Neutral Citation Number: [2016] EWCOP 21

Case number: **COP1278226**

IN THE COURT OF PROTECTION
(Sitting in public)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2016

Before:

MR JUSTICE CHARLES

IN THE MATTER OF proceedings brought by Kings College NHS Foundation Trust concerning C (who died on 28 November 2015)

BETWEEN in this Application:

V

(Second Respondent in the main proceedings)

Applicant

and

ASSOCIATED NEWSPAPERS LIMITED
TIMES NEWSPAPERS LIMITED
INDEPENDENT NEWS AND MEDIA LIMITED
TELEGRAPH MEDIA GROUP LIMITED
ASSOCIATED PRESS

Respondents

Richard Spearman QC, Vikram Sachdeva QC and Victoria Butler-Cole (instructed by **Bindmans LLP**) for the **Applicant**
Adam Wolanski (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents**
(on 9 December 2015)

Hearing date: 9 December 2015
- -

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.

.....

MR JUSTICE CHARLES

Charles J :

Opening remarks

1. In December 2015 this case attracted a considerable amount of media attention much of which can be characterised as reporting that engaged the prurient interest of the public in the personal details of the lives of others rather than the public interest in important issues relating to:

   i) the capacity of an individual to make decisions about serious medical treatment, and

   ii) the consequences of the conclusion of the Court of Protection (the COP) on whether a person (P) has the capacity to make the relevant decision to refuse life-saving treatment.

2. The COP concluded that the subject of the proceedings (C) had capacity to make the relevant decisions, she decided to refuse the treatment and died.

3. At the hearing on the issue of capacity MacDonald J, sitting as a judge of the COP, heard oral evidence from one of C's adult daughters about C's lifestyle and from three psychiatrists. He gave a public but anonymised judgment which contains a description of aspects of C's life and lifestyle. It is reported as *Re Kings College Hospital NHS Foundation Trust v C & V* [2015] EWCOP 80.

4. The application before me is for a reporting restrictions order that extends beyond the period of the reporting restrictions order granted at the first hearing for directions in the case and was not altered by Macdonald J. By its terms it ended on C's death.

5. At the hearing before me, as they had at an earlier out of hours hearing before Theis J, the media Respondents argued that I should dismiss the application. I am pleased to record that since then they have all recognised that I can and should make a reporting restrictions order.

6. A dispute remains on the duration of that order which engages the general approach that the COP should take to granting reporting restrictions orders / anonymity orders. Whilst:

   i) I agree with the media Respondents that the facts of this case include factors that are unusual, and

   ii) I acknowledge that I am only concerned with a situation in which at earlier stages there has been a public hearing with reporting restrictions that ended before this application was made

   this does not mean that it is not necessary or appropriate for me to address that general approach, and how it affects and is to be applied in this case, to the dispute over duration. In any event, this case also has factors that arise regularly in COP proceedings and, as appears later, an intense scrutiny of the balance to be struck between the relevant Convention rights governs both the initial orders made by the COP relating to a public hearing with or without reporting restrictions and the outstanding dispute in this case on duration.

7. Other issues have been raised since the hearing before me and I will return to them.

8. My discussion of the general approach to be taken by the COP explains why I agree with the parties to this application that an injunction should be granted. It also shows the approach that I think should be taken to the assessment of the competing factors on the disputed issue of its duration. More generally, I hope that it, and the points I raise in the Schedule to this judgment concerning the transparency pilot introduced from 29 January 2016 by a Practice Direction (the Transparency Pilot) and serious medical treatment cases, will be of assistance in:

    i) the application and assessment of the Transparency Pilot, and

    ii) the identification of the right balance between the competing Convention rights in cases covered by it and in serious medical treatment cases. They are not within it, but (in accordance with the earlier practice of the High Court in such cases) the COP has applied and developed a practice of generally ordering a public hearing with reporting restrictions in such cases (see in particular Practice Directions 9E and 13A).

A summary of my conclusions

9. I have concluded:

    (1) The COP has jurisdiction after the finding that C had capacity and her death to make the reporting restrictions order sought by the Applicant but insofar as it may be necessary or appropriate I will also make it as a High Court judge.

    (2) I make that order until further order of the court and on the basis that it will cover the reporting of C's inquest.

    (3) *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 sets out the approach to be applied by the COP in determining whether to grant a reporting restrictions order and so, in each case, the COP has to strike the balance between the competing Article 8 and Article 10 rights. This is a case sensitive exercise and care needs to be taken in transporting comment on the weight of the rival factors from one type of case to another.

    (4) Generally a staged approach that applies the relevant rules and so, in the COP, starts with the consideration of whether there is a good reason for a public hearing should be taken. But, this first stage is not an isolated or preliminary stage that, if such a good reason exists, founds an approach that the second stage is addressed on the premise that COP proceedings are treated in the same way as other proceedings where the default rule is that they are heard in public.

    (5) The default rule, and any practice direction that modifies it, represent a general conclusion on how best to administer justice. In reaching that conclusion a balance will have been struck between the relevant competing Convention rights and the factors, propositions and public interests that underlie them. But *Re S* makes it clear that this is not the end of the process and that as between Articles 8 and 10 (and so the factors, propositions and public interests that

underlie and promote them) neither takes precedence as such and so, in my view, it would be wrong to approach a default rule as creating a presumption. Rather, it is part of the structure for a reasoning process that applies the *Re S* approach to a given case.

(6) In many, and perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The interest protected by publishing names expressed by Lord Rodger in *In re Guardian News and Media Ltd* (the naming propositions) is rather different and on a staged approach will often fall to be weighed against the general conclusion as to anonymised reporting contained in the relevant Rule or Practice Direction.

(7) I suggest that generally the COP should address the following questions:

i) Are there good reasons for the hearing to be in public?

ii) If there are should a public hearing be ordered with or without reporting restrictions?

iii) As part of (ii): How effective are any such reporting restrictions likely to be in protecting and promoting the relevant Article 8 rights and how restrictive are they likely to be of the relevant Article 10 rights having regard to the factors, propositions and public interests that underlie and promote those competing rights?

iv) By reference to the conclusions on the above questions, on Lord Steyn's ultimate balancing test, should the hearing be in private or in public and if in private what documents (with or without redactions and anonymisation) should be made public (and when and how this should be done) and if in public what reporting restrictions order / anonymity order should be made?

(8) The answer to question (i) is almost always going to be "yes" because of the benefits of open justice and so almost always the *Re S* exercise will be engaged by addressing points (7) (ii) to (iv).

(9) On the intense scrutiny that is required of the rival propositions relating to anonymisation I consider that a distinction can be made between (a) cases where pursuant to the default or general position under the relevant Rules or Practice Directions the court is allowing access (or unrestricted access) to the media and the public, and (b) cases in which it is imposing restrictions and so where the court is turning the tap on rather than off. But, I hasten to accept that this distinction:

- simply reflects the strength of the reasoning that underlies the relevant COP Rules and Practice Directions, the established *Scott v Scott* exceptions and the positon referred to by Lady Hale that in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved, and so

- provides weight to the general arguments for anonymity to promote the administration of justice by the COP generally and in the given case, and does not

- undermine the force of the naming propositions as general propositions, with the consequence that the COP needs to remember that it is not an editor.

(10) The weight to be given to (a) a conclusion in certain types of case (including proceedings in the COP) on what generally best promotes the administration of justice and (b) the naming propositions will vary from case to case and on a staged approach to a particular case of that type the weight of the naming propositions, and so this aspect of the factors that underlie and promote Article 10, will often fall to be taken into account in the context of (i) the validity of the reasons for their application in that case, and (ii) the impact of a departure in that case from the general conclusion on what generally promotes the administration of justice in cases of that type. This means that those reasons and that impact will need to be identified in a number of cases.

(11) Reporting restrictions orders in serious medical treatment cases can extend beyond the death of the subject of those proceedings (P) and there is no presumption or default position that such orders should end on P's death.

(12) In this case the Article 8 rights of all of C's children are engaged.

(13) The essential reason for the engagement of those Article 8 rights is that the COP has invaded their private and family lives and made a finding as to its jurisdiction that has had a profound effect and impact on C's family and is based on evidence that relates to the private and family lives of C and her family (and in particular her children).

(14) The ultimate balancing exercise that supports the conclusion that the duration of the reporting restrictions order is to be "until further order of the court" is set out in paragraphs 167 to 169 below.

(15) The ultimate balancing exercise that supports the conclusion that the reporting restrictions order is extended to cover the inquest is set out in paragraphs 178 to 180 below.

A brief history

10. The COP proceedings were brought by King's College Hospital NHS Trust (the NHS Trust) by way of an urgent application on 9 November 2015. Moor J, the urgent applications judge, made a reporting restrictions order in the terms proposed by the NHS Trust and gave directions for the urgent provision of an independent assessment of C's capacity, so that the application could be determined on 13 November 2015. The applicant before me (V) and her sister (G) who are adult daughters of C were made aware of the application by the NHS Trust. V instructed solicitors and was made a party to the proceedings but G was not.

11. The reporting restrictions order was based on a precedent that has been used for some time and included terms preventing:

i) the publication of information that would be likely to lead to the identification of C and V and any member of C's family, if but only if such publication is likely to lead to the identification of C as the subject of an application for serious medical treatment, and

ii) seeking information about C from a member of C's family.

It provided that it was to have effect during C's lifetime.

12. At the hearing on 13 November 2015, MacDonald J did not consider further the reporting restrictions order made by Moor J but approved its continuation. V was too distressed to give oral evidence, and her sister G, who was not legally represented, gave oral evidence. Mr Brian Farmer of the Press Association attended the hearing and subsequently published a summary of the case on 13 November 2015. He has told me that MacDonald J announced his decision at about 8 pm and that, contrary to Mr Farmer's general (and in my view helpful) practice he did not raise the issue of reporting/naming after C's death because of the obvious distress of C's daughters. His summary was picked up by others and was published by them.

13. This publicity contained a photograph of the Royal Courts of Justice and did not identify C. The headline and opening three paragraphs of this Press Association report were:

> **Woman "mentally capable of refusing medical treatment"**
>
> A woman has persuaded a judge that her 50-year-old mother - -who wants to die because she thinks she has lost her "sparkle" -- is mentally capable of deciding to refuse medical treatment in hospital.
>
> The woman told Mr Justice MacDonald that no one in the family wanted her mother to die.
>
> She said she thought that her mother had made a "horrible" decision.

