

Additional material for chapter 16: Challenging the courts

Section numbers from the book are used. Its content provides fuller explanations and context.

16.5.1 Open justice requires that reports should identify the defendant

Case study: In September 2014 the Court of Appeal allowed an appeal by media organisations against an order that two men facing trial on terrorism charges should be anonymous and that all of their trial should be held in secret. The Court named defendants Erol Incedal and Mounir Rarmoul-Bouhadjar, and said only parts of the trial should be held in secret. Lord Justice Gross said: 'We express grave concern as to the cumulative effects of (1) holding a criminal trial in camera and (2) anonymising the Defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified' (*Guardian News and Media Ltd and others v Incedal* [2014] EWCA Crim 1861). See too the Additional Material for ch. 15 on www.mcnaes.com about Incedal's trial.

16.5.2 Public proceedings, reputation, family life and the Convention

Case study: In *Khuja* the Supreme Court in 2017 refused to grant an injunction to ban the media from identifying, in reports of criminal proceedings, a man mentioned in evidence as being a suspect in a police inquiry – known as Operation Bullfinch - into sexual offences. These involved the 'grooming' and prostitution in the Oxford area of girls aged between 11 and 15. Nine men were charged. In a preliminary hearing before magistrates in 2012 and in the nine's trial at the Old Bailey – in which seven were convicted in May 2013 - there was reference to Tariq Khuja, a prominent figure in the Oxford area. He was not a defendant but was referred to as having been arrested during Bullfinch because one of the complainants told police that when she was 13 she was repeatedly abused by a man with the same, very common first name. These references in open court included that police had released Khuja without charge after she failed to pick him out at an identity parade. His lawyers successfully applied in the magistrates' court and to His Honour Judge Rook QC at the Old Bailey for the media to be banned temporarily under section 4(2) of the Contempt of Court Act 1981 from identifying Khuja in reports of these proceedings because at that time he was still on police bail and, it was successfully argued, there was a significant risk that if he was identified in reports of the Bullfinch proceedings his own trial, if he were to be charged, would be prejudiced by that publicity. For explanation of section 4(2) orders, see 19.11 in *McNae's*. In July 2013 police told Khuja he was not to be charged but that the case would be kept 'under review'. In September 2013 the *Oxford Mail* and *The Times* asked Judge Rook to lift the section 4(2) order so they could identify Khuja in reports of Bullfinch proceedings. They pointed out there were no 'pending or imminent' proceedings against him, so – under section 4(2) - there was no risk of prejudice. After Judge Rook indicated he would lift the order, Khuja applied to the High Court for an injunction, to be based on his rights to privacy and family life under Article 8 of the European Convention on Human Rights, to ban the media from identifying him in such reports. His lawyers argued this anonymity was justified to avoid damage to his reputation and the consequent impact that damage would have on his family life. Mr Justice Tugendhat refused to grant the injunction, citing open justice principles, including as enshrined in Article

10 rights. He said that identification of Khuja in the context of the child abuse allegations could lead to him and his family, including children, being subject to very unpleasant behaviour or even harassment, but that members of the public generally who learned of the references to Khuja in the Bullfinch proceedings would not equate the suspicion he was under with guilt - he was not charged with any offence. Khuja's anonymity stayed in place for a further three years and nine months because he appealed to the Court of Appeal against this ruling, and – when that appeal failed - appealed to the Supreme Court. In that Court's ruling Lord Sumption said that there was no present reason to think Khuja will ever be charged with any offence, and acknowledged there was 'a real risk' that a person knowing what was said about Khuja in the Bullfinch proceedings would conclude he had sexually abused the complainant. Lord Sumption said he was 'less sanguine' than Mr Justice Tugendhat was about 'public reaction' to the way Khuja had featured in the Bullfinch trial. Nevertheless, Lord Sumption - in a ruling supported by the majority of the Supreme Court judges to refuse to grant the injunction – made the following points: 1) Khuja could not have 'any reasonable expectation of privacy' as regards matters aired in a public trial; 2) the impact on his family life of publication of what was said about him in the Bullfinch trial would be 'no different in kind from the impact of many disagreeable statements' which may be made about people in any high profile criminal trial, and the 'collateral impact' this process has on those affected is 'part of the price to be paid for open justice' and for the freedom of the press to report public, judicial proceedings fairly and accurately; 3) the impact on Khuja's family life would be 'indirect and incidental', in that neither he or his family participated in the trial, and nothing was said at it related to his family, and - although Khuja could claim that the damage to his reputation caused by identification would have an adverse impact on family life - he had 'no reasonable expectation of privacy' (see point 1 above, and 27.6 in *McNae's*), so could not use Article 8 rights to protect his reputation in this case, and so it would be 'incoherent' for the law to grant the injunction to prevent 'the collateral impact on his family life'; 4) circumstances when an injunction would be justified to prevent publication of 'private information' in relation to the reporting of public, court proceedings 'are likely to be rare' and clearly did not exist as regards the Bullfinch case, in that sexual abuse of children – especially organised abuse - is a subject of great, public concern, and the processes by which such cases are investigated and brought to trial are matter of legitimate public interest; 5) although Khuja was not a defendant in the Bullfinch case, his identity was not a peripheral or irrelevant feature of that particular story. Lord Sumption added that, as regards media reporting of court cases, the law recognised that – within the limits imposed by defamation law – the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration (*Khuja v Times Newspapers and others* [2017] UKSC 49). Lord Sumption's reference to the 'limits' of defamation law was apparently to the requirements of the privilege defences that reporting of court cases must be fair and accurate. See 22.5.1 in *McNae's* about these requirements.

