Neutral Citation Number: [2021] EWCA Civ 613

Case No: C1/2020/1855

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION**
**(ADMINISTRATIVE COURT)**
**Mr Tim Smith (sitting as a Deputy High Court Judge)**
**CO/2181/2020**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2021

**Before :**

**LORD JUSTICE PETER JACKSON**
**LORD JUSTICE DINGEMANS**
and
**LADY JUSTICE ANDREWS**

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**Between:**

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| **The Queen on the Application of CHF & Others** | **Appellants** |
| **and** | |
| **(1) The Headteacher and Governing Body of Newick Church of England Primary School**<br>**(2) East Sussex County Council** | **Respondents** |
| **PA Media** | **Interested Party** |

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**The Appellants** appeared in person with their McKenzie Friend
**The Respondents** did not appear
Written submissions were made on behalf of **the Interested Party**

Hearing date : 27 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 at 10:30am on Wednesday, 28 April 2021.

**Lord Justice Peter Jackson :**

*Introduction*

1. This appeal arises from a decision of Mr Tim Smith, sitting as a Deputy Judge in the Administrative Court on 9 October 2020 ('the Judge'). It concerns an order protecting the identification of the Appellants' children in any reporting of judicial review proceedings.

2. The Appellants are a couple with a number of children who share their distinctive surname. The parents are referred to in this judgment where convenient as CHF and CHM, denoting 'the children's father' and 'the children's mother'. In the summer of 2019 serious and sensitive allegations were made about the behaviour of one of the children towards other children also attending the First Respondent primary school, which is the responsibility of the Second Respondent Council. A dispute arose about the way in which the allegations were handled. In June 2020, the Appellants applied for judicial review. In their claim form they sought anonymity for the children and for themselves:

> "SECTION 8: OTHER APPLICATION
>
> 1. The Claimants propose to make an application for an anonymity order that the judicial review proceedings to be anonymised pursuant to rule 39.2(4), 5.4C and 5.4D of the Civil Procedure Rules, section 11 of the Contempt of Court Act 1981 and s.39 of the Children and Young Persons Act 1933, on the grounds that:
>
> 2. The Claimant parents are bringing this litigation on their own behalves, and also on behalf of each of their children; and, [it is] in the interests of the Claimant children's Article 8 right to respect for private and family life and Article 10 right to freedom of expression, that the parents and their children's names be anonymised as follows: [*alphabetical system suggested*]."

3. On 27 July 2020, Linden J granted permission to the Appellants to seek judicial review on one ground (the detail is not material) but refused it on others. When giving his decision he made an order in these terms:

> "Anonymity
>
> 9. I agree that an anonymity order is necessary in relation to the children who are referred to in this case.
>
> 10. Pursuant to CPR rule 39.2(4) I therefore direct **there shall not be disclosed in any report of the proceedings the name or address of the Claimants' children or any other children referred to in the evidence or any details leading to their identification**. Such children, if referred to, shall only be referred to by letter of the alphabet.

> 11. Pursuant to CPR rule 5.4C a person who is not a party to the proceedings may obtain a copy of a statement of case, judgment or order from the court records only if the statement of case, judgment or order has been anonymised such that: (a) the Claimant's children and any other children are referred to in those documents only by letter of the alphabet; and (b) any references to the names of such children have been deleted from those documents.
>
> 12. Any person affected by this Order may apply on notice to all parties to have this Order set aside or varied."
>
> (emphasis added)

4. I will refer to this order as 'the Anonymity Order'. Notwithstanding the order, the Appellant's names continued to appear on the title of the action and on the heading to the order itself.

