Neutral Citation Number: [2019] EWHC 1823 (Fam)

Case No: FD18F00035

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT AND FAMILY DIVISION
IN THE MATTER OF TT AND YY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before:

Sir Andrew McFarlane
The President of the Family Division

THE QUEEN
(ON THE APPLICATION OF TT)

Claimant

-and-
THE REGISTRAR GENERAL FOR ENGLAND AND WALES

Defendant

-and-
(1) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
(2) MINISTER FOR WOMEN AND EQUALITIES
(3) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(4) YY (by his litigation friend CLAIRE BROOKS)

Interested Parties

-and-
THE AIRE CENTRE

Intervener

-and-

(1) TELEGRAPH MEDIA GROUP
(2) ASSOCIATED NEWSPAPERS LTD
(3) NEWS GROUP NEWSPAPERS LTD
(4) REACH PLC

Interested Media Parties

- -

Ms Hannah Markham QC Ms Catrin Evans QC Ms Miriam Carrion Benitez (instructed by **A City Law Firm**) for the **Claimant**
Mr Michael Mylonas QC Ms Marisa Allman and Ms Susanna Rickard (instructed by **Cambridge Family Law Practice**) for the **Litigation Friend**
Mr Ben Jaffey QC and Miss Ms Sarah Hannett (written submissions) (instructed by **Government Legal Department**) for the **Defendant** and **First to Third Interested Parties**
Mr Gervase de Wilde (instructed by **Legal Department, Telegraph Media Group Limited**) for the **Media Groups**

Hearing date: 27 June 2019

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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.

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THE RIGHT HONOURABLE SIR ANDREW MCFARLANE

Sir Andrew McFarlane P:

1. On 7th June 2018, at the first hearing in judicial review proceedings, Mr Justice Francis made an order ('the order') in the following terms:

   "1. For the purposes of these proceedings the Claimant shall be referred to as TT. The Claimant's child shall be referred to as YY.

   2. No person shall disclose or publish any document relating to these proceedings in such a manner as to identify either directly or indirectly the Claimant or YY."

2. Subsequently applications have been made for a declaration of parentage and for the grant of parental responsibility with respect to the relationship between TT and YY. On 7th June 2018, the judicial review proceedings, which had been issued in the Family Division, were transferred to the Administrative Court. The applications, which are 'family proceedings', were consolidated with the judicial review proceedings and have been heard together in open court.

3. The substantive hearing of the combined judicial review and family proceedings took place over the course of 5 days and concluded on 15th February 2019. The judgment, which was reserved, will shortly be ready for circulation in draft to the advocates prior to formal handing down. The substantive hearing took place in open court with the media in attendance. The proceedings were reported in parts of the national Press. Any such reporting seems to have complied with the anonymity requirements of Francis J's order.

   Factual Background

4. The factual background upon which the judicial review and family proceedings are established can be shortly stated. TT's registered gender at birth was "female". TT has been diagnosed as gender dysphoric and for many years he has lived as a transgender male. TT's transition was assisted and supported by regular hormone treatment.

5. For some years it has been TT's hope that he would become the biological parent of a child. In 2016 TT took professional advice and, thereafter, he engaged treatment at a fertility clinic registered to provide "treatment services" under the Human Fertilisation and Embryology Act 2008 ['HFEA 2008']. His hormone treatment was suspended, his menstrual cycle recommenced and in due course, in 2017 he was artificially inseminated by inter-uterine insemination ('IUI') using donor sperm. Conception was achieved, and, in due time, TT gave birth to a child, YY.

6. Under the guidance of an endocrinologist, TT had paused his hormone treatment. Thereafter, and before attending the fertility clinic for IUI treatment, TT had applied for a Gender Recognition certificate which, when granted, would confirm for all purposes, his acquired gender as male under the Gender Recognition Act 2004 ['GRA 2004']. In support of his application to the Gender Recognition Panel TT made a declaration, as required by GRA 2004, s 3 that it was his intention to live in the gender of male for the rest of his life. The application was also supported by medical evidence confirming the diagnosis of gender dysphoria.

7. The Claimant had paused hormone therapy prior to the application for a Gender Recognition certificate. The Claimant did not disclose to the GR Panel the fact that he had paused therapy or that he was actively seeking IUI treatment with a view to becoming pregnant. Such information was not specifically requested as part of the GR certificate application. Instead, the Claimant was required to prove that he had been living for two years as a male. In this respect the Claimant relied upon the fact that he had transitioned to male, and had also changed all of his identification documents, a number of years earlier.

8. The Gender Recognition certificate was granted confirming TT's gender as male. The certificate was issued prior to the birth of YY and thus, at the time of YY's birth, TT was legally male "for all purposes" [GRA 2004, s 9(1)].

9. As is required by the Births and Deaths Registration Act 1953, TT attended his local register office to register the birth of his child. Having explained the factual background to the Registrar, TT insisted that he should be registered as YY's "father". The Registrar declined his request and advised that TT could only be registered as YY's "mother".

Judicial Review and Family Proceedings

10. By his judicial review claim, TT challenges the Registrar's decision. His primary claim is for a declaration that, as a matter of domestic law, he is indeed to be regarded as the "father". His secondary position is that, if not "father", his child's birth certificate should simply record his status in gender neutral terms as "parent". TT's alternative case is that, in the event that the court concludes that domestic law requires that he be registered as "mother", that outcome would be a breach of both TT's and YY's rights under European Convention on Human Rights, Article 8 so as to justify the court making a declaration of incompatibility under Human Rights Act 1998, s 4.

11. Subsequently, those acting for YY issued an application for a declaration that TT is YY's 'father' under Family Law Act 1986, s 55A. Finally, within the substantive process, there has been an informal application for the court to make an order under Children Act 1989 granting parental responsibility for YY to TT if such an order is needed depending upon the outcome of the judicial review/declaration applications.

Documentary film and newspaper article

12. Following the conclusion of the substantive hearing in February 2019, the legal teams acting for TT and YY became aware that TT had, apparently over the course of the past three years, been co-operating in the production of a one hour documentary film, the sole subject of which was TT, his desire to become pregnant and his journey through IVF treatment, conception via IUI to the birth of his child, YY. Having been told that the film was due to receive its world premiere at a film festival in New York in the coming weeks, and that that date would coincide with the publication in the UK of an article in a national newspaper describing TT as a transgender male who had given birth, TT's lawyers quite properly informed the court and the other parties of this new information.

13. The film, which the court has seen, features TT throughout. He is openly named using his correct name in the film and in the credits. The film includes a detailed account of

TT's intimate thoughts about the process of conception, pregnancy and birth. It also includes footage that shows in clear detail the IUI process and YY's birth.

