IN THE COURT OF APPEAL
OF ENGLAND AND WALES
(CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
OF JUSTICE (FAMILY DIVISION)

Appeal No: CA-2024-002784
Case No: FD23P00425

B E T W E E N:-

(1) LOUISE TICKLE
(2) HANNAH SUMMERS

Appellants

- and -

(1) THE BRITISH BROADCASTING CORPORATION
(2) PA MEDIA
(3) ASSOCIATED NEWSPAPERS LTD
(4) TIMES MEDIA LTD
(5) GUARDIAN NEWS AND MEDIA LTD
(6) TELEGRAPH MEDIA GROUP HOLDINGS LTD
(7) NEWS GROUP NEWSPAPERS LTD
(8) INDEPENDENT TELEVISION NEWS LTD
(9) REACH PLC
(10) SURREY COUNTY COUNCIL
(11) OLGA SHARIF
(12) URFAN SHARIF
(13) BEINASH BATOOL
(14 – 19) U, V, W, X, Y (CHILDREN)
(by their Children's Guardian)

Respondents

SKELETON ARGUMENT DATED 9 JANUARY 2025
ON BEHALF OF THE FIRST AND THIRD TO NINTH RESPONDENTS
for hearing on 14 and 15 January 2025

Suggested pre-reading (t/e excluding authorities: 3 hours):

- The judgment under appeal; and
- The Parties' skeleton arguments.

Contents

The Appellants' grounds of appeal were originally formulated before they had sight of the judgment of the court below. Having reviewed the judgment of the court below, it is

evident that the grounds overlap significantly. As a result, this skeleton deals with the grounds in the following order: 2(c) and 2 (e) together; 2(b); 2(b); and 2(a).

This skeleton argument is structured as follows:

Introduction

1. This skeleton argument is lodged on behalf of the First and Third to Ninth Respondents ("**the Media Parties**") in respect of the appeal against the judge in the lower court's ("**the Judge**") decision to grant anonymity to the judges in the historic family justice proceedings concerning Sara Sharif and her family ("**the Historic Proceedings**").

2. The Media Parties submit that the decision under appeal ("**the Decision**") contains several legal errors, which are fatal to the way in which the Judge undertook the necessary

balancing exercise and, consequently, caused the Judge to reach a conclusion that was obviously wrong. Moreover, the way in which the Judge decided to order anonymity for the judges amounted to a serious procedural irregularity.

Joining the First and Third to Ninth Respondents as Appellants

3. By a respondent's notice dated 18 December 2024, the Media Parties set out their grounds for appealing the Decision, joining cause with the Appellants' grounds of appeal and seeking permission to provide full grounds of appeal and a skeleton argument in support.

4. Then, by an Order of Lord Vos MR dated 19 December 2024, permission to appeal was granted by this Court on the basis of the Appellants' appellants' notice and skeleton argument. The consequence is that the Media Parties have been listed as respondents to the appeal, despite joining cause with the Appellants and, like the Appellants, holding the position of applicants in the lower court.

5. In the circumstances, the Media Parties invite the Court to direct that they are joined as appellants to this appeal (i.e. make them the Third to Tenth Appellants). That will reflect properly their role within the appeal.

Procedural background

6. This is covered with in the Appellants' skeleton argument, the contents of which the Media Parties gratefully adopt.

The Grounds of Appeal (amended by Order of King LJ 6 January 2025)

7. These are:

The decision was unjust because of a serious procedural or other irregularity in that :

2(a) The Judge failed to give any reasons, either at the time of making his decision, or following review, to justify the making of an injunctive order (indicating that written reasons would follow in the New Year);

2(b) (subject to permission to appeal being granted) The Judge adopted an approach to the media generally, and the appellants specifically, which (i) was unfair, (ii) demonstrated bias and/or inappropriate personal animus, and (iii) represented an unacceptable judicial encroachment upon the Article 10 ECHR rights of the appellants and/or the media, and further the Judge sought to rely upon his erroneous analysis regarding purported media irresponsibility in justifying the order restraining the naming of Judges in the historic proceedings.

The decision was wrong, in that:

2(c) The demands of the Open Justice principle mean anonymity for a Judge cannot be justified within the framework of balancing Article 8 and Article 10;

2(d) The Judge is not capable of justifying the order as it was made in the absence of any specific application and/or evidential foundation;

2(e) The order made is inimical to the proper administration of justice.

8. The grounds were originally formulated by the Appellants before they had sight of the judgment. In the light of the Judge's reasons set out in that judgment it is apparent that the grounds significantly overlap and this skeleton therefore deals with the grounds in the following order: 2(c) and 2(e) together; 2(b); 2(d); and 2(a).

