Neutral Citation Number: [2019] EWHC 494

Case No: FD18F00008

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2019

Before :

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

- -

Between :

(1) Jon Venables	**Claimants**
(2) Robert Thompson	
- and –	
(1) News Group Papers Limited	**Defendants**
(2) Associated Newspapers Limited MGN Limited	
- and -	
(1) Ralph Stephen Bulger	
(2) James Patrick Bulger	**Applicants**
The second Claimant and the Defendants did not appear	

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Sir James Eadie QC and Mr Simon Pritchard. (instructed by Treasury Solicitor) for the **Attorney General**
Edward Fitzgerald QC and Mr. Jonathan Price (instructed by Bhatt- Murphy**) for the claimants**
Mr. Robin Makin (of E. Makin & Co) appeared for the Applicants

Hearing date: 26th February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane President of the Family Division :

1. 26 years ago, on 12 February 1993, two-year-old James Bulger was abducted, brutally tortured and then murdered by two 10-year-old boys, Jon Venables and Robert Thompson. It was a crime that, at the time, profoundly shocked the nation and now, all these years later, will still be remembered in detail by many and also, I suspect, will be well known to the generation of those who were not even born at the time. The family of young James Bulger were and are deserving of the greatest sympathy as the indirect victims of this most horrific crime.

2. On 24 November 1993 Jon Venables ['JV'] and Robert Thompson ['RT'] were convicted of the murder of James Bulger. They were sentenced to be detained during Her Majesty's pleasure. Injunctions were granted at that time to restrain publicity as to their circumstances during the remainder of their childhood. In August 2000 both JV and RT reached the age of 18 years. They applied to extend the anonymity injunction in order to provide protection on into their adult life. That application, which was contested by a number of media agencies, received extensive consideration by the then President of the Family Division, Dame Elizabeth Butler-Sloss. On 8 January 2001, Dame Elizabeth, at the conclusion of a comprehensive judgment [*Venables v News Group Newspapers Ltd* [2001] Fam 430], granted the application and made a wide-ranging order, unlimited in time, prohibiting the publication of (in summary):

    a) any depiction, image, photograph, film or voice recording of JV or RT or any description of their physical appearance, voices or accents;

    b) (in the event that they assumed a new identity) any information likely to lead to the identification of the individuals formally known as JV or RT;

    c) any information likely to lead to the identification of the past, present or future whereabouts of JV or RT.

3. The judgment of Dame Elizabeth Butler-Sloss is clear (at paragraph 76) that, by granting the injunction, the court was traversing previously uncharted jurisdictional waters:

    > "I am, of course, well aware that, until now, the courts have not granted injunctions in the circumstances which arise in this case. It is equally true that the claimants are uniquely notorious. On the basis of the evidence presented to me, their case is exceptional."

    The President held that the circumstances fell within the developing domestic law of confidence. She concluded that there was "a very strong possibility, if not, indeed, a probability" that on release JV and RT would be pursued by those intent on revenge sufficient to engage their rights under European Convention on Human Rights, Articles 2 and 3 (to which I will turn in due course) and that there was therefore a strong and pressing social need for their confidentiality to be protected. It was further held that the requirement for proportionality was plainly met as the aim of the injunction was "to protect the claimants from serious and possibly irreparable harm".

4. It is of note that, despite the exceptional nature of the jurisdiction exercised in granting this wide-ranging injunction, there was no appeal against the 2001 order.

5. The present application relates only to JV and in the chronology that now follows I will not, therefore, make any further reference to RT.

6. JV was released by the Parole Board on licence from his original sentence on 24 February 2010. It is to be noted that the effect of the 1993 sentence of detention is equivalent to a prison sentence for life in that, although he may be at liberty on licence from time to time, JV may be recalled to custody at any stage during the remainder of his life.

7. On 24 February 2010 JV was, indeed, recalled to custody and charged as a result of the discovery of child pornography on his computer. The criminal process, which culminated in proceedings before Bean J (as he then was) at the Central Criminal Court, were originally conducted using the identity that had by then been adopted by JV. The rationale which justified doing so was to avoid the potential for prejudice were his true identity to become known prior to any possible jury trial. In addition, the judge made an order on 21 May 2010 under the Contempt of Court Act 1981 ['CCA 1981'], temporarily prohibiting the reporting of the existence of the prosecution. In the event, on 23 July 2010, following an initial process conducted in open court during which information was given relating to JV's current identity and whereabouts at the time of the commission of the offences, JV pleaded guilty to three offences concerning child pornography. Thereafter, understandably, Bean J concluded that it was in the public interest for the original identity of the defendant as 'JV' to be known. The CCA 1981 order was discharged, no further reference was made in court to JVs new identity or his whereabouts, but free reporting was permitted of the fact that the defendant in the case was the individual formally known as JV.

