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Case No: CO/10426/2005

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2006

Before :

MR JUSTICE DAVIS

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Between :

Michael Stone	**Claimant**
- and -	
(1) South East Coast Strategic Health Authority (formerly the Kent & Medway Strategic Health Authority) **(2) Kent County Council** **(3) Kent Probation Board**	**Defendants**
	Interested Parties
(1) Secretary of State for Health **(2) Josephine Russell**	

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Mr R Clayton QC and Mr G Nardell (instructed by **Peter Edwards Law**) for the **Claimant**
Mr P Havers QC and Mr B Collins (instructed by **Capsticks**) for the **Defendant**
Miss E Laing (instructed by **Department of Health Solicitors**) for the **Interested Party (1)**
Mr J Badenoch QC (instructed by **Harman Solicitors**) for the **Interested Party (2)**

Hearing dates: 19th – 22nd June 2006

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Approved Judgment

Davis J. :

Introduction

1. On the 9th July 1996 Lin Russell and her daughter Megan, aged 6, were the subject of a vicious attack while walking with their dog in a country lane in Kent. They were savagely beaten about the head with a blunt instrument; both died from their injuries. Megan's sister, Josie, then aged 9, was also with them at the time. She too was viciously attacked: but in the event she somehow survived her injuries. The sheer guts with which she, and her father Dr Shaun Russell, have thereafter confronted the horrendous events of that day have been the subject of universal admiration.

2. In 1997 Michael Stone was arrested and charged with two counts of murder (of Lin and Megan Russell) and one of attempted murder (of Josie Russell). He was convicted after a trial on all counts. On the 8th February 2001 his appeal against conviction was allowed. A retrial was ordered. At that retrial, Mr Stone was again convicted. He was sentenced to life imprisonment. His appeal against that conviction was dismissed on 19th January 2005.

3. Following the conviction of Mr Stone at his first trial, the three Defendants commissioned an independent Inquiry into the care, treatment and supervision of Mr Stone in the years prior to 1996. The members of the Inquiry Panel were Mr Robert Francis QC, Leading Counsel with extensive experience of medical law and litigation and inquiries; Dr James Higgins, Consultant Forensic Psychiatrist; Mr Emlyn Cassam, retired Director of Norfolk Social Services; and (until his resignation for professional reasons in 2004) Professor Ivor Gaber, then Professor of Broadcast Journalism at Goldsmith's College, London.

4. The report of the Inquiry was substantially completed by the end of 2000. Mr Stone cooperated with the Inquiry by giving it full access to his medical and probation and other records, although not giving evidence himself to the Panel. The intention of the Panel was that its report be published: but this inevitably had to await the outcome of the criminal proceedings and appeal process.

5. During the course of 2005 Mr Stone, through his lawyers, indicated that he objected to the report in its full form being published to the world at large. He accepted and accepts that the full version of the report may be provided to health professionals and relevant professional bodies and similar agencies (who would be under a duty of confidentiality with regard to its contents). He also accepted and accepts that *some* version of the report properly could, indeed should, be placed before the public. But it is asserted that the extensive citations from his private medical and other such notes and disclosure of psychiatric and other such information in the report would, if publicised, be a disproportionate and unlawful interference with his private life, contrary to Article 8 of the European Convention on Human Rights. It is also asserted that publication would breach the provisions of the Data Protection Act 1998.

6. The Defendants rejected these arguments. On the 15th November 2005 they formally resolved to publish the report in its complete form. By Claim Form issued on the 19th December 2005 Mr Stone challenged that decision, seeking declaratory relief and a quashing order. On 1st February 2006 Collins J. granted permission. By consent the report has in the interim not been published.

7. During the course of the proceedings, the Secretary of State for Health and Josie Russell were joined to the proceedings as interested parties. At the hearing before me Mr Stone was represented by Mr Clayton QC and Mr Nardell; the Defendants by Mr Havers QC and Mr Collins; the Secretary of State by Miss Laing; and Josie Russell by Mr Badenoch QC.

8. It may be noted that Mr Stone continues to assert his innocence. However, so far as this Court is concerned it must proceed and does proceed on the footing that he committed these crimes, as the jury have decided. Further, the report of the Inquiry is in no way directed at the issue of guilt or innocence of Mr Stone, which of course formed no part of its terms of reference: although the reality is that the report itself is now to be read in the context of Mr Stone having been found guilty of these crimes.

9. It is also relevant to note at the outset that the horrific murders, and the lengthy trial process relating to Mr Stone, have attracted huge publicity and extensive media coverage, which has continued to the present day. Even the fact of these judicial review proceedings has itself received some press coverage and representatives of the press were in court at stages during the hearing before me: which was conducted in public albeit with certain agreed reporting restrictions.

The Background to the Inquiry

10. There is no dispute that the three Defendants were empowered to commission the Inquiry: see, in particular, s.2 (b) of the National Health Service Act 1977 (as amended); paragraph 3(1) of the National Health Service etc. Regulations 2002 (SI 2002 No. 2375). In that regard also, guidance on the discharge of mentally disordered people and their continuing care in the community is proffered to Health Trusts and other such bodies in guidelines contained in HSG(94)27: whether such stated guidance is permissive or directory is not now of importance for present purposes. Paragraphs 34 to 36 of such guidelines relate specifically to the holding of independent inquiries (new, and more detailed, guidance was published in 2005). I was told that a significant number of such inquiries have taken place over the last few years; I was also told that, so far as is known, none has attracted the form of legal complaint to publication that this inquiry report now has.

