Easter Term
[2014] UKSC 25
On appeal from: [2013] CSIH 43

JUDGMENT

A (Respondent) *v* British Broadcasting Corporation (Appellant) (Scotland)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

8 May 2014

Heard on 22 and 23 January 2014

Appellant
Ronald Clancy QC
Duncan Hamilton
(Instructed by Burness Paul and Williamsons)

Respondent
Mungo Bovey QC
Daniel Byrne
(Instructed by Drummond Miller LLP)

Intervener – written submissions (Secretary of State for the Home Department)
Andrew Webster
(Instructed by Office of the Advocate General for Scotland)

LORD REED (with whom Lady Hale, Lord Wilson, Lord Hughes and Lord Hodge agree)

1. This appeal raises important issues concerning the principle of open justice: in particular, issues concerning the legal basis of the principle, the circumstances in which it can be departed from and the procedure which should be followed.

2. The appeal is brought by the BBC in order to challenge an order made by the Court of Session in proceedings for judicial review of a decision of the Upper Tribunal. In its order, the court permitted the applicant for judicial review to amend his application by deleting his name and address and substituting letters of the alphabet, in the exercise (or, as the BBC argues, purported exercise) of a common law power. The court also gave directions under section 11 of the Contempt of Court Act 1981 ("the 1981 Act") prohibiting the publication of his name or other identifying details and directing that no picture of him should be published or broadcast.

3. The appeal raises the following questions:

i) Whether the court possesses any power at common law to protect the anonymity of a party to proceedings before it, where the Convention rights set out in Schedule 1 to the Human Rights Act 1998 are engaged. It is argued on behalf of the BBC that any common law power which might previously have been exercised in such circumstances has been superseded by the Convention rights.

ii) Whether the court acted compatibly with the BBC's rights under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as given effect by the Human Rights Act, in making the order complained of, both in relation to the substance of its decision and in relation to the procedure which it followed.

iii) Whether the order fell within the scope of section 12 of the Human Rights Act, with the consequence that the BBC should have been notified and given an opportunity to make representations before any order was made.

The answers to these questions are of importance to courts, media organisations and individual litigants throughout the United Kingdom.

The factual background

4. The first respondent to this appeal, whom I shall refer to as A, is a foreign national who arrived in the UK as a visitor in 1991. Later that year he married a UK citizen, who also came from his country of origin and had a child from a previous relationship. He was then granted indefinite leave to remain in the UK. In 1996 he was convicted of sexual offences against his step-child and was sentenced to 4 years' imprisonment. In 1998 the second respondent, the Home Secretary, decided that he should be deported, and a notice of intention to make a deportation order was served. A and his wife were by then divorced. In 2000 he re-married. He and his second wife have a number of children.

5. Following service of the deportation notice, protracted proceedings began. The salient aspects can be summarised as follows. In 2001 A's appeal against the Home Secretary's decision was dismissed. He then applied to the Home Secretary to be allowed to remain in the UK on the ground that his removal would violate his rights under articles 2, 3 and 8 of the ECHR. That application was refused, and a deportation order was served in June 2002. A then appealed against the refusal of his application to remain in the UK. Appeals to an immigration adjudicator and to the Immigration Appeal Tribunal were dismissed in 2003 and 2004 respectively. A further appeal to the Court of Session was however allowed, and it was agreed that the appeal should remitted to the Asylum and Immigration Tribunal for re-hearing. Following that re-hearing, the appeal was dismissed by the tribunal in 2007. A's identity was withheld in the proceedings from 2001 onwards.

6. In its 2007 decision, the tribunal noted that A's claim under articles 2 and 3 of the ECHR was based on the argument that, in the event of his return to his country of origin, he would be at risk of death or ill-treatment at the hands of persons enraged by his offences. The tribunal accepted that, if he faced such a risk as a known sexual offender, he was unlikely to receive effective protection from the police. The claim that such a risk existed was however largely based upon the premise that his return to his native country would receive publicity. The tribunal was not satisfied that it would. Although threats of violence had been made against him in his country of origin at the time of the criminal proceedings, when his identity had been disclosed in the media, they had not continued in more recent times.

7. The claim based on article 8 was also rejected. For present purposes, it is relevant to note that the facts relied upon included an incident in January 2006 when A and his wife were attacked in their home in Scotland by a group of youths. Their children were then taken into care for a time because of police concerns that the house might be fire-bombed. A and his wife were attacked again in June 2006 in a public park in the same town. After that incident A ceased to live with his wife and

children. The incidents followed press publicity about A's case, in which his name and the town in which he lived were mentioned.

8. An appeal against the 2007 decision was allowed by the Court of Session in relation to article 8 only, and the appeal was again remitted to the tribunal for re-hearing on that issue: *A v Secretary of State for the Home Department* [2008] CSIH 59. Following that re-hearing, the appeal on the article 8 ground was dismissed by the tribunal in 2009. Leave to appeal against that decision was refused: *CB v Secretary of State for the Home Department* [2010] CSIH 89; 2011 SC 248. Later in 2010 A claimed asylum and submitted further representations. The claim and representations were treated by the Home Secretary as an application for the revocation of the deportation order made in 2002. That application was refused in 2011. A then appealed to the First-tier Tribunal. It was agreed that the scope of the appeal was confined to articles 3 and 8 of the ECHR.

9. In dealing with the appeal, the First-tier Tribunal gave a direction to the parties under rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) that no report of the proceedings should directly or indirectly identify the appellant or any member of his family. Although the words "no report" might, read in isolation, suggest that the direction operated against the media, it went on to state that it applied "to the appellant and to the respondent", consistently with rule 45. The direction was given on the basis that, first, the appeal concerned personal information about the lives of children, whose welfare might be injured if such information were revealed and their names known; secondly, the appeal concerned highly personal evidence which should remain confidential; and thirdly, A or others could be put at risk of harm by publication of his name and details.

