

Public Law Project: Judicial Review Trends and Forecasts 2017

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**Session 5:
Open justice and developments in the law on anonymity,
access to material on the court file and reporting restrictions**

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1. It is often said that justice must not only be done, but be seen to be done. Given the sheer number of cases going through the courts, their physical inaccessibility to the vast majority of people, and the complex material relied on in the majority of cases, for justice to be seen to be done requires that the public and media have access to court and access to the material underpinning public proceedings. Open justice in the modern age means more than merely a right to pass through the court doors.
2. Set against these important rights – to see justice done and to understand its workings – may be a range of other competing interests: the desire for anonymity and privacy; the risk that publicity will cause harm to the health, wellbeing or wider interests of those involved in court proceedings; and the need to avoid prejudice to ongoing or future cases.
3. This paper considers the law on open justice and the tension between these competing interests in order to address a number of questions:
 - (1) How far are the public and the media able to observe what goes on in our courts?
 - (2) What right of access do the public and the media have to materials referred to and relied on in proceedings?
 - (3) As parties to proceedings, or witnesses, how much of what goes before the courts can be protected from the glare of public exposure?
 - (4) When do wider public interests justify restrictions on open justice?

Open justice

The principle

4. The general rule of the common law is that justice must be administered in public at hearings which anyone may attend within the limits of the court's capacity and which the press may report (*Scott v Scott* [1913] AC 417; *Attorney General v Leveller* [1979] AC 440, at 470; *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [12]).
5. Open justice is a constitutional principle that stretches back to the fall of the Stuart dynasty (*Re BBC* [2015] AC 588, per Lord Reed, at 600C-G). It is “*a principle at the heart of our system of justice and vital to the rule of law*” and promotes the rule of law by letting in the light and allowing the public to scrutinise the workings of the law, for better or for worse (*R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2013] QB 618, at [1]).
6. As Jeremy Bentham famously stated, “*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity*” (*Scott v Scott* [1913] AC 417, at 477; *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court*, at [1]).
7. “*The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In Scott v Scott [1913] AC 417, Lord Shaw of Dunfermline (p476) criticised the decision of the lower court to hold a hearing in camera as constituting ‘a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security.’*” (*Al Rawi v Security Service* [2011] 3 WLR 388, at [11]).
8. The Supreme Court has recently stated that the significant of open justice “*has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions*”(*Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, per Lord Sumption, at [13]).

9. The ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in open court. This is a strong rule (*In Re S (A Child) (Identification: Restriction on Publication)* [2005] 1 AC 593, at [18]). In *Attorney General v Leveller* [1979] AC 440, Lord Diplock noted that evidence communicated to the court must be communicated publicly so that fair and accurate reporting of what has taken place is not discouraged. Lord Diplock observed that open justice requires that:

...all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

10. In *A v British Broadcasting Corporation* [2015] AC 588 Lord Reed explained that open justice is of fundamental importance because ([26]):

...justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report court proceedings.

11. Similarly, the Supreme Court in *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [16], has recently stated that:

It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so.

12. The utility and benefits of open justice are multiple:

- (1) Open justice protects public confidence. As Lord Atkinson put it in *Scott v Scott* [1913] AC 417, at 463: “*in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect*”.¹

¹ See also per Viscount Haldane, at 438, per Lord Atkinson, at 463, and per Lord Shaw of Dunfermline, at 477; *Home Office v Harman* [1983] 1 AC 280, per Lord Scarman, at 316; *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, per Lord Woolf MR, at 977; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, at [29]-[30].

- (2) Open justice deters inappropriate behaviour on the part of the court and makes uninformed and inaccurate comment about proceedings less likely (*R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, per Lord Woolf MR, at 977).
- (3) An insistence on openness can counter or neutralise any suggestion of secrecy or “cover up” in proceedings (*R (E) v Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 563 (Admin), per Laws LJ, at [26]).²
- (4) Open justice ensures that witnesses are less likely to exaggerate or to attempt to pass on responsibility (*R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, at 310-311 and 320).
- (5) Open justice can result in evidence becoming available which would not become available if the proceedings are conducted with one or more of the parties' or witnesses' identity concealed (*R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, at 977).
- (6) Open justice helps to ensure the preservation of the free press. It is well-recognised by the courts that, in the absence of the names of litigants, reports of court proceedings will be “*very much disembodied*” (*Re S* [2005] 1 AC 593, at 608). Anonymised court proceedings are less likely to be published in any detail and are less comprehensible to the public. Stories about particular individuals are simply much more attractive to readers than stories about unidentified people; this is “*just human nature*”. A requirement to report in some austere, abstract form, devoid of 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 (*Guardian News and Media Ltd* [2010] 2 AC 697, at [63]).

² See also the final report in the *Thames Safety Inquiry*, where Clarke LJ (as he then was) stressed, at [5.1], that: “... *it is of great importance that members of the public should feel confident that a searching investigation has been held, that nothing has been swept under the carpet and that no punches have been pulled*” (citing the final report in the *Herald of Free Enterprise* investigation, per Sheen J, at [60]).

13. The open justice principle applies to all courts of record (*Re LM (Reporting Restrictions; Coroner's Inquest)* (2008) 1 FLR 1360, per Sir Mark Potter, at [53]).

Departing from the open justice principle

14. The open justice principle is not absolute (*Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [14]). However, departure is the exception and any such exceptions must be construed narrowly (*R v Bedfordshire Coroner, ex p Local Sunday Newspapers Ltd* [1999] 164 JP 283, at [2]; *In Re S (A Child) (Identification: Restriction on Publication)* [2005] 1 AC 593, at [18]).
15. A heavy burden lies on those seeking to displace the application of the open justice principle to show that the ordinary rule must be displaced and to do so on the basis of “*clear and cogent*” evidence (*Scott v Scott* [1913] AC 417, per Viscount Haldane, at 438, and per Earl Loreburn, at 446; *Re BBC* [2015] AC 588, per Lord Reed, at 604D and 614G; *In Re Press Association, ex parte Robert Jolleys* [2014] 1 Cr App R 15, at [16]; *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003, at [13]).
16. The Supreme Court has emphasised that “*any judge faced with a demand to depart from the general rule must treat the question ‘as one of principle, and as turning, not on convenience, but on necessity’*” (*Al Rawi v Security Service* [2011] 3 WLR 388, at [11]).
17. As the Court of Appeal has recently emphasised in *Guardian News and Media Ltd v Incedal* [2016] 1 WLR 1767, it is for:

49. ...the party seeking to curtail the principle of open justice, to make a very clear case. The stringency of the test was expressed by Viscount Haldane in *Scott v Scott* at page 438 as requiring it to be shown that a hearing in camera was “strictly necessary” and “that by nothing short of the exclusion of the public can justice be done”; a similarly stringent test is put forward by Earl Loreburn at page 445.

