HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 34

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Attorney-General's Reference No. 3 of 1999: Application by the British Broadcasting corporation to set aside or vary a Reporting Restriction Order

Appeal Committee

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. I have had the benefit of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury in relation to this application. These are in accord and I agree both with their reasoning and with their conclusion that the "anonymity order" made by the House in this case should be discharged.

2. The order stated that it was made pursuant to section 35 of the Criminal Appeal Act 1968 and the Criminal Appeal (Reference of Points of Law) Rules 1973. In common with your Lordships I question whether the 1973 Rules applied to this reference. I also question whether the order was one that it was appropriate to make in the exercise of the inherent power that this House must enjoy to ensure that its proceedings do not result in an unjustified interference with a party's article 8 right to respect for his private life.

3. Rules 3 and 6 of the 1973 Rules related to references to the Court of Appeal of a point of law pursuant to section 36 of the Criminal Justice Act 1972. These rules have now been replaced by similar rules in Part 70 of the Criminal Procedure Rules 2005 (S.I. 2005 no. 384). Rule 70.3(2)(c) requires a reference to exclude any reference to the defendant's name and any other reference that may identify the defendant. Rule 70.8 provides:

> "Where the Attorney General refers a point of law, the court must not allow anyone to identify the defendant during the proceedings unless the defendant gives permission."

4. This rule is in conflict with the normal position under which the identity of a defendant in criminal proceedings can be made public. The House was not informed of the reason for the rule, but I suspect that the thinking behind it is that a defendant who has been acquitted should not be subject to publicity that suggests that he may have been guilty after all. While in some circumstances there may be justification for giving anonymity to a defendant who is the subject of an Attorney's reference on a point of law, I question whether the requirement of rule 70.8 will always strike the correct balance between the competing demands of Articles 8 and 10 of the Convention. Perhaps this case is one where it did not. The Criminal Procedure Rule Committee may wish to give consideration to making the grant to the defendant of anonymity on a reference to the Court of Appeal discretionary rather than mandatory.

LORD HOPE OF CRAIGHEAD

My Lords,

5. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I gratefully adopt his account of the background to this case. I am also in full agreement with him, for all the reasons that he gives, that your Lordships should accede to the BBC's application and discharge the anonymity order which the House made on 23 October 2000 ("the Order"). As the application raises some important issues of principle, however, I should like to explain how I think they should be approached.

The background

6. At the time of D's trial in June 1999 on the charge of rape of which he was acquitted by direction of the trial judge there was no statutory restriction on any reporting of the trial which revealed the identity of the accused. In that respect he had no legitimate expectation of privacy. The trial took place in public, and the fact that he was acquitted was a matter of public interest. The principle of open justice which lies at the heart of public confidence in the criminal justice system permits the free reporting of criminal trials and the proper identification of those who have been convicted and sentenced: *In re Trinity Mirror plc* [2008] EWCA Crim 50, [2008] QB 770, para 33. It permits the proper identification of those who have been acquitted too. The public interest may be as much involved in a remarkable acquittal as in a surprising conviction: *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, para 30, per Lord Steyn. D was, of course, protected against being put on trial again for the same offence by the double jeopardy

rule. That protection has now been removed by Part 10 of the Criminal Justice Act 2003. But this change of the law did not of itself impose any restriction on the extent to which the grounds for his acquittal or the reasons for seeking a retrial could be reported by the media.

7. The Court of Appeal has power under section 82 of the 2003 Act to order that any matter that would give rise to a substantial risk of prejudice to the interests of justice in the event of a retrial is not to be published. But until the prosecutor has given notice to the Court of Appeal of his application for a retrial under section 80(1) an order restricting publication may be made only on the application of the Director of Public Prosecutions, and then only if an investigation of the commission of the offence by the acquitted person has been commenced: see section 82(6). That stage has not been reached, and it is not yet clear whether it ever will be. So, had it not been for the order that the House made on 23 October 2000 the BBC would have been free to include details of this case in their proposed television programme suggesting that D was wrongly acquitted of the alleged rape and identifying him as the perpetrator. But broadcasting these details will not just be of interest to the public. Revealing D's name will affect him too. As Lord Hoffmann observed in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359, para 91, the reputation of an individual is part of his personality. It is, as he said, an "immortal part of himself". So it is right that he should be able to vindicate it. But control under the common law over information which is objectionable and false is one thing. The law of defamation will usually provide a remedy. Not so where information which the individual wishes to screen from others is accurately reported and is true.

8. The question is whether there is any good reason why the Order should remain in place in these circumstances. As the argument was developed before your Lordships, there are two aspects to this question. The first is whether there was any proper basis on which it could have been granted. The second is whether D is entitled to invoke the protection of article 8 of the European Convention on Human Rights against its being set aside. Mr Millar QC for the BBC devoted much of his argument to the first question. Lord Pannick QC in his helpful submissions as amicus curiae did not seriously contest the first point. He concentrated instead on the second question, having regard to the fact that the House in its judicial capacity is a public authority for the purposes of section 6(1) of the Human Rights Act 1998 and must act compatibly with the Convention rights.

The Order

9. The circumstances that led to the making of the Order are obscure, as no reasons for its making were given. It bore to have been made pursuant to section 35 of the Criminal Appeal Act 1968 and the Criminal Appeal (Reference of Points of

Law) Rules 1973. Section 35(3) of the 1968 Act states that for the purpose of disposing of an appeal the House of Lords may exercise any powers of the Court of Appeal or may remit the case to that Court. The powers to which this provision refers are the powers of disposing of an appeal contained in Part I of the 1968 Act, such as to allow or dismiss an appeal or order a retrial. Rules 3 and 6 of the 1973 Rules were made in the exercise of the rule-making power under section 46 of the 1968 Act as amended. But the 1973 Rules are not concerned with disposal of appeals. They deal with the conduct of references under section 36 of the Criminal Justice Act 1972. I am inclined to think that the correct view of this legislation is that it leaves the House free to deal with references as it thinks fit. The Practice Directions applicable to criminal appeals make no provision for them. Nevertheless it can be assumed that the House will, for obviously good reasons, wish to follow the procedures which the Court of Appeal is required to adopt. Those which are set out in Rules 3 and 6 fall into that category. The fact that D was identified by name on the cover of the bound record and other documents which were before the House in the reference suggests that their provisions had been overlooked. It seems likely that the purpose of the Order was to correct what was thought to have been a deficiency in this respect.

