Trinity Term
[2017] UKSC 49
On appeal from: [2014] EWCA Civ 1132

JUDGMENT

Khuja (Appellant) *v* Times Newspapers Limited and others (Respondents) (formerly known as PNM (Appellant) *v* Times Newspapers Limited and others (Respondents))

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Wilson
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

19 July 2017

Heard on 17 and 18 January 2017

Appellant
Manuel Barca QC
Miss Hannah Ready
(Instructed by Collyer Bristow LLP)

Respondents (1 and 2)
Gavin Millar QC
Adam Wolanski
(Instructed by Times Newspapers Limited Legal Department)

Respondent (3 and 4)
Gavin Millar QC
Adam Wolanski
(Instructed by Newquest Media Group Ltd Legal Department)

(1) Times Newspapers Limited
(2) Andrew Norfolk
(3) Newquest (Oxfordshire & Wiltshire) Ltd
(4) Ben Wilkinson

LORD SUMPTION: (with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Reed agree)

Introduction

1. For some years *The Times* and other media organisations have taken a close interest in investigating and reporting on allegations that the police and child protection authorities have failed adequately to confront a pattern of crime involving the sexual exploitation of vulnerable young teenage girls by older men. It need hardly be said that this is a subject of serious public concern. It has given rise to a number of government-ordered national inquiries, a review of standards of protection in children's homes, and substantial changes in the procedures of the police and prosecuting authorities for handling such cases. There have also been a number of prosecutions.

2. This appeal arises out of the trial of nine men on exceptionally serious charges involving organised child sex grooming and child prostitution in the Oxford area over a period of eight years. The men were arrested in March 2012 by Thames Valley Police after a long-running investigation known as "Operation Bullfinch". They were tried before His Honour Judge Rook QC at the Central Criminal Court between 7 January and 14 May 2013 on an indictment charging rape and conspiracy to rape children, trafficking and child prostitution. On 14 May 2013, seven of them were convicted. The trial attracted considerable publicity in the national and local press and in the broadcast media. Public interest in it was accentuated and prolonged by the perception that the victims of the men convicted had not originally been taken seriously by the police or Oxfordshire social services, and had not received the protection to which they were entitled.

3. The appellant, who has been referred to in these proceedings as PNM, is a prominent figure in the Oxford area. He was arrested at about the same time as the nine and was released on bail on terms (among others) that he surrender his passport. The reason for his arrest was that one of the complainants had told the police that she had been abused by a man with the same, very common, first name. However, she failed to pick him out at an identity parade. He was later told by the police that he would be released from arrest without charge but that the case would be kept under review. That remains the position. Police investigations are continuing, but PNM has never been charged with any offence, and there is no present reason to believe that he ever will be.

4. The question at issue on this appeal is whether an injunction should issue to prevent *The Times* and the *Oxford Mail* from publishing information identifying PNM as someone who had been arrested, bailed, his passport impounded and then de-arrested in connection with Operation Bullfinch, or as someone suspected by the police of being involved in sexual offences against children. The position of the two newspapers is that they wish to publish this information, identifying PNM, but that what they publish about these matters will be confined to material derived from the proceedings at the trial.

5. An injunction was originally granted under section 4(2) of the Contempt of Court Act 1981, at a preliminary hearing before the magistrates shortly after PNM's arrest. Section 4(2) empowers the court in any legal proceedings held in public

> "… where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

The magistrates' order prohibited the disclosure of any information which might identify PNM as the subject of pending criminal proceedings until such time as he was charged with an offence.

6. At the trial, evidence was given of the exploitation of six girls who at the relevant time were aged between 11 and 15. One of the girls was the complainant whose statements to the police had led to PNM's arrest. On 25 January 2013, immediately before she was due to give her evidence, PNM applied for a further order under section 4(2). At that time, he was still on bail. His application was heard in open court, and in the course of it the fact of PNM's arrest and the serious offences of which he was suspected were discussed. The prosecution agreed that it was inevitable that the complainant would refer to PNM in the course of her evidence. The judge made an order postponing publication of any information which might identify him as the person referred to by that complainant, on the ground that there was a significant risk that his right to a fair trial might be prejudiced. On 4 February 2013, after the complainant had finished giving her evidence, Judge Rook varied the order of 25 January so as to prohibit the publication of any report which referred to evidence which might identify or tend to identify PNM until a decision had been made whether or not to charge him.

7. A significant part of the relevant complainant's evidence related to her abuse by a man, whom I shall call X, with the same first name as PNM. In her evidence in

chief, she said that when she was 13 years-old she had been taken on a number of occasions over a period of about six months by one or other of the defendants to a flat, where she had had sex with X. She only ever referred to him by his first name and does not appear to have known his surname. She gave a detailed description of him. She referred to the identity parade but said that she did not recognise X and did not think that he was there. These matters also arose several times in the course of her cross-examination by counsel for the various defendants. Subsequently, PNM was referred to on a number of occasions. A police officer gave evidence that PNM had participated in an identity parade but had not been identified. There was also evidence referring to PNM's involvement by at least one of the defendants. In their closing speeches, both prosecuting and defence counsel referred to the alleged involvement of X on the footing that the complainant had been referring to PNM, identifying him by his full name.

8. In *In re Guardian News and Media Ltd* [2010] 2 AC 697, para 66, Lord Rodger of Earlsferry, speaking of the publication of the names of defendants in advance of criminal trials, observed:

> "In allowing this, the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court."

The law must of course take the presumption of innocence as its starting point, and experience suggests that as a general rule the public understand that there is a difference between allegation and proof. But Lord Rodger's observation cannot be treated as a legal presumption, let alone a conclusive one. The conclusions that the public may draw from evidence and submissions at a criminal trial in open court will differ from case to case, depending on, among other things, the gravity of the allegations, the character of the evidence and the extent of the publicity surrounding the trial. It would be foolish for any court to ignore the extreme sensitivity of public opinion in current circumstances to allegations of the sexual abuse of children and the concerns about the safety of children generally to which those allegations give rise. I have summarised in general terms in para 7 above the way in which the involvement of X and PNM were treated at the trial at the Central Criminal Court. In my opinion, the present appeal must be approached on the footing that there is a real risk that a person knowing of these matters would conclude that PNM had sexually abused the complainant notwithstanding that he had never been charged with any offence.

9. There were three applications to Judge Rook to lift the section 4(2) order. The first two were made by *The Times* on 8 and 15 May 2013, towards the end of the trial. On 16 May 2013, the judge declined to lift the order. Some of the matters relating to X which had been raised at the trial were referred to in open court during these applications. The judge's ruling, which was itself subject to his section 4(2) order, also referred to them.

10. The situation changed on 25 July 2013, when the police notified PNM that he would be released from arrest without charge, but that the case would be kept under review. In the light of the police's letter, on 25 September 2013, *The Times* and the *Oxford Mail* applied again to Judge Rook on the ground that there were now no "pending or imminent" proceedings against PNM which could be prejudiced by publication. On 14 October 2013 the Judge circulated a draft ruling stating that he proposed to lift the order. But he never formally did so, presumably because the matter moved to the High Court.

