Case No: CO/11252/2011

Neutral Citation Number: [2013] EWHC 1360 (Admin)
IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2013

Before :

LORD JUSTICE PITCHFORD AND MR JUSTICE SIMON

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Between :

THE QUEEN ON THE APPLICATION OF M	**Claimant**
- and -	
THE PAROLE BOARD	**Defendant**
-and-	
SECRETARY OF STATE FOR JUSTICE	**Interested Party**
and	
ASSOCIATED NEWSPAPERS LIMITED, MGN LIMITED, NEWS GROUP NEWSPAPERS LIMITED AND TIMES NEWSPAPERS LIMITED	**Interveners**

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Edward Fitzgerald QC and Quincy Whitaker (instructed by **Scott-Moncrieff - Solicitors**) for the **Claimant**
Julian Milford (instructed by **Treasury Solicitor)** for **The Parole Board**
T Weisselberg (instructed by **Treasury Solicitor**) for the **Interested Party**
Guy Vassall-Adams (instructed by **RPC LLP**) for the **Interveners**

Hearing date: 18 April 2013

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Judgment

Lord Justice Pitchford :

Introduction

1. This the judgment of the Court. The issue before the Court is whether an order for anonymity made by Simon J in the course of proceedings for judicial review should now be discharged upon the application of the interveners and the interested party.

Procedural Background

2. The 62 year old claimant is serving a sentence of life imprisonment imposed on 30 July 1973 for three offences of murder. Subsequently a minimum term of 20 years was notified by the then Home Secretary.

3. On 16 August 2011 the Parole Board declined to recommend that the claimant be transferred to open conditions. The claimant challenged that decision in a claim for judicial review issued on 21 November 2011. The claim was heard by Simon J on 23 January 2013. At that hearing, counsel for the claimant, Ms Quincy Whitaker, made an oral application for an order under CPR Rule 39.2(4) that no report of the proceedings should name the claimant. There was produced to the court an undated consent order signed by solicitors for the claimant and the Treasury Solicitor on behalf of the defendant, the Parole Board, and the interested party, the Secretary of State for Justice, which read:

> "Upon consideration of the papers it is agreed by all parties that pursuant to CPR 39.2 this matter be known as *R (M) v The Parole Board*."

4. One member of the Press Association was in court, Mr John Aston, to resist the making of an order for anonymity. The Press had no advance notification of the application and Mr Aston had not had the opportunity to obtain legal advice. Simon J put back argument until the conclusion of the substantive review claim but in the meantime made an interim order prohibiting publication. Later in the day Mr Aston had prepared a written submission. Ms Whitaker and Ms Steyn, on behalf of the Parole Board, made oral submissions and Simon J gave his ruling. An order was made in the following terms:

> "It is ordered that:
>
> (1) Pursuant to CPR 39.2 this matter be known as *R (M) v The Parole Board*.
>
> (2) No details of this claimant's identity or the details of his offences, (save as referred to in the final judgment), or his current location be published in any form in respect of any reference to this judgment or any part of the final judgment without further order.
>
> (3) No details of the identity or location of the person referred to as "FH" in these proceedings and in the final judgment be published in any form without further order.

(4) Liberty to any party to apply to discharge or vary paragraph 2 of this Order within 5 days of the date of this Order after having given prior written notice to the solicitors for the claimant and for the defendant."

5. On 28 January 2013 Associated Newspapers Limited, MGN Limited, News Group Newspapers Limited and Times Newspapers Limited (collectively called "the media interveners") issued an application notice under paragraph (4) of the order seeking the discharge of paragraphs 1 and 2. The Secretary of State made an identical application. The court has now received evidence and heard full argument on behalf of the media interveners, the Secretary of State and the claimant.

6. In a judgment handed down on 5 February 2013, Simon J dismissed the judicial review claim. At paragraph 51 of his judgment he said:

> "51. In the light of the claimant's attribution of the index offences to difficulties in his relationship with others causing him to enact violent fantasies directed towards the victim's family, it was the relevance of these questions which led the panel to conclude that, given the fact that he was "capable" of forming serial relationships of a sexual nature with women while in custody, and that the risk in relation to how he formed relationships and dealt with setbacks arising from them, was not sufficiently understood by the claimant and not adequately addressed in the therapy."

This finding is relevant to the conditions in which the claimant is currently and will, at least in the short term, be serving his sentence.

Factual background

7. The claimant's offences of murder were of exceptional gravity. In April 1973 he was, when aged 21, lodging with a couple in Worcester. He would babysit their three infant children. On 13 April 1973, while alone with the children in the house, the claimant killed all three, mutilated them after death and impaled them on the iron railings of a neighbour's fence. No defence was available to him on the medical evidence and the claimant pleaded guilty. The only explanation given by the claimant for the killing (of the first child) was that she would not stop crying.

8. On reception at HMP Wormwood Scrubs the claimant was placed on a rule 43 segregation unit. In January 1975 he was transferred to the long term wing where, within a few hours, he was the victim of a serious assault by other inmates and required hospital treatment and a return to segregation. In January 1977 the claimant was transferred to HMP Wakefield where, the following day, he was returned to rule 43 segregation at his own request after threats from inmates. In May 1978 the claimant was transferred to HMP Long Lartin also in segregation. In August he was moved to an ordinary wing but was returned to segregation on the following day after threats from inmates. The claimant remained at HMP Long Lartin until his transfer to HMP Channings Wood in January 1991. The claimant was absorbed into the general

prison population in May 1980. He was made a category B prisoner in 1985. In 1990 he was generally regarded as suitable for category C conditions. The claimant, during this period, had demonstrated a fine ability as an artist and spent much of his available time in that pursuit. He was fully co-operative with the rehabilitation process.

9. On transfer to HMP Channings Wood in January 1991 the claimant survived in the general prison population for only 4 days before discovering his bed soaked with urine and his cell and property smeared with excrement. He was returned to rule 43 conditions and was transferred. In January 1994 following his second Parole Board review the Board recommended transfer to open conditions with a further review in two years. That recommendation was accepted by the Secretary of State. In November 1994 the claimant was transferred to open conditions. However, his movements had come to the attention of the press. Inmates at the open prison made threats and the claimant was moved to secure conditions. A further attempt was made to settle the claimant in open conditions during May 1995. An attempt was made by other inmates wearing balaclavas to reach the claimant in his accommodation and, again, he had to be moved to secure conditions. In June 1995 he was returned to open conditions. In December 1996 the claimant voluntarily returned to closed conditions while he underwent intensive psychological review for an assessment whether there had been a sexual component to his offences. During 1996 the claimant was assaulted by inmates after an article about him appeared in the Daily Mirror. In February 1997 he was moved from the segregation wing to another secure prison where he remained until June 1998. An attempt to move him was cancelled when other prisoners learned of the nature of his offences. In June 2000 the Parole Board recommended that the claimant should remain in closed conditions because little work had been done to address a possible sexual component to his offending. In June 2002, following his fourth review, the Parole Board again recommended that the claimant should stay in closed conditions with a view to preparing a strategy for life outside prison. In June 2003 he was recommended for open conditions and the Secretary of State agreed with the recommendation.