10. A's claim under article 3 was again based on evidence, including a report by an expert witness, to the effect that he would be at risk of violence if he returned to his country of origin. It was said that the risk would arise as a result of publicity. The claim under article 8 was based on his family life with his wife and children, with whom he had resumed regular contact, although he continued to live apart from them because of the risk of stigmatisation if they were known to be connected to him.

11. The tribunal refused the appeal. In relation to article 3, the tribunal placed weight on the findings made in 2007, and added:

> "The proceedings involving the appellant are now anonymised thus reducing the risk of his being identified."

Permission to appeal to the Upper Tribunal was refused. An application to the Upper Tribunal for permission to appeal was also refused.

12. A then applied to the Court of Session for judicial review of the decision of the Upper Tribunal to refuse his application for permission to appeal. The petition was lodged on 21 September 2012, when a first hearing (ie a full hearing of the application) was fixed for 14 December 2012. On 30 October 2012 the Secretary of State gave notice that she intended to remove A on 11 November 2012. A then applied for the suspension (ie stay) of the removal decision *ad interim*, pending the full hearing of his application for judicial review.

13. The application for interim suspension came before Lord Boyd of Duncansby on 7 November 2012, together with an application to amend the petition by deleting A's name and address and substituting initials. Media organisations had not been notified of the hearing, and were not represented at it. Lord Boyd allowed the petition to be amended. He also made an order under section 11 of the 1981 Act "prohibiting the publication of the name of the petitioner, or any particulars or details calculated to lead to the identification of the petitioner", and directing "that no picture shall be published or broadcast of the petitioner in connection with these proceedings".

14. On 8 November 2012 Lord Boyd refused the application for interim suspension. In his opinion he explained that he had to decide whether A had established a *prima facie* case for setting aside the Upper Tribunal's decision, applying the test laid down in *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663 and *Eba v Advocate General for Scotland* [2011] UKSC 29; 2012 SC (UKSC) 1; [2012] 1 AC 710, and, if so, whether the balance of convenience favoured the granting of interim suspension of the removal decision. He concluded that a *prima facie* case had not been established. One of the arguments which he considered was that the First-tier Tribunal had failed to give adequate reasons for rejecting the article 3 claim, and had not properly considered the report of the expert witness. In response, it was argued that the author of the report had failed to recognise that, if the appellant were returned to his home country, that was likely to be following proceedings in which his identity was not disclosed. Lord Boyd concluded that the tribunal had been entitled to find that the risk of A's being identified was reduced by anonymisation, and that the point did not satisfy the *Cart* and *Eba* test.

15. It was envisaged at the time of the hearing before Lord Boyd that the application for judicial review would proceed to a first hearing, notwithstanding A's deportation. His counsel informed the court that he intended to seek the discharge of the first hearing fixed for 14 December 2012, so that a two day hearing could be held instead in January 2013.

16. A reclaiming motion (ie an appeal) against Lord Boyd's decision to refuse the application for interim suspension was heard by the Inner House of the Court of Session on 9 November 2012. It was refused: *A v Secretary of State for the Home Department* [2012] CSIH 86.

17. In the meantime, the BBC became aware of the order made under section 11 of the 1981 Act, and applied for it to be recalled (ie set aside). The application came before the court on 9 November, when it was agreed that it should be continued (ie adjourned) to be heard on a future date. It was subsequently heard by Lord Glennie on 14 and 15 November 2012. On 6 December 2012 he refused the application, and granted leave to reclaim: *British Broadcasting Corporation, Applicant* [2012] CSOH 185; 2013 SLT 324.

18. Lord Glennie noted that the only issue in the proceedings before the tribunal concerned the risk of its becoming known in his country of origin that A was being sent back. If that fact were known, and particularly if it were linked to information about the timing of his return, then it was accepted that there was a real risk of A's article 3 rights being infringed. That was why an anonymity direction had been made by the tribunal. In these circumstances, Lord Glennie accepted that it was necessary to allow A's name and identifying details to be withheld from the public in the court proceedings, and to make a section 11 order: first, so as to safeguard A's Convention rights, and secondly, so as to preserve the integrity of the court proceedings, since publication of that information would give A grounds for a fresh application to the Home Secretary and frustrate the proceedings before the court.

19. A absconded prior to his planned deportation, and was later detained. The Home Secretary then decided to deport him on 14 December 2012. An application was made to the court for the interim suspension of that decision, and for leave to amend the application for judicial review. The amendment, which was allowed, introduced averments to the effect that, following the granting to the BBC of leave to reclaim, it was uncertain whether the section 11 order would remain in place. The Home Secretary, it was argued, could not deport A until that matter was settled, since the tribunal had relied upon the anonymity order in holding that A would not be at real risk on return to his country of origin. If the BBC's reclaiming motion was successful, a material basis of the tribunal's decision would be removed.

20. The application for interim suspension was heard on 12 December 2012. It was accepted on behalf of the Home Secretary that A's deportation would be unlawful unless the section 11 order remained in place: in the absence of the order, there would be a real risk that A's identity and history as a sex offender would be publicised, and that such publicity would expose him to vigilante behaviour in his country of origin, contrary to his rights under article 3. The court concluded that the BBC was unlikely to succeed in a reclaiming motion against Lord Glennie's

decision, and refused interim suspension of the deportation decision on that basis. A reclaiming motion against that decision was refused by the Inner House the following day. A was deported to his country of origin on 14 December 2012.

21. The BBC reclaimed against Lord Glennie's decision to refuse to recall the section 11 order, and also challenged Lord Boyd's decision to make the order in the first place. The reclaiming motion was refused by the Inner House on 17 May 2013: [2013] CSIH 43; 2013 SC 533. The court considered that the material before the tribunal justified the conclusion that anonymity would be a significant protection of A's article 3 rights, and that in any event the recall of the section 11 order would subvert the understanding on which A's deportation had been authorised. The present appeal is brought against that decision.

22. A first hearing of the application for judicial review has not yet taken place. At the hearing of the reclaiming motion, the court was informed that the possibility of amending the application in order to seek an order for A's return to the UK was under consideration.