Grounds 2(c) and 2(e): Anonymity Unjustifiable

The Judge's approach to the open justice principle

9. The Judge held that, when undertaking the requisite balancing exercise in relation to publication of the judges' names, he had to begin with a "*clean sheet*" and that he should not start with a clear presumption in favour of open justice (the Decision at [28], [45], [51]). He held "*My conclusion on the naming of third parties and judiciary is therefore that there is no presumption that they should be named in shielded justice cases*" (the Decision at [61]). This was wrong as a matter of law.

10. The open justice principle lies "*at the heart of our system of justice and* [is] *vital to the rule of law*" (*R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013]QB 618 at [1]). It is the starting point whenever the court is asked to consider imposing restrictions on the ability of the media freely to report court proceedings.

11. Therefore, whilst as Lord Steyn famously identified in *Re S (A Child)* [2005] 1 AC 593 ("***Re S***") at [17], when undertaking the necessary balancing exercise, the court proceeds on the basis that "*neither article has <u>as such</u> precedence over the other*" (emphasis in original), as Nicklin J correctly held in *PMC v A Local Health Board* [2024] EWHC 2969 (KB), "*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*": a statement of the law with which the judge said he disagreed (the Decision at [45]).

12. To the same effect, in *Abassi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2023] Fam 287 ("***Abassi***") Lord Burnett explained at [77] to [78] that "*The use of the language of the need for "compelling" evidence to curtail free speech reflects that importance recognised in domestic authority and Strasbourg case law* […] *The absence of hierarchical primacy between articles 8 and 10 shows that there is no separate legal test arising from the use of the word "compelling" in discussion of the balancing exercise. Rather, 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*".

13. Moreover, legal decisions are a matter of high and obvious general interest. In *In re Guardian News and Media Ltd* [2010] 2 AC 697 ("***In re Guardian News and Media***") Lord Rodger referred to *Von Hannover v Germany* (2005) 40 EHRR 1 and *Petrina v Romania*

(Application No 78060/01) (unreported) 14 October 2008 to support the proposition that "*where the publication concerns a question 'of general interest',* article 10(2) *scarcely leaves any room for restrictions on freedom of expression*" (at [51]).

14. The Judge also failed to have any regard to the fact that one of the essential reasons why open justice is fundamentally important is that it is needed to ensure confidence of the public at large in the courts. This is particularly so in the family courts, where public confidence has for many years been subject to "*anxious debate*" (*Kent County Council v B* [2004] EWHC 411 (Fam) at [97], [98], [103]; *Griffiths v Tickle* [2022] EMLR 11 at [61], [69]; *Report of the President of the Family Division: Confidence and Confidentiality: Transparency in the Family Courts* (20 October 2021) at para 28). As a result, significant measures have recently been taken to increase transparency in the family courts, primarily by way of a pilot scheme which radically increases the amount of information which the media can presumptively report from almost all family cases.

15. Instead, the Judge wrongly found that the Historic Proceedings took place in the "*shielded justice environment of the family court*", which he distinguished from the "*open justice environment of the criminal and civil courts*" (the Decision at [27], [57], [61]). He wrongly said that "*Much of the jurisprudence on open justice is drawn from cases heard in public and so is of less applicability to cases where Parliament has implemented a statutory regime which is an exception to the open justice principle*" (the Decision at [57]).

16. In fact, contrary to what the Judge held, the open justice principle applies as much to family proceedings as to other proceedings, and is not '*displaced*' by statutory provisions. Instead, the principle operates in the family courts but is subject to exceptions which are "*narrow and circumscribed and their application in an individual case requires strict justification*" (*Griffiths v Tickle* cited at paragraph 14 above*,* at [35]); as explained by Lord Sumption in *Prest v Petrodel Resources Ltd & Ors* [2013] 2 AC 415 at [37], "*[c]ourts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different*".

17. The statutory provision referred to by the judge in support of his notion that the family courts operate in an environment of '*shielded justice'*, '*displacing*' open justice principles*,* was s.12 of the Administration of Justice Act 1960 ("**s.12 AJA**") (the Decision at [45]). However, s.12 AJA has no application at all to the current case since it does not confer anonymity on judges, or indeed on anyone else. Indeed the Judge appears to have misunderstood s.12 AJA, in that he said that "*the court retains a discretion to refuse permission to publish the names of social workers, experts and judges*" (the Decision at [55]), and, after referring to s.12 AJA, "*In relation to other third parties – social workers and other child protection professionals – I would be inclined to a starting point that shielded justice preserves anonymity for them*" (the Decision at [61]). In fact, there is no presumptive anonymity afforded to any of these groups by s.12 AJA or any other statutory provision.