8. At the conclusion of the criminal process, in civil proceedings, Bean J was invited by a number of media agencies to review the 2001 injunction made by Dame Elizabeth Butler-Sloss so as to permit publication of JV's new identity. In the course of his judgment [neutral citation [2010] EWHC B18 (QB)] Bean J, after reviewing a range of evidence including that relating to social media, observed:

> "One would have thought that, with the passage of 17 years since the murder and 9 years since Lady Butler-Sloss' judgment, the threat from members of the public would have diminished. But there is clear evidence that it has not. In his witness statement for the injunction application the claimant's solicitor, …, writes:
>
> > "The level of animosity felt towards, and the risks faced by JV can be seen in the public attitude towards Mr. [XX] who was mistaken for JV. Mr. XX was first mistaken for JV 5 years ago and he and his family have moved on a number of occasions, having been 'forced to flee for our lives'. On a night out in a pub he was warned by a friend that he must leave immediately as he was going to be stabbed in the toilets. Police concern for his safety led to the installation of a panic button in his home. Since the claimants returned to prison more than 2000 people have joined a Facebook group claiming that Mr. XX is JV. The group's members have vowed to track him down and wreak revenge for "the murder of James Bolger". The Daily Mail agreed not to report the latest whereabouts of Mr. XX, to protect his safety."

9. In the course of his review of the relevant case law, Bean J referred particularly to *Secretary of State for the Home Department v AP (No 2)* [2010] 1 WLR 1652, which engaged *AP's* rights under ECHR, Art 3 (in contrast to most other cases relating to reporting restrictions which are limited to engagement with a claimant's Art 8 rights) and in which the Supreme Court had upheld a reporting restriction order. On the evidence before him Bean J found "that the evidence of physical risk to AP was considerably less strong than the evidence of risk to Mr. JV in the present case. Nevertheless the Supreme Court granted anonymity." I shall turn in more detail to the case of *AP* in due course.

10. Bean J concluded his judgment as follows:

> "23. There is understandable and legitimate public interest in the fact that one of James Bulger's killers has now been convicted of child pornography offences. That fact and the details of those offences can now be (and have been since last Friday) freely reported. But there is no legitimate public interest in knowing his appearance, his location in custody; or the exact location at which he was arrested and to which he might return in the event of being released; or, if there is, it is of marginal significance when set against the compelling evidence of a clear and present danger to his physical safety and indeed his life if these facts are made public.
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> 24. As for his new name, my original view was that if he were to be tried and convicted by a jury in that name, it would then inevitably become a matter of public record, and the claimant would have brought that on himself. But now that he has been convicted on his own pleas of guilty entered in the name of JV, there is no reason why his new name should be made public. The effect of doing so would simply be to assist those who seek to track him down. The fact of public interest, as I have already said, is that the man formally known as JV has been convicted. His new name is entirely immaterial.
>
> 25. I do not think it makes any difference whether the case is put on the basis of JV's right to life under Article 2 of the ECHR or on the basis of domestic law. Even if the Human Rights Act 1998 had never been enacted I would reach the same conclusion as a matter of domestic law. It is a fundamental duty of the State to ensure that suspects, defendants and prisoners are protected from violence and not subjected to retribution or punishment except in accordance with the sentence of a court. That principle applies just as much to unpopular defendants as to anyone else."

11. For those reasons, Bean J granted JVs application to amend the 2001 injunction by prohibiting the publication of information about his new name, appearance, location in custody or location prior to being recalled to custody (other than to state that it was in the county of Cheshire). In all other respects the judge endorsed the continuation of the 2001 injunction. There was no appeal against Bean J's decision.

12. In November 2010 the Home Office published a review conducted by Sir David Omand into the fact that JV had been convicted of these serious offences whilst on licence.

13. On 20 June 2013 JV was released on licence by order of the Parole Board but he was subsequently recalled to custody on 22 November 2017 following the discovery that,

once again, he had accumulated an extensive amount of child pornography on a computer. In due course, JV pleaded guilty on the first available opportunity to 3 counts of making indecent photographs of children contrary to Protection of Children Act 1978, s 1 and one offence of possession of a paedophile manual contrary to Serious Crime Act 2015, s 69(1).

14. The child pornography found on JV's computer amounted to some 1170 images (including moving images) of which 392 were in category A, which is the most serious class of image. I have read the sentencing remarks of the trial judge, Edis J, at the Central Criminal Court on 7 February 2018 from which, for the purposes of this present application, I note that, given JVs history, a number of the images and films where of serious crimes inflicted on male toddlers.

15. In the course of his sentencing remarks Edis J observed:

> "The commission of these offences and the possession of the manual suggest that you have a compulsive interest in serious sexual crime against small children. The possession of the manual also suggests that you were at least contemplating the possibility of moving on to what are called "contact offences", that is actual sexual crime against children. This is against a background where you know the very substantial penalties you face if you are caught. The incentive for you to live a quiet [and] law-abiding life out of the public eye does not just come from penalties imposed by the criminal justice system, which is why there is an injunction in place to protect your life. You took a very great risk when you committed these offences and this suggests to me a compulsive desire which you could not control. You did this on a day when you were undergoing assessment in the [context] of your life licence. This shows how manipulative and dishonest you are.
>
> There is no evidence that you have ever actually embarked on the commission of any contact offence. There is no evidence of grooming or, in this set of material, of you having been in contact with other men with a view to gaining access to children."

