Case No: 1NG90726

Neutral Citation Number: [2016] EWHC 2864 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2016

Before :

MR JUSTICE MALES

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Between :

NATASHA ARMES	**Claimant**
- and -	
NOTTINGHAMSHIRE COUNTY COUNCIL	**Defendant**

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- -

Mr Philip Davy (instructed by **Uppal Taylor Solicitors**) for the **Claimant**
Miss Samantha Paxman (instructed by **Browne Jacobson LLP**) for the **Defendant**
Mrs A was not represented at the hearing
Mr Stephen Littlewood (instructed by **Sills & Betteridge Solicitors**) for **Mr B**

Hearing date: 8th November 2016

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Judgment

Mr Justice Males :

Introduction

1. In November 2014 I tried an action by the claimant, Natasha Armes, in which (among other things) she sought damages from Nottinghamshire County Council on the basis that the council was responsible in law for physical and sexual abuse which she claimed to have suffered during her childhood at the hands of foster parents with whom she was placed. Although I held that the council was not responsible in law for such abuse, I found as a fact that the claimant had suffered physical and emotional abuse by one of her foster parents, referred to in my judgment as Mrs A, and sexual abuse by another, referred to as Mr B ([2014] EWHC 4005 (QB)).

2. As explained at [240] of my judgment, I made an order for anonymity which applied not only to the claimant, but also to any witness of fact:

> "Although the trial was held in public, I made an order at the outset that until judgment there should be no report of the name, address or any other information which might lead to the identification of the claimant or any witness of fact (other than past or present employees of the defendant council and the defendant's solicitor). I did so in view of the nature of the allegations made, in order to protect the interests of those concerned. I now continue that order pursuant to CPR 39.2(4) and have anonymised this judgment accordingly. However, the order for anonymity will cease to apply in respect of any person who notifies the court in writing that they are content for their names to be identified. In addition there will be liberty to apply to enable any interested person to challenge the order for anonymity, on notice to the parties' solicitors so that they can notify those whose rights may be affected by any disclosure of their identity."

3. That order applied to Mrs A and Mr B, both of whom gave evidence on behalf of the defendant council, as well as to members of Mr B's family, who also gave evidence. They were witnesses in the action, but not parties. They were not represented.

4. An appeal by the claimant to the Court of Appeal was dismissed ([2015] EWCA Civ 1139). As recorded at [1] of the judgment of Tomlinson LJ, by the time the case reached the Court of Appeal the claimant had waived her anonymity. I understand that there is to be a further appeal by the claimant to the Supreme Court which is due to be heard next term. The issues on appeal have been concerned with the question whether the defendant council is responsible in law for the abuse committed by foster parents. My findings of fact have not been challenged.

5. There is now before me an application by the claimant, represented by Mr Philip Davy, to set aside that part of my order which grants anonymity to Mrs A, Mr B and other witnesses.

6. Notice of this application has been given to Mrs A and Mr B, both of whom are now elderly, the events in question having taken place some 30 years ago, in 1985/6 in the

case of Mrs A and in 1987/88 in the case of Mr B. As I recorded in my judgment, by the time of the trial Mrs A in particular presented as a frail and confused elderly lady with memory disturbance (see [47]). Her condition is unlikely to have improved in the meanwhile.

7. Mrs A has not attended or been represented at the hearing but has instructed solicitors, Weightmans LLP, who have written to the court explaining that she is of modest means and would have difficulty paying for legal representation. The letter advances reasons why the anonymity order should be maintained in her case.

8. Mr B has been represented by Mr Stephen Littlewood.

9. The defendant council has played no part in this application, although its solicitors provided a copy of the application to Mrs A and Mr B, neither of whom wished to reveal their present address to the claimant. Ms Samantha Paxman attended the hearing on behalf of the defendant. She explained that the defendant adopted a neutral position and advanced no submissions either way.

The reasons for the anonymity order

10. The order made at the beginning of the trial, which applied only until judgment, was made at the suggestion of counsel for the defendant council in circumstances where serious allegations of abuse had been made, not only against Mrs A and Mr B, but also against other witnesses, but those allegations had not yet been determined. In the event I found some but not all of the allegations of physical and emotional abuse by Mrs A to have been proved (see [140] to [150] of my judgment), as was the allegation of sexual abuse by Mr B (see [152] to [158]). However, I found that the allegation of physical abuse by Mrs B was not proved and I found it unnecessary to make findings as to the allegations against the two B boys (see [159]).