10. The claimant was returned to open conditions in February 2004. He progressed to paid employment and temporary leave. In July 2005 he was about to commence re-settlement leave when media interest at the hostel where he was staying intervened. In December 2005, the Sun newspaper ran a front page article about the claimant and he was required to return immediately to prison. The claimant requested rule 45 confinement. On 2 January 2006, following agitation at the prison, the claimant was moved to a vulnerable prisoners unit ("VPU"). In March 2007 following his sixth review, the Parole Board made no recommendation for the claimant's release but the claimant was to retain his category D status while remaining in closed conditions. In September 2007 the claimant was transferred to a prison environment in which, in effect, the whole prison was a VPU.

11. On 7 April 2009 Silber J dismissed the claimant's judicial review challenge to the Secretary of State's decision to keep him in closed conditions. The judge ordered that the title to the claim should be *R (M) v Secretary of State for Justice* and permitted redaction from parts of his draft judgment which otherwise might have led to the identification of the claimant and disclosure of the details of his offences.

12. In July 2009, after a seventh review, the Parole Board recommended that the claimant was suitable for open conditions; that recommendation was not accepted by the

Secretary of State who considered that there remained offence related work outstanding. The claimant commenced his second judicial review claim on 19 November 2009. Collins J, who considered the application on the papers also permitted the anonymity of the claimant in the title to the action. However, the claim was later withdrawn. After his eighth review the Parole Board, on 16 August 2011, declined to recommend the claimant's transfer to open conditions. It was this decision that was challenged at the hearing before Simon J on 23 January 2013. Simon J found that there was a proper evidential basis to support the Parole Board's conclusions and that the hearing was fair, and dismissed the claim. The claimant has since been transferred to further closed conditions and is currently residing in a VPU.

13. The claimant has been in prison for almost 40 years. It will be noted from the foregoing summary that he was the victim of a serious assault in 1975. He was also assaulted in 1996. On both occasions he was serving his sentence in closed conditions within the general prison population. An attempt was made by several prisoners to attack the claimant in May 1995, while he was serving his sentence in open conditions, but that attempt was thwarted. In January 1991 the claimant's cell was fouled when he had been in closed conditions with the general prison population for only four days. He was threatened with violence in 1978 and 1994. Threats of violence or a risk of violence appeared to have been precipitated by press reports in 1994, 1996 and 2005. On only one of those occasions was an assault committed.

The evidence of risk submitted by the parties

14. Mr Gordon Davison is the Deputy Director in the Ministry of Justice and Head of the National Offender Management Service ("NOMS"). On 16 September 2006 Mr Davison was Deputy Head of the Public Protection Unit at the Home Office. A meeting was held with the claimant's representatives to discuss steps which could be taken to manage the consequences of media interest should the Parole Board recommend the claimant's release following the review hearing due to take place on 6 November 2006. Mr Davison considered that the claimant's case did not meet the criteria for a full national identity change. In the event the Board did not recommend release (WS1 Davison, paras 8-11).

15. Mr Rikki Garg is practice manager and prison law consultant with the claimant's solicitors. Mr Garg describes a meeting held on 30 May 2008 with the claimant's senior case manager, Mr McMurdo, and the head of casework, Mrs Gambling. It was agreed that the claimant would remain in closed conditions for his own safety. From time to time since May 2008 there have been exchanges of correspondence and meetings between Mr Garg, NOMS and the claimant's case manager in which discussions have taken place both as to the claimant's sentence management and his security within the prison establishment. On 19 June 2008 Mr Garg wrote to Mrs Gambling with a proposal for a change of name by deed poll should the claimant become eligible for release (WS1 Garg paras 6-10). Mr Garg notes that following the Parole Board Review in 2007 the panel expressed concern that a strategy for safe release should be in place, since the events of 2005/2006 (paragraph 10 above) made it clear that press interest in the claimant put him at risk (WS1 Garg para 15).

16. On 12 February 2013 Mr Garg obtained permission from Mr Mapstone, the claimant's offender supervisor, to publish in his witness statement in the present applications Mr Mapstone's opinion expressed over the telephone that "[I]f the

claimant's details came back into the public arena then this would...set him back at least 8 years...[I]f the claimant was transferred to another category C establishment and his details were known, then there would be a serious risk to his life or of serious injury". Mr Mapstone e-mailed his agreement on the same day. (WS1 Garg paras 27-29). We have no witness statement from Mr Mapstone. Mr Davison confirms that Mr Mapstone gave his consent but has been told that Mr Mapstone did not utter the first quoted sentence (WS1 Davison para 63.1).

17. In Mr Davison's view the claimant has been managed satisfactorily in a closed prison for many years. He is likely to remain in a closed prison "for some time to come". Details of the claimant's crimes are already in the public domain. Anonymity in the reporting of the judicial review proceedings cannot be justified by the Secretary of State (WS1 Davison para 5). Discussions between the Treasury Solicitor's office and the claimant's solicitors and the draft consent order were not drawn, as they should have been, to Mr Davison's attention. Had they been, the draft consent order would not have been signed (WS1 Davison paras 21-23). The Secretary of State considers that "where offenders challenge judicial or quasi-judicial decisions...there must be a presumption that, wherever possible, the public has a right to know...the grounds on which the challenge is being made...[and] how public money is being used". The risk to the claimant in consequence of press attention has arisen when the claimant has been in open conditions and on those occasions the risk has been managed as required by the prison authorities. The risk to the claimant when he is closed conditions arises from the notoriety of his crimes; also, that risk continues to be manageable (WS1 Davison paras 31-36).