14. MacDonald J's judgment was emailed in draft to the parties' legal representatives on 25 November 2015, with suggested typographical amendments to be returned on 27 November 2015.

15. After the hearing C was moved to a hospice where her condition deteriorated. She died on Saturday 28 November 2015. V and her sister G had spent the last two nights of their mother's life at the hospice sleeping on camp beds next to her.

16. MacDonald J's judgment was handed down (without attendance) on 30 November 2015 and published on Bailii that day or shortly afterwards. The judge had not been informed of C's death and, as I understand it, he had not been informed whether or not C had refused the life-saving treatment that her doctors were advising her to have if she wished to live.

17. After publication of the judgment, there was a significant increase in media interest in reporting the case. It was featured in a number of newspapers and was discussed on Radio 4's Today programme. In the Guardian, a columnist criticised the evidence of C's family, and its acceptance by the court. V's solicitors received 24 press enquiries

on 2 December 2015. Around 40 of the people who contacted G around this time told her that they had been approached by journalists.

18. On 2 December 2015, an application was made out of hours by V for an interim order that the reporting restrictions order be extended. This was granted by Theis J until 9 December 2015. In that order, the members of C's family from whom information was not to be sought were identified in a confidential attached schedule.

19. On 3 December 2015, Theis J gave her reasons for extending the reporting restrictions order in a written judgment ([2015] EWCOP 83). In it she records that, based on a short hearing and limited submissions, she was of the view that "*there is no public interest in C or her family being identified.*"

20. The application came before me on 9 December 2015. In summary, the statements filed in support of it show that:

    i) V and G have been distressed by having to be involved in the COP proceedings, and by the extensive media interest in the information about C and their family that was provided to the COP, which appears to them to have been precipitated not only by a wish to report and comment on the bases on which the COP reached its decision but also to attract prurient interest in their mother's sexual and relationship history (including her relationship with her children V, G and A).

    ii) At the time of the hearing before MacDonald J, neither V nor G anticipated the possibility that C and her family would be named in the press and that photographs of them would be published. Their attention was entirely taken up with the decision the COP was required to make and its implications.

    iii) C's youngest daughter, A, is a teenager who was already suffering from fragile mental health which has manifested itself in her physical conduct. The suicide attempt of her mother and her subsequent refusal of life-sustaining treatment despite A's request to her to accept treatment, with which A had a direct and stressful involvement, have understandably had an appalling impact on A's emotional and psychological wellbeing.

    iv) A has already been negatively affected by the media coverage of the family, despite attempts by her father to shield her from it. Inevitably, A has now been told about certain very limited aspects of the COP's reasoning, including negative descriptions of her mother's character, which have upset her further. A's father and one of her teachers are sure that if her mother is named, this will have an even more serious effect on A's mental wellbeing and her ability to cope at school. V also asks the court to have regard to the serious risks of harassment of A not only directly from people around her, e.g. at school, but also on the internet including and in particular through social media.

    v) There have been numerous attempts by journalists to contact the family and people with a previous relationship with C and her children.

    vi) Family photographs have been obtained and published in a pixelated form.

21. Before the reporting restrictions order was extended:

    i) At around 5.30 pm on Wednesday 2 December 2015 a reporter from the Daily Mail went to the home of A's father (an ex-husband of C) where A lives. A answered the door and without saying who she was the reporter asked to speak to her father using his name, V asked who she was and was told that she was a journalist from the Daily Mail, A's father came downstairs and the journalist asked if he would talk to her about his ex-wife. He refused and the journalist left.

    ii) On the evening of 2 December 2015 a reporter from the Mail on Sunday was asking questions about C in one of the pubs in the village where A and her father live. This was reported to V by friends in the village.

22. More generally, the evidence indicates that on unspecified dates (a) the Daily Mail and the Sun contacted C's third ex-husband in America, and (b) a journalist went to see the husband of the housekeeper of flats where G had once lived seeking G's current details on the basis that he was writing a memorial piece about G's mother and was sure that G would want to speak to him. During his visit he opened C's Facebook page.

23. Some of the coverage contains pixelated photographs of C, V and G. It is plain that some of these photographs have been chosen as photographs that emphasise the aspects of the published accounts that are of prurient interest and there is at least a risk, particularly in respect to C, that she would be recognised by some people.

24. Examples of reporting in the Times (4 December), the Daily Mail (6 December) and the Sun Online (6 December), are highlighted by V:

    i) the Times ran a pixelated photograph of C on its front page with a caption "Voluntary death. The socialite allowed to die at 50 rather than grow old had a narcissistic disorder, doctors said. A court ruling blocked her identification. Page 7". The article at page 7 was under the headline: "I won't become an old banger" there was a further pixelated photograph of C standing by a car and a pixelated photograph of one of C's adult daughters,

    ii) the Daily Mail at pages 26 and 27 published the same pixelated photograph as that on the front page of the Times and the article had the headline: "Revealed: Truth about the socialite who chose death over growing old and ugly ---- and the troubling questions over a judge's decision to let her do it". Near the end of the article it is stated: "For the husband and daughters she leaves behind, the manner of her death is heartbreaking", and

    iii) the Sun Online has two headlines: "Mum who fought to die was "man eater obsessed with sex, cars and cash" and "A Socialite who chose to die at 50 rather than grow old was a "man eater obsessed with sex, money and cars", a pal claimed yesterday" and published two pixelated photographs of C at a younger age each showing her with a drink in hand. In one in which she is wearing a low-cut party dress and in the other she is raising her skirt, standing by a vintage motor car and wearing what appears to be the same outfit as she is

wearing in the photograph on the front page of the Times and in the Daily Mail.

25. The only evidence filed on behalf of the media Respondents for the hearing on 9 December 2015 was sworn by a solicitor and it related to issues concerning the service of the reporting restrictions order, getting copies of it and the giving of notice of the out of hours hearing before Theis J. This evidence was not directed to a request for more time to consider or to take instructions on the evidence put in on behalf of the Applicant or the issues.

26. I acknowledge that the media Respondents had very little time to consider and respond to that evidence (some of which was served the day before) but:

    i) they had had a week to consider their general stance to a continuation of the reporting restrictions order and so a continuing injunction to prevent the publication of material likely to identify C and her family, and

    ii) they would have been fully aware that they could have asked for and would almost inevitably been given more time to consider their position.

Comment and findings on the Applicant's evidence

27. Naturally I accept that this evidence has not been tested by cross examination and that some parts of it might be disputed, but to my mind:

    i) that evidence, and

    ii) the undisputed history

    clearly demonstrate and establish that C's family, and in particular her two adult daughters, were understandably distressed by the intensive and intrusive media attention.

28. I acknowledge that:

    i) C's family would also have been distressed by media attention triggered by the very recent death of their mother and the events leading up to it that focused on the issues of public interest, namely:

        a) the assessment by the COP of a person's capacity, and

        b) the approach of the law to autonomy, namely that someone with the relevant capacity can in exercising their autonomy choose to refuse life-saving treatment, whereas

        c) if the person does not have the relevant capacity the COP, applying a best interest test, can authorise their treatment with a view to prolonging their life,

    ii) significant parts of the coverage did focus on those public interests and did not, for example, publish pixelated photographs of C to draw attention to the

articles but used other photographs (e.g. of glasses of champagne and of the Royal Courts of Justice), and

iii) accurate, anonymised and fair reporting based on the published judgment would contain views and arguments that the family would find distressing.

29. But, in my view it should have been clear to anyone with any compassion that the focus of much of the reporting on C's lifestyle, some of the pixelated photographs that were used, and the nature of some of the approaches and investigations pursued by journalists would greatly add to the distress of C's family and in particular that of her adult daughters. I am satisfied that it did so and that V and G are correct in asserting that much of the publicity was precipitated not only by a wish to report and comment on the bases on which the Court reached its decision but also to attract prurient interest in their mother's sexual and relationship history (including her relationship with them and A).

30. Further, in my view it is obvious that the naming or other identification of C and her family would increase the distress caused to C's family.

31. This is natural because it is one thing for the family to have to endure media attention that will identify them to some and quite another for them to have to endure media attention that names them and so makes them known to a much wider range of people who could subject them to on line and internet comment or in the case of the youngest daughter to problems at school.

32. To my mind, it is obvious that it is very likely if not inevitable that if C and members of her family were identified in it that both of the following would be significantly more distressing to the members of C's family and particularly all of her children:

i) a repeat of the prurient aspects of the reporting that has taken place alone or coupled with the intrusive approach taken by some journalists to seeking information, and

ii) accurate and fair accounts of C's life, the decision of the COP on her capacity, her decision to refuse treatment and so to die and discussion on the issues of public interest that arise in respect of those decisions.

33. A (the teenage daughter) is in a different position to her adult sisters because she was shielded from the earlier publicity, or at least from some of it, and for very understandable reasons she has not been asked about it or her reactions to it.

34. However, there is compelling evidence from the family and a teacher, which I accept, that there is real risk (in the sense of it being more likely than not - rather than a risk that cannot sensibly be ignored) that the identification of C and her family would cause serious and possibly long term harm and distress to A. Indeed, I consider that this would be much more likely than not.

35. These levels of distress and risk for and to C's family and the Convention rights and public interests they engage have to be weighed against the Convention rights and public interests that favour accurate and fair reporting and publicity of the subject matter of these proceedings with or without C and so her family being identified.

The position of the media Respondents on 9 December 2015

36. At the hearing Counsel for the media Respondents:

    i) did not seek time for his clients to consider the evidence and their positions,

    ii) did not recognise that some of the media attention had caused significant distress to C's family, or that identification of C would or would be likely to cause further and heightened distress to C's family and a risk of serious harm to A,

    iii) rather, he made a number of points that the Applicant's evidence did not establish an interference with the Article 8 rights of C's family that warranted the continuation of the restrictions on the identification of C now she was dead and that it lacked sufficient particularity to make good the case that C's family would suffer harm if C's identity was to be published.

37. This stance was taken against the background of a submission that as a matter of law either:

    i) the Article 8 rights relied on by the Applicant were not engaged, and further or alternatively

    ii) existing authority showed that their Article 8 rights are not powerful enough to warrant the continuation of an injunction preventing the identification of C and her family.