The general principle of open justice

23. It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law. S*ed quis custodiet ipsos custodes*? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.

24. The significance of the principle of open justice is illustrated by the fact that it was one of the matters covered by the constitutional legislation enacted following the accession of William and Mary. The Court of Session Act 1693, which remains in force, provides:

> "That in all time coming, all bills, reports, debates, probations and others relating to processes shall be considered, reasoned, advised and voted by the Lords of Session with open doors, where parties, procurators and all others are hereby allowed to be present, as they used to be formerly in time of debates, but with this restriction, that in

> some special cases the said Lords shall be allowed to cause remove all persons, except the parties and their procurators."

The corresponding Act "Anent Advising Criminal Processes with Open Doors", passed on the same date, made similar provision for the High Court of Justiciary. As Lord Shaw of Dunfermline commented in *Scott v Scott* [1913] AC 417, 475, the two Acts formed part of the Revolution Settlement, and bore testimony to a determination to secure civil liberties against judges as well as against the Crown.

25. The principle that courts should sit in public has important implications for the publishing of reports of court proceedings. In *Sloan v B* 1991 SC 412, 442, Lord President Hope, delivering the opinion of the court, explained that it is by an application of the same principle that it has long been recognised that proceedings in open court may be reported in the press and by other methods of broadcasting in the media. "The principle on which this rule is founded seems to be that, as courts of justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished" (*Richardson v Wilson (1879) 7 R 237*, 241 per Lord President Inglis).

26. The connection between the principle of open justice and the reporting of court proceedings is not however merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.

Exceptions to the principle of open justice

27. Since the principle of open justice is a constitutional principle to be found in the common law, it follows that it is for the courts to determine its ambit and its requirements, subject to any statutory provision. The courts therefore have an inherent jurisdiction to determine how the principle should be applied.

28. That jurisdiction was recognised as long ago as the 1693 legislation I have mentioned. The Court of Session Act allowed the court to sit in private "in some special cases", leaving it to the court to determine the circumstances in which a departure from the principle of open justice might be appropriate. The Act concerning criminal procedure declared that "in the cases of rape, adultery and the like the said Commissioners [of Justiciary] may continue their former use and custom, by causing remove all persons, except parties and procurators, at the leading

of the probation, as they shall see cause". That provision, which has a direct homologue in the modern law, recognised the court's power to determine when departures from the principle of open justice were appropriate in such cases.

29. Exceptions to the principle of open justice were considered in the well-known case of *Scott v Scott* [1913] AC 417, in which the House of Lords emphasised in the strongest terms the importance of the general principle, but also recognised that there were circumstances in which it was necessary to depart from it. Viscount Haldane LC gave the example at p 437 of a court exercising a wardship jurisdiction: such a court was sitting primarily to guard the interests of the ward, and the attainment of that object might require that the public should be excluded. Lunacy proceedings were in a similar position. Another example given by the Lord Chancellor, of greater relevance to the present case, was litigation concerning a secret process, "where the effect of publicity would be to destroy the subject-matter". The Earl of Halsbury considered wardship and lunacy to fall outside the scope of the general principle that justice should be administered in public, but accepted that proceedings concerning trade secrets, or to prevent the publication of private correspondence, were exceptions to that principle, observing at p 443 that "it would be the height of absurdity as well as of injustice to allow a trial at law to protect either to be made the instrument of destroying the very thing it was intended to protect". Similar observations were made by Lord Atkinson at p 450 and by Lord Shaw of Dunfermline at pp 482-483. All of their Lordships stressed the need for a compelling justification for any departure from the principle of open justice. The Lord Chancellor said at pp 437-438:

> "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

30. A similar approach was followed in later cases in the House of Lords. In particular, the issue was considered in detail in the cases of *In re K (Infants)* [1965] AC 201 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440. In the former case, Lord Devlin noted at p 238 that the ordinary principles of a judicial inquiry included the rules that justice should be done openly, that it should be done only after a fair hearing, and that judgment should be given only upon evidence that is made known to all parties, and also rules of a less fundamental character, such as the rule against hearsay. He continued:

> "But a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed; otherwise it would become the master instead of the servant of justice. Obviously, the ordinary principles of judicial inquiry are requirements for all ordinary cases and it can only be in an extraordinary class of case that any one of them can be discarded. This is what was so clearly decided in *Scott v Scott*."

After citing the dictum of Viscount Haldane which I also have cited, Lord Devlin continued at p 239:

> "That test is not easy to pass. It is not enough to show that dispensation would be convenient. It must be shown that it is a matter of necessity in order to avoid the subordination of the ends of justice to the means."

31. More recently still, the importance of the common law principle of open justice was emphasised by nine Justices of this court in the case of *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; [2013] 3 WLR 179. Lord Neuberger, giving the judgment of the majority, described the principle as fundamental to the dispensation of justice in a modern, democratic society (para 2). He added that it had long been accepted that, in rare cases, a court had an inherent power to receive evidence and argument in a hearing from which the public and the press were excluded, but said that such a course might only be taken (i) if it was strictly necessary to have a private hearing in order to achieve justice between the parties, and (ii) if the degree of privacy was kept to an absolute minimum. He gave, as examples of such cases, litigation where children were involved, where threatened breaches of privacy were being alleged, and where commercially valuable secret information was in issue.

32. It has also been recognised in the English case law, consistently with Lord Neuberger's requirement of the degree of privacy being kept to a minimum, that where the interests of justice require some qualification of the principle of open justice, it may not be necessary to exclude the public or the press from the hearing: it may suffice that particular information is withheld. In *Attorney General v Leveller Magazine Ltd,* for example, Lord Diplock accepted at p 451 that, where the court might sit *in camera* in order to preserve the anonymity of a witness in the interests of national security, it could instead allow "a much less drastic derogation from the principle of open justice", namely that the witness should give evidence in public but should be permitted to withhold his name from the public and the press. Viscount Dilhorne and Lord Edmund-Davies agreed that the court could do so, in the exercise of its inherent jurisdiction to control its own procedure: pp 458 and 464 respectively.