16.6.1 Section 4(2) orders

Courts should recognise that a section 4(2) order could, by postponing media reporting of a case, distort or diminish the public's understanding of events.

Case study: In 2006 the head of the Metropolitan police's counter-terrorism branch, Peter Clarke said section 4(2) orders – imposed because of argument that reports of one terrorism trial could prejudice others then pending – were causing long delays in publication of reports of these trials. He said it had led to myths that the terrorism threat had been exaggerated. Terror cases took an average of two years to come to court, with each trial averaging 12 months, because they were so complex. Judges therefore felt compelled to impose what had become an interlocking web of orders under the Contempt of Court Act 1981 to ensure that defendants received fair trials before untainted juries, Mr Clarke said. 'This inability to put before the public what is happening has led to some myths, like the idea that the (terror) threat was being exaggerated at the behest of the Government to justify foreign policy - that is so far off the mark,' he told an anti-terror conference at St Antony's College, Oxford. In 2009 he returned to the subject of the Act, arguing that it was time to 'trust' jurors more in the interests of ensuring that communities were kept informed during the sometimes very long periods it took to prepare a case. 'I think there is a link between the application of the Contempt of Court Act and the potential effectiveness of counter-terrorist policing,' he told the BBC. 'It is fundamental to any type of policing that communities must have confidence in what the police are doing. All too often, though, it has been two or even three years before we have been able to explain to communities why certain actions were carried out' He said: 'If that happens it is going to be far more difficult for those communities to have confidence in the police, to have the confidence to come forward with intelligence and information which could be absolutely vital in terms of counter-terrorism.' Mr Clarke, who headed the Met's Counter Terrorism Command until 2008, said a 2003 raid on Finsbury Park Mosque was a particularly acute example. 'This was a hugely sensitive operation and we wanted to be able to explain to communities why it was we were doing something like that,' he said, adding that an explanation could not be given until three years after the event.' The police were then accused of exaggerating the terror threat in a bid to provide support for the Iraq invasion, which harmed the force's effectiveness, he said, adding that the 'official silence' required by the Act 'leaves an open court for others to roll out speculation, innuendo, sometimes deliberate lies'. He said: 'That unbalances the public debate and makes it very difficult for communities to know what to believe and therefore it makes it more difficult for the police to do their job.' Mr Clarke questioned how often in reality there was a 'substantial risk of serious prejudice', saying: 'In an era of global communication it is unrealistic to think that jurors will sit there in complete isolation not understanding the context of what they are trying.' He said: 'Juries are the bedrock of our judicial system - we need to cherish them and, most importantly, we need to trust them' (*Media Lawyer*, 15 December 2006 and 6 July 2009).

Case study: In 1994 Mr Justice Lindsay refused to make a section 4(2) order postponing reporting of civil cases involving pension funds, although criminal proceedings were pending. He said a risk of prejudice which could not be described as substantial had to be tolerated as the price of an open press and that even if the risk was properly to be described as substantial, a postponement order did not automatically follow (*MGN Pension Trustees Ltd v Bank of America* [1995] 2 All ER 355, Ch D).

Section 4(2) orders cannot restrict reports of events outside the courtroom or material already in the public domain

Section 4(2) refers only to postponing reports of a court's proceedings – but some courts have tried to use it temporarily to ban reporting of an external event, or of a statement not made in the proceedings. The Court of Appeal accepted in *R v B* [2006] EWCA Crim 2692 that such use is beyond the section's scope, and unnecessary because a media organisation can face proceedings under the Contempt of Court Act 1981 for publishing anything which creates a substantial risk of serious prejudice or impediment to an active case. That part of the Act is explained in 19.4 and 19.6 in *McNae's*.