18. The Judge also sought to distinguish *Re J* [2013] EWHC 2694 (Fam) in which Munby J held that arguments in favour of transparency are "*particularly compelling*" in cases involving "*interference, intrusion, by the state, by local authorities, and by the court, into family life*" on the grounds that the current case did not involve "*drastic*" orders and were private law, not public law, proceedings (the Decision at [49] – [50]). This was plainly wrong. The decisions in the Historic Proceedings were indeed *"drastic"* in the light of what subsequently occurred. The fact that the Historic Proceedings were in part private law proceedings does not in any way dilute the compelling nature of the arguments for transparency in this case.

19. The Judge even went as far as to use the judgment to promote his view that s.12 AJA "*needs reconsideration*" (the Decision at [46]), an opinion based on his (erroneous) belief that children are not afforded anonymity in reports of children proceedings. Children's anonymity is in fact conferred by s.97(b) of the Children Act 1989, at least while proceedings are ongoing.

The Judge's approach to the position of judges within the justice system

20. The Judge failed to have any regard to the unique constitutional position of judges. Instead he wrongly held that, when deciding whether to order anonymity, the judiciary occupy the same position as other professionals working within the justice system (the Decision at [55], [65] and [78]); and further wrongly held that, because judges, like those other professionals, are what he described as "*third parties*", their Article 8 rights *"need to be of less weight to displace the Article 10 rights to name them"* (the Decision at [84]).

21. Judges are the face of justice itself. They cannot be equated with 'professionals' who act as witnesses or in other roles in the courts. This suggestion of equivalence with other participants in court proceedings betrays a fundamental misunderstanding of the judges' role. The judiciary is one of the main repositories of state power. Through the operation of the common law, they make law; they interpret legislation; they are the bulwark against rogue actions of other organs of the state, including those at the highest levels of government; they have power over the liberty of the subject; they make decisions in loco parentis as to the welfare and custody of children, amongst other things. As in the Historic Proceedings, these decisions can be life-and-death.

22. The Judge went further at [70], comparing the role of the judge to that of "*the lookout on the Titanic"* and "*the soldiers who went over the top in the Somme on 1 July 1916"*. These comparisons are bizarre, and wrong.

23. Because of their role as dispensers of justice, judges must expect their decisions and their decision making to be the subject of public scrutiny, including scrutiny which involves '*vigorous*' and '*trenchant*' criticism (*Harris v Harris* [2001] 2 FLR 895 at [372]). As noted by Munby J (as he then was) in *Harris*, "*The freedom to publish things which judges might think should not be published is all the more important where the subject of what is being said is the judges themselves*" (at [368]); and "*Judges, after all, are expected to be, and I have no doubt are, men and women of fortitude, able to thrive in a hardy climate, and the vehemence of the language used cannot of itself measure the power to punish for contempt*" (at [372]).

24. Similarly, in *R (on the application of Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2011] QB 218, Lord Judge CJ said at [38]:

> "*Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished*."

25. In even the most restrictive reporting environments such as Special Immigration Appeals Tribunal (including terrorism cases that require closed sessions) and criminal cases awaiting trial by jury, where there is a risk of prejudice arising from pre-trial reports relating to issues in the case, one of the few things the media can always report is the name of the judge. Moreover, it has always been held that judges should be identified in reports of legal proceedings:

    25.1. *R v Felixstowe Justices ex p. Leigh* [1987] QB 582. A policy had been adopted of withholding the names of magistrates during proceedings and from the public and press after cases were heard. One of the magistrates had been subjected to abusive telephone calls following a sentencing hearing. Watkins LJ, with whom Russell and Mann JJ agreed, observed that the role played by the judiciary in the administration of justice was "*too well recognised to require explanation in this judgment*" (at 593H). In deciding that the policy as unlawful, Watkins LJ noted that whilst justices might be exposed to the risk of "*intolerable invasions of their privacy*", the open justice principle had to prevail in precluding anonymity for the magistrates because there was "*no such person known to the law as the anonymous J.P.*" (at 595B to 595D). Although the case concerned magistrates, Watkins LJ embraced within that principle all members of the judiciary (at 594G).

25.2. *NA v Secretary of State for the Home Department* [2010] UKUT 444 (IAC). A decision had been handed down without inclusion of the name of the member of the judiciary who had made the decision. The Upper Tribunal observed, in reliance on *Felixstowe Justices*, that "*It is a fundamental principle of justice that the public and litigants should know the name of any judge who is deciding or sitting as a judge in a case*" (at [12]). The Tribunal went on to hold that the failure to identify the judge's name on the decision was a breach of justice which vitiated the decision in question, given that the principle identified by Watkins LJ applied equally to all members of the judiciary (at [14] to [15]).