11. The terms of reference of the Inquiry were:

> "Fact-finding stage
>
> (1) To report on what care, supervision and services were provided by the Health Service, Social Services and the Probation Service in respect of Michael Stone and what professional judgements were made about his condition, its 'treatability', and his needs in the period 1992-1996 and, in so far as it appears relevant to the inquiry, before that period.
>
> (2) To report on what information concerning Michael Stone was shared between Health Services, Social Services and the Probation Service and other statutory and non-statutory agencies.

Evaluation stage

(3) To report on whether the care, supervision and services provided or planned for by the agencies individually and in liaison with each other were suitable and appropriate in the context of Michael Stone's history and needs. With particular reference to the period 1992-1996, to report the extent to which any professional judgement made was in the interests of the public, Michael Stone and staff of the agencies, and on the adequacy of the communications between agencies.

(4) To report on whether the care, supervision and services provided met statutory obligations, national guidance and local policies and practices.

Policy stage

(5) To report as the inquiry sees fit on the adequacy of mental health law, national guidance and local policies and practices in the context of the care, supervision and services provided in respect of Michael Stone (including any amendment or reform that may be proposed or made before the inquiry is completed).

(6) To identify and report on any other matters of relevance that may arise from the above.

(7) If the inquiry sees fit, to issue an interim report in connection with any of the items 1-4 before reporting on items 5 and 6."

It should be added that, for reasons it is not necessary to set out, it ultimately proved unnecessary for the Panel to report under paragraph (5) of the Policy Stage.

12. In its current complete form the report gives every sign of being a most detailed and thorough document. It extends, with Appendices, to some 384 pages. It also contains extensive quotations from school records, probation records, medical records, prison reports and other such records relating to Mr Stone.

13. Although in point of detail the report contains numerous and extensive citations from private medical information relating to Mr Stone it cannot be said that the broad subject matter of these references is not already in the public domain. On the contrary a very great deal of information about Mr Stone's medical and psychiatric and social history has over the years been widely publicised – in fact the means by which some of that information got into the public domain has, I gather, been the subject of complaint by Mr Stone, it being alleged that underhand means must on occasion have been deployed.

14. Much of that information, as obtained from newspaper cuttings up to 30th October 1998, is set out in a document prepared by Professor Gaber for the purposes of the

Inquiry called "the Stone Chronology". Much detail is given about Mr Stone's difficult and unhappy childhood problems and difficulties at school: prompting one newspaper to say "one theory for the motiveless attack on the Russells was that the killer was angered by the sight of a happy family." There was publicised reference to Mr Stone experiencing use of weapons such as hammers and cleavers in incidents of family violence. Reference is made to him dabbling in drugs and crime while still a boy and showing strong signs of deep-seated problems. It was reported that Mr Stone had allegedly told a psychiatrist that he had been responsible for the robbery and murder of a man when he was 16. It was reported that at the age of 18 he was "diagnosed as having a severe personality disorder with obsessive and compulsive habits." Details of his previous convictions were outlined, including one said to involve a hammer attack; others were publicised as involving knives and firearms. It was reported that between 1987 and 1992 he underwent spells of assessment at Broadmoor and Rampton maximum security hospitals, but "even there the long term danger was never confronted." It was reported that in 1994 he was moved from one hospital to another as doctors "attempted to establish whether he was mad or bad or both." Reference is made to a psychiatric conclusion, by an independent psychiatrist, that he had a personality disorder and was suffering from paranoid psychosis. Extensive reference is made to drug addiction. One newspaper reported that medical notes showed that he "harboured fantasies about torturing and killing. For months his mental state had been deteriorating...[his psychiatric nurse] told police, in evidence never put before the jury, that five days before the murders Stone had said he felt he was going to kill people…". There were numerous adverse comments publicised about Mr Stone, apparently gathered from people who had known him. It also reported that he had been classified as "too dangerous" for any of the available beds in Kent's institutions. There was also comment about his seeming mental state after the murders had been committed. Overall, as Mr Havers observed, the position is that it has for a long time now been in the public domain that Mr Stone has a psychiatric history and has suffered from mental illness, and an antisocial personality disorder with obsessive traits, has had problems with drug addiction, has been diagnosed as developing signs of paranoid schizophrenia or paranoid psychosis and has harboured fantasies about torture and killing.

15. A selection of newspaper cuttings was put in evidence before me. Over 1600 articles relating to Mr Stone are estimated to have been published between 1996 and 2006. By no means are all of such articles sensationalistic or unreflective. Many in effect ask the question "Why was [this man] allowed to roam free?" By way of example on the 24th October 1998, the Daily Mail published an article saying among other things: "Stone's story is a damning indictment of the mental health care available in this country". It referred to "a man who should have been locked away in a secure unit years ago for the safety of society…and, it must be said, for his own protection…. Inevitably, the West Kent Health Authority now faces the most searching examination of its practices and procedures. There must be questions too about the apparent breakdown of communications between the probation service and health officials. And about the way doctors handled his case… The lessons have to be learned".

16. By way of further example, on 25th October 1998 the Independent on Sunday expressed concerns that Mr Stone may have been diagnosed as schizophrenic, but "we have to wait for the independent inquiry to report before we know the full and correct version of the facts… The failure to treat Michael Stone has consequences for all of

us… there is a systematic refusal, often dangerous, to engage with people like him because they are too difficult and too violent, which is why they end up warehoused in prisons where treatment is practically non-existent." There are many other articles of similar tenor.

17. The Panel itself recommended by way of Addendum that its report should be published and should be published in full. It is also a point of comment that the Panel thought that publication might, in addition, help dispel some inaccuracies which had emerged in the media publicity.