14. The newspaper article, which appeared in a magazine section, included a full-page portrait photograph of TT, named him and identified him as a journalist on the same paper.

15. The documentary film has subsequently been shown at a dozen or more international film festivals and on two occasions in Sheffield and once in Belfast. The film is a co-production with the BBC. TT understands that the BBC intend to broadcast the film during the coming Autumn. Following broadcast, the film would be available to be viewed on iPlayer for one month.

16. On the 2nd May the court reconvened to consider the impact, if any, of this new material on the Article 8 arguments raised on behalf of TT and YY. Media representatives were in attendance at that hearing and heard the film and the article being described. In any event, the court has been told that one or more of the media representatives who had attended the substantive hearing, and therefore seen TT in court, had recognised his picture in the newspaper article and readily identified him as TT.

17. At this point it is important to stress that no reference whatsoever is made in the film or the article to the registration of YY's birth or TT's claim to be entitled to be registered as the father. Neither is there any reference to the current court proceedings in either the film or the article.

Media Groups' Application

18. In the light of these developments a joint application was made to the court on 29th May 2019 by Telegraph Media Group Limited, Associated Newspapers Limited, News Group Newspapers Limited and Reach PLC ('the Media Groups') to remove TT from the protection of the anonymity order, but retain a bar on directly naming YY. The form of order proposed by the Media Groups is:

> "1. For the purposes of these proceedings the Claimant's child shall be referred to as YY.
>
> 2. No person shall disclose or publish any document or other material relating to these proceedings in such a manner as to directly identify YY."

19. The basis of the Media Groups' case is that the entirely self-generated publicity that has been given by TT to his transgender status, pregnancy and the birth of his child means that the only relevant information that is currently not in the public domain is his identity as the Claimant in these proceedings. There is legitimate public interest, as TT plainly accepts by his participation in the film and the article, in his journey through pregnancy to parenthood. Equally, it is contended, there is public interest in the question of how the state and the law should recognise TT's parenthood as "mother" or "father" or "parent" as demonstrated by the media reports of the current proceedings. The Media Groups therefore submit that it is wholly artificial for the court to maintain a prohibition upon identifying the link between the individual who is the subject of the film and the article as being the Claimant in these proceedings.

20. The Media Groups' application is opposed by TT and, separately, by YY. Those representing the Registrar General and the three Secretaries of State who are party to the main proceedings are neutral on the issue.

The Legal Context

21. The legal context within which the present issue must be determined is not controversial as between the parties before this court. It is well known and well established. It is not therefore necessary for there to be an exhaustive description of it within this judgment, although a number of the leading cases include material that is directly relevant to the present dispute.

22. For over a century, it has been acknowledged that open justice is a constitutional principle (*Scott v Scott* [1913] AC 417). The Civil Procedure Rules 1998 permit the court to withhold the identification of a party in limited circumstances [r 39.2(4)]:

> '39.2(4): The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.'

23. Further, where proceedings relate to a child, the court in any proceedings (other than criminal proceedings) may protect disclosure of the information relating to the identity of a minor (Children and Young Persons Act 1933, s 39).

24. Practice Guidance on interim non-disclosure orders issued by Lord Neuberger MR in 2012 (see [2012] 1 WLR 1003) describes the approach to anonymity at paragraphs 12 to 14:

> '12. … Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence …
>
> 14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings.'

25. Articles 8 and 10 of the ECHR fall to be balanced when determining an issue of anonymity:

> Article 8
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> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
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> Article 10
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> 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.

26. In addition, under the Human Rights Act 1998, s 12 applies:

> 12 (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the

> proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.
>
> (5) In this section—
>
> "court" includes a tribunal; and
>
> "relief" includes any remedy or order (other than in criminal proceedings).

27. Lord Sumption JSC set out the modern approach, following a full analysis of the authorities, in *Khuja v Times Newspapers Ltd* [2017] UKSC 49 at paragraph 29:

> 'In most of the recent decisions of this Court the question has arisen whether the open justice principle may be satisfied without adversely affecting the claimant's Convention rights by permitting proceedings in court to be reported but without disclosing his name. The test which has been applied in answering it is whether the public interest served by publishing the facts extended to publishing the name. In practice, where the court is satisfied that there is a real public interest in publication, that interest has generally extended to publication of the name. This is because the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion. As Lord Steyn observed in *In re S*, at para 34,
>
> "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."
>
> "What's in a name?", Lord Rodger memorably asked in *In re Guardian News and Media Ltd*, before answering his own question, at para 63, in the following terms:
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> "'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to

> readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2001) 31 EHRR 8, 256, para 39 … More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors". See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2010] 1 AC 145 , para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."

> The public interest in the administration of justice may be sufficiently served as far as lawyers are concerned by a discussion which focusses on the issues and ignores the personalities, but

> > "the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want."'

28. The balance that a court must achieve when there are competing rights under Arts 8 and 10 in play was described succinctly by Lord Steyn in *Re S* [2004] [2005] 1 AC 593 at paragraph 17:

> 'First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.'

29. Where, as here, the interests of a child's right to family life and privacy under Art 8 must be considered, the need for intense focus on the child's interests was emphasised by Baroness Hale DPSC in *PJS v News Group Newspapers* [2016] UKSC 26 at paragraphs 72 to 74:

> '72. First, not only are the children's interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their parents. Secondly, by [HRA 1997] s 12(4)(b), any court considering whether to grant either an interim or a permanent injunction has to have "particular regard" to "any relevant privacy code". It is not disputed that the Independent Press Standards Organisation Editors' Code of Practice, which came into force in January, is a relevant Code for this purpose. This, as Lord Mance JSC has explained, at para 36, provides that "editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of children under 16".
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> 73. This means that, at trial, the court will have to consider carefully the nature and extent of the likely harm to the children's interests which will result in the short, medium and longer terms from the publication of this information about one of their parents. At present, there is no evidence about this. It is possible that, at trial, the evidence will not support any risk of harm to the children's interests from publication of the story in the English print and broadcasting media. It is possible that the evidence will indicate that the children can be protected from any such risk, by a combination of the efforts of their parents, teachers and others who look after them and some voluntary restraint on the part of the media.
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> 74. On the other hand, it is also possible that the evidence will support a risk of harm to the children's interests from the invasion of their own and their parents' privacy, a risk from which it will be extremely difficult to protect them. There is all the difference in the world between the sort of wall to wall publicity and intrusion which is likely to meet the lifting of this injunction and their learning this information in due course, which the Court of Appeal thought inevitable. For one thing, the least harmful way for these children to learn of these events is from their parents. Their parents have the resources to take wise professional advice about how to reveal and explain matters to their children in an age-appropriate way and at the age-appropriate time. No doubt their parents are already giving careful thought to whether this might be the best way of protecting their children, especially from the spike of interest which is bound to result from this judgment let alone from any future judgment. The particular features which are relevant to the balancing exercise in this case are contained in three short

> paragraphs in the unredacted version of this judgment. These unfortunately have to be redacted because it would be comparatively easy to surmise the identity of the children and their parents from them. There are particular reasons why care should be taken about how, when and why these children should learn the truth.'

