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Case No: CO/11362/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
PERMISSION TO APPLY FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2012

Before:
LORD JUSTICE TOULSON
MR JUSTICE SWEENEY and
MRS JUSTICE SHARP

Between:

THE QUEEN ON THE APPLICATION OF ASSOCIATED NEWSPAPERS LIMITED	<u>Claimant</u>
- and -	
THE RT HON LORD JUSTICE LEVESON (AS CHAIRMAN OF THE LEVESON INQUIRY)	<u>Defendant</u>

**Mark Warby QC and Gerard Clarke (instructed by Reynolds Porter Chamberlain) for the
Claimant**

Robert Jay QC and Cathryn McGahey instructed for the Defendant
John Hendy QC and Lance Harris instructed for the National Union of Journalists
David Sherborne and Louise Jones instructed for the Core Participant Victims
Christina Michalos instructed for The Commissioner of Police for the Metropolis

Hearing date: 13 January 2012

Approved Judgment

Lord Justice Toulson:

Introduction

1. The claimant is a major newspaper organisation. Its titles include the Daily Mail and The Mail on Sunday. It applies for judicial review of a decision of The Rt Hon Lord Justice Leveson in his capacity as Chairman of the Leveson Inquiry (“the Chairman”). Its application is supported by the Daily Telegraph, whose editorial legal director has written a letter to the court stating that it shares the concerns of the claimant but it has not taken an active part in the hearing.
2. The decision complained of is a decision in principle (or “a gateway determination” as it has been described) that the Chairman will admit evidence, subject to certain conditions, from journalists who wish to remain anonymous on the ground that they fear career blight if they identify themselves.

The Leveson Inquiry

3. The Inquiry was set up under the Inquiries Act 2005 because of public concern about the practices and ethics of national newspaper organisations. For many years there have been known instances of phone hacking and other illegal or dubious practices but for a long time the position of most newspaper organisations was that the problem was limited to a single paper and to certain rogue reporters acting without the knowledge of their superiors. A wider picture emerged as a result of lawsuits brought by a number of celebrities against the publishers of the News of the World (News International), but the event which particularly triggered the establishment of the tribunal was the disclosure that the News of the World had hacked into the mobile phone of a murdered school girl shortly after her disappearance. This discovery caused widespread revulsion. Alongside concerns about phone hacking at News International - and questions of who in the organisation knew about it, how much did they know and when did they know it - there were, and are, concerns about other illegal or unethical practices and how widespread within the newspaper industry they may be. This all led to the Inquiry being established with wide Terms of Reference.
4. The Terms of Reference are divided into two parts because a number of police investigations are under way which make it inappropriate for the Inquiry to seek to explore certain matters while they are the subject of those investigations. Part 1 has been divided into four modules. The inquiry is currently engaged with Module 1 of Part 1.
5. The Terms of Reference of Part 1 are:
 - “1. To enquire into the culture, practices and ethics of the press including:
...
c. the extent to which the current policy and regulatory framework has failed including in relation to data protection; and

- d. the extent to which there was a failure to act on previous warnings about media misconduct.
2. To make recommendations:
 - a. for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;
 - b. for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police.”
6. Module 1 is “the relationship between the press and the public” and looks at phone hacking and other potentially illegal behaviour.
 7. The Chairman has given core participant status to a number of bodies or groups. These include News International, various other newspaper organisations, the Metropolitan Police Commissioner (“the Commissioner”), the National Union of Journalists (“NUJ”) and a core participants victims group.

Inquiries Act 2005

8. Sections 17 to 19 contain provisions designed to ensure that inquiry proceedings are fair and are open to the public, subject to any restrictions required by law or considered by the minister appointing the inquiry or by the inquiry chairman to be conducive to fulfilling the purpose of the inquiry or necessary in the public interest.
9. Section 17 provides:
 - “1. Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
 - ...
 3. In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).”
10. Section 18(1) provides:

“Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers

reasonable to secure that members of the public (including reporters) are able –

...

- b. to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.”

11. Section 19 permits the inquiry chairman to impose a restriction on the disclosure or publication of evidence or documents given, produced or provided to an inquiry, but subsection (3) provides that such a notice must specify only such restrictions as are required by law or as he:

“considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).”

12. The matters mentioned in section 19(4) include the extent to which not imposing any particular restriction would be likely to impair the efficiency or effectiveness of the inquiry.
13. Section 2 provides that an inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability, but that it is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from the facts that it determines or recommendations that it makes.