25.3. *Baron v Baron* [2019] 4 WLR 79. Special procedure certificates in divorce proceedings had been published without it being possible to read the name of the deputy district judge or assistant justice's clerk who had given the certificate. Sir James Munby P said, referring to *Felixstowe Justices*, "*Litigants and others have a right to know who it is who makes an order, gives some direction or gives a statutory certificate* […] *And that applies equally to anyone, judge, justice's clerk or legal adviser, who is exercising a judicial function*" (at [58]).

25.4. *Derbyshire v Marsden* [2023] EWHC 1892 (Fam) ("***Marsden***"). An application was made by the media for disclosure of documents relating to care proceedings. The question arose as to whether the magistrates who had made earlier decisions should be named. Lieven J said that "*The role of the judge is one that beyond any doubt requires public accountability and openness*" (at [29]). As a result, there was "*no case for their names not to be in the public domain when decisions are made, in the same way as would the names of judges who had made such decisions*". (at [30]).

26. In equating the position of judges with that of other professionals within the court system, the Judge referred to this Court's decision in *Abassi* (see the Decision at [55] to [57]).

27. However, *Abassi* did not concern the anonymity of judges. Unlike the medical professionals that this Court was concerned with in *Abassi*, judges are not "*caught up in*

litigation" (*Abassi* at [121]). Judges administer the justice system. Openness is integral to the judge's role: this is not the case with those who are merely "*caught up in litigation*".

28. The judge declined to follow *Marsden* on the basis that, in his view, Lieven J's reasoning in that case conflicted with the decision in *Abassi* (at [54] of the Decision). This was wrong. As set out at subparagraphs 25.1 to 25.3 above, Lieven J's decision in *Marsden* was entirely in line with this Court's decision in *Felixstowe Justices*, which remains good law and is applicable both in the context of the family justice system and more widely.

29. Further, because of the apex position that judges hold within the justice system, the Judge was wrong to draw a distinction between scrutiny of judges on the one hand and scrutiny of "*systems and practices*" on the other (the Decision at [68] to [73]). That is a false dichotomy. Scrutiny and criticism of judges <u>is</u> scrutiny and criticism of 'the system'.

30. The judge therefore fell into error in failing to take into account the unique position of judges, and the true exceptionality of the proposal – first suggested by the judge himself – to anonymise them. Indeed, he not only rejected the proposition, advanced by the Media Parties, that there was an exceptionally high public interest in naming the judges, but he described that proposition as "*extraordinary"* and "*risible*", and one which he had to "*caution* [himself] *against dismissing out of hand*" (the Decision at [64]). Yet that proposition was self-evidently correct.

<u>Ground 2(b): Presumption of Irresponsible Reporting</u>

31. At paras [59] to [60], the Judge wrongly rejected clear authority that the Court must proceed on the footing that any reporting by the media of the Historic Proceedings will be responsible, fair and accurate. In an extraordinary passage, he declared that to proceed on such a basis would be "*creat[ing] the equivalent of the Emperor's New Clothes narrative which everyone knows to be false, but no one dare state*" (the Decision at [60]).

32. The authorities (to at least one of which – *R v Sarker* [2018] 1 WLR 6023 ("***Sarker***") – the judge was referred – see the Decision at [59]) are clear: the court must assume that the

media should be trusted to fulfil their editorial responsibility when publishing or broadcasting reports of court proceedings (*Re B* [2007] EMLR 5 at [25]). Put otherwise, the court must proceed on the footing that any reporting of the proceedings will be responsible, fair and accurate (*Sarker* at [32(iii)(b)]). The principle is unsurprising, not least because any media organisation which reports legal proceedings in an unfair and inaccurate manner would be exposed to a considerable risk of contravening the laws of libel and contempt.

33. That principle applies as much in family justice cases as it does in other areas of law (*Re C (A Child)* [2016] 1 WLR 5204 at [29]).

34. The Judge justified his departure from this principle, established by authorities, on the basis of anecdote and a selection of publications and broadcasts, without giving any adequate explanation of the facts behind those other publications and broadcasts and how they were relevant to the current case. He said he had little doubt that reporting would include "*rude and discriminatory slurs, moving onto vilification, abuse and threats".* The Judge's comments displayed a notable and inappropriate hostility towards, and prejudice against, the mainstream media.

35. By way of example, the judge launches an attack in [60] of the Decision on a Dispatches programme broadcast in July 2021 which is of no apparent relevance to the current case without providing any information at all about the programme, and without explaining how or why he felt able to condemn the programme in such emphatic terms. It is not without some irony that the Judge, in that same paragraph, comments "*Thank goodness that journalists don't have to operate as the courts do and hear both sides before delivering their verdict!*". By his judgment, the Judge had himself chosen to condemn the Dispatches broadcast without any attempt to hear the other side (for example, by contacting the programme makers before criticising the programme in his judgment).