11. On 15 October 2013, immediately after receiving Judge Rook's draft ruling, PNM applied to Tugendhat J in the High Court for an interim injunction restraining publication of any information liable to identify PNM as (i) a person arrested, released on bail or released without charge in connection with the investigation of offences against children, (ii) the subject of the section 4(2) orders made by Judge Rook, or (iii) the claimant in the High Court proceedings. The basis of the application was that the order was necessary to protect PNM against the misuse of private information and the infringement of his right to private and family life protected by article 8 of the European Convention on Human Rights. A draft claim form was put before Tugendhat J, and issued a week later on 22 October 2013. The Judge dismissed the application in a reserved judgment delivered on 22 October ([2013] EWHC 3177 QBD). The Court of Appeal (Lord Dyson MR, Sharp and Vos LJJ) dismissed an appeal ([2014] EWCA Civ 1132). Meanwhile the status quo is being preserved by the continuation of Judge Rook's section 4(2) order.

The law

12. With limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend within the limits of the court's capacity and which the press may report. In the leading case, *Scott v Scott* [1913] AC 417, public hearings were described by Lord Loreburn (p 445) as the "inveterate rule" and the historical record bears this out. In the common law courts the practice can be dated back to the origins of the court system. As Lord Atkinson observed in the same case at p 463, this may produce inconvenience and even injustice to individuals:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

13. The justification for the principle of open justice was given by Lord Atkinson in this passage, and has been repeated by many judges since, namely the value of public scrutiny as a guarantor of the quality of justice. This is also the rationale of the right to a public hearing protected by the European Convention on Human Rights. It is a "means whereby confidence in the courts can be maintained": *B and P v United Kingdom*, (2001) 34 EHRR 19, at para 36. Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions.

14. The principle of open justice has, however, never been absolute. There have been highly specific historic exceptions, such as the matrimonial jurisdiction inherited from the ecclesiastical courts, the old jurisdiction in lunacy and wardship and interlocutory hearings in chambers, where private hearings had become traditional. Some of these exceptions persist. Others have been superseded by statute, notably in cases involving children. More generally, the courts have an inherent power to sit in private where it is necessary for the proper administration of justice: *Scott v Scott*, supra, at p 446 (Lord Loreburn); *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 457 (Viscount Dilhorne). Traditionally, the power was exercised mainly in cases where open justice would have been no justice at all, for example because the dispute related to trade secrets or some other subject-matter which would have been destroyed by a public hearing, or where the physical or other risks to a party or a witness might make it impossible for the proceedings to be held at all. The inherent power of the courts extends to making orders for the conduct of the proceedings in a way which will prevent the disclosure in open court of the names of parties or witnesses or of other matters, and it is well established that this may be a preferable alternative to the more drastic course of sitting in private: see *R v Socialist Worker Printers and Publishers Ltd, Ex p Attorney General* [1975] QB 637, 652; *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 451-452 (Lord Diplock), 458 (Viscount Dilhorne), 464 (Lord Edmund-Davies). Orders controlling the conduct of proceedings in court in this way remain available in civil proceedings whenever the court "considers non-disclosure necessary in order to protect the interests of that party or witness": CPR rule 39.2(4). In criminal proceedings, the common law power to withhold the identity of witnesses *from a defendant* was abolished by section 1(2) of the Criminal Evidence (Witness Anonymity) Act 2008,

and replaced by rules now contained in sections 86-90 of the Coroners and Justice Act 2009. But the court retains the power which it has always possessed to allow evidence to be given in such a way that the identity of a witness or other matters is not more widely disclosed in open court, if the interests of justice require it. Where a court directs that proceedings before it are to be conducted in such a way as to withhold any matter, section 11 of the Contempt of Court Act 1981 allows it to make ancillary orders preventing their disclosure out of court. Measures of this kind have consistently been treated by the European Court of Human Rights as consistent with article 6 of the Convention if they are necessary to protect the interests of the proper administration of justice: *Doorson v The Netherlands* (1996) 22 EHRR 330, para 71; *V v United Kingdom* (1999) 30 EHRR 121, para 87; cf *A v British Broadcasting Corpn* [2015] AC 588, paras 44-45 (Lord Reed). But necessity remains the touchstone of this jurisdiction. In *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, 977, Lord Woolf MR, delivering the judgment of the Court of Appeal, warned against "the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as exceptions are applied by analogy to existing cases". Lord Woolf's warning was endorsed by the House of Lords in *In re S (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 29 (Lord Steyn).

15. More recently, two factors have combined to broaden the scope of the exceptions to the open justice rule and the frequency of their application. One is the growing volume of civil and criminal litigation raising issues of national security. This calls for no comment on the present appeal. The other is the recognition of a number of rights derived from the European Convention on Human Rights, which the courts as public authorities are bound by section 6 of the Human Rights Act 1998 to respect. The Convention right most often engaged in such cases is the right under article 8 to respect for private and family life. Article 8 rights are heavily qualified by the Convention itself, and even when they are made good they must be balanced in a publication case against the right to freedom of expression protected by article 10. But other Convention rights may occasionally be engaged which are practically unqualified, such as the right to life under article 2 and to protection against serious ill-treatment under article 3: *A v British Broadcasting Corpn* [2015] AC 588. These countervailing interests have become significant, not just because they have come to be recognised as legal rights, but because the resonance of what used to be reported only in the press and the broadcasting media has been greatly magnified in the age of the internet and social media.

16. As Lord Diplock pointed out in *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449-450, the principle of open justice has two aspects:

> "As respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As

> respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

The distinction between these two aspects is not always recognised in the case law, but it is of some importance in the present case. There is no issue on this appeal about the way in which the criminal trial and the applications under section 4(2) of the Contempt of Court Act were conducted. Judge Rook sat in public throughout. All of the relevant matters were disclosed in open court. No measures were taken to prevent parties or witnesses or those referred to at the trial from being identifiable to those members of the public who exercised their right to be present in court. This appeal is concerned with the question whether matters exposed at a public criminal trial may be reported in the media. It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so. In *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 Cory J, delivering the leading judgment in the Supreme Court of Canada, observed that

> "Listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial … Those who cannot attend rely in large measure upon the press to inform them about court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge … It is only through the press that most individuals can really learn of what is transpiring in the courts. They as listeners or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media."

For this reason, restrictions on the reporting of what has happened in open court give rise to additional considerations over and above those which arise when it is sought to receive material in private or to conceal it behind initials or pseudonyms in the course of an open trial. Arrangements for the conduct of the hearing itself fall within the court's general power to control its own proceedings. They may result in some information not being available to be reported. But in Convention terms they are

more likely to engage article 6 than article 10. Reporting restrictions are different. The material is there to be seen and heard, but may not be reported. This is direct press censorship.