Viscount Dilhorne gave as an example the practice of allowing a witness complaining of blackmail to withhold his identity from public disclosure in court, judicially approved in *R v Socialist Worker Printers and Publishers Ltd, Ex p Attorney General [1975] QB 637*. The proposition that the court had no power to allow a witness's name to be withheld from the public had been roundly rejected in that case: such a direction, it was held, was clearly preferable to an order for trial *in camera* where "the entire supervision by the public is gone" (p 652).

33. In Scotland, as I have explained, the principle of open justice has been recognised by statute since the seventeenth century. The court's power to make exceptions to the general principle was acknowledged in the legislation of 1693. As Lord President Gill noted when the present appeal was before the Inner House, the basis of the court's power to make such exceptions is its inherent power to control its own procedure in the interests of justice: [2013] CSIH 43; 2013 SC 533, para 37.

34. The common law power to make exceptions to the principle of open justice in the interests of justice was recognised in *Sloan v B* 1991 SC 412. Lord President Hope said at p 442:

> "There is no doubt that as a general rule the proceedings of a court are open to the public, and thus to public scrutiny, at all times. Exceptions have to be made in special circumstances to allow the court to conduct its proceedings behind closed doors where the interests of justice require this to be done. But that is always the exception, and the general principle which applies equally in the sheriff court as it does in the Court of Session is that the court sits both for the hearing of cases and for the advising of them with open doors."

35. It has also been recognised in Scotland that the qualification of the principle of open justice which is necessary in particular circumstances may not require to be as drastic as the complete exclusion of the public or the media from the proceedings, and that less extreme measures, such as the protection of the anonymity of a witness, may sometimes suffice. The point is illustrated by the case of *Scottish Lion Insurance Co Ltd v Goodrich Corporation* [2011] CSIH 18; 2011 SC 534, in which the court permitted the identities of the applicants to be withheld from public disclosure. The object of the proceedings was to protect the confidentiality of documents disclosing their identities, and an order designed to achieve that objective had previously been made by the court. As the court noted, the disclosure of their identities would be inconsistent with that order and would undermine the confidentiality which the proceedings were intended to preserve. The case was therefore one in which a limitation of the principle of open justice was necessary both to protect confidential information and to prevent the frustration of the judicial process.

36. In relation to this aspect of the present case, counsel for the BBC was critical of a passage in the opinion of the Lord President, at para 38, in which he stated that the court must have regard not only to the justice of its decision, but also to the justice of the procedures by which it gives it. It therefore had the inherent power, in his opinion, to withhold the identity of a party where, regardless of the outcome of the case, the disclosure of that party's identity would constitute an injustice to him. The Lord President gave as examples cases where disclosure would endanger a party's safety or would be commercially ruinous. He added that, quite apart from the Convention-related aspects of the problem, he would regard it as the court's duty to withhold the identity of a female pursuer where the decision turned on intimate medical evidence. He also considered that the court's inherent jurisdiction could be extended to the protection of third parties whose rights and interests might be affected in similar ways. The other members of the First Division expressed their agreement.

37. This passage in the Lord President's opinion was *obiter dictum*: his Lordship records that the subject of the court's inherent jurisdiction had not been the subject of submissions by the parties, but had become a matter of some importance because of a decision made by a judge in another case, following the hearing of the instant case. The examples which the Lord President gave were at a correspondingly high level of generality. Counsel argued however that this passage was an incorrect statement of the law, and might be treated by lower courts as authoritative. That apprehension appears to have been one of the principal factors to have prompted the bringing of this appeal, as much of the argument presented on behalf of the BBC was devoted to criticism of this *obiter dictum*. In the circumstances, some general observations may be made.

38. As I have explained, it has long been recognised that the courts have the power to permit the identity of a party or a witness to be withheld from public disclosure where that is necessary in the interests of justice. The Lord President was plainly right to approach the matter on the basis that the interests of justice are not confined to the court's reaching a just decision on the issue in dispute between the parties. It is necessary in the first place to recognise that the administration of justice is a continuing process: see, for example, *Attorney-General v Butterworth* [1963] 1 QB 696, 725 per Donovan LJ. The court can therefore take steps in current proceedings in order to ensure that the interests of justice will not be defeated in the future. For example, the High Court of Justiciary has permitted undercover police officers to give evidence while screened from the sight of the general public, and without public disclosure of their identities, in order to avoid jeopardising their effectiveness in future investigations.

39. Other cases may raise different considerations. In some cases, for example, anonymity may be necessary in view of risks to the safety of a party or a witness. The point can be illustrated by the case of *A v Scottish Minsters* 2008 SLT 412,

where a prisoner serving a sentence for sexual offences was permitted to bring proceedings, challenging the notification requirements applicable to sexual offenders, without disclosing his identity publicly, because of the danger to his safety if the nature of his offending became known to his fellow prisoners. The same approach was followed when the case subsequently came before the Inner House. In other cases the health of a vulnerable person may be at risk. An example is the case of *HM Advocate v M* [2007] HCJ 2, 2007 SLT 462, where the court made a section 11 order to prevent the publication of the identity of a woman who was due to be the principal witness at the trial of a person charged with having recklessly infected her with HIV. There was evidence before the court that the woman's mental health would be endangered if her identity became publicly known. There was also a risk that the woman would otherwise be unable to give evidence, in which event the prosecution could not proceed. An example of a case where harm of a different kind was considered to justify a departure from the ordinary practice is *Devine v Secretary of State for Scotland* (22 January 1993, unreported), an action of damages arising from the deployment of the SAS to end a prison siege, where Lord Coulsfield permitted the soldiers to give evidence while screened from the view of the general public, and without disclosing their names publicly. He did so on the basis that their evidence was essential to the proper presentation of the defence, and the Army's ability to deploy them in future operations would otherwise be compromised. In such a case, their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure. These are only a few examples.

