Neutral Citation Number: [2023] EWHC 587 (Admin)

Case No: CO/01822/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2023
Revised: 16/05/2023

Before :

LORD JUSTICE WARBY
and
MR JUSTICE MOSTYN

- -

Between :

THE KING **(on the application of JAVAD MARANDI)**	**Claimant**
- and -	
WESTMINSTER MAGISTRATES' COURT	**Defendant**
-and-	
(1) BRITISH BROADCASTING CORPORATION **(2) MARTIN BENTHAM** **(3) THE NATIONAL CRIME AGENCY**	**Interested Parties**

- -
- -

Lord Pannick KC, Jessica Boyd KC and Gervase de Wilde (instructed by **Farrer & Co**) for the **Claimant**
Monica Carss-Frisk KC and Jude Bunting KC (instructed by **in-house legal team**) for the **First Interested Party**
Tom Rainsbury (instructed by **in-house legal team)** for the **Third Interested Party**

Hearing date: 8 March 2023

- -

Approved Judgment

LORD JUSTICE WARBY :

Introduction

1. This is a claim for judicial review of a decision of the Westminster Magistrates' Court to lift an order anonymising the claimant in connection with a claim for forfeiture of assets brought by the National Crime Agency (the NCA) against three other individuals under the Proceeds of Crime Act 2002. The main issue is whether the judge erred in law when resolving a conflict between the imperatives of open justice and the rights of a non-party to respect for his private life.

2. The claimant was neither a party nor a witness in the forfeiture proceedings, but he does have some connections with the respondents to those proceedings. Before the hearing began, having learned that prejudicial references to him were likely to be made and fearing the reputational consequences, he applied for an anonymity order. The District Judge made such an order, heard the forfeiture proceedings and gave a public judgment in favour of the NCA which referred to the claimant but did not name him. Thereafter, on the application of the BBC the judge discharged his earlier order. The claimant challenges the judge's decision as flawed in law. He contends that we should set aside the decision of the judge, re-make the decision and restore the anonymity order.

The initial anonymity order

3. The forfeiture proceedings were brought against Parvana Feyziyeva (Parvana), Orkhan Javanshir (Orkhan) and Elman Javanshir (Elman). They are all members of the family of Javanshir Feyziyev (JF). Parvana is his wife, Orkhan his son, and Elman his nephew. The NCA's case was that the respondents were participants in or beneficiaries of the "Azerbaijani Laundromat", a "complex money-laundering operation operated by Azerbaijan's ruling elites" which had been "exposed" in 2017 by the Organized Crime and Corruption Reporting Project (OCCRP) on the basis of leaked banking documents. From that starting point, the NCA had undertaken investigations that led to the proceedings against these respondents.

4. The forfeiture proceedings were listed for hearing before District Judge (Magistrates Court) Zani to begin on Friday 29 October 2021 with a 10-day time estimate. In or before September 2021 the claimant learned that JF and his family were involved in proceedings brought by the NCA. In the second half of September 2021, he was shown the NCA's case summary. On the evening of Thursday 28 October 2021 he gave the media notice of an intention to apply the following day for a reporting restriction order (RRO). Notice of the application was given by email to the Press Association's alerts service, and to the Financial Times (who do not use that service) and Sky News.

5. The order sought provided for the claimant's name to be withheld from the public in the proceedings before the court; for references to the letters MNL to be substituted for all purposes in the proceedings; and for an order under s 11 of the Contempt of Court Act 1981 prohibiting the publication of the claimant's name "or any information likely to lead to [his] identification in connection with the proceedings."

6. The basis for the application was set out in a short witness statement from the claimant's solicitor, Mr Pike, dated 28 October 2021 which exhibited and verified the contents of a letter he had sent to the NCA that afternoon. Mr Pike said he understood that the NCA was making allegations of criminal or unlawful conduct against the claimant as part of its case against the respondents. The claimant's position was that the allegations against him were "without any foundation" and unless a RRO was made these allegations would be reported which was highly likely to cause considerable reputational and consequential harm to the claimant. The claimant asserted that his use of exchange houses to transfer legitimate and lawfully acquired funds from his business activities in Azerbaijan out of the country was not in any way illegal and gave rise to no legitimate suspicion.

7. The letter exhibited to the statement outlined the claimant's personal situation and his status as a "highly successful international businessman" with a "broad portfolio of business interests in this country and elsewhere", which were said to be lawful and not the subject of any current or past investigation by authorities. It was asserted that it was wholly unnecessary to include the claimant's name in the proceedings and that this would be a breach of his rights under Article 8 of the Convention. Reference was made to the decision of the Court of Appeal in *ZXC v Bloomberg LP* [2020] EWCA Civ 611, [2021] QB 28 (*ZXC*) that a person who has come under suspicion by an organ of the state has, in general, a reasonable expectation of privacy in relation to that fact and in relation to an expressed basis for that suspicion. Mr Pike wrote that "we do not consider that when the court is invited to conduct the balancing exercise, that there can be any real public interest sufficient to justify his identification against a third party." The letter maintained that it was now "standard practice" for banks to withdraw banking facilities upon reading of allegations of money laundering, which would have very substantial unjustified consequences for the claimant, his UK businesses and UK employees within them.

8. At about 8:20pm on 28 October 2021 the NCA confirmed by email that it would not refer to the claimant's name during the forfeiture proceedings but said that the matter would have to be dealt with by the judge the next day. Some of the application documents were emailed to the judge during the morning of 29 October 2021. The draft order was sent during the lunchtime adjournment. A written skeleton argument was submitted by Leading and junior Counsel for the claimant, whom the judge then heard in private, in the absence of the media. The core submission, reflecting the letter relied on in the evidence, was that publicity would represent an unjustifiable interference with the claimant's reasonable expectation of privacy and his rights under Article 8 of the Convention. The proposed order was then provided to members of the press so they could consider it and make representations, which two of them did: Martin Bentham, Home Affairs Editor of the Evening Standard and Koos Couvée, Senior Reporter with ACAMS MONEYLAUNDRERING.COM.

9. The judge gave a brief extempore judgment. He noted that Mr Marandi was not a respondent nor had the NCA brought proceedings against him in any court. He identified the concerns of Mr Marandi as expressed in Mr Pike's witness statement. He noted that the detailed submissions of the press on the need for open justice had included criticisms of the lack of detail provided in support of the application; that the NCA had sent an email stating that they were not opposing the application; and that Counsel for the respondents "in effect" supported the application. He concluded that

in all the circumstances it was "appropriate and necessary" for an order to be made in the terms sent to him by email "to reasonably and proportionately protect the Article 8 rights of MNL". Thereafter the judge used the cipher MNL in his judgments and orders in place of Mr Marandi's name.

10. There followed a public hearing of the forfeiture proceedings over ten days in public but subject to the restrictions I have mentioned. The judge received copious documentary evidence as well as oral evidence from witnesses who included Philip Deeks, an Accredited Financial Investigator for the NCA. His evidence included reference to the claimant, and the claimant's role in connection with companies that were said to be part of the money laundering activities alleged by the NCA. At one point Mr Deeks was asked whether the claimant was the subject of an ongoing investigation which he declined to confirm or deny. The respondents chose not to give or adduce any evidence of their own but to rely on cross-examination and submissions from their Leading Counsel. The hearing concluded on 12 November 2021, when the judge reserved judgment.

The forfeiture judgment

11. On 31 January 2022, the judge gave judgment in open court. He held that a total of £5,630,994.19 standing to the credit of the respondents in certain accounts with Rathbones and Lloyds Bank was recoverable property and ordered that it be forfeited pursuant to s 303Z12(4)(a) of the Proceeds of Crime Act. Freezing orders in respect of the balance of the monies held in the accounts were discharged and those sums were released to the respondents. The reasons for these conclusions were set out in a detailed written judgment in which the judge said he was "entirely satisfied that there was a significant money laundering scheme in existence in Azerbaijan, Estonia and Latvia at the relevant time" from which the respondents had benefited.

12. The judge's key findings for present purposes were as follows.

(1) The cornerstone of the scheme was the formation of an Azerbaijani company called Baktelekom along with two UK limited liability partnerships called Hilux and Polux. At all times these entities were paper or shell companies. They had no genuine independent existence. They filed no accounts; had no staff; and had no office premises. Their only function was to open and operate bank accounts (in the case of Hilux and Polux in Estonia and in the case of Baktelekom in Azerbaijan) to act as a conduit for substantial funds that originated from a criminal enterprise. In the two-year period from June 2013 over $2 billion was paid, mainly by Baktelekom, to Hilux and Polux, under the cover of crude fake invoices for the sale by the LLPs of huge quantities of non-existent steel piping to Baktelekom.

