and which might engage the privacy/confidentiality interests of the Claimant, was that the Court, by the Order of 20 November 2023, retrospectively approved the interim payments that were made before the proceedings were commenced. Since it was made, that order has also been open for public inspection under CPR 5.4C(1), no restriction on such access having been sought under CPR 5.4C(4). I have no evidence as to whether non-parties have obtained that order from the Court's records, but certainly no restriction has been placed on it. This is the sort of collateral impact on privacy interests that is the price to be paid for open justice (see [27] above). The Claimant has not provided any evidence that he would be caused particular harm if this information were to be published. I cannot accept that the Claimant is at any real risk of exploitation for the reasons I have explained (see [128] above). If the concern was to prevent details of these payments being available publicly, then, if justified, a more targeted order could have been made placing specific restrictions on non-parties obtaining copies of this order from the Court's records under CPR 5.4C(4). Beyond the all-embracing application seeking general restrictions upon non-party access to the records of the Court made as part of the anonymity application, the Claimant has not made a more targeted application for restrictions under CPR 5.4C(4). I am not determining it and, for that reason, express no view as to whether it would be granted.

137. There is a clear and continuing public interest in the Claimant's claim going beyond the inherent public interest in court proceedings generally. It is not the case that the initial publicity concerning the Claimant has faded from public memory or that legitimate journalistic interest in the Claimant's case has waned (see [23] above).

138. The fact that there remains continuing – and understandable and legitimate – media interest in the claim is also demonstrated by the recent inquiry with the family from MP1 and the representations sent by both MP1 and MP2 to the Court which make clear their ongoing interest in the claim and its ultimate resolution. The Claimant's claim is a matter of genuine, continuing and legitimate public interest. Imposing a reporting restriction on identifying the Claimant, at this stage, particularly in the context of the way his case has been used as a vivid illustration of the real cost of medical failings, as well as being futile, would take away an important part of the media's ability to engage readers on a matter of significant public interest. This is a good 'real world' demonstration of how examples from individual cases are effective in bringing important issues to public attention and engaging readers; it shows the value of 'what's in a name' (see [41] above).

139. I must consider the practical effect of granting, now, a reporting restriction order prohibiting identification of the name of the Claimant (and his mother). For Westlaw, the effect is immediate and direct. It would be required to amend the information provided in its "*Dockets*" section to anonymise the Claimant and his mother. The effect on MP1 and MP2 would be indirect and potentially delayed. They would not be required, immediately, to amend their existing publications. But in any future coverage of the case, they would be forced to make the choice I have identified (see [59] above). There would be a direct impact on the MP1 journalist's ability to carry through his stated intention to publish an article about the proceedings, and to include in it any details from the Particulars of Claim that he has obtained. If restrictions on identification of the Claimant are imposed, publication of such an article would

immediately bring to the fore the problem of jigsaw identification that arises from the previous reporting concerning the Claimant. What is very clear is that, if granted, the order would represent a significant interference of the media and the public's rights under Article 10. This is not one of the truly exceptional cases, raising issues under Article 2/3, where the Court is compelled to force the genie back into the bottle.

140. The stance adopted by Westlaw (see [121] above) is, on one level, hardly surprising. Someone who is publishing the names of parties to litigation, and who becomes aware of an anonymity order made by the Court, has no choice but to comply with the order and to remove the name(s) that is/are the subject of the anonymity order. The publisher could, I suppose, apply to the Court to challenge the anonymity order, but few will do so for commercial reasons that are obvious. The more concerning aspect of Westlaw's response is the suggestion that orders requiring retrospective anonymisation are not unusual. For the reasons given in this judgment, they should be. I suspect that in many cases in which such anonymity orders have been granted, the Court will simply not have addressed the issue of whether, and if so the extent to which, the anonymity order will affect existing publications and if so, how that affects the decision whether to make it.