18. Following directions given by Simon J for disclosure of any risk assessments, Mr Davison ordered a risk assessment to be performed at each of two prison establishments. So far, the risk to the claimant has been managed co-operatively as and when circumstances have required. A formal risk assessment had not been needed. The claimant has not himself sought to change his name by deed poll. It is likely that a risk assessment will be made in future whenever a prisoner seeks anonymity in judicial review proceedings. There were five homicides in prisons during the period 2010-2013 inclusive. In the year 2011, of a total of 15,457 assaults in prisons, 1,352 were 'serious' assaults and 228 required in-patient hospital treatment (WS1 Davison paras 55-58). The total prison population is some 80,000. The acting residential governor at the claimant's current prison establishment was asked to provide a threat assessment. He reported that the claimant did not feel under threat in his present establishment. It is considered that publicity would increase the risk to the claimant but the risk is manageable within the VPU.

19. A multi-disciplinary meeting was held in October 2011 to consider possible interventions with a view to the claimant's further progress. Participation in a therapeutic community, a Psychologically Informed Planned Environment (or "PIPE") programme was identified. The claimant declined to participate. Mr Davison said in his second witness statement that he was informed by his officials and the claimant's offender manager and supervisor that the claimant considers PIPE a waste of time, providing no foundation for his progress towards release. In his witness statement of 15 March 2013 Mr Garg said that the multi-disciplinary recommendation is being challenged on the claimant's behalf to demonstrate how it would lead to risk reduction. On advice from the project team leader, Mr Davison has rejected the

claimant's assertion that the PIPE intervention is unsuitable for him (WS2 Davison paras 9-13); neither is it accepted that the claimant's presence in a VPU will prevent his progress to an open prison environment should the Parole Board and the Secretary of State so determine (WS2 Davison para 14).

20. It would appear, therefore, that no further progress has been made since the Parole Board's decision of 16 August 2011. The claimant's ninth review is underway. The full review dossier was due for disclosure on 10 April 2013. The target date for the Parole Board hearing is 1 August 2013. It is doubtful whether that date will be met. If it is, and if the recommendation is that the claimant should return to open conditions, it is improbable that such a return could occur before October 2013 at the earliest; in the meantime the claimant will remain in closed conditions. It is accepted on behalf of the Secretary of State that protective steps will be needed if and when the claimant returns to open conditions. As usual those steps will be considered at the Parole Board review. They might include a change of name (WS1 Davison paras 3-7).

21. On behalf of the media interveners, Ms Brid Jordan, a senior associate with RPC LLP has made two witness statements. Ms Jordan has made a search of all newspaper articles about the claimant and his offences. In more recent years there has been extensive coverage in national and local newspapers in 1995, 1996, 2006, 2007 and 2011. All of the information contained in the newspapers is available online (WS1 Jordan). Ms Jordan has demonstrated that by using the bare minimum of relevant search criteria to be found in the judgment of Simon J of 5 February it has been possible to find the name of the claimant and, by that means, the details of crimes of which he was convicted (WS2 Jordan).

The common law principle of open justice

22. The importance of the principle of open justice at common law is so well known that it does not require further emphasis in this judgment. It is a cornerstone of the rule of law that public justice should be publicly reported unless the interests of justice otherwise require: *Scott v Scott* [1913] AC 417 at 463; *Attorney General v Leveller Magazine* [1979] AC 440 at pages 449H – 450B. It is for the party contending that derogation from this principle is necessary to produce clear and cogent evidence: Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003 at paragraph 13.

European Convention on Human Rights

23. The media interveners rely upon Article 10 ECHR which states:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information of 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, maybe subject to such formalities, conditions, restrictions or penalties as are prescribed by law

and are necessary in a democratic society, in the interest 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."

24. The issues raised by the current applications concern the appropriate balance to be struck between the interests of the media under Article 10 to publish (and the public to receive) reports of public proceedings and the claimant's convention rights under Articles 2, 3, 5 and 8:

"Article 2 – right to life

Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his convention of a crime for which this penalty is provided by law."

Article 3 – prohibition of torture

No-one shall be subjected to torture or inhuman of degrading treatment or punishment.

Article 5 – right to liberty and security

(1) Everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:

(a) The lawful detention of a person after conviction by a competent court …

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful …

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 his in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

25. By Section 6(1) Human Rights Act 1998 it is unlawful for a public authority (including a court) to act in a way which is incompatible with the Convention rights of an individual. In his judgment of 23 January 2013 upon the issue of anonymity, Simon J said:

> "3. I have been assisted by the short written submissions of Mr John Aston of the Press Association. He rightly draws attention to the primary position which is that there should be full reporting of both argument and the decision unless it is necessary and in the interest of justice that anonymity be granted. He submits that the issue before the court today is not what arrangements should be made if he is granted parole, for example details of where he may be released; and that, if that stage is reached and reporting restrictions then become necessary, orders can be made preventing the press from identifying where he will live. He concedes that it could be argued that injunctions might be necessary to prevent the press from approaching him; but makes the point that the court today is only concerned with whether the Parole Board made a legally valid decision not to recommend his transfer to open conditions, and that to impose a news black-out in a case of such seriousness is to deny the public the right to know the outcome in a disproportionate way, which runs counter to the public need for open justice. He submits that there is a danger in this type of case that the interests of the public, who have a right to be informed on matters of such seriousness, is not sufficiently taken into account.
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> 4. In her submissions, Ms Whitaker, in support of the application, draws attention to the fact that this claimant has been on rule 43 or in a VPU for much of his life in prison. He is now in a place where his identity is not known, but she submits that this may change shortly. Her real point is that the nature and seriousness of the offences are such that it is not simply his Article 8 rights which may be infringed in the most serious way were his identity to be made known when people hear about the facts of this case, but that Article 2 and Article 3 will be engaged since his life will be at risk.
>
> 5. I accept that submission. The facts suggest strongly that his life may be at risk if an order is not made. I am told that the Secretary of State for Justice is supportive of the application, which is a factor that I take into account but which is not dispositive of the issue. For reasons which I have given during the course of argument, I propose to allow the Press Association or any other party affected by the Order if they wish, to apply on proper notice and within a confined period to vary or discharge this Order, by counsel or however else they wish."

Simon J did not have before him the evidence which has now been presented to the Court; he provided the press or any other party with liberty to apply and on 5 February 2013 gave directions for the presentation of evidence for the current hearing.