16. Edis J, understandably, considered that any risk that JV posed to the public would be fully addressed by the fact that he continued to be subject to a life licence, he nevertheless passed an immediate custodial sentence totalling 40 months for the offences before the court. JV currently remains in custody serving that 40-month sentence, at the conclusion of which any question of his release once again on licence will be a matter for the Parole Board.

The present application

17. The application that is now before the court was issued on 26 January 2018 by Mr. Ralph Bulger and Mr. James Bulger, who are respectively the father and paternal uncle of the late James Bulger. The substantive application is for the 2001 injunction (as subsequently amended) to "be varied/discharged in so far as to permit the reporting of the charges and conviction of the person formally known as Jon Venables". Edis J directed that the application should be listed before the President of the Family Division. Subsequently, by order dated 1 May 2018, the then President of the Family Division, Sir James Munby, directed the Applicants to file and serve a draft order setting out the precise terms of the variation that was being sought.

18. In compliance with the order of 1 May, Mr. Robin Makin, the solicitor advocate representing the Applicants, has filed a draft version of the order which clearly identifies the variations which his clients seek. In summary they ask for the removal of the following categories of information that are currently subject to the injunction:

    a) any names used by JV prior to his recall to custody in 2017;

    b) information relating to the whereabouts and activities of JV up to and including his recall to custody in 2017;

    c) information relating to any release from custody and any subsequent recall to custody following JVs conviction in 2018;

    d) information as to the location of where JV may, from time to time, be held in custody if the Secretary of State considers that it is in the public interest to disclose that information.

19. In addition to the substantive application to vary the injunction, the Applicants seek an order for their costs of the application against the Ministry of Justice. I will deal with that application in a separate oral judgment.

20. Although RT and the original media agency respondents remain parties to the injunction proceedings, they have not taken any active part in this application. The parties appearing before the court have been the Applicants and JV, together with the Attorney General who has intervened as Guardian of the public interest.

The Applicants' Case

21. The Applicants' pleaded case was based upon the following key elements:

    a) the public interest in there being a full discussion of JVs criminal activity so that lessons may be learned with respect to the rehabilitation of criminals;

    b) the safety of the public who (it is said) have a right to know that an individual such as JV, who presents a risk to safety, has been living in a particular locality;

    c) the rights of the Applicants and other family members as victims to be consulted about, and make submissions with respect to, decisions made relating to JV's life licence;

    d) the balance that has to be struck between the rights of JV under the ECHR and the rights of the Applicants and others to freedom of expression under ECHR, Art 10.

    In addition to these central points, Mr. Makin submitted that reference to JV's "whereabouts" in the injunction required reconsideration in the light of the Secretary of State's decision in 2010 to announce that JV had been taken back into "custody". Mr. Makin submission is that that reference to "custody" amounted to a disclosure of JV's "whereabouts".

22. In oral submissions Mr. Makin chose to focus his primary case on the assertion that there is material that is readily available to those undertaking an ordinary Internet search which will identify a name used by JV and which purports to display images of JV. Mr. Makin therefore submits that this material is "common knowledge" and that the law should not be protecting the disclosure of material which is commonly known.

23. I should stress at this point that the position adopted by the Ministry of Justice has, throughout, been neither to confirm nor to deny that any suggested identification of a name or image in fact relates to JV. The court documents show that there has been at least one misidentification by members of the public of someone who was, wrongly, thought to be JV. It follows that, in the present proceedings, the AG has neither accepted nor rejected the contention that there is any information on the Internet which does in fact relate to JV.

24. Mr. Makin makes the further submission that, despite JV being named in open court during the 2010 preliminary Crown Court process and despite the publication subsequently of information on the Internet which purports to identify JV, there is no indication that JV has suffered any direct harm as a result.

25. More generally, Mr. Makin submitted that the current injunction is being widely breached, yet the Attorney General has failed to act promptly, or at all, in instituting contempt proceedings to enforce the court's order.

26. In terms of the wider public interest, a statement from the Applicants' Member of Parliament, George Howarth MP, records that Parliament has decided to hold a debate on a petition calling for a public inquiry into the James Bulger murder case. Mr. Makin submits that that debate cannot effectively take place unless the current injunction is relaxed or unless, as he indicated might be the case, an MP or a Peer might be willing to disclose otherwise protected information under the cloak of parliamentary privilege.

27. It is the Applicant's case that the onus is upon JV to establish a risk of harm and, it is submitted, it is not possible for him to do so as there is no evidence that the current level of disclosure has caused him any detriment. In making that submission, Mr. Makin asserts that, whilst the judicial conclusions in 2001 and 2010 may have been justified, they were made years ago and the current situation is now very different with, as he repeatedly claimed, information as to JV's assumed identity and current appearance being "common knowledge".