141. On the issue of proportionality, any concern about revealing the intensely private information about the Claimant's disability and his particular needs is likely to be capable of being met by the Court making more targeted orders that would prevent those details from being communicated in any future open court hearings in the litigation. At this stage of the litigation, and particularly having regard to the pre-existing media coverage, anonymising the Claimant is neither a necessary nor proportionate response to the concerns regarding the publication of information that engages the Claimant's Article 8 rights. In short, and particularly having regard to the previous media coverage, anonymising the Claimant at this stage would represent a disproportionate interference with the Article 10 rights of MP1, MP2, Westlaw and the public generally. As I have explained, there are other ways that the Court can mitigate the impact to the Article 8 rights of the Claimant, arising from the disclosure of medical and private information, in the remaining phases of the litigation.

142. In the further written submissions on behalf of the Claimant, it was argued that the order sought represented a "*very limited derogation from the principle of open justice*" enabling the press "*to report on any damages hearing or any settlement*" providing that such a report is "*not linked to the protected party, thereby protecting his right to private and family life whilst still protecting the Article 10 rights of the Press*". I reject that submission. It fails to appreciate the impact of jigsaw identification and the choice that MP1 and MP2 would have to make in relation to future coverage of the proceedings if the order were made (see [59] above). Without removing the earlier published reports (set out in Annex 2) from the public domain, their ability to report fully the remaining phases of the litigation will be severely constrained because of the obvious risk that, when read together, the Claimant would be readily identifiable.

143. For these reasons, I refuse to grant the order sought, or any order, under s.39 imposing reporting restrictions on identifying the Claimant in these proceedings. The Claimant's application is refused.

144. As I have refused the anonymity application, it is not necessary to consider the application for restrictions on access to documents from the Court records pursuant to 5.4C.

## H: The terms of the draft order and points of general importance

145. As I have refused the application, no issue arises as to the appropriate form in which to grant any order. However, the terms of the proposed order, because they have been taken from PF10, raise issues of wider importance. I should therefore take the opportunity to identify some problems that would have arisen, had I reached the stage of making an order.

146. Before looking at the particular paragraphs of the order, I would make the general observation that the law regarding withholding orders, reporting restrictions and other derogations from open justice is complex. The length of this judgment, and the issues that I have needed to address, perhaps demonstrates that clearly. In another case, I said: "*s.11 Orders have some serious traps for the unwary or uninitiated and there are important conditions precedent before they can lawfully be made. There are also important limits on what they can and do protect*": ***NT1 -v- Google LLC* [2018] EWHC 67 (QB)** [19]. The whole area of withholding orders and reporting restrictions does not easily lend itself to the use of a standard form order, still less its deployment on a mechanistic basis. If a party is going to use the standard form, then s/he or his/her advisors will need to understand what orders are being sought, the basis for them, and the jurisdiction to make them. Only then will it be possible to fashion an order that is appropriate for the facts of a particular case. Few are the cases (if any) in which the Court can simply be asked to make an order in the terms of PF10. Careful consideration of each of the paragraphs of the order is required together with an understanding of purpose, jurisdiction and justification for each of them.

147. The terms of the order sought by the Claimant on the application are set out in Annex 1 and, as I have noted, the draft closely follows PF10.

148. The recitation in Paragraph (2) wrongly reverses the burden. The default position is open justice. It is for the applicant to satisfy the Court, to the required standard, that the relevant derogation from open justice is necessary.

149. The references to s.6 Human Rights Act 1998 and CPR 39.2(4) as the jurisdiction under which the order would be made are erroneous. The principal statutory bases upon which a reporting restriction can be made in a case like this are s.11 Contempt of Court Act 1981 and, for cases involving children or young persons, s.39 Children & Young Person Act 1933. The condition precedent for the making of a s.11 order is that the Court has also made a withholding order. Without that, no order can be made under s.11. The order should therefore either itself grant the withholding order, or the order should identify the previous occasion on which the Court has made a withholding order.

150. The definition of 'publication' in paragraph (2) under "WHEREAS", because it refers to "*further publication*", would embrace any existing continuing publication (e.g. the continued act of publishing an article that is already available online at the point the order is made). For the reasons I have explained, a reporting restriction order the terms of which will have retrospective effect, and will impact an existing publication, will be problematic. Without the most anxious consideration, the Court should not usually

make a reporting restriction order the terms of which will require amendment to or removal of an existing lawful publication, and not without at least giving the relevant publisher notice of the application so that s/he/it can have an opportunity to make submissions before the order is granted (see [91] above).