The ruling

14. At a preliminary hearing on 26 October 2011 the Chairman said that a number of people had expressed an interest in providing evidence to the Inquiry but only under conditions of anonymity. Counsel to the Inquiry, Mr Jay QC, confirmed that this was so and described the witnesses as “saying that they will not give their evidence without protection of anonymity, which is the fear presumably of losing their employment and/or their professional reputations”. There was a general discussion and the Chairman said that he would hear further submissions on the subject on 31 October.
15. Counsel for the claimant, Mr Caplan QC, provided the Inquiry with written submissions and a draft protocol for dealing with applications for anonymity. Under the suggested protocol any application for anonymity would be in three parts – a statement of the protective measures requested; open submissions and evidence; and closed submissions and evidence. The second part would contain as much information as the witness could give without undermining the purpose of the application. The third part would contain information relating to the personal and professional circumstances of the applicant which could not be disclosed to other participants without undermining the purpose of the application.
16. At the hearing on 31 October there were short oral submissions on the subject of anonymity from, among others, counsel for the Inquiry, the claimant and the

Commissioner. At the same hearing the Chairman announced that the NUJ had applied for and been granted core participant status.

17. On 9 November the Chairman handed down a four page document headed “Ruling on Anonymous Witnesses”. In it he said:

“1. The Inquiry has been approached by a number of individuals all of whom describe themselves as journalists working for a newspaper or newspapers either on a casual or full time basis and who wish to provide evidence to the Inquiry on the subject of the culture, practices and ethics of the press. Each has asked to provide this evidence anonymously and with such other protection that the newspaper or newspapers for which they work or have worked cannot identify them. It is clear that the picture which they wish to paint is not entirely consistent with the picture that editors and proprietors have painted of their papers and they fear for their employment if what they say can be attributed to them.

2. It goes without saying that the best evidence is that which emanates from an identified witness that can be tested by questions and, if appropriate, considered in the light of any contrary evidence. Evidence from a witness who is anonymous could not properly be tested because the chapter and verse necessary to exemplify the evidence might identify both the newspaper and, ultimately, the source. Although counsel to the Inquiry could probe, no contrary case would be advanced. As a result, the weight that could be attributed to such evidence would be substantially diminished. But that is not the same as saying that it has no weight, particularly if it is to be considered along side similar evidence (if such there be) from sources who are prepared to be identified and who do provide chapter and verse.

...

5. Before embarking upon an analysis of the submissions that I have received in relation to anonymous evidence, it is worth reiterating that the purpose of Part 1 of the Inquiry which, as far as the press is concerned, is to consider the culture, practices and ethics of the press as part of the general background and which also requires me to look at specific relationships (with the politicians and the police). The facts (or narrative) provide only the starting point for the thrust of Part 1 which is to determine whether the current policy and

regulatory framework has failed and, if so, what recommendations to make...

6. Reverting to the general background, it is also important to put the evidence that I hear about culture and practices into context. It is obvious that specific illegal or clearly unethical conduct could, indeed, exemplify culture, practices and ethics either in a particular newsroom or more widely and it is an extremely important part of the picture. It is not, however, the only evidence that may be relevant to the background...
7. Further, although I must inevitably consider the specific in order to reach conclusions about the general, it is of critical importance that everyone understands the way in which I will approach Part I of the Inquiry. In the same way that it is not part of my function to rule upon whether or not the rights of any of those complaining about the conduct of the press have been infringed, I do not consider it my role, in this Part of the Inquiry, to make any findings of fact about the behaviour of any newspaper or editor in any individual case...The approach to evidence of witnesses who wish to remain anonymous, must, therefore, be considered in that context.

...

9. Mr Jonathan Caplan QC for Associated Newspapers Limited has provided helpful submissions reminding me of the importance of open justice and the role that the media has in giving effect to that principle through accurate reporting. He argues that s19 of the Inquiries Act 2005 provides for the circumstances in which the principle of public access to inquires can lead to privacy and, in the context of my duty pursuant to s17(3) to act fairly, submits that the conflict arises between the Article 8 rights of the anonymous witness on the one hand and those potentially subject to criticism on the other, along with the Article 10 rights of the press. I recognise the principle of open justice, but it is not the only consideration. Context is of critical importance and I am not proposing that the Inquiry should receive and be able to act upon evidence which is the subject of a restriction order so that neither the core participants nor the public know what the evidence is. I will only receive and act upon evidence which is given in public and which may be fully reported. What will be missing is the identity of the witness but that information will simply not be part

of the evidence or form any part of my assessment of that evidence...

