Neutral Citation Number: [2020] EWHC 702 (Fam)

Case No: FD19P00246, FD19P00380, FD19F05020, FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2020

Before :

THE PRESIDENT OF THE FAMILY DIVISION

- -

Re Al M (Reporting Restrictions Order)

- -
- -

Ms Christina Michalos QC (instructed by **DAC Beachcroft Solicitors**) for the **Applicant**
Ms Sarah Palin (instructed by Associated Newspapers Ltd, British Broadcasting Corporation, The Financial Times Ltd, Guardian News & Media Ltd, Telegraph Media Group Ltd, Sky PLC, Thomson Reuters, Times Newspapers Limited and the Press Association) for the **Respondent Media Group**

Hearing date: 21st February 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane P :

1. This judgment relates to an application for anonymity made by a witness who gave evidence during the fact-finding stage in these proceedings which concern the welfare of two children.

2. The underlying factual circumstances which relate to the issue of anonymity are known to the senior advisers representing each of the parties and the nine media organisations who have collectively instructed solicitors and counsel in these proceedings. In order for this judgment to be read by those who cannot be privy to that information, no reference to the underlying detail will be made.

The application

3. In essence, the case for anonymity arises from an unusual and exceptional combination of facts arising from the witness' previous career coupled with the potential for his/her involvement in these proceedings to exacerbate credible risks to his/her safety which already exist. The primary case of the witness ["XX"] is that the evidence establishes a real and immediate risk of harm or death such that European Convention on Human Rights ("ECHR") Articles 2 and 3 are engaged. Where Articles 2 and 3 are engaged, because these are unqualified rights, there is no question of balancing those rights against the right to freedom of expression protected by Article 10.

4. The witness's alternative case is that the risk of harm, and/or the fear of serious harm, to both XX and their family are sufficient to engage Article 8.

5. Further, it is asserted that XX is a victim of blackmail and should, in any event, be granted anonymity in accordance with well established public policy.

6. It is asserted that the Article 10 rights of the media are met by the description of XX that appears in the fact-finding judgment and that the Reporting Restrictions Order ("RRO") that is sought is a proportionate and fair way of protecting XX from serious harm and the risks that have been identified.

7. The underlying legal principles are not contested by those representing the media. The RRO application is opposed on the basis that naming XX does not materially alter such risk of harm that he/she may face in ordinary circumstances and, in any event X's identity is readily ascertainable. It is submitted that the case, therefore, falls outside Articles 2 and 3, a balance must be struck in which the Article 10 rights to freedom of expression are of considerable weight.

The application in more detail

8. In her most helpful skeleton argument, Ms Christina Michalos QC for XX sets out the basic legal principles which, as I have indicated, are not controversial:

    (1) There is no statutory protection for the identity of a witness in the position of XX under Administration of Justice Act 1960, s 12, or Children Act 1989, s 97.

    (2) Anonymisation of judgments, or mere directions permitting witnesses not to disclose their names, are not enforceable as injunctions.

(3) The court has power both to relax and to add to the "automatic restraints". In exercising this jurisdiction the court must conduct a "balancing exercise": *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47 and *Re J (A Child)* [2013] EWHC 2694 (Fam).

(4) The court has power to make a RRO granting anonymity to witnesses and others but anonymity should not be extended unless there are compelling reasons (*Re J (A Child)* above).

(5) There is an important need for transparency in the family justice system as well as the general importance of open justice. It is for a party seeking a derogation from the principle of open justice to justify that derogation and the court should only make such an order after closely scrutinising the application: *JIH v News Group Newspapers* [2011] 1 WLR 1645 at paragraph 21.

(6) Human Rights Act 1998, s 12, applies when a court is considering whether to grant any relief that might affect the exercise of the Convention right to freedom of expression.

(7) There is a public interest in the press being able to identify the names of individuals who are the subject of their press reports. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people: *Re Guardian News and Media Limited* [2010] 2 AC 697.

9. Ms Michalos submits that the following further principles are appropriate to the present case:

(1) Article 2 (Right to Life) and Article 3 (Prohibition of Torture, Inhuman or Degrading Treatment or Punishment) may be engaged where parties or witnesses are in physical danger: *A v BBC* [2015] AC 558.

(2) Where the conflict is between the media's rights under Article 10 and an unqualified right of some other party, such as the rights guaranteed by Articles 2 and 3, there can be no derogation from the latter: *A v BBC* (above).

(3) Where the evidence demonstrates that there is a real and immediate risk of serious harm or death, this cannot be balanced against any Article 10 right, no matter how weighty: *RXG v Ministry of Justice* [2019] EWHC 2026 (QB).