17. The limits on permissible reporting of public legal proceedings are set by the law of contempt, the law of defamation and the law protecting the Convention rights. The present appeal turns on the last category, but it is I think instructive to refer first to the law of contempt and defamation. Both of them are contexts in which the law has longer experience and a more defined policy about the use of the court's peremptory powers to restrain in advance the publication of proceedings in open court.

18. The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in legislation: *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 AC 190. There is a substantial number of statutory restrictions on the reporting of court proceedings. With very limited exceptions, all of them are concerned either (i) to protect the administration of justice itself by preventing the reporting of matters likely to prejudice the fairness of proceedings or to deter parties, witnesses or victims of crime from participating in them; or (ii) protecting children and young persons or other particularly vulnerable groups. Category (i) includes the automatic statutory restriction on the publication of material identifying the victims of sexual offences; pre-trial and preparatory hearings in criminal proceedings; and allocation or sending proceedings in Magistrates' Courts. However, much the most significant enactment in category (i) is the Contempt of Court Act 1981. The Act makes it a contempt of court to publish anything which creates a substantial risk that the course of justice will be seriously impeded or prejudiced, but is subject to an important exception for fair, accurate and contemporaneous reports of legal proceedings held in public: see sections 1, 2 and 4(1). Specific reporting restrictions may be imposed by the court under section 4(2) of the Act if it is satisfied that there is a substantial risk of prejudice to the administration of justice either in the proceedings in which the order is made or in other proceedings which are "pending or imminent". However, the power is limited to postponing publication for "such period as the court thinks necessary for that purpose", generally until the conclusion of the relevant proceedings. The most significant enactments in category (ii) are the automatic restriction in section 49 of the Children and Young Persons Act 1933 (as amended) and the discretionary restriction in section 45 of the Youth Justice and Criminal Evidence Act 1999, on the reporting of material likely to identify children and young persons "concerned in" criminal proceedings. In both Acts the protection is limited to a child or young person who is a defendant, witness or victim. There are corresponding discretionary restrictions in section 39 of the Children and Young Persons Act (as amended) on identifying children and young persons the subject of family proceedings. However, except in the case of under-18 defendants in criminal

proceedings, there are no statutory restrictions on the reporting of material deployed in open court which may identify a person alleged to have committed offences. Significantly, the few statutory restrictions on the reporting of allegations and investigations of alleged criminal offences automatically lapse upon the commencement of proceedings: see section 141F of the Education Act 2002 (allegations of criminal offences by teachers against pupils) and, once it comes into force, section 44 of the Youth and Criminal Evidence Act 1999 (children and young persons the subject of criminal investigations). The dependence of this area of law on statute and the extent of statutory intervention mean that it is fair to speak of a statutory scheme occupying the ground to the exclusion of discretions arising from the common law or the court's inherent powers. Lord Steyn made this point with the concurrence of the rest of the Appellate Committee in *In re S*, at p 604:

> "Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice."

19. Turning to the law of defamation, section 14 of the Defamation Act 1996 provides that a fair, accurate and contemporaneous report of court proceedings held in public is absolutely privileged, and that a report published as soon as practicable after any relevant reporting restrictions have been lifted is to be treated as contemporaneous. The privilege does not cover the whole ground, because disputes may arise as to whether a report is fair and accurate, and the media may have a legitimate interest in publishing reports of material derived from court proceedings but not contemporaneously. However, the invariable rule since the decision in *Bonnard v Perryman* [1891] 2 Ch 269 has been that even where absolute privilege is not available or its availability is in dispute, the court will not grant an interlocutory injunction in advance of publication if the defendant asserts that he will plead justification, unless, exceptionally, the court is satisfied that the defence is bound to fail. The rule originated in the division between the functions of judge and jury, the question of libel or no libel being exclusively for the jury. But in its modern form, its function is to balance the freedom of the press and the right of the claimant to protect his reputation, by confining the plaintiff to the post-publication remedies to which he may prove himself entitled at a trial. The media are at liberty to publish if they are willing to take the risk of liability in damages.

20. Articles 8 and 10 of the European Convention on Human Rights Convention provide:

"**ARTICLE 8**

Right to respect for private and family life

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 wellbeing 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.

ARTICLE 10

Freedom of expression

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."

21. In *Campbell v MGN Ltd* [2004] 2 AC 457, the House of Lords expanded the scope of the equitable action for breach of confidence by absorbing into it the values underlying articles 8 and 10 of the European Convention on Human Rights, thus

effectively recognising a qualified common law right of privacy. The Appellate Committee was divided on the availability of the right in the circumstances of that case, but was agreed that the right was in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test was whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive. The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true.

22. In its current form, the cause of action for invasion of a claimant's right to private and family life is relatively new to English law. It originates in the incorporation into our law of the Human Rights Convention. But once the court is satisfied that that right is engaged, it must be balanced against a public interest in freedom of the press. That interest is not new. Although now protected by article 10 of the Convention, it corresponds to a common law right which has been recognised since the 18th century. In *Campbell v MGN*, *supra*, at para 55, Lord Hoffmann described the balance between these competing values in language that has frequently been adopted since that case was decided:

> "Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need …"

Campbell did not involve a pre-emptive injunction against the press, nor did it involve the reporting of court proceedings. But in *In re S*, *supra*, which involved both of these things, Lord Steyn adopted Lord Hoffmann's approach, and summarised the principles in four points at para 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."

23. These two decisions are the principal English authorities for an approach to the balancing exercise which is fact-specific rather than being dependent on any a priori hierarchy of rights. On some facts, the claimant's article 8 rights may be entitled to very little weight. On some facts, the public interest in the publication in the media may be slight or non-existent. Nonetheless, 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 governing the pre-emptive restraint of media publication which have been accepted by the common law for many years in the cognate areas of contempt of court and defamation, and are reflected in a substantial and consistent body of statute law as well as in the jurisprudence on article 10 of the Human Rights Convention.

24. Nor, in practice, have they sought to do so. The point may be illustrated by the decision in *In re S* itself. S was a child aged five whose mother had been indicted for the murder of his brother. S's guardian brought proceedings in the Family Division in support of a claim for an order preventing (i) the publication of material likely to identify S, and (ii) the publication in any report of the mother's trial of her name or that of the deceased brother or of material (such as photographs) likely to identify them. The issue was whether an order in terms of (ii) should be qualified by a proviso that it was not to prevent the publication of a report of any part of the murder trial which was held in public. The application was based on the child's right to private and family life. It was a strong case on the facts, for there was psychiatric evidence that persistent publicity surrounding the trial would be "significantly harmful" to S. Nonetheless, the courts below held that the proviso must be included, and the House of Lords affirmed their decision. Lord Steyn delivered the only reasoned speech. His reasoning on the main issue can be summarised in four points. First, he drew attention, in a passage from which I have quoted at para 18 above, to the significance of open justice both at common law and in the jurisprudence of the European Court of Human Rights. Secondly, he pointed out that although there were many statutory exceptions to that principle founded on countervailing public and private interests, none of them applied in the case before them. In particular, section 39 of the Children and Young Persons Act 1933, which as it then stood covered much of the ground now covered by section 45 of the Youth Justice and Criminal Evidence Act 1999, was limited to protecting children and young persons "concerned in" the mother's trial as defendant, witness or victim. Lord Steyn was unwilling to introduce a wider exception to the open justice principle by what he called a process of accretion and analogy. Third, while the impact of publicity attending the trial would be extremely painful, S was not himself involved in the trial and the impact on him was "essentially indirect". At para 26, Lord Steyn observed:

