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Case No: HQ13X05086

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2013

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

PNM	**Claimant**
- and -	
(1) TIMES NEWSPAPERS LTD (2) ANDREW NORFOLK (3) NEWSQUEST (OXFORDSHIRE AND WILTSHIRE) LIMITED (4) BEN WILKINSON	**Defendants**

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Manuel Barca QC and Hannah Ready (instructed by **Wells Burcombe**) for the **Claimant**
Adam Wolanski (instructed by **Times Legal Department**) for the **1st & 3rd Defendants**

Hearing dates: 15 October 2013

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Judgment

Mr Justice Tugendhat :

1. On 15 October 2013 I heard the Claimant's application for an interim non-disclosure order (that is a privacy injunction). The circumstances are unusual and raise an important question on the principle of open justice. At the start of the hearing I made clear that I was sitting in open court. But in order to ensure that the purpose of the application for a non-disclosure order would not be defeated by any disclosure made during the course of the parties' submissions, I made this order pursuant to the Contempt of Court Act 1981 s.4(2) ("s.4(2)"):

> "IT IS ORDERED that in order to avoid substantial risk of prejudice to the administration of justice in pending or imminent proceedings the court orders that there should be no report published which refers to today's proceedings and which may identify or tend to identify by any means the Claimant/Applicant until further order
>
> The purpose of this order is to protect the fairness of the trial [of this High Court] action from publication of the material

> referred to, which, if published might have a substantially adverse effect on the fairness of the proceedings".

2. Also at the start of the hearing Mr Wolanski undertook on behalf of the Defendants that they would not publish any information of the kind sought to be protected by the order now applied for until I had given judgment on this application.

POSTPONEMENT OF REPORTING

3. The Contempt of Court Act 1981 s.4(2) reads:

> "[In legal proceedings held in public] 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."

4. The purpose of an order under s.4(2) is not to protect any rights of a person to prevent publication of information on the basis that it is private. The purpose of the order is to prevent prejudice to the administration of justice (which includes protection of the right to a fair trial) in any proceedings which are pending or imminent. Nevertheless, in the present case the orders made have had the incidental effect of postponing publication of information which the Claimant contends is also information in respect of which he has a reasonable expectation of privacy.

5. An order under s.4(2) cannot prohibit the publication indefinitely. It can only postpone publication for so long as it is necessary for the purpose of preventing an interference with the course of justice. It follows that there is no inconsistency in a person seeking the protection, simultaneously or sequentially, of s.4(2) and of a non-disclosure order in respect of the same information. However, counsel in this case, all of whom have great experience in this field, have no previous experience of an application for a non-disclosure order in respect of information which has been the subject of a s.4(2) order. The normal understanding is that when a s.4(2) expires (and they must all expire sooner or later) then the information will be publishable.

THE BACKGROUND TO THIS APPLICATION

6. On 22 March 2012 the Claimant was arrested on suspicion of having committed serious sexual offences upon children. A number of other persons suspected of related offences were arrested at or about the same time. On 24 March 2012 there was a hearing in the Magistrates Court of an application by the police concerning the Claimant's property. In the course of those proceedings an order was made under s.4(2). The effect of the Magistrates' order was to prohibit the disclosure of information which might identify the Claimant as the subject of pending proceedings "until such time as the [Claimant] is charged with a criminal offence…"

7. After March 2012 the police carried out investigations into the alleged offences. The Claimant was released on bail, and variations of his bail conditions were made from time to time. On 12 June 2012 there was a variation of the s.4(2) order made by the

Magistrates, the details of which are not material. The Claimant was not identified by any complainant in the course of identification procedures conducted by the police. He was not charged with any offence.

8. During this period a number of others who had been arrested in the course of the same police operation were charged. The case against those defendants proceeded to a trial in the Central Criminal Court ("the CCC").

9. In the course of that trial, on 25 January 2013 the Claimant made an application in the CCC for a new order under s.4(2). One of the complainants had referred to a man whom she alleged to have committed an offence, and the name by which she referred to that man was a first name which is the same as the Claimant's first name. It is a first name which is very common, that is, it is the same as the first name of very many men. The purpose of this application was for an order postponing publication of information which might identify the Claimant as the person referred to by the complainant. HHJ Rook QC ("the Judge") made an order under s.4(2). The case for the Claimant was that he is not the person to whom the complainant was referring.

10. In the course of that application the fact of the Claimant's arrest, and the very serious offences of which he was suspected, were published in open court. But publication of them was prohibited for the time being by the s.4(2) order that the Judge made. Although the Claimant had not been charged, the order was sought (and made) on the basis that, following his arrest, proceedings against him were nevertheless pending or imminent. He was still on bail.