18. The reasons given for the Panel for making such recommendations are worth setting out extensively:

> "7.6 The panel remained of the opinion that it would be in the public interest for the full account of Mr Stone's involvement with the relevant services to be in the public domain. The public interest factors identified by the Panel as justifying publication in this case are:
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> - At the time of the homicide Mr Stone was under the care of various agencies which had duties to monitor and assist him in order to reduce, so far as was practicable, the risk he may have presented to the public;
>
> - There is legitimate public concern that the arrangements for his treatment, care and supervision and the protection of the public were inadequate;
>
> - The commissioning agencies have already given an account in public of the patient's condition and an assertion that the treatment, care and supervision provided was appropriate; where an inquiry is set up to investigate those issues, the public might be thought to have a right to know the outcome;
>
> - If there has been failure in any arrangements for his treatment, care and supervision, the public have a right to know about it and about what steps need to be taken to prevent such a failure occurring in the future;
>
> - If there are lessons to be learned from what happened which might reduce the risk to the public in other cases, these should be made known to the wider professional community and the public;

- Where the events surrounding the care and supervision of a patient or client convicted of homicide had been the subject of widespread and legitimate debate and criticism, the public have a right to be provided with an accurate version of the facts;

- The press have made many assertions which the Panel have now found to be unsubstantiated. If the inquiry report is not published these matters will remain incorrectly reported.

- Mr Stone's case continues to be linked in the media to the proposed reforms of the Mental Health Act 1983 and the new legislative proposals in respect of dangerous severely personality disordered people. This discourse regularly refers to matters which do not accord with the version of events as found by the inquiry. If the Panel's findings are not made public, the public will not have the opportunity to make an informed judgment of the standard of Mr Stone's treatment, care and supervision, and the true relevance of his case to wider policy issues.

- Much of Mr Stone's background, mental and social history is already in the public domain, for better or for worse. In so far as that has been confirmed by the commissioning agencies in public statements, and in so far as reports concerning these matters are inaccurate, it would be unfair to him if the record were not put straight. Mr Stone has, after taking legal advice, consented to the disclosure of confidential information for the purposes of this inquiry. Such consent was given in the knowledge that the report of the inquiry was likely to be made public.

- Various agencies and their employees have been subject of criticism, much of it uninformed. Fairness to those who have been criticised in public would indicate that, if the Panel find the criticism to be ill-founded, that should be made known; in the case of those where criticism is made by the Panel, there is a public interest in knowing about the criticism, the reasons for it, and what, if any lessons can

> be learnt in relation to the treatment, care and supervision of certain types of patient or client.
>
> 7.7 Further, the Panel is of the view that publication of the Report is an essential element of the maintenance of public confidence in the system for the supervision and treatment of mentally disordered offenders. It is important that the actions of the relevant services are seen to be open to scrutiny and that the public are informed of the outcomes of such inquiries and reassured that relevant matters are identified and corrective action taken if and where deemed necessary.
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> . . . .
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> 7.11 The Panel's view is that any "short anonymised briefing" which the Commissioning Agencies might prepare and publish is unlikely adequately to reflect the complexity of the case and the rationale for the findings of this inquiry. If such a briefing were to mention any of the recommendations contained in the report it would give an unbalanced view of the Panel's findings. Recommendations reflect proposals to improve services and therefore may imply criticism. To publish only recommendations would deny the public the knowledge of the good practices of the agencies and staff which are noted in the report.
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> . . . .
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> 7.13 It seems to the Panel that the strength of their report is in the factual detail which allows readers to form their own conclusions based upon the information."

19. The Defendants, whose actual decision to publish it was, essentially adopted those viewpoints (deciding however, on police advice, to anonymise individuals involved). Various witness statements have been put in on behalf of the three Defendants to explain the factors they took into account in deciding to publish. Unsurprisingly, the reasons given are not identical in each case: but in my view it is realistic to take them collectively. Mr Clayton was mildly critical of the lack of details in some of such reasoning, but I reject such criticism: see, for example, the witness statement of Martin Hawkins, Assistant Chief Executive of the First Defendant, dated 8th March 2006, especially at paragraphs 16 to 28. I will have to rehearse some of these factors relied on in greater detail at a later stage in this judgment.

20. The Panel had, in preparing its report, been well aware of issues of confidentiality and of the rights of Mr Stone under Article 8. Indeed, the Panel had been at pains to obtain Mr Stone's written consent for the inquiry to have access to details about his treatment and care, which was given. (It was not, however, disputed at the trial before me that Mr Stone was subsequently free to refuse to give his consent to actual publication of the resulting report). It is notable that in a letter dated 9th July 2004 Mr Francis had explained that in preparing its report the Panel had considered whether the facts set out were (in the view of the Panel) necessary to be included in the public

interest after taking account of Mr Stone's rights in respect of his privacy and the confidentiality of his records. I unhesitatingly accept that as being the Panel's approach. Specific examples are given of matters excluded from the final version of the report by the Panel as not satisfying this requirement.

21. The issue was revisited by the Defendants themselves during 2004. Mr Mason of the Defendants' solicitors, Capsticks, wrote to Mr Francis on 8th June 2004, explaining that he had been given the task of reviewing the report on behalf of the Defendant authorities to ensure that it complied "with their duty of confidentiality/the DPA and Article 8 ECHR." Mr Mason appended to such letter a schedule containing the points – 24 in number – in the report (which Mr Mason had studied in full) which he thought "may cause some difficulty". Mr Mason said that he had approached the matter "deliberately erring on the side of caution". He said that he had found no "plainly obvious examples of unnecessary confidential informing being in the report"; and acknowledged that the report could only contain confidential information with express consent or if necessary in the public interest.