(2) The funds that flowed through the bank accounts of Hilux and Polux went to a number of different destinations. These included an account held at ABLV Bank in Latvia by Avromed Company (Seychelles), a company incorporated in the Seychelles. Records at ABLV Bank revealed that the claimant was the beneficial owner of this company and the signatory on its bank account. The NCA's case, which the judge accepted, was that Avromed Company (Seychelles) was being used to launder the proceeds of crime. During the period considered by the judge, Hilux and Polux transferred a total of $37 million to Avromed Company (Seychelles). In addition, Baktelekom paid $19 million to the company directly.

From the bank account of Avromed Company (Seychelles) JF received sums amounting to about $37 million. In addition, from that account a company beneficially owned by Mr Marandi received $107 million and Mr Marandi himself received $49 million directly. Funds from Hilux and Polux were also paid into accounts in Latvia and Estonia held by Avromed LLP, a UK registered entity. Avromed LLP then in turn made substantial payments to Avromed Company (Seychelles), from which payments of "relevant corresponding sums" could be traced to accounts held by JF, Parvana and Elman.

(3) Another entity used for these corrupt purposes was Brightmax Export Limited (Brightmax) incorporated in St Kitts & Nevis in 2014, which also maintained an account at ABLV Bank in Latvia. Hilux paid over $24m to Brightmax for the supply of "medical equipment"; this was, again, a fake transaction. The judge found that some of the £1 million which he held to be recoverable property in Orkhan's accounts could be "traced back to … monies from Brightmax and via the medium of MNL".

The application to discharge the anonymity order

13. On 28 January 2022, having evidently got wind that there was to be a hearing on the Monday, the BBC gave notice of an intention to apply to set aside the judge's order. The order had not provided for an expiry date nor, anomalously, did it give those affected liberty to apply to discharge or vary. It was however rightly accepted that the BBC was entitled to make such an application. It had not been heard on the application of 29 October 2021, having only received notice of that application indirectly, via the PA Media service, late on 28 October. Although affected by the order it had not been served with a copy.

14. The judge was unable to hear the parties in short order so he handed down his judgment anonymised so far as the claimant was concerned. He fixed a hearing date and set a timetable for the filing of papers in respect of the application to set aside the RRO. During March 2022, skeleton arguments were filed sequentially by Mr Bentham, the BBC and Mr Marandi. Written submissions were also filed from the interested parties and from Spotlight on Corruption and Transparency International UK. The NCA adopted a neutral stance. No party filed any further evidence. On 29 April 2022 the judge heard Martin Bentham and Leading Counsel for the BBC and for the claimant.

The law

15. The argument then and now turns on the proper application to this case of the principles, uncontroversial in themselves, which are identified in four key authorities: *R (Rai) v Winchester Crown Court* (*Rai*)*, Khuja v Times Newspapers Ltd* (*Khuja), ZXC*, and *Del Campo v Spain* (*Del Campo*).

16. *Rai* was the defendant to a charge of murder. She sought and obtained an order that her address should be withheld from the public and an RRO under s 11 of the Contempt of Court Act 1981. She relied on her Article 8 rights. The decision of the Crown Court to discharge that order was upheld by the Divisional Court ([2021] EWHC 2751 (Admin), (*Rai* (DC)) and by the Court of Appeal ([2021] EWCA Civ 604, [2021] 2 Cr App R 20 (*Rai* (CA)). In *Rai* (CA) the court approved the following

summary of the relevant principles contained in the Judicial College Guide to Reporting Restrictions in the Criminal Courts (the current (2022) edition is in identical terms):

- The general rule is that the administration of justice must be done in public; the public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously.

- Any restriction on these usual rules will be exceptional. It must be based on necessity.

- The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence.

17. The court held that these principles apply "across the board", including in cases involving rights under Article 8, in which "any restriction on the … media's ability to report them must fulfil a legitimate aim and be necessary, proportionate and convincingly established" by the production of "clear and cogent evidence": see *Rai* (CA) at [23]. At [24]-[28] the court noted that the leading authorities, whilst recognising that in such a case the court must conduct a balancing process, emphasise the great weight to be given to the open justice principle. Two key passages from well-known Supreme Court decisions were cited:

(1) *In re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [18], where Lord Steyn, having set out the famous balancing exercise at [17], went on to identify "the general rule" that "the press, as the watchdog of the public may report everything that takes place in a criminal court", adding that "in European and in domestic practice, this is a strong rule. It can only be displaced by unusual or exceptional circumstances".

(2) *Khuja* [23], where Lord Sumption, for the majority, pointed out that:-

> "… 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 … which have been accepted by the common law for many years … and are reflected in a substantial and consistent body of statute law as well as the jurisprudence on art.10 …".

18. *Khuja* was one of a number of men suspected of involvement in offences of child sex abuse. Some were charged and prosecuted. He was not, nor was he a witness at the trial, but one of the complainants accused him in the course of her evidence. The evidence was given in public but his name could not be reported at the time because the judge had made an RRO under s 4(2) of the 1981 Act, postponing any such reporting. This was to avoid prejudice to any criminal proceedings that might later be brought against him. When the prospect of such proceedings fell away the media applied to discharge the RRO. The claimant cross-applied in the High Court to restrain his identification, relying on his Article 8 rights. The High Court dismissed the application and appeals were dismissed by the Court of Appeal and the Supreme Court: [2017] UKSC 49, [2019] AC 162.

19. The Supreme Court reiterated the general rule that the English courts, with limited exceptions, administer justice in public at hearings which can be attended by members of the public and reported by the press. It held that Article 8 is given effect in a qualified common law right to privacy which has to be balanced against the right to freedom of expression. The balancing exercise is fact-specific and depends on the comparative importance of the rights in the particular circumstances and an assessment of the proportionality of the interference which the grant or refusal of the injunction would represent. The question that arose was "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": [29]. The test to be applied was whether the public interest served by publishing the facts extended to publishing the name. In practice, where the court was satisfied there was a real interest in publishing the facts, it had generally extended to publication of the name, because anonymised reporting was less likely to interest the public and provoke discussion. But this would not necessarily be so. "The identity of those involved may be wholly marginal to the public interest engaged": [30].

20. The court held by a majority of five to two that on the facts of the case the injunction sought was inappropriate and the judge had rightly refused to grant it. This was because the public interest in open justice and freedom of expression did extend to publication of the claimant's name and was not outweighed by his Article 8 rights. The impact of publicity on the private and family life of someone in the claimant's position was not to be underestimated but in general that impact, including the reporting under privilege of what was said in court, was "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": [34(2)]. "[I]f there is a solution to the problem of collateral damage to those not directly involved in criminal proceedings" it was to be found in a way of "managing the trial in way which avoids the identification of those with a sufficient claim to anonymity": [35]. That was not appropriate here. Four factors were identified as important in that respect. Among them were (i) that the claimant could not have had any reasonable expectation of privacy in respect of matters discussed at a trial held in open court and (iv) the claimant's identity was "not a peripheral or irrelevant feature of the story".

21. *ZXC* was a person under official suspicion of involvement in criminal conduct abroad who had been investigated but not arrested or charged. I have mentioned already at [7] above the decision of the Court of Appeal. The Supreme Court dismissed an appeal from that decision, and confirmed that there was a legitimate starting point that a person who had not yet been charged but was under criminal investigation has a reasonable expectation of privacy in that fact and the details underlying it: *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158 (*ZXC* (SC)).

22. *Del Campo* was a teacher accused by a colleague of workplace harassment. The colleague, having failed to obtain satisfaction by complaining to the education authorities, brought proceedings against the regional government for failure to prevent the alleged bullying and harassment. In a public judgment which referred extensively to the claimant by name the court upheld the claim and ordered the authorities to pay compensation. The applicant had not been a party or witness to the domestic proceedings, nor was he even aware of them until the media reported on the judgment. His attempts to have the decision annulled or to join the proceedings in Spain failed

so he applied to the European Court of Human Rights which found a violation of his Article 8 rights: (2019) 68 EHRR 27.