11. In anticipation of the hearing of the application heard on 25 January, and by a letter of that same date, Mr Jason Collie, the Assistant Editor of the Oxford Mail had written to the court on behalf of the Third Defendant (the publishers of the Oxford Mail, to whom I shall refer as the Oxford Mail). He set out objections to the proposed order. In that letter Mr Collie stated that he already knew that the Claimant had been arrested at the same time as most of those who were by then defendants to the proceedings in the CCC. He also knew that some of those who had been arrested had been released without charge. The Claimant had not been released, but Mr Collie submitted that since the Claimant had not been charged, and was not likely to be tried in the near future, there was not the risk of prejudice to the administration of justice in imminent proceedings which a court must find proved before the court can make an order under s.4(2).

12. On the same date the Claimant's counsel submitted a skeleton argument in which she set out the background and chronology. She referred to his arrest, to the nature of the matters of which he was suspected, to the Prosecution's Opening Note prepared for the trial of those suspects who had been charged, and to the extensive publicity that the police operation had attracted. She submitted that the Claimant was a person in respect of whom proceedings were pending or imminent and there was a risk to the administration of justice sufficient to justify the making of an order under s.4(2).

13. The Judge made the order which the Claimant asked for, postponing publication until such time as a decision was made whether or not to charge the Claimant. He gave reasons for making the order which are before me in the form of a note quoted in a skeleton argument submitted to the Court on a later application, made on 10 May. On

25 January 2013 the Judge found that there was a live investigation and, after considering the requirements of the section, he held that such an order was necessary.

14. On 28 January Mr Collie wrote to the Judge inviting him to make a variation to the wording of the Order he had made on 25 January, and the Judge did vary his Order on 4 February. The details are immaterial to what I have to decide.

15. The trial of the defendants lasted for some four months ending on 14 May 2013. Seven Defendants were convicted of numerous very serious sexual offences including rape and conspiracy to rape children, trafficking and child prostitution. Two defendants were acquitted.

16. On 7 May Mr Wilkinson, a reporter for the Oxford Mail, wrote an e-mail to the Claimant. He said that, as the trial was drawing to a close, his paper was considering running a story on the Claimant's arrest.

17. On 8 May The Times made three applications to the CCC. One of these applications was that the s.4(2) order made on 4 February be lifted. Mr Wolanski submitted that there were by then no proceedings pending against the Claimant. He had not been charged. In support of his submission that no charges were imminent, Mr Wolanski referred to a piece of information which the Claimant submits was confidential and must have been leaked to The Times by the police. Mr Wolanski also referred to the principle of open justice, and to the policy considerations upon which that principle is based. In particular he submitted that open justice may well encourage possible witnesses to come forward, whether to assist the Prosecution or any defendant.

18. On 10 May Counsel for the Claimant submitted a skeleton argument asking the court to keep the s.4(2) order in force. She submitted that proceedings against the Claimant were pending or imminent. She questioned the source of the information relied on by Mr Wolanski which, as she submitted, must have been leaked by the police (the only other possible sources of the leak being the Claimant and his advisers and the CPS). She also explained why, in her submission, that information did not in any event support Mr Wolanski's submission that no charge was imminent.

19. The Prosecution also submitted a written note to the court. Counsel informed the court that the investigation into the Claimant was continuing, and that new information had come to light. Counsel submitted that publication of the identity of the Claimant at that stage could jeopardise both the future investigation and any future trial.

20. On the afternoon of 14 May, that is very shortly before verdicts were expected, Andrew Norfolk, the chief investigative reporter for The Times (which is published by the First Defendant, who I shall refer to as The Times) also wrote to the Claimant. He set out a number of categories of information which The Times intended to report. For the most part those categories of information could not be said to be in any sense private or confidential: they relate to a public function exercised by the Claimant, and to his business. However, Mr Norfolk also referred to two pieces of information (including the one already referred to) which the Claimant submits could only have come to his knowledge as a result of a breach of confidence by someone. That someone, he submits, who breached the confidence was most likely to be a police officer. In the case of the second piece of information the Claimant states that it had

not been made known to himself or to his advisers, so the possible sources of the leak were limited to the police and the CPS.

21. The Claimant submits that the information (whether private or confidential or not) would, if published, tend to identify the Claimant as a person suspected of having committed an offence against one of the complainants who had given evidence in the trial. He submits that this would be so even if the report did not actually name the Claimant. He submits that he would be identified by what is commonly called jigsaw identification.

22. On 15 May solicitors for the Claimant wrote to the Attorney-General asking him to exercise his power to apply to the court for an injunction to restrain what they submitted was a threatened contempt of court on the part of The Times. The Attorney-General did not apply to the court.

23. On the same day, 15 May, the parties applied to the CCC for guidance and clarification on what matters were capable of being reported in relation to the proceedings which were before that court. Mr Wolanski for The Times applied to lift the s.4(2) order which had been in force since 25 January (as varied on 4 February). He submitted that no proceedings were by that time pending or imminent, or, if they were, it was nevertheless unnecessary for the order to remain in force.