30. Baroness Hale again focussed upon the approach to be taken when the interests of a child are engaged in *R (C) v The Secretary of State for Justice* [2016] UKSC 2 at paragraphs 1, 17 and 18:

> '1. The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge. The rationale for the second rule is not quite the same as the rationale for the first, as we shall see. This case is about the second rule. There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property. The first issue before us is whether there should be a presumption of anonymity in civil proceedings, or certain kinds of civil proceedings, in the High Court relating to a patient detained in a psychiatric hospital, or otherwise subject to compulsory powers, under the Mental Health Act 1983 ("the 1983 Act"). The second issue is whether there should be an anonymity order on the facts of this particular case.
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> …
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> 17. This longstanding principle of the common law is reflected in article 6(1) of the European Convention on Human Rights:
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> > "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

> It has been held acceptable to provide that a whole class of hearings, such as those relating to children, should normally be held in private: *B v United Kingdom* (2002) 34 EHRR 19. As the right is that of the litigant, this provision has normally become relevant in cases where the court proposes, in pursuance of one the exceptions to the normal rule, to sit in private, but the litigant wishes the case to be heard in public.
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> 18. However, in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The interest protected by publishing names is rather different, and vividly expressed by Lord Rodger in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 63:'
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> [see quotation at paragraph 26 above].

31. Earlier, in *K v News Group Newspapers Ltd* [2011] 1 WLR 1827, Ward LJ considered the approach where the Art 8 interests of a child are engaged (at paragraphs 17 to 19):

> '17. The position of the claimant's wife is equally clear: she opposes publicity. Then there are the children. The purpose of the injunction is both to preserve the stability of the family while the claimant and his wife pursue a reconciliation and to save the children the ordeal of playground ridicule when that would inevitably follow publicity. They are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment. In another context, in *Beoko-Betts v Secretary of State for the Home Department* [2009] AC 115, Baroness Hale of Richmond commented, at para 4, on the risk of
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> > "missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."
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> 18. Collins J may not have recognised the rights of the claimant's wife but he certainly did accept that the adverse effect on the children was relevant. Regrettably I cannot agree that the harmful effect on the children cannot tip the balance where the adverse publicity arises because of the way the children's father has behaved. The rights of children are not confined to their article 8 rights. In *Neulinger v Switzerland* [2010] 28 BHRC 706 the Strasbourg court observed, at paras 131 and 135:

> "131. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken …of 'any relevant issues of international law applicable in the relations between the parties', and in particular the rules concerning the international protection of human rights."
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> "135. … there is currently a broad consensus–including in international law–in support of the idea that in all decisions concerning children, their best interests must be paramount…"

Support for that proposition can be gathered from several international human rights instruments, not least from the second principle of the United Nations Declaration on the Rights of the Child 1959, from article 3.1 of the Convention on the Rights of the Child 1989 ("the UNCRC") and from article 24 of the European Union's Charter of Fundamental Rights (OJ 2007 C303, p I). For example, article 3.1 of the UNCRC provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

19. Thus it seems to me, just as "the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making", so too must the approach of the court to these injunctions have regard to the interests of children. The quotation is taken from para 20 of the speech of Baroness Hale of Richmond JSC, with whom Lord Brown of Eaton-under-Heywood and Lord Mance JJSC agreed, in *ZG (Tanzania) v Secretary of State for the Home Department* [2011] 2 WLR 148, which was a case concerned with the weight to be given to the best interests of children who are affected by the decision of the Home Secretary to remove or deport one or both of their parents from this country, more specifically with the question: in what circumstances is it permissible to remove or deport a non-citizen parent (here the mother whose immigration history was described as "appalling") where the effect will be that a child who is a citizen of the United Kingdom will also have to leave? I appreciate that the issue is far removed from that with which this Court is concerned but since the interests of the appellant's children are undoubtedly engaged, the universal principles cannot be ignored. The proper approach is, therefore, neatly summarised by Lord Kerr of Tonaghmore JSC, at para 46 of that decision, namely:

> "It is a universal theme of the various international and domestic instruments to which Baroness Hale JSC has

> referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."
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> However this learning must, with respect, be read and understood in the context in which it is sought to be applied. It is clear that the interests of children do not automatically take precedence over the Convention rights of others. It is clear also that, when in a case such as this the court is deciding where the balance lies between the article 10 rights of the media and the Article 8 rights of those whose privacy would be invaded by publication, it should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests. Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.'

32. Publication of information relating to proceedings in the Family Court with respect to children, which are ordinarily heard in private, is normally prevented on the basis that such publication will be a contempt of court, under Administration of Justice Act 1960, s 12:

> '(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—
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> (a)where the proceedings—
>
> (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
>
> (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

> …
>
> (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.
>
> (3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.
>
> (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).

33. Part of TT's case is that he is likely to experience harassment or hounding as a consequence of any publicity relating to these proceedings; this was a factor held to be of relevance by Tugendhat J in *Law Society v Kordowski* [2011] EWHC 3185 (QB) at paragraph 59:

> 'Although passed before the Human Rights Act 1998 ("HRA"), the Protection from Harassment Act 1997 is (like the law of libel and the Data Protection Act) one of the many different laws that give effect to the obligation of the state to prevent interference with the right of individuals to protection of their private lives (ECHR Art 8). In *Wainwright v The Home Office* [2003] UKHL 53 [2004] 2 AC 406 at para 18 Lord Hoffmann explained this as follows:
>
> > "There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. Sir Brian Neill's well known article "Privacy: a challenge for the next century" in Protecting Privacy (ed B Markesinis, 1999) contains a survey. Common law torts include trespass, nuisance, defamation and malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998".