38. In light of the comment made by Theis J, and the need for a balancing exercise if I was against the media Respondents on their legal arguments, I asked counsel whether his clients wanted to put in any evidence or comment on why the balance was that it would be in the public interest to publicise C's identity. I also asked if they wanted an opportunity to put in evidence on:

    i) the criticism of the Daily Mail journalist who had visited the home of A's father four days after C's death, and

    ii) points relating to the general approach that the COP should take to making reporting restrictions orders.

39. Counsel took instructions over lunchtime and informed me that he had instructions:

    i) to advance his arguments based on existing authority that the application should be dismissed (which involved an analysis of and submissions on the Applicant's evidence) but that

    ii) if that did not persuade me to dismiss the application his clients would like to take up the opportunity to put in such further evidence and comment.

40. As appears from my ex tempore judgment ([2015] EWCOP 88) I was not persuaded by those legal arguments, and made the point that in my view the wider points that the media Respondents had indicated they would like to address engaged the public

interest in the administration of justice, as had been identified and accepted by their counsel.

41. I extended the order made by Theis J until 4.30 pm on the day I handed down this judgment. I did not set time limits for such further evidence and comment. It arrived at the end of January 2016 in the form of (a) a witness statement from Mr Steafel (the Deputy Editor of the Daily Mail) dated 27 January 2016, (b) a note from Gavin Millar QC and Adam Wolanski of counsel on behalf of the first, second and third Respondents dated 28 January 2016 and (c) a note from Independent Print Ltd (IPL) dated January 2016.

42. The Applicant responded through submissions by her counsel dated 12 February 2016 and on 24 February 2016 counsel informed me that his media clients did not want to make any further comments.

43. I have identified two relevant cases have been reported since the hearing on 9 December 2015 and pre-date the further submissions. They are *R (on the application of C) v Secretary of State for Justice* [2016] UKSC 2 and *PJS v News Group Newspapers Ltd* [2016] EWCA Civ 100. I have also been referred by counsel to *Re W (Children) [2016] EWCA Civ 113* and *Affaire Societe de Conception de Presse v France* [2016] ECHR 216 – judgment in French, with translation by Hugh Tomlinson QC.

44. No-one asked for a further hearing.

The change of position by the media Respondents and the outstanding issues

45. As I have already mentioned, the media Respondents have all recognised that a reporting restrictions order should be made and thus that the legal arguments advanced on 9 December 2015 did not warrant a refusal of the application. I agree.

46. It is asserted, that the primary reason for this change of position is a lack of time to consider the Applicant's evidence prior to the hearing on 9 December 2015. However, as I have mentioned already this was not suggested at that hearing and that evidence was addressed in detail by their counsel to identify its alleged shortcomings, to refute its assertions of distress and harm and to support his submission that I should dismiss the application there and then.

47. IPL asks for guidance to the effect that the default position in serious medical treatment cases should be that reporting restrictions orders made by the COP should, absent exceptional circumstances, end on the death of P. Any such guidance relates to the general approach to be taken by the COP to the dispute over the duration of the injunction.

48. As I understand it, all of the media Respondents (but in any event those other than IPL and perhaps Associated Newspapers Ltd):

    i) invite me to make the reporting restrictions order up to the 18th birthday of A (C's teenage daughter), and

ii) raise a point about the jurisdiction of the COP to make or continue an injunctive order after the death of P, or after a finding that P has capacity.

Point (ii) is not raised as an argument against the making of the injunction but in support of an argument that I should make it as a High Court judge and not as a COP judge.

49. In the written exchanges the Applicant invites me to extend the injunction to cover C's inquest. Counsel for some of the media Respondents points out that no application for this has been served but state that their clients are neutral on this. No response on this point has been sent to me by IPL.

Mr Steafel's evidence

50. I am pleased that he decided to give evidence in respect of what I regard as important matters on which the COP needs evidence from the media to enable it to strike the right balance.

51. In particular I note that he says:

> "I accept that in some cases anonymity will be necessary to protect the rights of parties and their families in court cases, including proceedings in the Court of Protection. I also accept that in some cases the public interest in open justice can still be served despite the existence of anonymity orders. But I believe that there are and will continue to be cases in which the public interest requires parties to be identified. Although in this particular case ANL accepts that the balance is in favour of the family members' Article 8 rights. I do not accept that there can never be a case in which those rights could not be outweighed by Article 10 rights."

52. I agree with and welcome the balanced approach signified by what he says in that paragraph. I express the hope that it is reflected in the approach taken in the future by the media.

53. His evidence does not address:

i) the criticism of the conduct of the reporter who visited the home of A's father and so does not attempt to explain why it is asserted that this conduct complied with the Editors' Code of Practice then in force and so the professional standards to be expected of that reporter, or

ii) the prurient aspects of the reporting and the use of pixelated photographs.

54. Making the unlikely assumption in favour of the reporter that it did not occur to her that A might be at home when she called unannounced, and without any explanation of why that visit was thought appropriate it seems to me that it was a breach of that Code and so the professional standards to be expected.

55. Also, Mr Steafel does not directly address why it would be in the public interest to identify C (and her children and other members of her family) after A's 18th birthday. Rather his comments on identifying the subjects of reporting are made in more general terms and are not related back to this case. I shall return to this issue and the prurient nature of some of the reporting when assessing (a) the balance he refers to in

the passage I have cited from his evidence on the dispute concerning the duration of the injunction, and (b) the application to extend the injunction to cover C's inquest.

The two stages of proceedings in the COP and evidence that is likely to be given at those stages

56. In most cases there are two stages to proceedings in the COP:

    i) the jurisdictional stage, which turns on whether P lacks capacity at the relevant time to make the relevant decision, and if the court concludes that P lacks that capacity and so has jurisdiction,

    ii) the making of a decision on behalf of P applying the best interests test set by the Mental Capacity Act 2005 (the MCA).

57. Other aspects of the substantive jurisdiction of the COP in respect of persons who lack capacity are not governed by, or only by, an application of the best interests test (e.g. applications under s. 21A in respect of authorisations of a deprivation of liberty and issues relating to a lasting power of attorney under s. 23) but I need not explore that part of the jurisdiction conferred on the COP in this judgment.

58. Although I note the possibility raised by McFarlane LJ at paragraphs 41 to 43 of his judgment in *Re M* that the paramountcy principle set out in the Children Act 1989 might govern the grant of a reporting restrictions order in the case of a child (and absent argument on the point) I am of the view that the structure and language of the MCA (see in particular ss. 16 and 47) and the nature of the relief and the competing Convention rights that it engages mean the grant of a reporting restrictions or anonymity order is not governed by the best interests test and I proceed on that basis, as did the parties before me (See also the comment of Lady Hale referred to in paragraph 69 below).

59. In this case C's capacity was in issue. The most relevant provisions relating to the "capacity test" are, with my emphasis:

> 1 The principles
>
> (1) The following principles apply for the purposes of this Act.
>
> (4) **A person is not to be treated as unable to make a decision merely because he makes an unwise decision**.
>
> 2 People who lack capacity
>
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time **he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.**
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
>
> 3 Inability to make decisions
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he **is unable—**

> **(a) to understand the information relevant to the decision,**
>
> **(b) to retain that information,**
>
> **(c) to use or weigh that information as part of the process of making the decision,** or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means).
>
> (4) **The information relevant to a decision includes information about the reasonably foreseeable consequences of—**
>
> **(a) deciding one way or another,** or
>
> (b) failing to make the decision.

60. It is apparent from those provisions that in a number of cases where the capacity of P is in issue the COP will be given, or will seek, evidence about P and his or her approach to life and important decisions in P's life. An obvious source of such evidence is P and members of P's family.

61. As appears from MacDonald J's judgment this is what happened in this case.

62. If the NHS Trust had been satisfied that C had capacity to decide to refuse life-saving treatment it would not have initiated the proceedings in the COP and would have had to respect C's autonomy and so her decision to refuse the treatment.

63. This would have led to C making her decision and her family facing its consequences without having to go through the court process and without there being a public but anonymised judgment.

64. MacDonald J's judgment shows that C did not give oral evidence but that oral evidence about her life and lifestyle that was relevant to the very serious issue whether she had the capacity to refuse life-saving treatment was given by one of her adult daughters.

65. So:

    i) the jurisdiction of the COP was invoked as a result of the treating NHS Trust seeking a welfare order that permitted it to treat C against her expressed wishes and so far as necessary restrain her for that purpose,

    ii) it ended at the jurisdictional stage, and

    iii) after that C made her own decision to refuse treatment. But

    iv) the capacity issue raised emotional and deeply personal issues relating to both C and members of her family (particularly her children) that were relevant to the question whether C could make the decision to refuse life-saving treatment for herself and to the consequences of her doing so.

66. In many other cases relating to medical treatment, other health and welfare issues and matters and to P's property and affairs the jurisdiction will go on to the second stage. When that stage is reached the court applies a best interests test and, in doing so, it must apply s. 4 of the MCA which provides by ss. 4(2) and (6) with my emphasis that:

> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (6) He must consider, so far as is reasonably ascertainable—
>
> (a) **the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)**,
>
> (b) **the beliefs and values that would be likely to influence his decision if he had capacity**, and
>
> (c) **the other factors that he would be likely to consider if he were able to do so.**

67. As this case shows, the matters that must be considered pursuant to s. 4(6) may have been examined and taken into account when determining the capacity issue. For example, they inform whether P has the capacity to make what others may conclude is a bad decision.

68. In many cases it is likely that the evidence about such matters will come from members of P's family and friends and will involve them giving an account of matters that are private and personal to them as well as to P. For example, their views about P, family incidents and P's personal and private affairs and beliefs. However, in my experience save where P has a relevant religious or moral belief about types of treatment, such evidence is rare in serious medical treatment cases and much more common in other cases.

The underlying legal principles that govern the making of reporting restrictions orders

69. Unsurprisingly, there was a significant overlap between the parties on the leading cases to be considered in the context of the legal principles to be applied and so on the need to weigh the competing Convention rights. Indeed, at paragraph 20 of her judgment in *R(C) v the Secretary of State for Justice* [2016] UKSC 2 Lady Hale describes this as trite law (citing *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593).

70. In *Re S* is an important decision in this area. In it the House of Lords was considering the identification of a child through publication of a criminal trial of the child's mother for the murder of the child's sibling.

