Neutral Citation Number: [2022] EWHC 826 (QB)

Case No: QB-2022-000174

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

HER MAJESTY'S ATTORNEY GENERAL for ENGLAND and WALES	**Claimant**
- and –	
BRITISH BROADCASTING CORPORATION	**Defendant**

- -

Sir James Eadie QC, Oliver Sanders QC, Jennifer Thelen and Emmanuel Sheppard
(instructed by **the Treasury Solicitor**) for the **Claimant**

Hugo Keith QC, Zubair Ahmad QC and Dominic Lewis
(instructed by **the Special Advocates' Support Office)** as **Special Advocates**

Lord Pannick QC, Adam Wolanski QC and Hope Williams
(instructed by **the BBC Litigation Department**) for the **Defendant**

Hearing dates: 1-2 March 2022

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The Attorney General ("the Attorney") seeks an interim injunction to prevent the BBC from broadcasting a programme about an individual, "X". In a judgment handed down in private on 22 February 2022 and made public on 24 February 2022 (neutral citation [2022] EWHC 380 (QB) ("the first judgment")), I explained that the proposed programme would include the allegations:

> "that X is a dangerous extremist and misogynist who physically and psychologically abused two female partners; that X is also a covert human intelligence source (variously referred to as a "CHIS" or an "agent") for the Security Service ("MI5"); that X told one of these women that he worked for MI5 in order to terrorise and control her; and that MI5 should have known about X's behaviour and realised that it was inappropriate to use him as a CHIS."

2 Part of the hearing of the application for interim relief has been held in OPEN and part in CLOSED, pursuant to the Justice and Security Act 2013 ("the JSA"). In the first judgment, I rejected an application by the Attorney that the OPEN part of the hearing should take place wholly or substantially in private (i.e. in the absence of the public and press). The OPEN hearing proceeded in public on 1 March 2022, with some limitations as to which parts of the evidence could be referred to in argument. There was a CLOSED hearing on 2 March 2022. The BBC and its legal team were not present at the latter hearing, but their interests were represented by special advocates.

3 In the OPEN part of the proceedings, the Attorney's stance has been neither to confirm nor to deny ("NCND") that X is or was a CHIS. Either way, the Attorney says that to publish the allegation that he is or was one would endanger X and cause material damage to national security. In the CLOSED part of the proceedings, I have been told more.

4 The key facts, allegations and issues are as follows:

(a) The BBC accepts that the allegation that X is a CHIS is information relating to national security which is currently known only to a small number of people and is therefore capable of legal protection. The court can grant relief to prevent the disclosure of this information if the balance of public interests favours non-disclosure and/or if the court's obligation as a public authority under s. 6 of the Human Rights Act 1998 ("HRA") to protect X's rights under Articles 2, 3 and/or 8 the European Convention on Human Rights ("ECHR") demands it.

(b) In the context of the allegation that he is or was a CHIS, the Attorney says that disclosing X's name or image would cause real damage to national security and that the balance of public interests favours the grant of relief. She also contends that identifying X would give rise to a real and immediate risk that X would be killed or subject to serious physical harm. In those circumstances, she submits that there can be no balancing of X's interests against the interests of others: X's rights under Articles 2 and 3 are, as a matter of law, absolute and must prevail over the rights and interests of others, including the interests of any women who might in the future be harmed by X.

(c) The BBC does not accept that revealing X's identity would give rise to a real or immediate risk to X. It submits that the allegations that X was and remains violent and dangerous towards women are highly credible. It contends that there is a strong public interest in publishing X's identity because the evidence shows that X used his status as a CHIS to coerce and terrify his partner and MI5 should have known about his behaviour and realised that it was inappropriate to use him or continue using him as a CHIS. This is relevant to the public debate on the coercive control of women by their male partners and on the failure of state security institutions to address this problem. Publishing X's identity will remove the story from the realms of the abstract and so bolster and intensify the other public interests in the story. It will also enable women considering a relationship or liaison with X to have access to information which may protect them from death or serious harm at the hands of X. A court considering relief which would prevent publication must bear in mind not only X's rights and interests, but also those of the women who would or might be protected by having information about what he has done.

(d) The balancing of these competing public interests in a particular case is an intensely fact-specific exercise. In this case, the key factors are:

(i) the danger posed to women by X;

(ii) any means of preventing or mitigating this danger, other than publication of X's identity;

(iii) the nature and extent of the risk to X if his identity is disclosed;

(iv) the measures likely to be taken by relevant authorities to protect X, the extent to which they would be capable of protecting X from that risk and the effect of those measures on X's private life;

(v) the nature and extent of any wider damage to national security which would flow from disclosure of X's identity;

(vi) in the light of the measures likely to be taken to protect X, the extent to which publication of X's name or image would be capable of protecting women generally from any danger he may pose to them;

(vii) the effect on the rights of the BBC, and those who would receive the information it wishes to convey, of relief preventing the public disclosure of X's identity.

My approach to this OPEN judgment

5 As noted above, this application has involved a closed material procedure under the JSA. Closed material procedures involve a substantial derogation from the fundamental procedural principles of open justice and natural justice: see *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700, [2]-[8] of the judgment on jurisdiction. When giving judgment after a closed material procedure, there are two key safeguards. First, the OPEN judgment must identify every conclusion reached in whole or in part on the basis of evidence referred to in the CLOSED judgment and must say that this has been done. Second, the OPEN judgment should say as much as can properly be said about the CLOSED material relied upon: *ibid.*, [68]-[69].

6 I have prepared this judgment with these two points firmly in mind. CPR r. 82.2 requires me to ensure that information is not disclosed in a way which would be damaging to the interests of national security. Subject to that, however, I have sought to ensure that the key factual conclusions are made public in this OPEN judgment, so that members of the public can decide for themselves what they think about the conclusions I have reached and the law on which they are based.

The evidence

7 Following the OPEN hearing of the interim relief application, it is possible to give some more detail than I gave in my first judgment about the allegations the BBC wishes to broadcast and about the Attorney's reasons for wishing to prevent that broadcast.

8 The BBC's sources include two of X's former female partners, to whom the BBC has given the pseudonyms "Ruth" (with whom X had a long-term relationship some time ago) and "Beth" (with whom X had a long-term relationship more recently). These women have not met.

9 Ruth's evidence to the court includes the following:

> "I consider that [X] is dangerous enough to kill a woman and I fear that he will do so if he is not challenged and exposed. I think it is crucial that other women know his identity and what he looks like, so that he cannot trick and harm them."