*The hearing before the Judge*

5. The Appellants renewed their substantive application in respect of the unsuccessful grounds before the Judge on 9 October 2020. The hearing took place remotely. Apart from the parties, the Judge and the court staff, it was attended by Mr Sam Tobin of PA Media and by a law reporter. At the outset of the hearing, the Judge sensibly referred to the Anonymity Order:

> "THE DEPUTY JUDGE: Thank you. Now, there is a preliminary matter I want to begin with and that is the question of anonymity. In the order of Mr Justice Linden on the papers he made an anonymity order and, as I read it, that order does not need to be renewed at this particular hearing. Is that the understanding of all parties?
>
> [COUNSEL FOR THE RESPONDENTS]: That is our understanding, my Lord, that it is made for the purposes of the proceedings and continues until it is discharged.
>
> THE DEPUTY JUDGE: Yes. Sometimes it is time limited until an oral permission hearing but this one does not appear to have been. Is there anybody who intends making an application to vary or discharge the anonymity order?
>
> MR TOBIN: My Lord, sorry. It's Sam Tobin from the Press Association on the line.
>
> THE DEPUTY JUDGE: Yes, Mr Tobin.
>
> MR TOBIN: My Lord, I was not aware there was an anonymity order. As your Lordship may know, this hearing has been listed in public with the claimant's surname on the publicly available list and there has been prior reporting that I've been able to find online in relation to these proceedings.

Not these proceedings, I apologise, but in – I believe in relation to the claimants although I'm not sure about that.

THE DEPUTY JUDGE: Well, the anonymity – the anonymity order applies to the children, which is both the claimant's children, who are referred to, and also children who are referred to in the evidence. That is the extent of the anonymity order.

[CHM]: I did request for an anonymity order for all of us because we do not want this in the press. This is not a matter for the press.

THE DEPUTY JUDGE: Well, the anonymity order only extends to the children. That is the order which has been granted.

[CHM]: And this whole case – Would you please anonymise our names also, Judge?

THE DEPUTY JUDGE: Well, Mr Tobin has pointed out that those names are already in the public domain by virtue of how the case has been listed and the anonymity does not extend beyond the children.

[CHM]: All these details are about my children and so if you release my details you, therefore, release my children's identities.

THE DEPUTY JUDGE: Well, the point that I am making though… is, to the extent that that is a problem, it is a problem which already exists.

[CHM]: I appreciate that and that is one of our points on confidentiality, that [the] Council have breached that confidentiality and that has further extended to the fact that there are now press involved.

THE DEPUTY JUDGE: Mr [name of counsel], anything you want to say about anonymity?

[CMH]: Could I also ask who the other callers are?

THE DEPUTY JUDGE: No, I would like to hear – I would like to hear from [counsel] first.

[COUNSEL FOR THE RESPONDENTS]: My Lord, I do not have any instructions on whether the anonymity order should be extended to the parents as well. I mean, it is correct to say that the original application made by the parents in their claim for judicial review did, as I read, seek to seek anonymity in relation to all of them, so I think, in the absence of instructions, I take a neutral stance. I would note that certainly the council

> very strongly denies that it has in any way breached confidentiality.
>
> THE DEPUTY JUDGE: Mr Tobin, anything you want to say in relation to anonymity having heard that discussion?
>
> MR TOBIN: My Lord, all I would say is that the CPR is very clear on this. CPR 39.2, the default position is hearings are in public and parties to litigation are named. This is a hearing in open court and unless there's a reason for a derogation from the principle of open justice I would say there's no need to extend the anonymity further.
>
> THE DEPUTY JUDGE: Okay. [CHM], you have heard the submissions that have been made there. Is there anything further that you would like to add?
>
> [CHM] I need to protect my children. We have been through the most horrendous defamatory (sic) by [the] Council, the headteachers and the school governors, and by allowing the press will absolutely annihilate my family even further.
>
> … [*discussion about the identity of those attending the hearing*]
>
> THE DEPUTY JUDGE: Thank you very much. Well, it seems to me as though extending the anonymity order that has already been granted would be futile on the basis that the information is already in the public domain. I therefore decline to extend the anonymity order but the anonymity order can continue so far as the children are concerned, and I do not understand Mr Tobin to dispute that particular fact. Is that right, Mr Tobin?
>
> MR TOBIN: Not at all, my Lord. We, of course, wouldn't name the children even if we were able to, if there wasn't an order. Just to make that clear.
>
> THE DEPUTY JUDGE: Thank you.
>
> [CHM]: By identifying the children you – by identifying the parents----
>
> THE DEPUTY JUDGE: Mrs [name] ----
>
> [CHM]: -- you identify----
>
> THE DEPUTY JUDGE: -- no, I am sorry, I have made my ruling on that. I do not want to hear further submissions or debate about that."