> "This is an application for an injunction beyond the scope of section 39, the remedy provided by Parliament to protect juveniles directly affected by criminal proceedings. No such injunction has in the past been granted under the inherent jurisdiction or under the provisions of the ECHR. There is no decision of the Strasbourg court granting injunctive relief to non-parties, juvenile or adult, in respect of publication of criminal proceedings. Moreover, the Convention on the Rights of the Child, which entered into force on 2 September 1990, protects the privacy of children directly involved in criminal proceedings, but does not protect the privacy of children if they are only indirectly affected by criminal trials: articles 17 and 40.2(vii); see also Geraldine Van Bueren, *The International Law on the Rights of the Child* (1995), pp 141 and 182. The verdict of experience appears to be that such a development is a step too far."

Fourth, if harm arising indirectly was enough to justify a pre-emptive order, it would be difficult to set rational boundaries on the jurisdiction. At paras 32-33, he said about this:

> "First, while counsel for the child wanted to confine a ruling to the grant of an injunction restraining publication *to protect a child* , that will not do. The jurisdiction under the ECHR could equally be invoked by an adult non-party faced with possible damaging publicity as a result of a trial of a parent, child or spouse. Adult non-parties to a criminal trial must therefore be added to the prospective pool of applicants who could apply for such injunctions. This would confront newspapers with an ever wider spectrum of potentially costly proceedings and would seriously inhibit the freedom of the press to report criminal trials. Secondly, if such an injunction were to be granted in this case, it cannot be assumed that relief will only be sought in future in respect of the name of a defendant and a photograph of the defendant and the victim. It is easy to visualise circumstances in which attempts will be made to enjoin publicity of, for example, the gruesome circumstances of a crime. The process of piling exception upon exception to the principle of open justice would be encouraged and would gain in momentum."

25. In *In re Trinity Mirror (A intervening)* [2008] QB 770, the defendant pleaded guilty in the Crown Court to 20 counts of making or possessing child pornography. No direction was made for withholding the defendant's identity in court, but the

Crown Court made an order in the interest of the defendant's children prohibiting any publication in the media of material identifying him or his children. The Court of Appeal held that the Crown Court had no power to make such an order. But they also held that it would have been an inappropriate order even in the High Court, which did have jurisdiction. Sir Igor Judge P, delivering the judgment of the Court, observed (para 32) that it was

> "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."

He went on to say, at para 33:

> "It is sad, but true, that the criminal activities of a parent can bring misery, shame, and disadvantage to their innocent children. Innocent parents suffer from the criminal activities of their sons and daughters. Husbands and wives and partners all suffer in the same way. All this represents the further consequences of crime, adding to the list of its victims. Everyone appreciates the risk that innocent children may suffer prejudice and damage when a parent is convicted of a serious offence … However we accept the validity of the simple but telling proposition put by the court reporter to Judge McKinnon on 2 April 2007, that there is nothing in this case to distinguish the plight of the defendant's children from that of a massive group of children of persons convicted of offences relating to child pornography. 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."

26. *In re British Broadcasting Corporation. In re Attorney General's Reference (No 3 of 1999)* [2010] 1 AC 145 was another case arising out of an application by a defendant in criminal proceedings for an order restraining publication of material identifying him. A man referred to in the speeches as D had been charged with rape on the strength of DNA evidence, but acquitted on the judge's direction after that evidence had been ruled inadmissible. That ruling had subsequently been held on a

reference by the Attorney General to be wrong. Although he was at risk of being retried, there were no "pending or imminent" proceedings against him which could found an order under section 4(2) of the Contempt of Court Act 1981. In those circumstances, the BBC wished to make a programme about the functioning of the criminal justice system, focussing on controversial acquittals, including D's. The use of the material deployed at his trial and at the hearing of the reference would inevitably tend to suggest that he was guilty. Short of acquittal at a retrial, he had no means of vindicating his reputation since the facts derived from that source were true. Lord Hope (with whom Lord Phillips, Lord Walker and Lord Neuberger agreed) considered (para 13) that the only possible basis for an order preventing D from being identified was article 8 of the Convention. In his view proceedings at the trial, being public, gave rise to no legitimate expectation of privacy. But he held that article 8 of the Convention was nevertheless engaged because the link between his DNA and the rape was personal information which would suggest to the public that he was guilty: see paras 6, 20, 22. That consideration was, however, substantially outweighed by the right of the media to publish and the right of the public to receive information about the functioning of the criminal justice system. The fullest treatment of the balance between articles 8 and 10 appears in the speech of Lord Brown (with whom the rest of the Appellate Committee agreed). He considered that subject to D's article 8 rights and to the law of defamation, the BBC was entitled to publish material questioning the merits of D's acquittal: paras 59-60, 63. He attached very little weight to D's article 8 rights because, as he observed at para 68, "to say that his article 8 rights were interfered with by the unlawful retention and use of his sample is one thing; to assert that in consequence he must be entitled to anonymity in respect of the subsequent criminal process is quite another."

27. In *In re Guardian News and Media Ltd* [2010] 2 AC 697 five claimants challenged the lawfulness of Treasury directions freezing their assets under the Terrorism (United Nations Measures) Order 2006 on the ground that they were suspected of facilitating terrorism. The Supreme Court set aside anonymity orders made in their favour, whose effect was to prohibit any report of the proceedings that enabled them to be identified. The orders had been sought on the ground that disclosure of the fact that they were suspected of facilitating terrorism would cause some people to assume that the suspicion was justified, and would violate their article 8 rights. In particular, one of them, M, claimed that his reputation and his and his family's relations with his local community would be seriously damaged. The judgment of the Court was delivered by Lord Rodger. He applied the test derived from Lord Hoffmann's speech in *Campbell v MGN Ltd* [2004] 2 AC 457 at paras 55-56 and the judgment of the European Court of Human Rights in *Von Hannover v Germany* [2004] 40 EHRR, paras 57, 76, namely whether the publication of a report sufficiently contributes to a question of legitimate public interest to justify any curtailment of his and his family's right to private and family life: para 52. In *Von Hannover* there had been no public interest in the publication of photographs of Princess Caroline in the course of her ordinary daily pursuits. Lord Rodger concluded that the operation of the freezing order system for those suspected of

facilitating terrorism was a matter of legitimate public interest, and that any damage to the applicants' right to private and family life was incidental. At para 73, he said:

> "Although it has effects on the individual's private life, the purpose of a freezing order is public: it is to prevent the individual concerned from transferring funds to people who have nothing to do with his family life. So this is not a situation where the press are wanting to publish a story about some aspect of an individual's private life, whether trivial or significant. Rather, they are being prevented from publishing a complete account of an important public matter involving this particular individual, for fear of the incidental effect that it would have on M's private and family life."

