Neutral Citation Number: [2021] EWCA Civ 604

Case No: C1/2021/0322

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE **CO/3253/2020**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 339 (Admin)
Lord Justice Stuart-Smith and Mr Justice Nicklin

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2021

Before:

LORD JUSTICE ARNOLD
LORD JUSTICE LEWIS
and
LORD JUSTICE WARBY

- -

Between :

THE QUEEN ON THE APPLICATION OF BABITA RAI **Appellant**

- and –

THE CROWN COURT SITTING AT WINCHESTER **Respondent**

- and –

(1) PA MEDIA
(2) THE DIRECTOR OF PUBLIC PROSECUTIONS **Interested Parties**

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Philip Rule and **David C. Gardner** (instructed by **Instalaw Limited**) for the **Appellant**
Jude Bunting (instructed by **direct access**) for the **First Interested Party**
Adam Feest QC (instructed by the **CPS**) for the **Second Interested Party**

Hearing date: 22 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on 27 April 2021.

LORD JUSTICE WARBY:

1. The appellant is due to appear before the Crown Court at Winchester for trial on a charge of murder of her infant child. The underlying issue in this appeal is whether the Crown Court was wrong in law to discharge a reporting restriction order ("RRO") prohibiting the reporting of the appellant's home address in connection with those criminal proceedings.

2. The provision relied on is section 11 of the Contempt of Court Act 1981 ("section 11"), which is in these terms:-

> **"11. Publication of matters exempted from disclosure in court.**
>
> 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."

Background to the appeal

3. The relevant history can be shortly summarised.

(1) The appellant, originally from Nepal, entered the UK in 2017. In May of that year the body of a baby was found in a park. In March 2020 the appellant was arrested on suspicion of murder and in July 2020 she was charged.

(2) On her first appearance before Magistrates on 7 July 2020 an order was made in reliance on section 11 prohibiting until further order the "publication of the name and address of the defendant". The order stated its purpose: "if her name is reported at this time, it could prejudice a trial, it could give advance warning to the perpetrator of the charge."

(3) On the following day there was a preliminary hearing in the Crown Court before HHJ Miller QC at which the judge made an RRO prohibiting publication of the appellant's home address, but not her name. Again, the order was made in reliance on section 11. This Order explained its purposes were "to avoid a substantial risk of prejudice to the administration of justice in the proceedings, namely that reports of the address of the defendant will prejudice a fair trial of proceedings and risk the safety of the defendant's family."

(4) On 23 July 2020 HHJ Cutler CBE, the Hon. Recorder of Winchester, discharged Judge Miller's RRO, thereby lifting the remaining prohibition.

(5) On 30 September 2020, the appellant brought this judicial review claim, challenging the Order of HHJ Cutler. On 15 February 2021 the claim was heard by a Divisional Court (Stuart-Smith LJ and Nicklin J) and dismissed, for reasons given in a reserved judgment handed down on 19 February 2021, [2021] EWHC 339 (Admin) ("the DC Judgment").

(6) On 16 April 2021, at the pre-trial review, the appellant was arraigned on the single count of murder to which she pleaded not guilty. The trial is due to start on 4 May 2021.

The proceedings before Judge Cutler

4. These took the form of an application by the news agency, PA Media, to discharge the RRO of HHJ Miller. Written and oral submissions in support of that application were made by Mike Dodd, Legal Editor of PA Media. For the appellant, Mr Rule of Counsel made written and oral submissions in opposition to the application. Her solicitor, Mr Foster, filed a short witness statement giving an account of the appellant's reaction on learning that HHJ Miller QC had declined to continue the RRO granting anonymity.

5. Granting the application to discharge, HHJ Cutler relied on the Judicial College guide to *Reporting Restrictions in the Criminal Courts* ("The Judicial College Guidance"). In his *extempore* ruling, he reasoned as follows:-