34. As the core information is already in the public domain as a result of the steps that TT has positively taken to place it there, TT and YY do not base their case in favour of anonymity on breach of confidence. Their opposition to being publicly identified as parties to these proceedings is based upon the assertion that such unwanted identification would be an unjustified 'intrusion' from which they are entitled to be

protected. In this regard, particular reliance is placed upon paragraphs 57 to 62 in the judgment of Lord Neuberger PSC in the *PJS* case:

> '57. If PJS's case was simply based on confidentiality (or secrecy), then, while I would not characterise his claim for a permanent injunction as hopeless, it would have substantial difficulties. The publication of the story in newspapers in the United States, Canada, and even in Scotland would not, I think, be sufficient of itself to undermine the claim for a permanent injunction on the ground of privacy. However, the consequential publication of the story on websites, in tweets and other forms of social network, coupled with consequential oral communications, has clearly resulted in many people in England and Wales knowing at least some details of the story, including the identity of PJS, and many others knowing how to get access to the story. There are claims that between 20% and 25% of the population know who PJS is, which, it is fair to say, suggests that at least 75% of the population do not know the identity of PJS, and presumably more than 75% do not know much if anything about the details of the story. However, there comes a point where it is simply unrealistic for a court to stop a story being published in a national newspaper on the ground of confidentiality, and, on the current state of the evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case.
>
> 58. However, claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone. As Tugendhat J said in *Goodwin v News Group Newspapers Ltd* [2011] EMLR 27, para 85, "[t]he right to respect for private life embraces more than one concept". He went on to cite with approval a passage written by Dr Moreham in *Law of Privacy and the Media* (2nd ed (2011), edited by Warby, Moreham and Christie), in which she summarised "the two core components of the rights to privacy" as "unwanted access to private information and unwanted access to [or intrusion into] one's … personal space" - what Tugendhat J characterised as "confidentiality" and "intrusion".
>
> 59. Tugendhat J then went on to identify a number of cases where "intrusion had been relied on by judges to justify the grant of an injunction despite a significant loss of confidentiality", namely *Blair v Associated Newspapers Ltd* (10 March 2000, Morland J), *West v BBC* (10 June 2002, Ouseley J), *McKennitt v Ash* [2006] EMLR 10, para 81 (Eady J), *X & Y v Persons Unknown* [2007] EMLR 290, para 64 (Eady J), *JIH v News Group Newspapers Ltd* [2011] EMLR 9, paras 58-59 (Tugendhat J), *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB), paras 29-30 (Tugendhat J) and *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), para 23 (Eady J), to

which can be added *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 (QB), para 3 (Tugendhat J), *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), para 25 (Briggs J), and *H v A (No 2)* [2015] EWHC 2630 (Fam), paras 66-69 (MacDonald J).

60. Perusal of those decisions establishes that there is a clear, principled and consistent approach at first instance when it comes to balancing the media's freedom of expression and an individual's rights in respect of confidentiality and intrusion. There has been not even a hint of disapproval of that approach by the Court of Appeal (although it considered appeals in *McKennitt* [2008] QB 73 and *JIH* [2011] 1 WLR 1645). Indeed, unsurprisingly, there has been no argument that we should take the opportunity to overrule or depart from them. Accordingly, it seems to me that it is appropriate for this Court to adhere to the approach in those cases. Not only do they demonstrate a clear and consistent approach, but they are decisions of judges who are highly respected, and, at least in the main, highly experienced in the field of media law and practice; and they were mostly decided at a time when access to the internet was easily available to the great majority of people in the United Kingdom.

61. The significance of intrusion, as opposed to confidentiality, in these decisions was well explained in the judgment of Eady J in *CTB* [2011] EWHC 1326 (QB), where he refused an application by a newspaper to vary an interlocutory injunction because of what he referred to as "widespread coverage on the Internet". At para 24 he said that "[i]t is fairly obvious that wall-to-wall excoriation in national newspapers … is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up". As he went on to say in the next paragraph of his judgment, in a case such as this, "[f]or so long as the court is in a position to prevent some of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection".

62. The same approach was taken by Tugendhat J in a later judgment in the same case, *CTB* [2011] EWHC 1334 (QB), when refusing a further application to lift the interlocutory injunction after the applicant's name had been mentioned in the House of Commons. At para 3, having accepted that it was "obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose", he said that "in so far as its purpose is to prevent intrusion or harassment, it has not failed". Indeed, he regarded the fact that "tens of thousands of people have named the claimant on the internet" as confirming, rather than undermining, the argument that "the claimant and his family

> need protection from intrusion into their private and family life".'

Media Groups' Submissions

35. Mr Gervase de Wilde, who put the Media Groups' case to the court with clarity and force, submitted that the starting point with respect to the adult TT as a claimant in judicial review proceedings was in favour of open justice and it was, therefore, for TT to establish a right to privacy sufficient to maintain the current anonymity order.

36. Mr de Wilde submitted that the element of Article 8 personal privacy arising from the identity of TT as the Claimant in these proceedings was at the most minimal when compared to the extent of information that is, or soon will be, in the public domain as a result of the film and publicity related to it. There was, Mr de Wilde submitted, a genuine public interest in making the link between the known individual whose story is told in the documentary and the consequent legal issue that he has raised in the judicial review proceedings.

37. Mr de Wilde acknowledged that, in addition to the judicial review application, the court proceedings included two applications made within family proceedings that had been consolidated and heard with the judicial review. He also accepted that, in the normal course of family proceedings, AJA 1960, s 12 (1)(a)(iii) was engaged so that publication of information on the family process could amount to contempt of court. Given the stance that is now taken on behalf of TT and YY, who no longer rely on arguments relating to the family proceedings issue, it is convenient to deal with that point at this stage.

38. It has been necessary to contemplate whether the fact that family proceedings have been consolidated with the judicial review proceedings may have an impact on the question of anonymity. After due consideration, neither those acting for TT, nor those for YY, take any point with respect to the family proceedings. They are right to do so for at least three reasons.

39. Firstly, AJA 1960, s 12 only applies to the publication of information relating to proceedings before "any court sitting in private". At all times and at each relevant hearing this court has been sitting in public and not "in private". On that basis AJA 1960, s 12 does not apply.

40. Secondly, all parties are agreed that the only real relevance of the "family proceedings" point within the present application is to determine the starting point. Either the proceedings are open judicial review proceedings, and it would be for TT to establish a right to privacy, or they are closed family proceedings and it is for the media to establish due cause for greater openness. Irrespective of which of those two gateways is applicable, the pathway, once it has passed through them, is effectively the same and ends with a balance being struck under HRA 1998, s 12 between ECHR Arts 8 and 10.