28. *A v British Broadcasting Corpn* [2015] AC 588 was an appeal from Scotland, which is relied upon by PNM as marking a change of approach. A was a foreign national who had served a sentence of imprisonment for sexual offences against a child. The Home Secretary had served notice of her intention to deport him. He appealed against that decision on the ground that his deportation would violate his rights under articles 2 and 3 of the Convention, because if he returned to his country of origin he would be at risk of death or ill-treatment at the hands of people who knew the nature of his offences. Directions had been made at an early stage of the proceedings to enable A to conduct them using initials instead of his name, and an ancillary order had been made under section 11 of the Contempt of Court Act 1981 to prohibit his identification out of court. The appeal failed, one of the principal grounds being that these measures would prevent him from being identifiable after his return to his country of origin. The Supreme Court dismissed the BBC's application to lift the order on the ground that although there was a legitimate public interest in publication, it would not only have violated his article 2 and 3 rights but would have subverted the basis of the decision to authorise his deportation, thereby undermining the administration of justice. The decision itself therefore turned on very particular facts. But the general approach of Lord Reed (with whom the rest of the committee agreed) was very similar to that of Lord Rodger in *In re Guardian News and Media Ltd*, whose statement of the test he adopted (para 48). In the hierarchy of Convention rights, articles 2 and 3 stand very high, but Lord Reed was prepared to accept (para 41) that a lesser interest such as serious commercial damage would be enough to justify an order in a case where there was no public interest in publication.

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:

> "'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* (2000) 31 EHRR 246, 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."

Cf *In re British Broadcasting Corporation*. *In re Attorney General's Reference (No 3 of 1999)*, at paras 25-26 (Lord Hope), 56, 66 (Lord Brown).

30. None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed remarked of the Scottish case of *Devine v Secretary of State for Scotland* (unreported, 22 January 1993), in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that "their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure": *A v British Broadcasting Corpn*, at para 39. In other cases, the identity of the person involved may be more central to the point of public interest, but outweighed by the public interest in the administration of justice. This was why publication of the name was prohibited in *A v British Broadcasting Corpn*. Another example in a rather different context is *R (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] 1 WLR 444, a difficult case involving the disclosure via judicial proceedings of highly personal clinical data concerning psychiatric patients serving sentences of imprisonment, which would have undermined confidential clinical relationships and thereby reduced the efficacy of the system for judicial oversight of the Home Secretary's decisions.

Application to the present case

31. The nature of the article that *The Times* and the *Oxford Mail* wish to publish has varied over the period since the section 4(2) order was first sought. The current position of *The Times* was explained in an e-mail sent shortly before the application to Tugendhat J. It is that they wish to report the court proceedings concerning the imposition and lifting of the section 4(2) order in an article which will focus on issues relating to open justice. In particular, it will focus on the position of persons not party to proceedings about whom allegations are made in those proceedings, the extent of the protection which the law gives to those who are facing imminent or

pending criminal proceedings and the challenges of reporting criminal proceedings where such issues arise. They have said that they propose to identify PNM because this would make the piece "considerably more engaging and meaningful for our readers", but that any report would make clear that he had been released from police bail and was not facing imminent or pending proceedings. The position of the *Oxford Mail* was set out in a letter of the same date and is similar. They added:

> "We consider that the recent proceedings involving your client during which these issues were carefully explored in open court on several occasions, and in respect of which a detailed ruling was handed down, provide a very vivid illustration of how these issues are treated by the courts. It is our wish to explain these proceedings fully and fairly."

I mention these matters because the limited nature of the proposed publication was relied upon by the two newspapers as part of their case against the making of the order sought. They are not, however, critical to the issue before us. If no order is made, the two newspapers, and indeed other media organisations, will be at liberty, subject to the law of defamation, to publish anything that was said and done at the trial at the Central Criminal Court, and the appeal must be approached on that basis.

32. After an impeccable summary of the relevant legal principles, Tugendhat J began his assessment of the balance between the divergent interests involved with an assessment of PNM's interest in restricting the reporting of the trial so far as it related to him. He accepted that there would be some members of the public who would equate suspicion with guilt and that there was some risk that PNM and members of his family, including his children, would be subject to some unpleasant behaviour, possibly amounting to harassment. He also acknowledged that, not being a defendant in the trial, he would have no means of clearing his name if the media confined themselves to fair, accurate and contemporaneous reporting attracting absolute privilege. However, he considered that the significance of these facts was diminished by two factors. First, he approached the case on the footing set out in Lord Rodger's observation in *In re Guardian News and Media*, at para 66, namely that members of the public generally will understand the difference between suspicion and guilt. Secondly, he thought that because of its public nature, some knowledge of what had been said about him at the trial would spread among those who knew him personally or by name, so that restrictions on press reporting would be of little if any benefit to him or his family. Indeed, the prohibition of media reporting might lead to the circulation of ill-informed or misleading versions of what was said that would aggravate PNM's situation. By comparison, he considered that there was the highest public interest in the allegations of child abuse, which were the subject of continuing police investigations. The reports would be likely to make an important contribution to the knowledge of the public and to informed debate about the administration of justice. Publication might also encourage witnesses to

come forward, or lend significance to the fact if they did not come forward. In these circumstances, he thought that the case was not materially different from *In re S*. Under section 12(3) of the Human Rights Act 1998, the judge could not make the order unless satisfied that PNM was likely to succeed at a trial. He concluded that PNM's claim was likely to fail.

33. The legal basis of the judge's analysis was challenged in only two respects. First, it was argued on PNM's behalf that the decision of this court in *A v British Broadcasting Corpn* had modified the approach to such applications in a way which made the analysis in *In re S* less relevant. Secondly, it was suggested that in adopting Lord Rodger's observations in *In re Guardian News and Media* about the public's ability to distinguish between suspicion and guilt, the judge had applied a legal presumption which was not warranted. I have explained in para 28 above why I reject the first of these arguments. I also reject the second. Lord Rodger was describing the basis on which English law (unlike, say, German law) allows the publication of the identities of persons charged with offences in advance of their trial. No doubt this also represents the public's reaction in the generality of cases. But Lord Rodger was not putting this last point forward as a legal presumption to be applied irrespective of the circumstances, let alone an irrebutable one. Nor have the courts subsequently proceeded as if he was, as the analysis of the facts in *In re British Broadcasting Corporation. In re Attorney General's Reference (No 3 of 1999)* demonstrates. Read as a whole, this part of Tugendhat J's judgment was doing no more than saying that while some members of the public would equate suspicion with guilt, most would not.

