Neutral Citation Number: [2019] EWHC 2026 (QB)

Case No: HQ18X02122

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2019

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE NICKLIN

- -

Between :

RXG	**Claimant**
- and -	
(1) Ministry of Justice **(2) Persons unknown**	**Defendants**

- -

Edward Fitzgerald QC and Adam Straw (instructed by **Irvine Thanvi Natas Solicitors**) for the **Claimant**
William Hays (instructed by the **Government Legal Department**) for the Ministry of Justice
James Segan (instructed by the **Attorney General**) as Amicus Curiae

Hearing dates: 20 November 2018 and 28 February 2019

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Approved Judgment

Dame Victoria Sharp PQBD.

1. This is the judgment of the Court. This claim raises the issue of the circumstances in which the High Court should extend the anonymity of child defendants in criminal proceedings beyond their 18th birthday.

Background

2. On 23 July 2015, at the Crown Court sitting at Manchester, the claimant, RXG, pleaded guilty to two offences of inciting terrorism overseas contrary to section 59 of the Terrorism Act 2000. The particulars of the offences were that, on two occasions in March 2015, he had incited another person to commit acts of terrorism, namely the murder of police officers during an attack on an ANZAC Parade in Melbourne, Australia; and the murder by beheading of a person in Australia. The Australian Federal Police were alerted to the plot and they made several arrests. No attacks were carried out. In September 2016, a 19-year-old Australian was sentenced to 10 years' imprisonment by a Court in Victoria for his role in these matters.

3. RXG committed the offences when he was 14 years-old. He is the youngest person ever to be convicted of a terrorist offence. His case received international media attention. On 2 October 2015, Saunders J imposed a life sentence with a minimum term of 5 years. In consequence, the earliest date on which RXG may be considered for release is 2 October 2020. In his sentencing remarks, when considering how a 14-year-old boy could commit such serious offences, Saunders J said:

> "A considerable amount of expertise has gone into explaining how and why [RXG] became so radicalised. It appears he felt isolated in terms of his education and home life. There was a vacuum in his life which he filled with religious extremism. Over the period from 2012 to 2015 his behaviour gradually changed and certainly from 2014, he was accessing extremist material on the internet… He communicated with extremist propagandists who either worked for ISIS or supported their aims over the internet. They were experienced recruiters who were keen to enlist young impressionable Muslims to the cause. They groomed [RXG] and then started to use him to carry out their wishes. They succeeded in turning [RXG] into a deeply committed radical extremist. One professional who dealt with him had never encountered such entrenched extremist views… No doubt lessons can and have been learnt by many people from the unique circumstances of [RXG's] case but there is no material before me from which blame should be attributed to anyone, except those extremists who were prepared to use the internet to encourage extreme views in a boy of 14 and then use him to carry out terrorist acts."

4. During RXG's trial, reporting restrictions that prevented him from being identified were imposed under section 45 of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act). The effect of those restrictions was that no matter relating to RXG could, whilst he was under 18, be included in any publication if it was likely to lead members of the public to identify him as the defendant in the criminal proceedings.

5. Saunders J refused an application by various media organisations to lift the reporting restrictions so that RXG could be identified. The judge considered the following factors justified continuation of the reporting restrictions until RXG reached 18 years of age:

i) Naming RXG would not act as a deterrent. On the contrary it might, by garnering significant publicity, glorify RXG and encourage others to do the same thing.

ii) On the basis of the expert evidence available to the Court, naming RXG would create a serious risk that his rehabilitation would be threatened.

iii) The interference with the open justice principle by refusing to lift the anonymity order was limited:

> "… all the details of what happened, why and how it happened have been carefully recounted and analysed in public. There is nothing that I can identify which the public do not know to enable them to have an informed debate. So it comes down to the fact that without the name and a photograph public interest will be less. How much is impossible to say."

iv) The right of the public to know if and when someone is released from custody that s/he had committed an offence as serious as this was appropriately met in RXG's case as he "*will not be released until after he is 18 and he can [then] be named*".

6. Following his conviction and sentence, RXG has remained in a secure children's home. He was not given a new identity on arrival and continues to use his given name to this day. In October 2017, RXG was the subject of an autism assessment which concluded that his "*social, communication, cognitive, motivational and sensory functioning and behaviours are commensurate with high functioning autism*". RXG became an adult last year and, in the ordinary course, he would be transferred to an adult prison. We understand that his transfer has been delayed pending the decision in this case.

7. Recognising that the reporting restrictions under section 45 of the 1999 Act would come to an end on RXG's 18th birthday, representatives of RXG (then still a child) commenced these proceedings in the High Court on 13 June 2018 by Part 8 Claim Form. RXG sought an injunction the practical effect of which was to extend the reporting restrictions that had applied to RXG beyond his 18th birthday. For all practical purposes, the relief sought was *contra mundum* rather than against any particular defendant. On 20 June 2018, Sir Brian Leveson P. granted an interim injunction until the hearing of the claimant's claim. The order effectively continued the existing reporting restrictions beyond RXG's 18th birthday, pending the decision of the Court.

8. Any person or organisation that wished to become a defendant to the proceedings was required to apply to the Court by 20 August 2018. No such application was received. Although general notice of the application has been given to media organisations, none has sought to be joined to the proceedings or to make submissions to the Court as to the terms of the order sought by RXG. We have however received written submissions from the Press Association (the PA). In its submissions, the PA makes clear that it is an independent news organisation and does not represent or speak on behalf of the press as whole or any other media organisation.

9. The matter first came before this Court on 20 November 2018. We were concerned that RXG's transfer to an adult prison posed several questions about the management of RXG in such a prison and whether an anonymity order in the terms sought could be enforced as a matter of practicality. At a directions hearing on 7 December 2018, the Ministry of Justice (MoJ) was added as a defendant to the claim and the date for the hearing was set for 28 February and 1 March 2019. Further directions were given for the service of evidence.

10. The principal evidence relied upon by RXG is as follows:

    i) Letters from RXG's local Youth Justice Service dated 29 May 2018, 10 August 2018, 19 September 2018 and 4 December 2018, and a witness statement from the Head of Home at RXG's children's home dated 4 December 2018. The later letters and the witness statement dealt with the practicalities of maintaining RXG's anonymity following a transfer to an adult prison. In the letter of 29 May 2018, the author addressed the risks to RXG (and his family) arising from a loss of anonymity:

> "… the professionals and management involved in this case have convened and recognise that if [RXG]'s name were to be released into the public domain, there is potential for various repercussions which should be taken into account when considering this application.
>
> An immediate concern that arises is the potential for [RXG] being placed at risk. Highlighting his identity may lead to him being targeted within the custodial estate from those who might perceive there to be a need for retaliation for his offence. Within most adult prison populations there is likely to be a representation of those who are not only minded to seek retribution, but also willing and able to cause harm to [RXG].
>
> In addition to a risk to [RXG] directly, his family, in particular his parents, brother and younger sisters, are also likely to be identifiable as a consequence of his identification. This also potentially places them in harm's way by their association. This would cause further trauma to the family who have already had to resettle from their family home following [RXG]'s initial involvement in the Criminal Justice System. One specific area of concern regarding his siblings is around the education provision of his younger sisters. The school is already anxious regarding the situation and there is a strong likelihood that the naming of their older brother would lead to the girls being made to move school again to avoid the negative attention for the family and the school…
>
> It appears that [RXG] is making steady progress though his sentence… Progress is certainly evident in [RXG]'s presenting attitudes and alongside this it is acknowledged that his behaviour within the secure estate has been extremely positive since very early in his sentence. A concern, therefore, is that identifying [RXG] has the potential to undo the progress made if he were to perceive that he had been let down by 'the system'. This could mean that [RXG] takes backwards steps from his current position or even reignites any hostile feelings he once held and expressed towards certain sections of society…

> … [H]is naming within the public domain could hinder [RXG]'s rehabilitation in the immediate future but even if he were to overcome that obstacle, considering the long term consequences, his ability to ever effectively resettle would be made extremely difficult if his name became something that could be easily recognised as associated with extremism on any internet search engine."

ii) An assessment by Dr Louise Bowers, a Forensic Psychologist, dated 18 June 2018, based on an assessment of RXG on 4 June 2018. She assessed the likely impact on RXG of removing his anonymity as follows:

> "**Immediate effects**
>
> First, if RXG's identity is exposed by the media following his 18th birthday, there will inevitably be intrusive media reporting of the case. In my experience, cases that involve young children who commit unusual offences generate strong feelings in the public. Hostile reporting or simply being identified as 'a terrorist' will inevitably cause RXG distress and will evoke feelings of shame and humiliation. It is probable that this will have a profound impact on his psychological well-being and could lead to mental health problems. Second, if RXG is identified as the young person who planned a terrorist attack on the Anzac Parade, it is likely that he will be shunned and rejected by his peers at [Secure Setting] who will feel betrayed and misled by him. If this occurred, RXG would quickly become isolated and lonely which would inevitably have an impact on his confidence and self-esteem. Third, if RXG's identity is exposed, I would be concerned that he might feel let down by the professionals he works with and he may want to distance himself from them. This would then remove him from a vital source of psychological support at a critical time and could impact on his on-going therapy and intervention. Fourth, being labelled as [a] terrorist is likely to make it very difficult or even impossible for RXG to continue the process of developing a new pro-social identity…
>
> **His reintegration into, and continuing rehabilitation within, the community…**
>
> I continue to work with a number of young people who have committed serious offences as children and have been released from custody as young adults. Most of them have not had their identities protected, but some have. From this experience, I conclude that if RXG's identity is exposed and he has to attempt to reintegrate into the community identified as 'a terrorist', this will severely limit or totally block his opportunities to find suitable education or employment. It is likely that he will be rejected and shunned by society, and given his ASD and associated social difficulties, forming relationships in these circumstances will be very difficult and could become impossible for him. Rejection, a lack of meaningful activity and social isolation were all features of RXG's life at the time he was offending, and a return to these circumstances is likely to significantly affect his mental state and undermine his rehabilitation.
>
> **His ability to engage with support and probation services**

> RXG has ASD and as is often the case with individuals with this condition, he likes rules, structure and routine. In my view, RXG is highly likely to comply with his licence conditions and what is asked of him by the Probation Service whether his identity is protected or not. If RXG's anonymity is removed, in my experience, providing these services would be much more challenging for the Probation Service as they would need to protect him from harassment, abuse and direct harm in the community whilst he accessed them.
>
> **How his family may be affected, and in turn the effect this will have on him**
>
> I have no knowledge of RXG's family and I am unable to say how they may be affected if RXG's identity is exposed. However [the Youth Justice Service] provided evidence of multiple potential impacts. RXG is very concerned about the impact exposing his identity could have on his family. He does not fear his family would withdraw their support if he and they were identified, but if this occurs, this would increase RXG's feelings of guilt at a time when he will be psychologically fragile. RXG was extremely troubled by this aspect of the forthcoming proceedings, and he appeared more concerned about the impact of exposing his identity on his family than the impact for himself."