71. The decision and reasoning of the House of Lords is helpfully and accurately summarised in the headnote but the following extracts from the speech of Lord Steyn (with my emphasis) are worth noting:

> 17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. **First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account.**

Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.

23. The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. **The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the ECHR. This is the simple and direct way to approach such cases.** In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the ECHR provisions. ----------

IX. Article 8.

24. On the evidence **it can readily be accepted that article 8 is engaged**. Hedley J observed (para 18) "that these will be dreadfully painful times for the child". Everybody will sympathise with that observation.
25. But it is necessary to measure the nature of the impact of the trial on the child. He will not be involved in the trial as a witness or otherwise. It will not be necessary to refer to him. No photograph of him will be published. **There will be no reference to his private life or upbringing. Unavoidably, his mother must be tried for murder and that must be a deeply hurtful experience for the child. The impact upon him is, however, essentially indirect.**
26. While article 8.1 is engaged, and none of the factors in article 8.2 justifies the interference, it is necessary to assess realistically the nature of the relief sought. **This is an application for an injunction beyond the scope of section 39, the remedy provided by Parliament to protect juveniles directly affected by criminal proceedings**. No such injunction has in the past been granted under the inherent jurisdiction or under the provisions of the ECHR. ----------
27. The interference with article 8 rights, however distressing for the child, **is not of the same order when compared with cases of juveniles, who are directly involved in criminal trials.** In saying this I have not overlooked the fact that the mother, the defendant in the criminal trial, has waived her right to a completely public trial, and supports the appeal of the child. In a case such as the present her stance can only be of limited weight.

X. Article 10.

28. Article 10 is also engaged. **This case is concerned with the freedom of the press, subject to limited statutory restrictions, to report the proceedings at a criminal trial without restriction.** It is necessary to assess the importance of this freedom. I start with a general proposition. In *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 Lord Nicholls of Birkenhead described the position as follows (200G-H):

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

These observations apply with equal force to the freedom of the press to report criminal trials in progress and after verdict.

29. The importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms. In *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966, Lord Woolf MR explained (at 977):

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why

> proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely . . . Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

These are valuable observations. It is, however, still necessary to assess the importance of unrestricted reporting in specifics relating to this case.

30. Dealing with the relative importance of the freedom of the press to report the proceedings in a criminal trial Hale LJ drew a distinction. She observed (at para 56):

> "The court must consider what restriction, if any, is needed to meet the legitimate aim of protecting the rights of CS. If prohibiting publication of the family name and photographs is needed, the court must consider how great an impact that will in fact have upon the freedom protected by Article 10. It is relevant here that restrictions on the identification of defendants before conviction are by no means unprecedented. The situation may well change if and when the mother is convicted. There is a much greater public interest in knowing the names of persons convicted of serious crime than of those who are merely suspected or charged. These considerations are also relevant to the extent of the interference with CS's rights."

I cannot accept these observations without substantial qualification. **A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process.** Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. **It promotes the values of the rule of law.**

31. For these reasons I would, therefore, attribute greater importance to the freedom of the press to report the progress of a criminal trial without any restraint than Hale LJ did.

XI. Consequences of the grant of the proposed injunction.

32. There are a number of specific consequences of the grant of an injunction as asked for in this case to be considered. **First, while counsel for the child wanted to confine a ruling to the grant of an injunction restraining publication *to protect a child*, that will not do. The jurisdiction under the ECHR could equally be invoked by an adult non-party faced with possible damaging publicity as a result of a trial of a parent, child or spouse**. Adult non-parties to a criminal trial must therefore be added to the prospective pool of applicants who could apply for such injunctions. This would confront newspapers with an ever wider spectrum of potentially costly proceedings and would seriously inhibit the freedom of the press to report criminal trials.

72. The *Re S* exercise has been called one of parallel reasoning and in the context of this and other similar cases it engages competing titans who start level and none of them hold a trump card. As was accepted by the media Respondents one of the factors (and so titans) in this case is the administration of justice.

73. As Baker J points out in *In re M (A Patient) (Court of Protection: Reporting Restrictions)* [2012] 1 WLR 287 at paragraph 44 of his judgment (where he cites from the judgment of Maurice Kay LJ in *Donald v Ntuli (Guardian News & Media Ltd intervening*) [2011] 1 WLR 294):

    i) the intense scrutiny involved on both sides of the argument means that the application of the guiding principles is case sensitive and care needs to be taken in transporting comment on the weight of a particular factor or point from one case to another, and

    ii) the point that the injunction here relates to proceedings in the COP (and in particular to identifying that C was the subject of those proceedings) is a relevant and important factor that could mean that comments and factors regarded as important in other cases are less relevant or important in this and other cases relating to the COP.

    The point referred to in (i) is founded on the speech of Lord Steyn in *Re S* and his reasoning also supports the point referred to in (ii).

74. In my ex tempore judgment these points are reflected by my comment that it is important to remember that in exercising its jurisdiction the COP invades family life.

75. The COP has an investigatory jurisdiction with adversarial elements (e.g. on resolving disputes of fact). The jurisdiction relates to a person, referred to as P in the MCA, who lacks capacity to make the relevant decision. So the COP must investigate and make findings that found its jurisdiction and, if it has jurisdiction, enable it to make evidence based decisions on behalf of P. Those decisions and the evidence on which they are based relate to matters concerning and which affect private and family life.

76. Plainly that jurisdiction invades the private and family life of the subject of the proceedings because:

    i) it arises when P may not be able to or cannot make his own decisions because he lacks the capacity to do so, and it has the result that

    ii) decisions that P could have made in private, and which may relate to very personal matters, become the subject of court proceedings because P lacks the relevant capacity.

    Also, such decisions will regularly affect and have an impact on the private and family life of others, and in particular P's family.

77. Additionally, the COP, like other courts, makes evidence based decisions and so it will regularly hear evidence from a range of people about P and, particularly in the case of family members, such evidence is likely to cover their views and other matters that engage their own personal and family life and which may well relate to very personal matters. And, as is clear from this case, this evidence based approach means that the invasion can extend beyond P's individual life because it can directly and indirectly engage the family life of other members of P's family and others as witnesses or participators in relevant events.

78. The nature and this inevitable effect of the jurisdiction of the COP and the principle of open justice are clearly important factors to be taken into account by the COP in its assessment of whether generally the administration of justice will be best served by a private hearing (with or without the publication of some documents or material e.g. a judgment), or by a public hearing (with or without reporting restrictions). In each case, this general conclusion and the reasoning for it will be a factor to be taken into account in what Lord Steyn refers to as the ultimate balancing test to determine where the overall balance between the competing Convention rights lies.

The relevant COP Rules

79. The general default position is set by Rule 90 which provides that hearings in the COP are to be held in private with the result that s. 12 of the Administration of Justice Act 1960 (the AJA 1960) applies and so publication of information about the proceedings is generally a contempt of court. This default rule does not apply to applications for contempt of court, where the default rule is that the hearing is to be in public (see Rule 188(2)).

80. An order for a public hearing is a departure from this default position. However, it has always been the case that the COP should consider whether that default position should apply and Rule 5(2)(l) and (m) now expressly provide and confirm that in managing a case the COP must consider whether any hearing should be in public and whether any document relating to the proceedings should be a public document and if so whether it should be redacted.

81. Rule 92 provides:

> 92. Court's power to order that a hearing be held in public
>
> (1) The court may make an order—
> (a) for a hearing to be held in public;
> (b) for a part of a hearing to be held in public; or
> (c) excluding any person, or class of persons, from attending a public hearing or a part of it.
>
> (2) Where the court makes an order under paragraph (1), it may in the same order or by a subsequent order—
> (a) impose restrictions on the publication of the identity of—
> (i) any party;
> (ii) P (whether or not a party);
> (iii) any witness; or
> (iv) any other person;
> (b) prohibit the publication of any information that may lead to any such person being identified;
> (c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or
> (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.

82. Rule 93 provides that an order under Rule 92 may only be made where it appears to the court that there is good reason for making it and that it can be made at any time either on the court's own initiative or on application.

83. Rule 92 has two parts but its starting point (namely the default rule that hearings will be held in private and publication of information about the proceedings will generally be a contempt) means that in most, if not all, cases in which the COP considers whether there is a good reason for a public hearing:

    i) it will consider what, if any, orders should be made under Rule 92(2), and in most cases

    ii) the terms and effectiveness of an order under Rule 92(2) will be taken into account by the court in its consideration of whether it should exercise its power to order that the hearing should be in public.

84. The general approach of not considering whether there should be a public hearing without also considering what reporting restrictions should be imposed is not based simply on the Rules. Rather, the Rules and this process reflect the nature and effect of the jurisdiction of the COP and one of the long established exceptions to the general rule that courts sit in public (see *Scott v Scott* [1913] AC 417).

85. Those exceptions are based on the balance between open justice and the need to do justice in certain types of case, as are presumptions of anonymity in certain types of proceedings and the ECHR has held that the default rule for hearings of this type to be in private is Convention (and so Article 6) compliant (see *B v United Kingdom* (2001) 34 EHRR 529 at paragraph 38 and *X (Residence and contact – Rights of the Media to Attend)* [2009] EWHC 178 (Fam), [2009] EMLR 26 at paragraph 30, which both concern Family proceedings but engage the same underlying point (and see *R(C)* at paragraph 17).

The impact of the Rules and the underlying reasons for the Scott v Scott exceptions

86. It would be wrong to take an approach to issues relating to reporting restrictions or anonymity orders made by the COP, and therefore to the weight to be given to competing Convention rights, that the starting points are that:

    i) there will a public hearing in the COP, and

    ii) any reporting restrictions are sought or granted from that starting or default position (as for example would be the case in criminal and most civil cases).

87. Rather, the starting point is the default rule which:

    i) reflects a well-established exception to the general approach that courts sit in public, and

    ii) founds a distinction, equivalent to that recognised in *Re C* at paragraph 21, between reporting restrictions orders and anonymity orders made by the COP and many such injunctions made in other circumstances.

88. The general approach described above to the making of an order by the COP for a public hearing underlies and is reflected in:

    i) the practice of the COP to applications relating to serious medical treatment set out in Practice Direction 9E, which at paragraph 16 provides that the court will

ordinarily make an order pursuant to Rule 92 that any hearing be held in public, with restrictions to be imposed in relation to publication of information about the proceedings,

ii) the Practice Guidance of 16 January 2014 which gives guidance on the publication of judgments and provides that, unless the judge otherwise directs, the rubric to the judgment shall provide that the anonymity of P and his or her family must be preserved (as was done in this case), and

iii) the Transparency Pilot which effectively reverses the default position by the making of an order (a Pilot Order) that direct a public hearing (an attended hearing) and imposes reporting restrictions.