23. The Court's decision can be fairly summarised in this way: (1) the facts fell within the scope of Article 8 as the inclusion of the applicant's name in the judgment was capable of adversely affecting his enjoyment of private and family life; (2) the interference was in accordance with the law because the inclusion of the applicant's name pursued the public interest in ensuring the transparency of court proceedings and thereby the maintenance of public confidence in the courts; (3) the domestic court's reasoning may have pursued several of the legitimate aims in Article 8(2); but (4) the portrayal of the applicant's conduct in an "authoritative judicial ruling" stigmatised the applicant and could have a major impact, including on his reputation; and (5) domestic law provided a range of measures to avoid or mitigate this but the applicant had been afforded no opportunity to seek such measures nor had the court addressed the question; (6) in these circumstances the disclosure of his name was "not supported by any cogent reasons" nor accompanied by "effective and adequate safeguards".

The submissions made to the judge

24. Mr Browne KC for the claimant, went first. He sought to distinguish *Rai* as a case about anonymity or other reporting restrictions for the defendant in a criminal case. He argued that the forfeiture proceedings were civil proceedings concerned with the status of property. The claimant was not a respondent but a non-party. His Article 8 rights were "engaged" by the allegations and findings against him. Mr Browne relied on evidence given by Philip Deeks, an Accredited Financial Investigator with the NCA, who had declined when questioned to confirm or deny that the claimant was the subject of an ongoing investigation. He argued that, as someone who had not been interviewed and in circumstances where it had not been confirmed that he was even under investigation, the claimant enjoyed a reasonable expectation of privacy stronger than that of *ZXC*. He said the judge had to conduct a balancing exercise weighing this up against competing rights under Articles 6 and 10. The allegations were serious and they were false and likely to have a serious impact on the claimant, but they were made against him "peripherally"; his role in the proceedings was "peripheral" and he was "a peripheral figure" with a "peripheral role" in the court's findings about the respondents. The claimant had not had a fair opportunity to challenge those findings but had been "condemned unheard". At the hearing, though not in his skeleton argument, Mr Browne relied in this context on *Del Campo*. The solution, submitted Counsel, was the one identified in *Khuja* of anonymity.

25. For the BBC, Mr Bunting KC resisted any suggestion that the exercise for the court was simply one of balancing the impact on a person's privacy of reporting a given fact against the importance of that fact to the proceedings in question. He relied on *Rai,* submitting that the starting point is open justice; that any restriction on reporting should be imposed only when strictly necessary and justified by clear and cogent evidence; and that only in exceptional circumstances can a RRO be imposed to protect the legitimate interests of others. This case involved a topic of high public interest. The proceedings stemmed from investigative media reporting and reports of the proceedings would make an important contribution to public understanding of the subject-matter. Mr Bunting and the interested party Mr Bentham of the Evening Standard both submitted that the public would understand that mere allegations do not

amount to evidence of guilt, and that the claimant's evidence was neither clear nor cogent, amounting to little more than mere assertion and the expression of fears that publicity would harm the claimant's private life.

26. After the hearing, when judgment was reserved, on 4 May 2022, the claimant submitted a letter from his solicitor summarising things that JF had said to the claimant about the withdrawal of banking facilities. JF offered to confirm this in a witness statement which in due course he did. The BBC opposed the admission of this material. The judge indicated that having set a timetable for the submission of materials he was not minded to admit this late addition.

The judgment and order under review

27. On 9 May 2022 the judge handed down his judgment on the application to discharge and, for the reasons given in that judgment, he ordered that "the RRO is lifted and MNL may be identified by name in reports of the proceedings." But the judge continued to use the cipher MNL in order to safeguard Mr Marandi's right to bring this judicial review claim.

28. The judge first recorded his rejection of a complaint by the BBC about the way the original order had been sought and made, and his dismissal of the claimant's application to adduce further evidence. He summarised the procedural background, setting out verbatim Counsel's approved note of his extempore judgment of 29 October 2021. He then summarised the main submissions of the parties, much as I have done above. At [27], he analysed *Del Campo* as a case that turned on the applicant's inability to seek non-disclosure of his identity or personal information before judgment was passed, meaning that the resulting interference with his private life was unjustified because it had not been accompanied by effective and adequate safeguards.

29. Turning to his decision, the judge took as his starting point the foundational decision of the House of Lords in *Scott v Scott* [1913] AC 417 and the proposition (drawn from Mr Bentham's written argument) that "The general rule of the common law is that justice must be administered in public at hearings which anyone may attend within the limits of the court's capacity and which the press may report". The judge observed that in the forfeiture proceedings he had received "important oral evidence" including from Mr Deeks. He mentioned Mr Deeks' non-committal reply to the question about whether that the claimant was subject to investigation. But he also said he had had the opportunity to analyse in detail a "mountain of documentation" and detailed oral and written submissions.

30. The judge then addressed two main questions. The first was "*Is MNL a peripheral figure*?". The judge's answer was that in the light of the evidence and submissions he had heard "contrary to what has been promoted on his behalf … I do not consider MNL to be a peripheral figure in relation to the main proceedings. He is, in my opinion, a person of importance to the main proceedings." The second question addressed by the judge was "*Has MNL provided 'clear and cogent' evidence in support of the application for anonymity (per the rulings in Rai both Divisional Court and Court of Appeal)?*" The judge said he was not presently satisfied that the claimant had done so. Accordingly, the judge was "no longer satisfied that it was necessary or proportionate for the anonymity order to remain in place".

31. Explaining his answer to the first question, the judge cited extensively from the forfeiture judgment. He also said that Mr Marandi had featured directly and indirectly on a number of occasions in the NCA's case and in the evidence of Mr Deeks. The judge gave details of "some of these references". He said there had been evidence that the claimant was (1) one of three co-founders of Avromed Company LLC, and for some time a shareholder of that entity; (2) the beneficial owner of Avromed Company (Seychelles); (3) in 2012, a signatory of that company's ABLV account; and (4) a recipient of some US $49m from that account (the records of which showed that a further $35m and E8.4m had been paid to the respondents to the forfeiture proceedings). Mr Deeks had given evidence of "multiple payments" into the Avromed (Seychelles) account which were "then appropriated to" the claimant or in some cases JF in circumstances which did not match JF's account of events. Mr Deeks had said that over an 11-year period from 2005 sums in excess of US$106m had been paid from Avromed (Seychelles) account with ABLV Bank to Vynehill Enterprises Limited, a company which he said was "known to be" beneficially owned by the claimant. One such transaction had been designated "pharma products". The rest were all marked "account replenishment". Mr Deeks had also given evidence that the claimant was one of the sources of payments totalling US$1.1m that passed from JF's Latvian ABLV account to Orkhan's account with Barclays Bank between June 2015 and January 2016. Brightmax had transacted with Avromed Company to the tune of over $10m and had paid the claimant US$23m.

32. On the second question, the judge's decision to reject the claimant's belated application meant that the evidence remained as it was on 29 October 2021. The judge considered it to be "of significant importance" that no detail had been provided as to the number of employees whom the claimant and/or his businesses employed; whether this was in his personal capacity or as a director or member of a company or other entity; the location of the businesses, or the claimant's business assets or bank accounts; or details of his means or assets within or outside this jurisdiction. The provision of such information would have enabled the court to form a much clearer idea of the potential effect of discharging the anonymity order. Its continued absence considerably weakened the case for continuation of the order. The judge saw force in the submission of Mr Bunting KC, for the BBC, that "bare assertion has no evidential value", finding support for that proposition in the judgment of Fulford LJ in *Javadov v Westminster Magistrates Court* [2021] EWHC 2751 (Admin), [2022] 1 WLR 1952 (*Javadov*) at [64]. At [82], the judge considered *Del Campo*, but concluded that it was "fact specific and does not trump the need for open justice in the UK courts".

The judicial review challenge

33. In the absence of any right of appeal against such an order the claimant seeks judicial review, which is the recognised procedure for cases of this kind: see *R v Marine A* [2013] EWCA Crim 2367, [2014] 1 WLR 3326 [47], *Rai* (DC) [11] and *Javadov*, where the claim was for judicial review of a decision of the Magistrates' Court to hear a claim under the Proceeds of Crime Act in public.

34. Decisions about reporting restrictions are evaluative in nature, involving a judicial assessment and a balancing exercise akin to the exercise of a discretion. A judicial review challenge to such a decision will not succeed unless it is shown that the judge's approach was wrong in law in a way that undermines his conclusions, or outside the range of decisions properly open to him on the evidence, although the

scrutiny will be more intense in a case where the question is whether the decision involves an unjustified interference with fundamental human rights.

35. The claimant's first ground of challenge is that the judge's reasoning contains "serious errors of law" and should therefore be quashed. The second ground arises only if the first succeeds. In that event, we are asked to re-make the decision and maintain the anonymity order on the footing that any other decision would violate the claimant's rights under Article 8.