34. In my opinion, Tugendhat J committed no error of law, and his conclusion was one that he was entitled to reach. Left to myself, I might have been less sanguine than he was about the reaction of the public to the way in which PNM featured in the trial. But that would have made no difference to the conclusion, for the following reasons:

> (1) PNM's application is not that the trial should be conducted so as to withhold his identity. If it had been, the considerations urged by Lord Kerr and Lord Wilson in their judgments in this case, might have had considerable force. But it is now too late for that. PNM's application is to prohibit the reporting, however fair or accurate, of certain matters which were discussed at a public trial. These are not matters in respect of which PNM can have had any reasonable expectation of privacy. The contrast between this situation and the case where a newspaper responds to a tip-off about intensely personal information such as a claimant's participation in private drug rehabilitation sessions could hardly be more stark.

(2) That is not the end of PNM's article 8 right, because he is entitled to rely on the impact which publication would have on his relations with his family and their relations with the community in which he lives. I do not underestimate that impact. There is force in the judge's observation that the public nature of the trial, combined with the notoriety of the case, especially in the Oxford area, means that some people will know of the allegations about PNM in any event. But whether that be so or not, the impact on PNM's family life of what was said about him at the trial is no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial. A defendant at such a trial may be acquitted, possibly on an issue of admissibility, after bruising disclosures have been made about him at the trial. Within the limits of professional propriety, a witness may have his integrity attacked in cross-examination. He may be accused by other witnesses of lying or even of having committed the offence himself. All of these matters may be exposed in public under the cloak of the absolute immunity of counsel and witnesses from civil liability, and reported under the protection of the absolute privilege from liability for defamation for fair, accurate and contemporaneous publication. The immunity and the privilege reflect the law's conviction that the collateral impact that this process has on those affected 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.

(3) The impact on PNM's family life is indirect and incidental, in the same way as the impact on the claimant's family life in *In re S* and on M's family life in *In re Guardian News and Media Ltd*. Neither PNM nor his family participated in any capacity at the trial, and nothing that was said at the trial related to his family. But it is also indirect and incidental in a different and perhaps more fundamental sense. PNM is seeking to restrain reporting of the proceedings in order to protect his reputation. A party is entitled to invoke the right of privacy to protect his reputation but, as I have explained, there is no reasonable expectation of privacy in relation to proceedings in open court. The only claim available to PNM is based on the adverse impact on his family life which will follow indirectly from the damage to his reputation. It is clear that in an action for defamation no injunction would issue to prevent the publication of a fair and accurate report of what was said about PNM in the proceedings. It would be both privileged and justified. In the context of the publication of proceedings in open court, it would be incoherent for the law to refuse an injunction to prevent damage to PNM's reputation directly, while granting it to prevent the collateral impact on his family life in precisely the same circumstances. It would also, as Lord Steyn pointed out in *In re S*, make it particularly difficult to distinguish the many other cases in which judicial proceedings generate damaging or distressing collateral publicity for those not directly involved.

(4) I would not rule out the possibility of a pre-emptive injunction in a case where the information was private or there was no sufficiently substantial public interest in publication. But in relation to the reporting of public court proceedings such cases are likely to be rare. This is clearly not such a case. The sexual abuse of children, especially on an organised basis, is a subject of great public concern. The processes by which such cases are investigated and brought to trial are matters of legitimate public interest. The criticisms made of the police and social services inevitably reinforce the public interest in this particular case. The use of section 4(2) of the Contempt of Court Act 1981 to postpone the reporting of aspects of a public trial is justified by the need to protect the interests of justice, but it is nonetheless a proper matter for debate which the media are entitled to raise.

(5) Does the public interest extend to PNM's identity? This case differs from earlier cases in which the same question has arisen because the order sought by PNM would not prevent the identification of a party to the criminal proceedings or even of a witness. To my mind that makes it even more difficult to justify an injunction, for reasons which I have given. But in any event I do not think it can be a relevant distinction. The policy which permits media reporting of judicial proceedings does not depend on the person adversely affected by the publicity being a participant in the proceedings. It depends on (i) the right of the public to be informed about a significant public act of the state, and (ii) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration. PNM's identity is not a peripheral or irrelevant feature of this particular story.

35. I conclude with two points. The first is that the only question before us is whether a pre-emptive interlocutory injunction should issue. Nothing that I have said should be taken to limit the range of remedies that may be available after publication if the rights of the claimant are found to have been violated. The second is that restrictions on the reporting of proceedings in open court are particularly difficult to justify. It may in some cases be easier to justify managing the trial in a way which avoids the identification of those with a sufficient claim to anonymity. Applications for anonymity in the courtroom will generally raise many issues other than the impact on the applicant or his family. They will include the fairness of the trial, the nature of the issues, and the existence and extent of any legitimate public interest in the applicant's identity. I am in no position to suggest that such an application would have succeeded in PNM's case, if it had been made. But if there is a solution to the problem of collateral damage to those not directly involved in criminal proceedings, that is where it is to be found.

36. I would dismiss the appeal. The parties have agreed that in those circumstances the anonymity order made by this court on 17 January 2017 undersection 4(2) of the Contempt Court Act 1981 should be revoked and that the Appellant may be referred to in the title of the proceedings by his name, Tariq Khuja.

LORD KERR AND LORD WILSON: (dissenting)

37. We would have allowed the appeal.

38. Subject to what we regard as a controversial presumption, the legal framework within which PNM's application for an injunction fell to be considered is not in dispute. The law required Tugendhat J to appraise the competing rights of, on the one hand, the press and the public under article 10 of the European Convention and, on the other, of PNM and his family under article 8. That appraisal had to take place on the basis that neither right was in principle stronger than the other and that a decision as to which should prevail required first an intense focus on their comparative importance in the particular circumstances and then an assessment of the proportionality of the interference with each of them which the grant or refusal of the injunction would represent: see the propositions of Lord Steyn in the *S* case at para 17, quoted by Lord Sumption at para 22 above. If this approach was followed, there would be no danger that grant of the injunction would establish some further legal exception to the principle of open justice; and the risk referred to by Lord Woolf MR in the *Kaim Todner* case, cited at para 14 above, of an insidious growth by accretion of exceptions which would erode the general principle, would not materialise.

39. The judge's task was therefore to evaluate the strength of the rival considerations. If there was no legal error in his approach to the task, the Court of Appeal would have been right to have dismissed PNM's appeal. We have come to the conclusion, however, that, through no fault of his own, he did fall into error.

40. The controversial presumption to which we have referred originates in the judgment of Lord Rodger in the *Guardian* case, cited by Lord Sumption at para 8 above. Lord Rodger, who was delivering the judgment of this court, referred at para 66 to the freedom of the press to publish the identity of a person charged with an offence. He then observed:

> "In allowing this, the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities

> are not even in a position to charge with an offence and bring to court."