And later in the report:

> "RXG appears to have left his 'terrorist identity' behind and he is well on the way to developing a new stable and pro-social identity. He made several references to wanting the public to know who and what he is now, not who he was then. RXG likes and is proud of the person he has become and, in my opinion, this has contributed to his increased confidence and self-esteem. Research shows that 'shedding' the old offending identity and developing a new pro-social non-criminal identity is an important part of rehabilitation and desistance from offending… Being confronted with and constantly reminded of his past identity is likely to make it very difficult if not impossible for RXG to continue the process [of] developing a new pro-social identity. If he is labelled 'a terrorist' he may simply give up and see little point in continuing the journey towards improving his functioning and making amends for what he has done. In my opinion, allowing the stigma and shame of what RXG did as a child, come to define him as a young adult, would probably halt his psychological development and continuing rehabilitation."

Dealing with the risk of harm to RXG in the prison estate:

> "When RXG turns 18, he could be transferred swiftly to either a young offenders institution or given the nature of his offence, an adult prison. I currently work in both types of establishment. Prison officers are trained to support and protect vulnerable young adults in their care but vigilante attacks still do happen. In my experience, there is a certain respect prisoners can gain from attacking notorious offenders and some prisoners view these sorts of attacks as a badge of honour. If RXG enters the prison system identified as the youngest ever convicted terrorist, he could become a target for those who would want to and be capable of harming him.. RXG

> is not street-wise and his ASD makes understanding his social world and particularly new social situations difficult for him. Consequently, making the transition between the protected environment of [Secure Setting] and a prison will, in my opinion, be traumatic for RXG. If RXG's identity is exposed and he has to live under the constant threat of being harmed, it is likely that this will have a significant impact on his psychological functioning, to the point where his mental state could well deteriorate… Continuing to protect RXG's formal identity will, in my view, go some way to helping him to make this transition and continue his rehabilitative journey without significantly undermining the psychological progress he has made so far."

iii) Lochlinn Parker, RXG's solicitor, has provided five witness statements dated 13 June 2018, 13 September 2018, 6 November 2018, 22 November 2018 and 5 December 2018 respectively. In his second witness statement, Mr Parker has exhibited media reports and social media commentary that attended RXG's original criminal proceedings and the present application to continue the reporting restrictions. He summarised the coverage as follows:

> "The public reaction, gauged through social media commentary, has been overwhelmingly negative. Stories or social media posts have generated hundreds of replies. There is concern that the rights of potential victims and the wider public will be subordinated to those of RXG. There is anger that RXG is able to access the Courts at all, and to be in receipt of Legal Aid. There has also been, as there was previously, Islamophobic and racist commentary."

Mr Parker has exhibited a selection of social media postings. A significant number use violent language, and some make threats against RXG. Most take advantage of the practical anonymity that social media affords. The following represent a sample of the replies to posts on Twitter by media organisations reporting RXG's application for anonymity:

> "Terrorist. Traitor. String him up. What use is he to humanity" (@JAGKEV)
>
> "Release him to me, his identity will remain secret for life, I promise never to tell anyone where I buried the fucker" (@andyjonesKipper)
>
> "No he should be executed" (@asificared2)
>
> "Linch him (sic)" (@Chriss31745842)
>
> "no, he should be hanged" (@angelauk1900)
>
> "Nope… and give him a injection while his name is pronounced slowly…" (@colesypontyboy)
>
> "NO. He should be publicly hanged with his remains being fed to pigs" (@andyjgoldie)
>
> "Trip to the scaffold and an unmarked grave. Gives him plenty of anonymity" (@pnicholas79)

> "Hang them all. The tax Payer does not want to pay for their upkeep" (@_Wibble_)

iv) An email from a Probation Counter Terrorism Lead in the Security, Order and Counter Terrorism Directorate of the National Probation Service, dated 19 July 2018, in which he confirmed that the Probation Service was experienced in working with other agencies in the management of high-profile cases and those where offenders may be under threat from others.

v) A letter from Detective Chief Inspector Andrew Meeks of Counter Terrorism Policing North West, dated 30 July 2018, who was the Senior Investigating Officer in the case which resulted in RXG's conviction. He confirmed that the police could provide no material to support RXG's application for continued anonymity. He added:

> "If, in the event [RXG] were identified at a future date, we came into possession of information to suggest that he was at risk of harm, we would of course take action in accordance with our statutory responsibilities."

That was a reference to the *Osman* duty, which arises when a public authority becomes aware that there is a real and immediate risk to the life of a person, to take preventative operational measures to safeguard that person so far as this is practicable: *Osman -v- UK* (2000) 29 EHRR 245.

vi) An "Extremism Risk Assessment" on RXG, conducted by a Forensic Psychologist in July 2018, which concluded that RXG was "*emotionally and socially immature in comparison to others of his own age*". As to the risk of re-radicalisation, the author noted:

> "RXG… currently has media anonymity which affords him some protection from being recognised and pursued. Should this be removed, this may increase his risk, particularly if transferred to the adult estate where he may be exposed to other individuals engaged in the Daesh or other extremist ideology. Such individuals may target him especially given the controversial nature of his offence and his vulnerability due to his age… and ASD. Whilst anonymity might not totally serve to prevent this occurring it may assist in managing this risk particularly in the adult estate. Conversely, given [RXG]'s ASD it is unclear whether he would be able to maintain a cover story in the adult estate..."

In the identified risk factors of RXG becoming re-engaged with extremism, the Report noted loss of anonymity as an additional risk factor for RXG:

> "If anonymity (Additional factor) were to be maintained, this may decrease the risk although given [RXG]'s developmental disorder (Additional factor) it is unclear whether he would be able to maintain a cover story which may leave his vulnerable to mental health issues (Factor 13) particularly given his ongoing medical history. Such anxiety may motivate him to disclose his offence, particularly if approached by those he perceives to be held in high esteem as this would not only make him feel safe but also fulfil his ongoing need for status (Factor 4) and need to dominate others (Factor 6)."

For similar reasons, anonymity was also identified as a protective factor enabling both RXG and his family to avoid media interest. It was considered that anonymity also reduced the risk of RXG being identified and pursued by individuals involved with Daesh (or other extremism) as well as those holding anti-extremist views.

vii) A letter from a Clinical Psychologist, dated 28 September 2018, concerning RXG's preparations for transfer to an adult prison and the particular challenges presented by RXG's autism. She identified difficulties that RXG would have in adjusting to a new regime in an adult prison because of his autism.

viii) A report by a Chartered Forensic & Consultant Clinical Neuropsychologist, Dr David Murphy, dated 9 October 2018. The report concentrated mainly on the risks to RXG from being transferred to an adult prison, but Dr Murphy also considered risks arising from his identity becoming known:

> "… transferring RXG to an adult prison (especially a high secure one) would on balance not make any significant positive difference in reducing his risk of re-offending or build on his effective treatment to date. Whilst RXG was convicted of a serious offence that could have resulted in significant loss of life, the potential risks associated with a transfer into the adult prison estate (including RXG being victimised by other more able and older prisoners, becoming more socially isolated, developing additional mental health difficulties as a result of stress and possible undoing his therapeutic progress to date) would appear to outweigh any gains. Indeed, it is possible that a transfer to a category A prison may actually increase RXG's vulnerability to being targeted by others and possibly 're-radicalised'. This risk would appear to be linked to two key areas including RXG's general interpersonal vulnerability and social naivety associated with his ASD, and the possible loss of his anonymity…
>
> My understanding from the available case notes is that maintaining RXG's anonymity has been a very important factor in maintaining his progress and protecting him from being targeted by others. To date, RXG's anonymity has been successfully maintained. I suspect that attempting to maintain RXG's anonymity will require significant effort within a prison environment. Any breach in anonymity will in turn be very difficult to manage and it is likely to have a detrimental effect on RXG. As a result of difficulties associated with his ASD and social immaturity, RXG's ability to cope with any breach in anonymity is likely to be poor resulting in an increase in his intrapersonal stress which in turn would lead to increased self-isolation, as well as a risk of mood and mental health disturbance. Physical assault resulting from a breach in his anonymity from others would also be a possibility."

ix) A report by a Consultant Forensic Psychiatrist, Dr Callum Ross, dated 17 October 2018, on RXG's presenting needs, risks and appropriate treatment management based on his examination of RXG and a telephone conversation with RXG's mother. Dr Ross did not deal specifically with the issue of RXG's anonymity, but his report did identify that RXG's transfer to an adult prison

would present difficulties for him and a risk of deterioration in his mental health:

> "… the assessment of depressed mood in an individual with autism is challenging. I am concerned that [RXG] disengaged… and I am concerned by his own expressions of anxiety about moving into a Category A prison at the age of 18 accompanied as he is by a personality that struggles to mix and understand others".

x) A witness statement by the Legal Director of the Howard League for Penal Reform, Dr Laura Janes, dated 20 November 2018, which dealt principally with a challenge to the decision to move RXG to an adult prison.

xi) A letter from the Executive Director of the Youth Custody Service, dated 5 December 2018, confirming that HMPPS had experience of dealing with maintaining anonymity in the custodial environment and would be able to comply with any order that the Court made.