28. In the context of victim's rights, Mr. Makin submitted that, whilst the Applicants' statutory rights under the Domestic Violence, Crimes and Victims Act 2004 ['DVCVA 2004'] are not inhibited by the injunction, the injunction is used by the authorities to prevent information being given to the Applicants that would enable them to make informed representations with respect to decisions relating to JVs life licence. This, it is submitted, is in breach of the Applicants' ECHR, Article 8 rights and that such interference is not prescribed by law.

29. Finally, with respect to the term "whereabouts", Mr. Makin submitted that this wording was less than clear. It would be better if phrases such as "locality" or "location" were deployed. Further, it would be in the public interest for the Secretary of State to be able to say, from time to time, whether JV was or was not in custody.

30. Mr. Makin concluded his submissions by asking, rhetorically, why JV should be in a better position than any other individual convicted of offences relating to child pornography. Mr. Makin characterised JV as being a person "asking to be put in a privileged position simply because his original conviction was one of child murder".

The Attorney General's Submissions

31. The Attorney General ['AG'] does not have a direct interest in the outcome of these proceedings. He has, however, appeared before this court, represented by Sir James Eadie QC and Mr. Simon Pritchard, to make submissions in support of the contention that it is in the public interest for the injunction order to remain in place and for the application to vary that order to be dismissed. The AG's submissions may be summarised as follows:

a) the principles relating to anonymity orders have been set out in a number of recent House of Lords or Supreme Court decisions, in particular *AP* and *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2015] AC 588, which both relate to rights under Article 2 and/or Article 3;

b) as a public authority, the court is bound to act compatibly with the ECHR rights scheduled in HRA 1998; it is those rights which provide the foundation for the court's jurisdiction to restrain publicity;

c) the court must balance the competing rights so that freedom of expression under Article 10 and any Article 8 rights in favour of publicity on the one side are balanced against rights conferred by Articles 2, 3 and/or 8 on the other;

d) Article 10 is recognised as being an important right within the scheme of the ECHR, and all interferences with such a right need to be justified; the more serious the interference, the greater the required weight of justification;

e) Article 2 and Article 3 rights are at the top of the ECHR hierarchy of rights and freedoms. Such rights are unqualified. Nevertheless, the existence of Article 2 and/or Article 3 rights does not provide a trump card. Such rights must still be balanced against Article 10 and any Article 8 rights which sit on the other side of the scales;

f) in the present case the Applicants, who do not seek to set aside the injunction as a whole, clearly recognise that protection afforded by the injunction is justified;

g) the evidence continues to demonstrate that this case is of a truly exceptional nature in terms of notoriety and risk. The evidence does not justify any alteration in the balance struck by Dame Elizabeth Butler-Sloss and, later, Bean J;

h) 'Victims' are now afforded statutory rights under the DVCVA 2004. Any suggestion that the Applicants' rights as victims have not been met

should be addressed within the statutory scheme or via freestanding judicial review proceedings.

32. On the discrete issue surrounding the word "whereabouts", the AG is, in principle, amenable to there being some variation of the order so as to permit the Secretary of State to publish, from time to time, the fact that JV is, or is not, presently in custody, if the Secretary of State considers that such publication to be justified.

JV's Position

33. JV opposes the Applicants' application and, effectively, seeks to maintain the injunction in its present form. JV is represented by Mr. Edward Fitzgerald QC and Mr. Jonathan Price who submit that the development in the use of social media since the original injunction was made has increased the risk to their client. Examples are given of comments which have been posted online or via Twitter in recent times which make direct threats of lethal violence to JV.

34. On behalf of JV, Mr. Fitzgerald and Mr. Price, who adopted and endorsed the submissions made on behalf of the AG, accepted that there was a burden upon JV to establish a real risk of harm. They argued, however, that that burden had been fully discharged and accepted in the judgments of Dame Elizabeth Butler-Sloss and Bean J in 2001 and 2010, and that the risk of harm was now further established and confirmed in the evidence of Mr. Michael Spurr who is the chief executive of HM Prison and Probation Service (which I will set out in due course).

The Legal Context

35. The legal context within which the issues in this case now fall to be determined was comprehensively described in the 2001 judgment of Dame Elizabeth Butler-Sloss. Her analysis of the law was not the subject of appeal at the time and it has subsequently been accepted in a run of House of Lords and Supreme Court decisions on the subject of confidentiality during the ensuing 18 years. Further, in the present application Mr. Makin does not challenge the approach described by the President in her judgment and now set out in the submissions of the AG. Indeed, the Applicants do not challenge the continuation of the injunction as a whole; their case is, rather, that changes can be made to its terms without unduly compromising the Article 2 or Article 3 rights of JV.