41. Lord Rodger's observation in the *Guardian* case could not have been clearer: it was that the law proceeds on the basis that most people understand that persons charged with an offence - and even more obviously persons not or not yet charged with an offence but simply arrested on suspicion of it - are innocent until their guilt has been established. So Tugendhat J proceeded on that basis. He quoted para 66 of Lord Rodger's judgment and said that "I approach the case on [that] footing". In her judgment in the Court of Appeal, with which Lord Dyson MR and Vos LJ agreed, Sharp LJ correctly observed that the assumption or (as she elsewhere described it) the presumption set out in para 66 of Lord Rodger's judgment was "the basis upon which the judge proceeded".

42. Sharp LJ thereupon proceeded to explain why, in her view, Tugendhat J had been entitled to proceed on that basis. She said at para 38:

> "The approach to the open justice principle which guided the judge has been settled at the highest level … In my view, the appellant's argument ignores a fundamental part of that approach, which is that most members of the public understand the presumption of innocence and are able to distinguish between the position of someone who has been (merely) arrested, someone who has been charged, and someone who has been convicted of a criminal offence. Once that is understood, it follows that the effect of disclosing the fact of the appellant's arrest on his article 8 rights is significantly more limited than [counsel for PNM] contends."

43. To the extent that in this passage Sharp LJ was suggesting that most members of the public would not regard PNM's arrest as indicative of guilt, not only would the effect on him of its publication be significantly more limited but his case under article 8 would largely fall away.

44. Lord Sumption suggests in para 33 above that in para 66 of the *Guardian* case Lord Rodger was not articulating a legal presumption to be applied irrespective of the circumstances but merely explaining the basis on which English law allows publication in advance of trial of the names of those charged with offences. We cannot agree. The statement that "the law proceeds on the basis" surely means at least that, absent good reason for departing from it, the courts should act on the principle that most people believe that someone charged with an offence, and still more someone not charged with an offence but simply arrested on suspicion of it, is innocent until proved guilty.

45. If the law does not proceed on that basis, the court's inquiry into the attitude of members of the public to those charged with criminal offences or merely arrested on suspicion of them would be at large. Its conduct of the inquiry would require investigation and evidence. The statement of Lord Rodger can be interpreted only as indicating that investigation and the adduction of evidence are not needed. His statement plainly partakes of a legal presumption.

46. We consider it necessary both to confront the fact that Lord Rodger articulated a presumption and then critically to examine it. This is necessary since, in our judgment, Tugendhat J applied the asserted presumption and his application of it was endorsed by the Court of Appeal. If, as we believe to be the case, the asserted presumption can be shown to have no proper legal foundation, both courts would have fallen into error and the evaluative exercise would fall to be conducted again.

47. So our question becomes: on what grounds did Lord Rodger adopt - and purport to cast as a presumption - the proposition that most members of the public understand that a person who has been merely charged with an offence, and, even more obviously, a person who has been simply arrested on suspicion of an offence, is innocent until proved guilty? Lord Rodger cited no authority for the proposition. Indeed, he referred to no evidence in support of it. No such evidence had been adduced in those proceedings. We find that we cannot answer our question. We have no difficulty in accepting the proposition that most people understand that *the law* does not regard as guilty a man who has been no more than arrested or even charged. That, however, is distinctly different from saying that most people do not *themselves* regard him as guilty. Yet this is assuredly the proposition which is the subject of Lord Rodger's asserted presumption.

48. The respondents have not filed evidence in support of the proposition that most members of the public would not regard as guilty of sexual abuse a man whom they learned to have been arrested on suspicion of it. They can hardly be criticised for not doing so: for there appeared already to be a legal presumption to that effect. Nor did PNM file contrary evidence in attempted rebuttal of it. It is important, however, to put the absence of such evidence in context. His application was only for an interim injunction and was made in the circumstances of great urgency explained by Lord Sumption at para 11 above. On an interim application, while the court is disabled by section 12(3) of the 1998 Act from granting an injunction unless satisfied that the applicant is likely to secure an injunction at the full hearing, its approach is as preliminary as is the requested order.

49. Plainly there is increasing concern, judicial and extra-judicial, about the effect upon an innocent person's reputation of publication of the fact of his arrest. In the second volume of the report of his "Inquiry into the Culture, Practices and

Ethics of the Press" dated 29 November 2012, HC 780-11, Leveson LJ referred at para 3.25 to the case of Mr Christopher Jefferies, addressed in *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin); [2012] 1 WLR 2408. Mr Jefferies was exposed as having been arrested on suspicion of murder. He was later demonstrated to have been innocent of it but meanwhile he had been subjected to a protracted campaign of vilification in the press, which had led him to leave his home and to change his appearance. Although in that case the press had committed contempt of court and had published actionable libels about Mr Jefferies, the significance of the case for present purposes lies in the ease with which arrest may generally be associated with guilt. In the event Leveson LJ recommended at para 2.39 that, save in exceptional and clearly defined circumstances, the police should not release the names or identifying details of those who are arrested or suspected of a crime.

50. On 4 March 2013 Treacy LJ and Tugendhat J issued a paper entitled "Contempt of Court. A Judicial Response to Law Commission Consultation Paper No 209". They made clear that it reflected the views of the President of the Queen's Bench Division, the Senior Presiding Judge, Leveson and Goldring LJJ and other senior judges. They observed at para 5:

> "The police arrest many people who are never charged. If there were a policy that the police should consistently publish the fact that a person has been arrested, in many cases that information would attract substantial publicity, causing *irremediable* damage to the person's reputation." (Emphasis supplied)

They proceeded to indorse the recommendation made by Leveson LJ in para 2.39 of his report.

51. On 31 October 2016 Sir Richard Henriques, a former High Court judge, made a report entitled "An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence". Sir Richard said at para 1.67:

> "I consider it most unlikely that a Government will protect the anonymity of suspects pre-charge. To do so would enrage the popular press whose circulation would suffer. Present arrangements, however, have caused the most dreadful unhappiness and distress to numerous suspects, their families, friends and supporters. Those consequences were avoidable by protecting anonymity. Nobody is safe from false accusation and damaging exposure under present arrangements. A reputation built on a lifetime of public service or popular

> entertainment can be extinguished in an instant. I sincerely believe that statutory protection of anonymity pre-charge is essential in a fair system."

52. Only days prior to the date of Sir Richard's report Cobb J had given judgment in *Rotherham Metropolitan Borough Council v M* [2016] EWHC 2660 (Fam). Rotherham had made a teenage girl a ward of court and had secured interim injunctions that four named men should not associate with her. It had alleged that they had been sexually exploiting her. None of the four men had been charged with any offence in relation to her but two of them had been arrested in that connection and they remained on police bail. In the event, however, Rotherham decided that it would not be able to substantiate its allegations against any of the four men and Cobb J acceded to its application that the injunctions be discharged. Rotherham also sought an indefinite extension of interim reporting restriction orders against identification not only of the girl but also of the four men. Times Newspapers Ltd, also the first respondent to the present appeal, opposed extension of the orders insofar as they related to the four men. Cobb J said at para 39:

> "I next ask myself what is the public interest in naming these four men in the press as persons against whom injunction proceedings were once brought, interim injunctions (without evidence being tested) once made, but in respect of whom in the end no findings were sought, let alone made. In my judgment there is no, or if any, negligible, such public interest … On the other hand, there is a substantial risk that, given the strength of feeling in Rotherham and elsewhere about those who engage in child sexual exploitation and similar offences, they would be perceived to be perpetrators or likely perpetrators, and pilloried and/or targeted in their communities if they were known to have been under suspicion in this way."