10. One of the consequences of allowing a journalist to give evidence anonymously may very well be that it would not be fair to allow the name of the title or titles about which the journalist speaks to be identified if only because fairness could then require the facility to challenge the evidence (as opposed to testing it which would be the responsibility of counsel to the Inquiry). Further, given that I do not wish to prejudice on-going police investigations and will not be seeking to make findings of fact against any current specific title or individual editors, I am presently minded to the view that the name of the title about which the evidence relates (and, obviously, the identity of any manager who is criticised) should also be anonymous, save only where the allegations are already the public domain. The only exception will relate to the News of the World...
11. I agree with Mr Caplan's further submission that in any application for anonymity must receive intense scrutiny...
12. Although I would encourage all those who can contribute to this Inquiry to do so on an open basis, I understand the concerns expressed by journalists who fear for their continued employment if they do not follow the line being taken by their employers...In the circumstances, given the broad remit of this Part of the Inquiry into culture, practices and ethics at a general, rather than a specific, level, subject to the controls which I have referred, I will be prepared to receive anonymous evidence. Anyone who provides it will have to provide sufficient detail to demonstrate that he or she is speaking with firsthand knowledge and must also recognise that the weight that can be attached to it will be significantly less than that from a witness who is identified.
- ...
14. A draft protocol will be circulated: short written submissions can be made by core participants before it is promulgated."
18. On 15 November counsel to the Inquiry circulated a draft anonymity protocol. This largely followed Mr Caplan's suggested protocol but included some extra paragraphs.

19. On 16 November representatives of the victims group, the Guardian and the NUJ made opening statements. The NUJ's General Secretary, Ms Stanistreet, said in her opening statement:

“It's vital that in an Inquiry reflecting on the problems and issues within our industry, that the concerns, the experiences and insights of ordinary working journalists are heard and I know you're very much alive to this. They are the workers at the sharp end who deal with the reality of life in a pressured, busy newsroom every single day...

The NUJ is currently making a good deal of effort to identify journalists to give evidence and to share their experiences with the Inquiry. However the stark reality is that in many workplaces there's a genuine climate of fear about speaking out. In order that it's not simply those who have retired or who have been made redundant and left the industry who feel able to make a contribution, we're working with the Inquiry team to ensure that journalists who wish to contribute to the Inquiry can give their testimony in confidence to afford them protection from retribution.

The fear is not necessarily just of immediate punishment but of finding that a few months after your Inquiry ends a journalist who has spoken out may find herself on a list of redundancies. We support your draft protocol on anonymity and will discuss specific measures in relation to particular witnesses with the Inquiry team.

Of course, predictably some of the newspaper owners are unhappy about this, but the reality is that putting your head above the parapet and speaking out publicly is simply not an option for many journalists who would fear losing their job or making themselves unemployable in the future. In our experience, that fear has been a significant factor inhibiting journalists from defending the principles of ethical journalism in the workplace, and in media organisations hostile to the concept of trade unions there's a particular problem.”

20. The editor of the Guardian, Mr Rusbridger, said in his opening statement:

“On the point of anonymous evidence, I think that is clearly a difficult one. The reason that Nick Davies and the New York Times and later Panorama and Dispatches, i.e. journalists, were able to get at this story in a way that the police and the PCC weren't was because they spoke to journalists off the record. So when the New York Times turned up in town we said to them, “if you find and speak to enough people on the News of the World, they will tell you the same thing that they told Nick Davies”, which was that this stuff was going on, that it was known about, it was rife and it was ingrained in the paper.

The New York Times managed to get two journalists to speak on the record, and the third police inquiry immediately announced that they would interview these witnesses as suspects under caution, and of course that got nowhere.

So there was a contrast between the people who were trying to get public evidence and didn't get to the truth, and the people who took off the record evidence and did get to the truth.

[The Chairman: That makes an assumption, actually, but I take the point.]

...

I think it's inevitable, and I hear what the General Secretary of the NUJ said about the fear of people – I mean there are two factors that are going to be at the back of people's mind. One is the retribution factor, which Michelle Stanistreet talked about, which is you're going to be unemployable if you say bad things about the industry in front of this committee, and the other obviously is that if people were frank the police are going to come along and arrest them.