> "My starting point in this case is, and I accept what Mr Dodd says, that there is a presumption here in favour of publicity and … [there] should be a real reason why that should be restricted…
>
> We in the Crown Court now are much helped by the guidance given [in the Judicial College Guidance] and Mr Dodd rightly quotes from that guidance which we receive that the media is particularly concerned that accurate information of those involved in court proceedings, the announcement in open court of names and addresses enables precise identification vital to distinguish the Defendant from someone in the locality who bears the same name and avoids inadvertent defamation.
>
> I say that because no one has actually mentioned but there is a concern here that in Aldershot there is a large community of Nepalese, many of them have very similar surnames… and there is an importance here for the Defendant, if she is to be named publicly, is for the press to understand that they have the right person here. Indeed, the Home Office circular mentioned in … [para 5.4 of the Judicial College Guidance] says that a person's address is as much a part of his description as his name. [There is] a strong public interest in facilitating press reports that have correctly described the persons involved.
>
> I accept what Mr Rule has said … that there is always a balancing that the Court may and must do if Article 8 rights are engaged, and I find that there is that engagement of Article 8 rights, which I have to balance, but balancing from that start point and, as Mr Dodd says, there is no evidence in this case of danger to the Defendant from publication of her home address
>
> Indeed, in the circumstances I come to the conclusion, having borne in mind all that has been said in these submissions to me, that it is right that I should now lift and quash the restriction under the Section 11 order made by Judge Miller so that it no

> longer applies, which would allow, if the Press wish to, publish the address which they have for Babita Rai…."

The proceedings before the Divisional Court

6. The appellant's case before the Divisional Court was that publication of her address would violate her rights under Article 8 of the European Convention on Human Rights, and hence the decision to permit it was unlawful by virtue of s 6 of the Human Rights Act 1998. Three main points were argued in support of that case:-

   (1) First, it was submitted that the judge was wrong in law to start with a "presumption" in favour of publication: the right approach is to treat the Convention rights under Articles 8 (privacy) and 10 (freedom of expression) as inherently equal in weight, and to conduct a balancing process that focuses intensely on the specific rights in play, assessing the relative importance of protecting the appellant's address against the significance of its publication. It was argued that the Judicial College Guidance on which the judge relied is misleading and wrong in this respect, failing properly to reflect the principles laid down by the Supreme Court in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, *In re Guardian News and Media Ltd* [2010] 2 AC 697, and *A v BBC* [2015] AC 588.

   (2) It was argued, in reliance on *Richard v BBC* [2019] Ch 169 and *Khadija Ismayilova v Azerbaijan* (Applications nos. 65286/13 and 57270/14), that criminal suspects retain a legitimate expectation of privacy, such that the release of their address may be an unjustifiable interference with their Article 8 rights.

   (3) Thirdly, it was argued that the judge's reasoning process was vitiated because he failed to have regard to relevant matters and/or relied on matters that were immaterial or factually unproven and/or had insufficient regard to the need to avoid subjecting the appellant to unnecessary fears extraneous to the stress of the proceedings. The Article 8 considerations were weighty, whereas inclusion of the claimant's address in reports of the proceedings would make no meaningful contribution to the public interest. An RRO would have no adverse impact on such reports.

7. In support of this last line of argument, Mr Rule sought to rely on additional evidence in the form of a witness statement dated 28 January 2021 from the appellant herself containing details about her personal history, her feelings about the criminal process and the press reporting, some evidence of her physical and mental health, and assertions about the likely impact on her if reporting of her address was permitted.

8. The Crown Court, as respondent to the proceedings, was not represented before the Divisional Court. The claim was resisted by the first and second interested parties: PA Media and the Director of Public Prosecutions ("DPP"). As it had before HHJ Cutler, PA Media took a threshold point: it submitted that the Court had no jurisdiction to make any order under s 11 of the Contempt of Court Act as the appellant's address had not been withheld by the Magistrates Court, it had been made public at that stage. In the alternative, it was submitted that the judge's legal approach was correct, and that his conduct of the balancing process could not be impeached. The DPP adopted the submissions of PA Media.

9. The factual basis for PA Media's threshold point was contested. The Divisional Court described the relevant evidence as "far from satisfactory", but did not find it necessary to resolve the factual issue. The Court held that, even assuming the appellant was correct on that point, HHJ Cutler was right to discharge the s 11 order.

10. The Divisional Court's judgment is detailed, and carefully and closely reasoned, but it can fairly be summarised in this way.

(1) In practice, the default position in criminal proceedings in England and Wales is that a defendant's name and address are made available to the public and to reporters. That is the approach adopted in this case, where the court lists for the hearing on 7 July 2020 gave the appellant's name and address - as well as her date of birth, age, nationality, and details of her solicitors.

(2) The practice gives effect to established public policy as reflected in (a) Home Office circulars 78/1967 and 80/1989, which recommended that defendants' names and addresses be stated in open court and included on public court lists; and (b) the legislation that imposes automatic restrictions on the reporting of pre-trial proceedings, which nevertheless treats the defendant's name and address as presumptively reportable aspects of the case. (DC Judgment [31-36]).