11. The MoJ has adopted a neutral position on RXG's application. A witness statement from the Executive Director for the Long-Term High Security Estate, Richard Vince, dated 21 January 2019, has been filed by the MoJ. In his statement, Mr Vince confirmed that his statement represents the views of HM Prison and Probation Service (HMPPS) and the MoJ. By way of introduction, Mr Vince reassured the Court that HMPPS "*has the knowledge and experience within the adult [prison] estate to manage RXG safely (including during and after any transfer to the adult estate) whether an anonymity order is in place or not*". Specifically, Mr Vince provided a risk assessment, carried out in January 2019 (the HMPPS Risk Assessment). It addressed whether removal of RXG's anonymity would pose a threat of real and immediate risk to his life, and concluded:

> **"Article 2/3 risks to RXG**
>
> - There is no current assessed threat of real and immediate risk to life, either in the current secure setting or from the wider public. RXG is known in his own name within the secure setting.
>
> - Open source searches of the internet, as reported in the statement from Lochlinn Parker… highlight media coverage at the time of the initial court appearance and sentencing and again when application was made to the court for an extension to the existing anonymity order. Public reaction to the coverage focuses on Islamophobic/racist statements, comments on the perceived lack of open justice and the alleged 'injustice' of protecting the criminal and not attending to the needs of victims. Included are a number of opinions on how RXG should be dealt with, some of a violent nature.
>
> - Law enforcement partners consider that comments attached to online reporting (both on the conviction and on the possibility of an injunction to protect RXG's identity) are common with a story of this nature; the existence of these comments in themselves do not amount to an assessed threat against RXG. They found, based on initial intelligence checks and open source research, that there is no current assessed threat of a real and immediate risk

to life against RXG. As such, these comments may be more a reflection of public outrage than an indication of credible sophisticated threats.

- There does not appear to be any continued or ongoing widespread public interest in this case at present. The assessment, based on experience of managing other terrorist and youth offenders, is that there would be media interest and exposure were the offender's identity to be reported, but that rarely manifests in any increase of any risk of threat or violence to the offender…

- In sum, if the order was removed it is safe to assume the level of threat could be raised, but it is considered that this is unlikely to escalate into real and immediate threats to life.

Article 2/3 risks to RXG's family

- HMPPS understands there has been considerable work undertaken by police to support the family's safety. HMPPS is not aware of any current risk or threat to the family…

Article 8 risks to RXG in respect of his rehabilitation

- In the event RXG's identity is made known, our judgment is that media reporting is likely to disrupt his rehabilitation to some extent in the short term, which may be exacerbated due to his identified vulnerabilities.

- However, we judge that management strategies can be effectively deployed to support rehabilitative progress and mitigate the impact of any disruption. It is the experience of HMPPS that, where youth anonymity orders fall away on the individual attaining majority, any media exposure is relatively short lived and associated risks to RXG would be effectively managed by the holding establishment and, where necessary, by the local police.

Conclusion

- The risks to RXG and his family would currently appear to be low. It is accepted that there may be significant media coverage at certain points but it is not considered that this, on its own, will generate threats or risk of violence to RXG. Because of his vulnerability such coverage may well affect his rehabilitation in the short term but those responsible for RXG would, drawing on relevant experience, be in a position to mitigate the impact and to help him to progress…"

12. In the absence of any party that actively opposed the making of the order sought by the claimant, the Court invited the Attorney General to instruct counsel as an *amicus*. We have been greatly assisted by the written and oral submissions of Mr Segan.

Legal Framework: Statutory reporting restrictions

13. There are several different statutory powers that permit the court to impose reporting restrictions preventing the identification of persons involved in criminal proceedings. The particular statutory regime depends upon whether the relevant person is a defendant or witness; adult or youth.

Youths

14. Until 13 April 2015, the operative statutory regime for imposing reporting restrictions to protect children and young persons in criminal proceedings was contained in sections 39 and 49 of the Children and Young Persons Act 1933 (the 1933 Act). The default position differed as between the Youth (formerly Juvenile) Court and Crown Court:

    i) In the Youth Court, section 49 imposed an automatic prohibition on the reporting of the identity of children and young persons "*concerned in*" the proceedings (which includes a defendant), but with a power to lift that prohibition in certain circumstances.

    ii) In the Crown Court, there were no default reporting restrictions but section 39 conferred a power upon the court to prohibit reporting of the identity of children and young persons "*concerned in*" the proceedings.

15. Although section 39 provided no guidance as to the circumstances when the Court should impose reporting restrictions, the test to be applied was held to be whether there was "*good reason*" to impose reporting restrictions (*R -v- Lee* [1993] 1 WLR 103, 110 *per* Lloyd LJ). The potential for inconsistency in imposition of reporting restrictions in the Crown Court has been criticised as presenting a risk of "*uncertainty and unpredictability, verging on arbitrariness, in an important area of court reporting*": Para. 8-68 *Arlidge, Eady & Smith on Contempt* (5th Edition, 2017). Nevertheless, the difference in the default position between the Youth and Crown Courts was held to be "*a distinction which Parliament clearly intended to preserve*": *R -v- Lee*, *supra*.

16. On 13 April 2015, for proceedings in the Crown Court, section 39 of the 1933 Act was replaced by section 45 of the 1999 Act. Section 49 of the 1933 Act (albeit in a form amended by the 1999 Act) continued to apply automatic reporting restrictions to children and young persons involved in proceedings in a Youth Court.

17. Section 45 of the 1999 Act provides as follows:

> **45 Power to restrict reporting of criminal proceedings involving persons under 18**.
>
> (1) This section applies (subject to subsection (2)) in relation to—
>
> (a) any criminal proceedings in any court (other than a service court) in England and Wales or Northern Ireland; and
>
> (b) any proceedings (whether in the United Kingdom or elsewhere) in any service court.
>
> (2) This section does not apply in relation to any proceedings to which section 49 of the Children and Young Persons Act 1933 applies.
>
> (3) The court may direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any

publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.

(4) The court or an appellate court may by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied that it is necessary in the interests of justice to do so.

(5) The court or an appellate court may also by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied—

(a) that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and

(b) that it is in the public interest to remove or relax that restriction;

but no excepting direction shall be given under this subsection by reason only of the fact that the proceedings have been determined in any way or have been abandoned.

(6) When deciding whether to make—

(a) a direction under subsection (3) in relation to a person, or

(b) an excepting direction under subsection (4) or (5) by virtue of which the restrictions imposed by a direction under subsection (3) would be dispensed with (to any extent) in relation to a person,

the court or (as the case may be) the appellate court shall have regard to the welfare of that person."

18. The large body of case law under section 39 of the 1933 Act continues to be relevant and provide guidance for applications made under section 45 of the 1999 Act: *R -v- H* [2016] 1 Cr. App. R. (S.) 13 [8] *per* Treacy LJ. Hooper LJ summarised the principles applicable to the exercise of section 39 of the 1933 Act in *R (Y) -v- Aylesbury Crown Court* [2012] EMLR 26 [26]:

i) in deciding whether to impose or thereafter to lift reporting restrictions, the court will consider whether there are good reasons for naming the defendant;

ii) in reaching that decision, the court will give considerable weight to the age of the offender and to the potential damage to any young person of public identification as a criminal before the offender has the benefit or burden of adulthood;

iii) by virtue of section 44 of the 1933 Act, the court must "*have regard to the welfare of the child or young person*";

iv) the prospect of being named in court with the accompanying disgrace is a powerful deterrent and the naming of a defendant in the context of his punishment serves as a deterrent to others. These deterrents are proper objectives for the court to seek;

v) there is a strong public interest in open justice and in the public knowing as much as possible about what has happened in court, including the identity of those who have committed crime;

vi) the weight to be attributed to the different factors may shift at different stages of the proceedings and, in particular, after the defendant has been found, or pleads, guilty and is sentenced. It may then be appropriate to place greater weight on the interest of the public in knowing the identity of those who have committed crimes, particularly serious and detestable crimes; and

vii) (where applicable) the fact that an appeal has been made may be a material consideration.

19. Any reporting restrictions imposed under section 45 of the 1999 Act cease to have effect when the subject of the direction becomes 18: *Venables -v- News Group Newspapers Ltd* [2001] Fam 430 [28] *per* Dame Elizabeth Butler-Sloss P.; *R (JC) -v- Central Criminal Court* [2014] 1 WLR 3697 [13], [39] and *R -v- Markham* [2017] 2 Cr. App. R. (S.) 30 [89] *per* Sir Brian Leveson P. The position is the same for reporting restrictions imposed in the Youth Court under section 49 of the 1933 Act. As noted above, section 49(1) of the 1933 Act was amended (from 13 April 2015) by section 48 of the 1999 Act (and Schedule 2 para. 3(2)) expressly to provide that the automatic reporting restrictions in a Youth Court lapsed when the relevant person attained the age of 18. The Divisional Court had reached the same conclusion in relation to the former wording of section 49: *T -v- Director of Public Prosecutions, North East Press Limited* [2003] EWHC 2408 (Admin) [40].