41. Thirdly, whilst the application for a declaration of parentage and for parental responsibility form an important structural part of the substantive case presented (primarily) by YY, it is accepted that there is absolutely no factual material which has come to the court separately within the family proceedings as opposed to that produced for the purposes of judicial review. If in all other respects the media case is made out

with respect to greater openness in the judicial review proceedings, there is no separate justification of any weight to hold that the existence of the family proceedings should prevent the court from granting the Media Groups' application.

42. Returning to the case as a whole, Mr de Wilde submitted that the publication of the film and the article has radically changed the nature of the information that has hitherto been protected by the anonymity injunction. This is partly because this degree of publicity, which has been self-generated by TT, now falls to be considered within the Article 8 evaluation that the court must undertake within the judicial review proceedings. More widely, the only information that is now protected by the injunction simply relates to the fact that TT is the Claimant before the court. Whilst the situation might have been different had there been no subsequent publicity, an argument in favour of privacy can no longer be sustained. In the ordinary course of judicial review proceedings, a person's identity as a party to those proceedings does not attract a reasonable expectation of privacy. Where that individual has put the very information that might otherwise be said to be private directly into the public domain, then that information should no longer be treated as private.

43. Insofar as TT seeks to maintain a distinction between the film and, separately, publicity about these proceedings, by identifying the high degree of editorial control that he maintained over the production of the documentary and the article, Mr de Wilde submits that that distinction falls away once the film is broadcast. Thereafter the film, in just the same way as the court proceedings, will fall to be the subject of legitimate comment, which may or may not be favourable, but which will certainly be outside TT's control.

44. In response to TT's case to the effect that the registration of birth issue is likely to stir up strong reaction in some quarters and that this may lead to hostile comment and personal threats, Mr de Wilde accepts that there are likely to be strongly worded comments posted on the internet and elsewhere by individuals, but, on the present evidence, what has so far been posted online is well within the bounds of the law and falls well short of the circumstances that are said to be feared by TT. If matters were to escalate, then Mr de Wilde points to various means of protection under the law and via the Editors' Code of Practice that could be deployed to protect TT's interests.

45. In summary, with respect to Article 8, the Media Groups' case is that little, if anything, remains to be protected with regards to TT's privacy. If there are rights that remain to be protected, it is now proportionate that they should be overborne by the greater public interest in publication given the degree of publicity that TT has himself already achieved.

46. Turning to Article 10, Mr de Wilde submits that there is genuine public interest in transgenderism in general and in the particular issue of birth registration raised in these proceedings. TT is one of only a handful of transgender men who have given birth to a baby and he is in the singular exceptional position of having deliberately sought extensive publicity. He has, submits Mr de Wilde, put himself at the forefront of the debate on transgender rights. It is entirely legitimate for the Press to wish to name TT as the Claimant in this case and to do so would give a higher degree of interest for the public in the issue raised in these proceedings.

47. In relation to Article 10, Mr de Wilde raised two further, but altogether more subsidiary, points. Firstly it is said that TT's failure to disclose his involvement in the film amounted to a lack of candour and an attempt deliberately to mislead the court such as to justify legitimate criticism in the Press. With the advantage of the perspective of being the judge in the proceedings, I am clear that there can be no basis for holding that TT acted deliberately to mislead the court. He has put forward an innocent explanation, which has not been challenged and no oral evidence has been heard.

48. The second subsidiary point relied upon is that the court's substantive judgment is bound to refer to the film and the article. If the injunction remains in place the court will have to deal with those aspects in a private judgment. It is said that such a step would be artificial and unnecessary.

49. With respect to YY, Mr de Wilde submitted that the key information that YY's father is a transgender man who gave birth to him is already in the public domain via the article and that people who know TT and YY will know this information. It is submitted that a report of the court case will not add to the degree of publicity or knowledge that arises from the film or news about it.

50. Insofar as it is said that adverse comment and publicity attaching to TT, if he is named, may directly impact on YY in years to come because, even though time may pass, the digital imprint and the comments themselves will remain, Mr de Wilde referred to a decision by Mr Alex Verdan QC, sitting as a High Court judge, in the case of *Re Alcott (2)* [2016] EWHC 2414 (Fam) where the court was considering naming the child's parents in a published judgment. The passage in Mr Verdan QC's judgment relied upon is at paragraph 30:

> "I appreciate that naming the parties in my judgment leads indirectly to the further identification of [the child]. I accept that currently, given his young age, he can be protected by his parents from exposure to any publicity. I accept that in years to come he may, as a result of the Press reporting of this case and his parents being named, learn more about the history of the case and some personal details of his parent's private lives and he may suffer harm as a result. However, there is also a chance, despite the digital footprint left by this news that in years to come such details will be less accessible. The court has to look at the likelihood of this harm and evaluate how serious the risk is but these are not the only factor to take into account and do not take precedence and in my judgment on the facts of this case are outweighed."

Submissions on behalf of TT

51. The court has been greatly assisted by the submissions of Catrin Evans QC who, in common with all those who act for TT and YY in these proceedings, has accepted instructions on a pro bono basis to represent TT's position with respect to this media application.

52. Ms Evans submits that it is of primary importance to understand the distinction between the consequences for TT and YY if disclosure is limited to that which is contained in

the film and related publicity when compared to that which would follow from TT being named as the Claimant in these proceedings and the establishment, thereby, of a link between this case and the substance of the documentary. That distinction is, she submitted, critical.

53. Ms Evans, in my view rightly, did not take time engaging in debate as to the starting point and the question of where the burden of establishing a primary case might lie as, irrespective of the starting point, the balancing exercise between Art 8 and Art 10 must be undertaken. Similarly, as I have already observed, she did not place any reliance in the context of this application on the fact that the court was, in part, dealing with family proceedings.

54. Relying upon the judgment of Lord Neuberger in *PJS*, Ms Evans submitted that a person's reasonable expectation of privacy is not lost simply because some related information has been made public. The validity of the line of decisions establishing a jurisdiction to protect an individual from unwarranted intrusion was firmly established by Lord Neuberger (at paragraph 60).

55. Turning to the underlying facts, Ms Evans submits that it is critical to have regard to the effect of establishing a link between the individual portrayed in the film and the individual who has applied to be registered as the child's father. Knowledge of the content of the film is relatively transient, whereas being the first transgender man to seek to establish his status as "father" is a state of affairs, once it is in the public domain, that will endure. The degree of adverse comment generated by the anonymous account of the judicial review proceedings thus far is striking. It was, it is submitted, in part generated by a sarcastic and insensitive tone of the article that appeared in The MailOnline site. We live in a time when some members of society are strongly antagonistic against transgender individuals. On the day of the hearing of this application the police had announced that the number of reported transgender hate crimes had risen by 86% in the past four years. It is, submitted Ms Evans, the business of the Press to sensationalise stories. The potential for greater sensationalism than will result simply from broadcast of the film is plain as it would be tied to the result of these proceedings, whatever that is, coupled with the broadcast of the film; the result will therefore be cumulative.