(3) In law, the default position when dealing with applications for RROs is the general principle that all proceedings are conducted in public; media reports of the proceedings are an extension of this concept; RROs are derogations from this general principle of open justice which are "exceptional, require clear justification and should be made only when they are strictly necessary to secure the proper administration of justice"; the justification for an RRO must be established by clear and cogent evidence: *In re BBC*, also known as *Sarker*, [2018] 1 WLR 6023 [29] (Lord Burnett CJ) (DC Judgment [37-38]).

(4) There may be justification if the order is necessary (a) to avoid the administration of justice being frustrated; or (b) to protect the legitimate interests of others (DC Judgment [39-41]).

(5) It is only in truly exceptional circumstances that an order on this second basis can be contemplated: *In re Trinity Mirror plc* [2008] QB 770 [32-33]. Ordinarily, the collateral impact of publicity for the trial process is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public: *Khuja v Times Newspapers Ltd* [2019] AC 161 [34(2)] (Lord Sumption). (DC Judgment [42-43]).

(6) These and other authorities are inconsistent with the contention made on behalf of the appellant, that the correct starting point in a case such as this is one of presumptive parity as between privacy and publicity. Similar arguments were advanced and rejected in a consistent line of authorities, including *In re S* itself (see that case at [30-31] (Lord Steyn)), *A Local Authority v W* [2006] 1 FLR 1 [39-40], [53] (Sir Mark Potter P), and *Khuja* [23], [34(4)-(5)] (Lord Sumption). These cases show that:

> "the starting point is that *any* restriction on publication of information from open court proceedings is a significant

> interference with the Article 10 right that requires justification … By definition, everything that is disclosed in open court proceedings… is a matter of public interest."

(DC Judgment [44-48]).

(7) The appellant's further arguments about the privacy rights of criminal suspects were ill-founded. The domestic authorities show that, in general, a suspect has an expectation of privacy up to the point of charge; but once the suspect has been charged and become a defendant the open justice principle will lead to his or her identification. The ECHR decision in *Ismayilova* did not assist the appellant, relating as it does to the rights of a complainant in a criminal investigation, not those of the defendant to a criminal prosecution. (DC Judgment [49-50]).

(8) The Judicial College Guidance at paras 1 and 4.4 correctly states the law, gives proper guidance as to the engagement of Article 8 rights, and is accurate and fair. (DC Judgment [51-52]).

(9) Accordingly, HHJ Cutler did not wrongly apply the law. He carried out the balancing exercise he was required to do, and his decision on the evidence available to him was plainly correct. (DC Judgment [53]).

11. In reaching these conclusions, the Divisional Court reviewed the written submissions placed before Judge Cutler, and the witness statement of Mr Foster. It also reviewed a transcript provided by the appellant of the entire proceedings before Judge Cutler, including the oral argument as well as his ruling.

12. The Court ultimately dismissed the appellant's application to adduce fresh evidence in the form of her own witness statement of 28 January 2021, but before doing so it considered that evidence *de bene esse.* It concluded that the evidence was speculative and unexceptional, and did not come close to demonstrating convincingly an interference with the appellant's Article 8 rights of sufficient weight or seriousness as to displace the Article 10 interest in open justice. It would have made no difference if that evidence had been before HHJ Cutler. (DC Judgment [54-55]).

The appeal

13. The seven grounds of appeal which the appellant was given permission to argue on this appeal consist in large part of a repetition of the grounds advanced before the Divisional Court, and a challenge to the conclusions I have summarised at [10(3)-(9)] above.

14. Expanding on his grounds before us, Mr Rule accepts that the Judicial College Guide and the decision of the Divisional Court contain accurate statements of the common law. But he submits that the matter is different when it comes to a case, such as this, where a criminal defendant's Article 8 rights are engaged. If, in such a case, the defendant objects to the disclosure and reporting of an item of information, the Court must conduct a fact-sensitive, Convention-compliant, parallel analysis that treats the defendant's rights and the Article 10 rights of the media and the public at large as inherently equal, focuses intensely on the specific rights at stake, and assesses the proportionality of interfering with each. There can be no presumptive priority for Article 10, in the form of open justice. The Court is obliged to take care to avoid the

superfluous disclosure of private information. It must test the legitimacy of the disclosure and reporting of any given item of information by reference to the degree of intrusion or interference involved, and the extent to which disclosure would serve the overall objectives of open justice. Proportionality must be assessed by reference to the well-known four-stage test.

