

IN THE COURT OF APPEAL (CIVIL DIVISION)

IN THE MATTER OF SHARIF

On appeal from Williams J [2024] EWHC 3330 (Fam)

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WRITTEN SUBMISSIONS OF THE ADVOCATE TO THE COURT  
for the appeal listed on 14 and 15 January 2025

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1. These submissions are confined to the following issue, as identified in the request from Lady Justice King to the Attorney General for the appointment of an Advocate to the Court:

*In what circumstances, and upon what basis, can or should a court as a matter of law, make an order withholding / anonymising the name of a Judge in family proceedings.*

2. The issue is addressed within these submissions by reference to the following:
  - a. The ‘automatic restraints’ governed by statute;
  - b. The extension or relaxation of ‘automatic restraints’: RROs and their application to others involved in proceedings (social workers, guardians, etc);
  - c. The application of the extension/relaxation jurisprudence to judges;
  - d. In what circumstances should any such power be exercised?

**Automatic restraints on publication governed by statute**

3. As a starting point, it may be helpful to observe that any anonymisation or withholding of the name of the judge does not arise (at least directly) through the operation of section 12 of the Administration of Justice Act 1960 (“the AJA”) or section 97 of the Children Act 1989 (“the CA 1989”). Neither of those statutory provisions restrict or prohibit the naming of a judge. Indeed, the effect of sub-sections (2) and (3) of section 12 of the AJA is to

exclude this information from the restriction imposed by sub-section 1: sub-section (2) makes it clear that the text of the order made by the court, or a summary of the order, is not caught by the effective publication restriction imposed by sub-section (1), and sub-section (3) provides that a reference to a court includes a reference to a judge. As Williams J observed in the present case (para 46), section 12 thereby contemplates that an order of the court, which would almost always include the names of the child and the judge, is not captured by the restriction.

4. In *Re B (A Child) (Disclosure)* [2004] 2 FLR 142 Munby J (as he then was) provided a summary of what is and is not caught by section 12: see paragraphs 65 and 66 and 81 and 82. At paragraph 76 Munby J held that section 12 does not of itself prohibit publication of the bare fact that an identified witness has given evidence for, or against, a particular party to the proceedings.
5. In *Re J (Reporting Restrictions)* [2014] 1 FLR 523, Sir James Munby, then as President, said in paragraph 23 that the court has power both to relax and add to the ‘automatic restraints’, and in so doing must conduct the ‘balancing exercise’ described in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593. At paragraph 24 he observed that the court may also, by an appropriate injunction, afford anonymity “*to other participants in the process, for example, an expert, a local authority, or a social worker*”. He proceeded, referring to his earlier decision of *A v Ward* [2010] 1 FLR 1497, to note that such injunctions will not readily be granted: “*As I put it in A v Ward, para [181], any such application in relation to an expert or a social worker must be justified by reference to ‘the particular circumstances or particular vulnerabilities of specific individuals’.*”

### **Extension or relaxation of automatic restraints**

6. The extension of the automatic restraints of section 12 / section 97 by the imposition of a Reporting Restriction Order (RRO) will, generally speaking, be aimed at preserving the anonymity of the subject child or the family, and/or the integrity of the proceedings. Each of these aims may, by implication, require a restraint on the publication of the names of witnesses, experts, treating clinicians, social workers, guardians, etc. In certain cases it is

possible that the practical effect of a prohibition on reporting any information from the proceedings might by implication result in a restraint on the publication of the name of the judge. It is also conceivable, perhaps unusually but not impossibly, that in a particular case fulfilment of the aims described above would require that publication of the identity of the court or judge be restrained.