The cases

26. Upon the importance of the principle of open justice and the freedom of the press to report proceedings of public interest the common law and the European Court of

Human Rights ("ECtHR") walk in step. The requirement that courts should be vigilant to prevent inappropriate encroachment upon the right to report matters of public interest arising from court proceedings was emphasised by Lord Woolf CJ in *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at page 977D – G. In *AG v Leveller Magazine* at page 449H Lord Diplock identified the twin pillars of the principle of open justice: (i) the need where possible to hold proceedings in open court to which the press and public are admitted and (ii) the ability of the press to communicate those proceedings to the wider public. To similar effect were the observations of Lord Judge CJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] 3 WLR 55 at paragraphs 38 – 40. In *R (Mohamed) v Foreign Secretary (No 2)* [2010] 3 WLR 610 the then Master of the Rolls Lord Neuberger said at paragraph 180:

> "The Human Rights Act 1998 has enlarged the court's role for present purposes. The courts have always been a branch of Government (in the wider sense of that expression) and as such they now have a duty to comply with the Convention. As the Divisional Court said, Article 10 carries with it a right to know, which means that the courts, like any public body, have a concomitant obligation to make information available. Of course, the obligation is not unqualified or absolute, nor does it involve the court arrogating to itself some sort of roving commission. But where the publication at issue concerns the content of a judgment of the court, it seems to me that article 10 is plainly engaged; the public's right to know is a very important feature…"

27. The ECtHR explained the contribution to open justice made by the Art 6(1) ECHR requirement for public proceedings and reporting in *Pretto v Italy* [1984] 6 EHRR 182 at paragraph 21. The Court emphasised the importance of the Article 10 freedom in *Sunday Times v United Kingdom (No.2)* [1992] 14 EHRR 229 at paragraph 50. Article 10 applied equally to material capable of causing offence, shock or disturbance as to inoffensive material. The role of the press is to impart information and ideas on matters of public interest and, just as important, the public has a right to receive them. The Article 10 freedom should only be curtailed when "necessary" which implies the existence of a "pressing social need". The Court will, in a review of the exercise by the state of a power to curtail publication, consider the case as a whole and determine whether the curtailment was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

28. The House of Lords in *In re: British Broadcasting Corporation* [2010] 1 AC 145 discharged an anonymity order preventing the media from identifying a defendant who was, as a result of their Lordships' decision, likely to face a re-trial for murder. Lord Hope at paragraph 25 emphasised the freedom of the press to exercise its own judgement in the presentation of journalistic material. Art 10 protected not only the substance of ideas and information expressed but also the form in which they were conveyed. To similar effect was the observation in *Campbell v MGN Ltd* [2004] 2 AC

457, at paragraph 59, that judges are not newspaper editors. (see also *In re: Guardian News and Media* [2010] 2 WLR 325 (SC) at paragraph 63).

29. There may, however, be exceptional circumstances in which interference with the Article 10 freedom may be justified by a competing obligation upon the state to an individual involved in the proceedings. In *Osman v United Kingdom* [1998] 29 EHRR 245 the ECtHR explained the nature of circumstances in which the state may be obliged to take appropriate steps to safeguard the lives of those within its jurisdiction, requiring the state to "take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual". The threshold for the positive obligation was described by the court at paragraph 116 as follows:

> "In the opinion of the court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

30. A consideration of the extent of the duty in a very different context, the protection of witnesses, arose in *In re Officer L* [2007] 1 WLR 2135 (HL). Members of the former Royal Ulster Constabulary were summoned to appear at the Hammill Inquiry to give evidence as to the circumstances of the death at the hands of Protestant extremists in the streets of Portadown, Northern Ireland, of Mr Robert Hammill. The Inquiry was to address, among other things, the widely held suspicion that the RUC may have been complicit in the killing since, it was alleged, at the time of the affray a police Land Rover was close by but its occupants had done nothing to intervene. The officers sought from the Inquiry chairman a ruling that they should be permitted to give their evidence anonymously and from behind screens. Lord Carswell gave a judgment with which all other members of the House of Lords agreed. The Article 2 test whether the risk was real and immediate was, he said, objective. Subjective fear was not relevant to the *Osman* question (paragraph 20). Secondly, the steps which were to be taken were reasonable steps; accordingly, the test was again objective (paragraph 21). By comparison, the common law test of *fairness* to a witness in proceedings did not necessarily require a decision whether there was as a matter of fact a real and immediate risk to life. The fact the witness was in genuine fear of his life may, however, be relevant to the decision whether the interests of justice required anonymity (paragraphs 22 and 29).

31. In *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249 (CA) the issue was whether soldier witnesses should give evidence to the Bloody Sunday Inquiry in Northern Ireland or in London. Lord Phillips MR delivering the judgment of the court said at paragraph 28:

> "28. … [O]f one thing we are clear. The degree of risk described as "real and immediate" in *Osman v United Kingdom* 29 EHRR 245, as used in that case, was a very high degree of risk calling for positive action for the authorities to protect life. It was "a real

> and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party" which was, or ought to have been, known to the authorities: page 35, paragraph 116. Such a degree of risk is well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to evoke in the present context."

At paragraph 31 the court said it would first examine the soldiers' subjective fears and then consider whether they were objectively justified. This identification of a lower threshold of risk when the risk arose in consequence of an action taken by the state was expressly disapproved by the House of Lords in *Re Officer L* at paragraph 20 when Lord Carswell said:

> "20. … [T]here was a suggestion in paragraph 28 of the judgment of the court in *R (A) v Lord Saville of Newdigate* … that a lower degree would engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. … In my opinion the standard is constant not variable with the type of action in contemplation and is not easily reached. Moreover the requirement that the fear has to be real means that it must be objectively well founded. In this respect the approach adopted by Morgan J was capable of causing confusion when he held that the tribunal should have commenced by assessing the subjective nature of the fears entertained by the applicants for anonymity before going on to assess the extent to which those fears were objectively justified. That is a valid approach when considering the common law test but in assessing the existence of a real and immediate risk for the purposes of Article 2 the issue does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk. … That is not to say that the existence of a subjective fear is evidentially irrelevant, for it may be a pointer towards the existence of a real and immediate risk, but in the context of Article 2 it is no more than evidence."

32. In *Secretary of State for the Home Department v AP (No.2)* [2010] 1 WLR 1652 (SC). The Supreme Court considered the application by AP for the continuation of an anonymity order in proceedings in which he successfully challenged the terms of a control order made by the Secretary of State. The Secretary of State supported the application for an anonymity order on the ground that it assisted the efficient management of the control order. The applicant relied on Articles 2, 3 and 8. Lord Rodger, delivering the judgment of the court, said at paragraphs 12 -14:

> "12. But the court has been more influenced by the submissions of counsel for AP about the particular circumstances in this case. It would be counter-productive to go into the detail of the submissions which might serve to identify the town where AP is required to live.