11. Although the order initially made applied only until judgment, I considered that it would be wrong to allow it to lapse without at least giving those affected an opportunity to be heard. Accordingly I directed that the anonymity order would continue in force, but gave liberty to apply to enable any interested person to challenge it on notice to those affected. I had in mind in particular the possibility of an application by representatives of the press and expected that if any such application was to be made, it would be made within a short time after the conclusion of the trial. I expressed no view as to whether, in the event of an application, the order for anonymity should be maintained or set aside. In the event no application was made until 25 August 2016 when the claimant issued the present application to set aside the order for anonymity.

The claimant's application

12. The claimant's application is founded on the vital principle of open justice. In outline, Mr Davy submits on her behalf that:

    a. The general rule is that a hearing is to be in public: CPR 39.2.

    b. The case law emphasises the importance of public hearings both before (*Scott v Scott* [1913] AC 417 at 463) and after (*JIH v News Group Newspapers Ltd*

[2011] EWCA Civ 42, [2011] 1 WLR 1645) the coming into force of the Human Rights Act 1998.

c. An order for anonymity is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large which requires close scrutiny in order to determine whether such restraint on publication is necessary.

d. Although it may have been justifiable to order anonymity to safeguard witnesses against whom as yet unproven allegations were made, once findings had been made against those witnesses the justification for anonymity no longer applied. There are many examples of cases where findings of physical or sexual abuse have been made against witnesses in which no order for the witnesses' anonymity has been thought necessary.

13. Mr Littlewood for Mr B submits, also in outline, that:

a. The hearing was held in public and there is a public judgment dealing fully with both the facts and the law which is sufficient to enable any interested member of the public fully to understand the issues in the case.

b. Identification of Mr B would have a significant impact on his right to a family and private life under Article 8 of the European Convention on Human Rights as well as on the Article 8 rights of others (Mrs B and the two B boys) against whom no findings of abuse were made.

c. Identification of Mr B would be unfair as he was not warned regarding the rule against self-incrimination, was not legally represented, and was not able to mount his own defence to the allegations against him.

d. Weighing the Article 8 rights of Mr B and members of his family against the Article 10 rights of the public, the balance comes down firmly in favour of maintaining anonymity.

14. The solicitors for Mrs A make similar points, referring in particular to Mrs A's age and frailty, to the detrimental effect on her health which (it is asserted) identification would cause, to a concern as to what the claimant may do to give publicity to the conduct of Mrs A if the anonymity order is lifted, and to the claimant's delay in making this application.

Legal principles

15. The court has power under CPR 39.2(4) to order that the identity of a witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that witness. (The same rule applies to non-disclosure of the identity of a party, although I am here concerned with the position of witnesses).

16. The principles by which that power should be exercised have been considered in numerous recent cases, including cases at the highest level, in a variety of contexts. I will refer to some of them.

17. I begin with the decision of the Supreme Court in *In re Guardian News & Media Ltd* [2010] UKSC 1, [2010] 2 AC 697. In summary, the court held that it is necessary to balance the right of the press (or others interested) to freedom of expression under Article 10 of the European Convention on Human Rights against the witness's right to respect for his or her private or family life under Article 8. In the *Guardian News* case, both rights were in play. Identification of an individual known as M, who had been designated as a suspected terrorist, was a matter of legitimate public interest but, on the other hand, his identification would interfere with his private and family life.

18. Lord Rodger identified the test to be applied as follows at [52]:

> "… the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

19. In an oft-cited passage at [63] Lord Rodger emphasised the importance for press reporting of being able to identify the individuals concerned in litigation:

> "What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. … The judges [have recognised] that editors know best how to present material in a way that will interest the readers of their particular publication, and so help them to absorb the information. A requirement to report it in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."

20. On the facts of that case, the Supreme Court held that M should be identified. That was because the public could be expected to understand that M was merely a suspected and not a proven terrorist; the evidence relating to interference with his private and family life was very general and others in his position had been identified without undue adverse effects on them; and there was a powerful general, public interest in identifying M as to do so would contribute to an important debate about a matter of national interest.

21. *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645 was concerned with the sexual activities of a well-known sportsman. An order refusing anonymity was reversed on appeal. The fact that each case is likely to turn on its own facts was emphasised. Lord Neuberger MR's summary at [21] of the principles to be applied when an order for anonymity is sought included the following:

> "Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

22. Lord Neuberger went on to say at [22]:

> "Where, as here, the basis for any claimed restriction on publication 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 by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions."