89. *Independent Media News and Media Ltd v A* [2009] EWHC 2858 (Fam) and [2010] EWCA Civ 343 and *Re C* support a staged approach that applies the relevant rules and so, in the COP, starts with the consideration of whether there is a good reason for a public hearing.

90. But, this first stage is not an isolated or preliminary stage that founds an approach that the second stage is addressed on the premise that, if such a good reason exists, the COP proceedings are treated in the same way as other proceedings where the default rule is that they are heard in public. This is because the weight of the main competing factors at this stage namely:

i) the public interest in justice being administered in public, and

ii) the personal and private nature of the issues to be determined by the COP

will nearly always be affected by the existence and the likely effectiveness and impact of reporting restrictions.

91. Rather the default rule, and any practice direction that modifies it, represent a general conclusion on how best to administer justice. In reaching that conclusion a balance will have been struck between the relevant competing Convention rights and the factors, propositions and public interests that underlie them. But *Re S* makes it clear that this is not the end of the process and that as between Articles 8 and 10 (and so the factors and matters and public interests that underlie and promote them) neither takes precedence as such in a given case and so, in my view, it would be wrong to approach a default rule or practice as creating a presumption. Rather, it is part of the structure for a reasoning process that applies the *Re S* approach to a given case.

92. This staged approach accords with the approach taken by Lady Hale in *Re C* where in contrast to the earlier proceedings in the First-tier Tribunal, which had been held in private pursuant to its default Rule (see paragraph 23), the relevant default Rule for the judicial review (see paragraph 14) was for a public hearing and at paragraphs 1 and 36 Lady Hale said (with my emphasis):

> 1. **The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law.** In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that

> they have not heard or seen. **The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge. The rationale for the second rule is not quite the same as the rationale for the first, as we shall see. This case is about the second rule**. There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property. **The first issue before us is whether there should be a presumption of anonymity in civil proceedings, or certain kinds of civil proceedings, in the High Court relating to a patient** detained in a psychiatric hospital, or otherwise subject to compulsory powers, under the Mental Health Act 1983 ("the 1983 Act"). **The second issue is whether there should be an anonymity order on the facts of this particular case.**
>
> *Conclusion in principle*
>
> 36. **The question in all these cases is that set out in CPR 39.2(4)**: is anonymity necessary in the interests of the patient? **It would be wrong to have a presumption that an order should be made in every case. There is a balance to be struck. The public has a right to know, not only what is going on in our courts, but also who the principal actors are.** This is particularly so where notorious criminals are involved. They need to be reassured that sensible decisions are being made about them. On the other hand, the purpose of detention in hospital for treatment is to make the patient better, so that he is no longer a risk either to himself or to others. That whole therapeutic enterprise may be put in jeopardy if confidential information is disclosed in a way which enables the public to identify the patient. It may also be put in jeopardy unless patients have a reasonable expectation in advance that their identities will not be disclosed without their consent. In some cases, that disclosure may put the patient himself, and perhaps also the hospital, those treating him and the other patients there, at risk. **The public's right to know has to be balanced against the potential harm, not only to this patient, but to all the others whose treatment could be affected by the risk of exposure.**

The answer to the second question in *Re C* was that the balance in that case founded the making of an anonymity order.

93. Lady Hale also referred to the default Rules in the COP and the proposed transparency pilot (see paragraph 25) and commented that in all other jurisdictions dealing with the detention, care and treatment of people with mental disorders and disabilities, the starting point is usually privacy and always anonymity, although either or both may be relaxed. She went on to comment that this reflects the long-standing practice based on *Scott v Scott*. She also makes it clear that in answering the questions set by CPR 39.2(4) and so in striking the balance the approach to be applied is that described in *Re S* (see paragraph 20). And at paragraph 18 of her judgment she introduces her reference to well- known passages relating to the importance of a name and so in the identification of those involved to reporting that engages the attention of the public (cited at paragraph 154 below) (the "naming propositions") with the following:

> 18. However, in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The interest protected by publishing names is rather different, and vividly expressed by Lord Rodger in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 63:

94. In my view this recognition of the validity of a conclusion that generally in certain types of case (including proceedings in the COP) the administration of justice will be

best promoted by either a private hearing or a public hearing with effective reporting restrictions, supports the view that on a staged approach to a particular case of that type the weight of the naming propositions, and so this aspect of the factors that underlie and promote Article 10, will often fall to be taken into account in the context of (i) the validity of the reasons for their application in that case, and (ii) the impact of a departure in that case from the general conclusion on what generally promotes the administration of justice in cases of that type. This means that those reasons and that impact will need to be identified in a number of cases.

95. The weight to be given to the naming propositions and the conclusion on what generally best promotes the administration of justice will vary from case to case. For example:

i) if the case involves a celebrity but otherwise is not out of the ordinary and so the COP would be exercising a well-known decision making process the difficulty or impossibility of providing effective anonymisation may found a decision not to order a public hearing, and so to leave it to the trial judge to determine what if any document or judgment should be made public (see the Practice Guidance of 16 January 2014 and Rule 5(2)(l) and (m)). But if the case raises new or unusual points and so is out of the ordinary this may found a decision for a public hearing with no (or unusual) reporting restrictions, and

ii) when findings of serious mistreatment or malpractice are sought or when a member of a family wants (or has initiated) publicity that identifies P and family members issues will arise whether there should be a public hearing with no reporting restrictions (so the rival arguments and assertions are made public and linked to identified individuals) or whether there should be a private hearing (with disclosure to relevant bodies or persons).

96. I suggest that generally the COP should address the following questions:

i) Are there good reasons for the hearing to be in public?

ii) If there are should a public hearing be ordered with or without reporting restrictions?

iii) As part of (ii): How effective are any such reporting restrictions likely to be in protecting and promoting the relevant Article 8 rights and how restrictive are they likely to be of the relevant Article 10 rights having regard to the factors, propositions and public interests that underlie and promote those competing rights?

iv) By reference to the conclusions on the above questions, on Lord Steyn's ultimate balancing test, should the hearing be in private or in public and if in private what documents (with or without redactions and anonymisation) should be made public (and when and how this should be done) and if in public what reporting restrictions order / anonymity order should be made?

97. The answer to question (i) is almost always going to be "yes" because of the benefits of open justice and so almost always the *Re S* exercise will be engaged by addressing points 96 (ii) to (iv).

Jurisdiction of the COP to make a reporting restrictions / anonymity order after it has determined that C had capacity and/ or after C's death

98. As I have already mentioned this jurisdictional point is raised by the media Respondents but they do not resist me making an injunction as a High Court judge. They base the argument on the finding of capacity made by MacDonald J. The Applicant addresses the relevant jurisdictional effect of this finding and of C's death.

99. The media Respondents rely by analogy on *In re Trinity Mirror Plc and others* [2008] QB 770 concerning s.45(4) of the Supreme Court Act 1981 which provided that in "all other matters incidental to its jurisdiction" the Crown Court was to have the like powers, rights, privileges and authority as the High Court. The Court of Appeal held that the Crown Court has no inherent jurisdiction to grant injunctions and that unless "the proposed injunction is directly linked to the exercise of the Crown Court's jurisdiction and the exercise of its statutory functions, the appropriate jurisdiction is lacking".

100. Section 47 of the MCA is worded slightly differently and provides that: "the court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court". It is generally accepted that the COP does not have an inherent jurisdiction so the issue is whether it can grant an injunction because it is exercising that power "*in connection with its jurisdiction*".

101. At the time that the reporting restrictions order was made in this case by Moor J, sitting as a judge of the COP, I consider that it is clear that he was making that order in connection with the jurisdiction of the COP to determine initially whether or not C had capacity. In my view, it follows that he could in reliance on s. 47 have made that order for a period extending beyond any finding made that C had capacity, or the death of C (as to which see further below), if he had thought that that was appropriate. He did not do so.

102. The effect of the argument of the media Respondents is that if the hearing on 13 November 2015 had been before a judge, other than a High Court judge (which is not the practice in serious medical treatment cases but could occur in other cases) that judge having determined and announced his decision that C had capacity as a judge of the COP had no jurisdiction to continue, vary or discharge the injunction granted by Moor J. To my mind, that would be an unfortunate and odd result particularly, for example, if C had asked for it to be discharged. However, in my view, it does not arise because I consider that the termination, continuation or variation of an injunction made by the COP in the exercise of its jurisdiction conferred by s. 47 would also be within the jurisdiction so conferred as being "in connection with its jurisdiction".

103. However, by its terms the injunction that was granted by Moor J expired on the death of C and so the present application is for a new injunction that was made at a time when for two reasons the COP no longer had jurisdiction over C and was therefore *functus officio.*

104. The Applicant points to a number of sections in the MCA which give the COP jurisdiction to make orders in respect of persons whether they have or lack capacity (see ss 15 (1)(c), 21A, 23 and 26(3)) but, in my view, this does not provide an answer

because in this case the COP was not exercising jurisdiction under any of those sections.

105. To my mind the question on this application is whether the COP has power to grant a new injunction because it relates to proceedings that were before it although by reason of its decision and/or the death of P it no longer has any jurisdiction to make the welfare order sought. The answer is determined by considering whether in those circumstances it is exercising a power "*in connection with its jurisdiction*". In my view the answer is that it is. This is because, in my view, the nature and extent of the relevant Article 8 rights relied on flows from the existence of the earlier proceedings before the COP, in which it exercised its jurisdiction and I see no reason to construe s. 47 to limit the power it confers to the period during which that jurisdiction continues to exist over the subject of the proceedings.

106. Indeed, I agree with the Applicant that the principle that legislation should be interpreted so far as possible to be compatible with Convention rights supports this conclusion because:

i) it promotes the grain of the legislation (the MCA), and

ii) it enables the court best placed to carry out the balancing exercise between competing Convention rights to perform that exercise.

107. That grain links back to the points I have already made that the jurisdiction of the COP invades not only the life of its subject P but also on many occasions the lives of others and in particular P's family members.