6. The Judge then turned to the substance of the application. In his judgment at the end of the hearing (in which he refused the substantive renewal application), he referred to the issue in these terms:

> "At the outset, Mrs [name] urged me to extend the anonymity order to include her and her husband. [Counsel] for the defendants, was agnostic about this request. Mr Sam Tobin, a member of the Press Association who listened to the hearing, addressed me on why the order should not be extended. He referred to the starting point in Part 39.2 of the Civil Procedure Rules, that open justice required any anonymity order to be restricted. But, ultimately, I concluded that in view of the information already in the public domain it would be futile extending the anonymity order now. I therefore declined the request to extend the order to the parents."

7. The resulting order reads:

> "1. The Claimants' application to extend the anonymity order is refused. For the avoidance of doubt the Order in respect of [the Appellants' children] and any other children referred to in the evidence is to remain in force until further order of the Court."

8. The Appellants are named in the title of the Judge's order; the transcript of the judgment names the Appellants in the title but not in the text, though it has a statement in the title that 'Anonymisation Applies'; the transcript of the hearing does not anonymise the Appellants; the Respondents are named in all the documents. It will be recalled that the Anonymisation Order requires court documents to be edited before being accessed by a non-party by removal of the children's names, but it does not stipulate this in relation to the names of the Appellants.

*The appeal*

9. The Appellants applied for permission to appeal in respect of the whole of the Judge's decision. In relation to the question of anonymity, they argued that the Judge did not provide the children with effective anonymity through being identified via their family name, in breach of Article 8 ECHR.

10. Warby LJ refused permission in respect of the substantive renewal application, but he granted permission in relation to the Judge's decision about the Anonymity Order. He directed that until after judgments had been given on the appeal or further order, the Appellants were to be referred to as CHF and CHM and that no report of the proceedings is to contain their names or other details likely to lead to their identification. He gave permission to PA Media to make written representations on the appeal.

11. Written and oral submissions were made to us by the Appellants with the assistance of a McKenzie Friend. Written submissions were filed by Mr Tobin on behalf of the PA Media. The Respondents (whose names are not anonymised) play no part in the appeal.

12. The Appellants' case is that they did not apply to extend the Anonymity Order. They believed that it already prevented them from being named as it would lead to the identification of the children. However, the discussion before the Judge threw that

into doubt. His order, which purports to refuse their application to extend the order, is in error.

13. PA Media opposes the appeal. Mr Tobin's skeleton argument argues that the Anonymity Order should not be "extended". Reference is made to a number of leading decisions underlining the importance of the principle of open justice and the narrow limits on derogation. It is an important point of legal principle that orders of this kind should only be made when they are strictly necessary. Here, the children have the effective anonymity sought by the Appellants. If naming the parents would lead to the identification of the children, that is already covered by the Anonymity Order. If, however, identifying the Appellants would not lead the identification of the children, then it is not necessary to extend the order. PA Media is not aware of anything in the public domain about the case, beyond the court listing. There is no transcript of judgment which is publicly accessible. There is nothing from which any 'jigsaw' identification of the children could be pieced together.

*The law on anonymisation*

14. There are many leading cases emphasising the importance of the public interest in open justice and the need to limit departures from the norm to cases where it is necessary. The proper approach is well-established, and was recently reaffirmed by this court in a judgment given by my Lord, Dingemans LJ, in *XXX v Camden London Borough Council* [2020] EWCA 1468 at [14] – [21].

15. Section 12 of the Human Rights Act 1998 provides, so far as relevant to this case, that a court considering whether to grant any relief which might affect the exercise of the right to freedom of expression under Article 10 ECHR shall have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to journalistic material, the extent to which the material has, or is about to, become available to the public or to which it is, or would be, in the public interest for the material to be published; and to any relevant privacy code.