10 Beth has provided covert video footage which shows an apparently violent altercation in which X appears to attack her with a dangerous weapon and she can be heard to scream. This led to a police investigation which resulted in a criminal charge, but did not result in a conviction. Beth's evidence to the court is that:

> "I think X is a very dangerous individual – to me, to ex-partners and to other women… He thinks it's okay to treat women the way that he's treated me. I believe he must be named [and] identified to the public at large to warn others."

11 The experienced BBC journalist who researched the story says this:

> "I think I would be betraying the trust of the women who have bravely shared their stories with me if we do not tell the whole story, identify X as having been involved with MI5, and warn others. I consider, based on the information I have gathered, that X is a person who may well progress to committing even more serious acts of violence, sexual violence and coercion. He appears to regard himself as having a licence to act as he does because of his connections with the security services."

12 Ed Campbell, a senior and experienced News Editor at BBC News with responsibility for investigations, has considered carefully whether the story could be broadcast without identifying X. He says this in his witness statement:

> "Television is a visual medium. Particularly where a programme concerns matters of serious public concern, it is important to ensure that it is presented in a manner which engages the interest of viewers. A story which anonymises X

> (and which could therefore contain no images identifying X) would be significantly less likely to achieve this.
>
> A version of the story which does not name X would fail to warn women and the public at large that he represents a significant danger to women and is capable of serious violence… Not identifying X potentially leaves him free to continue abusing and coercing women, and we believe that it is entirely possible that he may progress to other acts of serious violence and sexual violence."

13 As to the extent of the threat posed by X, the BBC relies on: the video footage I have seen (which appears to depict a violent attack on Beth); certain matters disclosed to Beth in that footage; and evidence gathered independently by the journalist who researched the story. The BBC submits that, if the story includes X's name and image, women considering entering into a relationship with him could be informed about the danger he poses to them. If, on the other hand, the BBC is unable to identify X, the disclosure of the information about what he did will not serve to protect other women.

The law

The test for interim relief

14 Normally, when considering whether to grant interim relief, the court asks only whether there is a "serious issue to be tried" and then moves to consider the balance of convenience and any bars to relief: *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396. But where the relief sought might affect the exercise of the right to freedom of expression under Article 10 ECHR, a different and stricter test applies under s. 12 of the HRA, which provides in material part as follows:

> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected to such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published…"

15 The requirement on the applicant to show that she is "likely to establish that publication should not be allowed" means that courts should be "exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial". There are, however, circumstances where a lesser degree of likelihood will suffice, including where the potential adverse consequences of disclosure are particularly grave or where a short-lived injunction is needed to enable the court to hear and

give proper consideration to an application for interim relief: *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, [22].

16 In this case, the claim was issued on 19 January 2022. There have been two hearings before this one and I gave detailed directions. After the hearing on 16 February 2022, I made a declaration under s. 6 of the JSA and gave permission to the Attorney to withhold sensitive material under s. 8. It was therefore possible at the hearing of the interim injunction application to consider OPEN and CLOSED evidence and detailed written and oral submissions on the law and facts. Although it might be said that the consequences of disclosure of X's identity are particularly grave, the reality is that the court is in as good a position to reach conclusions as to the balance of competing interests as it would be at trial. In the circumstances, I have therefore approached the interim relief application on the basis that the Attorney must show that it is more likely than not that publication of X's identity will not be allowed at trial.

The elements of breach of confidence

17 In order to establish an entitlement to restrain disclosure of information said to be confidential, the applicant must show that the information has "the necessary quality of confidence", that it was imparted "in circumstances importing an obligation of confidence" and that there will be an "unauthorised use" unless relief is granted: *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J). Where, as here, the application is made by the Crown, it must also be shown that disclosure would cause "damage to the public interest": *Attorney General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 *(Spycatcher No. 2)*, 256C-F, 258H (Lord Keith), 270G-H (Lord Griffiths) and 283C (Lord Goff).

18 It is also important to note that there are some circumstances in which the law of confidentiality will protect false information: *Spycatcher No. 2*, 190C (Sir John Donaldson MR in the Court of Appeal); *McKennitt v Ash* [2005] EWHC 3003 (QB), [78] (Eady J) and [2006] EWCA Civ 1714, [2008] QB 73, [80] (Buxton LJ) and [85]-[86] (Longmore LJ); and *Toulson & Phipps on Confidentiality* (4th ed., 2020), paras 4-021-022.

19 The application of the law of confidence to the disclosure of the identity of persons alleged to be CHIS raises some potentially knotty issues. It is not necessary to analyse these issues here, because of concessions made by the BBC. The BBC concedes that a duty of confidence can arise in equity independently of any transaction or relationship between the parties, including in circumstances where the defendant has notice that the information is confidential: *Spycatcher No. 2*, 281 (Lord Goff). It also accepts that "secrets of importance to national security" are *prima facie* confidential and that X's identity as a CHIS is such a secret. The BBC does not contend that the information is so widely known as to be no longer confidential at all. It does submit, however, that the weight to be accorded to the confidentiality interest is diminished by the fact that X disclosed his CHIS status to Beth and that he did so in an effort to coerce and terrorise her.

20 This means that it is common ground that, so far as the claim for breach of confidence is concerned, the only issue is where the balance of public interests lies.

The balance of public interests

21 The BBC's case is that there is a powerful public interest in favour of disclosure in this case. The court is required to weigh the public interest in maintaining confidence against any countervailing public interest favouring disclosure: *Spycatcher No. 2*, 282-3 (Lord Goff). In

Associated Newspapers Ltd v HRH The Prince of Wales [2006] EWCA Civ 1776, [2008] Ch 57, Lord Phillips CJ emphasised at [68] that, in considering whether publication of confidential information is in the public interest, it is necessary to consider "not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached".

22 For the BBC, Lord Pannick QC drew attention to the judgment of the European Court of Human Rights in *Axel Springer AG v Germany* (App. No. 39954/08) [2012] EMLR 15, where at [79] the Court identified "the essential role played by the press in a democratic society" and its "vital role as 'public watchdog'". This was recently cited with approval by the Supreme Court in *Bloomberg LP v ZXC* [2022] UKSC 5, [59]-[60]. Reference was also made to the importance of public debate on standards of conduct in public life: *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329, [2019] EMLR 5, [23].

23 For my part, I accept that the relief sought in this case represents a very significant interference with the right of the BBC to freedom of expression and the correlative right of the public to receive the information the BBC wishes to publish. Both rights are protected at common law, by Article 10 ECHR and by s. 12 of the HRA. No court should countenance such an interference unless very good grounds are shown, especially where, as here, the relief would prevent publication by a responsible and experienced broadcaster of facts which would contribute to the debate on matters of legitimate public concern. Ultimately, however, performing the required balance of public and private interests is an intensely fact-specific exercise.