22. By his letter in reply dated 9th July 2004 Mr Francis, on behalf of the Panel, explained that he did not agree with Mr Mason's points of concern, explaining in detail why.

23. In the result the Defendants have decided to publish the report without any deletions. But very properly they first gave Mr Stone and his lawyers the opportunity of commenting on the proposal to publish the report in its then form in full. It is that correspondence which threw up the objections of Mr Stone to the inclusion of the details of his care and treatment and thus to the decision to publish, not simply to health professionals but also to the public at large, the report in full.

The course of the litigation

24. This case can hardly be said to have been underargued. The Grounds of Claim ran to 86 paragraphs. The hearing before me extended to some 3 days of argument. Four substantial folders of authorities and legal materials were put in, to be supplemented by another. Extensive written arguments were lodged. That lodged on behalf of Mr Stone – notwithstanding that it was entitled "Skeleton Argument" – alone ran to 157 paragraphs. I am grateful to all counsel for their submissions. At the same time I have tried not to lose sight of the wood for the trees.

25. Of the grounds that were originally advanced, two fell away. First, the Claimant had understood that it was being suggested that, in consenting to the disclosure of his medical, probation and social service records to the independent inquiry (as he did so consent, in writing, on 20th May 1999), he had also irrevocably consented to publication in full of the subsequent report. But the Defendants did not seek to pursue such a point. Second, it was suggested that there had been a misapplication of HSG (94)27. That too eventually did not need to be pursued.

26. Ultimately the two grounds pursued were, in essence, these:

    26.1. Publication to the world at large of the full report was not in accordance with law or necessary in the public interest, by reference to Article 8 of the Convention.

26.2. In any event, such publication would constitute a breach of the provisions of the Data Protection Act 1998.

These points were argued in that order and I propose to take them in that order. I add that, at the hearing, no further independent argument by reference to the requirement of "in accordance with law" for the purposes of Article 8 proved to be necessary. It was common ground that, under English common law, there is a general principle that a duty of confidentiality may be overridden where the public interest so requires: and that threw up in this case the like issues as would arise under Article 8(2) itself.

The applicable legal principles

27. Article 8 of the Convention is in these terms:

> "Article 8. Right to respect for private and family life.
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of other."

Article 10 of the Convention is in these terms:

> "Article 10. Freedom of expression.
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

28. Were this to be a claim based on ordinary "reasonableness" grounds it would manifestly be unfounded. The Defendants (and the Panel) have plainly considered the matter with great care. They applied the correct principles; they gave Mr Stone the opportunity to make representations and considered them; they took into account the relevant factors and did not have regard to irrelevant factors; and a conclusion to publish in full could not possibly be styled as perverse or irrational.

29. But that, of course, is not the test in a context such as the present. The focus is not on the decision making process but on the substance of the decision reached. The questions that have to be asked are whether Mr Stone's rights under Article 8 of the Convention have been breached; whether the decision to publish the report is an interference with his right to privacy which is not justified under Article 8(2). Reference may be made to R (SB) v Governors of Denbigh High School [2006] 2WLR 719 at paragraphs 29-30 [2006] UKHL 15 (Lord Bingham) and paragraph 68 (Lord Hoffmann). That, of course, was a case relating to Article 9 of the Convention, but the reasoning and approach is equally applicable in the present case by reference to Article 8.

30. For this purpose, it is also well established that the Court is required to adopt an intensity of review conditioned by the requirement that the proposed limitation of the Convention right be necessary in a democratic society and that such interference is really proportionate to a legitimate aim being pursued: see R (Daly) v Secretary of State for Home Department [2001] 2AC 532 at p547E-540D (per Lord Steyn).

31. In the present case it seems to me that the review of the court must be of a very high intensity. As has been emphasised in the European Court of Human Rights, the protection of personal data, and the need for appropriate safeguards, is of fundamental importance to a person's enjoyment of the right to respect for private and family life provided by Article 8: and that is particularly so in the case of medical data: see Z v Finland (1997) 25 EHRR 371; MS v Sweden (1997) 28 EHRR 313. Moreover it seems to me of importance that in the present case Mr Stone is not seeking simply to assert his private rights and private interest (although he is doing that): he is also himself asserting a matter of public interest. That consists not only of the upholding of the general principle of a right to privacy but also the upholding of a wider matter of public interest: viz. that a person can freely and frankly discuss sensitive matters with his or her doctor, probation officer and social worker etc. and, further, can cooperate with an inquiry of the present kind without being deterred by the risk of subsequent disclosure.

32. In the case of Campbell v MGN Limited [2004] 2AC 457 [2004] UKHL 22 which involved the internationally famous model Naomi Campbell (and which raised issues under Article 8 and Article 10) Lord Hope of Craighead said this at paragraph 113:

> "But decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing. Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a

> legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise. As Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998), para 11, pointed out, they are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society."

The same judge had also said in R v Shayler [2003] 1AC 247, [2002] UKHL 11 in paragraph 61 (in dealing with the application of proportionality principles):

> "…it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them."

I propose to apply that approach. It seems to me that a compelling case needs to exist to justify publication of this report in its present form.

33. Article 8 is not the only Convention right that has to be considered. As Campbell v MGN Ltd makes clear, Article 10 also has to be considered and given due weight. In the present case, it is now (albeit it was not in the original grounds) accepted on behalf of Mr Stone that – even though the three Defendants, as public bodies, cannot themselves directly invoke the provisions of Article 10 – such Article comes into play: if only because of the general corresponding right of the public to be free to *receive* information where it is sought to be published.