108. *Conclusion.* I can make the injunction sought as a judge of the COP and I do so. However to avoid any jurisdictional argument in the future, and if and so far as this is necessary, I also make it as a High Court judge exercising the jurisdiction of that court.

The arguments advanced by the media Respondents on 9 December 2015

109. Counsel for the media Respondents submitted that that the application was founded on three or four grounds and none of them provided a sound basis in law for the grant of the injunction sought. The reference to three or four grounds was based on a distinction that could be made between the Article 8 rights of the adult daughters and those of the teenage daughter. The other grounds identified were (a) C's medical confidentiality, which it was argued did not survive her death, and (b) the administration of justice. It is convenient to deal with the last ground when I consider the balancing exercise in this case.

110. *The argument on the Article 8 rights of C's daughters advanced on 9 December 2015.* It was argued that the impact of publication of C's identity, and so the identities of her daughters, did not found a cause of action by engaging the Article 8 rights of C's daughters or otherwise and further or alternatively that existing authority showed that their rights did not provide the basis for an injunction. The focus of the argument was on the teenage daughter because it was accepted that her case had additional features to those of the two adult daughters which made her case on the harm that she would suffer as a result of the publication of C's identity (and so her identity) stronger.

111. The argument was founded on *OPO v MLA* [2014] EWCA Civ 1277: [2015] EMLR 4. It was argued that none of the articles had been or were likely to be about C's children and so any impact on them of articles identifying C, and directed to C's private life, would be indirect and the threshold for establishing actionable rights based on the publication of material about another's private life was high and A (and a fortiori her adult sisters) did not meet it.

112. OPO was a child. His father MLA had written a book. OPO (through a litigation friend) sought an injunction to restrain its publication. One of the causes of action advanced to found the relief was misuse of private information. The Court of Appeal held that OPO had no such cause of action and so upheld the refusal of the court below to grant an injunction on that basis. However, the Court of Appeal did grant an interim injunction founded on the prospects of success of one of OPO's other causes of action, namely the intentional infliction of emotional harm by MLA. That is not relevant here.

113. The evidence of the risk of harm and the severity of such harm to OPO can be said to be higher than that to A. But, to my mind, any such differences do not matter and the argument of the media Respondents did not turn on degree of harm or its likelihood. Rather, the argument was that the private information was MLA's as it related to him and in particular his tormented childhood. I am not clear whether there were any references in the book that referred to OPO or were directly linked to OPO (see paragraphs 14 and 17 of the judgment of Arden LJ) and I confess that I am also unclear what the ratio for the conclusion that OPO had no cause of action for misuse of private information (MPI) is (see paragraphs 45 to 47). But it is clear that the Court of Appeal decided that OPO had no such cause of action against his father.

114. I do not understand why it was concluded by the Court of Appeal that only the Family courts had a jurisdiction based on a child's right to private and family life that is the subject of *Re S*. All public authorities and so courts must take Convention rights into account (see s. 6 of the Human Rights Act 1998) and I note that in taking the jurisdictional point on the limits of the COP to grant the injunction sought it was not argued that the *OPO* case founded or supported an argument that only the COP could grant the injunction sought here.

115. Rather, counsel for the media Respondents relied on both *OPO* and *Re S* to support his alternative submission that the indirect engagement of the Article 8 rights of all of C's daughters could not or did not outweigh Article 10.

116. In *Re S*, it was accepted that the child's Article 8 rights were engaged and that the circumstances of a publication relating to the criminal trial would be dreadfully painful times for the child (see paragraph 24 of Lord Steyn's speech). It was also pointed out that the basis for the injunction sought could not be confined to children because adults also have Article 8 rights (see paragraph 32).

117. *Conclusion on the argument on the Article 8 rights of C's daughters advanced on 9 December 2015.* As I have already mentioned in my view the media Respondents were correct to abandon their stance that as a matter of law, or precedent on the relevant balancing exercise, these arguments found the dismissal of the application before me.

118. A general and decisive reason for this is that each case has to be addressed by reference to its own circumstances. That means that a starting point that none of C's children would have a cause of action for MPI against their mother or a publisher does not take one anywhere not least because none of them are asserting such a cause of action and their mother (and so the media) is not seeking to publish her identity as part of an account she wants to give of her private information or her perspective on her private and family life.

119. Rather here, as in the different circumstances in *PJS v News Group Newspapers* [2016] EWCA Civ 100 the Applicant is relying on the duty of the court not to act in a way that is incompatible with the Convention rights of C's family. And so, by reference to the first stage of the reasoning process described by Jackson LJ, the Applicant is relying on the nature and effect of the COP's jurisdiction, its Rules and practice which reflect the long standing *Scott v Scott* exception to establish the reasonable expectation of privacy and the Article 8 rights of C's family.

120. The essential reason for the engagement of those Article 8 rights is that the COP has invaded their private and family lives and made a finding on its jurisdiction that has had a profound effect and impact on C's family and is based on evidence that relates to the private and family lives of C and her family (and in particular her children).

121. That approach means that the point that the impact or much of the impact on C's children is indirect does not of itself provide an answer to whether their Article 8 rights are engaged. Indeed, such a conclusion would run counter to acceptance in *Re S* that the indirect impact on the child in that case engaged the Article 8 rights of that child. I also note that in *Affaire Societe de Conception de Presse* the Strasbourg court proceeded, albeit in very different circumstances, on the basis that the publication of a photograph of a person engaged the Article 8 rights of his family members.

122. Further, it cannot be said that the result of the balancing exercise in *Re S* provides the answer here because the intense scrutiny it triggered engages other factors, and in particular the reporting of criminal proceedings without restriction.

123. If one is looking for an analogy the closest in the cases I was referred to is in *X v Dartford and Gravesend NHS Trust (Personal Injury Bar Association and another intervening)* [2015] 1WLR 3647 in particular at paragraphs 25 to 35. This relates to anonymity orders in respect of the settlement of cases for damages for personal injuries and shows that in contrast to the position in *Re S* the conclusion was that normally it should be recognised that the court is dealing with what is essentially private business albeit in open court and so should without the need for any formal application and so prior notice of any such application being given to the media should normally make an anonymity order (i.e. an order that prohibit the identification of the claimant and his or her immediate family and his or her litigation friend (see paragraph 34)).

124. *C's medical confidentiality*. If the only basis on which the injunction was sought was to preserve the duties of confidence owed to C in respect of her medical information there would be force in the point that such a duty should not found the injunctive relief sought after C's death (see for example the *LM* case (cited below at paragraph 144) at paragraph 40 of the judgment of Peter Jackson J). But this was not the only basis on which the Applicant sought the injunction and in any event it would not

render a balancing exercise unnecessary on the facts of this case (again see the *LM* case).

125. *Conclusion on the argument relating to C's medical confidentiality.* As I have already mentioned in my view the media Respondents were correct to abandon their stance that as a matter of law or precedent on the relevant balancing exercise this argument founds the dismissal of the application in this case.

The balancing act in this case

Introduction

126. At paragraph 96 I posed a set of questions to be addressed. In accordance with the normal approach to serious medical treatment cases they resulted in an order for a public hearing of this case and a reporting restrictions order based on an established precedent. It expired on C's death.

127. The last three of my questions now apply to the disputed issue relating to the duration of the reporting restrictions order and so the *Re S* exercise against the background that there has been a public hearing, an anonymised judgment, some publicity and the expiry of the original reporting restrictions order.

128. In that context:

i) it has now been accepted that the Article 8 rights of C's children are engaged and that for a period after the death of C the ultimate balancing test gives a result that prevents the publication of the name or photographs of C and members of her family that are likely to lead to the identification of C as the subject of the COP proceedings and thus of MacDonald J's anonymised judgment, and

ii) the issue is whether the close scrutiny of the competing factors should found a different result at a date that can be defined now, namely that from that date (A's 18th birthday) there should be no or different reporting restrictions.

129. That issue clearly involves an identification of the competing factors that have founded the original orders and the common ground that reporting restrictions should remain in force. This is because they provide the background to the assessment of whether the balance between them warrants either a fixed term order or one until further order.

The competing factors

130. *The good reasons for a public hearing.* In this case it is clear that such reasons are provided by (a) the general benefits that flow from a public hearing, (b) the issues involved in and affected by the case, (c) the public interest in people who are interested in the case, the wider public and the media knowing what the decision making process of the COP is in such cases. The existence of such good reasons has been recognised for a long time in serious medical treatment cases and founds the practice of the COP in them.

131. Effectively the same reasons underlie the Transparency Pilot.

132. One of the general benefits of a public hearing is that it promotes high standards in the presentation and determination of cases. Based on my experience of private and public hearings I consider that this is a weighty factor.

133. There are significant flaws in the counter argument that unless there is a private hearing the quality of the decision making will be reduced because those involved in COP proceedings will be inhibited from bringing or taking part in those proceedings or from giving a full account of relevant events. I acknowledge that this wish for privacy reflects a natural reaction but that reaction applies to many proceedings that are heard in public (e.g. criminal trials, personal injury and medical negligence injury claims and partnership disputes) where parties and witnesses give full evidence. Also, it seems to me that privacy is not something that necessarily promotes honesty or openness and the prospect that a public hearing would deter people from advancing irrelevant or incorrect assertions should be factored in.

134. The point that no absolute guarantee of confidentiality can be given greatly weakens the counter argument (see for example disclosure pursuant to Rule 91 and Part 3 of Practice Direction 13A). Also, so far as I am aware, there is no research on the question of what harm is done by partial, incorrect or incomplete accounts being given of private proceedings in the local community, whether the giving of such accounts would be reduced if there was a public hearing and how any such harm would be alleviated by such accounts being corrected and an accurate account of both sides of a dispute being given.

135. To my mind, as with the engagement of the Article 8 rights of participants in COP proceedings, the essential reason for a conclusion that the administration of justice by the COP is best promoted by either a private hearing or a public hearing with reporting restrictions is the invasion by the COP into the private and family life of the relevant people on the basis that the subject to the proceedings lacks, or may, lack capacity to make the relevant decisions. Naturally, the argument for a private hearing on that basis (or the basis referred to in the last two paragraphs) is greatly weakened by effective reporting restrictions and a responsible approach being taken by the public generally (e.g. on social media and the internet) and the national and local media.