15. In support of these propositions Mr Rule relies on the famous passage in the speech of Lord Steyn in *In re S* at [17]. He submits that his approach is also supported by other authorities including, in particular, the words of Sir Mark Potter in *A Local Authority v W* [53], Lord Reed in *A v BBC* [40-41], [49], [55] and [57], Lord Thomas CJ in *R (T) v West Yorkshire (Western Area) Senior Coroner* [2017] EWCA Civ 318 [2021] QB 205 [62-63], and Lord Sumption in *Khuja* at [34(1)] and [35]. Mr Rule maintains his reliance on domestic and Strasbourg authority about the privacy rights of those subjected to criminal investigation.

16. As to the facts, Mr Rule submits that the address in this case is the appellant's home, and that of her parents and two siblings. It is a place to which the appellant, a 23-year-old woman of good character, will return if she is acquitted or if – as he suggests is possible – she is convicted and sentenced for the lesser offence of infanticide. On the other hand, the address is not a location that has any relevance to the issues that are before the Crown Court. It is not the place of the alleged crime, or where the appellant was living at that time, nor is it the place of the appellant's arrest. It will have no part to play in the prosecution's case. It is not even a bail address, the appellant being in custody at HMP Bronzefield pending her trial. Disclosure and publication of her address is not necessary for the purposes of identification, as her name and other identifying details have been disclosed and extensively publicised in press reports of the case. Mr Rule refers to what he calls the "partiality" of such reporting, and criticises the Courts below for "ignoring" this. He relies on the evidence of Mr Foster as to the "distress and concern of the appellant as to publicity including of her home address". He has also presented us with extensive submissions based upon the content of the witness statement made and filed by the appellant in January 2021, six months after the decision of Judge Cutler. He argues that this contains evidence of a number of pertinent matters including the appellant's "deep distress at the thought of her address being made public".

17. For PA Media, Mr Bunting is critical of the way the appellant's case on the facts has been presented. He submits that these proceedings are a review of the decision of HHJ Cutler. This appeal must be decided by reference to the facts as found by the Judge. It is impermissible to seek to re-litigate the matter by introducing a new and expanded factual case, which was excluded by the court below. Mr Bunting submits that the relevant legal principles are well-established and set out in the Judicial College Guidance, which has been approved by two Lords Chief Justice. A criminal defendant seeking a derogation from open justice must show on the basis of clear and cogent evidence that such a derogation is "strictly necessary." The same test applies at common law and in cases where Convention rights are engaged. The Judge applied this test and came to a rational decision on the evidence before him. Even if the appellant is right on the law, the Recorder of Winchester carried out the fact-sensitive balancing exercise the appellant now urges.

18. For the DPP, Mr Feest QC adopts the submissions of Mr Bunting. His case is that the DC Judgment correctly states the key principles of law that apply to cases where RROs

are sought, namely: (a) the principle of open justice is a long-standing and well-established feature of the English criminal justice system; (b) when a court is required to balance competing rights under articles 6, 8 and 10, the importance of the open justice principle requires that significant weight be given to it; (c) any derogation from this principle, which includes proper identification of a defendant by name and address, should only be permitted when "strictly necessary" and when supported by "clear and cogent evidence"; (d) the burden of establishing the necessity for any derogation sought lies upon the party seeking it. Mr Feest submits that the DC Judgment represented an unimpeachable application of those principles to the facts and circumstances of this case.

Decision

19. At the conclusion of the hearing we announced our decision to dismiss the appeal with reasons to follow. My reasons for joining in that decision can be summarised as follows. I accept the submissions on behalf of the interested parties. The Divisional Court was right for the reasons it gave. The relevant legal principles are as stated in the DC Judgment. They are fairly and accurately summarised in the passages from the Judicial College Guidance on which Judge Cutler relied. The Judge properly applied those principles. He conducted a fact-sensitive balancing exercise, evaluating the specifics of the competing Convention rights on the basis of facts and matters that were agreed, known, or in evidence before him. In doing so, he did not rely on any matter that was irrelevant, ignore any relevant factor, or make any other error of principle. Having reviewed the Judge's decision with care, I consider it was correct and it must stand.