40. Some of these examples may arguably go beyond the categories envisaged in some of the older authorities. As Lord Loreburn observed however in *Scott v Scott* at p 446, it would be impossible to enumerate or anticipate all possible contingencies. Furthermore, in this area as in others the common law is capable of development. The application of the principle of open justice may change in response to changes in society and in the administration of justice. It can also develop having regard to the approach adopted in other common law countries, some of which have constitutional texts containing guarantees comparable to the Convention rights, while in others the approach adopted reflects the courts' view of the requirements of justice. To give only one example, the Supreme Court of Canada has considered some of the issues which I have mentioned, such as the anonymity of complainants in cases of sexual assault (*Canadian Newspapers Co v Canada* [1988] 1 SCR 122), the protection of parties to proceedings from embarrassment or humiliation (*Edmonton Journal v Alberta* [1989] 2 SCR 1326) and the concealment of the identity of undercover police officers (*R v Mentuck* [2001] 3 SCR 442). The development of the common law can also of course be influenced by the ECHR.

41. The examples given by the Lord President of a party or witness whose safety may be endangered or who may suffer commercial ruin if his identity becomes known, or that of the female pursuer where the decision turns on intimate medical

evidence, are all capable of raising issues which could warrant a qualification of the principle of open justice, applying the approach which I have explained. In relation to the last example, which was the subject of particular criticism by counsel for the BBC, I agree with the Lord President that it would be in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information about her where there was no public interest in its being publicised. Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in *Kennedy v The Charity Commission* [2014] UKSC 20, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

Convention rights

42. Having considered the source and importance of the principle of open justice, as well as the source and extent of the court's common law power to derogate from it, I now turn to the ECHR standards that apply in this context. Under the Convention, the principle of open justice is expressly protected by article 6(1), which provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a public hearing. Article 6(1) also provides that judgment shall be pronounced publicly. The rationale of these requirements, as explained by the European Court of Human Rights, is the same as in the common law:

> "The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6(1), a fair hearing, the guarantee of which is one of the foundations of a democratic society" (*B and P v United Kingdom* (2001) 34 EHRR 529, para 36).

43. As in domestic law, the general principle set out in article 6(1) is subject to qualifications:

> "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly

> necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

44. These qualifications broadly reflect the various grounds upon which exceptions to the principle of open justice are made in our domestic law, either under the common law or under statute. In relation to the last of the qualifications ("where publicity would prejudice the interests of justice"), the assessment is explicitly left to the opinion of the national court. In relation to the other qualifications, as in relation to the qualifications to other Convention guarantees, the European court has allowed national authorities a margin of appreciation. The court has accepted that a state can designate a class of cases, such as proceedings under the Children Act 1989, as an exception to the general rule (*B and P v United Kingdom* (2001) 34 EHRR 529, para 39). It has also accepted that measures short of the complete exclusion of the press and public, such as allowing a witness to remain anonymous, may be compatible with article 6(1) (see, for example, *Doorson v Netherlands* (1996) 22 EHRR 330, para 71), and that such measures may even be necessary in order to secure a fair trial (see, for example, *V v United Kingdom* (1999) 30 EHRR 121, para 87).

45. Article 6 is not the only provision of the Convention which is relevant to the principle of open justice. Articles 2 and 3 may for example apply where parties or witnesses are in physical danger. The rights guaranteed by those articles are, in this context, unqualified. The Convention therefore requires that proceedings must be organised in such a way that the interests protected by those articles are not unjustifiably imperilled: *Doorson*, para 70. In our domestic law, the court's power to prevent the identification of a witness is accordingly part of the structure of laws which enables the United Kingdom to comply with its obligations under those articles: *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 27 per Lord Rodger.

46. Article 8 may also be relevant. It protects the private lives of the parties, to which article 6(1) also refers, and in addition requires respect for the private lives of other persons who may be affected by legal proceedings, such as witnesses. It is however a qualified right:

> "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".

The court therefore allows a margin of appreciation to national authorities in striking a fair balance between the interest in publicity of court proceedings, on the one hand, and the interests protected by article 8, on the other hand: *Z v Finland* (1997) 25 EHRR 371, para 99.

47. Article 10 is also relevant to the principle of open justice, since the right to receive and impart information, which is guaranteed by article 10(1), may be engaged where measures are taken in relation to court proceedings to prevent information from becoming publicly available. The right guaranteed by article 10(1) is however qualified by article 10(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 … 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."

48. These qualifications reflect the fact that freedom of expression may conflict with other important values, including the rights to life and to bodily security protected by articles 2 and 3 of the Convention, the integrity of legal proceedings and the rights of litigants and accused persons, protected by article 6, and the right to respect for private life, protected by article 8. Where there is a conflict between the right of the media to report legal proceedings and the rights of litigants or others under a guarantee which is itself qualified, such as article 8, a balance must be struck, so as to ensure that any restriction upon the rights of the media, on the one hand, or of the litigants or third parties, on the other hand, is proportionate in the circumstances. The approach which should be adopted was considered in detail by Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593, and by Lord Rodger in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697.

49. Where the conflict is between the media's rights under article 10 and an unqualified right of some other party, such as the rights guaranteed by articles 2, 3 and 6(1), there can be no derogation from the latter. Care must nevertheless be taken to ensure that the extent of the interference with the media's rights is no greater than is necessary. The need for such care reflects the important role of the media in a democratic society in scrutinising the administration of justice generally, as well as their role as the conduit of information about particular proceedings which may be of public interest.

50. Article 10(2) specifically identifies "maintaining the authority and impartiality of the judiciary" as a legitimate aim which may justify interference with freedom of expression. The phrase has a wide scope, as the European Court of Human Rights explained in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 55:

> "The Court first emphasises that the expression 'authority and impartiality of the judiciary' has to be understood 'within the meaning of the Convention'. For this purpose, account must be taken of the central position occupied in this context by article 6, which reflects the fundamental principle of the rule of law.
>
> The term 'judiciary' (*'pouvoir judiciaire'*) comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase 'authority of the judiciary' includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function."