10. Rules 3 and 6 are designed to ensure that the identity of the respondent to the reference is not disclosed during the proceedings in the Court of Appeal. Their purpose is essentially preventative, bearing in mind that things that are mentioned in open court are normally available for publication by the media. Withholding the name from the public during the proceedings will provide the basis for the making of an order under section 11 of the Contempt of Court Act 1981: *R v Arundel Justices, Ex parte Westminster Press Ltd* [1985] 1 WLR 708. But the Rules rely instead on non-disclosure, not on the withholding of information that has been disclosed in open court. In any event it was not in the exercise of any power conferred on it by section 11 that the House made the Order. As for the Rules, they do not purport to confer a power to prohibit or restrict publication of information about the respondent's identity. I agree with my noble and learned friend Lord Neuberger that they are concerned only to prevent the identification of the respondent in the reference documentation and his identification at the hearing of the reference. They do not contemplate the situation that would arise if, contrary to what they provide, the respondent is identified.

11. It is hard to see therefore how, even on the most generous reading of section 35(3) and the Rules, the House could have reached the view that it had power to make an order under those provisions that prohibited any publication or broadcast of the proper name of any person or place which was likely to lead to D's identification as having been involved in the proceedings at any stage. The Order could be construed more narrowly, as prohibiting only the identification of D as the respondent to the reference. But even then it is, at best, highly doubtful whether the House had power to make such an order under the provisions referred to.

12. The fact is, however, that the Order was made. The issue is whether it should now be discharged. Lord Pannick invited your Lordships to regard the question whether the House had power to make the Order as being no longer the primary, or indeed the decisive, consideration. He suggested that, if the position was that by discharging the Order the House would be doing something which was incompatible with D's article 8 Convention right, the House would want to maintain the Order.

13. I think that this issue has to be approached on the assumption that it is at least arguable that the House had power to make the Order. Section 6(1) of the 1998 Act has an important part to play when a court is considering how it should exercise a power that has been conferred upon it by statute or, in the case of the High Court for example, is vested in it by an inherent jurisdiction. But it cannot confer on a court a power that it does not otherwise have. It would seem therefore that the setting aside of an order that has been made without jurisdiction cannot be said to be incompatible with any Convention right that its preservation might protect, as the assumption must be that the court did not have power to afford it that protection. But the House has an inherent jurisdiction to make such orders as are necessary for the purposes of the proceedings which are before it. It is perhaps worth noting that in *Montgomery v HM Advocate* [2003] 1 AC 641 the Judicial Committee of the Privy Council ordered that publication of the proceedings in that appeal be postponed until the conclusion of the trial: see pp 643, 675. So I would be reluctant to hold that the House did not have the power to make the Order even if, as seems to be reasonably clear, it did not have power under the Rules to do so. I agree therefore with Lord Pannick that the decisive issue is whether setting aside of the Order would be incompatible with D's rights under article 8 of the Convention.

The Convention rights

14. Article 8 provides:

> "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 protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. The BBC point to the qualification that article 8(2) sets out where this is necessary for the protection of the rights and freedoms of others. It wishes to assert the right to freedom of expression that is guaranteed by article 10 of the Convention, which provides:

> "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."

16. The BBC claim to assert this right on behalf of the public. Their position is that the information that they wish to broadcast is information which the public has a right to receive. Section 12(4) of the 1998 Act states that the court must have particular regard to the importance of that Convention right and, among other things, to the extent to which it is or would be in the public interest for the material to be published. As Sedley LJ said in *Douglas v Hello! Ltd* [2001] QB 967, para 136, the court must also bear in mind when it is applying that test that the qualifications in article 10(2) are as relevant as the right set out in article 10(1). The phrase "for the protection of the reputation or rights of others" is the qualification that is in point in this case. Mr Millar for the BBC submits that it is in the public interest that a programme that identifies D in relation to the rape in the context of the removal of the double jeopardy rule should be broadcast. There are two questions, then, that must be answered. Would disclosure of D's identity in such a programme engage his article 8 Convention right? If so, does his article 8 Convention right outweigh the right of freedom of expression under article 10 which the BBC wish to assert, bearing in mind the qualification in article 10(2)?

17. As in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, these arguments involve the familiar competition between freedom of expression and respect for an individual's privacy. In that case, at para 12, Lord Nicholls of Birkenhead said:

> "Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual."

As Lord Hoffmann said in para 55, there is no question of automatic priority. Nor is there a presumption in favour of one or the other. The question is rather as to the extent to which it is necessary to qualify the one right to protect the underlying value that the other seeks to protect. The outcome is determined principally by considerations of proportionality: *Douglas v Hello! Ltd* [2001] QB 967, para 137, per Sedley LJ.

The article 8 right

18. The first question, as to whether D's article 8 right is engaged, requires careful scrutiny. As I said earlier, the common law of defamation offers no assistance where information which the individual wishes to screen from others will be broadcast accurately and is true. But the area of the law to which Lord Pannick's submissions direct attention is the wrongful disclosure of private information. Like everyone else, there are facets of D's personality that are unique to him. They include aspects of his identity such as his name, his character and his appearance. In *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885, para 48, Lord Mustill, sitting in the Court of Appeal, said:

> "To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate."

It has come to be accepted, under the influence of human rights instruments such as article 8 of the European Convention, that the privacy of personal information is something that is worthy of protection in its own right: *Campbell v MGN Ltd*, para 46, per Lord Hoffmann. As he put it in para 50, human rights law has identified private information as something worth protecting as an aspect of human autonomy and dignity.

19. In *Von Hannover v Germany* (2004) 40 EHRR 1, para 50 the European court said that the concept of private life extends to aspects relating to personal identity, such as a person's name or a person's picture, and that it includes a person's physical and psychological integrity. As Clayton and Tomlinson, *The Law of Human Rights*, 2nd ed (2009), para 12.288, put it, identity involves the manner in which a person presents himself to the state and to others. So there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. The issue in this case is about the publication of a name, linked to an allegation that the person is guilty of the crime of rape. In *Burghartz v Switzerland* (1994) 18 EHRR 101 it was about the use of name as a means of personal identity and of linking it to a family: see para 24. It is not about whether the article 8 right is engaged by the publication of a photograph. So the familiar trilogy of cases that have addressed that issue – *Campbell v MGN Ltd* [2004] 2 AC 457 (Naomi Campbell), *Von Hannover v Germany* (Princess Caroline of Monaco) and *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2008] 3 WLR 1360 – offer no direct assistance. It has been suggested that the European court in *Von Hannover v Germany* took a wider view of what falls within an individual's private life than *Campbell v MGN Ltd*: see *Murray v Express Newspapers plc*, para 43 (viii). But it is not necessary to resolve that issue in this case. The principles on which all those cases proceed indicate that the publication of D's name will engage article 8 if this is done in circumstances where D has a reasonable expectation of privacy. This, as Lord Nicholls said in *Campbell v MGN Ltd*, para 21, is the touchstone of what falls within the ambit of "private life".