So those are two difficult factors which you're going to have to think about and I know you've given a lot of thought to already."

21. On 17 November Mr Caplan provided further written submissions on behalf of the claimant in relation to anonymity and the anonymity protocol, in which he expressed the claimant's concerns:

"7. The concern of ANL, and it is anticipated other C P [core participants] publishers, is that ...any evidence concerning allegations of journalistic behaviour which is improper, unethical or even illegal should be given as openly and fully as possible in order that it can be challenged if necessary and also tested against the evidence already provided to the Inquiry by management and editors. Such evidence, and the Inquiry's impression of it, is clearly fundamental to any findings about the culture, ethics and practices of the press...Even if the weight to be attached to anonymous evidence is "significantly less" than that which is given to a witness who is identified (Ruling of 9th November paragraph 12), the fact remains that some weight may/will be given to it and that this is a very important area of the Inquiry. Some of those who approach the Inquiry might be journalists who are disaffected with a particular employer or senior editor or who even have a grudge to bear: or they could simply be honestly mistaken. If granted anonymity

then their evidence cannot be tested. Such an approach will inevitably impact on the Inquiry's findings and recommendations. It will also be unfair, firstly, because the unspecified allegations will besmirch the press as a whole (or sections of it) and individual allegations will have been taken into account which cannot be counted.

8. This is not the kind of Inquiry in which any potential witness risks personal danger. The apprehension appears to be retribution in the workplace by damage to promotion prospects or even loss of present or future employment. There must, however, be objective support for such a fear and, even then, a careful examination of alternative options. ...Anonymity is patently not the only solution "possible" as in the Bloody Sunday case."
22. The submissions went on to propose that an undertaking might be given by core participant publishers that nothing said by any journalist to the Inquiry should be used in any subsequent disciplinary proceedings by their employer except in relation to proceedings for gross misconduct or in relation to a person charged with misleading the Inquiry.
23. On 23 November the Chairman said that a ruling on the draft protocol would have to be deferred because he was still receiving submissions from core participants but that, despite submissions inviting him to reconsider his ruling of 9 November, he was not prepared to do so. He added that if there had been a challenge to the principle, he would have expected it to be made.
24. On 28 November 2011 the Chairman handed down a supplementary ruling on anonymity and a finalised protocol for anonymity applications. In the ruling he said:
 - “1. On 9 November 2011, I ruled that I would accept evidence provided anonymously. Such evidence can take three forms. First, it can involve individuals who have approached the Inquiry anxious to assist but only on condition that they remain anonymous. Secondly, it can relate to others who, specifically for the purposes of the Inquiry, are prepared to provide evidence to third parties (such as the NUJ) who will then make a statement incorporating the evidence in the form of hearsay but without attributing it save only for validating the credentials of the witness as a journalist. Third, it may come from witnesses such as Mr Nick Davies. This last mentioned material has not specifically been prepared for the Inquiry but, in his case, it is recounted in his book *Flat Earth News*, parts of which he has exhibited to his statement. A draft protocol covering the first of these forms of evidence was circulated to core participants and, over the

ensuing two weeks, a number of submissions have been received about it. I am grateful for them all.

2. A number of submissions seek to raise issues of principle and invite me to reconsider my ruling of 9 November; I am not prepared to do so. The underlying circumstances arising in this case are different from those in cases such as *R v Lord Saville of Newdigate Ex parte A* [2001] 1 WLR 1855, *Bennett v A* and others [2004] EWCA 1439 and the more recent *Re Officer L* [2007] 1WLR 2135. Those involved in these inquiries knew the names of the witnesses who would give direct evidence that might impact specifically on them. In this case, nobody would know the identity of the anonymous witnesses (or indeed the identity of those who were sources for the NUJ or Mr Davies)...and, as I have recognised, limited or very limited weight could be attached to such evidence as a result.”

25. The Chairman referred to Mr Caplan’s suggestion that witnesses should be sufficiently protected by an undertaking from core participant publishers. The Chairman said:

- “5. It is, of course, open to ANL (or any other newspaper) to publish this undertaking to their staff and I am happy that they should but, with great respect, it seems to me to miss the point. First, the position of ANL is entirely to deny that any illegal or unethical practices are condoned at their titles. For the converse to be asserted as accurate by a journalist, it might be suggested that such a claim either involved gross misconduct or itself constituted gross misconduct. Secondly, and more important, the concern expressed by journalists (and I make it clear that I have absolutely no idea whether any journalist who has approached the Inquiry is employed by ANL and I make no suggestion to that effect) is not limited to dismissal or disciplinary proceedings but understandably extends to career prospects generally in what is, after all, a very difficult economic environment.”