> 13. In brief, counsel point out that the town where AP has to live is one where there are already considerable community tensions. There is organised racist activity in the town which has achieved not insignificant local support. There have been racist attacks, including physical violence, on members of the Muslim community in the town. There have also been attempts by racist groups to associate Muslims with terrorism.
>
> 14. Given these particular circumstances the court considers that there is force in AP's submission that, if he were revealed to be someone who was formerly subject to a control order and is now subject to deportation proceedings for alleged matters relating to terrorism, then he would be at real risk not only of racist and other extremist abuse but of physical violence. In other words there is at least a risk that AP's Article 3 convention rights would be infringed."

At paragraph 17 Lord Rodger referred to the absence of any submissions from the media in which some special feature of public interest might be identified. He concluded at paragraph 18:

> "18. For all these reasons, the court has concluded that, in this particular case, the public interest, in publishing a full report of the proceedings and judgment which identifies AP, has to give way to the need to protect AP from the risk of violence. Similarly in this particular case, that public interest would not justify curtailing AP's right to respect for his private and family life. The anonymity order should accordingly be maintained in the court's judgment, and any report of that judgment, should not reveal AP's identify. He should continue to be referred to as "AP"."

33. The Supreme Court again considered the application of Art 8 in *In re: Guardian News and Media Ltd and Others* [2010] UK SC 1 (SC). The Treasury had made directions against M under the Terrorism (United Nations Measures) Order 2006. He sought the continuation of an order giving him anonymity in subsequent proceedings to challenge the order. He argued that disclosure would bring to the attention of the community in which he lived, to the detriment of his private and family life, the fact that the Treasury considered on grounds it believed were reasonable that M had given support to terrorism. Lord Rodger, delivering the judgment of the court, held that the court was required to examine both the Article 10 right of the press to publish and the Article 8 right of M to respect for his private and family life. He concluded at paragraph 73 – 76:

> "73. 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 a important public matter involving this particular individual, for fear of the incidental effect that it would have on M's private and family life.

74. So far as the potential effect on M's private and family life is concerned, the evidence is very general and, for that reason, not particularly compelling. The apparent lack of reaction to the naming of Mr al-Ghabri [another party] is relevant in this respect since it suggests that the impact of identifying the individual on relationships with the local community is not likely to be as dramatic as the judges who made the orders appeared to have anticipated. The fact that, through his solicitors, M has himself gone out of his way to put into the public domain what he says are the effects of the freezing order on his family life, is also significant.

75. On the other hand, publication of M's identity would make a material contribution to a debate of general interest.

Conclusion:

76. In these circumstances, when carrying out the ultimate test of balancing all the factors relating to both M's Article 8 right and the Article 10 rights of the Press, we have come to the conclusion that there is indeed a powerful general, public interest in identifying M in any report of these important proceedings which justifies curtailment, to that extent, of his, and his family's Article 8 convention rights to respect for their private and family life."

The media interveners' submissions

34. The media interveners wish to report a matter of public interest namely the challenge by a prisoner guilty of the murder of three children to the Parole Board's decision that he should remain in a closed prison environment. It is the very notoriety of the killings and the killer which in their submission emphasises, if not creates, the public interest. The evidence tendered by the claimant does not establish a cogent case for anonymity.

35. It is conceded that where there is proved to be a real and immediate risk of death or serious injury from the publication of a party's name or other details the court will grant an anonymity order, as was the case in *Venables and Thompson v NGN Ltd & Others* [2001] Fam 430, *Maxine Carr* [2005] EWHC 971, *Jon Venables v NGN Ltd & Others* [30 July 2010 Bean J] and *SSHD v AP [No.2]* [2010] 1 WLR 1652. These occasions have usually arisen when it is necessary to protect the identity of the offender following release from custody. It is, adopting the test confirmed by the House of Lords in *In Re: Officer L*, appropriate to ask whether the reporting of the

current proceedings without reporting restrictions creates or materially increases a risk to the claimant's life or of serious injury or ill treatment.

36. It is submitted that since the claimant is and will remain for the time being in closed conditions the risk to the claimant is minimal. In any event there is already publicly available a great deal more information about the claimant and the circumstances of his crimes and sentence than is revealed in the current proceedings. There is no current prohibition against reporting of the claimant's name and his crimes. The matter of public interest at stake is his attempt to secure his release from custody. It is conceded that the claimant is a man who is liable to suffer harassment and abuse in custody and elsewhere in consequence of his criminal profile. The publication of his name in association with the present proceedings will do nothing or nothing significant to increase that risk.

37. It is acknowledged that the claimant enjoys the right to progress through the rehabilitation system to open conditions and eventual release should the Parole Board so recommend and the Secretary of State so order. The media interveners recognise that it may well be that at that stage special measures will be required to facilitate the necessary transfers including, perhaps, a change of name and its protection from publication. That possibility does not, however, arise in the current proceedings and will not arise for an appreciable period of time.

The Secretary of State's submissions

38. The Secretary of State regrets that consent for an anonymity order was given on his behalf at the hearing of the claim for judicial review. Upon reviewing the facts it was clear that the order could not be supported to the extent that it prohibited publication of the claimant's name, details of his offences and his current location by reference to the contents of Simon J's judgment. Publication will not add materially to the risk that the claimant's life and physical well being. Such risk as does exist does not constitute "a real and immediate" risk to the claimant's life and safety (Articles 2 and 3). The claimant's progress towards eventual release will not be impeded by publication (Article 5) and the balance between the interest of the press in reporting the proceedings (Article 10) and the claimant's right to respect for his private life (Article 8) lies in favour of the freedom to publish.

The claimant's submissions

39. The claimant submits it is demonstrated that press reports trigger attacks or threats of attacks upon him. The present danger of publication to the claimant is established by the assessment of Mr Mapstone. The claimant is in a VPU not because he wishes to be there but because there would be an enhanced risk to his safety among a category C population if he was not. Mr Mapstone assesses that even in a VPU the risk remains 'serious'. The present Acting Governor acknowledges that publicity will increase the risk to the claimant. Mr Fitzgerald QC argues that the Court, for present purposes, should assume that the claimant is placed within the normal prison population. The Court should not be dissuaded from acting as it had on three previous occasions, on two of which the Secretary of State had consented to anonymity orders.

40. Mr Fitzgerald points out that Parole Board proceedings are themselves held in private as an exception to the 'open justice' principle. In consequence statements were made

about third parties (including FH and SF) which they had no opportunity to contest. The public interest in reporting a challenge to proceedings which were themselves private should be assessed accordingly.

41. The claimant was required to demonstrate only that publication of his name and the details of his crimes would materially increase the risk of death or serious harm. There could be no doubt that the risk would be increased by publication. It was not established that the enhanced risk could be reduced to an acceptable level by means of protective measures within the prison system. The Court is required to take steps itself if the risk could not otherwise be reduced.