56. The potential for TT to be the victim of online trolling, door-stepping by the media or other behaviour that is likely to cause him distress is, it is submitted all too plain.

57. In summary, Ms Evans submitted that the likely level of harm to TT is sufficiently clear and high so as to justify retaining anonymity. Conversely there was, she argued, no necessity for the Press to identify TT as the Claimant in these proceedings. No identification had thus far been made and the reporting of the proceedings had not in any way been impeded. In short, there was no necessity to relax the present injunction.

Submissions on behalf of YY

58. On behalf of YY, Mr Michael Mylonas QC was clear to distance his client's case from that of TT. Indeed, he went so far as to submit that YY's case was much stronger than that of his father because of TT's voluntary disclosure of information to the extent that, without YY, TT may have been in difficulty in holding on to the anonymity injunction.

59. In common with Ms Evans, Mr Mylonas did not advance arguments under AJA 1960, s 12. He did, however, challenge the Media Groups' assertion that YY's Article 8 rights to privacy were not engaged. Rather than sidelining YY's best interests, as he suggested the Media Groups' submissions aimed to do, the court must maintain a sharp focus on the child's welfare.

60. Mr Mylonas drew particular attention to the approach to be taken to the interests of children as described in two cases. Firstly, the case of *K v News Group Newspapers Ltd* where, at paragraphs 17 to 19 quoted above, Ward LJ, in part relying upon Baroness Hale in *Beoku-Betts*, emphasised that, where the adverse effect on children arises from the behaviour of others, this may be a relevant factor.

61. Secondly, Mr Mylonas referred directly to the judgment of Baroness Hale in *PJS* at paragraph 72 where attention is drawn to the fact that a child will have independent privacy rights of their own, irrespective of the position of their parents.

62. Once information is online connecting YY with whatever adverse fallout may follow public identification of him as the child of the first transgender male parent to seek to be registered as a "father", the information will stay there forever. The potential for YY to be the target of playground bullies was, submitted Mr Mylonas, all too plain. Although he did not go so far as to criticise TT's decision to identify himself publicly through the film project and in the article, Mr Mylonas stressed that YY, as a young toddler, had obviously made no decision on his own part to engage in this publicity yet he would be caught in any adverse fallout from it.

63. Mr Mylonas argued that there was absolutely no public interest in any step that might identify YY as the individual at the centre of this case. The media story would not benefit from that identification, yet the possible adverse consequences for the child were extreme. In terms of Article 8, the balance was, in his submission, all one way.

Discussion

(a) TT's continued anonymity in these proceedings

64. The starting point, or default position, with respect to anonymity in these proceedings, which have been heard in public, should favour openness rather than privacy. The proceedings were, however, conducted on the basis of maintaining confidentiality as to the identity of TT and YY. The hearing, whilst in public, was subject to the original injunction order granted by Francis J. Although representatives of the media were present at the main hearing, no application was made to vary the anonymity order and, on the basis of the way that TT's case was put to the court, any application to vary or relax the requirement of confidentiality might have faced an up-hill climb as, at that time, TT's case was that he wished to avoid the prospect of being identified as a transgender parent and, in that regard, it was, he argued, important that YY's birth certificate should not present a potential trigger for any such identification.

65. It is said, and this is at the core of the Media Groups' case, that the situation as it had been understood at the substantive hearing has now entirely changed as a result of TT's participation in the documentary film and consequent newspaper article. That which was to be held as confidential, namely the identity of TT not only as a transgender male, but as a transgender male who has conceived, carried and given birth to a child, is now

publicly known and, in due course, is likely to become even more widely known when the film is broadcast on UK national television. Those acting for TT and YY have accepted, as inevitably they had to, that they cannot now rely upon breach of confidence as a ground to prevent publication; the basis of their stance is, rather, upon intrusion.

66. As the judgment of Lord Neuberger in *PJS* makes clear, the court has jurisdiction to prevent further, or more detailed, publication of material even when the central information that might otherwise have been protected is already widely known, where such further publication may lead to an unwarranted or disproportionate further intrusion into an individual's right to private and family life.

67. Irrespective of the starting point, and whether the burden falls either upon the media or TT to establish a case, a balance must be struck between the competing Art 8 and Art 10 rights which are in play.

68. So far as TT's Art 8 rights are concerned, it is now a given that his status as a transgender male will be widely known to many of those who know him, either socially or professionally. Once the film is broadcast on BBC television and on iPlayer, the broadcast itself, and any media comment or publicity generated by the broadcast, can only increase the degree to which his transgender status is known by a significant degree. There is validity in Mr de Wilde's description of TT as someone who has sought to put himself at the forefront of the public debate on transgender issues.

69. On that basis, it is justified to question what still falls to be protected by continuing to afford TT anonymity as the Claimant in these proceedings. The Media Groups' case is that effectively nothing remains; conversely, Ms Evans for TT argues that there is a clear distinction between what is already public and TT's identity as the Claimant and, she submits, this distinction is critical to the determination of this application.

70. On one view, Ms Evans is correct that there is a distinction, in terms of the content of the information, between knowledge that a person is a transgender male who has given birth, and knowledge that that person is also attempting to achieve the legal status of 'father', as opposed to 'mother', with respect to that child. But, in my view, this is not a stark distinction or one in which the information which is at present confidential is, of itself, on an altogether different level of sensitivity in privacy terms.

71. Ms Evans has, however, been able to establish that the birth registration issue is one which is likely to polarise some elements in public opinion and that there are those who are likely to comment upon these proceedings in strongly worded negative terms. That that is so is demonstrated by the online commentary which was generated during the hearing itself. It is therefore likely, and I accept that this is so, that were TT to be identified he would be likely to be personally named within, and be the target of, similar negative commentary once judgment is given – irrespective of which way this court may determine his application.

72. The balance between Art 8 and Art 10 is one of proportion and, with respect to this factor, I do not consider that the level of intrusion from negative comment and publicity that is likely to follow the court's determination of the judicial review claim if TT is identified as the Claimant is of the highest order. The tone of the reported comments that have been made thus far, whilst obviously unwelcome to anyone on the receiving

end, do not amount to personal threats and are all, as Mr de Wilde submits, apparently within the bounds of what is lawful.