16. The right to respect for private and family life is also engaged in a case of this nature, which concerns sensitive information about young children. The non-hierarchical balancing of rights under Article 8 and 10 is to be performed in accordance with the guidance laid down in *Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593.

17. There are a number of ways in which the power to restrain publicity may arise: in this case, it is relevant to note the inherent power of the High Court and also the statutory power contained in section 39 of the Children and Young Persons Act 1939 (as amended), which provides:

> "**39 Power to prohibit publication of certain matters**
>
> (1) In relation to any proceedings, other than criminal proceedings, in any court, the court may direct that the following may not be included in a publication —
>
> (a) the name, address or school of any child or young person concerned in the proceedings, either as being the person by or

> against or in respect of whom the proceedings are taken, or as being a witness therein:
>
> (aa) any particulars calculated to lead to the identification of a child or young person so concerned in the proceedings;
>
> (b) a picture that is or includes a picture of any child or young person so concerned in the proceedings;
>
> except in so far (if at all) as may be permitted by the direction of the court.
>
> (2) Any person who includes matter in a publication in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale."

18. In the context of court proceedings, which give rise to rights under Article 6, the general rule is that a hearing is to be in public unless the court decides that it must be held in private: CPR 39.2(1). The circumstances in which such a decision may be made (one being that a private hearing is necessary to protect the interests of any child) are set out in CPR 39.2(3). This appeal does not concern the question of whether proceedings are being heard in public or in private. The hearing before the Judge and the hearing in this court have both been in public, albeit by means of remote technology. It concerns identification of the parties.

19. Non-disclosure of the identity of a party or witness is governed by CPR 39.2(4):

> "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."

20. This rule reflects the principles summarised by Lord Neuberger MR in *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21]:

> "In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the Judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows:
>
> (1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.

> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
>
> (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.
>
> (6) – (10)"

21. Transparency of party identity was considered by Lady Hale in *R (C) v Secretary of State for Justice* [2016] UKSC 2 at [36]:

> "There is a balance to be struck. The public has a right to know, not only what is going on in our courts, but also who the principal actors are."

However, at paragraph 1, she had also stated:

> "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."

22. In this case Linden J made the Anonymity Order in order to protect the Article 8 rights of the child, the sibling group, and the other children. The Appellants were suing on their own behalf and, in substance, on behalf of their children. Indeed they might well have sued in the name of their child, with themselves as litigation friend. As it was, the children are neither parties nor witnesses but, even if they do not come squarely within the terms of CPR 39.2(4) as Linden J supposed, the court's power, indeed obligation, to uphold their Article 8 rights is not so limited, and no issue arises about that in these proceedings.

*Conclusions*

23. The Anonymity Order made by Linden J on the papers was a reasonable one. The subject matter of the proceedings is sensitive and it directly concerns the interests of a number of young children. The protection of their identities is a proper derogation from the principle of open justice.

24. As to the effect of the Anonymity Order, in my view its prohibition on the disclosure of any details leading to the identification of the Appellants' children would inexorably be breached by the naming of the Appellants themselves. The identity of the Respondents already localises the case to a county, a village, and a school, and on top of that the family surname is a distinctive one. So I do not accept that jigsaw identification is irrelevant. Properly understood, the Anonymity Order already provided the Appellants with the protection they sought.

25. However, the exchange that took place at the outset of the hearing before the Judge threw this into doubt. The Appellants clearly considered that their own names were covered by the order (*'if you release my details you, therefore, release my children's identities'*) but the Judge did not engage with this. Instead he more than once asserted that the anonymity did not extend beyond the children. In these circumstances, the response of CHM (*'Would you please anonymise our names also, Judge?'*) was not in any real sense an application to extend the Anonymity Order. It did not need extending, it needed clarifying.

26. Court orders should so far as possible be clear in their meaning and certain in their effect. Once such an order has been made, those concerned must take a view as to how it affects their own conduct: in this respect the court is a legislator not a censor. There will inevitably be situations at the margins where it will be open to argument whether a certain piece of information is or is not likely to identify a person: but we are not in that territory when it comes to naming these Appellants, and there is no reason for the court to leave that matter in any doubt.