Witnesses

20. Reporting restrictions under section 45 of the 1999 Act (and before that section 39 of the 1933 Act) can be imposed in respect of a child or young person "concerned in the proceedings". Section 45(7) defines that as someone (a) against or in respect of whom the proceedings are taken, or (b) who is a witness in the proceedings. However, as for defendants, any such reporting restriction lapses when the witness turns 18. Section 46 of the 1999 Act confers a power to impose a reporting restriction in relation to a witness (other than the accused) who is over the age of 18 and in need of protection. Eligibility for protection is defined by section 46(3) and relates to the likelihood of the quality of the evidence or level of co-operation being diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness. A reporting restriction imposed to protect an adult witness applies for the witness's lifetime: section 46(6).

21. These provisions left a lacuna, identified by Sir Brian Leveson P. in *JC* [13]. By section 46, Parliament had made provision for lifetime protection for adult witnesses, but had made no such provision for child or youth witnesses. Any reporting restrictions imposed under section 45 of the 1999 Act lapsed when the subject turned 18.

22. Parliament legislated to fill that lacuna in the Criminal Justice and Courts Act 2015. Section 78 of that Act amended the 1999 Act, with effect from 13 April 2015, by inserting a new section, section 45A which is in the following terms:

45A Power to restrict reporting of criminal proceedings for lifetime of witnesses and victims under 18

(1) This section applies in relation to—

(a) any criminal proceedings in any court (other than a service court) in England and Wales, and

(b) any proceedings (whether in the United Kingdom or elsewhere) in any service court.

(2) The court may make a direction ("a reporting direction") that no matter relating to a person mentioned in subsection (3) shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as being concerned in the proceedings.

(3) A reporting direction may be made only in respect of a person who is under the age of 18 when the proceedings commence and who is—

(a) a witness, other than an accused, in the proceedings;

(b) a person against whom the offence, which is the subject of the proceedings, is alleged to have been committed.

(4) For the purposes of subsection (2), matters relating to a person in respect of whom the reporting direction is made include—

(a) the person's name,

(b) the person's address,

(c) the identity of any school or other educational establishment attended by the person,

(d) the identity of any place of work of the person, and

(e) any still or moving picture of the person.

(5) The court may make a reporting direction in respect of a person only if it is satisfied that—

(a) the quality of any evidence given by the person, or

(b) the level of co-operation given by the person to any party to the proceedings in connection with that party's preparation of its case,

is likely to be diminished by reason of fear or distress on the part of the person in connection with being identified by members of the public as a person concerned in the proceedings.

(6) In determining whether subsection (5) is satisfied, the court must in particular take into account—

(a) the nature and alleged circumstances of the offence to which the proceedings relate;

(b) the age of the person;

(c) such of the following as appear to the court to be relevant—

(i) the social and cultural background and ethnic origins of the person,

(ii) the domestic, educational and employment circumstances of the person, and

(iii) any religious beliefs or political opinions of the person;

(d) any behaviour towards the person on the part of—

(i) an accused,

(ii) members of the family or associates of an accused, or

(iii) any other person who is likely to be an accused or a witness in the proceedings.

(7) In determining that question the court must in addition consider any views expressed—

(a) by the person in respect of whom the reporting restriction may be made, and

(b) where that person is under the age of 16, by an appropriate person other than an accused.

(8) In determining whether to make a reporting direction in respect of a person, the court must have regard to—

(a) the welfare of that person,

(b) whether it would be in the interests of justice to make the direction, and

(c) the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings.

(9) A reporting direction may be revoked by the court or an appellate court.

(10) The court or an appellate court may by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a reporting direction.

(11) The court or an appellate court may only make an excepting direction if—

(a) it is satisfied that it is necessary in the interests of justice to do so, or

(b) it is satisfied that—

(i) the effect of the reporting direction is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and

(ii) it is in the public interest to remove or relax that restriction.

(12) No excepting direction shall be given under subsection (11)(b) by reason only of the fact that the proceedings have been determined in any way or have been abandoned.

(13) In determining whether to make an excepting direction in respect of a person, the court or the appellate court must have regard to the welfare of that person.

(14) An excepting direction—

(a) may be given at the time the reporting direction is given or subsequently, and

(b) may be varied or revoked by the court or an appellate court.

(15) For the purposes of this section—

(a) criminal proceedings in a court other than a service court commence when proceedings are instituted for the purposes of Part 1 of the Prosecution of Offences Act 1985, in accordance with section 15(2) of that Act;

(b) proceedings in a service court commence when the charge is brought under section 122 of the Armed Forces Act 2006.

(16) In this section—

(a) "appellate court", in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal;

(b) "appropriate person" has the same meaning as in section 50;

(c) references to the quality of evidence given by a person are to its quality in terms of completeness, coherence and accuracy (and for this purpose "coherence" refers to a person's ability in giving evidence to give answers which address the questions put to the person and can be understood both individually and collectively);

(d) references to the preparation of the case of a party to any proceedings include, where the party is the prosecution, the carrying out of investigations into any offence at any time charged in the proceedings."

23. In enacting section 45A, against the background of the powers already in place by virtue of sections 45 and 46 of the 1999 Act, and in amending section 49 of the 1933 Act, it is plain that Parliament decided that, in contrast to the position that applied to witnesses, of whatever age, child or youth defendants should be excluded from the statutory protection of lifetime reporting restriction orders. Thus, that any restriction on the identification of child or youth defendants, by an order made pursuant to section 45 of the 1999 Act, would come to an end once the subject of such an order reached the age of 18.

The Venables jurisdiction

24. Prior to the enactment of section 45A of the 1999 Act, the Court had jurisdiction, where justified, to grant an injunction, the effect of which would be to continue reporting restrictions after a person's 18th birthday. In early cases, the foundation of the court's jurisdiction to grant *contra mundum* injunctions was considered to be the protection of confidential information at common law and equity: *Venables* [29]-[33]. However, following the decision of the Supreme Court in *In re Guardian News & Media* [2010] 2 AC 697, it is now clear that the power derives from section 6 Human Rights Act 1998: [29]-[31] *per* Lord Roger. We will refer to this power as the *Venables* jurisdiction.

25. In *A -v- BBC* [2015] AC 588 [42]-[49], Baroness Hale analysed the Convention Rights that were engaged when the Court was considering whether to impose reporting restrictions *contra mundum*. In summary:

    i) The principle of open justice is expressly protected by Article 6, but it is subject to qualifications that broadly reflect the various grounds on which exceptions to the principle of open justice are made in our domestic law, either under the common law or under statute: [42]-[43].

    ii) Articles 2 and 3 may be engaged where parties or witnesses are in physical danger. The rights guaranteed by those Articles are, in this context, unqualified. The Convention therefore requires that proceedings must be organised in such a way that the interests protected by those articles are not unjustifiably imperilled: [45].

    iii) Article 8 protects the private lives of the parties (to which Article 6.1 also refers), and other persons who may be affected by legal proceedings, such as witnesses. Article 8 is a qualified right: [46].

    iv) Article 10 is also relevant to the principle of open justice, but that too is a qualified right. Freedom of expression may conflict with other important values, including the rights to life and to bodily security protected by Articles 2 and 3 of the Convention, the integrity of legal proceedings and the rights of litigants and accused persons, protected by Article 6, and the right to respect for private life, protected by Article 8: [47]-[48].

    v) Where there is a conflict between the right of the media to report legal proceedings and the rights of litigants or others under a right which is itself qualified, such as Article 8, a balance must be struck. The correct approach to this balancing process was identified by Lord Steyn in *In re S (A Child)*

(Identification: Restrictions on Publication) [2005] 1 AC 593 [17], and by Lord Rodger JSC in *In re Guardian News and Media Ltd* [50]-[51].

vi) But where the conflict is between the media's rights under Article 10 and an unqualified right of some other party, such as the rights guaranteed by Articles 2 and 3, there can be no derogation from the latter. Care must nevertheless be taken to ensure that the extent of the interference with the media's rights is no greater than is necessary: [49].

26. There is a consistent line of authority emphasising the importance of open justice, most recently reviewed by Lord Sumption in the Supreme Court in *Khuja -v- Times Newspapers Ltd* [2019] AC 161 [12]-[30].

i) In *In re S*, the House of Lords declined to grant an injunction to protect the interests of a 5-year-old child whose mother had been indicted for the murder of his brother. Described by Lord Sumption as "*a strong case on the facts*" (*Khuja* [24]), there was psychiatric evidence that persistent publicity surrounding the trial would be "*significantly harmful*" to the child, S. Nevertheless, Lord Steyn held:

> "[30] 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…"

And set out what he saw as the consequences 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.
>
> [33] Secondly, if such an injunction were to be granted in this case, it cannot be assumed that relief will only be sought in future in respect of the name of a defendant and a photograph of the defendant and the victim. It is easy to visualise circumstances in which attempts will be made to enjoin publicity of, for example, the gruesome

circumstances of a crime. The process of piling exception upon exception to the principle of open justice would be encouraged and would gain in momentum.

[34] Thirdly, it is important to bear 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.

[35] Fourthly, it is true that newspapers can always contest an application for an injunction. Even for national newspapers that is, however, a costly matter which may involve proceedings at different judicial levels. Moreover, time constraints of an impending trial may not always permit such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting.