34. The actual methodology to be employed in such cases has to be related to its own facts and own circumstances, a "close and penetrating examination" being adopted. But what is of course clear is that in all such cases a balancing exercise has to be undertaken. And in a case such as the present an ultimate balance has to be struck not only by weighing the considerations for and against a restriction on the right to privacy by reference to Article 8 itself but also by weighing the considerations for and against a restriction on publication by reference to Article 10. An example of this can also be found in the House of Lords decision in re S (a Child) [2005] AC 593 [2005] UKHL 47. That was a decision in a factual context very different from the present – albeit raising issues under Articles 8 and 10. But, if I may respectfully say so, the actual approach adopted by Lord Steyn is very informative. Also very informative are his general comments - which I propose to follow in this case - at paragraph 17 of his opinion:

> "The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2AC 457. For present purposes the decision of the

> House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article 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. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

The overall balancing exercise in this case

(a) The redaction exercise

35. As I have said, Mr Stone has accepted that *some* report should be put into the public domain. One of his complaints has been, however, that the Defendants have taken an "all or nothing" approach to the issue of publication. It is submitted on his behalf that it is a fundamental principle that where there is to be an interference with Convention rights then such interference must be kept to the minimum necessary. That there is indeed such a general principle is borne out by authorities too numerous to require citation. Building on that, Mr Stone's advisers have in the course of these proceedings submitted, for illustrative purposes, a draft of extracts from what is currently contained in Chapter 8 of the report, redacted so as to delete citation from, or extensive reference to, medical etc. records. They say that this is illustrative of an approach which could and should, as a matter of proportionality, properly be adopted for the rest of the report.

36. The Defendants had in fact themselves considered some such approach. They had commissioned in 2001 an experienced journalist to prepare a summary of the full report with a view to publicising just the summary. Such a summary was duly prepared. It was included in the confidential bundle of evidence placed before me. The Defendants decided that, notwithstanding the best efforts of the journalist involved, such summary was not appropriate for publication: it was unable to cover all the fundamental points; it could not contain the amount of detail needed for the report to be of sufficient value to persons reading it; and its effect, by reducing the text, was to distort the report itself and to devalue its conclusions. I have considered that summary. It is sufficient for me to say – although my view will also find reflection in some of my comments later in this judgment – that that plainly was a justified decision.

37. As to the exercise in redaction undertaken by the Claimant's advisers in respect of Chapter 8, my more specific points on that are set out in Confidential Annex "A" to this Judgment. (These annexes, as agreed by Counsel and for reasons which I trust are obvious, must remain for the time being confidential, until further order of the court). But, having carefully considered the proffered redacted version of Chapter 8, I can set out in summary form in this public judgment my reasons for agreeing with the Defendants and with the Second Interested Party (Josie Russell) that such an exercise cannot be justified if there is to be publication:

37.1. First, the redactions tend to give a very misleading picture as to what Chapter 8 of the Report (in its unexpurgated form) is actually saying and what it is seeking to do.

37.2. Second, the deletions of the details would have the effect of depriving the public of knowing precisely what facts had prompted the conclusions and comments of the Panel as set out in Chapter 8. The conclusions and comments are necessarily based on the preceding details.

37.3. Third, the actual details of what was in the medical etc notes is crucial for assessing (and for forming an opinion on) what other professionals, dealing with Mr Stone either at the time or subsequently, should have known or should have done. That is to say, what did they know but not act upon? Or what did they not know but which they should have known? What information and records were (or as the case may be were not) passed on to other agencies?

37.4. Fourth, to the extent that individuals and procedures are criticised (or not criticised) in the report, the reader needs to know the details of what such individuals knew or could reasonably be expected to have known in order to assess such criticisms.

37.5. Fifth, such redactions tend to an impression of arbitrariness. For example – and it is only an example – dates are sometimes deleted, sometimes not.

37.6. Sixth, the scale of the redactions is such (and the proposed redactions extend not only to deletion of citations from medical records but also to some parts of the Panel's actual conclusions or comments) that it can be said – as the Defendants and Mr Francis on behalf of the Panel do say – that such report in such form virtually ceases to be the report of the independent inquiry and would be rendered "wholly valueless."

38. Mr Clayton in fact saw fit generally to criticise the "style" of the Report. That is a completely misplaced criticism – the style of the report is a matter for the Panel. A further criticism that the style adopted led to comments or conclusions which could not be linked to the preceding factual details, and so (it was said) could justify an exercise in redaction, is also completely misplaced.

39. I might add that I consider that there is a degree of force in the observation that publication of a summary or redacted version of this kind might be viewed with scepticism by the public, who might even suspect a cover-up. In any event, I agree overall with the Defendants' blunt submission that a redacted report of the kind proposed cannot and will not work. It is not practicable to publish a report without disclosing details of Mr Stone's private medical information.

40. As I have mentioned, the Defendants' own solicitors had, during 2004, put forward to the Panel a list of suggested possible deletions and modifications to the report. That exercise is itself criticised by Mr Clayton. He says that the discussions between Mr Mason and Mr Francis were fundamentally inadequate. He says that they failed to deal with the "overarching question of justification for the wholesale revelation of information derived from confidential medical records"; and that such points as they

did discuss were only "the tip of the iceberg" (a view point which subsequently found reflection in the Claimant's subsequent exercise of wholesale expurgation by way of redaction in respect of Chapter 8).