36. The legal argument in this court remains focused on the four cases I have already mentioned, although both sides also rely on the recent decision of the Court of Appeal in *Clifford v Millicom Services UK Ltd* [2023] EWCA Civ 50. It is common ground that the present case falls to be decided by reference to the principles identified in *Rai* (CA). The claimant does not now suggest that any different approach applies in civil proceedings such as these. Rightly so, in my view. The principles governing anonymity in that context are summarised in the Master of the Rolls' *Practice Guidance on Interim Non-Disclosure Orders* of 2011, [2012] 1 WLR 1003 (the Practice Guidance) at paras [9] – [14] which say this (citations omitted):

> "[9]. Open justice is a fundamental principle …
>
> [10]. Derogations from the general principle can only be justified in exceptional circumstances when they are strictly necessary … They are wholly exceptional …
>
> [12]. … Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> [13]. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence….
>
> [14]. When considering the imposition of any derogation from open justice the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings."

The first ground of challenge: alleged error of law

Submissions

37. For the claimant, Lord Pannick KC makes three main submissions. He argues that the judge (1) failed to recognise that the applicable principles are those identified in *Rai* and, specifically, that his task was, having regard to the importance of open justice, to determine the balance to be struck between privacy rights on the one hand and, the freedom of the press and open justice on the other; (2) failed properly to carry out the necessary balancing exercise, ignoring or failing to take proper account of three important factors, namely (a) the self-evident truth that identifying the claimant would have a very damaging impact on his personal and business reputation, a proposition which needed no evidence; (b) the obvious unfairness of publishing the claimant's

identity in a judgment relating to proceedings to which he was not a party nor a witness; (c) the fact that the force of the open justice principle was limited in this case because what the BBC was seeking permission to report was facts which had not been disclosed in open court; and (3) that the judge erred in law by focusing instead on irrelevant matters: the claimant's status as a "peripheral figure" in the events which were the subject of the forfeiture judgment and the supposed absence of any "clear and cogent" evidence that he would suffer harm.

38. The first submission focuses on the absence of any mention in the judgment of the balancing process. In support of his second submission:-

(a) Lord Pannick points to the recognition in *ZXC* that publicity for allegations of criminality is likely to have a serious impact on private life. Relying on *Del Campo,* he characterises what the judge had to say about the claimant in the forfeiture judgment as an "authoritative judicial ruling"; he emphasises the gravity of the resulting stigma, representing a serious interference with Article 8 rights; and he says the judge was wrong to distinguish *Del Campo* on this point.

(b) *Del Campo* is also relied on for what it said about unfairness. Lord Pannick further submits that the judge took no proper account of fact that this claimant's role and status in relation to the forfeiture proceedings are both remote. It is in this connection that he refers to paragraph [42] of *Clifford v Millicom* where I said (with the agreement of Lewis and Elisabeth Laing LJJ) that

> "the factors that need to be weighed in the balance include (a) the extent to which the derogation sought would interfere with the principle of open justice; (b) the importance to the case of the information which the applicant seeks to protect; and (c) the role or status within the litigation of the person whose rights or interests are under consideration".

(c) Lord Pannick relies on paragraphs [34(1)] and [35] of Lord Sumption's judgment in *Khuja* where he pointed out that what the claimant in that case was seeking was a prohibition on reporting of "matters which were discussed at a public trial" which were "not matters in respect of which [the claimant] could have had any reasonable expectation of privacy" and that restrictions on reporting of proceedings in open court are "particularly difficult to justify".

39. In support of his third submission, Lord Pannick says the claimant's argument before the judge was that he had a procedurally peripheral status such that he had no right to appear or make representations, but the judge confused this with the separate and irrelevant issue of whether the claimant was a peripheral figure in the forfeiture judgment, which I shall call substantive peripherality. The judge is said to have erred in law by treating Mr Deeks' non-committal answer as a piece of "important evidence" which favoured disclosure when it was if anything the opposite. Lord Pannick accepts that the claimant could have provided more evidence than he did but he submits (in writing) that the judge was wrong to rule out the evidence of JF and (orally) that the evidence the claimant did provide was sufficient given the manifestly damaging nature of the allegations and findings, and that the judge was wrong in law to think anything more was needed.

40. For the BBC, Ms Carss-Frisk KC responds that on a fair reading of the judgment under review the judge identified and applied the relevant principles; his decision involved the straightforward application of those principles involving no error. She points to the emphasis placed in *In re S* and *Khuja* on the weight to be given to open justice. She emphasises the public interest in the reporting of cases of this kind, buttressed (she says) by the fact that the Azerbaijani Laundromat was only revealed by the work of investigative journalists. She submits that the judge was not only entitled but right to focus on the twin questions of the claimant's importance in relation to the forfeiture judgment and whether there was clear and cogent evidence to support the claimant's case on damage. The claimant cannot complain of this, she submits. It has been a central part of his case throughout that he should be granted anonymity because he is a "peripheral" figure in every sense. In the proceedings below it was common ground that there had to be clear and cogent evidence; the claimant's case at that stage was that his evidence satisfied this requirement. The judge's finding that the claimant was an "important" figure was a legitimate one, involving no logical or legal error, and he was entitled to place weight on that finding. He was also entitled to find, for the reasons he gave, that the evidence fell short of the clear and cogent standard. His decision to exclude the evidence of JF was clearly a legitimate exercise of case management discretion.

Assessment

41. I accept that aspects of the judge's reasoning could have been set out more clearly. There are however many ways in which to express the reasoning that underlies a decision. And it is a commonplace that every judgment could be better written. The question for us is whether the judgment is legally flawed so that the decision must be quashed. In answering that question we must consider the judgment as a whole, read it fairly, and assess it in its proper context. That context includes the judge's initial anonymity judgment, the forfeiture judgment, the evidence presented to him, and the arguments advanced. This is why I have taken time to summarise the submissions made at the discharge hearing, as the judge himself did in some detail as part of his judgment.

42. Applying this approach, and for the reasons that follow, I consider it sufficiently clear that the judge identified the relevant legal principles and applied them to the facts as they appeared from the material before him in a fashion that cannot be impugned. I do not accept that he ignored relevant factors nor that he took account of matters that were irrelevant. In my view, Lord Pannick's argument, skilful as it is, comes down in the end to a disagreement with the weight which the judge attributed to the relevant factors.

43. I reject the claimant's criticism of the judge's approach to the law for these reasons:-

    (1) The starting point is the common law principle of open justice, authoritatively expounded in *Scott v Scott* and subsequent authorities at the highest level. The judge was right to begin here. The summary of the common law principles which he adopted from the argument of Mr Bentham is not materially different from the summary in the Judicial College Guide, approved in *Rai* (CA).

    (2) The general principles that (a) justice is administered in public and (b) everything said in court is reportable both encompass the mention of names. As a rule, "[t]he

public has a right to know, not only what is going on in our courts, but also who the principal actors are": *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444 [36] (Baroness Hale). In this case, it is clear that but for the claimant's late request for a derogation from these principles the NCA would have named him in open court. Its decision to do otherwise was a purely executive act which has no bearing on the propriety of the judge's decisions to grant and then lift anonymity. Those were decisions about what the law required. It would have been irrelevant if the NCA had consented to an anonymity order, as parties cannot waive or give up the rights of the public: see the Practice Guidance at paragraph 16.

(3) When considering the application for derogation in this case the judge was right to identify and apply a test of necessity. Under the common law as it existed prior to the entry into force of the Human Rights Act 1998, anonymity could only be justified where this was strictly necessary "in the interests of justice": see *Khuja* [14]. This was and remains an exception of narrow scope: see the tests cited in *Clifford v Millicom* at [31]-[32]. It has never been suggested that this case meets that standard. The claimant's case rests on the common law privacy right derived from Article 8, to which the Supreme Court referred in *Khuja.* But in that context too the applicant for anonymity has to show that this is necessary in pursuit of the legitimate aim on which he relies.

(4) The threshold question is whether the measure in question – here, allowing the disclosure of the claimant's name and consequent publicity - would amount to an interference with the claimant's right to respect for his private and family life. This requires proof that the effects would attain a "certain level of seriousness": *ZXC* (SC) [55], *Javadov* [39]. It was the very essence of the claimant's case – as to which the judge was in no doubt - that the reputational impact of disclosure would amount to a very serious interference with his Convention rights. In my view it is clear that the judge accepted throughout that the threshold test was satisfied. His reasoning cannot be understood in any other way.