Recognition of the importance of protecting the identity of informants

24 Both sides relied on the judgment of the Northern Ireland Court of Appeal in *AB v Sunday Newspapers* [2014] NICA 58, where an interim injunction was granted to restrain publication of articles alleging that AB had supplied information to the police about his involvement with a Republican paramilitary group. Sir Declan Morgan LCJ said this at [24]:

> "We are satisfied, therefore, that a person acting as a [CHIS] or informer has a reasonable expectation that his confidential relationship will not be disclosed. It is well recognised that many informers have criminal backgrounds and belong to a criminal social environment. Their motives for giving information to the police may be ambiguous or mixed… These features do not, however, diminish the reasons for protecting the confidentiality of the relationship which are firstly, to secure the welfare of the informer and secondly, to encourage the supply of information to the police by people who are unlikely to come forward unless they can be confident that their confidentiality will be protected. We do not accept, therefore, that it is in the public interest that investigative journalism should be free in all cases to reveal the full nature of the criminal activity of someone acting as an informer."

25 Lord Pannick QC submitted that the final sentence of this passage showed that, in <u>some</u> cases, the public interest <u>would</u> favour disclosure of the identity of an informer. The references to criminality were to the criminality necessary to maintain the informant's cover, not to the distinct kind of criminality alleged here.

26 For the Attorney, Sir James Eadie QC submitted that the passage as a whole showed the importance of maintaining the secrecy of the identities of informants, even in cases where criminality was alleged, and was fully consistent with earlier authority to the same effect:

see e.g. *Attorney General v Blake* [2001] 1 AC 268, 287E (Lord Nicholls); and *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, where Lord Bingham identified information liable to disclose the identity of agents or compromise the security of informers as a prime example of information whose confidentiality the courts were likely to protect. The value of informants and the importance of maintaining the secrecy of their identities was also shown by authorities indicating the courts' acceptance of the NCND principle: see e.g. *Re Scappaticci's Application* [2003] NIQB 56, [15]; *R (Al Fawwaz) v Secretary of State for the Home Department* [2015] EWHC 166 (Admin), [75] (Burnett LJ).

27 I accept that there is ample support in the authorities for the proposition that informants play a vital role in preventing crime and maintaining national security; and that disclosure of their identities undermines their ability to carry out that role effectively. The NCND principle is one of the ways in which the value of the role of informants and the need to protect their identities in the public interest has been recognised. *Blake* and *AB* show that the same public interests are also recognised by the law of confidentiality. But there is an important difference between (i) respecting the practice of NCND in relation to the identity of CHIS in the context of OPEN legal proceedings and (ii) granting relief to restrain publication of an allegation that an individual is a CHIS. The former is a procedural device designed to avoid damage to the public interest in legal proceedings. It comes into play once an allegation has been made that an individual is a CHIS. The latter prevents the allegation being made in the first place and so involves a significant interference with one of the core rights on which an effective democracy depends. An application for relief which would have that effect must be clearly and cogently justified.

National security assessments and the role of the court

28 Sir James submitted that, on well-established authority, special respect was due to the judgments and assessments of the executive on national security matters: see *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765, [53]-[62], [70] and [109] (Lord Reed PSC). This was particularly so where the assessment involved a predictive exercise: *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, [32] (Lord Sumption). When undertaking such an exercise, the executive is entitled to take a precautionary approach: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, [17] (Lord Slynn).

29 In the first judgment, I accepted as a general proposition that great respect was due to the expert view of the executive, for constitutional and institutional reasons: see at [43]. I pointed out, however, that the invocation of national security was not always conclusive and the extent to which it was appropriate to defer to the executive would depend on the legal context. Even in contexts where great deference was appropriate in principle, the court was still entitled and required to consider carefully the quality of the reasons given for any assessment before deciding what weight to give to it: [44]. The question in *Begum* concerned the proper approach to review by a specialist tribunal of a decision which Parliament had decided should be entrusted to the Secretary of State, who was accountable to Parliament. The question I was then considering was whether to permit a private hearing – a question that required a balancing exercise, which the CPR, for sound constitutional reasons, allocated to the court, not the executive: [45].

30 In my judgment, the same is true of the exercise which the court is required to undertake when assessing the balance of public interests under the law of confidentiality and under s. 12(4) of the HRA. It is for the court, not the executive, to decide whether the public interests which would be served by granting relief outweigh those which would be served by

publication. As with the question whether a court should sit in private, there are powerful constitutional reasons why this should be so. Parliament has given the executive a range of powers to protect national security. These include the power to impose more or less severe restrictions on liberty, to freeze assets and in certain circumstances to deprive persons of their citizenship. It has not, however, conferred any general power to impose prior restraints on speech, even on the ground that the speech will damage national security.

31 Where, as in this case, the executive wishes to prevent someone from speaking freely, it must rely on the same general law as anyone else. When it seeks to restrain speech under the law of confidentiality, the executive has the same task as any other litigant: to convince an independent court that the elements of the cause of action are present and that the balance of public interests favours the grant of relief. If the invocation of national security were sufficient to pre-determine the outcome of the application, or even to pre-determine it in all cases where the assessment surmounted the low hurdle of rationality, the effect would be to create a power of censorship quite alien to our tradition.

32 This does not mean, however, that the principles identified in *Rehman*, *Carlile* and *Begum* have no part to play. A court or tribunal called upon to conduct a balancing exercise between competing public interests needs a notional set of scales. Where the public interests relied upon in favour of relief relate to national security, and particularly where the assessment involves a predictive evaluation of what is likely to happen in a given situation, the court must show great respect to the judgment of the executive about whether the relevant risk is made out and about the weight to be attached to it: see by analogy the decision of SIAC in *U3 v Secretary of State for the Home Department*, SC/153/2018, 4 March 2022, at [42]-[43]. The effect of the line of authority culminating in *Begum* is that a court or tribunal should interfere with such a judgment only on rationality or other public law grounds.

33 This means that, subject to review on rationality or other public law grounds, both the existence of a risk to national security, and the weight to be ascribed to this important public interest on the Attorney's side of the scales, are matters for the executive. In many cases, it may be difficult to find interests weighty enough to outweigh the public interest in national security. But that will not be so in every case, particularly where the grant of relief carries its own risks to the safety of the public. The right of a broadcaster to freedom of expression, and the correlative rights of the public to receive information on matters of legitimate public concern, may also in some circumstances tip the scales against the grant of relief. It is the court, not the executive, that holds the scales and determines on which side the balance of competing interests falls.