16.6.2 Section 11 orders

16.6.2.2 Has the name or matter been withheld from the public?

Case study: In 2012 David Graham, of Blackpool-based Watsons Press Agency, cited the *Arundel* case when he persuaded a district judge to revoke a section 11 order giving anonymity to former professional footballer Alan Burrows, aged 70, who had been made subject to a sexual offences prevention order (SOPO). The order banned Burrows, who once played for Blackpool FC, from contact with children. Mr Graham pointed out that Burrows was named in open court when the SOPO proceedings began (*Media Lawyer*, 18 June 2012).

16.6.3 Anonymity, addresses and risk of attack

16.6.3.1 Police and prison officer defendants—risk of attack

Case study: In 2017 a lawyer for a police officer asked Hereford magistrates' court to impose a section 11 order banning the media from publishing his home address. The lawyer cited current security fears in the wake of the London and Manchester terror attacks. The officer was charged with assaulting a woman by beating her, which he denied. *Hereford Times* reporter Ben Goddard argued that national security grounds were not sufficient to justify banning publication of the officer's address, saying: 'The public has the right to know. We have people ringing up regularly with requests for their address to be withheld which are declined. Being a police officer is no different to any other profession.' The magistrates ruled that the *Times* could publish the officer's address (*Holdthefrontpage*, 8 June 2017).

Case study: In 2017 a High Court judge ruled that prison officers due to testify in a personal injury case could remain anonymous in its proceedings and give evidence from behind a screen because they feared a risk of harm if they were identified in reports of the case. This ruling was based on the common law 'duty of fairness' to witnesses. The personal injury claim was brought by Islamist extremist Michael Adebolajo, who is serving life for the murder of Fusilier Lee Rigby, against the Ministry of Justice and a number of prison officers over injuries he says he suffered during an incident in a cell. Mr Justice Langstaff said that the evidence of a threat to the officers' safety was of a potential as opposed to a real risk, and so he rejected argument that their Articles 2 and 3 rights were engaged. But on the common law issue, the judge took a different view, saying that the evidence from the

officers was that they were fearful. The judge said that was a real fear, even if the risk to them was not objectively verified, and that an anonymity order could be made in common law where it was necessary because a party feared that he might be put at risk if his identity was revealed, and where it was in the public interest because refusing the order might prevent that person from doing his job. The officers were suffering from stress, some were taking anti-depressants, and there had been an impact on their family lives, which suggested that they were being subjected to unnecessary unfairness, the judge added (*Media Lawyer*, 2 November 2017).

16.7.5.3 Challenges to juvenile anonymity in anti-social behaviour or criminal behaviour cases

Courts have the power to make orders in civil law to curb anti-social behaviour—see 10.10 in *McNae's* and the Additional Material for ch. 10 on www.mcnaes.com. As explained there, courts can make orders to provide anonymity for juveniles made subject to such measures and for those accused of breaching them. A journalist who wants a court to permit a report to identify a juvenile in such a case can cite Home Office guidance, *Publicising Anti-social Behaviour Orders*, issued to local authorities in 2005 about such orders, which at that time were ASBOs —see Useful Websites at the end of this chapter. Similar types of orders – known as anti-social behaviour injunctions (ASBIs) and criminal behaviour orders (CBOs) have replaced ASBOs.

This 2005 guidance said that orders against anti-social behaviour protect local communities and that: 'Publicity should be expected in most cases.'

The guidance said the benefits of publicity included:

- public reassurance that action was being taken to protect the community's human rights;
- enforcement - local people have the information to identify individuals who breach such orders;
- deterrence—if a person subject to such an order knows people might identify him/her for breaching it, a breach may be less likely, while others who see publicity about such orders might be deterred from anti-social behaviour.

A Home Office factsheet, *Replacing the ASBO*, said in 2013 that allowing the media to identify the juvenile in reports of courts deciding whether to impose a CBO and in reports of CBO breach proceedings will be a rare decision but 'may be necessary, in some circumstances, to help in enforcing the order and to protect victims and communities'.

Case law on ASBOs will be relevant to ASBIs and CBOs.

- Mr Justice Wilson said in the High Court in 2001 that in most cases magistrates should not ban identification by the media of a child subject to an ASBO, because the effectiveness of such orders would often depend on the local community knowing that the ASBO applied to that child (*Medway Council v BBC* [2002] 1 FLR 104).

Home Office guidance on ASBIs and CBOs, published in 2017 for 'frontline professionals', says:

'When deciding whether to publicise the injunction [or a CBO], public authorities (including the courts) must consider that it is necessary and proportionate to interfere with the young person's right to privacy, and the likely impact on a young person's behaviour. This will need to be balanced against the need to provide re-assurance to the victims and the wider community as well as providing them with information so that they can report any breaches. Each case should be decided carefully on its own facts.'