41. My specific comments on the points advanced are set out in Confidential Annex "B" to this judgment. For the purposes of this judgment, I here place on record my view that Mr Francis' justification for retaining these points in the report to be published, and with which the Defendants agreed, was well-founded. My reasons in essence correspond to those set out in paragraphs 37.2-37.4 of this judgment.

42. Those submissions on behalf of Mr Stone, however, are again illustrative of the general approach taken on his behalf: which is to the effect that it was not necessary and not of any high priority for the public to know the precise details and records of Mr Stone's treatment or discussions with health professionals, probation officers and other such people: some of which information, indeed, Mr Clayton was disposed to dismiss as mere "general background". Nevertheless, it is important to record that Mr Clayton also, fairly and rightly, conceded that the public should be in a position to know what went wrong and should have an intelligent understanding of the conclusions reached; and he accepted that the lessons derived from the inquiry had a high priority.

(b) <u>The balancing exercise</u>

43. In my judgment, the following points are particularly relevant in the balancing exercise for the purposes of Article 8.

44. So far as Mr Stone is concerned, much the most weighty point in his favour, as it seems to me, is his very entitlement to claim a right of privacy: in respect moreover of an aspect of private information (medical information) which – as the jurisprudence from Europe shows – is regarded as a vital and central element of that which should be protected under Article 8. Further, that is reinforced by other and wider considerations of the public interest: first, that persons may talk freely with their doctors, probation officers and other such persons without being deterred by risk of subsequent disclosure (although it has to be said such a risk in any case exists under English common law rules relating to confidentiality, where disclosure is necessary in the public interest); second, that such persons may give access to such information for the purposes of an inquiry without being deterred from doing so through fear of such matters later being released into the public domain.

45. But it seems to me that the force of those points is significantly outweighed by a number of other considerations (albeit some of them overlap):

45.1. First, there is the concession on behalf of Mr Stone that there should be *some* publication (to the public) of the report and that the public should be able to know what went wrong and should be able to form an intelligent understanding of the conclusions reached: that is to acknowledge that there is indeed a public interest in that regard. But, as I have indicated in my conclusions on the proposed redaction exercise, a system of expurgation which both involves removal of actual reference to the contents of medical notes and (in some respects) involves the editing of some of the comments and conclusions of the inquiry is not viable: the proposal made in that

regard on behalf of Mr Stone's advisers thus wholly devalues the proffered concession. In effect, such exercise – while of course limiting the intrusion into the privacy of Mr Stone – would turn the report into a report which is not, in truth, the report of the inquiry having regard to its terms of reference: and could indeed mislead. It was precisely for those reasons that the Defendants informed me at trial that, if that were to be the conclusion, then they would not publish the report at all. I did not regard that as an in terrorem argument: rather it reflected a realistic and understandable viewpoint.

45.2. Second, there is a true public interest in the public at large knowing of the actual care and treatment supplied (or, as the case may be, not supplied) to Mr Stone: and knowing, and being able to reach an informed assessment of, the failures identified and steps that may be recommended to be taken to address identified deficiencies. This is not simply in the context of the murder of Lin and Megan Russell by Mr Stone in circumstances of such great publicity. It also has a bearing for the future. As Mr Badenoch pointed out, it seems, regrettably, all too likely that in the future – and as has happened in the interim - there will be other instances where persons receiving psychiatric treatment or care in the community will commit acts of murder or extreme violence. The existence of potentially dangerous persons at liberty in the community affects the entire community. That community has a reasonable and justified expectation that an inquiry undertaken after such a high profile case as the present will be publicised in full, so that the public is not left in the dark (or in the shade) about how it happened or left to speculate about the lessons that have been or should be learned and about the recommendations made, with a view to implementation, to reduce the risk of such occurrences in the future.

45.3. Third, and following on from the second point, such objectives are not met simply by releasing a full version of the report to relevant health professionals.

45.4. Fourth, where individuals or agencies involved in Mr Stone's treatment are (or are not) to be criticised the public can legitimately expect to know the full reasons for that.

45.5. Fifth, the information to be disclosed is to be disclosed solely with the aim of providing an informed view as to what went wrong in this case with a view to important lessons being learned for the future, both for the assistance of other people in the position of Mr Stone and for the protection and reassurance of the public. The actual details of the case are crucial for an informed assessment of the Panel's conclusions and comments and for forming a view on that. (This would still be so, as I see it, even in circumstances where any established failures are not found to be causative of the subsequent criminality). The position is quite different from that pertaining in the cases of Campbell or of Z v Finland, where there was no corresponding public interest of the present kind.

45.6. Sixth, it is, I think, of importance as a justification for restricting Mr Stone's right to privacy in this context that this inquiry, and all this

publicity, have arisen out of Mr Stone's own acts – acts found to have been criminal. He has, as it were, put himself in the public domain by reason of those criminal acts, which inevitably created great publicity. Of course that is not to say that a convicted murderer forfeits all his rights under Article 8; of course he does not. But here the information sought to be disclosed relates – and relates solely – to the investigation foreseeably arising out of the very murders which he himself committed.