The importance of a name

34 Lord Pannick warned against any assumption that a prohibition on disclosure of X's identity would not matter, because the other elements of the story could be told in any event. In *In Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, the Supreme Court had to consider whether to grant anonymity to litigants contesting asset freezing measures. At [63], Lord Rodger famously asked:

> "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 information and ideas but also the form in which they are conveyed… More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, 'judges are not newspaper editors'. See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2010] 1 AC 145, [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."

Articles 2, 3 and 8 ECHR

35 The significance of Articles 2 and 3 to the protection of identities was first identified by Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] Fam 430. In that case, the court granted a *contra mundum* injunction protecting the new identities of the men who, when boys, had murdered Jamie Bulger. The relief was granted on the basis of evidence of a real and immediate risk of reprisals if the new identities were disclosed. The phrase "real and immediate risk" comes from the decision of the European Court of Human Rights in *Osman v UK* (2000) 29 EHRR 245, where the Court explained at [116] that a state could be responsible for a breach of Article 2 ECHR "where the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".

36 The jurisdiction recognised in *Venables* has since been exercised to protect new identities given to Mary Bell, who had killed two children in 1968 (*X (formerly Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] EMLR 37 (Dame Elizabeth Butler-Sloss P)); Maxine Carr, who had provided a false alibi for the Soham murderer Ian Huntley (*Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB) (Eady J)); and the Edlington brothers, who had inflicted violence and committed sexual assaults on three young children (*A v Persons Unknown* [2016] EWHC 3295 (Ch), [2017] EMLR 11 (Sir Geoffrey Vos C)).

37 In *RXG v Ministry of Justice* [2019] EWHC 2026 (QB), [2020] QB 703, at [35], the Divisional Court (Dame Victoria Sharp P and Nicklin J) recently summarised the principles governing the exercise of the *Venables* jurisdiction, as they understood them. These principles include the following:

> "(iii) The threshold at which article 2 and/or article 3 is engaged has been described as: 'the real possibility of serious physical harm and possible death' (*Venables,* [94]); 'a continuing danger of serious physical and psychological harm to the applicant' (*Carr,* [4]); an 'extremely serious risk of physical harm' (*Edlington,* [36]).
>
> (iv) In *Venables* ([87]-[89]) Dame Elizabeth Butler-Sloss P … held that the test is not a balance of probabilities but rather that the evidence must 'demonstrate convincingly the seriousness of the risk' and raise a real possibility of significant

> harm: a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.
>
> (v) Where an applicant demonstrates, by cogent evidence, that there is a real and immediate risk of serious physical harm or death, then there is no question of that risk being balanced against the article 10 interests: *Carr*, at [2].
>
> (vi) In cases where articles 2 and 3 are not engaged and the conflict is between the article 8 and article 10 rights, neither right has precedence over the other. What is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case. The justifications for interfering with or restricting each right must be taken into account and a proportionality test must be applied: *Edlington,* [28].
>
> (vii) The rights guaranteed by articles 2 and 3 are unqualified. Where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any article 10 rights, no matter how weighty. In that context, it should be noted that we would respectfully depart from the proposition articulated by Sir Geoffrey Vos C in *Edlington,* [35] that article 2 and 3 rights could be balanced against article 10 (a proposition later adopted by Sir Andrew McFarlane P in *Venables v News Group Newspapers Ltd* [2019] EWHC 494 (Fam), [2019] 2 FLR 81, [43]).
>
> (viii) However, where evidence of a threat to a person's physical safety does not reach the standard that engages articles 2 and/or 3, then the evidence as to the risk of harm will usually fall to be considered in the assessment of the person's article 8 rights and balanced against the engaged article 10 rights. Whilst the level of threat may not be sufficient to engage articles 2 or 3, living in fear of such an attack may very well engage the article 8 rights of the person concerned."

38 As can be seen, the Divisional Court in *RXG* differed from Sir Geoffrey Vos C in *A v Persons Unknown* on the question whether, once it was shown that there was a real and immediate risk of death or serious injury to an identified individual, it was necessary or permissible to balance the interference with freedom of expression against the interests of the individual. In *Re Al Makhtoum (Reporting Restrictions)* [2020] EWHC 702 (Fam), [2020] EMLR 17, at [10]-[14], Sir Andrew McFarlane P drew attention to this conflict of authority. At [16]-[18], he cited two recent decisions of the Court of Appeal which noted that the positive obligations imposed by Article 3 were not unqualified. At [19], he said that there was "a tension between the three divisions of the High Court at first instance as between themselves and, separately, from the developing jurisdiction at Court of Appeal level in a parallel context on whether questions of proportionality or balance have any place in the court's consideration where there is a real possibility, or real risk of an individual experiencing behaviour sufficient to fall within arts 2 and/or 3". This, he said, was an issue which must fall to be determined in another case.

39 *RXG* was followed in *D v Persons Unknown* [2021] EWHC 157 (QB), where Tipples J held at [78] that she was obliged to follow a decision of the Divisional Court and that, in any event, the latter was based on prior Supreme Court authority: *A v BBC* [2014] AC 25, [2015] AC 588, [45].

40 In *Re Winch (No. 1)* [2021] EWHC 1328 (QB), the Divisional Court (Warby LJ and Nicklin J) exercised the *Venables* jurisdiction to grant a *contra mundum* interim injunction to protect the identity of an informant. At [23], the court applied the principles in *RXG* and held that the "grave risks" to the claimants' Article 2 and 3 rights, which it found to be established, did not fall to be balanced against free speech rights. At [27], the court noted that the risks against which the injunction protected were of "violent and indiscriminate revenge for an act of public service". In *Re Winch (No. 2)* [2021] EWHC 3284 (QB), at [23], the Divisional Court (Warby LJ and Johnson J) granted a final injunction after trial, noting that it was not necessary to show that it was more likely than not that the individual would be killed or seriously injured if the injunction were not granted. What was required was an exercise in the evaluation of risk.

41 In *Rabone v Penine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, at [38], Lord Dyson said that a "real risk" was one that was "a substantial or significant risk and not a remote or fanciful one". At [39], he said that "present and continuing" captures the essence of the word "immediate". It was not necessary to show that the risk would materialise imminently.

42 In this case, I did not hear detailed argument on the question whether, once a real and immediate risk of death or serious injury is shown, it is necessary to balance these risks against the interference with freedom of expression. Given the conflict of authorities to which Sir Andrew McFarlane P referred, it seems likely that this conflict will have to be resolved at the appellate level. For reasons that will become apparent, in this case, as in *Re Al Makhtoum*, the conflict does not matter.