26. The Chairman continued:

- “6. As I have repeatedly made clear, the press performs a vital role in our society and the overwhelming majority of the work carried out by journalists is undertaken in accordance with the highest ethical standards and entirely in the public interest. The Inquiry, however, must be seen to be doing all that it can to hear the other side of the story and to ensure that it is not covered up.

I fully understand the reputational concerns that have been expressed by ANL and others and I am conscious of the need to ensure, to such extent as is possible, that the investigations of customs, practices and ethics is general. ...”

27. The Chairman then turned to the details of the protocol and commented on various submissions which had been made to him about it. He concluded:

“15. I add one footnote to this ruling. Mr Caplan, on behalf of ANL, was anxious to see the protocol in its final form before deciding whether to challenge my ruling of 9 November and was conscious that the time for doing so expired on 23 November. Over the last two weeks, I have twice been prepared to provide ex tempore judgment on the arguments that had been advanced; on each occasion, a further submission from a different core participant was then received which I had to consider...As for this protocol, the final version is attached to this ruling.”

28. The protocol was an expanded version of that originally suggested by Mr Caplan. I attach the protocol as an appendix to this judgment.

29. It is common ground that the rulings of 9 and 28 November and the protocol are to be read together, but there was some argument about their effect, which it is convenient to address at this stage.

The effect of the ruling

30. Mr Warby QC submitted that the ruling may be summarised as follows:

“The Inquiry shall admit and may rely in making its findings and recommendations upon evidence from witnesses who are anonymised (that is, whose identities are concealed not only from the public but also from Core Participants) and the admission and reliance on such evidence shall be considered fair and lawful provided that the following three conditions are satisfied:

- (a) the evidence is direct evidence of unethical or unlawful conduct on the part of one or more newspapers or goes to some other important issue in the Inquiry
- (b) there are redacted from the evidence all details which could reveal the identity of the newspaper title or group or individual to which it relates
- (c) there is evidence before the Inquiry – even if not disclosed to those affected – which suggests an understandable, that is not fanciful, risk that the

witness might, if identified, be subject to detriment in relation to their career.”

31. Mr Jay submitted that the Chairman has done no more than to determine in principle that his Inquiry is prepared to receive anonymous evidence, as opposed to ruling in advance that it will not do so, but that he has not given any indication of the principles which he will apply when considering an application for anonymity. He submitted that the present application is therefore premature because it has been brought in advance of “(i) the relevant principles being determined by the Chairman following detailed submissions, and (ii) any particular factual matrix being placed before the Chairman for evaluation.”
32. I do not entirely accept either of those submissions. The rulings of 9 and 28 November are not to be approached as if they were commercial contracts, but as an exercise in case management in a swiftly moving Inquiry. As I see it, the Chairman has made a decision in principle which goes beyond merely declining to rule out in advance an application for anonymity, but he has not put himself into the strait jacket of Mr Warby’s formulation. He has made a positive decision in principle to receive anonymous evidence from journalists who wish to conceal their identity because of fear of career blight, but that is a general ruling. When he comes to deal with individual applications for anonymity, he will scrutinise carefully what the witness says about his personal and professional circumstances and how far he thinks that the evidence will advance the purposes of the Inquiry.

Grounds of challenge

33. The written grounds of challenge in the application for judicial review are:
 1. That allowing employees or former employees of press organisations to give evidence against those organisations anonymously would be unfair and so would contravene the principles of natural justice;
 2. that the decision complained of fails to give effect to the principle of open justice;
 3. that the decision complained of infringes the rights of the claimant and of others under article 10;
 4. that the decision complained of fails to identify a public interest sufficient to justify a restriction order under section 19 of the Act, and fails adequately to balance any alleged public or private interest favouring anonymity against the countervailing public interest in open justice and free expression.
34. In short, the written grounds are lack of fairness, lack of openness and breach of Convention rights. In his oral submissions Mr Warby accepted rightly that it is the first which is critical. The duty of fairness expressed in statutory form in section 17(3) requires the Chairman to act with fairness towards those who have an interest in the outcome. In this case that includes the newspaper organisations, i.e. the owners

and managers; journalists, employed or freelance; victims of alleged malpractice; and the general public.