50. Thus in each case, it is for the court to determine on this very strict test whether the detailed reasons that have been put forward in the particular circumstances for departing from the general principle of open justice as regards particular matters or evidence in the course of proceedings necessitate a departure from the fundamental principle of open justice. As Lord Steyn said in *In re S (a child)* [2005] 1 AC 593 at para 18, that principle can only be departed from in unusual or exceptional circumstances.

18. The heavy burden to justify interference with open justice reflects the significance of Article 10 ECHR, which weighs heavily in the balancing exercise and requires that any restriction must be construed strictly (*R (BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin); *R (Gaunt) v Office of Communications* [2011] 1 WLR 2355, at [36]; *Jerusalem v Austria* (2001) 37 EHRR 567, at [32]; *Reynolds v Times Newspapers* [2001] 2 AC 127, at 200(d)-(e)).
19. The courts must guard against "*the natural tendency for the general principle [of open justice] to be eroded and for exceptions to grow by accretion as exceptions are applied by analogy to existing cases*" (*R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, at 977; *Re S* [2005] 1 AC 593, at [29]; *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [14]).
20. When deciding whether a departure from the open justice principle is justified, courts should proceed on the basis that the media will act responsibly (*R v B* [2006] EWCA Crim 2692; [2007] EMLR 5, at [25]):

...the responsibility for avoiding the publication of material which may prejudice the outcome of a trial rests fairly and squarely on those responsible for the publication. In our view, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. They have access to the best legal advice; they have their own personal judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one which any responsible editor would wish to take. In itself that is an important safeguard, and it should not be overlooked simply because there are occasions when there is widespread and ill-judged publicity in some parts of the media.
21. The Court of Appeal has emphasised that "*broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice*" (*Re C (A Child) (Private Judgment: Publicity)* [2016] 1 WLR 5204, at [29]).
22. Further, the risk of public misunderstanding of sensitive allegations made in court proceedings does not justify infringements of open justice. The public's understanding of legal constructs, such as the difference between suspicion and guilt in criminal proceedings, the test applied when imposing a freezing order or control order (*Guardian News and Media Ltd* [2010] 2 AC 697, per Lord Rodger, at

[60], [66]), or the making of allegations of sexual impropriety in Employment Tribunal proceedings (*BBC v Roden* [2015] ICR 985, at [40]) should not be underestimated.

Applications of the open justice principle

Access to material referred to or relied on in open court proceedings

23. The default position following *Guardian News and Media v City of Westminster Magistrates' Court* [2013] QB 618 is that access should be provided of any document placed before a judge and referred to in proceedings, particularly where access is sought for a proper journalistic purpose ([85]). In that case the Court of Appeal held that a newspaper publisher was entitled to see and have disclosure of court documents – opening notes, skeleton arguments, affidavits, witness statements and correspondence – which had been referred to in open court at an extradition hearing ([10], [76]). The Court's reasoning makes clear that the principle applies to all other judicial proceedings ([70]).

24. The key principle was set out by Toulson LJ (as he then was), at [85]:

In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.

25. It follows that where countervailing reasons exist supporting non-disclosure, the court should apply a fact-specific proportionality exercise considering the purpose of the open justice principle, the potential value of the material being sought in advancing that purpose, and any risk of harm which access to a document may cause to the legitimate interests of others ([85]). There may be stronger grounds for non-disclosure where the information relates to a child or vulnerable adult

([86]). Where there is a good reason for access, no harm to a third party and no great burden on the court, the material should be disclosed ([87]).

26. Non-disclosure of material read or referred to by the court amounts to a departure from the open justice principle. There is therefore a heavy onus on any party seeking to rebut the presumption in favour of disclosure.
27. The default position set out in *Guardian News and Media v City of Westminster Magistrates' Court* has been repeated in subsequent cases (e.g. *R v Marine A* [2014] 1 WLR 3326, at [49]: “It is an undoubted principle of the common law that material presented in open court should generally be released to members of the public, including journalists”).
28. The case law suggests that a broad approach should be taken when assessing whether documents have been read or referred to in relation to a hearing in open court:
 - (1) IN *Guardian News and Media v City of Westminster Magistrates' Court* [2013] QB 618 opening notes, skeleton arguments, affidavits, witness statements and correspondence that were referred to but not fully read out in open court were disclosed.
 - (2) In *NAB v Serco Ltd* [2014] EWHC 1225 (QB) Bean J (as he then was) held that, following *Guardian News and Media v City of Westminster Magistrates' Court* [2013] QB 618, the presumption is that documents in core bundles will be disclosed under the common law open justice principle ([29], [33]-[43]). In *NAB* a document was held to have been referred to at a public hearing where it was not read aloud, in whole or in part, it was not referred to in the skeleton arguments or reading lists filed by counsel for either side, it was unlikely that it had been read by the judge, and it was referred to in only one paragraph of a witness statement, with no questions or answers directly addressing it ([24]-[27]).
 - (3) The presumption does not only apply to documents, but also to video footage, stills and audio recordings (*R v Marines A, B, C, D & E* [2014] 1 WLR 3326).