43 However, the facts of this case provide a good illustration of the difficulties that may flow from an approach which refuses to countenance *any* consideration of countervailing interests in a case where the rights of an individual under Articles 2 and/or 3 ECHR are engaged. An approach which precludes any balancing of the very concrete need to protect life and safety against the apparently more abstract right to freedom of expression has superficial attraction. But the exercise of freedom of expression can itself save lives, even if the lives in question are not presently identifiable and so do not engage the state's operational duty under Articles 2 and/or 3. As a matter of principle, I find it difficult to see why, in a case such as the present, the court should be precluded from taking into account the interests of those who might be harmed by the grant of relief: in this case, the women considering a relationship or liaison with X. There is a real danger that the valuable protection which the ECHR confers would be brought into disrepute if the state's obligation to protect the life and safety of its citizens required the court to concentrate exclusively on the risks to X and shut its eyes to the interests of the women to whom (if the allegations are true) he may pose a danger.

44 In another case, it may be necessary to consider some or all of the following points:

(a) It might be said that, by allowing publication, the court had taken an active step which exposed the individual to the real risk of treatment contrary to Articles 2 or 3, as when a state deports or extradites an individual: see by analogy *Soering v United Kingdom* (1989) 11 EHRR 439. Framing the matter in that way, one could argue that the court would breach the (absolute) negative obligation imposed by Articles 2 and 3 ECHR. But this depends on the premise that the exposure to risk flows from the court's decision to allow publication. The premise is questionable. In a democracy which guarantees the right to freedom of expression, the default position is that people can say whatever they wish. They do not require the permission of the court before doing so. Anyone who wants to obtain relief which interferes with the right of freedom of

expression must persuade the court to grant that relief. If the court does so, it undertakes a positive act. If relief is sought on the basis that s. 6 of the HRA requires it, this must be because of a positive obligation imposed by the ECHR. This is how Dame Elizabeth Butler-Sloss P understood the position in the first *Venables* case: see at [46].

(b) Whilst it may be true to say the negative obligations to which states are subject under Articles 2 and 3 ECHR (the obligations not to kill or inflict inhuman or degrading treatment) are "unqualified", the same is not true of the positive obligation to take action to prevent the subjection of individuals to death or inhuman or degrading treatment at the hand of third parties: see e.g. *Pretty v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800, [15] (Lord Bingham). Whereas the negative obligation is "an absolute duty not to take life or ill treat people in a way which falls foul of article 3", the positive obligation is "to do what is reasonable in the circumstances to protect people from a real and immediate risk of harm": *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2009] 1 AC 536, [10] (Lady Hale) (emphasis added), cited in *Al Makhtoum*, at [17] (Sir Andrew McFarlane P).

(c) As Lord Dyson explained in *Rabone*, at [15] and following, the positive operational duty established in *Osman* exists in "certain well-defined circumstances". The existence of a real and immediate risk to the life or safety of an individual is a necessary, but not sufficient, condition for the imposition of a positive operational duty: *Rabone*, [21]. The law in this area develops incrementally. Where such a duty is imposed, its scope and extent in each particular context is shaped by policy considerations specific to the context: *ibid*., [22]-[25].

(d) Assuming that a positive operational duty arises in a case such as the present, the duty is owed by the state. It may not always be obvious which organ of the state (for example, the police or the courts) should bear primary responsibility for discharging the duty. It may also be a matter of debate as to what kinds of positive action the duty requires these state organs to take in particular circumstances.

45 Given the uncertain state of the law in this regard, I have assumed in the BBC's favour that the engagement of X's Articles 2 and 3 ECHR rights is not conclusive. On the footing that the law may require it, I have undertaken a balancing exercise, albeit one where any real and immediate risk to X's life or safety is accorded great weight. I have had regard to all the circumstances, including: (i) whether the risk to the individual can be satisfactorily addressed in other ways (e.g. through operational measures of the kind envisaged in *Osman v UK*); (ii) the weight of the public interest in publication; and (iii) the extent to which prohibiting publication would itself give rise to risks of harm to others at the hands of X.

My approach to the BBC's allegations

46 The BBC's proposed story is based on what Ruth and Beth have told it and on other research undertaken. The evidence establishes that the senior and experienced journalist responsible for researching the story took proper steps to assess whether its various elements were true. X was given an opportunity to comment, which he did not take up, and the journalist's work was subject to appropriate editorial oversight.

47 The Attorney has nonetheless sought to cast doubt on the truth and reliability of certain aspects of the proposed story. In particular, she suggests that there are matters which cannot be referred to without risk of indirectly identifying X that cast doubt on Beth's reliability, credibility and motivation. The Attorney has also argued forcefully, on the basis of OPEN and CLOSED evidence, that there is no evidence of wrongdoing on the part of MI5.

48 I propose to say very little on this topic, because it is no part of the court's function in considering whether to restrain publication on the ground of breach of confidence to adjudicate on the truth or falsity of allegations which the defendant wishes to make or on whether its criticisms of MI5 are justified. I have no doubt that a party claiming that publication of confidential information is in the public interest must in general show that the allegations it seeks to publish and the criticisms it seeks to advance are serious and have a credible evidential basis. The BBC's allegations comfortably meet this test. The BBC does not, however, have to show that its allegations are true or its criticisms justified in order to rely on the public interest in publishing them. This is not a claim for defamation. Even if it were, that cause of action would not give rise to a right to interim relief to restrain publication of a story in these circumstances: *Bonnard v Perryman* [1891] 2 Ch 269. Nor is it necessary for the BBC to show that MI5 has acted unlawfully or in breach of existing standards. Even if it acted lawfully, there is a public interest in publication of a story which prompts debate on whether the existing law or standards should be changed: *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329, [2019] EMLR 5, at [23] (Sir Terrence Etheron MR, Underhill and Henderson LJJ). This is one reason why the possibility of disclosure to specialist oversight bodies such as the Investigatory Powers Commissioner or the Investigatory Powers Tribunal does not provide a complete answer to the BBC's case that public disclosure is in the public interest.

The danger which X poses to women and the other means of addressing it

49 This approach to the BBC's allegations means that it is difficult to quantify with precision the extent of the danger which X poses to other women. I proceed on the basis that the BBC's view about this danger has a credible evidential foundation and, therefore, that X may well pose a significant danger to any woman with whom he enters into a relationship or liaison.

50 During the course of his submissions, Sir James said that, quite apart from the possibility of police investigation and criminal prosecution, UK law offered a range of mechanisms for protecting women from the risks of domestic abuse and violence (including sexual violence). After the hearing, at my invitation, he filed a note setting out these mechanisms. Lord Pannick took the opportunity to respond in writing.

51 The Domestic Violence Disclosure Scheme was introduced in 2009 following the murder of Clare Wood by her former partner. It creates a mechanism for the disclosure by police of information about an individual's previous violence to a current or former partner where the disclosure may help to protect the partner from violence. The information disclosed can include matters that did not result in criminal proceedings. The disclosure can be either at the request of the current or former partner or at the instigation of the police.