Ground 2(d): Absence of Evidence Supporting the Decision

The Judge as editor

36. As explained by Lord Rodger in *In re Guardian News and Media*, Article 10 protects both the form and substance of information and also the way in which it is conveyed. It is not for the court to decide what weight to ascribe to a certain piece of information that the media wishes to use. Judges are not newspaper editors, and thus there should be judicial deference to editorial independence (*In re Guardian News and Media* at [63]). The Divisional Court in *R (Rai) v Winchester Crown Court* [2021] EWHC 339 (Admin) (a decision which was upheld on appeal) expanded the point as follows (at [48]):

> "*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*."

37. Furthermore, the ability of the media to identify participants in court proceedings is an essential part of the open justice principle. Anonymised reports risk being in "*austere, abstract form*" and "*devoid of human interest*", therefore failing to engage the interest of the reading public (*In re Guardian News and Media* at [63] to [65]).

38. The Judge plainly failed to appreciate that his role did not extend to deciding the manner in which public interest matters should be reported, or what should or should not be included in such reports. He opined that inclusion of the Judge's name would give rise to a "*downside*" because it "*would draw attention to the content and personalise the story*", (the Decision at [64]) creating "*a herd of scapegoats*" (the Decision at [85]), and would amount to a "*distraction*" from "*public interest in accountability of the systems*" (the Decision at [73]). He also held that "*the disclosure and publication I am permitting will fulfil in very large measure the Article 10 rights of the press*" (the Decision at [89]). These were not matters properly within his province.

The Judge's assessment of the Historic Proceedings

39. Part of the Judge's reasoning was that in his view, the judges in the Historic Proceedings, had performed their roles in "*at least an adequate manner*", and thus they should not be named (the Decision at [26], [24], [64], [69] and [73]). The Judge's approach was wrong in law.

40. Whether a judge has carried out their role competently or incompetently is a matter that is neutral in the balancing exercise. As explained by Munby J (as he then was) in *X Council v B* [2008] 1 FLR 482, "*If local authorities which merit criticism are to be named then so too surely should those which deserve praise. If the public interest is a reason for naming the incompetent then surely the very same public interest requires the naming of the competent*" (at [23]).

41. The principle applies equally to judges as to local authorities (see *Felixstowe Justices* at 592H).

42. Whilst it may be correct, as the Judge notes at [18] of the Decision, that he has spent a substantial period of time considering the materials in the Historic Proceedings, the Judge erred when he relied on his positive views of their conduct as a factor that weighed in favour of their anonymity.

43. The Judge's view as to the adequacy of the decision-making in the Historic Proceedings, whether right or wrong, is not a reason to obviate the public's entitlement to scrutinise the judges in the Historic Proceedings. Instead, the fact that the Judge thinks the judges in the Historic Proceedings acted "*adequately*" itself weighs heavily in favour of enabling public scrutiny of the Judge's view, in furtherance of the open justice principle (*Harris,* cited at paragraph 23 above and *X Council v B*, cited at paragraph 40 above). Public scrutiny is facilitated by the judges being named (as explained at paragraphs 62 to 63 below).

44. The Judge said that the media could, if it considered the judge in the Historic Proceedings should be subject to further scrutiny, pass the disclosed information to a third party to

obtain "*expert advice*" and subsequently make a further application to the Judge or bring the information to the attention of the Judicial Complaints Investigation Office (the Decision at [65]). However, the fact that the media could do this was irrelevant. As the Judge himself acknowledged correctly at [35] of the Decision, the presence of alternative avenues of scrutinising the Historic Proceedings does not "*in any way undermine the compelling public interest in the media being able to discuss the history of Sara's involvement with the child protection system including the courts from the moment of her birth until her tragic death*".

The Judge's approach to evidence

45. It is trite that any derogation from the principle of open justice must be based on clear and cogent evidence (*Scott v Scott* [1913] AC 417 at 438 to 439 per Viscount Haldane LC).

46. Consequently, the court should not rely on generic concerns to justify a derogation from the principle of open justice (*Abassi* at [33] to [34], [80] and [117]). Concerns should relate directly to the rights and interests of those who would be the subject of such a derogation.

47. The Judge was therefore wrong to hold that he could rely on his own "*risk assessment*" based on inferences drawn from a variety of irrelevant sources to justify granting the judges in the Historic Proceedings anonymity, rather than on clear and cogent evidence relating to the specific circumstances of the judges in question (the Decision at [86]).

48. The Judge correctly acknowledged at [28] of the Decision that this Court in *Abassi* deprecated the reliance on 'generic' concerns to support a derogation from the open justice principle. Yet, at [83] of the Decision, the Judge held, contrary to the approach of this Court in *Abassi*, "*I do not accept the submission that evidence needs to be individual specific*". That was an error of law.