- (4) In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, documents read by the judge out of court before the hearing on which the judge based his decision and to which reference was made in a judgment were documents referred to at a hearing held in public.
29. The cases following *Guardian News and Media v City of Westminster Magistrates' Court* [2013] QB 618 indicate both the reach of the default presumption and its limits.
30. In *NAB v Serco Ltd* [2014] EWHC 1225 (QB) *The Guardian* sought disclosure of an internal report from Serco that was on the court file, long after the case against Serco had settled and when Serco were no longer involved in proceedings. Serco argued that the default presumption did not apply where disclosure was not needed to make the proceedings intelligible or to assist the public in understanding the issues which were before the court (at [37]). Bean J (as he then was) accepted that the report was no longer relevant to any issues in the ongoing case but, despite this, he ordered that the report should be disclosed in accordance with open justice because *The Guardian* had “a proper journalistic purpose in seeking to inspect a document which they believe may throw light” on an issue they were interested in exploring (at [38], [43]). That was sufficient to require disclosure. The Court rejected a submission from Serco that disclosure would cause an unjustified risk of reputational harm; the existence of allegations against Serco, as a defendant to the proceedings, was public knowledge (because the particulars of claim were available to the press and the public as of right under CPR r.5.4C(1)).
31. In *Re Guardian News and Media Ltd* [2016] EWCA Crim 58 the media appealed against the Crown Court's refusal to grant them access to CCTV footage which had been shown in open court during a criminal trial. The trial concerned the prosecution of a number of police officers arising from the restraint and death in custody of a mentally ill man. The CCTV footage was central to the prosecution case. Over two days, it had been viewed in detail by the jury in open court. The judge ruled that the media could not have access to it until the trial was completed. He indicated that the footage was of paramount importance to the case and that if it was published, it would be unrealistic to expect that the jury would be able to put out of their minds anything that they saw on television or social media, where the risk of distortion was very real. The Court of Appeal overturned the judge's decision. The default position was that access to the footage should be permitted,

the request had been made for the purpose of contemporaneous reporting (an important facet of the open justice principle), the responsible media's role as "*public watchdog*" was explicitly recognised in the Criminal Practice Directions so that documents should generally be supplied in response to a request unless there was a good reason for not doing so, all of those considerations applied with particular force to a case of public interest involving a death in custody, and the jury had already seen the footage, meaning that there was no real risk of the jury being swayed by references to it in the press.

32. In two cases arising from the conviction for murder of Alexander Blackman (known as 'Marine A') the Court Martial Appeal Court ruled that certain video footage shown in open court should be withheld from the media and the public. The footage had been played during Mr Blackman's prosecution and showed him shooting dead a wounded and dying Taliban insurgent. Relying on expert counter-terrorism evidence, two constitutions of the Court Martial Appeal Court concluded that allowing the footage to be released would give rise to a risk of terrorist atrocities and posed a real and immediate risk to life (*R v Blackman* [2017] EWCA Crim 326, at [9]-[11], [21], [23]; *R v Marines A, B, C, D & E* [2014] 1 WLR 3326, at [76], [78]). In the 2017 judgment, the Court made clear that the basis for withholding the footage was that its release would create a "*real and immediate danger to life*", it "*would significantly endanger a large number of people, not only in the United Kingdom but elsewhere*", and the evidence before the Court on this point "*was clear and compelling as to the threat*" (at [21], [23]). The facts justifying the decision to withhold the material were exceptional.
33. In *Blue v Ashley* [2017] EWHC 1553 (Comm) the media sought disclosure of a number of documents that had been referred to at a preliminary hearing in advance of trial. The documents sought included the trial witness statements of the claimant and the defendant; they had been referred to briefly at the preliminary hearing during an argument on whether expert evidence would be called at trial. Leggatt J emphasised the importance of open justice in determining applications of this nature (at [9]):

The case law shows that, in exercising powers to permit access to documents deployed in court proceedings, courts should be guided by the principle of open justice. This principle requires court proceedings to be conducted in public except where to do so would cause injustice. The open justice principle is a fundamental principle of the common law. Its importance has been reiterated in a number of recent cases including the decision of the

Court of Appeal in *R (Guardian News & Media Ltd) v Westminster Magistrates' Court* [2013] QB 618. As explained by Toulson LJ in that case, the essential purpose of the open justice principle is "to enable to public to understand and scrutinise the justice system of which the courts are the administrators" (para 79). The *Guardian News & Media* case also confirms that, subject to any statutory provision, the courts have an inherent jurisdiction to determine how the open justice principle should be applied. It follows that, even in the absence of a relevant statutory power, unless they are precluded by statute, the courts have power at common law to grant access to documents if the open justice principle requires this.

34. Applying these principles, the Court accepted that it had the power to order disclosure, prior to trial, of the documents sought by the media ([10]-[12]). The Court ordered disclosure of some of the statements referred to at the preliminary hearing ([25]-[26]), but declined to order disclosure of the trial witness statements. Leggatt J accepted that the trial witness statements had been placed before the court at the preliminary hearing ([19]), such that the default presumption applied. However, he considered that the default presumption ([21]):

...does not remove the need for the court to consider the particular circumstances, including the nature of the documents in question, their role and relevance in the proceedings and, importantly, the purpose for which access to the documents is sought. Toulson LJ made it clear that the court has to make an evaluation which involves assessing the extent to which affording access to documents will serve the public interest in open justice and weighing this against any countervailing factors. He also emphasised that this exercise cannot be reduced to the application of a standard formula.

35. Leggatt J concluded that the balance tipped against disclosure of the trial witness statements: open justice did not require advance disclosure of such material ([15]); there were reasons why it would be undesirable for witness evidence to be made available before it had been given in court ([16], [23]); and there was an absence of evidence that the statements were sought in order to facilitate a better understanding of the arguments made at the preliminary hearing, rather than advance publication of the trial evidence ([22]). The default position was therefore displaced ([23]).

Access to court judgments

36. "[S]ubject to certain established and limited exceptions, trials should be conducted and judgments given in public" (*Al Rawi v Security Service* [2011] 3 WLR 388, at [10]).

37. In *Re C (A Child) (Private Judgment: Publicity)* [2016] 1 WLR 5204 the Court of Appeal ordered disclosure of a judgment from private care proceedings in the Family Court. The care proceedings arose from the death of Ellie Butler. Her father, Ben Butler, was charged with murder and her mother with attempting to pervert the course of justice. The local authority commenced care proceedings in respect of their surviving child (C). A judgment was given in those proceedings in private, and was subject to a reporting restrictions order pending the parents' criminal trials, and to protect C's identity. Mr Butler was convicted of murder and indicated that he intended to appeal. Ellie's mother was convicted of child cruelty and perverting the course of justice. She had not indicated an intention to appeal. The reporting restrictions in the care proceedings were continued. A number of newspaper organisations applied for the judgment in the care proceedings to be put into the public domain. The application was dismissed the application on the basis that disclosure of the judgment would prejudice the father's right to a fair trial.
38. The Court of Appeal held that the court below had the power to order the disclosure of all or part of what took place in private proceedings, including any judgment at the end of proceedings, under its inherent jurisdiction ([12]). Whether this power should be exercised would depend on how serious a risk publication would pose to the fairness of potential future criminal proceedings. On the facts, the judge had reached the wrong conclusion: the risk of prejudice was minimal; it was plainly outweighed by countervailing public interest considerations; and the judge had failed to take into account the fact that the jury would be directed to ignore anything they read or heard outside the trial, the fact that the media should be trusted to behave responsibly, and the fade factor which meant that the impact of media reports would fade with time ([24], [34]).