136. *The Article 8 rights and the good reasons for a private hearing or reporting restrictions.* On changing their position the media Respondents through Mr Steafel (see citation at paragraph 51 above) refer to the family members' Article 8 rights but the underlying thrust of their point that the injunction should end on A's 18th birthday is that the adult children either do not have any relevant Article 8 rights, or that those that they do have are (and will) not be strong enough to found an injunction on the ultimate balancing test. I disagree.

137. Firstly, in my view the application of the points that I have made relating to the nature and effect of the jurisdiction and evidence based decision making of the COP, its rules and practice found the conclusion that all of C's children have Article 8 rights that the COP must take into account. This is supported by *Re S.* In other cases other witnesses and/or parties will for the same reasons have Article 8 rights.

138. I repeat that the essential reason for the engagement of the Article 8 rights of C's children is that the COP has invaded their private and family lives and made a finding

as to its jurisdiction that has had a profound effect and impact on C's family and is based on evidence that relates to the private and family lives of C and her family (and in particular her children).

139. To my mind it is clear that the nature of the evidence that V was too distressed to give and so which G gave clearly:

i) engages their Article 8 rights, and

ii) demonstrates that it relates to their personal and family life as well as to C's.

140. It only takes a moment to realise how personal and emotionally difficult it was for them to give or support the giving of evidence concerning their lives and that of their mother which could found the view that their mother had the capacity to make a decision effectively to end her life that they thought was unwise and they did not want her to make. The giving of that evidence took courage and I suggest shows a recognition by C's children of the importance of their mother's wishes, feelings and beliefs being made known to the COP and thus of their devotion and responsibility. Much of the evidence is extremely personal and goes to the core of the private mother and child relationship which clearly does not end when the child attains the age of majority.

141. I have already made findings on the distress caused and likely to be caused to those adult children V and G (see paragraphs 27 to 35 above).

142. Turning to A, there is no magic in her attaining the age of 18 and nothing to indicate that by that, or any other age, she will have overcome her existing vulnerabilities, or that they will have been reduced to the extent that the naming of C and her children will not cause significant harm to A.

143. Further, in my view the suggestion that she or her sisters should seek an extension of the injunction shortly before her 18th birthday when, if things go to plan, she will shortly be sitting her A levels is callous particularly as no assertion has been made that is specifically related to the circumstances of this case that publicity at that date that named of C and her family would promote Article 10 and the public interests on which it is based (see paragraphs 154 to 169 below).

144. *The death of C.* On 9 December 2015, I was invited not to follow two decisions at first instance namely *Re Gladys Meek; Jones v Parking and Others* [2014] EWCOP 1 (in particular at paragraph 104) and *The Press Association v Newcastle upon Tyne Hospitals Foundation Trust* [2014] EWCOP 6 (the *LM* case*)* (in particular at paragraphs 33, 39 to 43) which support the view that a reporting restrictions order made in respect of proceedings in the COP can continue after the death of the subject of those proceedings (P). I did not do so and in my view the acceptance by the media Respondents that a reporting restrictions order can be continued after the death of P is correct.

145. In my view, the relevant jurisdiction as exercised in those cases, and by Baker J in *In re M*, does enable the COP (or the High Court) to grant an injunction that extends beyond the death of P. I agree with and gratefully adopt what Peter Jackson J said at paragraph 42 of *Re LM* namely:

> 42. I conclude that where a court has restricted the publication of information during proceedings that were in existence during a person's lifetime, it has not only the right but the duty to consider, when requested to do so, whether that information should continue to be protected following the person's death, and to balance the factors that arise in the particular case.

146. To my mind, this is also recognised by paragraphs 27 and 29 of Practice Direction 13A.

147. It follows that I reject:

i) the request by IPL to give guidance to the effect that the default position should be that reporting restrictions orders made by the COP in serious medical treatment cases should, absent exceptional circumstances, end on the death of P, and

ii) IPL's assertion that the appropriate question is whether the circumstances of this case justify the extension of the reporting restriction beyond C's death and the media should not be asked to demonstrate the public interest in naming C.

148. To my mind, any such guidance or approach would run counter to the conclusion in *Re C* that there should not be a presumption or its equivalent namely "a default position absent exceptional reasons" because in each case there is a balance to be struck. Any such balance is a two-way street in which both sides need to show why the overall balance supports the result they seek and neither hold a trump or decisive card.

149. Naturally, I accept that in some serious medical treatment cases that balance should be struck by a reporting restrictions order that ends on P's death and *Re LM* is an example of that conclusion being reached in respect of the naming of *LM* but not of the naming of LM's carers and two Jehovah's Witnesses (if it would lead to them being connected to the COP proceedings).

150. I also accept that in contrast to many cases covered by the Transparency Pilot, a number of serious medical treatment cases focus on the pros and cons of particular medical treatments and so do not engage wider issues relating to P's private life or that or P's family. And it may be that this will lead to a number of injunctions in such cases being limited to P's lifetime. But, in my view, this should not be a presumption or default position.

151. As I have explained, in my view the starting point for the relevant process of reasoning is the Rules and Practice Directions which reflect the nature and effect of the jurisdiction of the COP. In my view, as reflected in the Transparency Pilot, the reasoning that founds this approach points to an injunction that is to last until further order rather than a fixed date or event. This is because it recognises that the invasion into private and family life by the COP is regularly not limited to that of P as an individual and will have an impact for an undefinable time.

152. The cases including *Re S* refer to the financial and other burdens that applications relating to reporting restrictions orders impose on national and local media. They are or are potentially cumulative. On the other hand, as this case shows, significant financial and emotional burdens are likely to be placed on the individuals involved in

a given case if they have to initiate a further application. In my view, the balance of those burdens, coupled with the prospects of an agreed solution being reached, also favours the normal duration of a reporting restrictions order being until further order as in the Transparency Pilot. If a member or representative of the media seek a change that permits wider or unlimited reporting they have a limited pool of people who they can seek consent from, whereas the parties cannot practically obtain consent to a continued or tighter order.

153. Whatever time limit is placed on the injunction I agree with the point made by Mr Farmer that everyone involved should at each stage flag the issue of duration. He mentions a practice of Peter Jackson J of doing this and providing that the injunction lasts until a month after the death of P in a serious medical treatment case. An alternative would be to provide that it lasts until judgment on the substantive issues. On both alternatives, and in any event, it seems to me that the terms, including the duration of the injunction, should be revisited at the substantive hearing or when judgment is given because it is only then that it will be known what (a) the nature and extent of the COP's invasion into the private and family life of P, P's family and others has been, (b) the relevant issues and decisions are and (c) the impact of any reporting restrictions on the competing Article 8 and Article 10 rights are likely to be in that case.

154. *The value of naming the people involved.* As I have mentioned at paragraph 18 of her judgment in *Re C* Lady Hale refers to the well-known paragraphs in Lord Rodger's speech in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697 where he said:

> 63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
>
> 64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that
>
> > "from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to

> reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."
>
> Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer.

155. These paragraphs are and record propositions of high authority that I have called the naming propositions. They are of significant importance in identifying the roles of the media and the court.

156. The naming propositions are reflected in the following points made by Mr Steafel:

> The Daily Mail considers it has a duty to the public to report fairly and accurately on what happens in the courts. In order to engage the interest of members of the public in the kinds of issues the court decides, it is however necessary to publish articles and reports that people actually want to read. That means telling our readers about the facts of the cases, including the real people and places involved, and sometimes publishing pictures that relate to these people and places.
>
> Where proceedings are anonymised, it is more difficult to engage our readers as the real people involved in the cases are necessarily invisible and the stories therefore lack a vital human dimension. It is human nature to find it more difficult to take an interest in a story about problems arising from, say, dementia or the right to die if the story does not feature identifiable individuals. If we cannot publish stories about important issues that people are drawn to read, this will inevitably limit and reduce the quality of public debate around these issues. It is in my view important in a democratic society that we should encourage informed debate I believe that the media, including the popular press, fulfils a vital function in this regard. By reading about the experiences of others, readers are likely to be able to identify with those people and understand what they are going through. But they are much less engaged - and correspondingly less focused on the surrounding public debate - where they cannot identify with real people, places and events. Pictures are a hugely potent way of engaging readers and one of the problems with covering anonymised cases is that it is impossible to include pictures in our stories which identify those involved.

157. I agree that fair and accurate reporting is vital if the public interest is to be promoted and I acknowledge that whether something is fair involves a value judgment and does not equate to it being balanced.

158. On the intense scrutiny that is required of the rival propositions relating to anonymisation I consider that a distinction can be made between (a) cases where pursuant to the default or general position under the relevant Rules or Practice Directions the court is allowing access (or unrestricted access) to the media and the public, and (b) cases in which it is imposing restrictions and so where the court is turning the tap on rather than off. But, I hasten to accept that this distinction:

    i) simply reflects the strength of the reasoning that underlies the relevant COP Rules and Practice Directions, the established *Scott v Scott* exceptions and the

positon referred to by Lady Hale that in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved, and so

ii) provides weight to the general arguments for anonymity to promote the administration of justice by the COP generally and in the given case, and does not

iii) undermine the force of the naming propositions as general propositions, with the consequence that the COP needs to remember that it is not an editor.

159. As I have already said (see paragraphs 94 and 95 above) the weight to be given to (a) the naming propositions, and (b) the conclusion on what generally best promotes the administration of justice will vary from case to case and on a staged approach to a particular case the weight of the naming propositions, and so this aspect of the factors that underlie and promote Article 10, will often fall to be taken into account in the context of (i) the validity of the reasons for their application in that case, and (ii) the impact of a departure in that case from the general conclusion on what generally promotes the administration of justice in cases of that type. This means that those reasons and that impact will need to be identified in a number of cases.

160. As I have already mentioned, although he refers to and relies on the naming propositions Mr Steafel does not say why in this case the relevant public interests, rather than the gratification of a prurient curiosity or interest of the public:

i) would be or would have been advanced by the identification of C and members of her family in the publicity that took place,

ii) was advanced by the reporting that contained pixelated photographs and focused on C's lifestyle, or

iii) why he says the balance will change on A's 18th birthday between reporting that does not name C and her family and reporting that does.

Accordingly he does not say, as an editor, why in this case the view expressed by Theis J that "*there is no public interest in C or her family being identified*" either is wrong or will become wrong when A is 18.