(5) The next stage is the balancing exercise. Both the judge's decisions expressly turned on whether it was "necessary and proportionate" to grant anonymity. That language clearly reflects a Convention analysis and the balancing process which the judge was required to undertake. The question implicit in the judge's reasoning process is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice. It is clear enough, in my view, that he was engaging in a process of evaluating the claimant's case against the weighty imperatives of open justice.

(6) It is in that context that the judge rightly addressed the question of whether the claimant had adduced "clear and cogent evidence". He was considering whether it had been shown that the balance fell in favour of anonymity. The cases all show that this question is not to be answered on the basis of "rival generalities" but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why "clear and cogent evidence" is needed. This requirement reflects both the older common law authorities and the more modern cases. In *Scott v Scott* at p438 Viscount Haldane held that the court had no power to depart from open justice "unless it be strictly necessary"; the

applicant "must make out his case strictly, and bring it up to the standard which the underlying principle requires". *Rai* (CA) is authority that the same is true of a case that relies on Article 8. The Practice Guidance is to the same effect and cites many modern authorities in support of that proposition. These include *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 where, in an often-cited passage, Lord Neuberger of Abbotsbury said at [22]:

> "Where, as here, the basis for any claimed restriction ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule …"

(7) In my opinion, the closing passage of the judgment under review reflects the conclusion arrived at by the judge after conducting the necessary balancing process. This was that, in the light of all the facts and circumstances that were apparent to him at that time, the derogation from open justice that anonymity would represent was no longer shown to be justified as both necessary for the protection of the claimant's Article 8 rights and proportionate to that aim.

44. My reasons for rejecting the claimant's complaint that in arriving at that conclusion the judge ignored relevant considerations are these:-

(1) It seems to me unreal to suggest that the judge ignored or overlooked the question of whether the claimant's reputation would be seriously harmed by disclosure of his name in open court and consequent reporting. This was the claimant's key contention, and the starting point for his argument. I agree that it is self-evident that associating a person with money-laundering in this way is inherently likely to cause serious harm to his reputation. That, it may fairly be inferred, was part of the reason why the judge accepted that publicity would interfere with the claimant's Article 8 rights, and it must have been one of the main factors in the judge's decision to grant him anonymity in the first place. The fact that judicial findings can cause reputational harm with a consequent impact on Article 8 rights was also at the centre of *Del Campo.*

(2) The decision under review accepted that the threshold of seriousness was crossed, so that there would be an interference. The nature and degree of such an interference on the facts of an individual case are not, however, self-evident matters. It does not flow inexorably from the content of the forfeiture judgment that disclosure of the claimant's name in that context would cause him serious reputational harm, still less that it would result in any particular degree of interference with his enjoyment of private or family life. In principle, these are matters requiring proof. Nor is the weight to be attributed to such interference a self-evident consideration. All of these were matters for the judge to evaluate, on the basis of the particular facts and circumstances before him at the time of decision, including such evidence as the claimant chose to adduce on the matter, and the arguments advanced.

(3) Lord Pannick's argument in this court treats the forfeiture judgment as if it contained a finding that his client is guilty of an offence. That is certainly not the formal position. Nor is it the only possible interpretation of the judgment. Nor is it

how the claimant's case was put before the judge. At that stage, Mr Browne was submitting that although his client was a mere suspect the public would not presume his innocence but would equate suspicion with guilt. But how the public would react to knowledge that a person is under official suspicion is a question of fact not a rule of law: *ZXC* (SC) [107]. And the public is able to distinguish between suspicion and guilt "in the generality of cases": *Khuja* [33]. Again, these were not self-evident matters but issues for the judge to assess in the circumstances of this case.

(4) As I have shown, the submission that the claimant's role and status were "peripheral" was a mantra of the argument advanced on his behalf by Mr Browne KC. It was one of the core components of the argument that it was unnecessary and would be unfair to name the claimant. Mr Browne did not limit his submissions to the question of the claimant's procedural status; he put the point in every possible way. The judge was required to assess those arguments and determine how much weight to attach to them. That is what he did.

(5) The judge squarely addressed and rejected the notion that the claimant had a substantively peripheral role and status. He held that the claimant was "a person of importance to the main proceedings". The legitimacy of that conclusion is understandably not in dispute. I shall return to its relevance. As for the formal procedural status of the claimant this was not in issue, indeed, it was indisputable. He was neither a party nor a witness. The question of unfairness was raised in that context. It cannot be argued and, to be fair, it has not been suggested, that it is always unfair to name a non-party. It is accepted that this must depend on the facts. Here, the focus was on procedural unfairness. The claimant had offered a general denial of wrongdoing but made no attempt to address the detail of the judge's substantive conclusions. The key authority relied on before the judge was *Del Campo.* It is true that as a non-party who was not giving evidence, the claimant's position was analogous to that of the applicant in that case. But the analogy cannot be pressed very far.

(6) Mr Del Campo knew nothing of the case in which he was accused of serious wrongdoing. He had no forewarning at all of the findings to be made against him, which came out of the blue after the judgment had been given. He had no chance to offer any evidence nor to make any other representations to the court, which named him in a public judgment without itself addressing the question of whether this was necessary, appropriate or proportionate. By contrast, the claimant in this case was forewarned in advance of the substantive hearing. He had and took the opportunity to apply for anonymity. He had the chance to put in evidence in support of that application and to some extent he took advantage of that too. He secured an anonymity order. He had the opportunity to attend the trial of the forfeiture proceedings or have someone do so on his behalf. We do not know if he did so, or if he made any attempts to provide relevant evidence. We have not been told that he did. He also had a full and fair opportunity to press for the continuation of anonymity after judgment was delivered. There was a three-month window of opportunity in which to adduce evidence in support of his argument at that stage. He had a half-day hearing and received a reasoned judgment on the issue. These considerations amply justify the judge's conclusion that *Del Campo*

is distinguishable on its facts and, implicitly, that naming this claimant would not be procedurally unfair.

(7) The argument that weight should be attached to the fact that the claimant had not been named in open court was not advanced to the judge. I am bound to say my instinct was to view it as unfair to the judge and the BBC and wrong to raise it now on this judicial review. But that objection has not been taken. I would reject the point on its merits. As Lord Pannick accepted, his argument seeks to pull itself up by its own bootstraps. If the initial anonymity order was unjustified, it would be illogical and unprincipled to treat its mere existence as a justification for keeping it in place. I do not think the observations of Lord Sumption in *Khuja* are on point. In that case, (as I read his reasoning) although the argument for anonymity "might have had considerable force" the claimant made no attempt to stop the press and public learning his name by attending the trial. The only reason the name was not reported was the imposition of a s 4(2) order postponing his identification. That order was not imposed to protect the claimant's private life, but to guarantee the due administration of justice in other proceedings thought to be pending or imminent. Once that purpose fell away the claimant could not say he had any reasonable expectation of privacy in that which had already become public knowledge.

45. Turning to the submission that the judge took account of irrelevant matters:

(1) I do not agree that the question of whether the claimant had a substantively peripheral role is irrelevant. It bears on the issue identified in *Clifford v Millicom* at [42(c)]. It goes directly to the question identified by Lord Sumption in *Khuja,* of the degree to which the public interest in open justice extends to the provision of the name in question. That, no doubt, is why the point was advanced on the claimant's behalf.

(2) It has not been argued and surely could not be said that the evidence adduced about this claimant was irrelevant to the forfeiture proceedings and should have been excluded from the hearing or the judgment on that ground. The judge's view that the claimant was, in the context of his overall findings, a "person of importance" was plainly a legitimate one. I note that JF (a non-party) is named in the forfeiture judgment as a "key individual". It is a legitimate view that it would be anomalous to grant anonymity to this claimant.

(3) I think the suggestion that the judge treated Mr Deeks' non-committal answer as "important" evidence depends on a misreading of a mildly infelicitous passage of the judgment. The judge was reciting a point made by Mr Browne KC on behalf of the claimant, but he went on to say that there was other evidence that implicated the claimant in the events that were the subject of the forfeiture proceedings.

(4) Nor do I accept that the judge was wrong to examine whether the evidence adduced by the claimant was sufficiently "clear and cogent" or to conclude that it was not. The reasons for that have already been indicated to some extent. It was for the claimant to show why his privacy rights mattered so much that a derogation from the open justice principle was necessary to give them proper effect. The specifics of the likely harm were by no means self-evident. The

judge's exclusion of JF's post-hearing evidence was plainly a legitimate case management decision. The other evidence adduced was thin in the extreme, and its deficiencies were all the more striking given the length of time the claimant had available to prepare and submit evidence that went into detail.