Restrictions on the open justice principle

The courts' inherent power

39. The general principle is that justice must be administered in public. However, the courts have recognised an inherent power to restrict the operation of open justice where necessary to protect the administration of justice (*Scott v Scott* [1913] AC 417; *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [14]). In *Khuja*, at [14], Lord Sumption stated that this inherent power was traditionally exercised:

...where open justice would have been no justice at all, for example because the dispute related to trade secrets or some other subject-matter which would have been destroyed by a public hearing, or where the physical or other risks to a party or a witness might make it impossible for the proceedings to be held at all. The inherent power of the courts extends to making orders for the conduct of the proceedings in a way which will prevent the disclosure in open court of the names of parties or witnesses or of other matters, and it is well established that this may be a preferable alternative to the more drastic course of sitting in private...

40. In *Attorney-General v Leveller Magazine* [1979] AC 441, Lord Scarman, at 470, accepted the formulation of Viscount Haldane in *Scott v Scott* that:

...to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

41. Lord Diplock similarly observed, at 450, that:

...since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.

42. The court's inherent power to restrict the open justice principle must be exercised only where it is shown that without the restriction the attainment of justice would be rendered "*really doubtful or, in effect, impracticable*" (*R v Westminster CC, Ex p Castelli* (1996) 28 HLR 125, at 133-134).

43. The principles identified above – under the heading "Departing from the open justice principle" – apply. In summary, the court must determine whether it is strictly necessary to depart from the open justice principle and it will only be in unusual and exceptional circumstances that this will be the case. As the Supreme Court has recently stated, "*necessity remains the touchstone of this jurisdiction*" (*Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [14]).

Anonymity

44. Anonymising parties to proceedings and others involved in open court proceedings is a significant interference with open justice and Article 10 ECHR (*Re Guardian News and Media* [2010] 2 AC 697, at [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* (2000) 31 EHRR 246, 256, para 39. ... More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 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.

45. As Lord Steyn observed in *Re S* [2005] 1 AC 593, in the context of criminal proceedings ([34]):

...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.

46. These principles have recently been reaffirmed by the Supreme Court in *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35. Where the court is satisfied that there is a real public interest in publication of the proceedings, "*that interest has generally extended to publication of the name. This is because the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion*" (at [29]). Quoting from *Re Guardian News and Media Ltd* [2010] 2 AC 697, Lord Sumption observed that:

The public interest in the administration of justice may be sufficiently served as far as lawyers are concerned by a discussion which focuses on the issues and ignores the personalities, but

“the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want.”

47. The *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003 provides, at [12]: “*There is no general exception to open justice where privacy or confidentiality is in issue ... Anonymity will only be granted where it is strictly necessary, and then only to that extent*”.

48. The rule, therefore, is that an anonymity order can only be justified where it is strictly necessary. Mere convenience is not enough. The Supreme Court has recently emphasised, citing a line of case law going back over 100 years, that while the reporting of proceedings in open court may cause inconvenience or even humiliation, that is not a basis for restrictions (*Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [12]):

In the leading case, *Scott v Scott* [1913] AC 417, public hearings were described by Lord Loreburn (p 445) as the “inveterate rule” and the historical record bears this out. In the common law courts the practice can be dated back to the origins of the court system. As Lord Atkinson observed in the same case at p 463, this may produce inconvenience and even injustice to individuals:

“The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

49. Similarly, in *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, Lord Woolf MR held, at 978:

In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.

50. Even “*unremittingly hostile*” press reporting may not be sufficient to justify anonymity (*R (M) v Parole Board* [2013] EWHC 1360 (Admin), at [45], [57]; *SF v Secretary of State for Justice* [2013] EWCA Civ 1275, at [15], [31]).

Parties to public law proceedings

51. In accordance with the open justice principle, there is a presumption that parties to proceedings will be identified.
52. In *R v Westminster CC, Ex p Castelli* (1996) 28 HLR 125, the applicants, who were homeless, sought to challenge decisions not to provide them with temporary accommodation. They were both HIV positive, and suffered social stigma attached to their medical condition. They had been pursued by the press. It was suggested that publicity of their names as litigants would deter others from pursuing similar remedies. The Court rejected this application. Latham J held, at 134, that the power to anonymise cannot be used simply to protect privacy or to avoid embarrassment. It must be shown that the failure to grant anonymity would render the administration of justice “*really doubtful or, in effect, impracticable*”. The evidence of this must meet a “*cogent standard*”.
53. In limited circumstances it may be appropriate to grant anonymity to parties where the disclosure of medical evidence would not simply be embarrassing but would be “*positively damaging*” (*H v Ministry of Defence* [1991] 2 All ER 834; *R v Criminal Injuries Board, ex p A* [1992] COD 379; *R v Westminster CC, Ex p Castelli* (1996) 28 HLR 125, at 133).
54. There may also be an HRA basis under Articles 2, 3 and/or 8 ECHR for ordering anonymity in judicial review proceedings (see below).
55. An application for anonymity in judicial review proceedings should be made at permission stage, any subsequent application should be made in advance of the substantive hearing, and such applications should be supported by the evidence on which the applicant seeks to rely (*R (M) v Parole Board* [2013] EWHC 1360 (Admin), at [69]).

Parties to civil proceedings

56. An order anonymising a party to civil proceedings can be made by the court under CPR r.39.2(4) if it considers that this is necessary in order to protect the interests of that party. The power under CPR r.39.2(4) must also be read in accordance with the open justice principles set out above.
57. The Supreme Court in *R (C) v Secretary of State for Justice* [2016] 1 WLR 444 has recognised “*there that is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property*” ([1]). In cases involving the care, treatment and detention of patients under the Mental Health Act 1983, a careful fact-sensitive balancing exercise is required to determine if anonymity is necessary in the interests of the patient (at [36]):

The public has a right to know, not only what is going on in our courts, but also who the principal actors are. This is particularly so where notorious criminals are involved. They need to be reassured that sensible decisions are being made about them. On the other hand, the purpose of detention in hospital for treatment is to make the patient better, so that he is no longer a risk either to himself or to others. That whole therapeutic enterprise may be put in jeopardy if confidential information is disclosed in a way which enables the public to identify the patient. It may also be put in jeopardy unless patients have a reasonable expectation in advance that their identities will not be disclosed without their consent. In some cases, that disclosure may put the patient himself, and perhaps also the hospital, those treating him and the other patients there, at risk. The public's right to know has to be balanced against the potential harm, not only to this patient, but to all the others whose treatment could be affected by the risk of exposure.