45.7. Seventh, I also think it a point of considerable importance as a justification for restricting Mr Stone's right to privacy in this context that a great deal of information relating to the background, treatment and mental health of Mr Stone has already been put in the public domain, and at a significant level of detail (see the numerous newspaper articles mentioned above and the Stone Chronology prepared by Professor Gaber). The essential nature of his observed mental and personality disorders is already known. When so much has already been divulged, it seems to me highly material to a decision whether to permit disclosure of more such information. Indeed I think it also noteworthy that the Panel make clear that they also wish to correct certain errors and inaccuracies in previous public reporting. I agree with Mr Clayton that previous publication of private information in the public domain does not mean that an individual necessarily loses his right to privacy in respect of a proposal to put yet more such material in the public domain (cf. Editions Plon v France 18th May 2004, unrep. decision of the European Court of Human Rights, Second Section). But, as it seems to me, it must be relevant to the balancing exercise and to the issue of proportionality: and here the previous disclosure in the public domain has already been very extensive indeed. That must tell against the asserted detrimental impact of publication of further, albeit more detailed, information.

45.8. Eighth, Josie Russell and Dr Russell – the victims (directly or indirectly) of these crimes - support publication. So do – quite apart from the Panel itself and all the Defendants – the Secretary of State and relevant Mental Health authorities.

46. Mr Stone has raised a concern that publicising this report in full will give rise to risks as to his own personal safety. But the evidence shows that that has been assessed by the prison service, who conclude that there is no such increased risk.

47. As to the point made by Mr Clayton that others will be deterred in the future from cooperating with inquiries of this kind, that is a legitimate point of principle and cannot be ruled out as a possibility. The evidence, however, in this case indicates that in the past other offenders have cooperated fully and have consented to providing information to inquiries in the knowledge that a report is to be published. There is also no actual evidence that access to the relevant information has in fact been restricted in such cases because of concerns as to subsequent publication.

48. There are a number of other points I should mention:

48.1. I gained the distinct impression that Mr Stone – who, as I have said, continues to assert his innocence – was concerned that publication of this

information would incline the public against his assertions. I cannot attach any significant weight to that. First, Mr Stone already has been convicted; in the eyes of the public he is entitled to be considered guilty. Second, and in any case, such publication of these details is unlikely, realistically, to be significantly more damaging to him with regard to his criminality than the previous publicity he has experienced.

48.2. Mr Stone is also concerned as to how the press will publicise the matter: he fears adverse sensationalism. But, broadly speaking, and within the parameters of the law of defamation, it is a matter for the Press as to how it reports matters. Besides, it is not to be presumed that further press publicity will necessarily be unfairly hostile in the way Mr Stone fears. There were indications from a number of the press articles following his conviction that a thoughtful line was being taken as to the need for lessons to be learned. It is not fanciful to think, in fact, that some readers of the report perhaps may be inclined, having access to the full facts, to take a more sympathetic view of Mr Stone than, in the absence of full information, they hitherto may have been inclined to take.

48.3. Publication of the report in full can, in my view, only assist the legitimate and ongoing public debate with regard to treatment of the mentally ill and of those with disturbed personalities in the community: which has already resulted, among other things, in extensive proposed revisions to the Mental Health legislation.

49. For all these reasons (which in many ways reflect the reasons given by the Panel itself as set out in paragraph 18 above and the reasons given by the Defendants, and with which I agree) I think that a compelling case in favour of publication in full is made out, balancing the relevant considerations under Article 8 alone. It seems to me, by reference to that Article, that such a decision is proportionate and justified as being necessary in the public interest.

50. Turning then to Article 10 – which is conceded to be engaged and relevant – and balancing the considerations there, as I see it that can only operate to confirm such a viewpoint. The considerations set out above – not least the fact that in essence much of the information is (albeit without the detail of the report) already in the public domain – seem to me to tell strongly against an interference with the operation of Article 10 being justified.

51. Mr Clayton made the point that this is not a case of publication by the press, the freedom of which the courts, generally speaking, seek to uphold. That is true. But the reality is that, for much of the public, access to the report will depend on informed comment by the media. It surely is desirable for the press and other media to have access to the full report – the more so when one of the purposes of the report is to correct previous publicised inaccuracies - so that their summaries and their comments for public consumption are based on knowledge of the full facts and details as set out in the report. It is moreover, in my view, important that the conduct of the public authorities in a context such as the present are seen to be subject to public scrutiny, with consequential legitimate and informed public debate on the conclusions to be drawn and lessons to be learned.

52. For these reasons, and on the ultimate balancing test, I am of the clear view that the decision to publish the report in full was entirely justified.

The Data Protection Act 1998

53. I turn to the argument based on the Data Protection Act 1998. This was rather shortly addressed in the written submissions but was greatly expanded in oral argument. If the argument is correct, it would of course mean that there could be no publication as the Defendants seek. Indeed, publication would also then not be "in accordance with law" for the purposes of Article 8.

54. However I consider that the Claimant's argument is unjustifiably restrictive and is not correct.

55. The Data Protection Act 1998 was made in consequence of Directive 95/46/EC of 24th October 1995. As a matter of principle, the Act should be sought to be interpreted so as to accord with the policy and purpose behind the Directive.

56. The recitals to the Directive are extensive. Respect for fundamental rights and freedoms, "notably the right to privacy", is much emphasised: see recitals (1)-(3), (7), (8), (10) and (33). Recital (34) provides as follows:

> "(34) Whereas Member States must also be authorized, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of date where important reasons of public interest so justify in areas such as public health and social protection – especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system – scientific research and government statistics; whereas it is incumbent on them, however, to provide specific and suitable safeguards so as to protect the fundamental rights and the privacy of individuals."

57. Article 1 of the Directive provides as follows:

> "1. In accordance with this Directive, Member states shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
>
> 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1."

Article 8 (in the relevant respects) provides as follows:

> "(1) Member states shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions,

> religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.
>
> . . . .
>
> (3) Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.
>
> (4) Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority."