20. I would add that even if, contrary to my view, the appellant was entitled to ask us to reconsider the matter afresh in the light of her witness statement, filed after the Judge's decision, the outcome would be the same. I have, like the Divisional Court, reviewed that evidence *de bene esse.* In my judgment, the Divisional Court's assessment of the appellant's further evidence was correct. The Article 8 case presented to the Judge was weak. The additional evidence does little to bolster it, and certainly does not amount to clear and cogent evidence sufficient to justify a derogation from the principle of open justice.

Discussion

21. I do not think it necessary to expand on those reasons in any great detail, but I shall set out the essential points as I see them.

The law

22. The current version of the Judicial College Guidance was last revised in May 2016. It is not a source of law; as explained in the Foreword by Lord Thomas CJ, it is a "practical guide for judges and the media on the statutory and common law principles which should be applied" when addressing issues about the open justice principle and exceptions to it. But, like the Divisional Court, I am satisfied that HHJ Cutler was right to rely on the relevant passages in the Guidance as an accurate summary of the principles that apply in this case. Those passages are set out in the DC Judgment at [51] and need not be fully restated here. It is enough to mention the first three bullet points in the summary that appears in a box on page 7:

- The general rule is that the administration of justice must be done in public. The public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously
- Any restriction on these usual rules will be exceptional. It must be based on necessity
- The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence

23. There is no dispute that this accurately reflects the many common law authorities on these issues. The Guidance proceeds on the basis that this approach applies across the board, including cases where rights under Article 8 of the Convention are engaged, saying "... any restriction on the public's right to attend court proceedings and the media's ability to report them must fulfil a legitimate aim and be necessary, proportionate and convincingly established" by the production of "clear and cogent evidence". The authorities do not justify Mr Rule's submission that this is wrong. On the contrary, they support Mr Bunting's argument that the common law and Convention are in step.

24. The point can be illustrated by reference to *In re Trinity Mirror plc*. Raymond Cortis pleaded guilty in the Crown Court to offences of child pornography, then applied for an order restraining his identification on the grounds that publicity would represent an unwarranted interference with the Article 8 rights of his children. The Judge granted the order, having found that the proper balance between the rights of these children under article 8 and the freedom of the media and public under article 10 should be resolved in favour of the interests of the children. An appeal succeeded on the basis that section 11 did not apply as the applicant's name had already been made public and the Crown Court had no other jurisdiction to make such an order. As Sir Igor Judge P put it, giving the judgment of the court at [31]: "The court with jurisdiction to make this order, if it were ever appropriate to be made, is the High Court." But the Court went on at [32-33] to express its disagreement with the judge's conclusion on the right balance between the Convention rights, saying this:

> "In our judgment it is impossible to over emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime. Moreover the principle protects his interests too, by helping to secure the fair trial which, in Lord Bingham of Cornhill's memorable epithet, is the "defendant's birthright". From time to time occasions will arise where restrictions on this principle are considered appropriate, but they depend on express legislation, and, where the court is vested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case.

> … If the court were to uphold this ruling so as to protect the rights of the defendant's children under article 8, it would be countenancing a substantial erosion of the principle of open justice, to the overwhelming disadvantage of public confidence in the criminal justice system, the free reporting of criminal trials and the proper identification of those convicted and sentenced in them. Such an order cannot begin to be contemplated unless the circumstances are indeed properly to be described as exceptional."

25. These are the principles that apply when section 11 is invoked. The section is – in the words of *In re Trinity Mirror* - "express legislation" which vests the court with discretion to impose "restrictions" on the normal operation of the open justice principle, by preventing the public from getting to know information that is put before the court. It is worth noting that not only were these observations made in express reference to Article 8, the Court also considered and referred to both *In re S* and *A Local Authority v W*, both cases where the privacy rights of children were relied on to seek anonymity for those accused of crime.

26. The central problem with Mr Rule's submissions on the law, so it seems to me, is that he focuses exclusively on the general methodology for resolving conflicts between Articles 8 and 10 that is prescribed in paragraph [17] of *In re S*, without regard to what Lord Steyn went on to say about the application of that methodology. Neither Article 8 nor Article 10 has priority *as such.* But where the open justice principle is engaged the weight to be attributed to the Article 10 right to impart and receive information is considerable. Lord Steyn made this clear at a number of points in his judgment in *In re S*, beginning at [18], where he identified "the general rule" that "the press, as the watchdog of the public may report everything that takes place in a criminal court", adding that "in European and in domestic practice, this is a strong rule. It can only be displaced by unusual or exceptional circumstances".