(5) At least seven months passed between the time the claimant got to know that he was likely to be named and the date of the hearing in April 2022. By the end of that hearing the claimant himself had provided no evidence at all. It was left to his solicitor to provide a letter and short statement. There had been no supplementary material since the end of October. None of this was explained. Other than mentioning his British citizenship, the evidence contained almost nothing about the claimant's personal life. There was, for instance, nothing about his private and family life. The judge was told that had been "resident in the UK" for many years but not where he lived, or if he had a partner or children. The evidence dealt exclusively with his business activities. It consisted largely of generalities. The matters which the judge recorded as having not been addressed were all relevant, and the contrary has not been argued. He might have gone further. The sources of the information relied on were not clearly specified. Further, as Mostyn J explains at [72], the assertion of Mr Pike about the risk that the claimant's banking facilities would be withdrawn appears to be inadmissible lay opinion.

The second ground of challenge

46. In the circumstances, there is no need to address the submissions of the parties on the second ground. I would however make two observations. The first is that *ZXC* is a case about the initial step in the Convention analysis, in cases where no legal proceedings have begun; it has no bearing on the balance to be struck between privacy rights and the public interest in transparency and open justice when a person features in a public trial. The second is that to me the argument that a derogation is necessary in the present case seems markedly weaker than the case unsuccessfully advanced by Mr Khuja.

Conclusions

47. For all these reasons, I would dismiss this judicial review claim and lift the stay on the judge's order and the interim anonymity order that he imposed to hold the position pending our decision – although those orders will stay in place pending any application for permission to appeal. I add that I agree with Mostyn J that although this is not required it is good practice to notify the media of an application of this kind. That was done here. I also agree that there were nonetheless significant procedural shortcomings at the initial stage. I refer to the unexplained delay in making the application, the consequent late notice to all concerned, and the unlimited duration of the order coupled with the absence of any return date or liberty to apply. It also seems to me that it is desirable to add a proviso defining the territorial limits of the order.

MR JUSTICE MOSTYN :

48. In *DPP v Shannon* [1975] AC 717, 766 Lord Simon of Glaisdale recalled that the father of English legal history, F.W. Maitland, "was wont to observe how rules of substantive law have seemed to grow in the interstices of procedure"[1].

49. Procedural rules exist for a purpose, and that purpose is to ensure that every legal cause is despatched not merely efficiently, but fairly. Procedural rules are not so much directed to ensuring that the content of a judicial decision is just – that is what the substantive law achieves – but that the way it is reached is fair. In their interstices they incorporate and promulgate the elementary rule of natural justice, mirrored in Article 6 of the European Convention of Human Rights, that everyone has the right to a fair hearing.

50. A fair hearing means not only that your judge is not biased (*nemo iudex in causa sua*) but that you are heard (*audi alteram partem*). And being heard means not merely that you are allowed to participate in a hearing that affects you, but, critically, that you are given reasonable notice of it.

51. We know that the claimant was warned in the second half of September 2021 that the NCA intended to make allegations against him in forfeiture proceedings brought against monies held in UK bank accounts by members of JF's family. The claimant therefore had over a month to take whatever steps he judged necessary to protect himself. The choice he made was to apply for a reporting restriction order ("RRO") on the afternoon of 28 October 2021. Astonishingly, that was the day immediately before the commencement of the substantive forfeiture trial. No explanation has been offered for this delay.

52. The notice given to the NCA was therefore not even of one clear day. It was so short that had the NCA decided to contest the application it is doubtful that it would have been able to assemble its case in the time left. However, that evening the NCA agreed not to refer to the claimant by name in the proceedings.

53. The press were not served until that evening, and so, to all intents and purposes had no notice at all.

54. The following day the application was heard in private. The press were not allowed into the hearing. The NCA did not contest the application. Obviously, the Respondents (JF's family members) did not contest it. The press were then provided with a copy of the draft order and two journalists were allowed to make oral submissions after the hearing had concluded, and without having heard the submissions on behalf of the claimant. The order records that the court only heard counsel for the claimant and for the parties but the note of the judge's judgment states that he heard detailed submissions from the press. The procedure is utterly bizarre.

55. The consequence of what looks like a strategic decision to give almost the shortest possible notice to the NCA, and in reality none to the press, was that the application

[1] Variations of this aphorism include that of Lord Parker of Waddington in *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 84 ("the common law may be found secreted in the interstices of procedure"); of Lord Denning MR in *National Provincial Bank v Ainsworth* [1964] Ch 665 at 684 ("substantive law has a habit of being secreted in the interstices of procedure"); and of Oliver Wendell Holmes ("legal progress is often secreted in the interstices of legal procedure").

for the RRO was effectively uncontested. Allowing the press to make submissions after the hearing was over does not amount to much of a contest.

56. In my judgment, this process did not meet the requirements of natural justice.

The nature of these proceedings

57. These forfeiture proceedings under s. 303Z14 of the Proceeds of Crime Act 2002 are technically civil proceedings. While the CPR do not formally apply to them, it is my judgment that they, and the jurisprudence on them, should be treated as being broadly applicable where Part II of the Magistrates' Courts Act 1980 and the Magistrates' Courts Rules 1981 are silent. That jurisprudence includes the Practice Guidance.

58. Neither that Act nor those Rules say anything about the procedure to be followed when a non-party wishes to apply in forfeiture proceedings for a RRO. We have been referred to r. 5(3) of the Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017 which provides that:

> "The applicant must send a copy of [an application under section 303Z14(2) of the Act for the forfeiture of money held in a frozen account] to every person to whom notice of the account freezing order made under section 303Z3(2) of the Act in respect of the funds to which the application relates has been given **and to any other person identified by the court as being affected by the application**." (emphasis added)

At no stage during the hearing of the forfeiture application did the Court send a copy of that application to the claimant. If it had, the claimant would have been entitled to be heard on whether the forfeiture application should be granted (r.16(1)). Inferentially, the claimant would have been entitled to be to be heard through, and represented by, an advocate.

Reasonable notice

59. Under Section 303Z16 a party aggrieved by a forfeiture order under s. 303Z14 has 30 days to mount an appeal. In contrast, a person aggrieved by a notice of administrative forfeiture under s.303Z9 can apply under s.303Z12 to set aside that notice, and will be given at least a week's notice of the hearing. These provisions suggest that that the normal period of notice for an application made in forfeiture proceedings is at least a week.

60. A RRO is an interim remedy in the nature of an injunction. Under CPR 23.7(b) an application for an interim remedy should be served at least three clear days before the hearing. Shorter notice, and *a fortiori* no notice, can only be justified in a situation of exceptional urgency, where there is literally no time to give the requisite period of notice or where to give the requisite period of notice would lead to irretrievable prejudice being caused to the applicant for relief: see *National Commercial Bank Jamaica Ltd v Olint Corporation Limited (Practice Note)* [2009] 1 WLR 1405 at [16] per Lord Hoffmann; *RST v UVW* [2009] EWHC (QB) 24 at [7] and [13] per Tugendhat J; and *CEF Holdings Ltd & Anor v City Electrical Factors Ltd & Ors* [2012] EWHC 1524 (QB) at [235] per Silber J.

61. The Practice Guidance at [20] – [22] states that:

> "[20] Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application …
>
> [21] Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose …
>
> [22] Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. It will only be in truly exceptional circumstances that failure to give a media organisation advance notice will be justifiable on the ground that it would defeat the purpose of an interim non-disclosure order…"

The Practice Guidance does not specify a normal minimum period of notice.

62. In my judgment, absent emergency conditions, three clear days' notice[2] is the minimum that should be given to the other parties when a RRO is sought in forfeiture proceedings in the Magistrates' Court (and, as I explain below, it would be good practice to notify the media at the same time).

63. In circumstances where the claimant had more than a month's warning of the hearing, it is very hard to understand why he waited until the afternoon before the first day of the final hearing to make and serve his application. In my judgment, if it was intended to have the application returnable on the morning of the first day of the hearing (i.e. Friday 29 October 2021), which would be conventional, then the application should have been served on Monday 25 October 2021, at the very latest.

64. That would have given the NCA and the press the minimum period of notice which is, in my opinion, consistent with the duty to conduct litigation fairly and in accordance with the rules of natural justice.