35. A duty of fairness does not exist in a vacuum. In that respect a duty to be fair is like a duty of care. In a case of a professional retainer, the professional person's duty of care is inexorably tied up with what he is retained to do. This point was eloquently made by Oliver J in *Midland Bank v Hett Stubbs and Kemp* [1979] 1 Ch 384, 434. So in the present case, the starting point for any consideration of the Chairman's duty of fairness is the task which he was appointed to perform under his Terms of Reference.
36. As to the European Convention, some of the factors relevant to conducting the Inquiry fairly are also the subject of articles of the Convention, particularly articles 8 and 10, but they do not add anything to his statutory duty. Applying those articles involves the self same exercise of acting fairly towards the different groups to which I have referred. Article 10, for example, might be seen differently when viewed from the perspective of the journalists who wish to be free to tell their experiences without fear of the risk of career blight, by the alleged victims and members of the public who wish to hear what the journalists have to say, and by the newspaper organisations who wish to receive information about the identity of the journalists so that they can respond fully and freely.
37. As to open justice, if permitting anonymity would further the purposes of the Inquiry without breaching section 17(3), a restriction under section 19 on disclosure of the witnesses' statements in unredacted form would ex hypothesi be permissible under section 19(3) and (4). It is for those reasons that I have said that the critical challenge is the challenge to the fairness of the Chairman's ruling.

The alleged unfairness

38. Mr Warby submitted that the Chairman failed to give any or adequate attention to the reputational or "class libel" risk to the claimant and other newspaper organisations, when he ruled in advance that he would in principle accept anonymous evidence from journalists if it were sufficiently relevant and if satisfied that the journalist would not give it otherwise than anonymously for fear of career blight. As more fully developed, the submission was two-pronged. Mere fear of career blight could not in Mr Warby's submission be a sufficient reason for exposing the media organisations to the risk of anonymous class libel. He relied, in particular, on *Re Officer L*, where the House of Lords held that anonymity should not be given to police officers in a Northern Ireland inquiry who claimed to be in fear for their personal safety in the absence of objective evidence to persuade the inquiry that they would in fact suffer an enhanced risk to their personal safety. A mere subjective claim of fear of career blight could not in his submission lawfully justify the granting of anonymity. Secondly, he submitted that even if there might be an exceptional case where the risk of career blight, objectively analysed, was such as to make it lawful to grant anonymity to the witness, the Chairman had not carried out such an inquiry but had prejudged the matter by indicating that he would accept such evidence, subject to relevance and subject to the journalist professing an "understandable" fear of career blight.

Prematurity

39. As I have indicated, Mr Warby argued that the ruling was wrong in principle and/or premature. Mr Jay argued that the application for judicial review was premature. Both anticipated that there would be a likelihood of a further judicial review application, or applications, when the court would address the issue of anonymity after rulings had been given on specific anonymity applications. That would be highly regrettable if it can be properly avoided. The last thing that would serve the purposes of the Inquiry would be for it to be punctuated by successive judicial review applications. The capacity for a public inquiry to be derailed by repeated visits to the courts has been demonstrated in the past. Where there is an issue of principle which requires to be considered by the court, it is generally speaking best done at the earliest opportunity.
40. I will come to Mr Warby's argument that the ruling was premature when considering his challenge to it, but I am not persuaded that his application for judicial review is premature. Whether an application is premature depends on the subject matter and the nature of the challenge. The claimant's challenge goes to the root of the ruling and now is the right time to address it.