52 The Scheme has to date been non-statutory, but s. 77 of the Domestic Abuse Act 2021 (which is not yet fully in force) will impose on the Secretary of State a duty to issue guidance to chief officers of police about the disclosure of police information by police forces for the purposes of preventing domestic abuse. The Scheme is capable of providing some protection to women who are current or former partners of individuals with a history of violence. It

does not, however, offer any protection to those who have not yet entered into a relationship with the individual concerned (e.g. those who have met the individual on a dating website and are planning to meet him).

53 The Crime and Security Act 2010 ("the 2010 Act") confers powers on police to issue a domestic violence protection notice. When such a notice is issued, magistrates are required to hear an application for a domestic violence protection order within 48 hours. But such an order is designed to protect a particular person whom the court considers it necessary to protect and can only be made where the court is satisfied that a perpetrator has been violent towards or threatened violence against her: s. 28(1)-(3) of the 2010 Act. In other words, this mechanism cannot protect other women who might in the future become victims of abuse by the perpetrator.

54 The Stalking Protection Act 2019 allows for early police intervention in stalking cases. The police can apply for a stalking protection order where it appears to them that: (a) the respondent has carried out acts associated with stalking; (b) the respondent poses a risk of stalking to a person; and (c) there is reasonable cause to believe the proposed order is necessary to protect the other person from that risk. Magistrates can grant the order if satisfied that these conditions are satisfied. Such an order may no doubt provide protective benefit in some cases, but the mechanism is likely to be of use only where the police know of a particular woman who may be at risk. In any event, this mechanism addresses one form of anti-social behaviour, which is not alleged in the present case.

55 The Sexual Offences Act 2003 contains a number of potentially relevant measures. A sexual risk order can be made against an individual thought to pose a risk of harm to the public: see s. 122A. Such an order can be made even though the individual has not been convicted of or cautioned for a relevant offence. Separately, there are notification requirements which apply to those convicted of or cautioned for certain sexual offences (s. 80) and sexual harm prevention orders, which can be made after conviction of certain sexual offences. Of these the sexual risk order is most likely to be of relevance in a case such as the present, but even that is unlikely to address risks posed to women at large, rather than to particular women or classes of women.

56 The BBC points to publicly available material which they say casts doubt on the effectiveness of some of these mechanisms. It would not be appropriate to undertake a detailed analysis of this.

57 For present purposes, it is sufficient to note that these mechanisms are part of the means by which the UK discharges its general positive obligations under Articles 2 and 3 ECHR to have in place a system to protect its citizens (and in particular women) from violence and sexual violence. They do not, however, negate the value in public disclosure of the identity of a person who is reasonably believed to pose a risk of such violence. The mechanisms I have mentioned are in the main focussed on addressing risks to specific individuals. Public disclosure is, in principle, capable of addressing the more general risk posed to women by persons liable to engage in violence against them.

58 The words "in principle" are, however, important. Whether and to what extent public disclosure would in fact serve to address the risks posed by a particular individual depends on the facts. I consider this below at paras 72-75.

The risks to X's life and safety arising from publication of his name and image

59 The Attorney's evidence on the extent of the risk took the form of OPEN and CLOSED witness statements from Witness A, a senior and experienced MI5 officer. For obvious reasons, there is considerably more detail in the CLOSED version of the statement than the OPEN one. The latter records MI5's assessment that the publication by the BBC of an assertion that this individual was working as a CHIS for any intelligence agency could give rise to a real and immediate threat to their life or to serious risk of harm.

60 Lord Pannick complains that this evidence is "entirely generic" and amounts to a mere assertion that the risk is real and immediate. He also relies on the evidence of the journalist who researched the story. The journalist's view is that the relevant groups are "fragmentary, dispersed and immobilised" and that being "outed" as an agent is unlikely to lead to any harm in the present context. Lord Pannick notes that the suggestion of a real and immediate risk is undermined by the fact that X felt comfortable telling Beth that he was a CHIS, which strongly suggests that he did not consider that disclosure would give rise to a serious and immediate threat.

61 The special advocates' skeleton argument had OPEN and CLOSED sections. The OPEN section contains the submission that "no sufficient evidence has been provided – in OPEN or in CLOSED – to properly support" the assessment that a real and immediate threat to X's life or safety would arise from publication of X's identity.

62 On this topic, I can record my conclusions in OPEN, but I am constrained in what I can say about the reasons for those conclusions. It is possible to say, however, that the CLOSED statement of Witness A contains a detailed and nuanced assessment of the risks to X and others arising from disclosure of X's identity. The author has been careful to eschew hyperbole. Although the BBC's journalist has some knowledge of the relevant groups, on this topic his experience is necessarily less well-rounded and his expertise less focussed on the assessment of future risk than MI5, which has considerable institutional experience and expertise in this area.

63 Witness A cannot and does not purport to predict with accuracy when (or even whether) the risk will materialise, but the CLOSED evidence shows that the assessment cannot properly be described as "generic". It is specific about the groups from which the risk arises and based on knowledge of these groups and their previous conduct. This is an assessment of future risk, which falls squarely within the category to which great respect is due, for the constitutional and institutional reasons given in *Rehman, Carlile* and *Begum*.

64 The CLOSED proceedings have allowed for the assessment to be probed and questioned with the assistance of the special advocates. In the light of that exercise, I am satisfied that it provides cogent evidence establishing that disclosure of X's identity would expose him to a "real and immediate risk" of death or serious injury at the hands of others. Giving that phrase the meaning identified by Lord Dyson in *Rabone*, the risk which would flow from publication of X's identity is "a substantial or significant risk and not a remote or fanciful one"; and it would be "present and continuing" from the moment of publication.

65 I have borne in mind that, according to the BBC, X chose to tell Beth that he worked for a security or intelligence agency. Whilst this is relevant to the strength of the confidentiality interest relied upon by the Attorney, I do not accept that it shows that X thought that public

disclosure of his alleged CHIS status would not be risky. In the first place, saying something to one person, particularly when that person is a long-term partner, is quite different from saying it to the world at large. It may be that, if the information was disclosed by X to Beth in the circumstances alleged by her, X should have foreseen that she might pass it on to others. But there is nothing to indicate that X did foresee that consequence, still less that he would have been unconcerned if he had. In any event, there is nothing to indicate that X's assessment of the extent of any risk is of particular relevance here. No-one suggests that he is an expert in the assessment of risk, even the risk to himself. In my judgment, the fact that X told Beth that he was a CHIS (assuming he did tell her that) is of minimal relevance to the true extent of the risk to X's life and safety posed by public disclosure of his identity.