20. The fact that D was acquitted of the rape is not of itself private information the publication of which would be incompatible with his right to privacy. This has nothing to do with his private life. The trial was held in public, and the media were at liberty to publish D's name along with other details of the case other than the identity of the complainant. But the point to which the BBC wish to draw attention is not confined to his acquittal. At the heart of the broadcast will be the fact that a DNA profile obtained from a saliva sample that was taken from him when he was arrested for an offence of burglary was matched with the DNA profile obtained from swabs taken from the rape victim. The judge's ruling that the DNA evidence was inadmissible having been held to have been wrong in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, it is arguable that it is available as new and compelling evidence for the purpose of a retrial within the meaning of section 78 of the Criminal Justice Act 2003. What the BBC wish to do is to undermine his acquittal and to campaign for his retrial. Lord Pannick's response is that if the keeping and storing of his DNA sample was an interference with the right guaranteed to D by article 8(1), so too must be the programme that the BBC wish to make which will refer to him by name and to the circumstances of his acquittal on the assumption that his DNA profile is available as new and compelling evidence.

21. D was acquitted of the burglary, and it was conceded in that case that his DNA profile ought to have been removed from the database before the match was made

under section 64(1) of the Police and Criminal Evidence Act 1984, as it was prior to the substitution of section 64(1A) by section 82 of the Criminal Justice and Police Act 2001. In *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, differing views were expressed as to whether retention of fingerprints or samples amounted to an interference with the right to respect for private life. In para 31 Lord Steyn said that he inclined to the view that article 8(1) was not engaged and that, if he was wrong in this view, any interference was very modest indeed. Baroness Hale of Richmond disagreed. In para 78 she said that it would be surprising if Strasbourg were not to consider it incumbent upon the state to justify its retention and storage of DNA samples and profiles. Her prediction was borne out by the court's decision in *S and Marper v United Kingdom*, Application Nos 30562/04 and 30566/04, 4 December 2008. In that case the Grand Chamber drew attention in para 122 to the risk of stigmatising those who have not been convicted of any offence and are entitled to the presumption of innocence. It held that the blanket and indiscriminate nature of the power of retention under the substituted section 64(1A) of PACE failed to strike a fair balance between the competing public and private interests, and that there had been a violation of article 8: para 125.

22. As the indiscriminate retention of samples of a person's DNA must now be held to be incompatible with his rights under article 8(1), so too must be the publication of the fact that his retained DNA has been used to link him to the commission of a crime of which he has been acquitted. I think that it must follow that the test as to whether this was information in respect of which D had a reasonable expectation of privacy is satisfied. He was acquitted of the burglary in connection with which his DNA samples were taken. He has been acquitted of the rape too. The double jeopardy rule has been abolished but the Attorney General has not taken steps to seek his retrial for that offence. He remains entitled to the presumption of innocence. This is not just an article 6 point. It has a direct bearing on the approach that must be taken to his article 8 right. The link that his DNA sample provides to the commission of the rape is personal information. The giving of publicity to the link will inevitably suggest that he is guilty of the offence. Lord Pannick described this as the jigsaw effect. His reputation, his personality, the umbrella that protects his personal space from intrusion, will just as inevitably be damaged by it. The conclusion that broadcasting this information will engage his right to respect for his private life seems to me to be inescapable.

The article 10 right

23. The question then is whether publication of the facts that the BBC wish to publish in the exercise of their right of freedom of expression under article 10 can be justified under article 8(2). The tests that must be applied are well settled. 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. Any restriction of the right of freedom of expression must be subjected to very close scrutiny. But so too must any restriction on the right to privacy. The protection of private life has to be balanced against the freedom of expression guaranteed by article 10: *Von Hannover v Germany* (2004) 40 EHRR 1, para 58. One must start from the position that neither article 8 nor article 10 has any pre-eminence over the other. The values that each right seeks to protect are equally important. The question is how far, as article 8(2) puts it, it is "necessary" for the one to be qualified in order to protect the values that the other seeks to protect.

24. Further guidance as to the approach that is to be adopted was given in *Von Hannover v Germany*. In para 60 the European court said that in the cases in which it has had to balance the protection of private life against freedom of expression, it has always stressed the contribution that photographs or articles in the press make to a debate of general interest. In para 63 it pointed out that a fundamental distinction had to be drawn between reporting facts which were capable of contributing to imparting information and ideas on matters of public interest and reporting details of the private life of an individual. In para 76 it said that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published material makes to a debate of general interest. So the extent to which the programme that the BBC wish to make will satisfy that test must be examined with just as much care as the question whether the broadcast will engage D's right under article 8.

25. Lord Pannick suggested it would be open to the BBC to raise the issue of general interest without mentioning D's name or in any other way disclosing his identity. But I think that Mr Millar was right when he said that the BBC should not be required to restrict the scope of their programme in this way. The freedom of the press to exercise its own judgment in the presentation of journalistic material has been emphasised by the Strasbourg court. In *Jersild v Denmark* (1994) 19 EHRR 1, para 31, the court said that it was not for it, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. It recalled that article 10 protects not only the substance of the ideas and the information expressed but also the form in which they are conveyed. In essence article 10 leaves it for journalists to decide what details it is necessary to reproduce to ensure credibility: see *Fressoz v France* (1999) 31 EHRR 28, para 54. So the BBC are entitled to say that the question whether D's identity needs to be disclosed to give weight to the message that the programme is intended to convey is for them to judge. As Lord Hoffmann said in *Campbell v MGN Ltd* [2004] 2 AC 457, para 59, judges are not newspaper editors. They are not broadcasting editors either. The issue as to where the balance is to be struck between the competing rights must be approached on this basis.

26. Will the revealing of D's identity in connection with the proposed programme pursue a legitimate aim? I would answer that question in the affirmative. In *Jersild v Denmark*, para 31 it was recognised that there is a duty to impart information and ideas of public interest which the public has a right to receive. The programme that the BBC wish to broadcast has been inspired by the removal of the double jeopardy rule. What this means in practice for our system of criminal justice is a matter of legitimate public interest. Among the issues which can be so described are the kinds of offences to which Part 10 of the 2003 Act applies, and the circumstances in which an application for a person who has been acquitted to be retried would be appropriate. These issues could, of course, be discussed in the abstract by reference to hypothetical facts and circumstances. But the arguments that the programme wishes to present will lose much of their force unless they can be directed to the facts and circumstances of actual cases. The point about D's name is that the producers of the programme believe that its disclosure will give added credibility to the account which they wish to present. This is a view which they are entitled to adopt and, given the content of the programme as a whole, it is an aim which can properly be regarded as legitimate.