Discussion

41. I have said that the starting point for considering the Chairman's duty of fairness is the task which he was appointed to perform under his terms of reference, i.e. the purpose of the Inquiry. It is also important to understand in outline the situation which gave rise to the ruling.
42. The Inquiry has heard evidence from more than 20 alleged victims. Many are celebrities but some are not. They have given evidence of instances of illegal accessing of voicemails, other invasions of privacy and alleged victimisation for criticising the press. For the most part they have named the news organisations, which include a large section but not all of the tabloids. I should make it clear that much of this evidence has been challenged and rebuttal evidence has been given. The Inquiry has also heard or will hear evidence from former journalists about alleged malpractices, and it has heard hearsay evidence based on "off the record" statements made by journalists. Mr Rusbridger referred in his opening statement to reports by Mr Nick Davies (a Guardian journalist), the New York Times, Panorama and Dispatches based on such conversations. The Chairman referred in paragraph 1 of his ruling dated 28 November to Mr Davies and his book *Flat Earth News*. That is the context in which some journalists have approached the Inquiry wishing to give evidence anonymously. Direct evidence from such journalists is at the moment a missing piece of the jigsaw.
43. As the Chairman observed in paragraph 2 of his ruling dated 28 November, the circumstances are significantly different from those of the soldier or police officer cases such as the Bloody Sunday Inquiry and *Re Officer L*. In those cases the inquiry knew the identities of the witnesses concerned and intended to call them. They were compellable, but the question was whether they should be allowed anonymity for their own safety. In this Inquiry the Chairman is not in a position to call the witnesses who are asking for anonymity unless they come forward, which they say that they are fearful of doing unless they have an expectation of anonymity.

44. In the nature of things the Chairman had to address the issue of how he should respond in general to such requests before knowing the details of the evidence which such witnesses would give. As I see it, the issue gave rise to the following questions:
1. Was there a credible basis for thinking that there were witnesses who had relevant evidence to give but who would not do so unless they had a prospect of anonymity because of real fear of career blight?
 2. If so, was it likely to be better for the purposes of the Inquiry, i.e. in the public interest, to admit such evidence (subject to relevance), with its obvious and unavoidable limitations, than not to have it?
 3. If so, would its admission be likely to cause such prejudice to the claimant, and other newspaper organisations, that it would be unfair to admit it notwithstanding the detrimental effect from the viewpoint of the purposes of the Inquiry and from the viewpoint of other interested parties?
45. We were referred to various authorities on the standard of review, including *R v Panel on Takeovers and Mergers ex parte Guinness plc* [1990] 1 QB 146 and *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855.
46. Question 1 is a question of fact. Question 2 involves an evaluation of what would be best in the interests of the Inquiry. On those questions a court ought not to hold that the Chairman was wrong unless his decision was incapable of rational justification (or in lawyers' language "Wednesbury unreasonable"). Subject to the statutory duties of fairness and openness, it is for the Chairman under the Act to make all decisions about how the Inquiry should proceed.
47. Question 3 is rather different because it involves the question whether the procedure proposed would be fair. It is ultimately for the court to decide whether it would be unjust, but in doing so the court must recognise that the Chairman is in a far better position to assess and balance the degree of prejudice which may be caused to different parties because of his infinitely greater knowledge of the details and his feel for where justice lies. The court would therefore only interfere if satisfied, notwithstanding the Chairman's considerable advantage, that he was wrong.
48. In stating the matter as I have in the particular context of the facts in this case, I have sought to distil and apply the principles derived from the authorities, particularly the judgment of the Court of Appeal in *R v Lord Saville of Newdigate*, paragraphs 31, 38–39 and 67–69.
49. The Chairman was plainly entitled to regard it as credible that journalists who could give relevant evidence were unwilling to do so without anonymity for fear of career blight, for he had representations to that effect from a number of sources.
50. He was similarly entitled to conclude that it was in the interests of the Inquiry to hear evidence from those working in newsrooms about the culture, practices and ethics of

their workplaces. This was at the heart of what he was appointed to investigate (as he observed in paragraph 5 of his ruling dated 9 November) and he was entitled to regard evidence about what went on in the newsroom as “an extremely important part of the picture” (paragraph 6 of the same ruling).