42. The claimant's Article 8 rights included the right to respect for his "physical and psychological integrity" (*Maxine Carr* at paragraphs 3 and 4). In the case of this claimant maintenance of a stable and safe prison environment is integral to his progress towards his ultimate rehabilitation.

43. Article 5 is engaged because the state has determined that custody is appropriate only if the claimant presents a danger to the public. If the claimant is, in consequence of the risk presented by disclosure of his details, to remain in the segregated conditions of a VPU he is, in those conditions, unable to progress towards release. The claimant has a right not to be detained arbitrarily. A failure by the Secretary of State to make available to the claimant facilities available to other prisoners to make progress towards rehabilitation could constitute a breach of Article 5 (*James v United Kingdom* [2013] 56 EHRR 12). Furthermore, if the response of the state to a prisoner's claim for judicial review (by permitting disclosure) places the claimant at risk of harm, there is a real danger of a chilling effect upon the prisoner's right of access to the Court to challenge the lawfulness of his detention under Article 5(4).

44. The claimant argues that discharge of the order in protection of the media interveners' Article 10 right would be a disproportionate interference with the claimant's competing rights under Articles 2, 3, 8 and 5.

Discussion

45. The claimant has been in custody since 1973 for offences which attracted a minimum term of 20 years. However, he will not be released unless and until the Parole Board determines that it is safe to release him. The state has provided a prison regime which enables a prisoner serving an indeterminate sentence, following completion of the minimum term, to demonstrate that any risk to the public of which his crime is evidence has so receded that it is safe to release him. A prisoner serving a sentence of imprisonment for life will, if released, be on licence for life and will be subject to any conditions which the Secretary of State considers appropriate to ensure that the prisoner does not become an unacceptable risk to the public. There will always be those whose view is that a prisoner convicted of murder, particularly the murder of children, should never be released. If, however, the rule of law is to mean anything the law must apply to all prisoners equally. A media campaign calculated to undermine the lawful progress of a prisoner towards rehabilitation and eventual release (upon the recommendation of the Parole Board and by the order of the Secretary of State) is as much capable of undermining the rule of law as the secret justice which media organisations rightly view with suspicion. Freedom to report and to express opinion includes editorial freedom to choose the terms of report and

opinion. It is our view, however, that in assessing the risk of harm to the claimant which may follow publication, this Court is entitled to have regard to the terms in which those reports and opinions are likely to be expressed. We have read a representative sample of media reports from 1995 onwards. We shall assume that some media reporting at least will be unremittingly hostile to the claimant.

46. Rule 24(4) of the Parole Board Rules 2011 (2011 No. 2947) provides that a Parole Board hearing shall be held in private. The work of the Parole Board will frequently involve consideration of evidence which is sensitive and personal to the prisoner and to those by whom he is supervised and assessed. It will examine the evidence of the prisoner himself. It will also consider expert evaluation of his suitability for progression through the prison system and proposals for his movement within the prison establishment and, ultimately, arrangements for his release. Parliament has resolved that the public interest is better served by holding the proceedings in private. That has not prevented media interest in Parole Board hearings resulting in hostile reporting of the prisoner and his offences. A challenge by way of judicial review to a decision of the Parole Board is usually made on the ground either that the Board gave insufficient reasons for its decision or that the decision was perverse. Although the Court will be examining the evidence on which the Board made its decision and its reasons, the proceedings themselves are held in public. In the majority of cases the public nature of the proceedings will mean that they are susceptible to public reporting of the judicial review hearing. It is our view that although the challenge is to the determination of a review held in private the default position is that the proceedings in the Administrative Court will be reported. This is the case for public challenge to many and various administrative and quasi-judicial decisions made in private. In some cases, however, the prisoner may have grounds for asserting either at common law that the interests of justice cannot be served unless the Court protects his identity, or that public reporting will interfere disproportionately with his Convention rights. If the prisoner makes an application that he should be permitted to remain anonymous and/or that the judgment of the court should omit reference to material which would harm those rights, the onus is upon him to establish the necessity for such an order.

47. A consideration of the merits of any application for anonymity will be fact sensitive. A balance will be struck between the competing interests to be served after an analysis of each of them. There is, however, a weighty presumption that public proceedings will be publicly reported. The embarrassment, anxiety or distress generated by the prospect of exposure to public scrutiny of private matters will rarely be a sufficient reason for displacing the need for open justice.

48. The claimant is serving a sentence of life imprisonment for offences of grave seriousness. The public has a legitimate interest in being informed of his challenge to the Parole Board's decision that he should not be moved to open conditions. We accept the submission made on behalf of the media interveners that it is the exceptional nature of the claimant's crimes and his identity that generates and justifies the public interest in his case. It was argued on behalf of the Secretary of State that the public's legitimate interest is enhanced by the allocation of public funds to enable the claimant to make that challenge. We consider that the use of public funds is of marginal, if any, significance to the public interest under consideration. Provision is separately made for assessment of the merits for public funding purposes. The

underlying, dominant public interest in the reporting of the current proceedings would be the same whether they were publicly or privately funded, or funded by charitable contributions. Put another way, the fact the proceedings are publicly rather than privately funded does not buy access to information which must remain private in the interests of the administration of justice or in the necessary protection of the litigant's Convention rights.

49. The case for discharge of paragraphs 1 and 2 of the order has been made persuasively and responsibly by the media interveners. It is recognised that the public interest resides not only in the right of the public to be informed about the current proceedings but also in sustaining the rule of law. It is not in the public interest that the claimant's lawful progression through the prison system towards transfer to open conditions and eventual release, if so ordered, should be thwarted by unlawful means. Mr Vassall-Adams acknowledged on behalf of the media interveners that there may well come a time when the claimant's identity and whereabouts will need to be protected from public knowledge in order to ensure his safety and to facilitate his re-entry to society. The case advanced to the Court is that in *current* circumstances a cogent case for anonymity has not been presented.