The need to maintain the authority and impartiality of the judiciary, as a justification for an interference with freedom of expression, thus overlaps with the right to a fair trial under article 6(1), and with the entitlement to derogate from the open justice principle under that article "where publicity would prejudice the interests of justice". As the court indicated in the *Sunday Times* case, it is article 6(1) which occupies the central position in this context.

51. Where the European court finds that a restriction of the principle of open justice is justifiable under article 6(1), it may not therefore find it necessary to consider the matter under article 10, on the basis that no separate issue arises. In the case of *B and P v United Kingdom*, for example, the court declined to examine a complaint under article 10 that the applicants were prohibited, upon risk of being found in contempt of court, from disclosing any documents used in proceedings under the Children Act 1989. The orders complained of were ancillary to measures taken to prevent public access to the hearing and to the judgment. Those measures had themselves been found to be justifiable under article 6(1) in order to protect the privacy of the children and the parties and to avoid prejudicing the interests of justice.

52. The European court has accepted that the law of contempt falls within the ambit of the legitimate aim of maintaining the authority and impartiality of the judiciary. As it stated in the *Sunday Times* case at para 55:

> "The majority of the categories of conduct covered by the law of contempt relate either to the position of the judges or to the functioning of the courts and of the machinery of justice: 'maintaining the authority and impartiality of the judiciary' is therefore one purpose of that law."

In many later cases the court has accepted the compatibility with article 10 of restrictions on the publication of material which may prejudice the outcome of court proceedings: see, for example, *Worm v Austria* (1997) 25 EHRR 454 and *BBC Scotland, McDonald, Rodgers and Donald v United Kingdom* (Application No 34324/96) (unreported) given 23 October 1997.

53. As the court explained in the *Sunday Times* case, it is unnecessary, where the aim of maintaining the authority and impartiality of the judiciary is engaged, to give separate consideration to the aim of "protection of … the rights of others", so far as the rights of the litigants in that capacity are concerned:

> "In so far as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase 'maintaining the authority and impartiality of the judiciary': the rights so protected are the rights of individuals in their capacity as litigants, that is, as persons involved in the machinery of justice, and the authority of that machinery will not be maintained unless protection is afforded to all those involved in or having recourse to it. It is therefore not necessary to consider as a separate issue whether the law of contempt has the further purpose of safeguarding 'the rights of others'." (para 56)

54. The balance to be achieved under article 10, in this context, is therefore between on the one hand protection of public discussion of matters of legitimate interest in a democracy, and on the other protection of the integrity of particular court proceedings or of the administration of justice more generally. If other interests protected under article 10(2) or under other articles of the Convention, such as article 8, are also involved, then they must also be taken into account. This approach is consistent with that adopted under our domestic law, as explained in para 41.

The relationship between the Convention and domestic law

55. It was submitted on behalf of the BBC that the source of the court's power to allow a party to legal proceedings not to disclose his identity publicly, in a situation where Convention rights are engaged, is to be found in the Convention rights themselves, rather than in the common law. Reference was made to *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593, para 23 per Lord Steyn, and *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 30 per Lord Rodger. These dicta were not however concerned with the conduct of court proceedings. They concerned a different issue, namely the jurisdiction of the English courts to make orders *contra mundum* restraining publicity relating to court proceedings, and in particular the publication of information identifying persons involved in those proceedings: a jurisdiction which might otherwise have been in doubt, as Lord Rodger noted.

56. It is apparent from recent authorities at the highest level, including *Al Rawi and others v Security Service and others (JUSTICE and others intervening)* [2011] UKSC 34; [2012] 1 AC 531, *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; [2013] 3 WLR 179 and *Kennedy v The Charity Commission* [2014] UKSC 20, that the common law principle of open justice remains in vigour, even when Convention rights are also applicable. In another recent decision, *R (Osborn) v Parole Board* [2013] UKSC 61; [2013] 3 WLR 1020, this court referred at para 61 to the importance of the continuing development of the common law in areas falling within the scope of the Convention guarantees, and cited as an illustration the case of *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 Intervening)* [2012] EWCA Civ 420; [2013] QB 618, where an issue falling within the ambit of article 10 was decided by applying the common law principle of open justice. Similar observations were made in *Kennedy v The Charity Commission* at paras 46 and 133; and the majority judgments in that case provide a further illustration of the same approach.

57. That approach does not in any way diminish the importance of section 6 of the Human Rights Act, by virtue of which it is unlawful for the court to act in a way which is incompatible with a Convention right, unless subsection (2) applies. As was made clear in *Kennedy*, however, the starting point in this context is the domestic principle of open justice, with its qualifications under both common law and statute. Its application should normally meet the requirements of the Convention, given the extent to which the Convention and our domestic law in this area walk in step, and bearing in mind the capacity of the common law to develop as I have explained in para 40. As the case of *V v United Kingdom* demonstrates, it is however necessary to bear in mind that, although the Convention and our domestic law give expression to common values, the balance between those values, when they conflict, may not always be struck in the same place under the Convention as it

might once have been under our domestic law. In that event, effect must be given to the Convention rights in accordance with the Human Rights Act.

Section 11 of the Contempt of Court Act 1981

58. It is necessary next to return to section 11 of the 1981 Act, which provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

59. Section 11 was enacted in order to implement a recommendation made in the Report of the Committee on Contempt of Court (1974) (Cmnd 5794), para 141, footnote 72, following the case of *R v Socialist Workers Printers and Publishers Ltd, Ex p Attorney-General* [1974] 1 QB 637. As Lord Rodger explained in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 31, section 11 does not itself confer any power upon courts to allow "a name or other matter to be withheld from the public in proceedings before the court", but it applies in circumstances where such a power has been exercised. The purpose of section 11 is to support the exercise of such a power by giving the court a statutory power to give ancillary directions prohibiting the publication, in connection with the proceedings, of the name or matter which has been withheld from the public in the proceedings themselves. Section 11 thus resolves the doubt which had arisen following the *Socialist Workers* case as to the power of the court to make such ancillary orders at common law. The directions which the court is permitted to give are such as appear to it to be necessary for the purpose for which the name or matter was withheld.