24. Counsel for the Claimant's skeleton argument set out a list of seven items of information, all of which relate to the Claimant, which she said had been "placed in the public domain in respect of evidence in this trial" (including in hearings preceding the trial itself). Counsel submitted that, if published, these pieces of information would lead to a jigsaw identification of the Claimant as the man whom one of the complainants had accused of abusing her. She submitted that any such identification would be incorrect, and that it was necessary to prevent the risk of incorrect identification of the Claimant, and so to avoid prejudice to the administration of justice in the proceedings against him which, she submitted, were still pending or imminent. Since the complainant's evidence had by then been believed by the jury, in so far as they had convicted seven of the defendants who had been on trial, publication of the information in question risked giving rise to "oath affirming", that is, making the evidence of that complainant appear more credible than would otherwise be the case in any future proceedings in which the Claimant might be the defendant.

25. Counsel for the Claimant went on in her skeleton argument to submit that the information the publication of which was postponed also engaged the Claimant's right to private life, and that on that separate ground the court should postpone publication, on the ground that to do so was necessary to prevent an unjustified interference with the Claimant's right to his private life. She also re-iterated her concerns as to the source of the two pieces of information which she submitted must have been leaked to the press by the police.

26. At this hearing the Prosecution opposed the application to discharge the s.4(2) order.

27. On 16 May the Judge declined to discharge the order, for reasons which he set out in a ruling. He held that it remained necessary to postpone publication of the information in question until a decision had been made whether to charge the Claimant or not. He

stated that, if no decision had been made by mid-September, it might be appropriate to review the position at the end of that month.

28. However, the Judge varied the terms of the s.4(2) order to reflect the submissions of Mr Wolanski. The order includes the name of the Claimant, as it had done in the form in which it was made on 25 January and 4 February. It reads:

> "In order to avoid substantial risk of prejudice to the administration of justice in pending or imminent proceedings the court orders that there should be no report of the evidence presented in these proceedings ([which he names]) which may identify or tend to identify, by any means, [the Claimant] as a person referred to in that evidence and this includes any reference to the name [the first name which is also the first name of the Claimant] mentioned in evidence in the trial
>
> Until further order
>
> The purpose of making the order is to protect the fairness of the trial from the publication of the material referred to, which, if published might have a substantially adverse effect on the fairness of the proceedings."

29. In his ruling (which was itself subject to the s.4(2) order) he referred to the evidence given at the trial which related to the man the complainant alleged had abused her (which could be understood, or misunderstood, as being a reference to the Claimant). The Judge also referred to the evidence of a police officer who gave the Claimant's full name for the purpose of informing the court that the Claimant had not been identified as the alleged abuser in the course of an identification procedure.

30. In his ruling the Judge stated that Mr Norfolk had proceeded with laudable care both by giving the Claimant and his lawyers notice in his e-mail of the material that The Times wished to publish, and by agreeing to an adjournment to enable the parties to reflect on their positions. The Judge referred to two media publications which had, for a short time, contained a piece of information the publication of which was postponed by the s.4(2) order, but he noted that that information had been removed from the websites in question. The variation he made to the form of the order on this occasion was to ensure that there could not be any doubt that it covered the piece of information in question. He also referred to other items of information and explained why he had concluded that it was necessary to postpone publication of them. In setting out his conclusion he stated that he accepted Mr Wolanski's submission that his conclusions as to the scope of the information subject to the s.4(2) order "represent a significant departure from the norm".

31. On 25 July 2013 the police notified the Claimant by letter that he was to be released without charge in respect of the offences for which he had been arrested, but that the case would be kept under review.

32. At the end of September, and in accordance with the indication given by the Judge on 16 May, the matter was brought back before him. The parties exchanged written submissions and the Judge heard oral argument on 25 September. The Claimant

sought the continuation of the s.4(2) order, submitting the proceedings remained pending or imminent. The Prosecution submitted the Claimant did not face any pending or imminent proceedings, and so that there was no basis in law for the s.4(2) order to be continued. Mr Wolanski for The Times and the Oxford Mail also submitted that the Claimant did not face any pending or imminent proceedings, and so there was no basis in law for the s.4(2) order to be continued.

33. The exchange of submissions lasted into October, and the Judge has not yet handed down his ruling. The s.4(2) order therefore still remains in force.

34. On 4 October, solicitors for the Claimant wrote to The Times and the Oxford Mail giving notice that he intended to apply to this court for a privacy injunction to prevent the Claimant being identified in relation to the police operations which had led to the convictions of the seven men in May.

35. On 8 October each of The Times and the Oxford Mail replied in similar terms. They stated that, when the s.4(2) order was discharged, they would wish to report the court proceedings concerning the imposition, and lifting, of that order relating to the Claimant. They stated that there would be a considerable public interest in such a report. That interest included: (a) the position of individuals about whom allegations are made during court proceedings, but who are not parties to those proceedings; (b) the extent of the protection from publicity given by law to those who are facing imminent or pending criminal proceedings; (c) the challenges of reporting criminal proceedings where such issues arise. They stated that they wished to identify the Claimant since this would make the piece considerably more engaging and meaningful for their readers. They added that any report would be fair, and would make clear that the Claimant had been released from police bail and was not facing imminent or pending proceedings.