151. In any application for a reporting restriction order, the Court must focus specifically upon what, if any, prior reporting of the case there has been (whether in the mainstream media or legal websites like Westlaw). In cases where there is pre-existing publication, unless exceptionally the Court decides that it is appropriate to make an order requiring amendment to or deletion of an existing publication, the Court should either remove paragraph (2) in the definition of publication, or should include a public domain exception, the effect of which is to exclude pre-existing publication from the scope of the reporting restriction order. Even then, the Court must focus on and assess the impact that jigsaw identification would have on future reports of the proceedings. For that purpose, any applicant seeking a reporting restriction order *must* file with the Court evidence demonstrating the extent to which the information which is sought to be restrained by the reporting restriction order has already come into the public domain. That will include any pre-existing media coverage and, after proceedings have been commenced, public judgments in the claim, documents available to public inspection under CPR 5.4C(1), details of any open court hearings in the claim, and what is available about the claim on third-party providers such as Westlaw.[4]

152. An application for a reporting restriction will effectively be an *ex parte* application, with the corresponding obligation on the person making it in terms of full and frank disclosure, both as to facts and law: ***MEX Group Worldwide Ltd -v- Ford*** **[2024] EWCA Civ 959** [119], approving Carr J's distillation of the principles of full and frank disclosure in ***Tugushev -v- Orlov*** **[2019] EWHC 2031 (Comm)** [7].

153. The words "*by consent*" will not be appropriate (or relevant) in an anonymity order. The Court must decide for itself whether the derogations from open justice are strictly necessary, irrespective of the consent of the parties: see ***Practice Guidance*** [16].

154. In paragraph 1 of the draft order, it is wrong to include the words "*is confidential*". The Court cannot, by order, make something confidential when it is not. The name of a party to litigation is not confidential. If satisfied that it is necessary to do so, the Court can order that the name is to be withheld from the public in the proceedings, and direct that it be replaced by a cipher in hearings in open court and documents, but that does not make it confidential. The model order attached to the ***Practice Guidance*** contains, in paragraph 3, a form of withholding order that also permits the Claim Form to be issued using a cipher.

155. The reference in paragraph 2 to CPR 39.2(4) is incorrect. The order should identify the correct statutory basis for the reporting restriction (not least so that it can be readily ascertained whether the restriction is automatically time limited – e.g. under s.39 Children & Young Persons Act 1933). The order should set out clearly what cannot be published. The terms of a reporting restriction, if made under s.11 Contempt of Court

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[4] As well as the "*Dockets*" section drawn from information publicly available from CE-File, Westlaw also provides information, drawn from the cause lists published by HMCTS, about when there have been hearings in particular claims. This information enables the identity of parties to a pending claim to be readily identified when the relevant case number is searched.

Act 1981, will closely mirror the information which the Court has directed must be withheld from the public. The order should also state for how long the restrictions are to last.

156. Examples of a withholding order and a reporting restriction order made under s.11 Contempt of Court Act 1981 are included in §7.12.9 Administrative Court Guide 2024[5], which also includes useful general guidance as to anonymity and reporting restrictions in civil proceedings (guidance which applies equally to proceedings beyond the Administrative Court of the King's Bench Division). In my view, in the difficult area of reporting restrictions, it is more likely to promote better understanding of the Court's powers and the orders that can be made when anonymity is sought, to give guidance in this way (together with examples of suggested wording for orders tailored to the particular type of order that is being made) than to promulgate a single 'standard' order like PF10.

157. In respect of paragraph 4 of the draft order, the operative power to restrict non-party access to documents from the Court's records is CPR 5.4C(4). If a withholding order has been made at the commencement of the proceedings, it will usually be effective in ensuring that documents filed by the parties will withhold the protected information, meaning that it will usually not be necessary to impose any further order under 5.4C(4). It may be necessary to make an order under CPR 5.4C(4) to restrict non-party access to confidential annexes to documents that are filed in the proceedings, if that is the method of withholding that the Court has used to protect the relevant information.

158. Paragraph 5 is unlikely to arise unless, exceptionally, the Court is granting an anonymity order which has retrospective effect.

159. Paragraph 6 should reflect the totality of the orders made by the Court that are derogations from the principles of open justice, including withholding orders, reporting restrictions and restrictions to non-party access to documents from the Court's records. On CE-File that restriction should then appear in the Case Summary field so as to be plainly visible.