60. It was submitted on behalf of the BBC that section 11 does not enable an order to be made for the purpose of protecting an individual's Convention rights: such an order can only be made, it was argued, in order to protect the public interest in the administration of justice. That submission is of limited significance in the present case since, as I shall explain, one of the purposes of the order was to protect the administration of justice. Section 11 does not in any event contain any such limitation; and, where the courts are required under the Human Rights Act to impose reporting restrictions in order to protect Convention rights, they must use the means which are available to them.

61. It was also submitted that no order could be made under section 11 unless members of the public had been present in the courtroom and had had a name or other matter withheld from them. That is however an unduly narrow construction of the provision. In the present case, for example, even if there were no members of the public present in court during the hearing before Lord Boyd, the effect of the order permitting the applicant for judicial review to be described as "A" was that his identity would be withheld from anyone looking at the rolls of court, either in Parliament House or on the internet, when any future hearing was listed, and from anyone present in the building when such a hearing was announced over the public address system. Anyone attending subsequent hearings in the case would hear him referred to in the same way; anyone who requested to see court documents to which the public could have access would also see him referred to in that way; and any judgments in the case, published on the internet or in the law reports, would be similarly anonymised. In all these respects, A's identity would be withheld from the public.

Section 12 of the Human Rights Act 1998

62. Section 12 of the Human Rights Act provides:

> "(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 not 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 relevant privacy code.

(5) In this section -

'court' includes a tribunal; and

'relief' 'includes any remedy or order (other than in criminal proceedings).''

63. As Lord Nicholls of Birkenhead explained in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253, para 15, section 12 was enacted to allay concerns about the potential impact of article 8 Convention rights upon the grant of injunctions or interdicts against the media. It appears that section 12(2), in particular, was intended to restrict the scope for pre-publication injunctions or interdicts being granted against broadcasters or the press on an *ex parte* basis, and that section 12(3) was designed to impose a more demanding test for the grant of interlocutory injunctions than the *American Cyanamid* standard. The effect of the provisions depends however upon the language used by Parliament rather than upon the particular concerns which may have prompted their enactment.

64. In the present case, the First Division considered that an order under section 11 of the 1981 Act fell within the scope of section 12(2) of the Human Rights Act, on the basis that the expression "relief" was wide enough to cover an order of that kind. The first respondent has taken advantage of the BBC's appeal to challenge that conclusion.

65. As I have explained, section 11 of the 1981 Act applies where the court "allows a name or other matter to be withheld from the public in proceedings before the court", and permits the court to "give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary".

66. When an application is made to the court to allow a name or matter to be withheld, that is not an application for relief made against any person: no remedy or order is sought against any respondent. If ancillary directions under section 11 are also sought, prohibiting any publication of the name or matter in question, that equally is not an application for relief made against any respondent: the directions will operate on a blanket basis. In such circumstances there is no respondent who should be notified, or who might be present or represented at the hearing. There is therefore no obligation under section 12(2) of the Human Rights Act to allow the media an opportunity to be heard before such an order can be granted.

67. The Lord President observed at para 39 that, even if the media were not entitled to be heard by virtue of section 12(2) of the Human Rights Act, they were entitled to be heard as a matter of fairness, although there was a question as to the stage at which the opportunity to be heard should be given. I agree. There are many situations in which courts make orders without having heard the persons who may be affected by them, usually because it is impractical, for one reason or another, to afford a hearing to those persons in advance of the making of the order. In such circumstances, fairness is secured by enabling any person affected to seek the recall of the order promptly at a hearing *inter partes.* In principle, an order under section 11 of the 1981 Act falls within the ambit of that approach. It would be impractical to afford a hearing to all those who might be affected by a section 11 order (including bloggers, social media users and internet-based organisations) before such an order was made; but fairness requires that they should be able to seek the recall of the order promptly at a hearing *inter partes*. Article 13 of the Convention also requires that the media should have an effective remedy for any violation of their article 10 rights. That requirement is capable of being fulfilled, where a section 11 order has been made *ex parte*, provided its recall can be sought promptly at a hearing at which the media are able to make representations (cf *Mackay and BBC Scotland v United Kingdom* (2010) 53 EHRR 671, para 32). As the facts of this case demonstrate, the existing procedures in the Court of Session are capable of satisfying those requirements.

68. That said, a conclusion that the existing procedures provide a sufficient safeguard to meet the requirements of the Convention does not mean to say that improved procedures may not be possible and desirable. Although it would be impractical to provide all those who might be affected by a section 11 order with an opportunity to make representations before such an order is made, it may nevertheless be possible in some circumstances to provide such an opportunity to

some of those who would be affected. Nothing I have said is therefore inconsistent with the Lord President's conclusion that improved procedures should be introduced, or with the intention of the Scottish Civil Justice Council to address that issue. Any improved procedures should not however make it impossible to obtain orders restricting publicity on an *ex parte* basis: as the Lord President recognised, there will inevitably be circumstances in which it is necessary for such orders to be made on that basis.

The present case

69. It is necessary finally to consider the application of these principles to the present case. The BBC was aware of A's identity at all material times. It would have been free to report it, were it not for the order made by Lord Boyd under section 11 of the 1981 Act. The order therefore fell within the scope of article 10 of the Convention, as given effect by the Human Rights Act. The BBC was entitled to challenge the order as being incompatible with article 10, on the assumption that a public broadcaster such as the BBC can qualify as a "victim" of a violation of that article. In the light of the relevant case law of the European Court of Human Rights (eg *Radio France v France* (2004) 40 EHRR 706; *Őesterreichischer Rundfunk v Austria* (Application No 35841/02) (unreported) given 7 December 2006; *Mackay and BBC Scotland v United Kingdom* (2010) 53 EHRR 671), and in the absence of argument to the contrary, I proceed on the basis that it can.