73. Ms Evans is also correct in drawing a distinction between knowledge that someone has been the subject of a film and the film's contents, which are unlikely to endure in the public memory, and knowledge that a person was the first transgender man to seek to register himself as the father of a child to whom he had given birth. But that distinction does not compare like with like. Whilst the fact that there was a film, or its contents might fade, the information at the core of the film, namely that TT is a transgender male who has given birth, will not and that information is very much of the same order as the fact that TT is the Claimant in this case. In terms of the durability of the information in the public memory, or the memory of those who know or may encounter TT, if there is a distinction to be drawn between that which is currently public and that which is not, it is, in my view, a distinction without a significant difference, or, to use Mr de Wilde's word, artificial.

74. In assessing proportionality, it is also right to have full regard to the fact that each step of the process that has led to this hearing has been generated by decisions that TT, and TT alone, has made. It was TT who decided to seek IUI treatment whilst living as a man. It was he who decided to apply, during the same time-period, for a Gender Recognition Certificate. It was he who was involved in the commissioning and production of the documentary which was filmed, with his full cooperation, over the three years culminating in YY's birth. It was he who sought to be registered as YY's 'father' and, when that was refused, it was he who issued judicial review proceedings. Subsequently, it has been TT who consented to, and cooperated with the publication of the newspaper article naming him and carrying a portrait photograph of him. The documentary film has already been shown at bespoke venues abroad and in the UK and there is no indication that TT intends to take any step to prevent the broadcast of the film on national television.

75. The fact that the current circumstances in which this decision falls to be made have been generated entirely by TT's own actions and decisions is in contrast to most, if not all, of the relevant authorities. The paradigm case on intrusion is one where information which would otherwise be confidential, has come into the hands of others and, by some means, has entered the public domain and is at risk of further publicity. TT's actions have established firstly a situation where it is public knowledge, that TT is a transgender man who has given birth to a child, and secondly a situation where the public know that an anonymous claimant, in exactly the same, very rare, set of circumstances, has applied to be afforded the status of 'father' under the law with respect to that child.

76. In *Khuja v Times Newspapers*, Lord Sumption JSC identified the test as being 'whether the public interest served by publishing the facts extended to publishing the name' and he went on to record that 'in practice, where the court is satisfied that there is a genuine public interest in publication, that interest has generally extended to publication of the name.'

77. There is, and properly should be, genuine public interest in the question of law and human rights which lies at the centre of this case. Our society is still in the process of accepting and adapting its institutions and norms to accommodate, the transgender status of individuals. As a matter of both fact and law, the circumstances of TT's claim are novel. The issue raised in the proceedings has not apparently been determined by

any court either in this jurisdiction or elsewhere in the Western world. The issue has not been directly addressed by Parliament. As the comments from the online commentariat have demonstrated, not all citizens share the same view as TT on how the law should record his status with respect to his child. This is therefore a case, to echo Lord Sumption's words, in which there is a real public interest in publication and, as a result, this should normally extend to the publication of the Claimant's name.

78. When an 'intense focus' is applied to the Art 8 and Art 10 rights that are in play with respect to naming TT as the Claimant, I do not regard that issue as being of a significantly different order to the information that TT has already deliberately made freely and publicly available. Whilst his identity as the Claimant in this case is not currently public, the fact that he is the Claimant is, in reality, all part of a piece with that which is already known and with the fact that he has made a film about his experience and has sought to publicise that film. The degree to which his privacy will be compromised by revealing this additional information, whilst not at the 'most minimal' level argued for by the Media Groups, is not great. If, which has not been established, TT experiences direct harassment or media behaviour which contravenes the law or the Editors' Code, as a result of identifying him as the Claimant, steps are available to provide him with a measure of protection.

79. Conversely, as I have already described, when intense focus is applied to the Art 10 side of the balance, there is a genuine public interest to be served by publicity and debate about the issues raised in this case such as would normally justify naming the individual involved. Indeed, in the present case, having seen the film, which is an impressive and wholly sympathetic documentation of TT's experience in the very process that has led to this application, I consider that the public interest will genuinely be enhanced by directly linking his identity as the subject of the film with his role as the Claimant in this case which seeks to establish the consequence, in terms of law and status, of that which the film records.

80. In conclusion, therefore, if the sole issue to be determined related to TT's identity as the Claimant in these proceedings, I would strike the balance firmly in favour of the Media Groups' application and discharge the injunction insofar as it relates to TT.

(b) The position of YY

81. But, of course, there is a pressing need to consider the position of YY. The determination of this application will therefore turn around YY's Art 8 rights, and the question is whether they are of sufficient weight to lead to the conclusion that the injunction against publicity should remain in place.

82. Children have independent privacy interests of their own and YY's position requires analysis that is independent of that relating to TT. That is particularly so where, in part, the factors in play with respect to TT include the fact that he has been the principal, indeed the sole, actor in generating the situation that leads to the present application. YY is not to be required to tolerate a situation, which otherwise significantly breaches his right to private life, simply because it has arisen from decisions made by his parent; his own position must be separately considered.

83. Despite his young age, YY has a right to respect for his privacy and his family life. In the context of the present case, that right includes not having knowledge of the unconventional nature of his parentage made known publicly. Whilst the direct impact of any intrusion will, given his age, be limited, he has a right for his family life with TT to be free from unwarranted intrusion. That is particularly so if the intrusion is of such a degree as to cause such stress as may compromise TT's ability to focus on caring for YY and meeting his needs. YY's best interests are a primary, but not determinative, consideration. At the main hearing the court had advice from the retired CAFCASS guardian who is acting as YY's litigation friend to the effect that it was not in the child's best interests for knowledge that he was born to a transgender male to be disclosed publicly.

84. There is, however, a problem in assessing YY's Article 8 rights in the context of the present application because the reality is that the core information about YY's parentage has already been made public, at least to the extent that it is likely to be known by all those who know TT, and it is due to be given significantly wider publicity by the television broadcast of the documentary film. The baseline that existed when YY's litigation friend proffered her advice to the court has therefore shifted and, for better or for worse, the prospect of YY growing up in circumstances where those who know him do not know that the parent who gave birth to him is a transgender male is now probably remote.