(4) The threshold for engagement of Articles 2 and 3 is "the real possibility of serious physical harm and possible death" or "a real and immediate risk of serious physical harm or death": *RXG v Ministry of Justice* (above).

(5) "A real risk is one that is objectively verified and an immediate risk is one that is present and continuing": *Adebolajo v Ministry of Justice* [2017] EWHC 3568 (QB).

(6) However, where evidence of a threat to a person's physical safety does not reach the standard that engages Articles 2 and/or 3, then the evidence as to risk of harm will usually fall to be considered in the assessment of the person's Article

> 8 rights and balanced against the engaged Article 10 rights. Whilst the level of threat may not be sufficient to engage Articles 2 or 3, living in fear of such an attack may very well engage the Article 8 rights of the person concerned: *RXG v Ministry of Justice* (above).

Where Arts 2 and 3 are engaged is it appropriate to balance Art 10?

10. In her submissions Ms Michalos drew the court's attention to the apparent conflict of first instance authorities on the question of whether or not it is appropriate to consider striking any balance with Article 10 rights in cases where Articles 2 and/or 3 are engaged.

11. In *A and B v Persons Unknown* [2016] EWHC 3295 (Ch); [2017] EMLR 11, Sir Geoffrey Vos, Chancellor, considered an application for a permanent RRO for two brothers who had been convicted of very serious offences against three child victims (known as the "Edlington case"). At paragraph 35 of his judgment Sir Geoffrey Vos, when considering the question "should an injunction be granted?" stated:

> "A risk of a breach of the unqualified rights in Articles 2 and 3 of the ECHR is a risk as to events in the future rather than a present breach of that unqualified right. Accordingly, I do not think that even such a potential breach can automatically trump the Article 10 right to freedom of expression. A broadly similar approach as the Supreme Court adopted in *PJS v News Group Newspapers* [2016] AC 1081 is required. There must be an intense focus on the nature and extent of the risks under Articles 2 and 3, and on the comparative gravity of those risks and of the rights under Article 8 and 10 of the ECHR in the individual case. The justifications for interfering with Articles 8 and 10 or for restricting each of those rights must be taken into account, and a proportionality test must be applied."

12. On the facts of the case the Chancellor concluded that there were serious and real risks of the claimant's rights under Articles 2 and 3 of the ECHR being infringed if the order sought was denied.

13. In *Venables v News Group Papers Limited and others* [2019] EWHC 494 (Fam) I, sitting at first instance, considered an application to vary an anonymity injunction granted to one of the killers of James Bulger. At paragraph 43 of my judgment I expressly endorsed the approach taken by Sir Geoffrey Vos in *Re A and B*.

14. Subsequently in *RXG v Ministry of Justice* a divisional court of the Queen's Bench Division (Dame Victoria Sharp P and Nicklin J) has taken a contrary view. *RXG*, in common with the *Venables* and *Edlington* case, considered the exercise of what has become known as the "Venables jurisdiction". At paragraph 35 (vii) the court stated:

> "The rights guaranteed by Arts 2 and 3 are unqualified. Where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any Art 10 right, no matter how weighty. In that context, it should be noted that we would respectfully depart from the proposition

> articulated by the Chancellor, Sir Geoffrey Vos in *Edlington* (paragraph 35) that Arts 2 and 3 rights could be balanced against Art 10 (a proposition later adopted by Sir Andrew McFarlane P in *Venables*)."

15. In the present application, Ms Palin, for the media, accepted the proposition put forward by Ms Michalos and conceded that where Articles 2 and/or 3 are engaged, there can be no derogation and "where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any Article 10 right, no matter how weighty" [skeleton paragraph 14.4]. The issue does not therefore fall for immediate determination in the course of the present application which, for reasons to which I will turn shortly, is very strong on the facts in favour of the grant of a RRO.

16. Before, however, leaving the point, and, having noted the difference of view expressed in *Edlington* and *Venables* on the one hand and *RXG* on the other, I would draw attention to two recent Court of Appeal authorities on a parallel and related point. In *Re X (A Child: FGMPO)* [2018] EWCA Civ 1825, the Court of Appeal (Irwin, Moylan and Asplin LJJ) considered the imposition of a worldwide travel ban in a case concerning Female Genital Mutilation. In *Re K (Forced Marriage: Forced Marriage Passport Order)* [2020] EWCA Civ 190 (Sir Andrew McFarlane P, Peter Jackson and Haddon-Cave LJJ) considered a similar travel ban within a Forced Marriage Protection Order. In *Re X (FGMPO)* Moylan LJ, giving the lead judgment, held that although Article 3 is an "absolute" right, the concept of "proportionality" is not irrelevant where the duty upon the State is to protect people from the harm which others may do to them, in distinction to the direct actions of the State's own agents to take life or seriously ill-treat people (*E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536).