27. There remains the question of proportionality. As against the public's right to receive information there is D's right to be protected against publication of details of his private life. But the weight that is to be given to his right has to be judged against the potential for harm if publication does take place. The fact that he was acquitted of the rape is already legitimately in the public domain. He cannot complain of a violation of his rights under article 8 if, as a result of the programme, an application is made for him to be put on trial again for that offence. This is because the statute provides for this, and because the interests of a democratic society in the prevention of crime and disorder lie in the bringing of those who have committed crimes before the courts so that, if convicted, they can be punished for them.

28. There is a risk, as Lord Pannick has pointed out, of D's being tried by the media. That, of course, is to be deprecated. If this happens it will add to the effects on his personality that will flow inevitably from the mention of his name in the broadcast. But I do not see this additional feature as a reason for holding that his article 8 right to the protection of his reputation outweighs the right of freedom of expression on a matter of legitimate public interest. It may increase the pressure on the authorities, which will be there anyway as a result of the broadcast, to take steps for him to be retried. If that happens, the system of justice will take its course. Procedures are available for protecting D's identity so that he can receive a fair trial: section 82 of the 2003 Act: see also *Montgomery v HM Advocate* [2003] 1 AC 641. The conclusion which I would draw is that the interference with D's article 8 right will be significant, but that it is proportionate when account is taken of the weight that must be given to the competing right to freedom of expression that the BBC wish to assert.

Conclusion

29. For these reasons I too agree that the Order should now be discharged.

LORD WALKER OF GESTINGTHORPE

My Lords,

30. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury. For the reasons which they give I too would allow this application.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

31. For centuries past it was not possible to re-try a defendant following acquittal on indictment, whatever damning evidence might subsequently come to light. This was the so-called double jeopardy rule. A narrow exception to the rule was introduced by sections 54 and 55 of the Criminal Procedure and Investigations Act 1996, which provide on strict conditions for the quashing of "tainted acquittals" where, for example, a juror or witness has been interfered with or intimidated. On 4 April 2005, however, there came into effect Part 10 of the Criminal Justice Act 2003 which now makes it possible to re-try persons acquitted of specified serious offences where the Court of Appeal is satisfied that there is "new and compelling evidence" available and that a retrial would be "in the interests of justice". Thus far this power has been little used and, indeed, it seems that only the second such retrial is to take place in December 2009.

32. This is the context in which the BBC are anxious to commission and broadcast a series of programmes designed to explore a number of controversial acquittals which they suggest warrant, at the very least, close consideration of possible retrials. One such acquittal—and that which the BBC wish to use for the pilot episode of their proposed series—was that of the defendant ("D") who at the Central Criminal Court on 18 June 1999 was acquitted of a most shocking offence: the anal rape of a 66-year old woman in her own home. The acquittal necessarily followed from the trial judge's

ruling that DNA evidence crucial to the prosecution's case was inadmissible by virtue of section 64(3B) of the Police and Criminal Evidence Act 1984 (PACE).

33. As matters presently stand, however, the BBC cannot use D's case for their proposed broadcast, at any rate not as they would wish. D's acquittal was the subject of an Attorney-General's reference under section 36(1) of the Criminal Justice Act 1972, initially to the Court of Appeal and then upon further reference to your Lordships' House. On 14 December 2000 the House decided that the DNA evidence was not after all inadmissible but rather could at the judge's discretion have been admitted under section 78 of PACE—*Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91 (hereafter "the reference"). Meanwhile, however, at the beginning of the reference hearing on 23 October 2000, their Lordships had made an order:

> "that, pursuant to section 35 of the Criminal Appeal Act 1968 and the Criminal Appeal (Reference of Points of Law) Rules 1973, no mention shall be made in any publication or broadcast of the proper name of any person or place which is likely to lead to the identification of the Respondent until further Order."

That order, so long as it stands, would prevent the BBC from broadcasting the circumstances of D's acquittal and discussing the possibilities of his future retrial save on an entirely anonymous basis, and it is that order which by the present application to the House the BBC now seek to have discharged.

34. Before turning to consider the powers under which the order ("the anonymity order", as I shall call it) was made, and the arguments for and against its discharge, it is necessary to set out something more of the circumstances of the offence and how D came to be tried and acquitted of it. Much of this can conveniently be found in Lord Steyn's opinion on the reference.

35. The rape occurred in the early hours of 23 January 1997 when a man climbed over a garden wall, forced open a ground floor window and entered the victim's bedroom. Having threatened her, punched her several times and tied her hands behind her back with flex, he then raped her anally. Afterwards he pushed her into a hallway cupboard and blocked its door shut. He then left, taking with him money and other stolen items. Many hours later, about 7 pm that evening, the police found the victim still tied up in the cupboard. As Lord Steyn observed: "The ordeal of the woman was horrendous and the offence of rape was of the utmost gravity." On 15 April 1997 a DNA profile, obtained from semen found on swabs taken from the victim, was placed on the national DNA database.

36. On 4 January 1998 D was arrested and charged with an unrelated offence of burglary. A saliva sample was lawfully taken from him and submitted for DNA profiling. This eventually led to a match being made on 6 October 1998 between D's DNA profile and that obtained from the semen found on the rape victim's swabs. Meanwhile, however, on 23 August 1998, D had been acquitted on the unrelated burglary charge so that, in accordance with section 64 of PACE as it then stood, his DNA sample should have been destroyed, and the profile derived from it removed from the database, before the match was made on 6 October. (Such, at least, has always been conceded by the prosecution although it seems that retention of the sample might after all have been lawful: D had given a false name when arrested and tried for the unrelated burglary and had thereby concealed from the police his previous convictions including one for affray which would have justified retention of the sample despite acquittal on the burglary charge. Whatever be the position as to that, however, I shall henceforth consider the case, as did the House on the reference, on the basis that retention of the saliva sample had been unlawful under PACE.)

37. On 15 October 1998, following the matching of the profiles on 6 October, the police arrested D for the rape and, upon his refusal to consent to the taking of an intimate sample, a police superintendent authorised the taking of a non-intimate sample of plucked head hair. On 18 October a forensic scientist confirmed that the DNA profile obtained from this hair matched that found on the rape victim's swabs and said that in his opinion the chances of obtaining such a match if the DNA found on the swabs had come from someone unrelated to D was one in 17 million. D was then charged with burglary, assault occasioning actual bodily harm and rape, committed on 23 January 1997.

38. In June 1999, D was tried before Judge Hitching and a jury at the Central Criminal Court. The Crown's case depended entirely on the DNA evidence: the match between the profile of the sample taken from D's hair on 15 October 1998 and the profile obtained from the swabs taken from the victim—"compelling evidence" as it was later described by the Court of Appeal on the reference. The defence, however, successfully submitted to the judge that that evidence was rendered inadmissible by the mandatory terms of section 64(3B) of PACE:

> "Where samples are required to be destroyed . . . information derived from the sample of any person entitled to its destruction . . . shall not be used—(a) in evidence against the person so entitled; or (b) for the purposes of any investigation of an offence."