49. The Judge's observation that the Court of Appeal had held that "*generic concerns about the impact on individuals arising from the 'firestorm' associated with end of life cases were relevant*" to the balancing exercise (the Decision at [28]) misunderstands the decision in

Abassi. The passage at [121] of *Abassi* that the Judge must be understood in its full context: this Court was considering the hypothetical use of reporting restriction orders in the context of ongoing litigation where there is an extant risk to the administration of justice (see the penultimate sentence of the paragraph). It is clear from the judgment as a whole that the Court was not sanctioning the reliance on generic concerns, nor could the Court have done so, given the settled approach of high authority to derogations from open justice articulated in *Scott*.

50. The 'evidence' the Judge relied upon to justify anonymity can be grouped as follows:

50.1. Personal anecdotal evidence. The Judge relied on his time having responsibility for security "*in the SEC*" and as Presiding Judge for Milton Keynes (the Decision at [88]). The Judge also relied on his own experience of being targeted with social media abuse and threats within proceedings, although gave no specific examples (the Decision at [85]).

50.2. The views of third parties unconnected to the Historic Proceedings or the instant applications for disclosure and publication. This category includes those views expressed in the Judicial Attitude Survey 2022 (the Decision at [77]) as well as by the Magistrates Association in the wake of *Marsden* (the Decision at [55]). The views expressed by social worker Lisa Arthurworrey in an article published by the Fifth Respondent in 2007 (the Decision at [79]) also fall into this category, as does the bare information that the author of the s. 7 report is being "*supported*" by the Tenth Respondent (the Decision at [80]).

50.3. Assumptions made under the guise of observations based purportedly on empirical evidence. The Judge's assessment of the Historic Proceedings falls within this category. Another example was the Judge's observation that "*Most social workers, magistrates, legal advisers and judges would never expect to feature in a case of this complexity and of national interest in contrast to the High Court Judges*" (the Decision at [55]). In the case of judges, it is impossible to understand how he reaches this conclusion; judges in courts lower than the High Court do occasionally have to

deal with cases of complexity and/or national interest, and if they did so would expect those matters to be reported. Similarly, his assumption that naming gives rise to a risk the creation of a 'social media lynch mob' and of doxing the individual in question and their family members (the Decision at [55]) is an assumption, the basis of which is not clear. So too was the Judge's view that reporting of the Historic Proceedings would give rise to "*attention*" that would "*range from measured commentary through to rude and discriminatory slurs, moving onto vilification, abuse and threats*" (the Decision at [75]; see also at [85]), and the "*real possibility of some individuals going further – much further*" than online abuse (the Decision at [76]; see also at [81]). All of this was unevidenced speculation.

50.4. Notorious instances of physical attacks "*upon those in authority by those with grievances*" (the Decision at [76]).

50.5. Instances of reporting which the Judge considered irresponsible, unfair and/or inaccurate. Examples given are unspecified reports of the murders of Alice da Silva Aguiar, Bebe King and Elsie Dot Stancombe (the Decision at [59]). He also refers to reporting which led to the Leveson Inquiry (the Decision at [60]), despite the fact that the Leveson Inquiry concerned malpractice within the media industry that took place around two decades ago, and the Inquiry was a decade ago. He also mentions reporting that followed the Divisional Court's decision in the *Miller* (the Decision at [75]) despite this concerning a topic of no feasible bearing on the current case. He places significant emphasis on a headline in a "*well-known national newspaper*" he deems misleading (the Decision at [59]), without any reference to the text of the article in question, when it is an established principle that when considering the meaning of articles the text has to be considered as a whole: *Charleston v News Group Newspapers* [1995] 2 AC 65.

51. None of the evidence falling into these five categories could justify the Judge's decision to grant the judges in the Historic Proceedings anonymity.

52. First, the Judge placed emphasis on the risk that what he described as a 'virtual lynch mob' would raise its digital pitchforks. However, this risk was said to arise from matters that had no connection to the current proceedings or Historic Proceedings and which, as the Judge himself recognised, was in certain forms (i.e. the extrajudicial views relied upon) an "*illegitimate consideration*" (the Decision at [55]).

53. Whether or not the Judge's Hobbesian view of the online world is correct, he was wrong to proceed on the basis that online vitriol would translate into real world threats to physical safety. As Nicklin J said in *Various Claimants v Independent Parliamentary Standards Authority* [2022] EMLR 4, with reference to an assertion that malign individuals existed who wished to do harm to MPs, "*The civil justice system and the principles of open justice cannot be calibrated upon the risk of irrational actions of a handful of people engaging in what would be likely to amount to criminal behaviour*" (at [52]).