[36] Fifthly, it is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85 per cent of all British adults read a regional or local newspaper compared to 70 per cent who read a national newspaper. Very often a sensational or serious criminal trial will be of great interest in the community where it took place. A regional or local newspaper is likely to give prominence to it. That happens every day up and down the country. For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now under consideration it is likely that they will often be silenced. Prudently, the '*Romford Recorder*', which has some 116,000 readers a week, chose not to contest these proceedings. The impact of such a new development on the regional and local press in the United Kingdom strongly militates against its adoption. If permitted, it would seriously impoverish public discussion of criminal justice."

ii) In *In re Trinity Mirror plc (A intervening)* [2008] QB 770, a defendant charged with possession of child pornography was granted a reporting restriction preventing publication in the media of material identifying him or his children. The Court of Appeal held that the Crown Court had no power to make such an order, but that it would have been wrong for the High Court (which would have had power to make the order) to have made the order.

iii) *In re BBC; In re Attorney-General's Reference (No.3 of 1999)* [2010] 1 AC 145 also concerned reporting restrictions made in respect of a defendant in criminal proceedings. The defendant had been acquitted of rape on the direction of the trial judge following a ruling that DNA evidence was inadmissible. The Court of Appeal (Criminal Division) subsequently held that the DNA evidence had been wrongly excluded. At the request of the Attorney General, the Court of Appeal referred the point for consideration by the House of Lords. In October 2000, the House of Lords made an order pursuant to section 35 of the Criminal Appeal Act 1968 and the Criminal Appeal (Reference of Points of Law) Rules 1973 that no report should identify the defendant. Subsequently, the law was changed by Part 10 of the Criminal Justice Act 2003. This made it possible to retry persons who had been previously acquitted of specified serious offences, where there was new and compelling evidence available, and a retrial would be in the interests of justice. The BBC applied to the House of Lords for the discharge of the anonymity order so that it might broadcast a television programme which included a suggestion that consideration should be given to ordering a retrial of the defendant. Lord Hope noted that no reporting restriction had been imposed on the defendant's original trial, which had taken place in open court, and so he had "*no legitimate expectation of privacy*" [6]. Lord Brown attached very little weight to the defendant's Article 8 rights [68]:

> "… to say that his Article 8 rights were interfered with by the unlawful retention and use of his sample is one thing; to assert that in consequence he must be entitled to anonymity in respect of the subsequent criminal process is quite another."

iv) In *In re Guardian News and Media Ltd* the applicants challenged an order made freezing their assets on the ground that they were suspected of facilitating terrorism. Anonymity orders had been made in their favour prohibiting any report of the proceedings that enabled them to be identified on the ground that disclosure of the fact that they were suspected of facilitating terrorism might lead some people to conclude that they were guilty. It was contended that this would violate their Article 8 rights. The Supreme Court set aside the anonymity orders. Lord Rodger gave the lead judgment. Applying *Campbell -v- MGN Ltd* [2004] 2 AC 457 and *Von Hannover v Germany* (2004) 40 EHRR 1, the test was whether the publication of a report sufficiently contributes to a question of legitimate public interest to justify any curtailment of the person's right to private and family life. Freezing orders imposed in cases of suspected facilitation of terrorism were matters of legitimate public interest. Any damage to the applicants' Article 8 rights was incidental. Lord Rodger noted [73]:

> "Although it has effects on the individual's private life, the purpose of a freezing order is public: it is to prevent the individual concerned from transferring funds to people who have nothing to do with his family life. So this is not a situation where the press are wanting to publish a story about some aspect of an individual's private life, whether trivial or significant. Rather, they are being prevented from publishing a complete account of an important public matter involving this particular individual, for fear of the incidental effect that it would have on M's private and family life."

27. As to the importance of unfettered reporting of criminal trials, as Lord Judge LCJ said in *In re Trinity Mirror plc*:

> [32] ... it is impossible to over emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offices should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime. Moreover the principle protects his interests too, by helping to secure the fair trial which, in Lord Bingham of Cornhill's memorable epithet, is the defendant's 'birthright'. From time to time occasions will arise where restrictions on this principle are considered appropriate, but they depend on express legislation, and, where the court is vested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case.
>
> [33] It is sad, but true, that the criminal activities of a parent can bring misery, shame, and disadvantage to their innocent children. Innocent parents suffer from the criminal activities of their sons and daughters. Husbands and wives and partners all suffer in the same way. All this represents the further consequences of crime, adding to the list of its victims. Everyone appreciates the risk that innocent children may suffer prejudice and damage when a parent is convicted of a serious offence. Among the consequences, the parent will disappear from home when he or she is sentenced to imprisonment, and indeed, depending on the crime but as happened in this case, there is always a possibility of the breakdown of the relationship between their parents. However we accept the validity of the simple but telling proposition put by the court reporter to Judge McKinnon on 2 April 2007, that there is nothing in this case to distinguish the plight of the defendant's children from that of a massive group of children of persons convicted of offences relating to child pornography. If the court were to uphold this ruling so as to protect the rights of the defendant's children under article 8, it would be countenancing a substantial erosion of the principle of open justice, to the overwhelming disadvantage of public confidence in the criminal justice system, the free reporting of criminal trials and the proper identification of those convicted and sentenced in them. Such an order cannot begin to be contemplated unless the circumstances are indeed properly to be described as exceptional."

28. Media reports of proceedings in open court may well have an adverse impact on the rights and interests of others, but, ordinarily: "*the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*": *Khuja* [34(2)] *per* Lord Sumption.

29. In *Khuja*, Lord Sumption addressed the submission that the balance between the competing interests could be struck by permitting full reporting of the proceedings in open court but preventing the naming of a particular individual. Referring to Lord Steyn's remarks in *In re S* [34] (above) and to the question "*What's in a name?*" which was memorably posed by Lord Rodger *In re Guardian News and Media Ltd* [63], Lord Sumption said [29]:

> "In most of the recent decisions of this court the question has arisen whether the open justice principle may be satisfied without adversely affecting the claimant's Convention rights by permitting proceedings in court to be reported but without disclosing his name. The test which has been applied in answering it is whether the public interest served by publishing the facts extended to publishing the name. In practice, where the court is satisfied that there is a real public interest in publication, that interest has generally extended to publication of the name. This is because the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion."

However [30]:

> "None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed JSC remarked of the Scottish case *Devine -v- Secretary of State for Scotland* (unreported) 22 January 1993, in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that "*their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure*": *A -v- British Broadcasting Corpn* [2015] AC 588 [39]. In other cases, the identity of the person involved may be more central to the point of public interest, but outweighed by the public interest in the administration of justice. This was why publication of the name was prohibited in *A -v- British Broadcasting Corpn*. Another example in a rather different context is *R (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] 1 WLR 444, a difficult case involving the disclosure via judicial proceedings of highly personal clinical data concerning psychiatric patients serving sentences of imprisonment, which would have undermined confidential clinical relationships and thereby reduced the efficacy of the system for judicial oversight of the Home Secretary's decisions."

30. In *A Local Authority -v- W* [2006] 1 FLR 1; [2005] EWHC 1564 (Fam), Sir Mark Potter P. also noted that the proper application of the parallel analysis required by *In re S* meant that there would be exceptional cases which justified an incursion into the open justice principle. He said [53]:

> "Paragraphs 17 and 23 of the judgment [in *In re S*] are clear as to the approach to be followed in a case of this kind. There is express approval of the methodology in [*Campbell -v- MGN Ltd*] in which it was made clear that each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or 'trumps' the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out. Having so stated, Lord Steyn strongly emphasised the interest in open justice as a

> factor to be accorded great weight in both the parallel analysis and the ultimate balancing test and stated that, at first instance, the judge had rightly so treated it. However, nowhere did he indicate that the weight to be accorded to the right freely to report criminal proceedings would invariably be determinative of the outcome. Indeed, he acknowledged that although it was the 'ordinary' rule that the press, as public watchdog, may report everything that takes place in a criminal court, that rule might nonetheless be displaced in unusual or exceptional circumstances."

31. As Lord Sumption also observed in *Khuja* [23]:

> "… in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot simply because the issues arise under the heading 'private and family life', part company with principles governing the pre-emptive restraint of media publication which have been accepted by the common law for many years in the cognate areas of contempt of court and defamation, and are reflected in a substantial and consistent body of statute law as well as in the jurisprudence on Article 10 of the Human Rights Convention".

Exercise of the *Venables* jurisdiction

32. In *Venables*, Dame Elizabeth Butler-Sloss P. granted a lifelong anonymity injunction to protect the new identities of Jon Venables and Robert Thompson, who were convicted, in 1993, of the murder of James Bulger, a two-year-old boy.

33. The *Venables* jurisdiction has since been exercised on only three further occasions, in each case to protect the new identities of notorious offenders:

    i) Mary Bell, who had killed two small children in 1968: *X, formerly known as Mary Bell -v- O'Brien* [2003] EMLR 37;

    ii) Maxine Carr, who had provided a false alibi for the Soham murderer Ian Huntley: *Maxine Carr -v- News Group Newspapers* [2005] EWHC 971 (QB); and

    iii) the Edlington brothers, who had inflicted grievous bodily harm and committed various sexual offences against three young children: *A -v- Persons Unknown* [2017] EMLR 11 ("*Edlington*").

34. Maxine Carr's case appears to be the only occasion on which the *Venables* jurisdiction has been exercised to protect the identity of someone who was an adult at the time of his/her offence and conviction. The other cases concerned defendants who had been young children when they committed their offences: the offenders were aged 10½ in *Venables*, 11 in *Mary Bell* and 10 and 12 in *Edlington*.