36. On 14 October the Judge circulated to the parties the text of the ruling that he proposed to make (but which he has not yet made). It was in those circumstances that the application for the privacy injunction came before me.

THE ORDER SOUGHT ON THIS APPLICATION

37. There was at the hearing only a draft claim form (which the Claimant undertook to issue), and no particulars of claim. In the draft claim form the Claimant asks for an injunction restraining the disclosure of "private and/or confidential information referred to in the Confidential Schedule attached to the claim form". However, in his oral submissions Mr Barca made clear that the cause of action relied on is not based on the law of confidentiality, but on misuse of private information. Mr Barca submits that the rights relied on are the reputational rights of the Claimant, but also the much wider rights to private and family life recognised by Article 8.

38. The order sought on this application is substantially in the form of the Model Order set out in the Practice Guidance: Interim Non-Disclosure Orders issued by the Master of the Rolls in August 2011 ([2012] 1 WLR 1003) and set out in the White Book (2013) Vol 1 para B13-001.

39. The information disclosure of which is sought to be prohibited is information which:

> "is liable to or might identify the Claimant as a party to the proceedings [in the High Court] and/or as the subject of the Information [as defined in the Confidential Schedule 2] or which otherwise contains material (including but not limited to the profession, business, habitual residence, age or ethnicity of the Claimant) which is liable to, or might, lead to, the Claimant's identification in any such respect, provided that nothing this Order shall prevent the publication, disclosure or communication of any information which is contained in this Order other than in the Confidential Schedules or in the public judgments of the Court in this action given on … October 2013".

40. Confidential Schedule 2 to the draft order (which is the same as the Confidential Schedule to the claim form) contains four paragraphs. Para (1) has three sub-paragraphs and para (3) has nine sub-paragraphs. The three sub-paragraphs of para (1) are his arrest, release on bail and release without charge in so far as that information identifies him as a person arrested in connection with the investigation of offences against children.

41. Confidential Schedule 2 para (2) includes one of the pieces of information (referred to above) which the Claimant claims is confidential information leaked to the press by the police.

42. The nine sub-paragraphs of para (3) list categories of information very little, if any, of which would, by itself, be information in respect of which a person would have a reasonable expectation of privacy, and some of which is undoubtedly public knowledge. These categories of information are included in the Schedule not because they are themselves private, but because publication of them might lead to jigsaw identification.

43. Confidential Schedule 2 para (4) is information that it is the Claimant who is the subject of one of the s.4(2) orders in the criminal proceedings referred to above, and that he is the Claimant in the High Court proceedings.

THE APPLICABLE LAW

44. There has been little debate about the applicable law, save on one point.

45. It is common ground that, pursuant to the Human Rights Act 1998 s12(2) no injunction is to be granted to prohibit the publication of the information in question in this case unless the court is satisfied that the Claimant is likely to establish at any future trial that publication should not be allowed. The test of likelihood is that explained in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at para [22] (in most case the court must be satisfied that the Claimant is more likely than not to succeed at trial, but a lower threshold may be applied in some circumstances).

46. It is not in dispute that anonymity should not be granted to a party to proceedings except in accordance with the principles set out by the Master of the Rolls in *JIH v News Group Newspapers Limited* [2011] EWCA Civ 42; [2011] 1WLR 1645 para [21]-[22]:

"[21] In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the Judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows:

(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.

(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly

> available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.
>
> (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.
>
> [22] Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions."

47. The law on the cause of action for misuse of private information is also not in dispute. It can be taken from the summary given by the court in *K v News Group Newspapers* [2011] EWCA Civ 439; [2011] 1 WLR 1827 at para [10]:

> "(1) The first stage is to ascertain whether the applicant has a reasonable expectation of privacy so as to engage Article 8 [right to private and family life]; if not, the claim fails.
>
> (2) The question of whether or not there is a reasonable expectation of privacy in relation to the information:
>
> > "… is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher": see *Murray v Express Newspapers* [2009] Ch 481 at [36].
>
> The test established in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 is to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive.
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> (3) The protection may be lost if the information is in the public domain. In this regard there is, per *Browne v Associated Newspapers Ltd* [2008] QB 103 at [61],

> "…potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper."

Whether what may start as information which is private has become information known to the public at large is a matter of fact and degree for determination in each case depending on its specific circumstances.

(4) If Article 8 is engaged then the second stage of the inquiry is to conduct "the ultimate balancing test" which has the four features identified by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at [17]:

> "First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each." (It should be noted that the emphasis was added by Lord Steyn.)

(5) As *Von Hannover v Germany* (2005) 40 EHRR 1 makes clear at [76]:

> "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."'