54. There was in fact no evidence upon which the Judge could conclude that naming the judges in the Historic Proceedings would give rise to a risk to their physical safety. The physical safety of all individuals working within the justice system, including judges, is, of course, of crucial importance. However, when referring to the various incidents of harm and abuse to individuals in a variety of roles and situations the Judge did not attempt to distinguish between strident criticism, a risk to safety arising from disaffected litigants or 'those with grievances', and a risk to safety arising from reports of court proceedings. These are very different risks, arising from very different circumstances.

55. Secondly, the Judge bundled together a variety of concerns under the heading 'article 8' without explaining exactly how Article 8 is engaged on the facts of the current case. In so far as the Judge finds that criticism of the judges is likely to engage Article 8, that is wrong. Article 8 protects private and family life. Judges carry out a public function. Commentary and criticism on how they carried out that function cannot properly be said to engage their Article 8 rights without more: see *Abassi* at [91] where Lord Burnett CJ said "*article 8 cannot be deployed to protect professionals from criticism unless that criticism reaches the threshold identified in the Strasbourg case law and summarised by Lord Rodger JSC in the Guardian case* [2010] 2 AC 697*, namely that "the publication in question had*

constituted such a serious interference with his private life as to undermine his personal integrity".".

56. Thirdly, the Judge referred to Article 2 ECHR, but did not, as he was required to, begin to explain how the high threshold necessary to engage this provision was met (*RXG Ministry of Justice* [2020] QB 703 at [55]). Quite obviously neither Articles 2 nor 3 were in play given the absence of evidence of a real and immediate, or indeed any, threat to the physical safety of the judges concerned.

57. Fourthly, the Judge did not seek the views of the judges in question. As set out in greater detail at paragraphs 67 to 76 below, the Judge had ample time to seek the judges' views. Given that the Appellants' application had initially been made to CJ/3, who it can be presumed did not seek to anonymise [redacted] elf at that time, the Judge should have inferred at the time of the 9 December hearing that CJ/3 was not, in fact, concerned about being identified in connection with the Historic Proceedings, if he was to draw any inference at all. If the judges in the Historic Proceedings had expressed no objection to being named, that would have been the end of the matter.

58. Fifthly, the judge relied upon his assumption that those involved in the Historic Proceedings, including the judges, may be "*suffering*" to some degree (the Decision at [80). His desire to protect other judges from '*suffering* 'is understandable, but irrelevant: what matters when deciding the issue of anonymity is not what judges feel, but whether there is proper evidence of a risk to their physical safety arising from reports of the proceedings which name them.

The temporary order

59. The Judge erroneously concluded that the interference with Article 10 rights and the open justice principle was limited because the judges had been granted anonymity for initial period of 3 months (the Decision at [95]). He said that "*Any delay in the determination of the issue will cause minimal prejudice in the context of a matter of weeks and holding the ring requires non-publication rather than publication*" (the Decision at [6(iii)]). This was

wrong. It is trite that news is a perishable commodity, and the public interest in reporting the courts is best served by contemporaneous reporting. Therefore, even a temporary anonymity order that anonymises judges in connection with proceedings over which they have seen is significant derogation from the important principle of open justice and interference with the Article 10 rights of the media and the public.

60. Accordingly, the delay between the convictions of the Twelfth and Thirteenth Respondents on 11 December 2024 and the Judge giving his decision on the issue of naming the judges in the Historic Proceedings on the evening of 13 December, in the light of the absence of clear and cogent evidence supporting that decision, was a significant and unjustifiable interference with the Media Parties' Article 10 rights to impart, and the public's right to receive, information.

Other Article 10 considerations

61. In addition to the errors of approach identified above, the judge failed to take any account of the damaging effect that an order anonymising judges would have, not just to public confidence in the administration of justice but to trust in the mainstream media.

62. The public look to the media to hold public figures and bodies and organs of the state including judges to account. This includes the ability to identify the public figures in question. If the media are unable to do this the relationship between the media and the public will suffer, encouraging audiences to turn to online sources for their news – sources which are often unattributed and which often operate as if they were subject to none of the legal and regulatory restrictions which apply to the media. This is contrary to the public good.

63. In the current case, if the RRO remains in place the media will be unable not just to name CJ/3, but even to identify the specific position CJ/3 held, given the risk this could identify CJ/3. These incomplete reports will be not just opaque but mystifying, and are bound to raise suspicions of a cover up.

A new exception to open justice?

64. There is no reported domestic authority in which judges have been granted anonymity. What the Judge did in the current case was therefore novel, and ran contrary to Lord Steyn's clear warning in *Re* S at [20] that it is not for the courts "*except in the most compelling circumstances*" to create new exceptions to the principles of open justice.