51. As to the third question, nobody doubts that the admission of anonymous evidence gives rise to a risk of prejudice to the claimant and other newspaper organisations for the reasons set out by Mr Caplan in his submissions dated 17 November. A disaffected journalist with a grudge may choose a time when the public mood is seen as very hostile towards tabloid papers to tell malicious stories, which, in a toxic atmosphere and without means of cross-examination, may pass for true when they are false. The specific allegations made by alleged victims have in a number of instances received specific rebuttals, but newspaper organisations would not be able to respond in the same way to anonymous allegations. They would not know at which newspaper they were aimed, but the effect in the minds of the public could be to tar them all with the same brush. These are legitimate concerns.
52. That is one side of the picture, but there are other relevant considerations. In addition to those which I have already mentioned (such as the legitimate interest of alleged victims in hearing what the journalists have to say), it should not be overlooked that although an allegation by an unnamed person against an unnamed paper cannot be rebutted in the same way as an allegation by a named person against a named paper, if journalists come forward to give a picture of the culture and practices in major news organisations which most journalists working in such organisations would simply not recognise as anywhere near to the truth, there is nothing to prevent other journalists who are prepared to be identified from coming forward and saying that they do not recognise the picture being presented.
53. Above all, it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced as is practically possible. If the Chairman is prohibited from admitting the evidence of journalists wanting to give evidence anonymously, there will be a gap in the Inquiry’s work, although the material (or similar material) is already in a real sense in the public domain. There is a point of detail about whether and at what stage Nick Davies’s book came to be received by the Inquiry, but that is a point of secondary importance. If the court ruled that the Chairman could not lawfully admit evidence of the kind under consideration, and his report reflected that fact, the result would be that the Inquiry would not have examined a raft of available material. There would be cause for concern that in those circumstances the Inquiry would have failed in a significant regard to achieve its terms of reference, and the credibility of its findings and recommendations would be lessened. It would be open to the criticism of not having heard the full story.
54. It has to be stressed that this is an inquiry; it is not the same as a criminal trial or a disciplinary proceeding. Mr Warby said that the newspaper organisations are “in the dock” and in a metaphorical sense that is true; but it is true because an inquiry has been set up to try to explore as fully as it can the culture and the practices of the newspaper industry in the light of things which have given rise to public concern.
55. In determining where fairness lies in a public inquiry, there is always a balance to be struck. I am not persuaded that there is in principle something wrong in allowing a witness to give evidence anonymously through fear of career blight, rather than fear

of something worse. Fear for a person's future livelihood can be a powerful gag. Nor am I persuaded that the Chairman acted unfairly and therefore erred in law in deciding that on balance he should admit such evidence, subject to his considering it of sufficient relevance and being satisfied that the journalist would not give it otherwise than anonymously.

56. The public interest in the Chairman being able to pursue his terms of reference as widely and deeply as he considers necessary is of the utmost importance. Although the names that have featured most prominently in newspaper coverage of the Inquiry have been largely the names of celebrities, newspaper magnates and politicians, any follower of the Inquiry will be aware that the Chairman has throughout been particularly concerned about the interests of ordinary members of the public, who do not have ready access to media lawyers. I say that in order to emphasise that the issues being investigated by the Inquiry affect the population as a whole. I would be very reluctant to place any fetter on the Chairman pursuing his terms of reference as widely and deeply as he considers necessary. I recognise that his ruling may cause damage to the claimant and other newspaper proprietors. However, such risk of damage will be mitigated to some extent (although not entirely, as I readily accept) by the fact that he will not use anonymous evidence to make specific findings against particular organisations. It is also important to recognise that the evidence in question will be part of a much wider tapestry and that it is open to the claimant and others to present balancing non-anonymous evidence.
57. I am not persuaded that the Chairman has reached an impermissible pre-judgment. He has reached a decision on a point of general principle, and he has kept open more detailed scrutiny of individual cases.

The Commissioner

58. The Commissioner is concerned about the possibility that the Chairman may receive anonymous material which is exculpatory of a possible future defendant in criminal proceedings. It was submitted on his behalf that the protocol issued by the Chairman should be amended to include the following paragraph:

“The Chairman will only grant protective measures to an applicant whose evidence is exculpatory of any individual or company in exceptional circumstances and only after having invited representations on the matter from the core participants.”

59. The Chairman declined to include express provision of that kind in the protocol. He said:

“Given the circumstances in which witnesses have sought anonymity, I consider the likelihood that statements prepared by such witnesses will indeed be exculpatory of any specific individual to be low but it is sufficient if I express myself mindful of the point and, in the interests of fairness, will approach a consideration of any material with that concern in mind”.

60. Judicial review is a means of correcting unlawfulness. It is not for the court to micromanage the conduct of the Inquiry by the Chairman, least of all in relation to hypothetical situations the likelihood of which appears to the Chairman to be remote. Such matters are properly matters for the Chairman.

Conclusion

61. I would refuse this application for judicial review. For the future, how the Chairman deals with individual anonymity requests in the context of his general ruling and protocol will be matters of detailed consideration for him, which should not foreseeably give rise to further requests for judicial interference.

Mr Justice Sweeney:

62. I agree.

Mrs Justice Sharp:

63. I also agree.