39. The judge having ruled the DNA evidence inadmissible, the prosecution offered no evidence and, on 18 June 1999, D was duly acquitted.

40. Following D's acquittal, the Attorney General, pursuant to section 36 of the 1972 Act, referred to the Court of Appeal the point of law arising as to whether, notwithstanding the terms of section 64(3B) of PACE, the judge had a discretion to admit the evidence. The Court of Appeal answered the question in the negative but the House of Lords, on a further reference by the Court of Appeal at the Attorney General's request, on 14 December 2000 reversed the Court of Appeal's decision and held that section 64(3B)(b) did not involve the mandatory exclusion of evidence obtained as a result of a failure to comply with the prohibition on use of an unlawfully retained sample for the purposes of an investigation. Rather, read with section 78 of PACE, it left the question of admissibility to the trial judge's discretion. The House held that the admission of the evidence would not breach article 8 of the Convention nor, in the absence of any principle of Convention law prohibiting the use of unlawfully obtained evidence, the defendant's article 6 right to a fair hearing.

41. D's acquittal was reported by the Evening Standard under the headline "Rape charge man freed by DNA loophole". The article named D—the defendant's right to anonymity in rape cases having been repealed in 1988—and the London Borough where he lived, and reported the judge as having "called for urgent action to block a legal loophole". So too, following the House's decision on the reference (and despite the anonymity order of which it appears to have been unaware), The Times on 15 December 2000 published an article under the headline "Spinster, 70, tells of rape ordeal in DNA case", naming D as the man "acquitted of the offence" and naming the victim too (she having waived her statutory right to anonymity), giving her account of the crime and its impact upon her life. Shortly afterwards, on 1 February 2001, a weekly magazine, Take a Break, contained a further interview with the victim, again naming both her and D, the publishers again being unaware of the anonymity order. D brought proceedings against the publishers for breach of confidence and infringement of privacy but on 14 June 2001 his claim was struck out by Eady J on the basis that it had no realistic prospect of success—*WB v H Bauer Publishing Ltd* [2002] EMLR 145.

42. It is perhaps worth noting that, at the same time as the Court of Appeal heard the reference in D's case, it also heard *R v Michael Weir* (unreported, 26 May 2000), an appeal against a conviction for what Lord Steyn called "a particularly brutal murder" where the prosecution's case had been similarly based on DNA evidence which should have been removed from the database (but which in Weir's case the trial judge had admitted). Consistently with its opinion on the reference in D's case, the Court of Appeal allowed Weir's appeal, ruling that the DNA evidence in his case should similarly have been held excluded. Most regrettably, the prosecution failed in its attempt to appeal this decision too to the House, missing the deadline for submitting the case papers by 24 hours. Weir of course can never be retried for the murder: his trial had resulted in a conviction, not acquittal. But there can be no inhibition in naming him, subject always, of course, to his right to sue in defamation if so advised.

43. Finally before coming to the arguments, it is pertinent to note various developments in the law relating to the DNA database since the House's decision on the reference. On 11 May 2001, by virtue of section 82(2) of the Criminal Justice and Police Act 2001, section 64(1) of PACE was replaced by section 64(1A) which permits samples taken from a suspect (even if not charged or if subsequently acquitted) to be retained and used "for purposes related to the prevention or detection of crime or the investigation of an offence". (As from 2005 this provision was further amended to permit use also for "the conduct of a prosecution".)

44. It was this change in the law in 2001 which was unsuccessfully challenged in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196. Baroness Hale of Richmond alone amongst the Appellate Committee thought that the retention and storage of DNA profiles of samples constituted an interference with the appellants' rights under article 8. But each member of the Committee, Lady Hale included, was quite clear that, even if it did, it was readily justified under article 8(2).

45. On 4 December 2008, however, the Grand Chamber of the European Court of Human Rights delivered its judgment in the same case, *S and Marper v United Kingdom* (at App. Nos. 30562/04 and 30566/04), unanimously holding that the indefinite retention of samples and DNA profiles allowed under English law cannot be justified under article 8. As stated at paragraph 125 of its judgment:

> ". . . the Court finds that the blanket and indiscriminate nature of the powers of retention of the . . . DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

Since the hearing of the present application, the government have announced measures to be taken to limit the database so as to comply with the Court's judgment.

46. It is against this background that the BBC now apply to have the anonymity order discharged. As will have been noted, it purported to have been made "pursuant to section 35 of the Criminal Appeal Act 1968 and the Criminal Appeal (Reference of Points of Law) Rules 1973" (the 1973 Rules). These provisions need to be considered in the context of section 36 of the Criminal Justice Act 1972, the section under which references are made:

"36. Reference to Court of Appeal of point of law following acquittal on indictment.

(1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it.

(2) For the purpose of their consideration of a point referred to them under this section the Court of Appeal shall hear argument—

(a) by, or by counsel on behalf of, the Attorney General; and

(b) if the acquitted person desires to present any argument to the court, by counsel on his behalf or, with the leave of the court, by the acquitted person himself.

(3) Where the Court of Appeal have given their opinion on a point referred to them under this section, the court may, of their own motion or in pursuance of an application in that behalf, refer the point to the House of Lords if it appears to the court that the point ought to be considered by that House.

(4) If a point is referred to the House of Lords under subsection (3) of this section, the House shall consider the point and give their opinion on it accordingly; and section 35(1) of the Criminal Appeal Act 1968 (composition of House for appeals) shall apply also in relation to any proceedings of the House under this section.

(5) Where, on a point being referred to the Court of Appeal under this section or further referred to the House of Lords, the acquitted person appears by counsel for the purpose of presenting any argument to the court or the House, he shall be entitled to his costs …..

. . .

(7) A reference under this section shall not affect the trial in relation to which the reference is made or any acquittal in that trial.

47. Section 36(4), it will be noted, expressly applies section 35(1) of the Criminal Appeal Act 1968 to the hearing of references by the House of Lords: the House is to be composed in the same way as when hearing appeals. Nothing, however, in section

36 applies to section 35(3) of the 1968 Act which allows the House of Lords, *on appeal*, to exercise any powers of the Court of Appeal or to remit the case to them.

48. As for the 1973 Rules (made under section 46 of the 1968 Act and now superseded by comparable provisions in Part 70 of the Criminal Procedure Rules 2005), rules 3(1) and 6 are in point:

> "3(1) Every reference shall be in writing and shall (a) specify the point of law referred and, where appropriate, such facts of the case as are necessary for the proper consideration of the point of law; (b) summarise the arguments intended to be put to the court, and (c) specify the authorities to be cited;
>
> Provided that no mention shall be made in the reference of the proper name of any person or place which is likely to lead to the identification of the respondent.
>
> . . .
>
> 6. The court shall ensure that the identity of the respondent is not disclosed during the proceedings on a reference except where the respondent has given his consent to the use of his name in the proceedings."