7. In *Abbasi v Newcastle upon Tyne NHS Trust* [2023] Fam 287 the Court of Appeal considered the question of the court's jurisdiction to make RROs (encompassing, inter alia, treating clinicians) in end-of-life proceedings. At paragraph 66 Lord Burnett of Maldon CJ held that the court enjoyed all the powers available to it under its inherent jurisdiction and by virtue of section 37 of the Senior Courts Act 1981: "*Those powers could be exercised to protect the integrity of the proceedings themselves and those involved in, affected by or connected with the proceedings. In using this language, we do not intend to define the limits of the power*". At paragraph 67, the Lord Chief Justice confirmed that there is no need for distinct causes of action to be identified to enable the court to make appropriate orders, including RROs: "*The Convention rights of those affected by the proceedings must be considered and, seised of the proceedings, the court may make such orders as are just and convenient under the inherent jurisdiction and section 37 of the 1981 Act. In particular, it may make such orders as it considers necessary to protect the integrity of the proceedings themselves and the administration of justice*".
8. In the consideration of whether a RRO should be relaxed to enable publication, the court must conduct a balancing exercise of the competing Convention rights. This, as *Abbasi* shows, includes the rights of those affected by or involved in the proceedings and, as the Court of Appeal noted at paragraph 78, there is an absence of hierarchical primacy between articles 8 and 10. Depending on the outcome of that balancing exercise (more on this question below), it is permissible for the court to maintain restrictions on publication and the anonymity of those involved.
9. There is also authority for the proposition that the court can grant an injunction to maintain anonymity on the specific application of someone involved in the proceedings: see for example *X v Y (Restraining Abuse of Children's Guardian)* [2022] 2 FLR 334. In this case,

Macdonald J held that the article 8 rights of the guardian were engaged and whilst the threshold for the engagement of the right as it related to a person's reputation was a high one, having regard to the seriously offensive nature of the father's attacks, an impact on the guardian's private life would result.

### **Application of the extension / relaxation jurisprudence to judges**

10. Neither *Abbasi, A v Ward* nor *X v Y* of course address the question of judges<sup>1</sup>. The question arises as to whether that jurisprudence extends to encompass the judiciary.
11. The right to respect for private life, as protected by article 8, may extend to professional lives: see *Niemietz v Germany (Application No 13710/88) (1993) 16 EHRR 97*, *R (Wright) v Secretary of State for Health* [2009] AC 739, *Re W (A Child)* [2017] 1 WLR 2415 and *Re Guardian News and Media Ltd* [2010] 2 AC 697 cited in *Abbasi* (paragraphs 59-60). In *Špadijer v Montenegro* (9 November 2021; application 31549/18), which concerned the abuse of a prison guard at work by her colleagues, the ECtHR ruled that the state had violated the applicant's article 8 rights because of insufficient domestic protections.
12. As a matter of principle, it must follow that a judge's article 8 rights may also be engaged in a professional context. If so:
  - a. on an application to set aside or vary a RRO (in which the name of a judge has been restrained) the process articulated in *Abbasi* as to the balancing of competing Convention rights would potentially be engaged in relation to the judge as well as others "involved in, affected by or connected with" the proceedings (see paragraph 7 above) – albeit plainly the weight of relevant factors may well be different depending on the person;
  - b. conceivably, though the circumstances are likely to be extremely rare, a judge could, as in *X v Y*, bring a specific application for an injunction to restrain the

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<sup>1</sup> It is apparent from paragraph 4 of *X v Y* that the request for an injunction sought to encompass restraint on identifying the trial judge and social worker. This was not pursued since counsel "was not instructed on their behalf, had had no indication that they sought the relief and that no applications for such relief were before the court".

publication of their identity on the basis of an infringement to their Convention rights.

13. The authorities of *Derbyshire County Council v Marsden & Others* [2024] 1 FLR 537 and *R v Felixstowe Justices ex p Leigh and another* [1987] 1 QB 582 emphasise the significance of openness and transparency which, in the particular contexts of those cases, includes the naming of the judge. This is undoubtedly a point of significant weight which will weigh heavily in the article 10 side of the balance. But, if a judge's Convention rights are engaged, a balancing exercise which includes consideration of those rights must nonetheless take place. In *Marsden*, although no party submitted that the magistrates should not be named (see paragraph 29 of the decision), Lieven J nonetheless made reference to the need to conduct a balancing exercise (paragraph 31).