35. The following principles can be derived from these four cases, and the underlying jurisprudence:

    i) Restrictions upon freedom of expression must be (a) in accordance with the law; (b) justifiable as necessary to satisfy a strong and pressing social need,

convincingly demonstrated, to protect the rights of others; and (c) proportionate to the legitimate aim pursued: *Venables* [44].

ii) The strong and pressing social needs which may justify a restriction upon freedom of expression, in principle, include:

a) the right to life and prohibition of torture under Articles 2 and 3: *Venables* [45]-[47]; *Mary Bell* [16]; *Maxine Carr* [2]; and *Edlington* [9], [35]; and

b) the right to a private and family life under Article 8: *Venables* [48]-[51]; *Mary Bell* [19]-[31]; and *Maxine Carr* [3].

iii) The threshold at which Article 2 and/or 3 is engaged has been described variously 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*": *Maxine Carr* [4]; an "*extremely serious risk of physical harm*": *Edlington* [36].

iv) In *Venables* ([87]-[89]), Dame Elizabeth Butler-Sloss P. considered that the authorities of *Davies -v- Taylor* [1974] AC 207 and *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] QC 563 provided helpful guidance as to the assessment of future risks to physical safety. She 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: *Maxine Carr* [2].

vi) In cases where Article 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 right, no matter how weighty. In that context, it should be noted that we would respectfully depart from the proposition articulated by the Chancellor, Sir Geoffrey Vos in *Edlington* [35] that Article 2 and 3 rights could be balanced against Article 10 (a proposition later adopted by Sir Andrew MacFarlane, P. in *Venables -v- News Group Newspapers Ltd* [2019] EMLR 17 [43]): see further [26](vi) above.

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 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.

ix) Article 8 rights may, depending on the facts of a particular case, justify a *contra mundum* injunction. In *Venables*, Dame Elizabeth Butler-Sloss P., expressed uncertainty to whether the engaged Article 8 rights, on their own, would have justified the order: [86]. In *Mary Bell*, the evidence did not reach the level at which Article 2 was engaged ([16]), but the Article 8 rights (balanced against Article 10) did justify a *contra mundum* injunction ([61]). In *Mary Bell*, factors under Article 8 that favoured the granting of a *contra mundum* injunction included:

a) the youth of an offender at the time of the offending: [45];

b) the length of time which has elapsed since the offences were committed: [45];

c) the likely impact upon the mental or physical health of the person if identified: [45], [60(4)], [61]; and

d) the fact that there was significant information (beyond the new identity of Mary Bell) already in the public domain about the applicant and his or her crimes which enabled the media to comment freely on the case: [60(1)-(2)].

x) The making of a *contra mundum* injunction was regarded as exceptional in *Venables* [76], [97]; *Mary Bell* [33], [64]; and *Edlington* [34]. In *Mary Bell*, Dame Elizabeth Butler-Sloss P. held that the notoriety which may be a consequence of the commission of serious offences would not, of itself, entitle the offender, upon release, to an anonymity order based upon the likelihood of press intrusion: to do so would unjustifiably open the floodgates: [59]. The cases in which *contra mundum* orders have been granted have been exceptional. In three of them, the Court found that Article 2 was engaged and, in *Mary Bell*, the combination of the Article 8 rights engaged outweighed those engaged by Article 10.

Has the *Venables* jurisdiction survived section 45A of the 1999 Act?

36. As a preliminary point, it may be argued, and the PA did argue, that the effect of the section is to preclude the continuation of the *Venables* jurisdiction at common law. This is said to follow because "*[i]f two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication*": *R (Child Poverty Action Group) -v- Secretary of State for Work and Pensions* [2011] 2 AC 15 [33] *per* Lord Dyson JSC and *Southern Gas Networks -v- Thames Water* [2018] 1 WLR 5977 [37] *per* Hickinbottom LJ: "*The courts will not maintain a common law remedy in the case of an evident intention of Parliament to displace it*". The PA submitted that Parliament had deliberately not included convicted child or youth defendants in the category of

those eligible for lifetime anonymity orders under section 45A. It is not for the court to grant an injunction in a manner inconsistent with the implicit will of Parliament.

37. In the specific area of reporting restrictions, Lord Sumption noted in *Khuja* [18]:

> "The dependence of this area of law on statute and the extent of statutory intervention mean that it is fair to speak of a statutory scheme occupying the ground to the exclusion of discretions arising from the common law or the court's inherent powers. Lord Steyn made this point with the concurrence of the rest of the Appellate Committee in *In re S* [20]:
>
> > 'Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice.'"

38. Mr Segan submits that, if Parliament had ousted the *Venables* jurisdiction by section 45A, it would simply have substituted one anomaly for another. As section 45A applied only to children and young persons, life-long anonymity orders would remain available for adult defendants (like Maxine Carr) but could not be made in respect of a defendant who was a child or young person.

39. We are quite satisfied that section 45A has not had the effect of ousting or curtailing the *Venables* jurisdiction. It is well-established that the courts will decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear in the relevant legislation: *R (Evans) -v- Attorney General* [2015] AC 1787 [56]; *R (Jackson) -v-Attorney General* [2006] 1 AC 262 [159]; *R -v- Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131. There is nothing in section 45A of the 1999 Act that gives any hint that Parliament intended to curtail the *Venables* jurisdiction. Mindful of Lord Sumption's warning in *Khuja*, we are satisfied that this is not an instance of the Court being asked to create a new jurisdiction to grant reporting restrictions; the jurisdiction is well-established. The question is whether it has been curtailed by section 45A.

40. Given the Convention obligations, particularly those of Articles 2 and 3, we are satisfied that Parliament has not removed the Court's power to grant injunctions similar in terms to those granted in *Venables*, *Mary Bell* and *Edlington*. Although not the point in issue, the Court of Appeal in *JC* certainly proceeded on the basis that the terms of section 45A left it open to individuals "*to apply for injunctive relief for extended protection against publicity*": *R (JC) -v- Central Criminal Court* [2015] 1 WLR 2865 [43] *per* Laws LJ. Our conclusion, and one we reach without difficulty, is that, when Parliament enacted section 45A of the 1999 Act, it was fully aware of the *Venables* jurisdiction, intended that it continue and that section 45A simply placed anonymity orders for witnesses and victims on a statutory footing, thereby harmonising the regimes for adults, young persons and children and removing the anomaly that had been identified by Sir Brian Leveson P. in *JC*.

Submissions

RXG's submissions

41. On behalf of RXG, Edward Fitzgerald QC, contends that Articles 2 and 3, as well as Article 8, are engaged and that RXG should be granted a lifelong *contra mundum* injunction protecting his identity.

42. He makes four broad arguments in favour of RXG being granted anonymity:

Risk of attack and serious harm

i) Identifying RXG will put him at risk of serious harm from third parties, will have a profound adverse impact on his psychological well-being, and will increase the risk he poses to himself.

The risk that RXG will be targeted by extremists

ii) RXG's offending behaviour took place over the internet, where he did not use his real name, and the evidence suggests that his identity is not known outside his family and immediate community. If he now loses his anonymity, he will be of interest to extremists who may target him to seek to indoctrinate him. ISIS said it wanted him to be its 'poster boy' and RXG is of particular interest for propaganda purposes because of the notorious nature of his offence and the fact he was the youngest convicted terrorist in the UK.

RXG's rehabilitation would be at risk

iii) There is clear public interest in ensuring that RXG is rehabilitated, and in preventing a recurrence of his offending. The key object of any sentence of detention imposed in respect of offences committed by children is rehabilitation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity: *R (Smith) -v- SSHD* [2006] 1 AC 159 [23]-[25] *per* Baroness Hale. This object is not abandoned when the child becomes 18: [12] *per* Lord Bingham. RXG's rehabilitation will be jeopardised if he is identified.

Risks to RXG's family

iv) RXG's family would be put at risk of violent attack and there would be a substantial adverse impact on the best interests of his siblings, who are children of primary school age. Mr Fitzgerald QC suggests that they would be forced to move school, causing them trauma and emotional distress.

Articles 2 and 3

43. Mr Fitzgerald QC submits that there is a real and immediate risk of serious harm or death that would result from RXG being identified as the person who, when he was 14, had incited the acts of terrorism for which he was convicted. He relied upon the following:

i) There would be intense media focus on RXG if the current anonymity order were to be lifted. The evidence suggests that RXG would become instantly and globally infamous as the youngest person to be convicted of a terrorist conviction in this jurisdiction. There was widespread coverage in major domestic and some international media outlets of his arrest, plea and sentencing. That attention had led RXG's family permanently to relocate. If his name is publicised in media reports, then it will be embedded in the public domain on the internet.

ii) Some members of the public have expressed violent and threatening views about RXG in the comment sections of online media sites (see [10(iii)] above). Although most major media organisations do not permit users to leave comments of this nature, users on social media (and other websites) had posted violent and threatening messages. Comments on some websites included more explicit threats to harm or kill RXG. The authors of those posts, he submits, "*may have a propensity to violence*". That the threat to RXG represented by the social media postings is real is supported by the evidence of Dr Bowers and the Youth Justice Board ([10(i) and (ii)] above).

iii) The relevant professionals involved in RXG's care and rehabilitation consider that a refusal by this court to grant a lifelong anonymity order will put RXG at increased risk of serious harm while in prison. The 29 May 2018 letter from the Youth Justice Service (see [10(i)] above) suggested that there would be "*potential for various repercussions*" should RXG be identified and there are likely to be persons who are "*willing and able to cause harm*" in most adult prisons. Evidence from a forensic psychologist, who has worked in prisons and for the prison service for a number of years, was that harming notorious offenders is considered by some prisoners to be a 'badge of honour' and RXG could become a target for that reason (see [10(ii)] above).

iv) RXG would also be at an elevated risk of harm upon being released from prison if he were identified with his terrorist convictions. In support of this, Mr Fitzgerald QC relied on Tell Mama's most recent Annual Report which showed a large increase in violent attacks on Muslims across the country as well as on the decision in *Secretary of State for the Home Department -v- AP (No.2)* [2010] 1 WLR 1652 where the Supreme Court granted an order protecting the identity of a Muslim man, primarily because there had been racist attacks on the Muslim community in the town in which he lived.