58. Guidance from the Court of Appeal in the context of child claimants in infant settlement proceedings indicates that when dealing with private information in open court there should be a presumption in favour of anonymity unless such an order is unnecessary or inappropriate (*JX MX v Dartford and Gravesham NHS Trust* [2015] 1 WLR 3647, at [29]-[30] and [34]).
59. This guidance was applied in *GB v Home Office* [2015] EWHC 819 (QB), at [2]-[4], in the context of a non-child claimant in contested proceedings. Coulson J held that, following *JX MX v Dartford and Gravesham NHS Trust*, vulnerable parties to proceedings who would suffer from invasions of their privacy if anonymity was not granted to them should be granted anonymity unless such an order could be

shown to be unnecessary. Coulson J observed that there is a reverse burden of proof in these cases. In *Birmingham City Council v Riaz* [2015] EWHC 1857 (Fam) Keehan J appeared to suggest that *JX MX v Dartford and Gravesham NHS Trust* related to the “rights of litigants” and was not confined solely to children and protected parties ([13]):

...the decision [in *JX*] reflects the emphasis the courts now place on the need to accord due respect to the Article 8 rights of litigants, especially of children, young people and protected parties balanced against the Article 10 rights of the press and broadcast media.

60. However, cases following *GB v Home Office* suggest that Coulson J may have extended the application of *JX MX v Dartford and Gravesham NHS Trust* further than was intended by the Court of Appeal. In *Norman v Norman* [2017] EWCA Civ 49, a case concerning financial remedies disputes in divorce proceedings, the Court of Appeal made clear that the reverse burden favouring anonymity was not of application to divorce proceedings and applied to infant settlement proceedings in particular because such proceedings involve highly personal and private information and are uncontested (at [66]-[67], [82]). Neither of these factors apply to ordinary litigation, including the Claimant’s current case.
61. A number of other cases in the High Court and the Court of Protection have similarly confined the guidance in *JX MX v Dartford and Gravesham NHS Trust* to infant settlement proceedings (*A v East Kent Hospitals University NHS Foundation Trust* [2015] EWHC 1038 (QB), at [9]-[10]; *Re C (Deceased)* [2016] EWCOP 21, at [123]).

Witnesses

62. In *Attorney-General v Leveller Magazine* [1979] AC 440, the House of Lords considered a case involving the anonymity of witnesses in a trial. Lord Scarman (at 470) and Lord Diplock (at 450) held that anonymity could only be justified where it could be shown that the application of the open justice principle would frustrate or render impracticable the administration of justice.
63. In civil proceedings, an order can be made under CPR r.39.2(4) anonymising a witness if the court considers that this is necessary in order to protect the witness’

interests. As with the power to anonymise parties, this power must be read in accordance with the open justice principles set out above.

HRA anonymity

64. In limited circumstances a court may be required, pursuant to s.6 HRA, to grant anonymity in order to prevent a breach of Articles 2, 3 or 8 ECHR.

65. Lord Rodger indicated in *Guardian News and Media Limited* [2010] 2 AC 697, at [26], that:

...in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield: a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation the court may make an anonymity order to protect the individual.

66. In order to be satisfied that Article 2 ECHR requires anonymity, the court must be satisfied that without anonymity a “*real and immediate*” risk to life will arise, or will be materially increased (*Re Officer L* [2007] 1 WLR 2135; *R (M) v Parole Board* [2013] EWHC 1360 (Admin), at [50]). This threshold has been described as “*stringent*”, “*high*”, “*very high*” and “*not readily satisfied*” (*Re Officer L* [2007] 1 WLR 2135, at [20]; *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225, at [30], [66], [69], [115]). A “*real*” risk to life is one that is “*substantial or significant*” and an “*immediate*” risk is one that is “*present and continuing*” (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at [38]-[40]).

67. These principles apply to Article 3 ECHR: the court must be satisfied that a “*real and immediate*” risk of serious ill-treatment would arise without a grant of anonymity. The level of suffering needed to engage Article 3 is high. Article 3 was drafted in the shadow of the atrocities of the Second World War and both the Strasbourg Court and the domestic courts have been at pains to stress that, to be invoked, it requires a high “*minimum level of severity*”, described variously as “*serious suffering*” or “*intense physical or mental suffering*” (*R (Hall) v University College London Hospitals NHS Foundation Trust* [2013] EWHC 198 (Admin), at [26]).

68. A number of applications for anonymity have been made relying on Articles 2 and 3 ECHR: *Venables and Thompson v NGN Ltd & Others* [2001] Fam 430

(anonymity granted); *Maxine Carr* [2005] EWHC 971 (anonymity granted); *Re Officer L* [2007] 1 WLR 2135 (anonymity refused); *Secretary of State for the Home Department v AP (No.2)* [2010] 1 WLR 1652, at [12]-[18] (anonymity granted); *R (M) v Parole Board* [2013] EWHC 1360 (Admin), at [54] (anonymity refused); *SF v Secretary of State for Justice* [2013] EWCA Civ 1275 (anonymity refused).

69. Interference with the following matters can fall under Article 8 ECHR: private and family life; personal autonomy; physical and psychological integrity (*Maxine Carr* [2005] EWHC 971, at [3]-[4]); reputation (*Pfeifer v Austria* (2009) 48 EHRR 8, at [35]); professional life or career progression (*Niemietz v Germany* (1993) 16 EHRR 97, at [29]). An application for anonymity under Article 8 ECHR requires the court to conduct a proportionality assessment, balancing any Article 8 ECHR interference with the principle of open justice and the rights enshrined under Article 10 ECHR.
70. It is only in an exceptional case that an anonymity order will be justified under Article 8 ECHR. The very high threshold is clear from the decided cases:
- (1) In *Re S* [2005] 1 AC 593, a child's guardian applied for an order under Article 8 ECHR preventing the child's mother being named in reports of her trial for murder. There existed psychiatric evidence stating that reporting would be "significantly harmful" and "extremely hurtful" to the child. Despite these "strong" facts,³ the House of Lords refused the anonymity order on the basis that: the HRA 1998 and common law contained a strong rule in favour of unrestricted publicity of any proceedings in a criminal trial; a criminal trial is a public event and full contemporaneous reporting of criminal trials promotes public confidence in the administration of justice and the values of the rule of law; great importance was attributed to the freedom of the press to report the progress of a criminal trial without any restraint; there already exists a range of statutory reporting restrictions, and the application of Article 8 ECHR should be considered in this context; and the impact on the child, who was not involved in the mother's criminal trial, was "essentially indirect", and indirect harm was not sufficient to justify the order sought.