50. It is common ground that the most influential of the claimant's Convention rights are those which arise under Articles 2 and 3, and that the principle on which an evaluation of their potency is to be made was explained by the House of Lords in *In re: Officer L*. The state will be required to act (the positive obligation) when there is a "real and immediate" risk, objectively verified, of death or serious injury. In the present context the issue is whether a risk to the claimant's life or serious injury will be created or materially increased by publication of his name as a party to and a witness in the judicial review proceedings. Both the Secretary of State and the Court are for present purposes manifestations of the state. Both have obligations towards the claimant which derive from the claimant's Convention rights. The means by which those obligations are met, however, are very different. The Secretary of State is responsible for managing the risk, if any, to the life and well being of the claimant in custody, open or closed, and, if it should occur, on his release. He will need to assess the requirement for additional steps to be taken should disclosure of the claimant's details take place. The Court's obligation is to assess the impact of disclosure upon the ability of the Secretary of State effectively to manage any risk to claimant's life and well being. It is, in our view, material to the question whether there is or would be a real and immediate risk to the safety of the claimant occasioned by disclosure that means are available to the Secretary of State to protect the claimant from the unwelcome consequences of disclosure. The media interveners are right, in our view, to concentrate their present submissions upon the protection available to the claimant in closed conditions and, if necessary, in a VPU environment, since those are the conditions in which the claimant will be held in the near future whether or not disclosure takes place. If the Secretary of State has the means at his disposal, by taking reasonable steps, to protect the claimant from the risks inherent in disclosure, that is a matter which the Court must consider when assessing its own obligation to take "necessary" steps.

51. We have given careful and anxious consideration to the evidence tendered to the Court by all parties to these applications. In our judgment, there is at present no real and immediate risk to the claimant's life and safety because he is serving his sentence

in conditions in which his safety can be closely monitored. Should disclosure of his details take place in a report of the judicial review proceedings, extra vigilance will be required because it is known that in the past such disclosures have caused agitation and, at least, threats of violence to the claimant. However, we do not find that disclosure would create a real and immediate risk to the life and health of the claimant because we are satisfied that in a VPU the risk of harm can and would be effectively managed. We do not accept Mr Fitzgerald's submission that we are bound to consider the degree of risk inherent in disclosure on the assumption that the claimant is and will remain within the general population of a category C prison. Experience has shown that interest in the claimant waxes and wanes depending upon the prominence give to his offences and the profile of the prison population with whom he is serving his sentence. Our decision by no means consigns the claimant to a VPU for the rest of his sentence.

52. In reaching this conclusion we have taken into account the fact that for several years there has been available to any interested person the means to discover the identity and criminal background of the claimant. We do not, however, underestimate the power of fresh media reporting to generate renewed hostility towards the claimant. Although relevant, we have not regarded as conclusive either (i) the absence of a prohibition against reporting the claimant's name and circumstances outside the context of the judicial review proceedings, or (ii) the means available to any interested person to discover those details by utilising the information contained in the judgments of Silber and Simon JJ. The fact that serious attacks have not been made on the claimant in recent years despite the existence of such means of discovery does not, on the facts of the present case, inform the court what may be the effect of fresh media reporting of the claimant and his crimes. We find that hostility is likely to be renewed following reports of the judicial review proceedings but that in the circumstances no real and immediate risk to the life and well being of the claimant will result.

53. It is acknowledged on behalf of the claimant that if he fails to persuade the Court that the anonymity order should continue on grounds founded upon Articles 2 and 3, he is unlikely to persuade the Court that his Article 5 and Article 8 rights will bring about a contrary result. As to Article 8, we do not accept that the claimant's psychological health is significantly at risk. We have read his witness statement in which he demonstrates a realistic and pragmatic approach to issues of his own safety. We have been more concerned about the longer term chilling effect of disclosure upon the exercise by the claimant of his right of access to a court for a resolution of the lawfulness of his detention in closed or open conditions. As to the merits of such a challenge, we have concluded that there is at present no evidence of denial to the claimant by the Secretary of State of the means to engage in offence related work which will enhance his progression within the prison system. It is our judgment that any possible future challenge to a decision of the Parole Board is some way ahead. Furthermore, we have no evidence from the claimant that he would be deterred by the risk of resulting publicity from pursuing his legitimate interests in the form of legal proceedings.

54. We are left in no doubt, after an examination of the respective Convention rights under consideration, that reports of the judicial review proceedings should be permitted. There is a strong public interest in favour of such reports. It is not

demonstrated that the public interest must yield to the claimant's Convention rights. Paragraphs 1 and 2 of Simon J's order will be discharged.

Paragraph (3) of the order

55. Paragraph (3) of Simon J's order reads:

> "(3) No details of the identity or location of the person referred to as "FH" in these proceedings and in the final judgment be published in any form without further order."

No application has been made by any of the parties for the discharge of paragraph (3) of the order but the media interveners have drawn to the Court's attention the fact that (i) the identity of the individual referred to as FH in Simon's J's judgment is already in the public domain, (ii) the order, unlike paragraph (2), does not confine the prohibition against publication to reports of the judicial review proceedings, and (iii) the name of another person called SF was referred to in the course of argument but no order was made to prohibit publication of that individual's identity.

56. Neither the media interveners nor the Secretary of State wish the Court to remove the protection given to FH to which that person is entitled, and are content that SF should be treated in the same way. It is proposed that the present paragraph (3) should be discharged and replaced by the following reporting restriction:

> "1. No details of the identity or current location of the persons referred to as FH and SF in these proceedings may be published in any report of these proceedings.
>
> 2. In paragraph 1 "these proceedings" means the instant judicial review proceedings and the judgment *R (on the application of M) v Parole Board* [2013] EWHC 141 (Admin) and the media's application to discharge the reporting restrictions relating to M and the Court's judgment on this application."

55. We observe that neither FH nor SF was notified of the right to make representations to the Court either on 23 January 2013 or at the hearing of these applications. However, it seems to this Court that the order proposed has the advantage of giving the appropriate protection to both individuals and we shall make an order in the terms proposed. There shall as proposed be a *confidential* schedule to the order in which the correct name and address of FH are identified, but we make an order under CPR 5.4C(4)(b) that the confidential schedule shall be provided only to a party to these applications and any legal advisers to media organisations not represented by the media interveners. We agree with the written submissions made on behalf of the claimant that there is no evidence that the identity of SF is already in the public domain. It follows that the prospect of inadvertent disclosure of SF's identity is extremely remote. We shall not, therefore, order that SF's details are added to the confidential schedule.

ADDENDUM

Procedural deficiencies

57. In a supplementary skeleton argument from the media interveners dated 22 March 2013 it is proposed that this Court should issue guidance as to the procedure appropriate to applications for anonymity orders in the Administrative Court.

58. Section 12 Human Rights Act 1998 provides:

> "Freedom of expression
>
> 12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to
>
> (a) the extent to which-
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any privacy code.
>
> (5) In this section-
>
> "court" includes a tribunal; and
>
> "relief" includes any remedy or other order (other than in criminal proceedings".