The Youth Court Bench Book, which is guidance published by the Judicial College for these courts, says of ABSIs and CBOs: 'The court would need to have a good reason, other than age alone, for preventing the identification of any child or young person in such proceedings. The court should consider that unless the nuisance is extremely localised, enforcement of the order will normally depend on the general public being aware of the order and of the identity of the person against whom it is made. Effective enforcement may require the publication of photographs of the offenders, as well as their names and addresses.'

See Useful Websites, below, for the official documents cited above about ASBOs, ASBIs and CBOs.

16.7.5.7 An anonymity order cannot validly be made in respect of a dead juvenile

Case study: In 2016 during a preliminary hearing of a case at Maidstone Crown Court, Judge Jeremy Carey made - as an interim measure - a section 45 order banning publication of the identity of dead baby Eli Cox in reports of or references to the case. The order was sought by the prosecution on behalf of Kent County Council. Eli had died, aged five months, of a 'catastrophic' head injury at a house in Minster, Isle of Sheppey, Kent. The two defendants in the case were his mother Katherine Cox, 32, who had eight other children, and her boyfriend, Danny Shepherd, 25, both of Millfield Road, Faversham. They denied causing or allowing Eli's death and causing or allowing physical harm to him. The order was challenged by journalists Keith Hunt for the KM Media Group and Julia Roberts of the Ferrari News Agency. Their submitted written argument said in part: 'We submit that the court does not only have no power to make an order giving anonymity to a dead child, it has no power to make any order giving anonymity to any other child of the family who is not a victim, witness or defendant in the case.' Subsequently Judge Carey said that the prosecution had withdrawn its application, and that he had decided that there was 'no basis in law' for making the order sought. Shepherd and Cox were convicted of the charges, which included possessing the drug amphetamine. The council's spokesman said Eli's siblings were now 'being appropriately cared for' following the conclusion of care proceedings (*Press Gazette*, 14 December 2016; BBC website, 3 August 2017).

16.9 Lifetime anonymity for witnesses

16.9.1.1 Is there 'fear' or 'distress' and would the quality of evidence really be diminished?

Case study: In 2010 at the Old Bailey Judge Jeremy Roberts refused to make an order under section 46 of the Youth Justice and Criminal Evidence Act 1999. The order had been requested

by the prosecutor, who wanted anonymity for a 58-year-old woman. She was a prosecution witness in a case in which two men faced charges relating to possessing unlicensed herbal medicines. The judge, after hearing the Press Association's arguments that such an order would not be justified, said he did not believe that the quality of her evidence was likely to be diminished if he did not make the order, adding: 'She is a responsible, obviously intelligent lady. She has held a very responsible position in the past' (*Media Lawyer*, 10 February 2010).

Case study: At Blackpool magistrates' court in 2009 a journalist successfully opposed a prosecution application that section 46 anonymity was needed for a barrister to improve the quality of his evidence. He was a prosecution witness in an assault case in which—the prosecution said—the defendant was expected to make derogatory allegations (*Media Lawyer*, 7 April 2009).

16.9.1.2 Does the section 46 order serve much purpose?

Case study: In 2007 a judge at Kingston Crown court made a section 46 order banning identification of witnesses due to testify as the victims of an attempted robbery. But she lifted it after the Newsquest newspaper group and local reporters pointed out that the defendants knew the witnesses, whose identities were already in the public domain as they had previously been named in open court, and that if the order remained in force the media would no longer be able to identify the victims or say where the offence occurred (*Holdthefrontpage* website and *Media Lawyer*, 19 and 20 September 2007).

Useful Websites

http://webarchive.nationalarchives.gov.uk/20100405140756/http://www.asb.homeoffice.gov.uk/uploadedFiles/Members_site/Documents_and_images/Enforcement_tools_and_powers/ASBOs_PublicisingGuidance_0031.pdf

Home Office guidance: 'Publicising anti-social behaviour orders'

www.gov.uk/government/uploads/system/uploads/attachment_data/file/251312/01_Factsheet_Replacing_the_ASBO_-_updated_for_Lords.pdf

Home Office Factsheet 'Replacing the ASBO'

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679712/2017-12-13_ASB_Revised_Statutory_Guidance_V2.1_Final.pdf

Home Office guidance on ASBIs and CBOs,

<https://www.judiciary.uk/wp-content/uploads/2016/10/youth-court-bench-book-august-2017.pdf>

Youth Court Bench Book