³ *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, per Lord Sumption, at [24].

- (2) In *Re Trinity Mirror plc* [2008] QB 770, a defendant pleaded guilty in the Crown Court to 20 counts of making or possessing child pornography. The Crown Court made an order in the interest of the defendant's children prohibiting any publication in the media of material identifying the defendant or his children. The Court of Appeal held that the Crown Court had no power to make such an order (at [30]). Sir Igor Judge P, delivering the judgment of the Court, observed, at [32], that it was *"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"*. At [33], he added:

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.

- (3) *Re British Broadcasting Corporation* [2010] 1 AC 145 was another case arising out of an application by a defendant in criminal proceedings for an order restraining publication of material identifying him. A man referred to in the speeches as D had been charged with rape on the strength of DNA evidence, but acquitted on the judge's direction after that evidence had been ruled inadmissible. The BBC wished to make a programme about the functioning of the criminal justice system, focussing on controversial acquittals, including D's. Lord Hope (with whom Lord Phillips, Lord Walker and Lord Neuberger agreed) held that, given that the proceedings at the trial had been public, they gave rise to no legitimate expectation of privacy. Any interference with Article 8 ECHR brought about by the link between his DNA and the rape was, however, substantially outweighed by the right of the media to publish and the right of the public to receive information about the functioning of the criminal justice system. Lord Brown observed, at [68], that:

to say that his article 8 rights were interfered with by the unlawful retention and use of his sample is one thing; to assert that in consequence he must be entitled to anonymity in respect of the subsequent criminal process is quite another'.

- (4) In *Guardian News and Media Ltd* [2010] 2 AC 697 the Supreme Court concluded that the subject of a freezing order application should not be granted anonymity on Article 8 ECHR grounds. The applicant argued that disclosure would bring him to the attention of the community in which he lived, to the detriment of his private and family life. The Court rejected his submissions:

73. Although it has effects on the individual's private life, the purpose of a freezing order is public: it is to prevent the individual concerned from transferring funds to people who have nothing to do with his family life. So this is not a situation where the press are wanting to publish a story about some aspect of an individual's private life, whether trivial or significant. Rather, they are being prevented from publishing a complete account of an important public matter involving this particular individual, for fear of the incidental effect that it would have on M's private and family life.

74. So far as the potential effect on M's private and family life is concerned, the evidence is very general and, for that reason, not particularly compelling. The apparent lack of reaction to the naming of Mr al-Ghabri [another party] is relevant in this respect since it suggests that the impact of identifying the individual on relationships with the local community is not likely to be as dramatic as the judges who made the orders appeared to have anticipated. The fact that, through his solicitors, M has himself gone out of his way to put into the public domain what he says are the effects of the freezing order on his family life, is also significant.

75. On the other hand, publication of M's identity would make a material contribution to a debate of general interest.

Conclusion:

76. In these circumstances, when carrying out the ultimate test of balancing all the factors relating to both M's Article 8 right and the Article 10 rights of the Press, we have come to the conclusion that there is indeed a powerful general, public interest in identifying M in any report of these important proceedings which justifies curtailment, to that extent, of his, and his family's Article 8 convention rights to respect for their private and family life.

- (5) In the recent Supreme Court decision in *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, Lord Sumption (with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Reed agreed) reiterated that it will only be in rare cases that Article 8 ECHR could lawfully prevent the identification of someone named in open court. The facts of the case are significant; they show that even where naming an individual will link him/her to grave allegations of the most serious criminality, Article 8 ECHR does not confer a right to restrict publication. In *Khuja* the appellant had been arrested following an

investigation into allegations of child sexual exploitation and grooming in the Oxford area. The appellant was not charged. Nine other men were tried and seven were convicted of exceptionally serious child sexual offences. During the trial the appellant's identity emerged. He sought an injunction preventing the media from identifying him, in accordance with the matters aired in open court, as someone who had been arrested for serious criminal offences, bailed, his passport impounded and then de-arrested in connection with the enquiry. The Supreme Court characterised his application as seeking *"to prohibit the reporting, however fair or accurate, of certain matters which were discussed at a public trial"* (at [34(1)]). This application was firmly rejected by the Supreme Court. Significantly, the Court, on these facts, held that Article 8 ECHR orders restricting publication would be rare, and stated that, *"This is clearly not such a case"* (at [34(4)]). The Court rejected the application for a restriction order for the following reasons:

- (i) The appellant was seeking to prohibit reporting of matters aired in open court, including his name (at [34(1)]);
- (ii) At its highest the allegations that he had been involved in serious sexual offending were described by Lord Sumption as *"no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial"* which the media are entitled to report to the public (at [34(2)]);
- (iii) The impact of publication of the most serious matters that arise in criminal prosecutions, including attacks on a person's integrity, accusations of lying, and allegations of the commission of criminal offending, *"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"* (at [34(2)]);
- (iv) The impact on the appellant's family life was *"indirect and incidental"* as he had not participated in any capacity at the trial (at [34(3)]);
- (v) There is no right under Article 8 ECHR to protection of one's reputation arising from matters said in open court (at [34(3)]);
- (vi) The fact that the appellant was not a defendant or even a witness to the proceedings made *"it even more difficult to justify an injunction"* (at [34(5)]). Further:

The policy which permits media reporting of judicial proceedings does not depend on the person adversely affected by the publicity being a participant in the proceedings. It depends on (i) the right of the public to be informed about a significant public act of the state, and (ii) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration.