Then Cobb J quoted from a leading article in The Times on 19 October 2016 as follows:

> "False rape and abuse accusations can inflict terrible damage on the reputations, prospects and health of those accused. For all the presumption of innocence, mud sticks."

In the end Cobb J concluded that the restriction orders against identification of the men should be continued indefinitely. He said at para 46:

> "… I have reached the firm conclusion that there is no true public interest in naming the four associated males, against whom, in the end, no findings have been sought or made. [Their] article 8 rights … would be in my judgment significantly violated were they to be publicly exposed in the media as having been implicated to a greater or lesser degree, but not proved to be engaged, in this type of offending."

These observations seem to us to show great insight and to resonate strongly with the facts of the present case.

53. Nor should this court spurn the opportunity to derive insight from decisions in other jurisdictions, in particular in the courts of Canada. It is clear that in the law of Canada the principles of free expression and of open justice, enshrined in sections 2(b) and 11(d) of the Canadian Charter of Rights and Freedoms, have the central importance with which they are invested in the law of England and Wales. But the privacy rights of those suspected or accused, but not convicted, of grave crimes are not undermined by any presumption analogous to the controversial presumption articulated by Lord Rodger. The result is that they are afforded significantly greater value and they not infrequently prevail.

54. Thus in *BG v The Queen in Right of The Province of British Columbia* (2002) BCSC 1417 the Supreme Court of British Columbia prohibited, until the conclusion of the proceedings, identification of school staff accused of abusing boys in an action brought by them in later life against the school. The judge held at para 38 that protection of innocent people was a social value of superordinate importance which, were they to suffer irreparable harm to their reputation, would justify overriding the general principle of open justice; at para 41 that, accused of being paedophiles, the staff had been put in the category of persons most condemned and reviled by society; and at para 53 that, were they to be publicly identified, they would suffer irreparable harm before they had had any opportunity to rebut the accusations. Two years later, after the action had been dismissed, the Court of Appeal was required to decide whether a prohibition against identifying the complainants (as opposed to the staff) had rightly been discharged. In his judgment at (2004) BCCA 345 para 26, Finch CJ cited substantial authority in support of his proposition that "replacing the names of certain parties with initials relates only to 'a sliver of information' and minimally impairs the openness of judicial proceedings". Irrespective of whether, by our standards, it goes too far, the proposition articulated by the Chief Justice highlights the chasm, which we would be unwise to ignore, between the approach taken by Tugendhat J to the determination of PNM's application and that which would be taken to the determination of an analogous application in a highly respected fellow jurisdiction.

55. In *R v Henry* (2009) BCCA 86 the same Court of Appeal had granted permission to Mr Henry to reopen his appeal against conviction for offences of sexual assault. His case was to be that Mr X, who had already been convicted of other assaults, had instead been the perpetrator of the assaults for which he, Mr Henry, had been convicted. The court prohibited public identification of Mr X until determination of the appeal. Newbury JA observed at para 17 that the public interest in the openness of trials and in the administration of justice was not diminished by withholding his identification and she concluded as follows:

> "If our society takes seriously the proposition that a person in Mr X's position is presumed innocent until proven guilty, it seems to me that the deleterious effects, both on his privacy interests and on the administration of justice, of the publication of his name do outweigh the public interest in knowing that fact."

So there the presumption of innocence, instead of precipitating a conclusion that the public would generally act by reference to it and that there was thus no need for injunctive intervention, prompted the opposite conclusion, namely that intervention was necessary in order to make the presumption as effective in the street as it would be in the court-room.

56. Albeit with natural hesitation, we conclude that there was no basis for the presumption articulated by Lord Rodger in para 66 of the *Guardian* case and that accordingly Tugendhat J fell into error in dismissing PNM's application on foot of it. The balancing exercise needs to be conducted again.

57. The newspapers strongly argue that the subject-matter of the proposed publications extends beyond the arrest of PNM on suspicion of sexual offences against children in that it extends to the part which his name played in criminal proceedings open to the public. There is no doubt that the naming of him in the criminal trial creates a powerful extra dimension to the public interest in the proposed publications. But it is worthwhile to reflect on the circumstances in which he came to be named in the trial. First, he was named in the course of the successful application which on 25 January 2013 he made to the judge for continuation of the order under section 4(2) of the 1981 Act. Then, in the course of the evidence, he was named by a police officer as not having been identified in the course of an identification procedure. After his name had thus been introduced into the evidence, it was mentioned very occasionally by counsel during the succeeding months of the trial. In assessing the strength of the public interest in unrestricted reporting of what was said at the trial, it is not, so we suggest, irrelevant that PNM's name first figured there in the context of his successful application for a temporary prohibition against

identification and thereafter mostly by reason of evidence indicative of his innocence.

58. In *Von Hannover v Germany* (2004) 40 EHRR 1 the European Court of Human Rights held that, in allowing publication in the press of articles, and in particular of photographs, which described and depicted aspects of the daily life of Princess Caroline of Monaco, Germany had breached her rights under article 8 of the convention. It concluded at para 76:

> "… the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution …"

In the present case the newspapers argue that the debate of general interest surrounds the power of the court to postpone publication of a report of part of its proceedings under section 4(2) of the 1981 Act. What, then, is suggested to be the contribution to that debate which identification of PNM would make? By email dated 8 October 2013, Times Newspapers Ltd offered its answer:

> "We wish to identify your Client in our reporting since this would make the piece considerably more engaging and meaningful for our readers."

We would not quarrel with this. It accords with the observations made by Lord Rodger in the *Guardian* case when in para 63 he answered Romeo's question about the significance of a name. But, against the public interest that the proposed piece about section 4(2) would be considerably more engaging and meaningful, this court needed first to recognise the risk to PNM that his identification would generate a widespread belief not only that he was guilty of crimes which understandably attract an extreme degree of public outrage but also that he had so far evaded punishment for them; and then, in consequence, to balance the risk of profound harm to the reputational, social, emotional and even physical aspects of his private and family life, notwithstanding that he is presumed by the law to be innocent and has had no opportunity to address in public the offences of which at one time the police suspected him to be guilty.

59. At the end of this only interim inquiry, our view is that the scales have descended heavily in favour of PNM's rights under article 8; that he was likely to have established his right to an injunction against identification at full trial; and,

with great respect to our colleagues, that they are wrong today to be dismissing his appeal.