70. As I have explained, article 10 sets out a qualified guarantee: the right of freedom of expression can be subjected to restrictions which are prescribed in law and are necessary in a democratic society "for the protection of the … rights of others … or for maintaining the authority and impartiality of the judiciary". There is no doubt that an order made under section 11 is prescribed by law. The issue is whether the order made in the present case was necessary in a democratic society for the protection of the rights of others or for maintaining the authority and impartiality of the judiciary.

71. There are undoubtedly features of the case which support the BBC's contention that there was at all material times a public interest in its ability to report it without restrictions. These include the fact that the case concerns the deportation of a foreign sex offender, the remarkable length of time the proceedings have taken, and the cost of the proceedings to the taxpayer. The reporting of the present case would contribute to a debate of general interest: cases concerning the deportation of foreign offenders are not infrequently reported as part of a debate about the impact of European human rights law, or about the procedure followed in such cases. It is also true that A has in the past been the subject of publicity in which his name and photograph were published. It is also undeniable that, although the BBC could report

all other aspects of the case, their inability to reveal A's identity would detract from the human or journalistic interest of the story.

72. Nevertheless, the arguments in favour of Lord Boyd's decision to make the order, and Lord Glennie's decision not to recall it, were in my view overwhelming. It is necessary first to recall the procedural context in which those decisions were taken. The tribunal had made a decision, the effect of which was to authorise A's deportation, and it had also made an anonymity direction on the ground that A "could be put at risk of harm by publication of [his] name and details". Its decision to authorise A's deportation, in the face of concerns about the risk of his being ill-treated on his return to his country of origin, had been made on the basis that anonymity would be a significant protection of his article 3 rights. Lord Boyd's order was then made in proceedings in which the validity of the tribunal's decision was challenged. A date had been fixed for the hearing of A's challenge to the decision, but the Home Secretary proposed to deport A several weeks before that hearing took place. The case came before Lord Boyd so that he could decide whether the deportation should be allowed to proceed before the challenge to the tribunal's decision had been heard.

73. In that situation, the publication of A's identity, or of information enabling him to be identified, would have subverted the basis of the tribunal's decision to authorise his deportation. That decision had been based on an assessment that there was no real risk of a violation of article 3 if A's identity was not publicised in connection with the deportation proceedings. The decision would have been undermined, before the challenge to its validity was determined, if his identity was published in the meantime. A fresh application to be allowed to remain in this country could then have been made on the basis of the new factual situation created by the publication of his identity in connection with the deportation proceedings. That application would then have required to be considered by the Home Secretary, and a fresh decision made. The publication of A's identity would therefore have frustrated the judicial review proceedings before the court. Indeed, the entire proceedings since at least 2007 would have been rendered largely pointless.

74. The reasons for making the order were equally compelling if considered from the perspective of protecting A's article 3 rights in the event of his deportation. The tribunal, as the fact-finding body in this case, had accepted that A would be at serious risk of violence if his identity became known in his country of origin in connection with these proceedings, and had concluded that anonymity would be a significant protection of his article 3 rights. In those circumstances, the court's failure to make a section 11 order would, as the Lord President observed, have had the grave consequence that the deportation might create all the risks that the tribunal's directions as to anonymity had been intended to prevent.

75. In these circumstances, it was plainly necessary in the interests of justice, and in order to protect the safety of a party to the proceedings, to depart from the general principle of open justice to the extent involved in the making of the orders made by Lord Boyd. It follows that, subject to any issue arising under the Convention, the order allowing A to withhold his identity in the proceedings was in accordance with the common law, and the section 11 order was made in accordance with the power conferred by that provision.

76. It also follows that the section 11 order was not incompatible with the Convention rights of the BBC. The interference with its freedom of expression was necessary to maintain the authority and impartiality of the judiciary, since its publication of A's identity in connection with the proposed deportation would have completely undermined the judicial review proceedings. In these circumstances, where the publication of A's identity in connection with the proceedings might well have rendered those proceedings pointless, the interference with the BBC's article 10 rights was unavoidable if the authority and impartiality of the judiciary, within the meaning of article 10(2), were to be maintained. Put shortly, the order had to be made if the court was to do its job, notwithstanding the resulting restriction upon the BBC's capacity to do its job. The interference with the BBC's article 10 rights was also necessary for the protection of the rights of others, namely the right of A not to be subjected to violent attack. As Lord Rodger observed in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 27, the media do not have the right to publish information at the known potential cost of an individual being killed or maimed.

77. Although the BBC was not represented before Lord Boyd, it was able to apply to the court promptly for the recall of the order. As I have explained, that application was due to be heard by the court on 9 November 2012, only two days after the order had been made. With the BBC's agreement, that hearing was postponed until 14 November 2012, when Lord Glennie heard the BBC's application over the course of two days. He concluded that the order was justified and should not be recalled. For the reasons I have explained, that decision was correct. The procedure that was followed in my opinion satisfied the BBC's entitlement under the Convention to an effective remedy.

Anonymity in relation to this judgment

78. At the outset of the hearing of this appeal, the court made an order "that no one shall publish or reveal the name of the respondent who is involved in these proceedings or publish or reveal any information which would be likely to lead to the identification of the respondent in connection with these proceedings". That order was made with the agreement of the BBC.

79. A is now residing in the country where, as the tribunal concluded, he is at risk of serious violence if his identity becomes known in connection with these proceedings. His application for judicial review of the tribunal's decision to authorise his deportation has not yet been heard. In these circumstances, it is appropriate both in the interests of justice, and in order to protect A's safety, that his identity should continue to be withheld in connection with these proceedings, and that the order should therefore remain in place.

Conclusion

80. For these reasons, I would dismiss the appeal.