Anonymity as a matter of common law fairness

71. Courts are under a common law obligation to treat those giving evidence fairly. This can entail a duty to provide anonymity where the applicable criteria are met. The common law test involves balancing competing issues, including: the unfairness to the witness in allowing him/her to be identified; the unfairness in restricting the openness of proceedings; and any other unfairness that would result from granting anonymity. The test was summarised in *Re Officer L* [2007] 1 WLR 2135, at [22]:

The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in paragraph 8 of its judgment in the *Widgery Soldiers* case, an allegation of unfairness which involves a risk to the Lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well founded, can be taken into account, as the Court of Appeal said in the earlier case of *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation of witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination.

72. The common law test is broader than under Articles 2 and 3 ECHR. It includes consideration of the following factors (*Re Officer L* [2007] 1 WLR 2135, at [14]):

- (1) The seriousness of the applicant's fear and its impact on him or her;
- (2) The reason for the applicant's fear;

- (3) The likely effect of granting anonymity in removing or reducing that fear;
 - (4) The effect on the public's perception of the impartiality of proceedings if anonymity were granted;
 - (5) The likely effect on the applicant of refusing his or her application in whole or in part;
 - (6) The likely effect on the ability of the court to arrive at the truth if it refuses or grants the application in whole or in part;
 - (7) The likely effect on the ability of the public to follow the evidence if the court refuses or grants the application in whole or in part;
 - (8) The absence of a real and immediate risk justifying anonymity on HRA grounds.
73. As well as considering whether there is in fact any objective risk, the court can therefore take into account genuinely held subjective fears of harm or injury, especially if they involve a concomitant risk to health. However, such fears will have much more significance if they are reasonable, objectively justified or supported by objective evidence (*Re Officer L* [2007] 1 WLR 2135; *Application by A and Others (Nelson Witnesses)* [2009] NICA 6, at [41]; *R v Saville of Newdigate, ex p A* [2000] at [31]).
74. In addition to the factors listed above, the court may also consider the likely effect of granting or refusing the application on:
- (1) The purposes of the court proceedings that are involved, e.g. an inquest at which the Article 2 ECHR rights of the bereaved family are engaged, or a public inquiry into a matter of national importance;
 - (2) Public confidence in the process (*Application by A and Others (Nelson Witnesses)* [2009] NICA 6, at [41]); and

(3) The ability of the applicant and/or others to continue to perform their jobs (*R v Bedfordshire Coroner, ex p Local Sunday Newspapers* [2000] 164 JP 283, at 290-291).

75. The threshold for granting anonymity at common law is a high one. This is clear from the facts of *Re Officer L* [2007] 1 WLR 2135. In that case anonymity was refused to a number of former police officers giving evidence at the Robert Hamill Inquiry who feared death or very serious injury from attacks, in the context of ongoing attacks against soldiers and threats that further such attacks would take place ([12]). Despite these circumstances anonymity was refused.

Reporting restrictions

76. Reporting restrictions provide a limited category of exceptions where the open justice principle can be lawfully restricted, preventing the media from reporting open court proceedings in full. Reporting restrictions should be distinguished from the use of the court's inherent power or power under the HRA to make anonymity orders or to regulate its own procedure, e.g. to sit in camera in certain circumstances. Reporting restrictions concern what the media can be report about matters that have already been *aired in open court*. Anonymity applications and regulation of the court's procedure concern restrictions that a court can impose on what is said in open court *at all*, i.e. before the matter is aired in open court.

77. Reporting restrictions represent a significant interference with open justice and Article 10 ECHR. The effect of a reporting restriction is to prevent members of the public, who could have seen and heard evidence given in open court had they attended court, being made aware of it by the media. As Lord Sumption observed in *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [16], the effect of a reporting restrictions is that, "*The material is there to be seen and heard, but may not be reported. This is direct press censorship.*" For this reason "*restrictions on the reporting of proceedings in open court are particularly difficult to justify*" (at [35]).

78. An explanation of all statutory reporting restrictions is beyond the scope of this paper. Some of the relevant provisions are considered below. This paper does not address the statutory restrictions that protect child and vulnerable groups, including ss.39 and 49 of the Children and Young Persons Act 1933, s.45 of the Youth

Justice and Criminal Evidence Act 1999 and s.1 of the Sexual Offences (Amendment) Act 1992.

There is no inherent jurisdiction to impose reporting restrictions on matters aired in open court

79. There is no common law power or inherent jurisdiction allowing the imposition of reporting restrictions in respect of what happens in open court. Any such restriction must be based on an existing statutory power (*Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, at [18], citing *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 AC 190).

s.4(2) orders

80. Section 4 of the Contempt of Court Act 1981 provides that:

(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

81. Section 4(2) confers a power to postpone reporting of a case where the court considers it necessary to avoid a substantial risk of prejudice to the same case or to other cases, pending or imminent. The power is strictly construed for this purpose only, and there is no inherent or common law power outside s.4(2) to postpone reporting of proceedings that have taken place in open court (*Re Times Newspapers Ltd* [2008] 1 WLR 234, at [12]; *Reporting Restrictions in the Criminal Courts* (Judicial College, May 2016), at p.27).

82. The test in deciding whether a s.4(2) order should be made is set out in *R (Telegraph Group Plc) v Sherwood* [2001] 1 WLR 1983, at [20]-[23]:

(1) Unless it is demonstrated that an order is necessary to avoid a substantial risk of prejudice to the administration of justice, no order should be made.

The courts have repeatedly emphasised that the substantial risk threshold, set by Parliament, is a high one (*AG v Times Newspapers Ltd* [2012] EWHC 3195). The degree of risk must be substantial as distinct from merely possible or minimal. It must also be a practical risk, in the sense that it must carry a prospect that the outcome of the trial would be different without an offending publication or that it would require the discharge of the jury (*AG v Guardian Newspapers Ltd. (No. 3)* [1992] 1 WLR 874).

- (2) Even if it is shown that an order is necessary to avoid a risk of prejudice, it does not follow that an order should be made. The court should then consider whether the order is necessary in a democratic society in a sense contemplated by Article 10(2) ECHR.
 - (3) The staged approach to be taken by the court is to ask itself:
 - (i) Whether reporting would give rise to a "*not insubstantial*" risk of prejudice to the administration of justice in the relevant proceedings. If not, that will be the end of the matter;
 - (ii) If such a risk is perceived to exist, would a section 4(2) order eliminate it, and, even if it would, could the risk be overcome by less restrictive means;
 - (iii) If there is no other way of eliminating the perceived risk of prejudice it still does not follow necessarily that an order has to be made. The judge may still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being "*the lesser of two evils*". At this stage value judgments may have to be made as to the priority between competing public interests.
83. A s.4(2) order should only be made as a "*last resort*" (*R (Press Association) v Cambridge Crown Court* [2013] 1 WLR 1979, per Lord Judge CJ, at [13]; *Re C (A Child) (Private Judgment: Publicity)* [2016] 1 WLR 5204, at [27]).
84. The Court of Appeal has emphasised that there is no power under s.4(2) to ban the publication of a name or evidence given in open court, to prevent embarrassment or discomfort, to protect a person's reputation, or even to protect a person's safety (*Re Trinity Mirror plc* [2008] QB 770; *R (Press Association) v Cambridge Crown Court* [2013] 1 WLR 1979).