THE EVIDENCE BEFORE THE COURT ON THIS APPLICATION

48. The Claimant has made two witness statements. Both contain detailed information which the Claimant seeks to keep confidential by a provision in the draft order.

49. He describes his personal circumstances, his family relationships and his business. Over two pages of the first statement are devoted to an account of his arrest and of the feelings of devastation that that engendered in him, together with the effect upon his health. He exhibits a medical report. It is dated as long ago as 7 August 2012, but he states that the situation it describes prevails to this day. He gives details of how he came to learn of the press interest in his case, and some of the background matters which are recounted above. He expresses his strong feelings about what he believes to be the leaks of the particular pieces of information referred to above, that is the leaks for which he suspects the police to be responsible. At para 40 of his first statement he turns to describe the wider family situation. He identifies a number of children, both his own and those of close family members, and describes their individual sensitivities. At para 45 he turns to describe incidents amounting to abuse or

harassment from members of the public which he has suffered. He has been accused of child abuse. At para 46 he turns to describe his position in society and at work, and identifies a number of people who are indirectly affected by any publication seriously adverse to himself.

50. In his second witness statement the Claimant describes how, since the time of his arrest, his business relationship with a particular organisation of great importance to him has been profoundly affected, with serious personal and financial consequences. He makes clear that the representatives of that organisation had since that time known that he had been linked to the police investigation into child abuse. He does not suggest that this knowledge resulted from any leak or other impropriety on the part of the police. As I understand it, he accepts that that knowledge was likely to have been acquired as a result of the police performing their duties in a proper manner. He exhibits reports from the Oxford Mail which include quotations from the police in which they say that they are continuing to investigate allegations of child abuse. One of these contains information about himself which (so he says), while not itself private, taken with other information would be likely to lead to a jigsaw identification of himself as an alleged abuser.

51. The Claimant clearly has grave fears about the nature of any press reporting and of the consequences. He fears he will be regarded as guilty by the public and that he and his family, including the children, will suffer gravely, and be the subject of behaviour which would be gravely distressing and damaging to them.

52. There is also a witness statement by the Claimant's solicitor from which some of the background information set out above is derived.

53. For The Times there is a witness statement by Michael Smith, Head of News. He enlarges upon what had been written in the letter of 8 October. He explains the extensive coverage which his paper has given to the police investigation in question and other police investigations of a similar nature. He explains how in the past such coverage has led to actions on the part of the Government, and to awards which his journalist, Mr Norfolk, has received for that work. Thus the interest of The Times in publishing the reports it wishes to publish is not confined to the legal proceedings in question but relates to the wider legal issues arising from them. Representatives of The Times were in court, in particular to hear the submissions in relation to the s.4(2) orders made by the Judge. So they know what was said in open court.

54. Mr Smith states that there is a real public interest in exploring the circumstances in which reporting restrictions are imposed because judicial proceedings are pending or imminent. He refers to the role of the press in a democratic society (as the eyes and ears of the public) as has frequently been recognised by judges eg in *McCarton Turkington Breen (a firm) v Times Newspapers Ltd* [2001] 2 AC 277 at p290.

55. Mr Smith states that The Times does not wish to report anything concerning the Claimant which has not been said in open court. But it does desire to report the proceedings surrounding the imposition, maintenance and discharge of the s.4(2) order made in the CCC. They wish to do this because the order raises important issues about the Article 10 rights (freedom of expression) of the press to report matters of public interest. He refers to one of the general principles underlying the open justice principle, namely that such reports may encourage other witnesses to come forward,

including those who might be able to rebut allegations against someone who has been unfairly identified as an alleged offender (see eg *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966).

56. Mr Smith re-iterates the point, which was endorsed by the Supreme Court in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697 at para [63], that it is important for the press to be able to identify in their reports the names of individuals who are the subject of the reports. He re-iterates what was said in the letter of 8 October as to the report being a fair one. Finally, in relation to the allegations of breach of confidence by the police, he denies that Mr Norfolk has been guilty of any impropriety.

57. For the Oxford Mail Mr Collie and Mr Wilkinson have made statements. Both of them are journalists. Mr Collie states that the police investigation is of intense interest to his readers. He describes the history of the Oxford Mail in challenging reporting restrictions imposed, or sought to be imposed, by court orders. In the present case the Oxford Mail published a report of the proceedings in the Magistrates Court on 24 March 2012. The report contained very little information, because Mr Wilkinson, the reporter, had been asked to leave the court and the s.4(2) order had been made by the Magistrates. The Oxford Mail had in fact obtained relevant material from other sources (that is information which was not the subject of the s.4(2) order). It could have published that information, but chose not to do so.

58. Mr Collie refers to the public interest in terms similar to those of Mr Smith, and to the public interest in the situation in which the Claimant finds himself, where his name has been mentioned in criminal proceedings to which he is not a party.