23. These statements of principle were approved and applied in *JX MX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96 in the different context of an application for approval of a compromise of a personal injuries claim brought by a child. Moore-Bick LJ observed at [17] that:

> "The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them. Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the European Convention on Human Rights, in particular article 6, 8 and 10."

24. The question of anonymity was revisited in *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444, a case concerned with the anonymity of a mental patient. Lady Hale began her judgment at [1] with a powerful restatement of the importance of open justice:

> "The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should

> be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge."

25. Rejecting a submission that there should be a presumption of anonymity in cases concerning mental patients, Lady Hale said at [36]:

> "The question in all these cases is that set out in CPR 39.2(4): is anonymity necessary in the interests of the patient? It would be wrong to have a presumption that an order should be made in every case. There is a balance to be struck. The public has a right to know, not only what is going on in our courts, but also who the principal actors are. This is particularly so where notorious criminals are involved. They need to be reassured that sensible decisions are being made about them. On the other hand, the purpose of detention in hospital for treatment is to make the patient better, so that he is no longer a risk either to himself or to others. That whole therapeutic enterprise may be put in jeopardy if confidential information is disclosed in a way which enables the public to identify the patient. It may also be put in jeopardy unless patients have a reasonable expectation in advance that their identities will not be disclosed without their consent. In some cases, that disclosure may put the patient himself, and perhaps also the hospital, those treating him and the other patients there, at risk. The public's right to know has to be balanced against the potential harm, not only to this patient, but to all the others whose treatment could be affected by the risk of exposure."

26. Finally, I refer to two recent cases where the issue on the facts was closer to that arising in the present case, namely whether the identity of perpetrators of sexual abuse should be disclosed. In *Birmingham City Council v Riaz* [2014] EWHC 4247 (Fam) Keehan J was satisfied to the civil standard of proof, i.e. on the balance of probabilities, that the defendants had taken part in the sexual exploitation of a teenage girl. A risk assessment carried out by the police suggested that there was a high risk of reprisal attacks against the defendants if their identities were known, but Keehan J regarded that as speculative and lacking a sound factual basis (see [137] and [138]). His conclusion was that such risk as existed was manageable and was outweighed by the public interest in the public knowing the details of cases of child sexual exploitation by much older men, a matter of "very considerable and widespread public interest" (see [146] to [153]).

27. In *Rotherham Metropolitan Borough Council v M* [2016] EWHC 2660 (Fam) on the other hand, Cobb J ordered that the identities of four men who had been suspected of child sexual exploitation based on "sufficient and ostensibly reliable evidence" but in respect of whom the evidence in the end "did not support a conclusion" that they were engaged in such abuse (see [17]) should not be disclosed. In part this was because to disclose the identity of the men concerned would lead to identification of the girl in

question, but also because the men had not been convicted of or charged with any offence and no findings had been made against them. Moreover, as Cobb J put it at [39]:

> "there is a substantial risk that, given the strength of feeling in Rotherham and elsewhere about those who engage in child sexual exploitation and similar offences, they would be perceived to be perpetrators or likely perpetrators, and pilloried and/or targeted in their communities if they were known to have been under suspicion in this way."

28. I would summarise the position as it emerges from these authorities, so far as relevant to the present case, as follows:

    a. The court has power to make an order for the anonymity of a witness, but only if it is "necessary" to do so in order to protect the interests of the witness. Nothing less than this will do. Some of the cases emphasise this by saying that anonymity must be "strictly necessary".

    b. Although other "interests" may sometimes be in play, often the interests which may need to be protected are a witness's rights under Article 8 to respect for his or her private or family life. That is the position here.

    c. In such a case the first question to be determined is whether identification of the witness would interfere with his or her rights under Article 8. This will only be the case if the consequences of identification reach a certain level of seriousness (or as Lord Neuberger put it in *JIH*, if the facts and circumstances of the case are "sufficiently strong"). Depending on the subject matter of the case and the nature of the evidence, giving evidence as a witness may be embarrassing or sometimes even humiliating, but this will not generally be enough to justify an order for anonymity by reference to Article 8. Something more is required, although in view of the wide range of circumstances in which Article 8 can apply, I doubt whether that something is susceptible of precise definition.