### **The circumstances in which any power should be exercised**

14. It is necessary to distinguish between two situations:
  - a. on the one hand where the court, in pursuit of the ambitions identified in paragraph 6 above, makes a RRO which restrains the naming of the judge (or has the effect of so restraining, through a prohibition on the reporting of any information from the proceedings); and
  - b. on the other hand, the situation where, on an application to relax a RRO (or in the unlikely event of a specific application by a judge) a consideration arises as to whether, having regard to the interests of the judge, an injunction should remain or be granted.
15. Whilst the first of the scenarios is not likely to involve weighing in the balance factors of specific relevance to the judge, the second of course may well do. It is the second scenario which arises on the facts of this case, and which is considered below.
16. As *Abbasi* makes clear, notwithstanding the absence of the word 'compelling' in the evaluation of the evidence that would be required in order to tip the scales in favour of article 8, "*the practical realities of the balance in such cases will be that evidence of a compelling*

*nature is needed to curtail the legitimate exercise of free speech*". In the assessment of the significance of the potential infringement of Convention rights, consideration is given in *Abbasi* to the question of 'future risk' in the context of the article 8 / article 10 balancing exercise: see paragraphs 84-88. The court also distinguished between cases involving article 3 and those involving article 8. Under the former, if the evidential threshold is surmounted, no balancing exercise arises; it is an unqualified right. Within the article 8 evaluation, the court deemed the *risk* of a social media reaction "*from third parties who might vilify individuals and lead to their harassment or physical peril*" (para 90) to be of limited weight against the strong article 10 rights of the parents. At paragraph 103 the court concluded that the "*possibility of serious and improper secondary activity following the public discussion of the parents of these cases is speculative*". This is of course a case- and fact-specific evaluation.

17. In line with the indication from Lady Justice King that these submissions need not address any issues concerning the adequacy of the material relied on by the judge, no submissions are made as regards whether, evidentially, the risk of harm, vilification or online abuse to the judges in this case (and the conclusion of Williams J at paragraph 83) is sufficient to weigh more heavily in the balance of Convention rights than the importance of their names being made public.
18. However, it is right to observe, as articulated by Mr Purchase KC and Ms Reeves on behalf of the judges, and by the Council of Circuit Judges and Association of District Judges in their joint letter dated 7 January 2024, that judges face considerable (perhaps unique) difficulty in putting before the court or evidencing the risks they face, or even advancing a case for their own protection. This particular feature may be said to be relevant to the overall evidential evaluation.
19. It may also be helpful to note that in *X v Y* (supra) Macdonald J, in a manner not dissimilar to Williams J in this case, took judicial notice of the harm the guardian faced if material was published, in circumstances where the guardian did not wish to put before the court the personal consequences of the father's actions: see paragraph 82 of the judgment.

20. In *Re S* [2005] 1 AC 593 Lord Steyn emphasised (at para 17) that “*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*”.
21. When it comes to the evaluation of the potential infringement of the article 8 rights, one of the considerations may be the extent to which judges are required to tolerate abusive behaviour (a point addressed by Williams J at paragraph 78). In *Abbasi* (paragraph 121) the court, whilst noting that nobody is obliged simply to “put up with” abuse, said that “*the courts cannot shut down legitimate debate save when the rights of those affected by that debate, or put differently, the adverse consequences, are of such strength as to outweigh the right to free expression*”.
22. On the question of justification for the infringement of the article 10 right, a distinction may be drawn between the circumstances of *Abbasi* and the circumstances of withholding the identity of a judge: in the latter, the court is not weighing a desire by parents to tell their story against competing article 8 rights, but the (arguably) narrower (though, having regard to the principles of open justice as mentioned above, clearly significant) question of the publication of identity. Acknowledging the importance of the question posed by Lord Rodger in *Re Guardian News and Media* (‘What’s in a name?’), the adverse consequences may be said to weigh more heavily in the balance where the “*legitimate debate*” – namely what went wrong in this case – is, by the restriction, curtailed rather than being entirely “*shutdown*” (as it might have been in *Abbasi*).
23. Other than in a case falling within the first category as set out in paragraph 14 above, it is likely to be only in an exceptional case that the court would take the step of not naming the judge. In this case, Williams J noted, at paragraph 75, that not naming the judges would be an exceptional step, and he later (at paragraph 78) said that when the balance comes to be applied to the judge, “*the expectation would be for naming*”.
24. As to the circumstances when such exceptional circumstances may potentially be met, where the case is one of extreme notoriety and involves particularly heinous facts, and has generated considerable public interest, it may be considered that the risk of infringement

of the article 8 rights will be greater, and the more serious the potential consequences will be. Those factors may weigh in the balance, informing the evaluation of the existence of any “*adverse consequences of such strength as to outweigh the right to free expression*” (Abbasi at paragraph 121).

25. In the event that further assistance can be provided during the hearing, additional submissions will be made orally.

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