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[5] www.judiciary.uk/wp-content/uploads/2022/09/24.85_HMCTS_Administrative_Court_Guide_WEB1.pdf

**Annex 1: draft Order sought by the Claimant**

**BEFORE** [*Judge / Master*] sitting at [A] District Registry, [address given] on [*date*].

**UPON HEARING** [*Counsel / Solicitor*].

**AND UPON** considering the application of the Claimant's solicitor dated 1 November 2024:

(1) Consideration of the Article 8 rights of the Claimant to respect for private and family life, and the Article 10 right to freedom of expression.

(2) It appearing that non-disclosure of the identity of the Claimant is necessary to secure the proper administration of justice and in order to protect the interests of the Claimant and that there is no sufficient countervailing public interest in disclosure.

(3) The Defendant indicating its neutrality to the making of the order and there being no representations from the press or any other interested party. [*please see N244 dated 1 November 2024 and the Defendant's position. The Defendant has been served with the application and will now take instructions*]

**AND PURSUANT** to section 6 of the Human Rights Act 1998 and CPR rules 5.4C, 5.4D and 39.2(4)

**WHEREAS** for the purposes of this order:

(1) 'Publication' includes any speech, writing, broadcast, or other communication in whatever form (including internet and social media), which is addressed to the public at large or any section of the public.

(2) Publication for the purpose of this Order includes any further publication (as defined in subparagraph (i) [it should be (1)] above) from the date of this Order, even if such information has derived from a previous stage or stages of these proceedings.

**IT IS ORDERED [BY CONSENT] THAT:**

1. The identity of the Claimant as a party to these proceedings is confidential and shall not be published.

2. Pursuant to CPR Rule 39.2(4), there shall not be disclosed in any report of these proceedings or other publication the name or address of the Claimant, the Claimant's Litigation Friend or other immediate family members, or any details (including other names, addresses, or a specific combination of facts) that could lead to the identification of the Claimant in these proceedings. The Claimant and the Litigation Friend shall be referred to as set out at paragraph 3 of this Order.

3. In any judgment or report of these proceedings, or other publication (by whatever medium) in relation thereto:

    (i) The Claimant shall be referred to as "KXA".

    (ii) The Litigation Friend shall be referred to as "LXA"

(iii) The Claimant's sister shall be referred to as "TXA"

(iv) Any other details which, on their own or together with other information publicly available, may lead to the identification of the Claimant (including any names of other immediate family members or their addresses) shall be redacted before publication.

4. Pursuant to CPR Rules 5.4C and 5.4D:

(i) A person who is not a party to the proceedings may not obtain a copy of a statement of case, judgment or order from the Court records unless the statement of case, judgment or order has been anonymised in accordance with subparagraphs 3(i) to (iii) above.

(ii) If a person who is not a party to the proceedings applies (pursuant to CPR r.5.4C(1B) or (2)) for permission to inspect or obtain a copy of any other document or communication, such application shall be on at least 7 days' notice to the Claimant's solicitor, trustee or deputy.

5. The Claimant's solicitor shall file with the Court an electronic (PDF) bundle of the statements of case that has been anonymised in accordance with paragraph 3 above by **[*date – 21 days from date of the order*]**, and re-filed in the event that any statement of case is amended, within 21 days of such amendment being approved.

6. The Court file shall be clearly marked with the words "An anonymity order was made in this case on **[*date of this Order*]** and any application by a non-party to inspect or obtain a copy document from this file must be dealt with in accordance with the terms of that Order."

7. Any interested party, whether or not a party to the proceedings, may apply to the Court to vary or discharge this Order, provided that any such application is made on 7 days' notice to the Claimant's solicitor, trustee or deputy.

8. Pursuant to the 'Practice Guidance: Publication of Privacy and Anonymity Orders' issued by the Master of the Rolls dated 16 April 2019 a copy of this Order shall be published on the Judicial Website of the High Court of Justice (www.judiciary.uk). For that purpose, a court officer will send a copy of the order by email to the Judicial Office at judicialwebupdates@judiciary.uk.

9. The costs of obtaining this order be costs in the case.