    d. If identification would interfere with the witness's right to respect for his or her private or family life, it is necessary to consider (in the terms of Article 8.2) whether that interference "is necessary in a democratic society … for the protection of the rights and freedoms of others". The rights and freedoms of others which will generally require consideration are (or at least include) the right to freedom of expression, including the vital freedom of the press to report court proceedings held in public, under Article 10. A balance therefore needs to be struck.

    e. In striking that balance, the question has been described as whether there is a sufficient public interest in identification of the witness to justify the interference with the witness's Article 8 rights. Considered in isolation that way of posing the question may suggest that once any material interference with Article 8 rights has been identified, there is a presumption in favour of anonymity unless there is a strong public interest in identification. However, when this formulation of the question is viewed in the full context of the cases

discussed above, it is apparent that this is not so. I would make three points. One is that the general rule remains the principle of open justice. The second is that what matters is not merely the fact of interference with Article 8 rights but rather the severity or otherwise of the consequences for the witness of being identified. The more severe those consequences, the more likely it is that anonymity will be ordered and *vice versa*. The third is that the weight to be given to an interference with freedom of expression must depend on the extent to which the issues raised by the litigation involve matters of real public interest. The greater the public interest (as distinct from the separate question whether the identity of the witness is likely to be of interest to the public), the more likely it is that anonymity will be refused.

f. All these points need to be taken into account. Inevitably, therefore, striking the necessary balance requires close attention to the facts of the particular case.

Discussion

29. In this case the hearing was held in public and many of the claimant's allegations have been vindicated in a public hearing after careful scrutiny of the available evidence, albeit that her claim against the defendant council has so far failed on legal grounds. The fact that the claimant was the victim of physical, emotional and sexual abuse at the hands of foster parents during her childhood is now a matter of public record. The only issue, therefore, is whether the names of Mrs A and Mr B should be put into the public domain.

30. It is expressly accepted by Mr Davy on behalf of the claimant that identification of the witnesses would *prima facie* interfere with their Article 8 rights. In my judgment this concession is correctly made. Identification of Mrs A or Mr B would expose them to public view as child abusers, in the former case as a perpetrator of emotional and physical abuse and in the latter case as a sexual abuser. Given the strong feelings to which such allegations understandably give rise, it is not difficult to accept that this may generate hostility towards them and, at the least, that their respective reputations in their local communities may be severely damaged. These consequences, in my view, are sufficiently serious to constitute an interference with their Article 8 rights.

31. Accordingly the real question is whether that interference is justified by the requirement of open justice or, in Convention terms, freedom of expression. So far as that question is concerned, there are a number of factors which need to be considered.

32. First, although the consequences for the witnesses of being identified will include damage to their reputations and the possibility of hostility towards them, there is no concrete evidence of any adverse consequences going beyond this. I have already noted that in *Birmingham City Council v Riaz* [2014] EWHC 4247 (Fam) Keehan J was unimpressed by a police risk assessment suggesting a high risk of reprisal attacks against perpetrators of child sexual abuse on the ground that this assessment had no sound evidential basis. In the present case there is no such evidence at all. While identification of the witnesses may lead to adverse consequences for them, to what extent this will be so is difficult to predict. There is no evidence to suggest that such consequences would extend beyond "embarrassment, distress or anxiety to the [witnesses] or to members of their respective families and friends" (cf. *Birmingham City Council* at [149]).

33. Second, in the period of almost two years since my judgment was delivered, no press organisation has applied to set aside the order for anonymity or (so far as I am aware) shown any interest in publishing a story identifying Mrs A or Mr B. To some extent this fact cuts both ways. On the one hand, it suggests that press freedom of expression has not been adversely affected by the existence of an order for anonymity, and that there has been ample scope for public debate of any issues relating to abuse by foster parents with no need so far for the identification of Mrs A or Mr B as a human interest peg on which to hang any story. On the other hand, it suggests that the consequences for the witnesses of being identified are unlikely to include extensive press coverage of their misdeeds.

34. Third, I bear in mind that the events in question occurred a very long time ago and that it is very many years since Mrs A and Mr B have ceased to act as foster parents. In one sense, therefore, it may be said that the issues raised by this case are not current issues. On the other hand, there are (as I understand) numerous other cases raising allegations of historic abuse by foster parents (hence, no doubt, the decision of the Supreme Court to grant permission to appeal). Accordingly, just as in the *Birmingham* and *Rotherham* cases, the issues raised by this case are legitimate topics of public concern.