65. This new exception, if it takes root, would give rise to multiple, obvious and irresolvable difficulties: are judges in future to make anonymity orders prohibiting identification of themselves? If so, when and in what circumstances? What about judges sitting on appeal from cases where judges have been anonymised? Should they too be anonymised?

66. The only proposal the Judge made for how these issues should be navigated in future is that it should be for the media to give notice to the parties in advance of publication as to whether they wished to identify judges and others, so that the court could decide whether that was appropriate (the Decision at [92]). It would appear from this unworkable proposal that the judge is unaware that a fundamental bulwark of free speech under English law is the principle that the courts do not act as censors, and do not impose prior restraint unless there is a real prospect, established by evidence, of a resulting publication being unlawful. This principle is now enshrined in s.12 of the Human Right Act. As Munby J said in *Kent County Council v B* at [146]:

> *"Licensing in advance what may be published or broadcast is simply censorship under a different name. It is not for the BBC to explain or seek permission to broadcast. As I had earlier had occasion to emphasise in Kelly at p 81, a case which, as it happens, also involved the BBC: "unless injuncted by the court, the BBC is entitled to broadcast. It is for those seeking to obtain an injunction to establish their case and to do so convincingly. If they cannot establish that case then the BBC is entitled to broadcast.""*

Ground 2(a): Failure to Give Reasons

67. In addition to the substantive defects in the Decision that are set out below, the instant appeal should be allowed because the first instance decision was unjust due to a serious procedural irregularity.

68. The Judge announced the decision to anonymise the judges in the Historic Proceedings at the end of the hearing on 9 December 2023, it having not been raised by any of the Parties but instead, it appears, being the result of the Judge's misunderstanding of submissions made on behalf of the Children's Guardian (see the Decision at [15]). Having made a decision that could not have been foreseen by the Parties, and one that amounted to an interference with the open justice principle and Article 10 rights of the media parties and the public, the Judge was under a duty to give reasons.

69. Where a judicial decision affects the substantive rights of the parties, the decision must be reasoned (*English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409 at [13]). As a significant interference with the media parties' Article 10 rights, the Decision affected the substantive rights of those parties.

70. However, the Judge failed to give proper reasons for his decision. At the hearing on 9 December, the reason was terse and twofold: first, the third parties should be given an opportunity to provide their views on being identified and, secondly, the risk of a social media 'pile on'. No evidence of a social media pile on had been canvassed before the court.

71. The parties were then given two days to put in further written submissions on the issue of the judges' anonymity. By an email sent by the Judge's clerk at 17:07 on 13 December 2024, the Judge conveyed that "*His Lordship maintains his decision that the judges are not to be named or otherwise identified. Full reasons will follow in His Lordships reserved judgment*". No further reasons were given in that email.

72. Later, by an email from his clerk on the same day at 20:22, the Judge conveyed the passage that is quoted in the Decision at [6]. However, as the Judge implicitly recognised when

stating, "*My* judgment *will contain my analysis of the competing rights and how I have come to the conclusion I have*", those reasons were not sufficient.

73. It was only upon the Decision being handed down in draft form on 18 December 2024 that the Judge gave the media parties a reasoned decision (albeit one that was fatally flawed for the reasons given above). Yet, receiving reasons at that stage precluded the media parties from making substantive representations to the Judge, the Judge having made his decision and adjourned the issue of permission to appeal until an unspecified time in the future.

74. If the Judge had always intended to rely on a wide range of anecdotal evidence and sources unrelated to the instant proceedings, matters which by their nature could not have been foreseen by the media parties, he should have given sufficient forewarning to ensure that he was properly addressed on them during the 9 December hearing.

75. Similarly, if the Judge was concerned about having not heard the views of the judges themselves, he ought to have invited the judges to give their views as to the prospect of being identified in media reports, as he had invited other non-parties (i.e. the CPS) on the matters of disclosure and publication during the previous hearings (see, eg, the Judge's Order dated 14 December 2023).

76. The process outlined above amounted to a serious procedural irregularity, vitiating the Judge's decision on anonymity for the judges. As set out above, the issue of anonymising judges is a matter of public confidence in the administration of justice. Therefore, such an exceptional derogation from the principle of open justice must be the result of a procedurally correct process.

Conclusion

77. For the reasons given above, the Media Parties invite the Court to join them as appellants to the instant appeal, and to allow the appeal against the Decision on all five grounds of appeal. The lower court made several errors of law and, consequently, reached a decision

on the facts which was not open to it. Moreover, the lower court's failure to give reasons for granting anonymity was a serious procedural irregularity, which amounted to a further and unjustified interference with the media parties' Article 6 and Article 10 rights.

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9 January 2024