17. Moylan LJ held that there is a distinction between the State's negative and positive obligations under Article 3 as described by Baroness Hale in *E v Chief Constable of the RUC* (paragraph 10):

> "…nevertheless, there must be some distinction between the scope of the State's duty not to take life or ill-treat people in a way which falls foul of Article 3, and its duty to protect people from the harm which others may do to them. In the one case, there is an absolute duty not to do it. In the other, there is a duty to do what is reasonable in all the circumstances to protect people from a real and immediate risk of harm. Both duties may be described as absolute but their content is different. So once again it may be a false dichotomy between the absolute negative duty and a qualified positive one…"

18. In *Re K (FMPO)* the court adopted the approach described by Moylan LJ with regard to Female Genital Mutilation so that it is to apply without alteration, save for context, in cases of Forced Marriage Protection Orders.

19. There is, it seems, therefore, a tension between the three divisions of the High Court at first instance as between themselves and, separately, from the developing jurisdiction at Court of Appeal level in a parallel context on whether questions of proportionality

and balance have any place in the court's consideration where there is a real possibility, or real risk of an individual experiencing behaviour sufficient to fall within Articles 2 and/or 3. This is an issue which must fall to be determined in another case on another day.

The applicant's case

20. The applicant's case can be stated shortly. The evidence before the court more than establishes that he/she is already at immediate risk of experiencing harm sufficient to meet the high threshold of both Article 2 and Article 3. Nevertheless, it is said that were it to become known that XX had given evidence which was directly detrimental to the interests of the father in these proceedings then, given the extremely high esteem in which the father is held, there is a real risk that one or more individuals, on their own as a self-starting player, would decide that XX should be the target of immediate and very substantial violence.

21. For the media, Ms Palin does not challenge the evidence of risk of harm to XX, both generally and as a result of knowledge of his connection with this case, that has been put before the court.

22. Ms Palin, however, submits that XX's identity is well known and it can be tracked on Google as can his/her connection with this case. It therefore serves no purpose to keep XX's identity confidential. Ms Palin also submitted that the case put forward by the applicant, namely that some unknown individual might read the judgment, put two and two together and decide target XX is too remote to establish any additional risk of Article 2/Article 3 harm.

23. In response Ms Michalos submitted that the Media submission that additional information about XX is not relevant given the level of exposure XX currently has is wrong in law following the Supreme Court decision in *PJS* where an injunction was upheld notwithstanding evidence that there had already been a significant breach of the confidentiality of the personal information which the injunction was intended to protect.

24. Ms Michalos also made two factual submissions. The first, which was well made, but not of the greatest weight, cannot be adequately summarised in this public-facing judgment. The second was of much greater force and pointed to the Media submissions which postulate XX being identified by a potentially dangerous individual taking the time to read the fact-finding judgment, undertake Google searches and then putting two and two together in order to generate a plan to cause XX harm. Ms Michalos submitted that the Media's postulation wholly misses the point of the Media's own application which is for permission to name XX so that his involvement can be splashed across the Press with the consequence that it will quickly become known and actively discussed on social media.

Discussion and conclusion

25. The arguments on each side in relation to this issue were efficiently mounted by counsel and I am grateful to both of them for doing so. My conclusion can be stated with similar brevity.

26. Having read the underlying evidence, which is not contested, and which includes an independent, professional assessment of risk from a source whose opinions can only command the greatest of weight, I am entirely satisfied that, despite what may already be public knowledge about XX, the additional information that he/she has been a witness in this case will significantly add to the risk of very serious harm or death that they may already face. Whether the test is as the Queen's Bench Divisional Court described it in *RXG*, so that there is no question of balance or proportionality once a real and immediate risk of serious harm or death is established, or whether it is as Sir Geoffrey Vos and I have separately described it, there is no difference in terms of outcome on the very strong facts in this case. Once an intense focus is applied to the nature and extent of the Art 2 and 3 risks, and to the comparative gravity of those risks and of the rights of the media and the public under Art 10, the justification for restricting publication of XX's identity is fully made out.

27. In coming to that conclusion, I accept Ms Michalos' submission that, on the basis of *PJS*, the fact that there may be some information in the public domain that might connect XX with this case is, as a matter of law, not determinative of the Media application. I also accept that this very application has clearly been brought by the Media because they would wish to afford significant publicity to XX's role in this case, thereby enhancing the risk of self-starting terrorist activity against XX by those who are sympathetic to the father.

28. At the conclusion of the oral hearing on 21st February, I therefore granted the RRO sought on behalf of XX.