35. Fourth, neither Mrs A nor Mr B have been convicted of any criminal offence. As I made clear in my judgment at [158], my findings of fact against them were made in accordance with the civil standard of proof, that is to say on the balance of probability. Despite my findings in accordance with the civil standard of proof, Mrs A and Mr B would be entitled to the presumption of innocence in any criminal proceedings. On the other hand, as I also made clear, I had in mind the need for strong evidence in a case of this nature.

36. Fifth, I accept that identification of Mr B would be likely to lead to the identification not only of Mrs B but also of the two B boys (now adults of course) against whom serious allegations were made. On the other hand, my judgment makes clear that those allegations have not been proved.

37. Sixth, neither Mrs A nor Mr B was a party to this action, but merely witnesses, and therefore have had no personal stake in this action in which serious allegations against them have been made. On the other hand, it is difficult to think that this made any practical difference. If Mrs A or Mr B had been separately represented, it is unlikely that the conduct of the case on their behalf would have proceeded any differently from the way in which the defendant council conducted its defence, which included cross-examining the claimant and deploying whatever arguments could be deployed to submit that the claimant's allegations had not been proved. It is possible, I suppose, that with separate advice Mrs A or Mr B might have chosen not to give evidence, but in that event they would not have been witnesses and no question of an order for their anonymity under CPR 39.2(4) could have arisen. It is hard to think that they should be in a better position having given evidence which was not believed than if they had not given evidence at all. (I cannot see that the rule against self-incrimination is relevant: both witnesses denied the abuse alleged against them).

38. Seventh, an important factor is that the witnesses' identities are part of the story of the claimant's life. One of the considerations which weighed with me in exercising my discretion to disapply the limitation period was that there would be a benefit to the

claimant in knowing that her evidence had been heard and taken seriously and that her case had been considered on its merits (see [see 101] of my judgment). Although most of the cases considered above were cases where it was the press rather than the claimant who sought identification of a witness or a party, that is not decisive. The claimant also has rights under Article 10. It seems to me that, even if there is no general public interest in identification of the witnesses for the purpose of a press report or public debate about abuse by foster parents, the claimant has a legitimate interest in being able to tell her story without restriction, including the fact that to a large extent her claims have been found to be well-founded as a matter of fact. She was free to do so, and to name Mrs A and Mr B publicly, at all times up to the commencement of the trial. It would seem strange if she is now prevented from doing so in circumstances where there has been a trial and she has been believed. Of course, in whatever she chooses to say, she will be subject to the ordinary principles of law including the law of defamation (in the event that she goes further than I have found to be justified) and harassment (in the event that she seeks to harass or otherwise persecute the witnesses). There is, however, no evidential basis for thinking that she intends to do either of these things.

39. Eighth, there are many cases in which witnesses who have been found guilty of abuse in one way or another in civil claims have been identified, notwithstanding the potentially adverse consequences for them which may arise. In many such cases no question of anonymity has arisen for decision, but *Birmingham City Council v Riaz* [2014] EWHC 4247 (Fam) is an example of a case where anonymity was expressly refused, in part, as Cobb J put it at [36] of his judgment in *Rotherham Metropolitan Borough Council v M* [2016] EWHC 2660 (Fam), because the witnesses "had forfeited their right to anonymity by virtue of their conduct".

40. Ninth, Mrs A's solicitors referred to the claimant's delay in making this application. I accept that there has been delay, but this has caused no prejudice to the witnesses. On the contrary, they have benefited from the order for anonymity for the past two years. There is no suggestion that the witnesses or members of their families have organised their lives in reliance on their anonymity in ways which they would not otherwise have done.

Conclusion

41. I consider that the factors identified above are finely balanced. In the end, I conclude that the principle of open justice should prevail. It cannot be said that an order for anonymity is necessary (let alone strictly necessary) to protect the witnesses' interests. The consequences for the witnesses of being identified are not so severe as to require anonymity in circumstances where (1) serious allegations against them have been proved applying a standard of proof which takes account of the need for strong evidence, (2) those allegations relate to a matter of legitimate public concern and (3) the claimant ought to be free to tell her story as she wishes, including the fact that her allegations against her former foster parents have been upheld.

42. Accordingly the order for anonymity will be set aside. Without wishing to encourage any such application, however, I direct that the order will remain in place pending determination of any application for permission to appeal from this judgment.