161. Rather, he refers to three cases concerning assisted dying. Although they relate to persons with serious illnesses who wanted to die these cases raise different issues to this case which relates to the right to refuse treatment and not to assisted dying or suicide. Also they are not cases in which the COP had to become involved because of an issue whether the relevant person had capacity. Further:

i) so far as I am aware (and I decided the strike out application in the *Nicklinson* case) none of the individuals whose Article 8 rights were engaged objected to being identified and the articles exhibited indicate that they sought publicity, whereas in contrast

ii) the evidence in this case provides compelling support for the view that if the NHS Trust had accepted that C had capacity and so had not involved the COP she and her family would not have sought (and would probably not have had to suffer) publicity.

So, whilst I agree that these assisted dying cases engaged matters of great public importance and that the identification of the individuals involved assisted in drawing the attention of some people to those issues I do not accept that they are examples that provide any real assistance in the balancing exercise in this and other COP cases.

162. Further, respectfully and mindful of the force of the naming propositions, when cases engage issues of such high public importance and interest I am unpersuaded by Mr Steafel's assertion that anonymised reporting of them would become "arid and academic philosophical debates" and "would not engage the public in any meaningful way". For example, the point raised by Mr Steafel that the Archbishop of Canterbury has noted that assisted dying (and so not this case) is one of the "*biggest dilemmas of our time*" necessarily raises important issues of public interest and debate that should engage the interest of the public and are not linked to individual cases.

163. Also, his evidence does not persuade me that in most COP cases Article 10 will not be effectively and proportionately recognised and promoted by reporting that does not identify P and members of his family (and in some cases others) in a way that links them to the COP proceedings. Having said that I hope that it is apparent from what I have said (see for example paragraph 95 above) that I agree with Mr Steafel that:

i) "blanket anonymity orders in the Court of Protection or defaulting to an assumption that there can be no public interest in identifying parties in such cases" should be avoided, and

ii) in some cases "of great personal sensitivity, the public interest may be better served by naming the people involved than keeping them anonymous particularly where one or more family members wishes their plight to be publicised". And I would add when one or more family member or others involved wish to correct an inaccurate and unfair account of the issues or to provide promote another view on the issues and events in the proceedings that have been published.

164. But this agreement reflects the need for a case specific analysis of the impact of the competing factors, propositions and public interests for and against anonymistaion. That exercise of parallel reasoning is not an exact or mathematical one because it is an "apple and pears" argument but it requires an intense scrutiny in the circumstances of the given case of the weight of the competing factors.

165. So, to my mind, in this exercise the COP needs to consider why and how the naming propositions, and so the proposed naming or photographs of C and her family members that links them to the COP proceedings, would or would be likely to engage or enhance the engagement of the interest of the public in matters of public interest rather than in those of prurient or sensational interest.

166. This has not been done in this case. But in contrast evidence has been put in on the likely harm to the relevant individuals that such reporting would cause.

167. *The ultimate balance in this case on the dispute relating to duration.* On one side are:

i) the Article 8 rights of all of C's children,

ii) the weight of the arguments for a reporting restrictions order in this case, and so of the general practice in the COP of making such orders in analogous COP cases where the family do not want any publicity and have given evidence of matters that affect their private and family life and that of P of a clearly personal and private nature,

iii) the acceptance by the media Respondents that until A is 18 the balance between the Article 8 rights and Article 10 rights in this case justifies the grant of a reporting restrictions order,

iv) the compelling evidence of the extent and nature of the harm and distress that reporting that identifies C and any member of her family as respectively the subject of (or members of the family of the subject of) the COP proceedings and so of MacDonald J 's judgment would cause, and

v) the ability of the court to make a further order if and when circumstances change.

168. On the other side are the general propositions relating to the benefits of naming the individuals involved.

169. I accept that Thiess J's statement that "there is no public interest in C and her family being identified" and my indications of agreement with it at the hearing go too far because of the well-known and important naming propositions and the public interests that underlie them. But, in my view, the absence of an explanation of why:

i) the accepted balance changes on A's 18th birthday and so of why identifying C and her family and linking them to the COP proceedings and the publicity at the end of last year would then promote the public interests that underlie Article 10, or why those public interests could not in this case then still be properly and proportionately served by reporting that observes the reporting restrictions order, or

ii) more generally why any such identification would at any other time promote (or have promoted) or its absence would harm (or would have harmed) the public interests that underlie and promote Article 10

means that the naming propositions have no real weight in this case and balance of the competing factors comes down firmly in favour of the grant of a reporting restrictions order until further order.

The extension of the order to cover C's inquest.

170. The earlier orders provide that the injunction does not restrict publishing information relating to any part of a hearing in a court in England and Wales (including a coroner's court) in which the court was sitting in public. It seems to me therefore that the result the Applicant seeks would be achieved by changing the word "including" to "excluding".

171. This is much closer to the position in *Re S* and Potter P addressed such an application in *Re LM* [2007] EWHC 1902 (Fam) where he said:

> **The Overall Approach**
>
> 53. In approaching this difficult case, I consider that I should apply the principles laid down in *Re S*, ----------
>
> 54. There are obvious differences between proceedings at an inquest and the criminal process, most notably that the task of the Coroner and jury is to determine the manner of the death of the deceased and does not extend to determining questions of criminal guilt. In various cases that has been held to be a matter of weight in respect of witnesses seeking to protect their own personal safety. However, in this case, the inquest to be held is into the killing of a child, L, in the situation where a High Court Judge has already found as a matter of fact that the mother was responsible for L's death and the application is made because harm is indirectly apprehended to a child who is a stranger to the investigative process. It is presently uncertain whether criminal proceedings will in fact be taken against the mother. If so, and the Coroner is so informed, then no doubt he will further adjourn the matter pursuant to s.16. of the *Coroners Act 1988*. If that is done, then the question of publicity and reporting restrictions in those proceedings will fall four square within the principles propounded in *Re S*. If not, and if, as seems likely, the mother continues to pose a danger to any child in her care, then, if continued, the reporting restrictions in the care proceedings would prevent that fact from reaching the public domain, despite its clear public interest and importance.

172. He carried out a detailed balance between the competing rights emphasising the strength and importance of a public hearing of the inquest and so the general conclusion on what promotes the administration of justice in such proceedings. Having done so he refused the injunction sought that the parents should not be identified.

173. Here the important issue of child protection is absent.

174. In the note of counsel for some of the media Respondents dated 28 January 2016 points are made about the importance of a proviso permitting the reporting of other proceedings conducted in open court, including a coroner's court. But after the Applicant sought this extension junior counsel responded (as mentioned in paragraph 49 above) that his clients are neutral on this point.

175. As the approach of Potter P confirms an application for restrictions on the reporting of other proceedings conducted in open court engages important and powerful interests against the making of such an order. However, in my view:

i) the expressed neutrality of some of the media Respondents reflects a responsible and understandable stance that in isolation the inquest is unlikely to give rise to issues of public interest or to any such issues in respect of which the general propositions in favour of naming C or her family will have any significant weight, and

ii) in any event, I consider that that is the position.

176. The essential question is therefore whether, unless the court makes a further order, C's family should be at risk of publicity relating to the inquest that makes the connection between them and the COP proceedings and so effectively of suffering the

harm and distress that any other reporting that identifies them and makes that link would bring.

177. The history of the prurient nature of some of the earlier reporting is a clear indicator that such reporting might be repeated. But, even if that risk is discounted I have concluded that the balance comes down firmly in favour of extending the order to cover the inquest.

178. The main factors to be taken into account overlap with those to be taken into account in respect of the duration of the order.

179. On the one side are:

i) the points set out in paragraph 167 (i) to (v) as the inquest is likely to take place before a is 18 and

ii) the points set out in paragraph 175.

180. On the other side are:

i) the powerful and weighty reasoning that underlies the conclusion and practice that the administration of justice is best served by inquests being heard in open court without reporting restrictions, and

ii) the general and accepted force of the naming propositions absent any evidence or reasoning that they found a need for reporting of the inquest that makes the link with the COP proceedings.

The notification and service points raised by the media Respondents on 9 December 2015 and before Theis J out of hours

181. It is clearly important that s. 12 of the HRA and the relevant practice directions are followed in respect of the notification of applications and that any reporting restrictions orders that are made are properly and promptly served. Accordingly, as I have done before and others have done, I emphasise this and record that the difficulties that the solicitor for the media Respondents describes in connection with obtaining a copy of the sealed order (or a copy of the order in the terms actually made rather than the draft served when notification of the application heard by Moor J was given) from the solicitors acting for the NHS Trust and the Applicant are regrettable.

182. I suggest that the lesson to be learned is that copies of the order in the terms granted should not only be promptly and properly served but should be held by the parties so that they can be easily and quickly provided on request. Also the COP should try to ensure that it can do this.

183. Complaint was also made by the media Respondents about the timing and notification of the out of hours hearing before Theis J, of which Mr Farmer was given direct notice and the media was not. But ANL heard about the application and instructed counsel who made submissions to Theis J on the notification and other points.

184. Theis J addresses the lack of notification through CopyDirect and concluded that the reasons for not giving such notice did not stand up to scrutiny but nonetheless she

granted the relief sought. It is however clear from what I have been told that counsel for the Applicant had thought about the notice point and concluded that it was appropriate to make a without notice application. He tried to do so to the applications court; but was turned away and so had to pursue an out of hours application given the urgency and the nature and extent of the media interest. So, although Theis J disagreed with him, I consider that counsel for the Applicant acted properly and I add that in my view some of his reasons for acting as he did and which he acknowledges he could have explained them better to Theis J were properly arguable.

185. As I understood it the notification points were not relied on before me on 9 December 2015 as a ground for dismissing the application (and, in any event, they were certainly not pressed on that basis). In my view that approach was correct in the circumstances of this case.

186. Rather, what was pressed before me at that hearing were the other points that had been made before Theis J and which the media Respondents have now correctly recognised were flawed. So, with the benefit of hindsight, the media Respondents should be relieved that they failed to persuade both Theis J and me to refuse the application with the result that they were free to publish and did publish articles in terms that they now accept would not have accorded with the correct balance between the competing Convention rights.

Miscellaneous

187. I will address and confirm the terms of the reporting restrictions order and any applications that are made when I hand down judgment. If an order is agreed and I approve it the judgment can be handed down without attendance.

188. In the Schedule to this judgment I have made points about the precedent for and the terms of reporting restrictions orders but as the order I made on 9 December 2015 continued that made by Theis J and it seems to me that this should be reflected in the order that will come into effect when I hand down this judgment.