27. Also, as seen above, there is no embargo on the court issuing documents bearing the Appellants' names to a non-party or, until the intervention of Warby LJ, to the case being publicly listed under the family name. That may not have been a matter of much significance if the judicial review proceedings had quietly proceeded on their way but, now that the matter of anonymity has become contentious, the need for clarity is increased.

28. PA Media takes the responsible position that it would not identify the children even if no order had been made: no doubt that flows from the relevant code of practice. However, the argument that the Anonymity Order should not be extended because (a) if naming the parents would identify the children there is no need, whilst (b) if naming the parents would not identify the children there is no justification, does not provide clarity. The Appellants, who are litigants in person, are in my view entitled to regard that logic as being of limited comfort.

29. I would not criticise the Judge unduly for his handling of a matter which arose at the outset of a remote hearing with a different focus and in circumstances where neither of the directly interested parties (the Appellants and PA Media) was legally represented. However, I do consider that he fell into error in two ways. The first is, as I have explained, his misconception that the Appellants were seeking to extend an order which, properly understood, already provided the protection to which their children were entitled. The second concerns his approach to the balancing exercise that he then very briefly went on to conduct.

30. In that balancing exercise, the Judge gave decisive weight to the fact that some information was already in the public domain, leading him to say that it would be

futile to extend the anonymity order. This view, which seems to have been based on the fact that the Appellants' names had appeared on the court lists, was an error of approach. The fact that information is in the public domain may certainly be a factor that speaks against making a restrictive order, but it is not an absolute barrier, as is vividly seen from the decision in *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] 1 AC 1081. Here, the degree to which the Appellants' names were in the public domain was minimal and could scarcely count against the making of whatever order was otherwise appropriate. Into that wider question, the Judge did not venture.

31. The result is to leave in place an order whose effect has been placed in doubt. That decision cannot stand and this court must make its own determination. Looking at the matter afresh, and applying the guidance contained in *Re JIH* and in *Re S*, it is clear that there are just two significant features to balance: the privacy rights of the Appellants' children and the importance of the public interest in the identification of litigants. In making the Anonymity Order, the court concluded that the children's right not to be identified must take priority over the publication of information that would have that effect. The naming of the parents would have just that effect. Apart for the important general principle of party transparency, there is no specific countervailing public interest. On the facts of this case, the balance falls in favour of making it explicit that the Appellants cannot be named as to do so would identify the children. I would therefore amend the Anonymity Order to the extent set out below.

32. I would add that PA Media, whose vigilance on behalf of good practice is appreciated, need have no apprehensions about this decision. It does not imply that adult litigants can always expect to be anonymised in public law cases involving children. Those are fact-sensitive assessments, and in the majority of cases an order similar to that made by Linden J may be quite sufficient. The decision in this case is justified by the need to clarify the misunderstandings that have arisen.

33. I would allow the appeal and discharge paragraph 1 of the Judge's order. In its place, I would substitute the following:

> "1. Paragraphs 10 and 11 of the order of Linden J dated 27 July 2020 are amended to read as follows:
>
> > '10. There shall not be disclosed in any report of the proceedings the name or address of the Claimants' children or any other children referred to in the evidence, or any details (including the name or address of either of the Claimants) that might lead to the identification of the children. The Claimants may be referred to as CHF and CHM. The children, if referred to, shall only be referred to by letters of the alphabet.'
> >
> > 11. Pursuant to CPR rule 5.4C a person who is not a party to the proceedings may obtain a copy of a statement of case, judgment or order from the court records only if the statement of case, judgment or order has been anonymised such that: (a) the Claimants, the Claimant's children and any other children are referred to in those documents only by letters of the alphabet as above; and (b) any references to

> the names of the Claimants and such children have been deleted from those documents."

**Lord Justice Dingemans**

34. I agree.

**Lady Justice Andrews:**

35. I also agree.

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