49. It is not possible to say now whether or not D's identity was in fact revealed in open court during the hearing of the reference. However, the bound record of the reference before the House, both on its face and within the petition, named D. And the judgments on the reference, both of the Court of Appeal and of the House of Lords, by fully describing the facts of the case and the date when and court where D had been acquitted, enabled anyone interested to discover with ease the identity of the accused whose acquittal had been the subject of the reference. I turn now to the arguments.

50. Although D had been represented throughout the reference proceedings and was served with notice of the present application, he was not present or represented upon it. The House was, however, greatly assisted by both written and oral arguments from Lord Pannick QC acting as *amicus curiae.*

51. There was some discussion before your Lordships as to whether the 1973 Rules have any application to a reference hearing before the House. On their face they apply only to the Court of Appeal and, despite the implication arising from the anonymity

order itself, section 35(3) of the Criminal Appeal Act 1968 has no apparent application to a reference before the House. There was discussion too as to whether the duty purportedly imposed on the court under rule 6 extended beyond the conclusion of the reference proceedings themselves. Rather more fundamentally, there was consideration of whether such duties (or powers) purportedly arising under the 1973 rules were lawfully imposed (or conferred) on the court. Where was the authority to make such rules? On this latter question it is important to have in mind the detailed legal analysis and clear conclusion arrived at by the Judicial Committee of the Privy Council in *Independent Publishing Co. Ltd v Attorney General of Trinidad & Tobago* [2005] 1 AC 190—see paras 21-68 and in particular para 67:

> "Their Lordships … conclude that if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law."

52. Whether the 1973 Rules are to be regarded as "legislation" sufficiently clearly conferring power to make non-publication orders in respect of open court proceedings *contra mundum* may be doubted. Although not referred to at the hearing, section 82 of the Criminal Justice Act 2003 provides to my mind an instructive contrast with the 1973 Rules. Section 82 provides for restrictions on publication in the interests of justice with regard to hearings by the Court of Appeal of prosecutors' applications for orders to quash acquittals and order retrials:

> "82(1) Where it appears to the Court of Appeal that the inclusion of any matter in a publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial, the Court may order that the matter is not to be included in any publication while the order has effect.
>
> . . .
>
> (3) The Court may make an order under this section only if it appears to it necessary in the interests of justice to do so."

Unlike the position regarding the 1973 Rules, no one could question the legitimacy of section 82 and any *contra mundum* orders made under it.

53. To my mind, however, for reasons to which I shall shortly come, it is not in fact necessary to resolve any doubts about the *vires* or scope of the 1973 Rules one way or the other. Similarly it is unnecessary to reach any concluded view upon whether section 11 of the Contempt of Court Act 1981 (the 1981 Act) would have allowed the making of the anonymity order, another question briefly debated before your Lordships:

> "11. In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

Here too it may be doubted whether, unless the anonymity order was in any event authorised by rule 6 of the 1973 Rules, section 11 could supply the necessary power.

54. The reason why all these questions seem to me in the end unimportant is that on any view the House was bound at the time this anonymity order was made (3 weeks after the coming into effect of the Human Rights Act 1998), as it is bound today, to act compatibly with any Convention rights arising (section 6 of the 1998 Act) which in this context involved and involves striking the appropriate balance between D's article 8 privacy rights on the one hand and the BBC's (and for that matter everyone else's) article 10 rights to freedom of expression and communication on the other. This essentially is what the House decided in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 ("*S*") where Lord Steyn, giving the only reasoned speech, said at paragraph 23:

> "The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from Convention rights under the ECHR. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the ECHR provisions."

Lord Steyn had already described at paragraph 17 what he meant by "the ultimate balancing test" (as to "the interplay between articles 8 and 10"), in the following four propositions derived from *Campbell v MGN Ltd* [2004] 2 AC 457:

> "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 cases 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."

55. The facts of *S* were very different from those of the present application but both concerned orders to the world at large forbidding the identification of the defendant in criminal proceedings having regard to the interests of privacy, there for the benefit of the accused's 8-year old son; here, of course, for the benefit of the respondent to a section 36 reference.

56. In upholding the trial judge's variation of his own order in ultimately permitting the defendant's identification, Lord Steyn at paragraph 30 said this:

> "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."

At paragraph 34 he added:

> ". . . 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."

57. Whether in the present case the House correctly struck the balance at the time of making the anonymity order in October 2000 is altogether less important than the question whether it is now appropriate to continue it or discharge it and it is upon that question that I propose to focus. Just before doing so, however, I should perhaps note that there can be no question here as to the House's power to make such an order if the ultimate balancing exercise requires it. Mr Millar QC's submissions to the contrary—

largely based upon an enlarged Court of Appeal's recent judgment in *In Re Trinity Mirror Plc* [2008] QB 770—are in my opinion misconceived. *In Re Trinity Mirror* was concerned with the Crown Court's powers to make anonymity orders (in particular under section 45(4) of the 1981 Act). As pointed out at para 22 of the Court of Appeal's judgment, the Crown Court's powers are more restricted than those of the High Court which arise under section 6 of the 1998 Act read in conjunction with section 37 of the 1981 Act (as in *S* itself). The full width of the section 37 power, to grant injunctions whenever just and convenient, is no less available to your Lordships' House than to a High Court judge.

58. The thinking underlying rules 3 and 6 of the 1973 Rules (whether sanctioned by primary legislation or not) is not difficult to understand. Section 36 of the 1972 Act for the first time enabled the Attorney General to seek clarification of the criminal law by the higher courts, in effect by way of advisory opinions, notwithstanding the accused's acquittal. Section 36(7) made plain that, whether the ruling in the respondent's case had been right or wrong, the reference was not to affect his acquittal. The rule-makers clearly thought that this clarification should not be achieved at the defendant's expense as to an extent it would be if publicity of the reference appeared to bring his acquittal into question. It was therefore to be heard anonymously.

59. Such an approach, however, seems to me to produce some curious anomalies. Suppose another alleged rapist had been similarly acquitted but not himself made respondent to an Attorney General's reference. Following the ruling in D's case there would be nothing to prevent the media from pointing out that it was now perfectly clear that the other acquitted man should in fact have been convicted. Or take, indeed, the quashing of Mr Weir's murder conviction which, as already pointed out, the media are now free to suggest, in the light of the ruling on D's reference, involved a plain miscarriage of justice. More troubling still, but for the reference in D's case and the anonymity order made upon it, there would be no bar to the media publicising the full details of D's Old Bailey trial and acquittal, including his identity. Now, however, if the anonymity order stands, it operates retrospectively to cloak in anonymity even any description of the trial proceedings themselves. The reference, in short, appears to place D actually in a better position in terms of future anonymity than he would otherwise have been in.