27. This does not mean that a fact-sensitive approach is not required. As Lord Steyn went on to say, "The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8." The "strong rule" referred to by Lord Steyn reflects the fact that not all kinds of speech are of equal value. The jurisprudence shows there is a hierarchy or scale, with political speech towards the top end, via what Baroness Hale has called "vapid tittle-tattle", down to hate speech (to the extent this is protected by the Convention). Speech involving the communication to the public of information about what takes place in a criminal court ranks high in this scale of values. The fact-sensitive investigation must start with that recognition. The point is reflected in paragraph [30-31], where Lord Steyn emphasised the importance of the freedom of the press to report the progress of a criminal trial without restraint, and at [37], where Lord Steyn approved the Convention analysis of Hedley J at first instance, in these terms:

> "Given the weight traditionally given to the importance of open reporting of criminal proceedings it was… appropriate for him, in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it."

As appears from *In re S* [11], Hedley J had begun by recognising "the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges and the inevitable price that involves in incursions on the privacy of individuals".

28. In my judgment, none of the later authorities relied on by Mr Rule serves to undermine or qualify the authority of these passages from *In re S,* or to refine or add to what was said by Lord Steyn in a way that helps the argument for the appellant. On the contrary, the cases relied on contain several reaffirmations of the same approach.

(1) In *A Local Authority v W* [53], Sir Mark Potter P observed that Lord Steyn, having identified the methodology with its "intense focus", had "strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test".

(2) In *A v BBC* [56-57], Lord Reed said:

> "It is apparent from recent authorities at the highest level ... that the common law principle of open justice remains in vigour, even when Convention rights are also applicable … the starting point in this context is the domestic principle of open justice … Its application should normally meet the requirements of the Convention".

(3) In *Khuja* [23], Lord Sumption pointed out that

> "… in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading 'private and family life', part company with principles … which have been accepted by the common law for many years … and are reflected in a substantial and consistent body of statute law as well as the jurisprudence on article 10 …"

29. Another recent, authoritative re-statement of the modern law is that of Lord Burnett CJ in *Sarker* [29]. The substance of that paragraph appears at [10(3)] above. It is set out fully in the DC Judgment at [38]. It contains yet another reaffirmation of the principles identified in the Judicial College Guidance. *Sarker* was about a postponement order under s 4(2) of the Contempt of Court Act, and Mr Rule sought to persuade us that the case was only authority as to common law principles. That is plainly not the case. At [17], Lord Burnett mentioned submissions advanced by Counsel for the BBC about the Strasbourg jurisprudence, but said that "the domestic authorities so clearly articulate the relevant principles that it is unnecessary for us to refer to it." The same point emerges from the citations contained in the comprehensive review of the jurisprudence by Dame Victoria Sharp P and Nicklin J in the most recent case cited to us, *RXG v Ministry of Justice* [2020] QB 703 [25-31]: see esp. [25(i)], [31]. It is unnecessary and would be undesirable further to multiply citations.

The case as it stood before HHJ Cutler

30. The matter was argued on the basis that, as Mr Rule acknowledged before the Divisional Court, had it not been for the application to restrict reporting, the address would have been provided in open court at the first hearing on 8 July 2020. So the real issue was whether it was right for the court to grant and continue an RRO to prohibit reporting of the address in connection with the case.

31. HHJ Miller QC had granted such an order on two bases: a risk of prejudice to the administration of justice and danger to the appellant and her family. The case for PA Media was that neither could be sustained. Mr Rule did not rely on either. He acknowledged before HHJ Cutler, as he has ever since, that he cannot show any risk to life and limb. He has argued that a fear of reprisals or, as he has put it, vigilante action, is enough. That is sufficient to engage Article 8 and to support the continuation of the RRO.

32. The characteristics of the address that Mr Rule has highlighted were not in dispute. But the only evidence as to the impact disclosure might have was that of the appellant's solicitor. This was contained in a single paragraph of his short witness statement which said as follows:-

> "… I attended to Ms Rai with Counsel and an interpreter in the cells following the preliminary hearing at Winchester Crown Court on 8 July 2020 when the restriction relating to publishing Ms Rai's name was lifted. Ms Rai was very upset and crying. She was anxious and disappointed that the restriction had been lifted in relation to her identity and would be spread across the newspapers. She was in a dejected condition and was exhibiting visible signs of distress. She was anxious about the publication of her personal details, including the threat of publication of her home address. I support her application that her personal address be withheld and respectfully invite the Court to continue the order."