Measures to protect X

66 On this topic too, there is very little that can be said in OPEN. It is possible to record, however, that there was CLOSED evidence about measures that would be taken to protect X if X's identity were disclosed (bearing in mind that this judgment proceeds on the basis that the Attorney neither confirms nor denies that X is or was a CHIS). The evidence establishes that those responsible have assessed that extensive protective measures would be necessary and that they would be likely to implement such measures.

67 There is no evidence to suggest that, once such measures had been implemented, there would still be a real and immediate risk to X's life and safety. But the measures themselves would have a very substantial impact on X's private and family life.

68 It might be said that, if other protective measures would suffice to reduce the risk to an individual to a level where it is no longer real and immediate, there is no need to restrain publication of his identity. As a matter of principle, I can see that such an argument might be available in some circumstances. But much will depend on the kind of protective measures in contemplation and the balance of other public interests. I say more about this in my CLOSED judgment. It is possible to record here, however, that the Attorney submits that public disclosure of X's name would cause wider damage to national security even though it may be possible to implement protective measures capable of reducing the risk to X below the level where Articles 2 and 3 ECHR are engaged.

The wider impact of publication on national security

69 Witness A's OPEN and CLOSED statements contain evidence which, in my judgment, establish the following propositions, which have in any event been recognised in the case law:

(a) CHIS play a critical role in MI5's operations and are an important tool in preventing attacks in the UK.

(b) CHIS are recruited and retained with the understanding and expectation that their identities will be kept secret in perpetuity.

(c) If people considering becoming CHIS believed that their identities and roles might be disclosed publicly they would be far less likely to agree to work for MI5.

(d) High levels of trust are required to retain CHIS and keep them operating safely and effectively. That trust would be damaged if CHIS see that the identity of a person said to be a CHIS has been publicly disclosed.

(e) These observations have special force in the particular field of activity in which it is said X worked.

70 I accept that a reader of the story the BBC wishes to publish would understand that the BBC were identifying X because of unusual factors specific to this case: his alleged serious criminality and his abuse of his status as an informant. It does not follow, however, that "the only persons who might be discouraged from working as a CHIS are people who behave, or intend to behave, like X: that is to say people who are guilty of seriously deviant behaviour, and would disclose their role as a CHIS deliberately in order, in this case, to perpetrate abuse" (BBC's skeleton argument, para. 48).

71 Someone hearing the BBC's story who works as a CHIS, or is considering whether to do so in the future, would not necessarily assume that the story was accurate in every respect. Such a person might rationally conclude that it was based principally on the say-so of Beth. In that case, the logical conclusion would be that the trigger for the disclosure of the allegation that X is a CHIS was the making of an allegation that he was guilty of seriously deviant behaviour and had deployed his alleged CHIS status as part of his abuse of Beth. I do not think that this would provide the kind of comfort the BBC suggests. Existing or potential CHIS might well fear that their own identities would be liable to be disclosed if someone made a similar allegation about them, or a different but equally serious allegation, whether the allegation was true or not. I consider Witness A's assessment that such a fear might discourage people from acting as CHIS to be both cogently reasoned and plausible. There is no public law flaw in the assessment. The assessment is therefore entitled to considerable respect. As I have sought to explain, it must be given commensurate weight in the balancing of public interests, following the approach in *Rehman*, *Carlile* and *Begum*.

Would public disclosure of X's identity materially reduce the risk which X poses to women?

72 As I have said, without making a finding to this effect, I proceed on the basis that there may well be a significant danger that X will act violently towards a woman with whom he has a relationship or liaison in the future.

73 There are three ways in which the public disclosure of X's identity could, in principle, mitigate this risk. First, any woman who happened to watch the broadcast and remembered X's name or what he looks like would be forewarned of the danger. The chance that a woman considering a relationship or liaison with X falls into this category is likely to be small. Second, the broadcast of a story using X's name would inevitably attract secondary reporting on internet news sites, including the BBC's own. A woman considering a relationship or liaison with X could undertake an internet search of his name and would be likely to find the story. This is, in practice, likely to be the main way in which public disclosure of X's identity would protect women. Third, the broadcast of a story containing X's image would be likely to attract secondary reporting of X's image on internet news sites, including the BBC's own. A woman who had access to an image of X could run the image through an image locator website or app and might be able locate the story in that way. The chance that a woman considering a relationship or liaison with X would have the technological proficiency and make the effort to do this is, realistically, small.

74 I would require considerable persuasion to grant relief if I considered that the effect of that relief had a material effect on women's ability to access information that might protect them from the risk of violence at the hands of X. But the question whether the relief sought would have that effect has to be answered on the basis of the evidence, OPEN and CLOSED.

75 One aspect of the evidence to which I have already referred (bearing in mind the caveat as to the Attorney's NCND stance) is that, if X's identity were publicly disclosed, it is likely that extensive measures would be implemented to protect him from the real and immediate risks to which the disclosure would expose him. These measures would substantially undermine the protective effect which disclosure of his identity would have on women considering a relationship or liaison with him. Once these measures had been taken, as they are likely to be, public disclosure of X's identity would not materially reduce any risks that X poses to women. This undermines one of the principal public interest justifications in favour of publication. It also means that, in the particular circumstances of this case, the grant of relief would not materially increase any danger that X poses to women.

The effect on the rights of the BBC, and those who would receive the information it wishes to convey, of relief preventing the public disclosure of X's identity

76 The story the BBC wishes to publish engages the core freedom of expression interests protected by the common law and under Article 10 ECHR and given special prominence by s. 12 of the HRA. Not only is the story "journalistic… material" for the purposes of s. 12(4) of the HRA, it is also a contribution to two inter-related current topics of public concern and debate: (i) violence by men against women and (ii) the alleged inadequacy of the awareness and understanding of this problem and the response to it by state institutions. The public interest in publication of the story is heightened by the additional element that, according to the BBC's allegations, X abused his status as a CHIS to coerce and terrify a female partner.

77 The excerpt set out at para. 34 above from Lord Rodger's judgment in *In Re Guardian News and Media Ltd* shows that the imposition of a legal requirement not to identify the person at the centre of a story represents a serious interference with the right to freedom of expression of the journalist and the media organisation for which he or she works. Equally important in this context, it also represents a serious interference with the right of the public to receive the information the journalist and media organisation wish to convey. However, since the Attorney has identified important public interests that would be served by the relief sought, and a balancing exercise must therefore be undertaken, it is important to assess the extent to which the relief sought would impact on the BBC's ability to communicate its story.