58. The structure of the Data Protection Act 1998 – reflecting that of the Directive - is to provide for "personal data" (defined in section 1) and then (in section 2) to make provision for "sensitive personal data". Sensitive personal data expressly includes personal data consisting of information as to a data subject's physical or mental health or condition: section 2(e). "Data controller" and "data processor" are given wide definitions in section 1. "Processing" is also given a wide definition in section 1: see also the decision of the Court of Appeal in the Campbell case [2003] QB 633. Section 4 then sets out the principles to be applied by every data controller. The first principle (as set out in Schedule 1) is that: "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless:

> a) at least one of the conditions in Schedule 2 is met; and
>
> b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

That language connotes that more than one condition in Schedule 2 or Schedule 3 is capable of being satisfied in any given case.

59. It is not disputed that the Defendants' decision to publish would involve "processing" of "sensitive personal data" relating to Mr Stone.

60. It is clear in this case – and is conceded on behalf of Mr Stone at this stage of the argument – that a condition in Schedule 2 is satisfied: viz. paragraph 5(2) of Schedule 2 ("The processing is necessary… for the purpose of any other functions of a public nature exercised in the public interest by any person"). It is common ground that the word "necessary", as used in the Schedules to the 1998 Act, carries with it the connotations of the European Convention on Human Rights: those include the proposition that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued.

61. The issue in the present case thus is whether one or more conditions set out in Schedule 3 is satisfied.

62. Paragraph 7 of Schedule 3 provides that one such condition is where "the processing is necessary…. (b) for the exercise of any functions conferred on any person by or under an enactment".

63. That the Defendants have the power to commission an inquiry and promulgate its report is, as I have said and as Mr Clayton ultimately accepted, established under s.2 of the National Health Service Act 1977 and paragraph 3 of the 2002 Regulations. Such power is properly described as a "function" – indeed is so described in paragraph 3(3) and Schedule 1 of the 2002 Regulations themselves. Further the Defendants, by reference to the 2002 Regulations made pursuant to the 1977 Act, are exercising functions "under" an enactment. Consequently since the processing is – consistently with the earlier part of my judgment and the Claimant's concession by reference to paragraph 5 of Schedule 2 – "necessary", one of the conditions in Schedule 3 is satisfied.

64. Mr Clayton's response to this, in his submissions in reply, was very wide ranging. It came to this. The inclusion of such provision has to be traced back, he submitted, to Article 8(4) of the Directive. Article 8(4), however, is qualified by the words "subject to the provision of suitable safeguards". But paragraph 7 of Schedule 3 does not, he submits, make provision for any such safeguards (in contrast, for example, with paragraph 9 of Schedule 3): and he submits it should be read, consistently with the Directive, so as to include the provision of appropriate safeguards.

65. I cannot accept this for a number of reasons:

    65.1. First, the Directive clearly leaves a margin of appreciation to Member States in implementation.

    65.2. Second, Article 8(4) itself leaves it to Member States to decide what "suitable safeguards" are to be provided in a particular case.

    65.3. Third, the structure of the 1998 Act – reflecting the Directive – is to build in safeguards. By way of example, an exception has to be justified where it is "necessary".

    65.4. Fourth, Parliament clearly has distinguished paragraph 7 of Schedule 3 from paragraph 9: in the latter "appropriate safeguards" are expressly made requisite; in the former (which relates to the exercise of functions by or under an enactment, with the attendant responsibilities that entails) they are not.

    65.5. Finally, if an additional requirement for "appropriate safeguards" is somehow to be read into paragraph 7 it is left unexplained as to what different result that would or should actually lead to in the present case.

66. Mr Havers and Miss Laing also argued that the Defendants came within paragraph 8 of Schedule 3 (which reflects what is provided in Article 8(3) of the Directive). In view of my decision on paragraph 7 it is not strictly necessary to express a concluded

view on this: but I will, in deference to the arguments I heard, state – albeit briefly – my opinion on that.

67. Paragaph 8 of Schedule 3 provides as follows:

> "(1) The processing is necessary for medical purposes and is undertaken by:
>
> (a) a health professional or
>
> (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.
>
> (2) In this paragraph "medical purposes" includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services."

68. The publishing of the report would, I consider, be within the ambit of "medical purposes", for the purposes of paragraph 8, as relating to "the management of healthcare services". It would also, essentially for the reasons I have already given, be "necessary" for such medical purposes. Furthermore the processing would be by the Defendants, who are within the class of persons owing a duty of confidentiality equivalent to that which would arise if they were health professionals. Accordingly, the processing would fall within the ambit of paragraph 8.

69. I was attracted by Mr Clayton's argument that such paragraph was intended to relate to (for example) an exchange of professional views on a medical case between two separate medical departments: the safeguard being that each is under a duty of confidentiality. But as against that paragraph 8 focuses on the processing and the person undertaking the processing: it does not focus on the recipient of the information. Further, a safeguard is built in, in that the duty of confidentiality owed is such that, under English law, there in any event could be no processing or disclosure unless it had first been concluded that (assuming the absence of express consent) the public interest so required.

70. Overall, therefore, I preferred the submissions of Mr Havers and Miss Laing on the availability of paragraph 8 of Schedule 3 here to sanction the publication of the report, in addition to paragraph 7 of Schedule 3.

Conclusion

71. The public interest requires publication of the report in full. The decision to publish was justified and proportionate, and does not constitute an unwarranted interference with Article 8 of the Convention. Further, no breach of the Data Protection Act 1998 is involved.

72. Accordingly, this claim fails and I refuse to grant Mr Stone any of the relief that he seeks.