36. It is not therefore necessary for me to set out an extensive recital of the legal landscape in this judgment. I accept that a balance must be struck between the competing rights of the Applicants and the wider public, which are in favour of openness and transparency, against those of JV. If JV's rights under Article 2 and/or Article 3 of the ECHR are at risk of being breached, that factor is not a trump card and it remains necessary for the court to strike a balance as against the Article 10 rights of the Applicants and others.

37. It is necessary to maintain focus upon the terms of the relevant ECHR Articles:

Article 2 Right to life

> 1 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 conviction of a crime for which this penalty is provided by law.
>
> 2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
>
> **Article 3 Prohibition of torture**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> **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 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.
>
> **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.

38. In the course of her 2001 judgment, Dame Elizabeth Butler-Sloss made the following central findings with respect to the legal context. She held, firstly, that the granting of an injunction in these circumstances was in accordance with domestic law and, in

particular, the law of confidence. Secondly, she held that within the law of confidentiality there will, in some cases, be information which may require a special quality of protection and she held that:

> "In the present case the reason for advancing that special quality is that, if the information was published, the publication would be likely to lead to grave and possibly fatal consequences. In my judgment, the court does have the jurisdiction, in exceptional cases, to extend the protection of confidentiality of information, even to impose restrictions on the press, when not to do so would be likely to lead to serious physical injury, or to the death, of the person seeking that confidentiality, and there is no other way to protect the Applicants other than by seeking relief from the court."

39. Dame Elizabeth also held that the court must be satisfied that the proposed relief was necessary in a democratic society to satisfy a strong and pressing need and that the proposed intervention was proportionate to the legitimate aim pursued. In that latter regard, she held that the need was "to protect the claimants from serious and possibly irreparable harm, which would, in my judgment, clearly meet the requirement of proportionality."

40. On the question of whether a real risk of harm was established the President's crucial conclusion was as follows (paragraph 92):

> "The Attorney General and the Official Solicitor both submitted that there is a high risk of serious physical harm and the real possibility that a claimant might be killed if identified. Moreland J and Pill LJ felt it necessary to grant injunctions to protect the children during their detention in secure accommodation. In 1993 Moreland J considered that there was a real risk of revenge attacks upon them from others. Lord Woolf CJ in his statement on the tariff in October 2000 confirmed, from the information presented to him on the tariff, that that remained the situation. I heard evidence, in chambers, which supported the conclusion to which Lord Woolf CJ came, that there are solid grounds for concern that, if their identities were revealed on release, there might well be an attack or attacks on the claimants, and that such an attack or attacks might well be murderous."

41. In the case of *AP* the Supreme Court considered the continuation of an anonymity order made during the course of a hearing relating to a Control Order made pursuant to the Prevention of Terrorism Act 2005. On the evidence the court found that there was a risk that the individual would be subjected to physical violence, thereby infringing his rights under Article 3 of the Convention, were it to be revealed that he was someone who was formally subject to a Control Order and now the subject of deportation proceedings related to terrorism. The Supreme Court therefore held that the anonymity order should continue.

42. In *A v BBC* [2015] AC 588, the Supreme Court considered the lawfulness of an anonymity order that had been made in favour of a foreign national who was due to be deported. The Supreme Court, starting from the general rule in favour of open justice, held that the rights guaranteed under Articles 2 and 3 of the Convention were unqualified and proceedings had to be organized so that the interests of those protected by the two articles were not unjustifiably imperilled. The media's right under Article

10 to receive and impart information was relevant to the principle of open justice, but when that right, being qualified, was in conflict with the unqualified right of another party there could be no derogation from the latter. Care must nevertheless be taken to ensure that the extent of the interference with the media's rights was no greater than was necessary so as to reflect the important role of the media in a democratic society. The court granted the anonymity order in that case.

43. In a first instance decision, *Re A and B* [2016] EWHC 3295 (Ch), Sir Geoffrey Vos, Chancellor of the High Court, crystallised the approach to be taken in a manner which seems to me to be entirely correct (paragraph 35):

> "A risk of a breach of the unqualified rights in Articles 2 and 3 of the ECHR is a risk as to events in the future rather than a present breach of that unqualified right. Accordingly, I do not think that even such a potential breach can automatically trump the Article 10 right to freedom of expression. A broadly similar approach as the Supreme Court adopted in *PJS v News Group Newspapers Limited* [2016] AC 1081 is required. There must be an intense focus on the nature and extent of the risks under Articles 2 and 3, and on the comparative gravity of those risks and of the rights under Article 8 and 10 of the ECHR in the individual case. The justification for interfering with Articles 8 and 10 or for restricting each of those rights must be taken into account, and a proportionality test must be applied."

44. The test in the present case, as formulated by Sir James Eadie, with whom Mr. Makin did not join issue on this point, is whether it is established that there is a real risk of harm of the degree described in Article 2 or Article 3 of the ECHR. I agree.