As Lewis LJ pointed out in the course of argument, most of this is about the appellant's dismay at being named. None of it supports the submission that the appellant would suffer "deep distress" if her home address were published. That prospect is dealt with as one aspect of "the publication of her personal details", and the term used is "anxious".

33. Mr Rule advanced a variety of other factual assertions in his written and oral submissions to HHJ Cutler, but there was no other evidence. Much of what he said was directed to propositions about the extent and nature of the publicity surrounding the case, none of which was before the Court. He argued, as he has before us, that there was so much identifying information in the public domain that disclosure of the home address was unnecessary and/or disproportionate to any public interest in the reporting of the proceedings.

The ruling of the Judge

34. I have set this out in all its material parts at [5] above. For my part, in agreement with the Divisional Court, I can see no grounds for criticising the Judge's approach. In summary, the Judge began with the principle of open justice as reflected in the Judicial College Guidance; he treated the disclosure of a defendant's address as an integral part of the court process which engaged that principle; he evaluated the significance of a defendant's address generally, and in this case, for the criminal process and for the purposes of reporting; he asked himself whether the appellant had demonstrated a sufficient countervailing case; when answering that question, he recognised that the appellant's rights under Article 8 were engaged; having considered the evidence, he concluded that the appellant had not shown that those rights were weighty enough to tip the balance.

35. I do not believe the Judge could lawfully have reached any other conclusion. The domestic and Strasbourg authorities about the rights of suspects to which Mr Rule has directed our attention cannot help the appellant. I would accept the general proposition that an individual who becomes the defendant to a criminal charge retains privacy rights; but those rights are necessarily curtailed to a considerable degree when the matter comes before a court in public. As the authorities show, the disclosure and reporting of private information deployed in open court does not require item-by-item justification. The starting point is that everything may be reported. The court's procedural duties provide a safeguard against the introduction of personal information of no relevance. Beyond that, the onus of justifying a restriction lies on the person who seeks it. The evidence put before HHJ Cutler could not have been regarded as clear and cogent evidence that disclosure of the address posed so serious a risk to the appellant's privacy rights that it was essential to impose a restriction under section 11.

The additional evidence

36. The appellant's notice filed on 23 February 2021 contained 8 grounds of appeal. The last of these was a challenge to the Divisional Court's dismissal of the appellant's fresh evidence application. Separately, on 23 March 2021, the appellant applied for permission to adduce the same evidence at the hearing of this appeal. On 26 March 2021, the single judge (Bean LJ) refused permission to appeal on ground 8 and dismissed the application to adduce fresh evidence before this Court. The appellant then sought, out of time, to renew the application. I would dismiss that application. Where permission to appeal to the Court of Appeal has been refused by the court of first instance and by the single judge, that is the end of the matter; the application cannot be renewed. It is a procedural abuse to seek to circumvent that rule by way of an interim application with the same aim. That application was rightly refused by Bean LJ and should not have been renewed. No good reason was shown for the delay in doing so. If it was ever appropriate to entertain additional evidence the occasion would be on a re-hearing or further hearing in the Crown Court, and not in this judicial review claim.

37. But I have, as already mentioned, reviewed the evidence and reached the same conclusion as the Divisional Court. In this respect, I shall confine myself to adopting what is said in paragraphs [54-55] of the DC Judgment.

The effect of our decision

38. When permission to appeal was granted, a stay was imposed on the Divisional Court's order. We have refused permission to appeal, but to preserve the appellant's further appeal rights we have continued that stay until 4pm on Friday 30 April, the last working day before the trial.

We make a limited RRO

39. At the outset of this appeal, we made an RRO pursuant to s 4(2) of the Contempt of Court Act 1981 postponing reporting of this appeal – including this judgment. The Divisional Court took the same approach in respect of the proceedings before it. Both orders were made on the basis that publication of reports of these civil proceedings would risk prejudicing the criminal proceedings. Both orders are postponements not prohibitions; they will come to an end when the criminal proceedings against the appellant are concluded by the verdict of a jury or in some other way.

Lord Justice Lewis:

40. I agree.

Lord Justice Arnold:

41. I also agree.