78 While an injunction restraining the BBC from identifying X would undoubtedly affect the immediacy of the story and its attractiveness to an audience, it would not prevent the BBC from:

(a) recounting Ruth's and Beth's allegations about X's abusive conduct towards them (save for those parts of the allegations which would give rise to an unacceptable risk of indirectly identifying X);

(b) recounting Beth's allegation that X told her that he worked for an intelligence agency and used that information to coerce and terrify her;

(c) recounting Beth's allegation about X's attack on her;

(d) showing some of the video footage of the attack, obscuring X's face and any other potentially identifying details and modifying his voice to avoid identifying him;

(e) explaining in general terms the basis for the BBC's view that MI5 should have known about X's character and conduct and should not have employed or continued to employ him as a CHIS.

79 These elements comprise what Mr Campbell at paras 31-32 of his statement identifies as the "core element" of the story – i.e. that which makes it newsworthy and a matter of legitimate public concern: X's use of his CHIS status as a means of abuse and the alleged negligence or complicity of MI5. Mr Campbell says at para. 33 that a story which omitted X's links with MI5 "probably would not be published". That is understandable: a story alleging that an unnamed person with no particular status is guilty of domestic violence would not, on its own, be newsworthy. But there is no suggestion in Mr Campbell's evidence that the BBC would not publish a story which could include the elements I have identified above simply because they were prevented from identifying X.

80 Before leaving this topic, I should deal briefly with an argument raised by the Attorney which I do not accept. Sir James submitted that, when considering the balance of public interests, it was important to bear in mind that the Government would be severely constrained in how it could respond to the story and that there was therefore a danger that the story would be one-sided. In my judgment, the constraints which would inevitably operate on the Government are real, but they flow from the Government's decision to adopt an NCND stance on the question whether X is or was a CHIS and to say little about its general policies in relation to CHIS. As the authorities I have referred to at para. 26 show, there are sound reasons for the policy decision to adopt the NCND stance in cases such as the present. But the fact that the Government is constrained in public debate as a result of its own policy decision is not a reason to limit the ability of others, who have not adopted the policy, to contribute to that debate. The fact that the debate will inevitably be partial to some extent is not a reason for shutting it down altogether. In any event, the Government can and should explain to the public the constraints on what they can say and the reasons for them.

Conclusion

81 In my judgment, the Attorney is more likely than not to succeed at trial in establishing that the balance of public and private interests favours the grant of relief prohibiting the BBC from disclosing X's name and image. I reach that view on the basis of clear and cogent OPEN and CLOSED evidence. The result is the same whether the matter is viewed through the prism of the law of confidentiality or that of ECHR rights (assuming in the BBC's favour that the latter requires a balancing exercise even once Articles 2 and/or 3 are engaged).

82 The information about X's identity, in the context of the allegation that he is a CHIS who works or worked for MI5, is – as the BBC accepts – confidential. Although X is said to have disclosed it to Beth, and she disclosed it to the BBC, it is not known other than to a small group of individuals. The Attorney has satisfied me that, if it were to become publicly or widely known, there would be a real and immediate risk that X would be killed or seriously injured. In order to address that risk, extensive protective measures would have to be, and would be, taken. As a result of those measures, public disclosure of X's identity would have no significant protective effect on women considering entering into a relationship or liaison with X. Whilst including X's name and image would make the BBC's story more engaging and potentially more attractive to a wider audience, this would come at the expense of

material damage to the effectiveness of the work of the security and intelligence agencies and, therefore, the national security of the UK.

83 The BBC will still be able to convey what it regards as the core elements of its story, including the allegation that X abused his CHIS status and the allegation that MI5 is at fault for using or continuing to use him as a CHIS. The Government will be heavily constrained in how it can respond to the latter allegation, but the constraints can be explained. The relief I grant will constitute a significant interference with the BBC's right to freedom of expression and the correlative right of the public to receive the information the BBC wishes to convey. However, it will not prevent the BBC from making the allegations central to its story, nor from drawing attention to what it contends are the important issues of public concern to which it gives rise.

The precise terms of the interim injunction

84 In my first judgment, at [11]-[17], I drew attention to a dispute between the parties about the form of relief sought. The Attorney initially sought a very broad injunction, which would have prevented the BBC from publishing any of the information contained in a letter it sent to the Home Office without her express prior written agreement. This form of relief was said to be modelled on that at issue in *Attorney General v Punch Ltd* [2002] UKHL 50, [2003] 1 AC 1046. The BBC objected that this would give the Government the right to approve the contents of its programme in advance, something which was objectionable for any press or media organisation, especially one with a Charter obligation of independence from the Government.

85 By the time of the hearing of the interim relief application, matters had moved on. As a result of the first judgment, considerably more was now in the public domain. The Attorney served a confidential schedule to her Particulars of Claim and the differences between the parties as to what could and what could not be referred to in public narrowed somewhat, though some significant differences remained.

86 By the end of the OPEN part of the interim relief hearing, Sir James made clear that the Attorney no longer sought the open-ended form of relief claimed in the Particulars of Claim. The parties therefore agreed that, if injunctive relief were appropriate in principle, the relief would have to identify precisely the information that could not be disclosed.

87 This agreement means that I do not have to resolve definitively whether the form of relief originally sought would have been appropriate. However, it is right to record that I would have required great persuasion to grant relief whose effect was to give a Government Minister "copy approval" over the contents of a broadcast. The relief at issue in *Punch* had been granted by consent. Other authority points strongly against relief that imposes prior restraints on the media: see e.g. *Kent County Council v B (A Child)* [2004] EWHC 411 (Fam), [145] (Sir James Munby P). In principle, it seems to me that an injunction which restrains a media organisation from exercising the right of freedom of expression should be narrowly tailored and, where possible, should precisely identify the information whose publication is prohibited.

88 In this case, the "core" information whose disclosure will be prohibited is X's name and image. But there will also be other secondary information which, if disclosed, would tend to identify him. At the interim relief hearing, a precautionary approach to the identification of this secondary information was taken. This was necessary for obvious reasons. The BBC

and special advocates emphasised, however, that there remained some significant disputes about what could and could not be safely referred to without running the risk of identifying X. I indicated that I would resolve any such disputes after giving this judgment, if – as has transpired – I accepted the Attorney's case in principle. I shall give directions so that this process can be completed as soon as possible. The result will be an injunction order which aims to identify with precision the information whose disclosure is prohibited.

Note on timing and procedure for the hand-down of this judgment

89 A version of this OPEN judgment was sent to the Government Legal Department and special advocates pursuant to CPR 82.17 on 14 March 2022. An extension of time was given for the Security Service to respond. The special advocates replied. It was necessary to hold a short CLOSED hearing to consider these submissions on 30 March 2022. This resulted in some minor amendments, which did not alter the substance of the judgment.