85. As the Judicial College has made clear, the reference in s.4(2) to avoiding a substantial risk of prejudice to the administration of justice refers to the protection of the public interest in the administration of justice rather than “*the private welfare of those caught up in that administration*” (*Reporting Restrictions in the Criminal Courts* (Judicial College, May 2016), at p.28). The courts have emphasised that s.4(2) cannot be used to protect private interests affected by reporting of public criminal proceedings. For example, in *Re Belfast Telegraph Newspapers Ltd’s Application* [1997] NILR 309 a defendant argued that the scandalous nature of the allegations against him would result in members of the public attacking him and sought an order under s.4(2) preventing publication of his name. It was held that he was not entitled to a s.4(2) order as attacks upon the accused by ill-intentioned persons were not to be regarded as a natural consequence of the publication of the proceedings and such dangers should not cause the court to depart from well-established principles.
86. Section 4(2) only allows a court to postpone reporting, it does not allow a court to ban reporting indefinitely (*R (Press Association) v Cambridge Crown Court* [2013] 1 WLR 1979; *Reporting Restrictions in the Criminal Courts* (Judicial College, May 2016), at p.28).

s.11 orders

87. Section 11 of the Contempt of Court Act 1981 provides that:

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.

88. Section 11 does not confer a power on the court to order that matters be withheld from the public in open court; for example, s.11 does not empower a court to anonymise a party to proceedings (*R v Westminster CC, Ex p Castelli* (1996) 28 HLR 125, at 132). Rather, s.11 allows a court to make orders to give effect to any orders which have lawfully been made under an existing power. For example, if a court had ordered that a witness should be anonymised during proceedings on HRA grounds, s.11 would allow a court to order that the witness be screened while giving evidence so as to give effect to the anonymity ruling.

89. A s.11 order cannot be made if a name or matter has already been mentioned in public proceedings (*Re Trinity Mirror* [2008] 2 Cr App R 1; *R v Arundel Justices, ex p Westminster Press* [1985] 1 WLR 708; *Reporting Restrictions in the Criminal Courts* (Judicial College, May 2016), at p.26).
90. Section 11 cannot be used to guard against embarrassment or the impact of publicity on reputation or business interests; s.11 is not designed to protect the “*comfort and feelings*” of those involved in open court proceedings (*R v Evesham Justice, ex p McDonagh* [1988] QB 553; *R v Dover Justices, ex p Dover District Council and Wells* (1991) 156 JP 433; *Reporting Restrictions in the Criminal Courts* (Judicial College, May 2016), at p.26). As was observed by Lord Justice Brown in *R v Central Criminal Court, ex p Crook* (1984), *The Times*, 8 November:

There must be many occasions when witnesses in criminal cases are faced with embarrassment as a result of facts which are elicited in the course of proceedings and of allegations made which are often without any real substance. It is, however, part of the essential nature of British criminal justice that cases shall be tried in public and reported and this consideration must outweigh the individual interests of particular persons.

Applications for orders prohibiting media reporting of matters aired in open court

91. The courts have repeatedly rejected applications from those involved in and identified during open court proceedings who have sought to prevent the media identifying them in reports of the proceedings (see above under Article 8 ECHR at paragraph 70). Such reporting “*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* [2017] 3 WLR 35, at [34(2)]).

Challenges to reporting restrictions

92. Reporting restrictions can be challenged on a number of grounds, depending on the nature of the proceedings in which the restriction has been made. These possible challenges include:
- (1) The substantial risk of serious prejudice threshold is not met on the evidence.

- (2) The restriction is not justified by clear and cogent evidence demonstrating the necessity and proportionality of the interference with open justice and Article 10 ECHR.
- (3) A restriction is made without a lawful, statutory basis, e.g. use of s.4(2) to permanently ban publication of proceedings, or use of s.11 to prohibit publication of matters aired in open court.
- (4) Where the proceedings to which the restriction applies will be determined by a judge (i.e. without a jury), it should be assumed that any prejudicial reporting can and will be ignored by the court.
- (5) Any reporting at an early stage of proceedings, even if prejudicial, will be subject to the “*fade factor*” (*Re C (A Child) (Private Judgment: Publicity)* [2016] 1 WLR 5204, at [30]).
- (6) In jury cases – including some criminal trials, civil trials and inquests – a court considering a reporting restriction should pay particular regard to the long line of case law which emphasises the robustness of juries, the risk of criminal sanction should the jury ignore the directions it is given, and the “focusing effect” that applies when a jury hears evidence in court. The Court of Appeal has repeatedly stressed that juries “*have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial*” and will assiduously adhere to the directions they are given so as to return a true verdict in accordance with the evidence (*Re B* [2007] EMLR 5, at [31]; *Re C (A Child) (Private Judgment: Publicity)* [2016] 1 WLR 5204, at [28]; see also *Montgomery v HM Advocate* [2003] 1 AC 641 (PC)). The jury issue was considered recently by the Court of Appeal in *Re Guardian News and Media Ltd* [2016] EWCA Crim 58:

49 (2) *Trust the jury*: A number of authorities address the impact on juries of media publicity and the safeguards in the trial process to ensure a fair trial, together with the confidence necessarily placed in the jury under our criminal justice system.

...

57 In summary, over and above the responsibility of the media to avoid inappropriate comment which may interfere with the due administration of justice, three safeguards can be discerned in respect of the impact on juries of media publicity:

- i) The conduct of the trial by the trial Judge, including, in particular, appropriate directions to the jury - as to not conducting internet searches and, in any event, to focus on and only on the evidence in the case rather than anything they might have seen or heard outside of the trial;
- ii) The "focusing effect" (per Lord Bracadale) of listening to evidence over a prolonged period in the "immediacy of the court environment";
- iii) The integrity of juries and their own commitment to the fairness of the trial process.

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