85. Key to determining where the balance lies with respect to YY must now relate to the question of the likely *additional* harm that he may suffer if he is identified as the child who is the subject of this judicial review application, over and above any harm that he may experience from it being known that he is a child born to a transgender man. In this regard, YY's age is plainly relevant. He will not, therefore have any direct knowledge of any publicity, let alone its content, that may be generated by these proceedings when judgment is handed down in the coming month or months. If there is an appeal process, and even if that process runs up through the domestic courts and on to Strasbourg, he is still likely to be very young when it concludes. The potential for immediate and direct harm to YY from any publicity and comment arising from publishing material around the court proceedings that identifies TT is currently effectively zero and even allowing for an appeal process is low. This is in contrast, for example, to the position of the children in *PJS*, as described by Baroness Hale at paragraph 74, who would learn distressing information directly from wall to wall publicity and intrusion of the sort that would have followed lifting the injunction in that case.

86. A factor that is, however, relevant is the potential for YY's interests to be adversely affected as a consequence of TT being upset or harmed by any negative publicity, and this must be taken into account if that upset or harm arises from being identified as the Claimant, as opposed more generally to being known as a transgender male or the individual who features in the documentary film. There is, however, no evidence before the court to suggest that TT will fail as a parent in this regard or be unable to continue to care well for his child in a time of stress.

87. The potential for direct harm to YY that it is possible to foresee arises when he is older and of school age. The playground is, as Ward LJ rightly observed, a cruel place and, if he is known to be a child born to a transgender male, it is most unlikely that this information will not be used to YY's detriment at some time. The question that is at

the heart of this part of the case is whether such unwelcome attention or bullying will arise because of the identification of YY as being the subject of this claim by TT to be registered as his 'father', or whether it would arise in any event because of knowledge of his circumstances that are known and will become better known through the film. In this regard, and with respect to YY's circumstances, I do not accept that the fact that he was the subject of a legal dispute as to the status of his parent significantly elevates the potential or level of harm above that which may follow the more general knowledge of the circumstances of his conception and birth.

88. A further factor of some relevance is the degree of detail that is contained in the documentary film. Viewers are shown both the process of YY's conception and his birth in full detail. Throughout the film, TT candidly and bravely describes his feelings and the experience of undertaking the treatment process. This material is in the public domain and will be more generally seen when the film is broadcast. From the perspective of YY, filming of the moment and process of his conception, and filming of his birth, is filming of material that is of a high order of intimacy and privacy, yet the film has been shown to the public and is to be broadcast on national television. It is, therefore, difficult to understand how being known as the child who was also the subject of these judicial review proceedings is likely to increase any detriment to YY's Art 8 rights given the quality of the material which is already in the public domain.

89. In conducting this intense consideration of YY's position, it is relevant that, if the Media Groups' application is granted, the anonymity injunction will be removed so far as TT is concerned, but it will remain with respect to direct reference to YY's identity. Of course, YY is TT's child and anyone who knows TT will know of YY; to that extent YY's identity will indirectly be made public if the application is granted. But YY's name will not be disclosed. No image of YY, other than one immediately following his birth, or as a young baby shown from behind, is contained in the film or in the newspaper article.

90. My primary conclusion with respect to YY is that, for the reasons that I have given, I am not persuaded that the publication of the additional information, namely the fact that YY's father is the Claimant in these proceedings, is, of itself, sufficient to engage YY's Art 8 rights. Even though YY is likely to be identified indirectly if the anonymity order relating to TT is lifted, I do not consider that knowledge of the fact that TT has sought to be registered as his 'father' rather than his 'mother' adds, from YY's perspective, sufficiently to the knowledge of those who will know him and who will know of the circumstances of his conception and birth from the material that is already in the public domain to engage Art 8 with respect to YY.

91. If I am in error in that primary conclusion and a balance falls to be struck between YY's Art 8 rights and those of the media under Art 10, YY's interests are a primary consideration. If the balance were between the competing Art 8 rights of others (with no Art 10 element) the child's rights are likely to indicate the outcome. Where, however, the balance is between a child's Art 8 rights and the media's rights under Art 10, and where 'a tangible and objective public interest tends to favour publication the balance may be difficult to strike' and the interest of a child are not to be treated as a trump card (*K v News Group Newspapers)*.

92. In determining this issue, the court is required by HRA 1998, s 12(4) to have particular regard to the importance of Art 10 and the extent to which the material is, or will be, available to the public, or is, or would be, in the public interest were it to be published.

93. In the present case much of the material which identifies TT as a transgender man who has carried and given birth to a child is already available to the public. It is common ground that the subject of the film and associated publicity raises matters which are of legitimate public interest. Further, as I have already held, it is plainly in the public interest for there to be reporting of the issue before the court with regard to birth registration and, where TT is fully identified as the transgender male who is the subject of the documentary, it is in the public interest for the two stories to be linked, as in reality they are, by removing the anonymity order protecting TT being identified as the Claimant in this case.

94. The factors that relate to HRA 1998, s 12 that I have summarised in the previous paragraph, apply to TT's position as much as they do to YY's. When brought into the balance in YY's case they underline the importance of the rights protected by Art 10 and point towards openness. These factors are not, any more than YY's welfare is, a trump card.

95. Finally, in considering relevant factors, the degree of publicity so far as YY is concerned is restricted. He is not to be directly named or identified. Those who know TT, and learn that he is the Claimant in this case, are also likely to know YY and thus, indirectly, he will be identified as the child who is the subject of this claim. For reasons that I have already given, I regard this degree of intrusion as at a low level so far as YY is concerned.

96. Despite affording priority to YY's best interests, I consider that the additional intrusion into his right to privacy and family life, over and above that which will follow from the existing publicity, is not so significant as to justify maintaining anonymity. In reaching that conclusion as to significance I have, as I have explained, paid particular regard to two factors: firstly, YY's age and the fact that any direct impact on him is likely to be felt some years hence when the detail of the court case, as opposed to knowledge of the underlying biological facts, will have faded, and, secondly, that knowledge that he was the subject of this legal challenge is unlikely to add significantly to that which is, or will be, already known about him as a result of the film and publicity arising from it in terms of adversely impacting upon his right to family and private life.

97. In the circumstances, if a balance between YY's Art 8 rights and Art 10 rights does fall to be struck, I consider that the intrusion into YY's Art 8 rights that would follow from publication of the fact that his parent, TT, has applied to be registered as 'father' rather than 'mother', is both necessary and proportionate given the genuine public interest in the issue raised which otherwise justifies naming TT as a party, and indirectly YY to those who know him, or will come to know him, as TT's child.

Conclusion

98. For the reasons that I have given, I will therefore grant the Media Groups' application and direct that the present anonymity order be varied to the following terms:

1. For the purposes of these proceedings the Claimant's child shall be referred to as YY.

2. No person shall disclose or publish any document or other material relating to these proceedings in such a manner as to directly identify YY.