60. Let it be assumed, however, that the anonymity order could be varied to operate on the basis that it attaches only to the reference itself and not to the original trial process. In this event, of course, the BBC would be free to report D's acquittal and to assert that by virtue of some nameless later authority it now appears that the excluded DNA evidence should after all have been admitted and D therefore convicted. That, submit the BBC, is the very least that they should now be entitled to broadcast.

61. Lord Pannick, however, submits that the anonymity order was properly made and should remain in full force. What essentially he argues is that the retention of D's sample and DNA profile was always unlawful under domestic law so as to violate D's article 8 rights, a conclusion made clearer still by the recent Grand Chamber judgment in *S and Marper*. There is, he points out, no domestic law now in force such as allows of any article 8(2) justification for the retention and use of samples and, indeed, this will remain so until Parliament legislates to comply with the Court's judgment. To discharge the anonymity order would, submits Lord Pannick, substantially risk compounding the violations of D's privacy rights which have already occurred. The whole focus of the proposed broadcast would be on the unlawfully retained DNA and the way it serves to establish D's identity as the person guilty of the rape. The House should continue to bar it.

62. There is a further reason too, Lord Pannick argues, why the House should not discharge the anonymity order so as to permit the BBC to call into question the correctness of D's acquittal on the rape charge. This would, submits Lord Pannick, offend against the presumption of innocence enshrined in article 6(2) of the Convention and be irreconcilable with the Strasbourg jurisprudence—reflected, for example, in paragraph 37 of the Court's judgment in *Minelli v Switzerland* (1983) 5 EHRR 554:

> "In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty."

A judgment on the present application discharging the anonymity order would, Lord Pannick submits, suggest that your Lordships regard D as guilty of the rape, his acquittal notwithstanding.

63. In my opinion there is nothing in this article 6 argument: by discharging the order your Lordships would be saying no more than that is it perfectly proper for the BBC if they wish (and no doubt at the risk of a defamation action) to call D's innocence into question. Indeed it is difficult to see why the position here is any different from that of a court, say, refusing to strike out as hopeless a claim for damages by the victim of a rape against her alleged attacker notwithstanding his acquittal—or, say, the Court of Appeal acceding to a prosecutor's application under

Part 10 of the 2003 Act to re-try an acquitted defendant. Nor is there any sensible risk of the BBC's proposed broadcast here compromising the fairness of any possible retrial of D even supposing one were eventually to be sought and permitted. One could hardly be further from proceedings which are "active" within the meaning of section 2(3) of the 1981 Act.

64. The balance to be struck is, I repeat, solely between the respective article 8 and article 10 rights here in play.

65. What weight, then, should be attached to the BBC's article 10 right to free expression? Whilst Lord Pannick naturally recognises the high value ordinarily attaching to the freedom of the media to report on court proceedings and to discuss matters of obvious public interest such as arise here, he nevertheless suggests that very little weight should be given to that right in this case. Why, he asks rhetorically, cannot the BBC broadcast their programme simply referring to D as D without actually identifying him?

66. The short answer to that submission is in my opinion to be found in paragraph 34 of Lord Steyn's speech in *S* (quoted at paragraph 56 above): such a programme would indeed be "very much disembodied" and have a substantially lesser impact upon its audience.

67. As for the possibility of varying the anonymity order to allow D to be named relative to his original trial and acquittal but not as the subject of the reference (the BBC's fall-back position—see paragraph 60 above), there appears to me little merit in arriving at such a compromise. If D is to be deprived of his favoured position of immunity from all future identification and the BBC are to be permitted to name him relative at least to the unsatisfactory circumstances of his acquittal, then the interests of free expression surely outweigh such limited residual advantage as D would enjoy from being unnamed relative only to the reference.

68. Indeed, Lord Pannick's submissions notwithstanding, I have great difficulty in attaching any substantial weight to D's article 8 rights suggested to arise from the unlawfulness of the process by which he originally came to be identified as the alleged rapist. To say that his article 8 rights were interfered with by the unlawful retention and use of his sample is one thing; to assert that in consequence he must be entitled to anonymity in respect of the subsequent criminal process is quite another. Lord Pannick's argument comes close to impugning the correctness of the House's decision on the reference and, indeed, to asserting that, until the UK's database is compliant with the Grand Chamber's decision in *S and Marper*, any use made of it will of itself necessarily constitute an unlawful violation of article 8. That cannot be right. Given, as the House noted on the reference itself, that the Convention does not prohibit the

use of unlawfully obtained evidence, it would be inconsistent then to regard such use as compounding the unlawfulness.

69. Thus to my mind D's best argument for asserting a continuing article 8 right to anonymity is that suggested by my noble and learned friend Lord Hope of Craighead at paragraph 22 of his opinion. I agree with Lord Hope that the presumption of innocence is of relevance not only under article 6 (in respect of which, as stated above, I conclude D can have no complaint here) but also under article 8 insofar as it bears on D's reputation. That said, for the reasons already given, on the particular facts of this case I find it difficult to regard D's right to his reputation as outweighing that of the BBC to imperil that reputation by their proposed broadcast, a broadcast of undoubted public interest.

70. There are other considerations too which broadly favour the BBC's case. First, that the victim herself waived her right to anonymity. It would seem somewhat odd if a broadcast now at liberty to name the victim (whose identity the legislation would have allowed her to withhold) cannot blame the accused (whose identity enjoys no legislative protection) the merits of whose acquittal the BBC desire and are entitled to put in question. Sadly the victim died in 2002 but there can be little doubt that she would have applauded the BBC's intention to carry the case further. Secondly, D's own failure to respond in any way to this application. Thirdly, the fact that, as described above, D's name has already come to be published on more than one occasion in connection not only with his trial but also with the reference.

71. For my part, therefore, I have no doubt whatever that the balance here falls in favour of the BBC's right to free expression. There can be no possible justification for the reference placing D in a more advantageous position as to publicity than he would have been in had the critical point of law been settled in someone else's case I would accede to this application and discharge the anonymity order.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

72. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Phillips of Worth Matravers, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood. I agree with them that this application should be granted.

73. I would like to discuss the meaning and effect of rule 6 and the proviso to rule 3 of the 1973 Rules. For that purpose, I shall assume that those rules apply to an appeal to this House from the Court of Appeal's ruling on a reference by the Attorney General under section 36 of the 1972 Act, and that this House's order of 23 October 2000 was made under those rules.