59. Mr Wilkinson describes the circumstances of his report of the proceedings before the Magistrates on 24 March 2012. He also explains how (as stated above) the Oxford Mail published the first name which a complainant witness had attributed to her abuser, but which was subsequently removed from the online edition. The complainant had given that evidence on 16 January, which was before the Judge had made the first s.4(2) order in the trial. Although he had said in the e-mail of 7 May that the Oxford Mail was intending to publish a report, no such report had in fact been published at that time. In June and July he had published reports about the Claimant which did not name him and which were based on information obtained from the police (he is not referring there to leaks).

SUBMISSIONS OF THE PARTIES

60. Mr Barca submits that publication of information which suggests that a person is guilty or suspected of a serious sexual offence (including by the jigsaw effect) will inevitably engage that person's right to private life: *In re BBC* [2009] UKHL 34; [2010] AC 145 para [22]. He submits that information that a person has been arrested on suspicion of such an offence will for that reason engage that person's right to private life and amount to a serious interference with that right.

61. He submits that having carried out the intense scrutiny that it is required to carry out, the court cannot conclude that there is sufficient general, public interest in publishing a report of the proceedings which identifies the Claimant and the normally reportable

details to justify any resulting curtailment of the right of the Claimant and of the children in question to respect for their private and family life.

62. Further, Mr Barca submits that there is one respect in which *In re S* is no longer to be regarded as good law, namely in what is said in that case about children. He cites from Ward LJ's judgment in *K v News Group* at paras [18]-[20]:

> "[18] …. I cannot agree that the harmful effect on the children cannot tip the balance where the adverse publicity arises because of the way the children's father has behaved. The rights of children are not confined to their Article 8 rights. In *Neulinger v Switzerland* (2010) 28 EHRC 706 the Strasbourg court observed that:
>
> > "131. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken … 'of any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights. …
> >
> > 135. … there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount."
>
> Support for that proposition can be gathered from several international human rights instruments, not least from the second principle of the United Nations Declaration of the Rights of the Child 1959, from article 3(1) of the Convention of the Rights of the Child 1989 (UNCRC) and from article 24 of the European Union's Charter of Fundamental Rights. For example, article 3(1) of the UNCRC provides:
>
> > "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration…."
> >
> > [20] How then does this approach square with the way Lord Steyn advised in *In Re S* that the ultimate balance should be struck, see [10(4)] above. He was confining himself to articles 8 and 10 and not ranging more widely to take note of the other Convention rights of children. He expressed his opinion long before *Neulinger* called for a re-appraisal of the position. In any event, the emphasis he added makes it clear that he was concerned strictly with the balance between article 10 and article 8 "*as such*", i.e. where the only rights in balance were those conferred by articles 8 and 10. If, as he requires, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary, then the additional rights of children are to be

> placed in the scale. The question then is whether the force of the article 10 considerations outweigh them given what I have said in paragraph 19."

63. Mr Barca notes that there is no evidence that the police have suggested that it would assist any investigation if the Claimant were to be publicly identified as one of the men whom they had arrested. Further he submits that any publication of some of the items of information which were mentioned in the e-mails of 7 and 14 May, would not be a report of the trial.

64. Mr Wolanski submits the balancing exercise must be conducted in accordance with *Re S*, which remains binding on this court, and where the evidence relating to the children included professional evidence (unlike the evidence in the present case): see para [10]. He relied in particular on the following passages:

> "29. The importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms. In *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966, Lord Woolf MR explained (at 977):
>
> > "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely . . . Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."
>
> These are valuable observations. It is, however, still necessary to assess the importance of unrestricted reporting in specifics relating to this case.
>
> 30. Dealing with the relative importance of the freedom of the press to report the proceedings in a criminal trial Hale LJ drew a distinction. She observed (at para 56):
>
> > "The court must consider what restriction, if any, is needed to meet the legitimate aim of protecting the rights of CS. If prohibiting publication of the family name and photographs

> is needed, the court must consider how great an impact that will in fact have upon the freedom protected by Article 10. It is relevant here that restrictions on the identification of defendants before conviction are by no means unprecedented. The situation may well change if and when the mother is convicted. There is a much greater public interest in knowing the names of persons convicted of serious crime than of those who are merely suspected or charged. These considerations are also relevant to the extent of the interference with CS's rights."

I cannot accept these observations without substantial qualification. A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.

31. For these reasons I would, therefore, attribute greater importance to the freedom of the press to report the progress of a criminal trial without any restraint than Hale LJ did.

XI. Consequences of the grant of the proposed injunction

32. There are a number of specific consequences of the grant of an injunction as asked for in this case to be considered. First, while counsel for the child wanted to confine a ruling to the grant of an injunction restraining publication *to protect a child*, that will not do. The jurisdiction under the ECHR could equally be invoked by an adult non-party faced with possible damaging publicity as a result of a trial of a parent, child or spouse. Adult non-parties to a criminal trial must therefore be added to the prospective pool of applicants who could apply for such injunctions. This would confront newspapers with an ever wider spectrum of potentially costly proceedings and would seriously inhibit the freedom of the press to report criminal trials.