Service on the media

65. The claimant's application sought a *contra mundum* anonymity order bolstered by an order under s 11 Contempt of Court Act 1981 to give it teeth. The popular belief is that such an application must be served on the media under s.12(2) of the Human Rights Act 1998. Indeed FPR PD 12I paras 3.1 – 3.3, *Re P (A Child)* [2013] EWHC 4048 (Fam) (Sir James Munby P), and the Practice Guidance at [22] – [23] all explicitly presuppose that such an obligation to serve the media exists. I have pointed out above that the claimant's solicitors served the media during the evening of 28 October 2021.

[2] The period of "three clear days" will not include the day on which the period begins or the day on which service takes place: CPR 2.8(3). The period being less than 5 days, a Saturday, a Sunday, a Bank Holiday, Christmas Day and Good Friday will not count in reckoning when it begins and ends: CPR 2.8(4).

66. However, the decision of the Supreme Court in *A v BBC* [2014] UKSC 25, [2015] AC 588 is that the popular belief is wrong. Lord Reed JSC stated:

> "65. … section 11 of the 1981 Act applies where the court "allows a name or other matter to be withheld from the public in proceedings before the court", and permits the court to "give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary".
>
> 66. When an application is made to the court to allow a name or matter to be withheld, that is not an application for relief made against any person: no remedy or order is sought against any respondent. If ancillary directions under section 11 are also sought, prohibiting any publication of the name or matter in question, that equally is not an application for relief made against any respondent: the directions will operate on a blanket basis. In such circumstances there is no respondent who should be notified, or who might be present or represented at the hearing. There is therefore no obligation under section 12(2) of the Human Rights Act to allow the media an opportunity to be heard before such an order can be granted.
>
> 67. The Lord President observed at para 39 that, even if the media were not entitled to be heard by virtue of section 12(2) of the Human Rights Act, they were entitled to be heard as a matter of fairness, although there was a question as to the stage at which the opportunity to be heard should be given. I agree. There are many situations in which courts make orders without having heard the persons who may be affected by them, usually because it is impractical, for one reason or another, to afford a hearing to those persons in advance of the making of the order. In such circumstances, fairness is secured by enabling any person affected to seek the recall of the order promptly at a hearing inter partes. In principle, an order under section 11 of the 1981 Act falls within the ambit of that approach. It would be impractical to afford a hearing to all those who might be affected by a section 11 order (including bloggers, social media users and internet-based organisations) before such an order was made; but fairness requires that they should be able to seek the recall of the order promptly at a hearing inter partes."

67. Therefore, a *contra mundum* or blanket anonymity order does not come within s.12(2) of the Human Rights Act 1998 and there is no strict obligation to notify the press before seeking the order.

68. This decision has been followed by the Court of Appeal in *Executor of HRH Prince Philip, the Duke of Edinburgh (Deceased) v Guardian News and Media* [2022]

EWCA Civ 1081. Sir Geoffrey Vos MR stated at [18]:

> "The media might, in fairness, be heard on such a question, but had no right to be heard before any order as to a private hearing was made. That much is also clear from CPR Part 39.2, which makes no such provision. Instead, it provides by CPR Part 39.2(5) that, unless and to the extent that the court otherwise directs, an order that a hearing should be held in private should be published on the judiciary's website."

69. In my judgment it would nevertheless be good practice whenever a *contra mundum* anonymity or other blanket RRO is sought, for the media to be notified at the same time that the respondent to the application is served. This is not only a matter of fairness but should also help to ensure that the initial hearing of the application is on a more informed basis. Para 22 of the Practice Guidance (quoted above) suggests that it will only be in very rare circumstances that this good practice is not followed.

Supporting evidence

70. CPR 25.3(2) requires that an application for an interim remedy must be accompanied by evidence (as does the Practice Guidance at para 17) and in my judgment that requirement applies equally to an application of this nature, in whichever court it may be made. The Practice Guidance states at para 31 that:

> "Applications, especially those which seek derogations from open justice, must be supported with clear and cogent evidence which demonstrates that without the specific exception, justice could not be done. "

It goes without saying that the evidence must be admissible. Here, the application was supported by a witness statement made by the claimant's solicitor Julian Pike dated 28 October 2021. To that statement was exhibited a letter of the same date from Mr Pike to the NCA. That letter stated that the claimant had for approximately thirty years operated and held shareholdings in lawful businesses in Azerbaijan, including, for a period of time, a substantial shareholding (but not a directorship) in the largest pharmaceutical company in Azerbaijan. It went on to deny strenuously that the claimant had been involved in money laundering or other unlawful conduct. However, the claimant in that letter did not offer to be interviewed by, or to give a witness statement to, the NCA in order to give chapter and verse about the entities under scrutiny and to clear up any unwarranted suspicions about his role in them.

71. On page 5 of the letter Mr Pike wrote:

> "Our client's application is to prevent the forfeiture proceedings against Mr Feyziyev and his family being conducted in a manner which wrongly and unnecessarily identifies [the claimant], but which at the same time places [him] in the invidious position of him being identified as being involved in very serious allegations of criminal wrong-doing

> about which he has not been investigated; where he is unable to defend himself within the present proceedings (because he is not a party); where there is no evidence of wrong-doing; and where the media would be able to freely report the allegations against with all the very serious present day consequences that that entails.
>
> To be clear as to the most obvious consequence of [the claimant] being wrongly referred to and identified in the forfeiture proceedings, it is now standard practice for banking institutions when conducting their regular due diligence to simply withdraw banking facilities when they read of such allegations as those that the NCA plans to claim as against [the claimant]. There is no opportunity to explain or negotiate with the banks. This then creates not only very substantial and unjustified consequences for [the claimant], but it does the same for his UK businesses and UK employees within those businesses."

72. I agree with Ms Carss-Frisk KC that the second paragraph of this extract is a piece of non-expert opinion evidence. It does not say that it is an account of anything that Mr Pike has personally perceived, and Mr Pike has not demonstrated that he is sufficiently skilled in banking practices to qualify as an expert witness. In such circumstances s.3(2) of the Civil Evidence Act 1972 applies. This states:

> "It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived."

73. That passage was therefore strictly inadmissible. Ms Carss-Frisk KC did not go so far as to suggest that the judge should not even have looked at this passage, but she relied on its formal inadmissibility as an additional reason for attributing no, or very little, weight to it in the balancing exercise. I agree. It was not worth the paper it was written on. There was no good reason why the claimant could not have obtained the best possible evidence from an expert in banking practices who could have made a witness statement as to the consequences when a customer is said to have been involved in money laundering. In civil proceedings such expert evidence would then have had to be the subject of permission under CPR Part 35, but it would be an analogy too far to impose that requirement on these proceedings in circumstances where s. 3(1) of the Civil Evidence Act 1972 would make such expert evidence admissible in any event.

74. I share Warby LJ's concerns at para 45 that it is far from satisfactory that the evidence of the apprehended concrete damage that the claimant relied on, were he to be named in the proceedings, was the non-expert opinion of his solicitor expressed in a letter attached to a witness statement made by that solicitor.

Hearing in private: press excluded

75. The RRO application was heard by the judge in private in the absence of the press. We have not been told how that came about, but this was an exceptional course to take and could only be justified if the application could not fairly be heard in the presence of the press. Ordinarily, that will not be so as the media will offer undertakings not to publish the hearing papers or, if necessary, reporting restrictions can be imposed to protect any confidential evidence. It is not as if this was one of those cases where the evidence disclosed intimate personal information which the claimant could justifiably wish to withhold from the media. I do not understand why the press were not able to attend the hearing and were only allowed to make oral submissions after it was over.

Draft order

76. A draft order was emailed to the judge during the luncheon adjournment. This, and other documents were offered to the press the evening before on the usual undertaking that they would only use the documents for the purpose of the claimant's application and no other. The Explanatory Note referred to at para 25 of the Practice Guidance was not supplied to the press at any point. The draft order stated:

> "1. The following information shall be withheld from the public in proceedings before the Court: the name of the individual whose name is set out in the Confidential Schedule to this Order.
>
> 2. There be substituted for all purposes in these proceedings in place of references to the individual whose name is set out in the Confidential Schedule to this Order, and whether orally or in writing, references to the letters "MNL".
>
> 3. Pursuant to s.11 of the Contempt of Court Act 1981, no person shall publish (as defined in s.2 of the Act) in connection with these proceedings the information referred to at paragraph 1 above, or any information likely to lead to the identification in connection with the proceedings of the individual whose name is set out in the Confidential Schedule to this Order."