45. The case of *PJS,* which is referred to in the extract from the Chancellor's judgment in *Re A and B,* is relied upon by Mr Makin in support of his contention that, where information is 'common knowledge', the court should not continue to maintain orders for confidentiality. The issue in *PJS* related to the identity of a celebrity who had been referred to anonymously in a national newspaper story alleging extra-marital sexual activity. The Supreme Court had evidence that the identity of the individual had been publicised in media outside England and Wales and that a significant number of members of the public in England and Wales were said to know of the celebrity's identity. The relevance of public knowledge was considered directly by Lord Neuberger PSC at paragraph 57:

> "57. If PJS's case was simply based on confidentiality (or secrecy), then, while I would not characterise his claim for a permanent injunction as hopeless, it would have substantial difficulties. The publication of the story in newspapers in the United States, Canada, and even in Scotland would not, I think, be sufficient of itself to undermine the claim for a permanent injunction on the ground of privacy. However, the consequential publication of the story on websites, in tweets and other forms of social network, coupled with consequential oral communications, has clearly resulted in many people in England and Wales knowing at least some details of the story, including the identity of PJS, and many others knowing how to get access to the story. There are claims that between 20% and 25% of the population know who PJS is, which, it is fair to say, suggests that at least 75% of the population do not know the identity of PJS, and presumably more than 75% do not know much if anything about the details of the story. However, there comes a

> point where it is simply unrealistic for a court to stop a story being published in a national paper on the ground to confidentiality, and, on the current state of the evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case."

However, Lord Neuberger went on to hold that claims based on respect for privacy and family life do not depend on confidentiality alone. The majority of the court, including Lord Neuberger, allowed PJS's appeal and upheld the maintenance of the confidentiality injunction in that case.

46. A passage specifically relied upon by Mr. Makin appears in the judgment of Lord Toulson JSC at paragraph 86:

> "Confidentiality in a meaningful sense can survive a certain amount of leakage, and every case must be decided on its, but in this case I have reached a clear view that the story's confidentiality has become so porous that the idea of it still remaining secret in a meaningful sense is illusory. Once it has become readily available to anyone who wants to know it, it is lost the essence of confidentiality. The court must live in the world as it is and not as it would like it to be. I would echo Jackson LJ's words that "it is in my view inappropriate (some may use a stronger term) for the court to ban people from saying that which is common knowledge". In my judgment that is good sense and good law."

Lord Toulson's words must, however, be read on the basis that his was the one dissenting judgment and that his conclusion that the appeal should be dismissed was at odds with the other members of the Supreme Court.

47. The decision in *PJS*, in my view, points against the Applicants' case in the present proceedings, rather than supporting it as Mr. Makin argues. Firstly, for the reasons given by the majority, even in a case where the relevant ECHR right arose under Article 8 rights to a private life, the balance fell in favour of confidentiality notwithstanding that the confidential material was in fact known to a substantial number of people. Where, as here, the rights to be protected are of a wholly different order and relate to protection from torture and murder, the relevance of some of the confidential material being known to some members of the public (and even assuming for these purposes that the leaked material was indeed true) must be substantially reduced even from the level found in the very different circumstances of *PJS*.

Evidence

48. The Applicants' statement is supported by two statements by Mr. Makin and a statement from George Howarth MP. Rather than containing primary evidence, these statements helpfully set out the Applicants' arguments, firstly to justify the case for the disclosure of information and, secondly, to dispute the assertion as to a risk of future harm to JV were the injunction to be relaxed. In this latter regard, the statements support the primary case put forward orally by Mr. Makin to the effect that much information which is said to be about JV is already 'common knowledge', yet JV has not apparently suffered any harm.

49. In addition to the evidence that was before Bean J, which I have seen and which persuaded that judge to continue the injunction, I have received up to date evidence

with respect to the risk of harm from the solicitor acting for JV, who quotes a range of highly threatening media postings, together with a statement from Mr. Michael Spurr, the chief executive of HM Prison and Probation Service. Mr. Spurr's statement is important. In particular he states:

> "It is known, from social media monitoring, that there are large sections of society with remaining strong feelings of anger and hatred towards the subject, some appearing to be of an obsessive nature. It is assessed that there is a high likelihood of these emotions manifesting as targeted or opportunistic violence towards the subject were his identity widely available.
>
> Whilst there have been no targeted threats of violence towards the subject, owing to the preservation of his identity, open source research has revealed social media posts of a violent nature from perceivably unconnected members of the public. The open source research has been limited to open profiles, and it is believed that private profiles or groups exist with the explicit purpose of sharing views about the subject in a private forum. The content of these groups or the intent of the members is not known but it is likely that some exist for the discussion and escalation of vigilante behaviour.
>
> The existence of the injunction has been and remains a critical element in protecting against Article 2 risks presented to the subject. Whilst the amended injunction proposal does not seek to directly reveal current details of the case and is limited to information not including images, it is highly likely, if not inevitable, that triangulation of geographical and biographical information would reveal his current identity beyond doubt to previous associates and lead to the revelation of recent images and information confirming the identity of the subject on social media. This is at least as wide reaching as the mainstream media but with little scope for censorship or control. Such is the nature of social media, any successful identification of the subject online is highly likely to reach individuals with whom he associates [who] were unaware of his identity and may react adversely when presented with this revelation. This could lead to confirmation of his current or future location and lead to targeted or opportunistic vigilante violence or demonstrations.
>
> A full compromise of the subject's identity would make the application of covert protection measures untenable due to his notoriety and high profile nature. It would be impractical to consider relocating the subject in a new identity without significant changes to his appearance which would not be considered reasonable and proportionate balanced against maintaining the injunction and preserving his identity in a less intrusive manner."