33. Secondly, if such an injunction were to be granted in this case, it cannot be assumed that relief will only be sought in future in respect of the name of a defendant and a photograph of the defendant and the victim. It is easy to visualise circumstances in which attempts will be made to enjoin publicity of, for example, the gruesome circumstances of a crime. The process of piling exception upon exception to the

> principle of open justice would be encouraged and would gain in momentum.
>
> 34. Thirdly, it is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.
>
> 35. Fourthly, it is true that newspapers can always contest an application for an injunction. Even for national newspapers that is, however, a costly matter which may involve proceedings at different judicial levels. Moreover, time constraints of an impending trial may not always permit such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting.
>
> 36. Fifthly, it is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85% of all British adults read a regional or local newspaper compared to 70% who read a national newspaper. Very often a sensational or serious criminal trial will be of great interest in the community where it took place. A regional or local newspaper is likely to give prominence to it. That happens every day up and down the country. For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now under consideration it is likely that they will often be silenced. Prudently, the Romford Recorder, which has some 116,000 readers a week, chose not to contest these proceedings. The impact of such a new development on the regional and local press in the United Kingdom strongly militates against its adoption. If permitted, it would seriously impoverish public discussion of criminal justice."

65. Mr Wolanski relied on a number of passages in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, in particular

> "66. Importantly, a more open attitude would be consistent with the true view that freezing orders are merely indicative of suspicions about matters which the prosecuting authorities accept they cannot prove in a court of law. The identities of

> persons charged with offences are published, even though their trial may be many months off. In allowing this, the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court. But, by concealing the identities of the individuals who are subject to freezing orders, the courts are actually helping to foster an impression that the mere making of the orders justifies sinister conclusions about these individuals. That is particularly unfortunate when, as was emphasised on the appellants' behalf, they are unlikely to have any opportunity to challenge the alleged factual basis for making the orders."

66. Mr Wolanski submitted that matters have moved on since the e-mails were sent to the Claimant in May. The Defendants have now made clear that what they are intending to publish, if not prohibited from doing so, would be fair and accurate, and would include the facts that he was no longer under arrest and was not now facing imminent or pending proceedings. The content of the e-mails of 7 and 14 May does not represent what the Defendants now intend to publish (if not prohibited from doing so).

67. I record that, although some of the information that is the subject of this application has appeared in the media at different times (as set out above), the Defendants do not advance a case that the information is in the public domain.

68. Mr Wolanski does not dispute that, at a time before these matters were mentioned at the trial, the information that the Claimant had been arrested (and other information) was private information which engaged the Claimant's rights under Art 8. What the Defendants submit is that once the information had been mentioned in open court, as it was, the Claimant no longer enjoyed a reasonable expectation of privacy, or, whatever expectation he might have by then have enjoyed was to be overridden when balanced against the principle of open justice recognised in Article 6 (a public hearing) and Article 8(2) (the rights and freedoms of others).

69. Mr Wolanski submits that if an injunction were to be granted restraining the Defendants from identifying the Claimant, it would bind only the Defendants. No other parties have been joined or notified of these proceedings. And he notes that the difficulties that the Claimant describes in his second witness statement are difficulties that started very shortly after his arrest, and at a time when there was a s.4(2) order in force postponing publication of his identity.

70. Mr Barca's response to this point is that it is impractical for a claimant to join or notify all possible publishers, and these Defendants are the only ones who have demonstrated an intention to publish the information in question.

71. Mr Wolanski does not ask me to reject the evidence of the Claimant, but he notes that the medical evidence relating to himself is over a year old, and that there is no evidence relating to any children from any independent or professionally qualified witness as to any particular adverse effects that such children might suffer.

72. Mr Barca further submits that it would be anomalous if the Claimant were to find himself in a worse position than if he had been charged. If he had been charged and brought to trial he would have sought to clear his name by seeking an acquittal. Since he was not a defendant, that course is not open to him. By contrast, where it is a defendant whose information is subject to a s.4(2) order, there is generally no need for any further restraint on publication at the end of the trial. At the end of the trial a defendant will usually have been acquitted or convicted, and the verdict of the jury gives him all the legal protection that is available to him.

DISCUSSION

73. It is regrettable that there is no draft particulars of claim in this action. In a case as unusual as this one it would have been helpful to have seen how the claim is formulated: *Caterpillar Logistics Services (UK) Ltd v de Crean* [2012] EWCA Civ 156; [2012] 3 All ER 129 para [72]. The Supreme Court has again re-iterated in *Osborn v The Parole Board* [2013] UKSC 61 at para [55]:

> "The guarantees set out in the substantive articles of the Convention, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial body of much more specific domestic law…. For example, the guarantee of a fair trial, under article 6, is fulfilled primarily through detailed rules and principles to be found in several areas of domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid. The guarantee of a right to respect for private and family life, under article 8, is fulfilled primarily through rules and principles found in such areas of domestic law as the law of tort, family law and constitutional law."