44. Based on this evidence, Mr Fitzgerald contends that there is a real and immediate risk of serious harm and death that would result from revealing RXG's identity. Consequently, Articles 2 and 3 place the court under a duty to take all reasonable steps which might be expected to avoid that risk. He submits that granting RXG anonymity is a "reasonable step", and so the Court is obliged to take it.

Article 8

45. In addition, or in the alternative, Mr Fitzgerald QC submits it is necessary for the court to grant an injunction in order to act compatibly with RXG's rights under Article 8 of the Convention. He listed the following factors as justifying an injunction.

Rehabilitation would be jeopardised

i) Naming RXG would obstruct and harm his rehabilitation, because the evidence demonstrates that the key risk factors leading to his terrorist offences were social isolation, rejection, and a lack of constructive activities. Because of the exceptional public interest in this case, revealing his identity will make him irreversibly infamous. It will ostracise him from ordinary society and make it extremely difficult for him to find employment, make friends with people who are not extremists, and take part in ordinary activities.

A contra mundum injunction is necessary to protect the public

ii) Mr Fitzgerald QC submits that damage to RXG's rehabilitation may expose the public to the risk of RXG committing further offences. In support of this submission, Mr Fitzgerald QC relied on Dr Bowers' evidence (see [10(ii)] above). She is described as a "*leading expert in the assessment of the impact of disclosure of the identity of children who have committed offences*" and her evidence is to the effect that RXG has made good progress in his rehabilitation, but she is extremely concerned about the potential consequences of him becoming publicly linked with the offences, particularly in terms of being able to find suitable education and employment. She further notes his autism and associated social difficulties will mean forming relationships in these circumstances will be very difficult and may even become impossible. Social isolation, rejection and lack of meaningful activity, she concludes "*is likely to significantly affect his mental state and undermine his rehabilitation*". She suggested that the stigma and shame of the offence "*would probably halt his psychological development and continuing rehabilitation*".

iii) Those involved in RXG's care said, in May 2018, that identifying him has "*the potential to undo the progress made*" and make his ability to effectively resettle "*extremely difficult*" ([10(i)] above). The Extremism Risk Assessment ([10(vi)] above) noted that RXG's anonymity acted "*as a protective factor*" against attempts by ISIS to contact and re-radicalise him. Media reports identifying RXG may also assist ISIS to recruit and indoctrinate impressionable teenagers to follow his example. A Social Services report, prepared before RXG's original sentence, agreed this may serve to "*increase his infamy and notoriety within the terrorist network*". The Extremism Risk Assessment suggested that RXG was of potential value "*in propagating the cause*". He is of particular interest for such propaganda purposes because of the notorious nature of his offence and the fact he was the youngest convicted terrorist in the UK. In this respect, Mr Fitzgerald QC relies on the evidence that, prior to his offences, ISIS told RXG that they wanted him to be the 'poster boy' for their cause.

iv) In consequence, if his anonymity were to be removed, RXG would be at risk of being exploited by extremists given his particular vulnerabilities associated with his autism. One such vulnerability is his obsessive tendency which, at present, is focused on constructive activities, including football, but might shift back to extremism.

v) Mr Fitzgerald QC submits that reports prepared for the purposes of the original anonymity decision by Saunders J were to the same effect. The Judge was satisfied that *"[i]f I allow [the claimant] to be named there will be a serious risk on the expert evidence that his rehabilitation will be threatened*." A report from a consultant clinical psychologist identified RXG's personal contact with violent extremists and his susceptibility to influence, authority and indoctrination as 'high risk factors' for future violent extremism. A social work report from 2016 stated that RXG would be stigmatised as a terrorist in any community in which he lived and may become vulnerable to further radicalisation due to social isolation.

Loss of anonymity would put RXG's family at risk and would be contrary to the best interests of his sisters

vi) Finally, Mr Fitzgerald QC submits harm to the applicant's family weighs in favour of granting an injunction: *Edlington* [41]. Further, what is in the best interest of his sisters who are at primary school, is a primary consideration for the court when considering the application: *ZH (Tanzania) -v- Secretary of State for the Home Department* [2011] 2 AC 166 [23]-[26]). He argues that removing RXG's anonymity is likely to force the family to move again and the evidence suggests that this would put them "*in harm's way*".

Submissions of the Amicus Curiae

Articles 2 and 3

46. Mr Segan submits that the evidence before the Court demonstrated "*little in terms of threats of harm*". In his third witness statement, RXG's solicitor had noted there had been a recent attack by prisoners on another prisoner in the adult prison to which it is proposed RXG will be transferred and that this "*raise[s] real concerns about RXG's safety*". However, the HMPPS Risk Assessment does not support a more generalised conclusion. The UK Prison Service had experience in dealing with high-profile individuals, including Hammad Munshi who was reported to be the UK's youngest terrorist when convicted in 2010, at the age of 16. In response to threatening comments published by members of the public on social media and elsewhere, the MoJ stated the "*existence of the comments in themselves do not amount to an assessed threat against RXG … [and] that there is no current assessed threat of a real and immediate risk to life against RXG*." Overall, Mr Segan submitted the evidence does not suggest that lifting the anonymity order is likely to result in any real and immediate threat to RXG's life.

Risk to RXG's rehabilitation, re-radicalisation and risk to the public

47. Mr Segan referred the Court to Dr Bowers' evidence that RXG is "*highly likely to comply with his licence conditions and what is asked of him by the Probation Service whether his identity is protected or now*". Further, he noted Dr Bowers' evidence that these adverse consequences for his re-settlement in the community are ones which arise for "*most, if not all*" young persons who have committed very serious offences but whose identity has not been protected.

48. The MoJ accepts there is a risk of radicalisation if RXG's identity became known to other prisoners and that there may be disruption to his rehabilitation, in the short-term, if he were to become the subject of media reporting. However, the MoJ's assessment is that management strategies can be effectively deployed to support RXG's rehabilitative progress and mitigate the impact of any disruption. This conclusion is supported by the assessment of the Counter-Terrorism Unit (see [10(iv)] above).

Risk of violent attack upon RXG's family

49. Mr Segan acknowledges that the Youth Justice Service had assessed that removing RXG's anonymity potentially placed his family "*in harm's way by their association*" and, in its evidence, the Prison Service acknowledges that there will need to be significant work by the police to ensure the safety of the family if RXG's identity were to be revealed.

Risk of adverse impact upon best interests of RXG's sisters

50. Evidence from the Youth Justice Service suggests that revealing RXG's identity has a "*strong likelihood*" that his younger two siblings would be made to move school to avoid negative attention.

Risk of aiding terrorist causes by glorifying RXG

51. Finally, in relation to the risk of RXG being used to promote terrorist causes, Mr Segan directed the Court's attention to the more recent evidence of the assessment of the Police that it is difficult to gauge whether the revelation of RXG's identity would promote the offence or terrorism in general.

Decision

Articles 2 and 3

52. RXG has not convincingly established a real and immediate risk of serious harm if his identity were to be revealed. Articles 2 and 3 are therefore not engaged. Most of the evidence is general, non-specific and speculative.

53. The only evidence of identifiable threats comes from social media and online comments. Undoubtedly these are unpleasant. However, the disinhibiting effect of posting online, often with the benefit of anonymity, is well-recognised. It is also, sadly, a feature of modern life that individuals are prepared to use language online that they would never use in person, and make threats of a kind they would never carry out. Such posts may be made for a number of reasons, and violent and threatening language can be frightening for those at whom it is targeted. Nevertheless rhetoric and invective is generally insufficient, without more, to amount to a credible threat of violence or one which engages the *Osman* duty.

54. We consider that the HMPPS Risk Assessment is a more reliable indication of the level of future threat. We are satisfied that there is no current assessed threat of real and immediate risk to RXG's life in his current setting or from the wider public. Such risks of harm which do exist are likely to be mitigated by the Prison Service and local

police. Dr Bowers' opinion is that, without anonymity and once transferred the prison estate, RXG may become a target because of the notoriety of his offence. We acknowledge that there exists a risk, but it is speculative and does not amount to a real and immediate risk. We are also satisfied that the Prison Service is very experienced in protecting high-profile criminals who may be targeted by other offenders. The presence of prisoners who are 'willing and able' to commit violent acts is a day-to-day reality in prison. It is a risk that exists for all those sentenced to detention or imprisonment, but the Prison Service is well-equipped to manage and mitigate that risk. Once RXG is released, the local police will also be well-placed to deal with any potential risk of harm.

Article 8 and 10 balancing exercise

55. We must assess the Article 8 rights of RXG and the Article 10 rights of the public in open justice applying the well-established *Re S* balance. A properly calibrated balance cannot be achieved by adopting an abstract assessment of the engaged rights. Such an assessment "*is not a mechanical exercise to be decided upon the basis of rival generalities*": *A Local Authority -v- W* [53] *per* Sir Mark Potter P. The exercise to be performed is a parallel analysis in which the starting point is presumptive parity. The court must examine the justification for and proportionality of interfering with each right and an intense focus is required on the comparative importance of the specific rights being claimed in the individual case.

Article 8

56. The evidence establishes that, if RXG now loses his anonymity, he is liable to become the focus of significant media attention. We accept the assessment that intense media attention is likely to be short-lived, but that is not an answer to the evidence as to the likely long-term harm to RXG's rehabilitation. The coverage will leave an indelible record on the internet identifying him as the person who, aged 14, was convicted of inciting acts of terrorism. RXG's notoriety is likely to be enhanced because he was the youngest person ever to be convicted of such an offence. On the evidence, the reality of the situation is that, if he were named, he will never escape being associated with his past offending.