Discussion

50. Before turning to the detail of the present application it is appropriate to stand back and have regard to the purpose of this injunction.

51. In short terms, the crime committed by JV and RT, namely the abduction, torture and murder of a 2-year-old boy, rightly outraged all who heard of it. Both of the perpetrators were arrested, convicted and sentenced. The sentence is a life sentence. Whilst at times JV may have been at liberty, he has never been entirely free and never will be. He has

subsequently been recalled to prison and convicted on two occasions for offences which all right-thinking people will regard as wholly repulsive. On the second occasion the sentencing judge held that JV's obsession with pornographic images of very young boys indicated that he was to be regarded as a risk in the future.

52. The criminal justice system, in the form of the courts, the prison service, the Parole Board and the probation service has a statutory duty to monitor JV and make decisions with regard to the need to protect the public from harm. Decisions as to what should happen to JV as a result of his past offending and, should he offend in the future, any future offending, are matters for the State. Irrespective of what one may think of JV, he, in common with every other citizen, has a right to be protected from serious threats to his life which may arise from individuals seeking to take the law into their own hands. That this is so is a matter, as Bean J held, of the law of England and Wales as much as it is under the law of the ECHR, which is itself part of our domestic law under the Human Rights Act 1998. The purpose of the confidentiality injunctions to protect JV from being unlawfully murdered or seriously assaulted. It is extremely rare for criminals to be protected in such a manner. The question of whether JV should be protected has already been decided in principle in 2001. The question currently before the court is whether the circumstances have changed sufficiently to justify varying the injunction and reducing the level of confidentiality.

53. Turning now to the detail of the case, the central premise upon which this application to vary the confidentiality injunction is now based is that JV's name and image are freely available should any member of the public undertake an Internet search; it is therefore submitted that details of his identity, and locations with which he has been connected in the past, have become "common knowledge". This basic premise is not, however, in my view, established.

54. Evidence filed by Mr. Makin, which does not form part of the open bundle in these proceedings, but which I have carefully read, does purport to identify JV and give some details of his circumstances from time to time. However, much of the information would seem to relate to a period of some 5 or more years ago judging by dates which appear against some of the entries. Secondly, at least two entirely different names are attributed to JV in this material.

55. Thirdly, and most importantly, this court does not know whether any of this material actually relates to JV at all. The government's position throughout has been neither to confirm nor to deny the accuracy of any assertion that may be made as to JV's identity. As the extract from the judgment of Bean J demonstrates, there has, in the past, been at least one entirely mistaken belief that an individual is JV and that belief was apparently sustained by those who held to it for a period of years.

56. Mr. Makin asserts that the material to be found on the Internet does, indeed, relate to JV. This court must, however, determine any issue, and particularly an issue is important as this one, on the basis of credible evidence which is capable of establishing the proposition relied upon as fact on the basis that it is proved on the balance of probability. On the evidence that has been submitted in support of the Applicants' case, I am clear that no court could properly find as a fact that JV's identity has been accurately described in material that is publicly available on the Internet.

57. The conclusion in the preceding paragraph is sufficient to hold that the Applicants have failed to establish the basic factual case upon which they rely and that, therefore, the application to vary the injunction should be dismissed. If, however, that primary conclusion is wrong, it is necessary to go on to consider what the position would be if it were established that accurate information as to JVs identity was, indeed, readily available to the public.

58. Based on such a finding, Mr. Makin submits that the court may hold that the relevant information is "common knowledge" and that the court should, in the words of Lord Toulson SCJ, live in the world as it is and accept that the material has now lost the essential element of confidentiality. Whilst I understand Mr. Makin's submission, and for the same reason that the other Supreme Court Justices disagreed with Lord Toulson, I am unable to accept it as, by focusing on only one element in a sophisticated balancing exercise, it does not represent a correct statement of the law.

59. The judgments of the majority of the Supreme Court Justices in *PJS* demonstrate, even where there has been substantial leakage of what would otherwise be confidential information (and the degree of such leakage in *PJS* would seem to be of an altogether higher order than is suggested in the present case) the importance of the rights to be protected must nevertheless be evaluated and can, as was the case in *PJS*, lead to the maintenance of a confidentiality injunction notwithstanding apparent widespread knowledge of the sensitive material.