74. The guarantee of the reputational rights recognised by article 8 is mainly fulfilled in the English law of libel. Other torts which fulfil the guarantee of wider rights recognised by article 8 are harassment and breach of confidence and misuse of private information. Mr Barca has not relied on the law of harassment, confidentiality or libel. The case is based on misuse of private information.

75. I accept the evidence of the Claimant (Mr Wolanski did not invite me to do otherwise) in so far as he describes the impact of the events since March 2012 upon himself and his family, and his fears as to what is likely to happen if the prohibition on reporting expires. I also accept that there will probably be some members of the public who will equate suspicion with guilt, and that there is some risk that he and other family members (including children) may be subject to very unpleasant behaviour, or even harassment. That has happened in the past to people accused of child abuse, regardless of whether the accusation has any foundation in fact.

76. I accept Mr Barca's submission that the Claimant's position is more difficult than it would have been if he had been a defendant. The trial process does not assist him. Nor, I would add, is there any other obvious means by which he might clear his name.

A report of the proceedings, and even a report of his arrest, might (if appropriately prepared) be protected by one of the public interest defences available to a libel defendant.

77. However, I also approach the case on the footing set out in para 65 above, namely that members of the public generally will understand the difference between suspicion and guilt, and will know that a person is to be presumed innocent unless and until proved guilty.

78. I have no doubt that there is the highest public interest in the allegations of child abuse that have been, and remain, the subject of police investigations. There are no proceedings which are now pending or imminent, and I do not have to consider whether the Claimant's right to a fair trial (should any proceedings be brought in future) is engaged in the present case so as to require a reporting restriction. If it were, the Judge would continue the s.4(2) order. What is at issue in the present case is his right to his (and his family's) private and family life as guaranteed by English domestic law.

79. I take note of the difficulties that the Claimant has already encountered in his business and with members of the public, even though there has been a reporting restriction in force since two days after his arrest. Newspaper reports are not the only means by which members of the public receive information. If the court were to prohibit the newspaper reports intended to be made by the Defendants, that would not prevent those who know the Claimant personally or by name from spreading what information they know (whether accurately or inaccurately). The order sought would, in my judgment, be of limited benefit to the Claimant and his family, to the extent that it was a benefit at all. And there is a real risk, as noted in para 65 above that the continuation of the prohibition would tend to justify sinister conclusions about the Claimant.

80. In my judgment I am bound by the decision in *Re S*. I also note that *K v News Group* did not concern reporting of a criminal trial. In any event, the evidence in relation to the children referred to by the Claimant is not such that the balancing exercise would produce a different outcome even if I were to adopt the approach of Ward LJ. The Claimant is an adult non-party to the criminal proceedings, and his position was specifically addressed in *Re S* at para [32].

81. It is not necessary, in order for a newspaper to rely on the principle that reporting may encourage witnesses to come forward, for there to be any evidence in support of such likelihood. The fact that there is no evidence from the police to that effect, and the fact they have, before September, supported the continuation of the s.4(2) order, does not affect the force of that point. In my judgment it is an important point, particularly in a case of alleged sexual abuse.

82. While I understand the Claimant's suspicions that the two items of information mentioned above were leaked by the police, I do not find that these points add anything to the issues that I have to decide. There is now no threat by the Defendants to publish either of these pieces of information otherwise than as a report of proceedings in open court. I can make no findings of fact on these points on contested written evidence. There is nothing before me to call in question the denials by the Defendants that their journalists have been engaged in any improper behaviour.

83. The Claimant has failed to satisfy me that he is likely to succeed at any future trial in the claims he makes in this action. On the contrary, I think it unlikely that he could succeed. In my judgment there is sufficient general, public interest in publishing a report of the proceedings which identifies the Claimant and the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life. In my judgment the reports sought to be restrained by the Claimant would be likely to be reports which make an important contribution to the knowledge of the public and to debates about the administration of justice. Such reports may well lead to witnesses coming forward, including those who might rebut any allegations concerning the Claimant. And it might also be significant if no witness came forward following any publication.

84. This judgment is drafted with a view to it being publishable in accordance with *JIH* principle (9) in any eventuality. It is for that reason that it contains less specific information than is normally given in judgments of the court.

CONCLUSION

85. For these reasons the application for a non-disclosure order is dismissed. I shall hear argument as to the form of the order, and in particular as to any provision relating to the evidence put before the court.

86. Notwithstanding that conclusion, the heading of this judgment will remain anonymised until the Claimant’s application for permission to appeal has been determined, and, if permission is granted, until further order of the Court of Appeal. If the application for permission is not pursued, or is dismissed, the name of the Claimant will be substituted for the letters PNM.