77. The draft order, expressed as a final order on the application, did not even adopt the standard phrasing for such an order as used by those placed on the judiciary website, let alone the wording contained in the model order attached to the Practice Guidance. Unlike those orders, it did not give the press, or anyone else affected by the order, liberty to apply to vary or discharge it.

78. In my opinion the orders posted on the judiciary website, and the order made in this case, are deficient in two key respects. None of them deals with any extra-territorial effect of the order and none has a specific end-date. In theory, a historian writing about one of these cases in 100 years' time would be in contempt of court if the identity of the anonymised party were revealed. The standard family order for a RRO contains a territorial limitation and an end-date clause[3] and to my knowledge such limitations are included in every such order. The end-date will vary with the facts of

[3] Standard Order No. 14

the individual case but if the order is not intended to protect the interests of a minor child (when the end-date would normally be that child's 18th birthday) I would be surprised if any anonymity order could justifiably last for more than 2 years (with liberty to apply for an extension).

79. The scheme of the Practice Guidance is to regulate "interim" RROs which endure only until the trial of the substantive claim. Thus the guidelines for the model order say, if an order is made to last "until further order" (which means "until further order in the meantime") that:

> "…the court should ensure that the order contains provision for periodical review by the court to ensure that the claim progresses, for instance, to default judgment, summary judgment, or to a trial in the absence of the persons unknown. "

The order made in this case did not contain any return date nor any provision for periodical reviews.

80. The model order at clause 20 contains a 'Babanaft' territorial limitation. It is not clear to me why that standard clause is ignored in all the orders posted on the judiciary website, just as it was in the order made in this case.

Application granted: Form of Order

81. After hearing the application in the morning of 29 October 2021, the judge gave an extempore judgment in the afternoon granting it, seemingly as a final order. As provided for in the draft, it had no end-date. When the substantive judgment was handed down on 31 January 2022 it was endorsed with a rubric which stated:

> "The prohibition on naming MNL by Order previously made by this court, remains in force until further Order."

82. In my judgment, in circumstances where the judge had not heard all the evidence, let alone rendered findings in a judgment, the better course, in order to hold the ring, would have been to have made a temporary RRO, with a specific provision in it for the matter to be reconsidered once judgment had been given: see *R v Somerset Health Authority ex p S* [1996] C.O.D. 244 per Brooke J; *ASG v GSA* [2009] EWCA Civ 1574 per Waller LJ at [4]; and *XZ v YZ* [2022] EWFC 49, [2022] 1 WLR 4365. In the latter case I held that that, to hold the ring, the court could make a temporary RRO, without full evidence and without performing the established exercise of striking a balance between the various rights under the Convention and that such a temporary RRO would endure only until the parties and the court were ready to deal substantively, justly and fairly with the question of whether to make a final order.

83. Although the Practice Guidance is expressed to be dealing with "Interim Non-Disclosure Orders" it is not talking about temporary orders in the sense I have just explained, but, rather, about final interlocutory orders to endure until trial of the substantive claim. The Practice Guidance does not address the not uncommon type of order that was applied for and made here, where anonymity is sought not only in the period leading up to judgment but indefinitely thereafter. However the Practice Guidance does address the situation where the initial order has been made *ex parte*

(which is what, in effect happened here). If so, such an order would need to be carefully reviewed. At para 40 it states:

> "A return date is particularly important where an order contains derogations from the principle of open justice. It is the means by which the court ensures that those derogations are in place for no longer than strictly necessary. It is also the means by which the court ensures that the interim non-disclosure order does not become a substitute for a full and fair adjudication."

84. In my judgment, to make a strictly temporary RRO would be appropriate where the court could not be satisfied that it had all the evidence, and was not in the position to foresee all its likely findings, so as to enable it to make a final order.

Summary of required procedure

85. In summary, it is my clear view that:

i) An application for a RRO must be accompanied by clear and cogent evidence, which demonstrates that without the order, justice could not be done. The evidence must be admissible. A non-expert opinion expressed in a solicitor's letter is not likely to be worth the paper it is written on.

ii) Save in situations of great urgency, an application for a RRO should be served no fewer than 3 clear days before the hearing.

iii) A draft order should be served at the same time.

iv) It would be good practice to notify the media through PA Media's Injunctions Applications Alert Service[4]. That service is subscribed to by all the national media (newspapers and broadcasters) with the exception of the Financial Times. If notice has to be served on the FT it needs to be served on it directly.

v) It would be good practice to permit the press to attend the hearing of the application and to make submissions either through an advocate with rights of audience or in writing.

vi) Where the evidence is incomplete and findings have not been made, the better course, if the court is satisfied that anonymity should be granted, may be to make a temporary RRO with a return date or other provision for the matter to be reconsidered before finalising the public judgment or shortly following its hand-down.

vii) The order, whether temporary or final, should delineate its extra-territorial effect and provide for the press and any other affected person to have liberty to apply.

viii) If the order made is a final order it should provide for an end-date.

[4] https://pa.media/injunction-applications-alert-service/national-media-organisations/

86. It is only by observance of these standards that fairness, and therefore justice, will be afforded to all parties, and to society at large, on an application for an order which would have the effect of derogating from the core constitutional principle of open justice.

Synopsis of the law

87. I agree fully with the synopsis of the law given by Warby LJ above in [43]. As this synopsis shows, the law is now settled, stable and easily understood.

88. In my opinion, it applies to all types of proceedings where a RRO is sought, including those proceedings in the Family Court or the Family Division held "in private" under FPR 27.10 but which are not covered by s.12 of the Administration of Justice Act 1960. There is no secrecy attaching to such a proceeding heard in chambers ("in private" in the modern language): see *Scott v Scott* [1912] P 241 per Fletcher Moulton LJ (later vindicated in the House of Lords) and *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 at 1071 per Lord Woolf MR; and two decisions of my own namely *Xanthopoulos v Rakshina* [2022] EWFC 30 at [88] - [100], *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC 52 at [30] - [34].[5] The law is pithily summarised in the Practice Guidance in the Guidelines on clause 14 of the model order:

> "Private hearings can be reported without fear of contempt unless the material comes within the protection of the Administration of Justice Act 1960 s.12. A specific order is required to prevent reporting under the Contempt of Court Act 1981 s.11: *Clibbery v Allan* [2002] 2 WLR 151; *McKennitt v Ash* [2008] QB 73. Section 11 orders should only be made when strictly necessary."

Decision on the facts

89. I also agree fully with Warby LJ's exposition of the facts and his application of the law to those facts. I am not surprised, on the facts of this case, that the initial anonymity order was discharged.

90. My only surprise is that the anonymity order was granted in the first place on 29 October 2021. In my judgment, for reasons of procedural unfairness as well as a distinct lack of merit, it should never have been granted.

91. Warby LJ shows that in his judgment of 9 May 2022 the judge properly undertook the requisite balancing exercise weighing, on the one hand, the core constitutional principle of open justice against, on the other, the potential damage to the claimant's private and family life by being named in the judgment of 31 January 2022. For the reasons given by Warby LJ, I do not accept Lord Pannick's submission that the judge's reasoning was "riddled with errors".

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[5] The absence of any secrecy attaching to those family cases not covered by s.12 of the 1960 Act is put beyond doubt in circumstances where they are not actually heard in private but are instead heard pursuant to the curious half-private-half-public hybrid arrangement in FPR 27.11 whereby the press and legal bloggers, but not the general public, are allowed to attend.

92. In circumstances where the claimant never advanced an account of why the allegations against him (as they were before 31 January 2022) or findings (as they became after 31 January 2022) were wide of the mark, and where the evidence of the specific concrete harm he might suffer was of very little weight, his resistance to the discharge application was in my judgment always doomed to failure. Further, in agreement with Warby LJ at [44(6)] I do not accept the argument of the claimant that his claim for anonymity acquires additional force because the order of 29 October 2021 prevented his name from being mentioned in open court. On the facts of this case, where I am satisfied that the initial order should not have been made, that argument has no traction.

93. I too would dismiss the judicial review claim and discharge the interim anonymity order granted by the judge to hold the position pending our decision.

Postscript

94. The claimant sought permission to appeal ('PTA') our decision. We refused that application but made an order for anonymity to be continued until the determination of his PTA application to the Court of Appeal. That application was refused by Andrews LJ on 15 May 2023 who ordered that:

> "The anonymity order granted by the Divisional Court pending the determination of the application for permission to appeal is discharged. An unredacted version of the judgment of the Divisional Court [2023] EWHC 587 (Admin) shall be sent to the National Archives."

This revised version of this judgment, naming the claimant, has been sent to The National Archives and replaces the previous version.