59. The media interveners argue that the wide terms of section 12 required the claimant to give notice to media organisations of the order sought in the present case. Section 12 is not, it is submitted, confined in its application to a party to an action but applies to any "respondent" to the application which will be restrained from publication of a report of the proceedings. The media interveners seek to derive support for this proposition from the Practice Note (Official Solicitor: Deputy Director of Legal Services: CAFCASS Applications for Reporting Restrictions Orders [2005] 2 FLR 111 ("the "Practice Note") and Practice Direction: Applications for Reporting Restriction Orders [2005] 2 FLR 120, handed down by Dame Elizabeth Butler-Sloss on 18 March 2005. The Practice Note and Practice Direction are framed on the basis that section 12 of the 1998 Act applies to proceedings in the Family Division (see para 2, Statutory Provisions, Practice Direction).

60. We have been provided with the witness statement of Mr Michael P Dodd, legal editor to the Press Association ("PA"). Part of the PA's functions is to operate the Injunction Alert Service service which provides subscribers with access to notification of all proposed applications for a reporting restrictions order in proceedings in the Family Division particulars of which have been given to the PA by the applicant for the order. No such service is available for monitoring applications in the Administrative Court.

61. It is submitted that the draft consent order in the present case should not have been presented to the court without providing an opportunity for full argument. As Sir Christopher Staughton remarked in *R v Westminster City Council, ex parte P* [1998] 31 HLR 154, 163 (cited with approval by Lord Woolf in *R v Legal Aid Board, ex parte Kaim Todner* at page 977D and Lord Rodger in *SSHD v AP (No.2)* at 1654G) when both sides are agreed that information should be kept from the public, that is when the Court had to be most vigilant. The problems which arose in the present case could have been avoided, it is submitted, if the claimant's solicitors had followed the Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003 which makes clear the need to provide the court with clear and cogent evidence.

62. This Court has been invited to give guidance in relation to proceedings in the Administrative Court as to the appropriate procedure for ensuring that submissions and evidence are received and directed to the important issues which arise upon such applications. It is submitted that the claimant's failure to follow the appropriate course of giving notice of the application and filing the requisite evidence has caused real prejudice to the media interveners and to the administration of justice. We observe, however, that Mr Dodd says as paragraph 12 of his witness statement dated 12 April 2013, "PA has been aware of this case for some time, but has not been in a position to be able to protest by challenging any order in court because of the prohibitive cost of doing so. We did have a reporter, Mr Aston, in court when the latest order was made, and endeavoured to object at that time". We note that Mr Aston made his objection known to Simon J on the day of the hearing and was given time to prepare his submission. Of practical relevance to the procedural aspects of the current applications, however, is Mr Dodd's evidence that, having made enquiries of subscribers to the Injunction Alert Service, he is able to say that an extension to embrace applications for reporting restrictions to the Administrative Court would have the support of several of the major news organisations who, by that means, could

form their own judgement whether a challenge any particular application should be made with the benefit of legal advice. We have the following observations to make.

The procedure adopted in M's previous judicial review challenges

63. The Claimant has in the past brought judicial review proceedings in which he has sought to challenge the decision of the Secretary of State for Justice refusing to transfer him to open conditions. In the each case he was granted anonymity: by Silber J in CO/1398/09 and by Collins J in CO/1398/09. In neither case was there an objection to such an order. In his judgment given in the former case, *R. (on the application of M) v. Secretary of State for Justice* [2009] EWHC 768 (Admin), Silber J's description of the claimant's offences was abbreviated (as it was in the present claim) so as to preserve his anonymity. In claim CO/1398/09 the Claimant discontinued the claim before it was considered at a hearing.

The procedure adopted in the present case

64. As already stated no application for anonymity was made in the application for permission and no order was made at that stage. On 21 December 2012 the claimant's solicitors wrote to a representative of the Treasury Solicitor (acting for the Parole Board), seeking agreement for an order for anonymity. On 21 January 2013 another representative of the Treasury Solicitor (acting for the Secretary of State for Justice) telephoned Mr Garg asking whether there had been an application for anonymity and indicating that the Secretary of State would support such an application. It was agreed that Mr Garg would draft a consent order which could be signed and placed before the court at the start of the hearing on 23 January 2013. The consent order was produced to the court (paragraph 3 above).

65. At the start of the hearing before Simon J on 23 January there was a discussion as to whether an order for anonymity ought to be made, and he adjourned the matter until 2.00pm so that it could be more fully argued. At 2.00 pm the Court heard from the parties and also from Mr Aston (representing the Press Association). Ms Whitaker and Ms Steyn confirmed that the parties (including the Secretary of State) agreed to anonymity; Mr Aston opposed such an order on the basis of a short skeleton argument. During the course of the argument it became apparent that in order to preserve the claimant's anonymity it would also be necessary to confine any references to the offences for which he had been sentenced.

66. Following argument in which Ms Whitaker referred to the Supreme Court decision of *Home Secretary v. AP (No.2)* [2010] 1 WLR 1652 on Article 3, Simon J was satisfied on the material then available that an order for anonymity should be made, at least in the short term, in order to protect the Claimant's rights under articles 2 and 3; an order was made in the terms set out at paragraph 4 above.

67. In the event, Mr Vassall-Adams's clients issued their application on 28 January; the Secretary of State has applied to vary the Order, on the grounds that his consent was limited to paragraph 1 of the order and that neither he nor his senior officials in fact agreed to anonymity in this case.

The procedure which should have been adopted

68. It is now common ground that the course adopted by the claimant's legal advisors was wrong; and this has been frankly accepted by them. Any order for anonymity should have been applied for at the permission stage and any subsequent application should have been in the form of a written application issued in good time before the hearing on 23 January. In either case the application should have been supported by evidence on which the claimant proposed to rely.

Guidance

69. Although we recognise the need for clarity and the application of principle when considering an order for reporting restrictions, we decline the invitation to give general guidance for the provision of advance notice of such applications to media organisations. We do, however, intend the present judgment to provide an alert to judges sitting in the Administrative Court to the problems which can arise if applications are made at the last moment and 'by consent'. The variety of claims which are issued in the Administrative Court makes it inappropriate for practice guidance to be given in a single decision of this Court upon one aspect of its jurisdiction without a much wider opportunity for consultation between the Administrative Court Users Group and the senior judiciary. It seems to this Court, however, that attention is required to the issue as to what, if any, notice should be given to media organisations of an application either at the permission stage or in advance of the substantive hearing for judicial review for the purpose of enabling any interested person or organisation to make representations if so advised.