57. It might be said that other youth and child defendants, who lose the protection of reporting restrictions that they had previously enjoyed until their 18th birthday, are in a similar position. However, most will not have achieved anything like the notoriety of RXG. For them, the coming of their 18th birthday is likely to go unremarked and the discharge of the reporting restrictions is unlikely to lead to media reports publicly associating them with their previous offending.

58. RXG's Article 8 rights are clearly engaged by the impending lifting of the reporting restrictions that have protected his identity. In *In re BBC* ([18]) Lord Hope quoted with approval the following passage from Lord Mustill's judgment in *R -v- Broadcasting Standards Commission, Ex p British Broadcasting Corpn* [2001] QB 885:

> "To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space

> from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate."

59. The position now is that RXG occupies a space in which he is (and has been) shielded from unwanted intrusion arising from and linked to his past offending. That shield was put in place deliberately in order to protect and promote his rehabilitation. RXG, of course, has a direct interest in his continuing rehabilitation but there is a wider, and significant, public interest that his rehabilitation be successful: cf. *Mary Bell* [58] *per* Dame Elizabeth Butler-Sloss P.

60. The evidence compels the conclusion that, if RXG is identified as the child who, aged 14, committed acts of inciting terrorism, then it is likely to have "*a profound impact on his psychological well-being*". We consider that the evidence of Dr Louise Bowers, in particular, clearly articulates the nature of the harm he would face from losing his anonymity (see [10(ii)] above). In terms of the factors identified in *Mary Bell* (see [35(viii)] above), RXG's case presents a combination of issues that make his case truly exceptional.

    i) He was a child at the time of his offences. Saunders J, as the sentencing Judge, was satisfied that RXG had been groomed and radicalised by others who succeeded in turning him into a "*deeply committed radical extremist*". That conclusion was made before RXG had been diagnosed with ASD. But that diagnosis, as the evidence explains, goes a long way to explain why RXG was particularly vulnerable to exploitation by others.

    ii) The likely impact upon his mental health if he is now identified is clearly established in the evidence. In the immediate-term, he risks being shunned and rejected by his peers as well as disengaging from the professionals with whom he has developed a good relationship and whose efforts have been so important in his rehabilitation. In the longer term, he would face ostracism and isolation in the community, the effects of which would be exacerbated by his ASD. As Dr Bowers noted, "*rejection, a lack of meaningful activity and social isolation were all features of RXG's life at the time he was offending, and a return to these circumstances is likely to significantly affect his mental state and undermine his rehabilitation*". And, "*if [RXG] is labelled 'a terrorist' he may simply give up and see little point in continuing the journey towards improving his functioning and making amends for what he has done… [A]llowing the stigma and shame of what RXG did as a child to come to define him as a young adult, would probably halt his psychological development and continuing rehabilitation*".

    iii) The 4 years since RXG's offending might appear to be a short time. But in terms of the development of a child, and particularly the intensive rehabilitation that RXG has received, this represents a significant period. The evidence shows that RXG "*appears to have left his 'terrorist identity' behind and he is well on the way to developing a new stable and pro-social identity*".

61. The principal reason for imposing the original reporting restriction protecting RXG's identity was to promote RXG's rehabilitation, to avoid 'criminalising' or stigmatising him, to support his re-integration into society and to recognise that his offending took

place when he was only 14. The evidence demonstrates that the loss of anonymity will present significant challenges and threats to RXG in terms of his rehabilitation and reintegration to society when released. With anonymity removed, his historic offending will remain a facet of his public identity, which he will have to confront. If he is publicly named, the evidence demonstrates that he risks social ostracism and his further rehabilitation is jeopardised. Those risks are exacerbated by his autism. In short, naming him now undermines all the objectives that justified his being anonymised in the first place. The expert evidence demonstrates that if anonymity is maintained, RXG would find it considerably easier to 'shed' his old offending identity and to developing a new pro-social non-criminal identity.

62. It is to be noted that the power to protect the identity of persons under the age of 18, is consistent with the principles that inform the sentencing of children and young persons. Every court, when sentencing a child or young person must:

    i) have regard to (a) the principal aim of the youth justice system, which is to prevent offending by children and young people: section 37(1) Crime and Disorder Act 1998; and (b) the welfare of the child or young person: section 44(1) Children and Young Persons Act 1933; and

    ii) follow the Sentencing Council guidelines unless satisfied that it would be contrary to the interests of justice to do so: section 125(1) Coroners and Justice Act 2009.

63. The Sentencing Council guidelines, "*Sentencing Children and Young People*", include the following guidance:

    i) The seriousness of the offence should be the starting point, but the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused.

    ii) Where possible, the sentence should focus on rehabilitation and the court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) as well as any underlying factors contributing to the offending behaviour.

    iii) It is important to avoid 'criminalising' children and young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish. Restorative justice disposals may be of particular value for children and young people as they can encourage them to take responsibility for their actions and understand the impact their offence may have had on others.

    iv) The court should bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed, and they have not attained full maturity. As such, this can impact on their decision-making and risk-taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions

can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).

v) For these reasons, children and young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the child or young person and hinder their re-integration into society.

vi) Offending by a child or young person is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the child or young person from society if that can be avoided.

vii) The impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult as any sentence will seem longer due to their young age.

64. Statutory recognition of the reduced culpability of children and young persons comes not only from the Sentencing Council guidelines but also from the lower maximum sentences for some offences. In *R -v- Clarke (Morgan)* [2018] 1 Cr. App. R. (S.) 52, Lord Burnett LCJ reaffirmed the principle that attaining the age of 18 should not radically alter the approach of the courts to sentencing:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R -v- Peters* [2005] EWCA Crim 605; [2005] 2 Cr. App. R. (S.) 101 (p.627) is an example of its application: see [10]–[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday…"

65. Similarly, in *R -v- Babic* [2018] EWCA Crim 457, the Lord Chief Justice noted at [26]:

> "Parliament has recognised in the statutory scheme that the culpability of a young offender is very different from that of an adult offender. It has often been observed that there is no cliff edge for sentencing purposes when an offender reaches the age of 18. That is to ensure that the factors which lead to significantly shorter sentences for those under the age of 18 who commit the same offence as adults, reflected in any relevant guidance, does not lead to a step-change in the

> sentence. Youth and immaturity are always relevant factors in determining culpability."

66. In this case, there is a consensus in the expert evidence that the identification of RXG as a person convicted of terrorist offences would fundamentally undermine his rehabilitation. The position is exacerbated by his autism which manifests itself in his obsessive behaviour. This, combined with his need for recognition and status, makes him very vulnerable to exploitation and potential re-radicalisation. As noted in his autism assessment, RXG has learned to compensate for some of these difficulties and he now has a better understanding of his autism and how to manage it more effectively. However, this is in the context of the protection he currently enjoys.

67. We do not consider that it assists the analysis of the engaged Article 8 rights to approach the issue on the basis of RXG's expectation of privacy, as Article 8 embraces wider rights than that. This is not a case about the misuse of private information. Nor is RXG asking for "privacy" in the sense of being allowed to keep details of his offending secret. He seeks "*the personal 'space'… [the] shell, or umbrella… which protects that space from intrusion*" in order not to have his rehabilitation jeopardised.

68. In our view, it is necessary to make an assessment of the position of RXG now, some 4 years after he pleaded guilty. In balancing the competing rights engaged by his case, it is important to give real weight to the fact that he was a child when he committed the offence; to his diagnosis of autism and to his mental health; to the significant period during which his identity has been protected and to the positive impact this has had on his rehabilitation. In assessing the importance of these factors, we cannot ignore the approach and objectives identified by the Sentencing Council to which we have referred.

Article 10

69. There are plainly powerful arguments to be made on the Article 10 side of the equation. There is a fundamental public interest in unfettered reporting of the trials of those charged with criminal offences. There is also a clear public interest in understanding how a child of 14 could have incited what would have been an appalling terrorist atrocity had his efforts not been thwarted. RXG's criminal trial took place in public. Further, the position at the time of conviction was that the reporting restrictions imposed in his case would cease to apply when RXG reached the age of 18. Indeed this formed an express part of the reasoning of the sentencing judge when he decided to maintain the anonymity order. Moreover, looking at the matter more broadly, and away from these facts, Parliament has by statute, provided a clear presumption that children and young persons who are defendants in criminal proceedings should be identified once they reach adulthood.

70. Nevertheless, in conducting the parallel analysis the Court is required to balance the interference with the respective rights engaged, on the facts. We are concerned with an individual and concrete harms. As noted by Lord Sumption in *Khuja* [30], there will be cases where a prohibition on the identification of a defendant is both necessary and proportionate. We apprehend that such an outcome is likely to be rare, and would only arise in an exceptional case. However, where the facts merit such a conclusion, the Court must act accordingly.

Conclusion

71. We are satisfied that RXG's case is an exceptional one. The evidence does not demonstrate a threat that engages Articles 2 and/or 3. However, there is compelling evidence that identifying RXG is likely to cause him serious harm and to interfere significantly with his Article 8 rights in the manner identified above. We acknowledge that any prohibition on the identification of a defendant in criminal proceedings is a serious matter and represents a significant interference with the open justice principle. It does so in this case, notwithstanding that RXG's trial was in public and all the facts pertaining to his offending, except for his identity, were therefore in the public domain. Nevertheless, on the evidence before us, in our judgment, it is both necessary and proportionate to make such an order.

72. We therefore grant an order extending the reporting restrictions which prohibit the identification of RXG until further order. We will invite submissions on the terms of the Order, but it should be clearly understood that the reporting restrictions remain subject to review, in the event of a material change of circumstance.