74. It seems to me that the basis of D's argument for invoking rule 6 and the proviso to rule 3 of the 1973 Rules is simply not within the meaning and purpose of those rules. In the light of both their language and their context, I consider that the purpose of those rules is relatively limited. In 1973, as now, almost every criminal trial was held in public and the defendant could be identified freely, irrespective of his ultimate conviction or acquittal. If he was convicted and he appealed, his appeal would also normally be in public, and, again, he could be identified freely, irrespective of the outcome of the appeal.

75. When the Attorney General was given the right to refer to the Court of Appeal a point of law, arising out of an acquittal on indictment, by section 36, the 1973 Rules were introduced to regulate such references. The only explanation for the inclusion of rule 6 and the proviso to rule 3 is that it was thought appropriate to reduce the risk of the defendant receiving further publicity (over and above that resulting from his trial at which he had *ex hypothesi* been acquitted) as a result of the section 36 reference. However, it cannot have been intended that, in terms of risk of publicity, a defendant would be better off as a result of a section 36 reference than he would have been if there had been no such reference. It was therefore necessary to frame the rules relating to the defendant's identification with some care. Hence, rules 3 and 6 are limited to prohibiting the identification of the defendant in the section 36 reference itself or "during the proceedings on a reference". In that connection "during the proceedings" must, in my view, refer to the course of the proceedings in court.

76. If one examines the facts of this case and the purpose of the two rules in that light, it seems to me impossible to justify the continuation of the order made by your Lordships' House on 23 October 2000, at least as against the BBC in connection with the programme it wishes to broadcast. Although D was apparently identified in the section 36 reference at least when it came before this House, this does not appear to be a case where the defendant's identity, or indeed the trial, came to the attention of the party seeking to use and disseminate the information as a result of the defendant having been identified either in the reference following his acquittal or in the proceedings pursuant to that reference.

77. The evidence shows that D's case was identified by Mentorn Media, the independent production company commissioned by the BBC to look for criminal cases which had resulted in "controversial acquittals" and which might be the subject

of a TV programme. D's case was selected as promising material. This was said in the evidence in support of this application to have been in the light of "the very serious nature of the offence which had been committed", "the fact that the crime remained unsolved", and "the media coverage that the case received" both "at the time of [D's] acquittal" and "at the time of the publication of the judgment of the House of Lords in the case". It therefore does not appear that Mentorn Media came to know, or were even reminded, of this case as a result of D having been named in the section 36 reference or having had his identity disclosed during the hearing of the reference or the appeal. So the mischief against which rules 3 and 6 are directed simply does not seem to be in play here.

78. Having said that, I accept that the attraction of making a programme about D's case has been enhanced as a result of the decision of this House in December 2000. Accordingly, it can be said that the section 36 reference has increased the likelihood of D being identified more widely as the possible perpetrator of the crime in question. However, I do not consider that such an argument brings D's case within the scope of rules 3 and 6. As already mentioned, those rules are concerned with the identification of a defendant in the reference documentation and at the hearing of the reference. So far as the section 36 reference is concerned, it was the media coverage of the decision of this House to which the BBC's evidence refers, and no mention of D's identity was contained in the opinions or the report see *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91.

79. It was a combination of (a) the appalling nature of the crime, (b) D's trial and acquittal in June 1999, (c) the contemporaneous media coverage including the description of the crime and the identification of D, (d) the December 2000 decision of this House, and (e) the resultant further media coverage of that decision, all of which were perfectly properly in the public domain, which led to the conclusion that it was worth making a programme about D's case. Quite apart from the wording of rules 3 and 6, the 1973 Rules cannot have been intended, in my view, to protect a defendant on facts such as these. There would have been no protection if the December 2000 decision of this House had been on precisely the same point but in a different case (which could easily have happened). The fact that this House reached its decision on the facts of D's case does, I accept, make his case a slightly more promising subject for a TV programme, but that must have been very marginal factor, if it counted at all.

80. Even without taking article 10 into account, it seems to me that it is wrong to treat rules 3 and 6 as having a particularly wide reach. In general, an alleged criminal who is involved in proceedings, of whatever nature in whatever court, is subject to the risk of publicity. That is an inevitable consequence of the administration of justice being public and transparent. The protection which can and should be afforded to an acquitted defendant whose case leads to a section 36 reference is, therefore, of necessity, limited. It is understandable and practicable to stipulate that he should not be identified in the written and oral aspects of the reference, but it would be wrong in principle and practice to go much further. It cannot be right that a defendant can avoid

being named in connection with a crime of which he has been acquitted simply because part of the reason the case is of interest is that it included a successful section 36 reference following his acquittal. Indeed, in my view, it cannot be right that he can avoid being named in such circumstances where the section 36 reference was partly responsible for the case coming to the attention of the media or anyone else.

81. Quite apart from the limited effect of the language of rules 3 and 6, this conclusion accords with principle and practicality. The notion that justice should be administered publicly is well established, and its effectiveness should not be constrained save for compelling reasons. To defeat the present application, D would, I think, have to establish that it was enough that the report of the section 36 decision enabled him to be identified as the acquitted defendant in the particular case, and/or that the publication of the section 36 decision brought his case to the BBC's attention. Neither proposition can be right in principle, as, once the decision on the section 36 reference was reported, the information was in the public domain. Anyway, neither proposition is within the natural meaning of the 1973 Rules. The second proposition would also be very difficult to establish in many cases, and could lead to arguments both as to the facts and as to the degree to which it would have to be established that the section 36 reference, as opposed to other aspects of the case, brought the case to the attention of the person who wishes to publicise it.

82. I have so far approached matters on the assumption that rules 3 and 6 applied to the Attorney General's appeal to this House in 2000, and that the order of 23 October 2000 was made under those rules. However, like Lord Hope, I find it difficult to construe section 36 of the 1972 Act or sections 35 and 46 of the Criminal Appeal Act 1968, or indeed the 1973 Rules themselves, as meaning that rules 3 and 6 can or do apply to such an appeal. Having said that, at least as at present advised, I also agree with him in thinking that this House has jurisdiction to deal with section 36 appeals (whether referred by the Court of Appeal, or on appeal from the Court of Appeal) as it sees fit, and that this would, save in exceptional circumstances, involve following the same rules and procedures as the Court of Appeal was required to adopt in relation to such appeals.

83. That leads on to the other assumption I have been making, namely that the order of 23 October 2000 was properly made pursuant to rules 3 and 6. It is not necessary to determine that question, but, like Lord Phillips and Lord Hope, I find it almost impossible to see how the very wide terms in which the order was expressed could even be arguably justified as being within the ambit of the two rules.

84. Accordingly, for these reasons, in addition to those given by Lord Hope and Lord Brown, with which I agree, I would allow this application.