60. In the present case, in contrast to *PJS*, the court is concerned with the prospect that if he is identified JV may be pursued and attacked with possibly fatal consequences. Before conducting the balancing exercise, it is necessary, therefore, to redetermine the question of whether there is a real risk that JV will suffer harm within the context of ECHR Article 3, or death (Article 2).

61. Although this evaluation must be a contemporary one, that is one conducted on the basis of what is currently known, the court is entitled to take as a starting point the fact that both Dame Elizabeth Butler-Sloss and Bean J were satisfied as to such a "real risk" in 2001 and 2010.

62. Bringing matters up to date, I place weight upon the evidence obtained by Mr. Spurr and by JV's solicitor. That evidence fully demonstrates that there has been no reduction in either the notoriety of JVs involvement in the murder of James Bulger or of the "strong feelings of anger and hatred" of substantial sections of society towards him. The content of some of the recent social media postings is in the most graphic and horrific terms. In that regard there would seem to have been no reduction in the level of risk from that found in the previous proceedings.

63. The nature of JV's recent criminal offending will also have done nothing to reduce the risk of future harm.

64. In terms of re-evaluating the risk, however, I consider that this court is justified in going further by taking account of the degree to which social media has developed in the 9 years since the decision made by Bean J and the 18 years since that of the previous President. A decade ago the use of social media was still in its infancy. Now any and every member of the public may have some access to social media in one form or another. Those who are interested in a particular topic, whatever it may be, may now

readily find other fellow enthusiasts and "share" messages of common interest. These interest groups, which may at times become echo chambers for particular opinions, provide a means for the promulgation and publication of information which is at an altogether more sophisticated level in terms of potential spread and speed than that which was available when the court last looked at this case.

65. In addition, it is right to have regard to the altogether greater degree of publicity that would be afforded to information as to JV's identity if the injunction were to be relaxed. Rather than a few internet postings, the national mainstream media would be likely to publicise to information, thereby giving it an altogether higher profile than is currently the case.

66. The purpose of the injunction is to protect JV from being put to death. Mr. Makin is, with respect, wrong to suggest that JV is being put in a privileged position simply because he has been convicted of murder. As Dame Elizabeth Butler-Sloss held, JV is "uniquely notorious" and there is a strong possibility, if not a probability, that if his identity were known he would be pursued resulting in grave and possibly fatal consequences. This is, therefore, a wholly exceptional case and the evidence in 2019 is more than sufficient to sustain the conclusion that there continues to be a real risk of very substantial harm to JV.

67. To adopt the language of Sir Geoffrey Vos, when an intense focus is maintained upon the nature and extent of the risk to JV under Articles 2 and 3, and on the comparative gravity of those risks and the Article 8 and 10 rights of the Applicants and others on the other side of the scale, the gravity of the risks in this case come down very heavily in favour of continued confidentiality as to JVs identity and circumstances notwithstanding the ordinary goal of offences in the justice system

68. I can deal shortly with a further point relied upon by Mr. Makin. If, as he claims, JV has not yet suffered harm this does not, in my view, provide any reassurance as to the future. Firstly, for the reasons that I have given, I am not satisfied that accurate information as to JVs identity is available to the public and, on that basis, any point as to the absence of harm falls way. Secondly, I accept the analysis of Mr. Spurr that the existence of the current injunction has been and remains a critical element in protecting JV. Without the injunction the mainstream press would be free to report accurate details of JVs identity and past whereabouts. He would be likely to be identified. No further injunction or future attempt to change his identity would be likely to regain any significant element of protection.

69. Whilst I do not accept that the Secretary of State in some way acted in breach of the injunction prohibiting the disclosure of "whereabouts" by publishing the fact that JV was, at that time, "in custody", if, as was indicated, the Secretary of State is amenable to some variation of the injunction to permit him from time to time to publish the fact that JV either was, or had been, in custody or on license I would be prepared to accept such an amendment subject to the drafting of its terms.

70. Set against the very substantial weight that must attach to the Article 2 and Article 3 factors in this case, the other matters relied upon by the applicants, even taken at their highest, fall well short of tipping the balance in favour of greater openness. I accept the Attorney General's submission that any falling short in the rights to be afforded to the

Applicants and other family members as "victims" can be addressed within the statutory scheme or, if necessary, via separate judicial review proceedings. I accept that normally the public and Parliament should be able to debate important matters relating to future policy on the basis of full disclosure of relevant information; for the reasons I have given that is simply not possible in this case without compromising JVs right to be protected from serious violence.

71. It must follow from the conclusions that I have now set out that the application to vary the injunction must fail save for amendments made in February 2018 which permitted reports of the second criminal proceedings and save for any agreed relaxation regarding the Ministry of Justice' ability to disclose, from time to time if JV is in custody or out on licence. I have reached that conclusion by applying the law to the evidence before the court. My decision is in no way a reflection on the Applicants themselves, for whom there is a profoundest sympathy. The reality is that the case for varying the injunction has simply not been made.