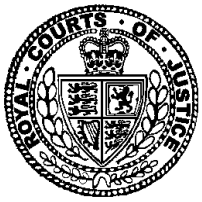

Neutral Citation Number: [2024] EWHC 2812 (Admin)

Case No: AC-2024-LON-003602

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2024

Before :

MR JUSTICE JOHNSON

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Applicant**

- and -

KIB **Respondent**

- -
- -

Lisa Giovannetti KC (instructed by the Government Legal Department) for the Applicant

Hearing date: 31 October 2024

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 5 November 2024

Mr Justice Johnson:

1. On 30 October 2024, the Secretary of State applied for an anonymity order in respect of the respondent. The application is made pre-action, without notice to the respondent, and seeks the imposition of the order with a degree of urgency and without a hearing. The order sought prevents the respondent (and anyone else) from publicising that the respondent is subject to these proceedings. It also prevents the respondent (and anyone else) from publicising the town where the respondent lives. If the respondent breaches the order they are liable to imprisonment, albeit there is no penal notice. I was told that such an order is "not unusual" and I was shown examples of such orders in other cases, but not any reasoned judgment for the making of such an order.

2. I considered that the application potentially raised issues that merited oral argument. I listed a hearing, to be held in public (at least in part), but without notice to the respondent and with the respondent's name ciphered on the court list, to enable the issues to be ventilated. Lisa Giovannetti KC attended a hearing at short notice, on 31 October 2024, and made submissions on behalf of the Secretary of State in support of the application. I am grateful for her considerable assistance.

The order that is sought

Original form of draft order

3. The application seeks the following draft order:

> "1. The Respondent, [Name given], is to be identified only as KIB for the purpose of these proceedings.
>
> 2. Nothing shall be published that would or would tend to identify the Respondent as being subject, by notice (a "TPIM notice"), to terrorism prevention and investigation measures. This prohibition shall include, but not be limited to, information that would or would tend to identify the locality, town and/or address at which the Respondent is residing or has resided while subject to a TPIM notice; and information that would or would tend to indirectly identify the Respondent by identifying family members as being the relatives of a person subject to a TPIM notice.
>
> 3. The information referred to at paragraph 2 above shall be known as "the Prohibited Information".
>
> 4. "Published", as used in paragraph 2, refers to the:
>
> a. Dissemination of the Prohibited Information to the public, or any section of the public, by way of newspaper, magazine, leaflet, journal or in any other paper form;

b. Broadcast and/or sharing of the Prohibited Information with the public, or any section of the public, including in any sound or television format on radio, satellite, cable or television; or

c. Dissemination to and/or sharing of the Prohibited Information with the public or any section of the public, including on any internet site or electronic/digital forum or by way of social media or email;

by any person.

5. The prohibition on the Prohibited Information being published, as set out at paragraph 2, shall not apply where and to the extent that publication is necessary:

a. For the effective and proper management and enforcement of the Respondent's TPIM notice; and/or

b. For the protection of national security and/or the international relations of the United Kingdom; and/or

c. For the detection and/or prevention of crime.

6. This Order is to remain in force until further order.

7. There shall be liberty to apply to vary or discharge this Order."

Clarification of intended effect of order

4. On 30 October 2024 I sent written questions about the proposed order to the Secretary of State's solicitor. In response, by a letter dated 31 October 2024, the Secretary of State's solicitor provided the following clarification as to the intended effect of the order:

(1) The order was intended to bind the respondent – in other words it would have the effect of preventing the respondent from publishing the fact that they are subject to these proceedings.

(2) The order was not intended to prevent the respondent from disclosing the existence of the TPIM in ways that do not amount to publication within the terms of the order, such as by revealing the existence of the TPIM to their family, or to a doctor (or, it might be added, a lawyer).

(3) The Secretary of State did not consider that there was any requirement to publish the anonymity order on the judiciary website at this stage (because the obligation to publish anonymity orders on the judiciary website (see CPR 39.2(5)) arises in

respect of orders made under CPR 39.2(4), whereas this order would be made under CPR 80.15.

(4) The wording of the order (see second sentence of paragraph 2) was intended to prevent any publication of the respondent's address, even if that was not in connection with the publication of the fact that they are subject to a TPIM.

(5) The order was intended to come into force immediately, and before any application for permission to make a TPIM, notwithstanding the wording of the first sentence of paragraph 2 which suggests otherwise. A revised form of order was suggested to cater for this point.

(6) An order that authorised the issue of proceedings using a cipher for the respondent would not suffice, because it was necessary to prevent the respondent from publishing their identity and address, and such an order would not have that effect.

5. I was also told that in all previous TPIM cases, the court has, without notice to the respondent, granted applications made by the Secretary of State for an anonymity order in respect of the respondent, and has done so at the same time as making an order granting permission to impose a TPIM under section 6(1)(b) of the Act, and that "anonymity orders for TPIM subjects is an established part of the overall scheme."

Proposed amended order

6. To address the point at paragraph 4(5) above, the Secretary of State amended the draft order that was sought so that paragraph 2 reads:

> "Nothing shall be published that would or would tend to identify the Respondent as being subject, by notice (a "TPIM notice"), to terrorism prevention and investigation measures or would identify / tend to reveal that the Secretary of State is considering imposing such measures on the Respondent. This prohibition shall include, but not be limited to, information that would or would tend to identify the locality, town and/or address at which it is proposed the Respondent shall reside, the Respondent is residing or has resided while subject to a TPIM notice; and information that would or would tend to indirectly identify the Respondent by identifying family members as being the relatives of a person subject to a TPIM notice."

The legal framework

Anonymity orders in civil proceedings

7. The strong general rule, which can only be displaced by unusual or exceptional circumstances, is that proceedings take place in public: *Scott v Scott* [1913] AC 463, *Re S (A Child)* [2004] UKHL 47 [2005] 1 AC 593 *per* Lord Steyn at [18]. This is an aspect of the open justice principle. It means that the names of the parties to a case are, generally, made public when matters come before the court, and are included in court orders and judgments (and, it might be added, the published court list): *JIH v News Group* [2011] EWCA Civ 42 [2011] 1 WLR 1645 *per* Lord Neuberger at [21(1)], *In re*

Guardian News and Media Ltd [2010] UKSC 1 [2010] 2 AC 697 *per* Lord Rodger at [63] ("What's in a name? 'A lot', the press would answer."). Even before the matter comes to court, there is a requirement to include the parties' full names on a claim form and every other statement of case: CPR PD 7A para 4.1(3). Any member of the public is entitled to obtain from the court records a copy of a statement of case, and thereby to see the parties' names: CPR 5.4C(1)(a).

8. There is, where justified, a power to make an order for a party's anonymity, with an associated reporting restriction order under section 11 of the Contempt of Court Act 1981, and an associated order under CPR 5.4C(4) restricting access to the court record. That power involves a derogation from the open justice principle, and will only be exercised when, and to the extent that, it is established on clear and cogent evidence that it is strictly necessary: Master of the Rolls' Practice Guidance: Interim Non-Disclosure Orders [2012] 1 WLR 1003 at [12], *Scott per* Viscount Haldane LC at 438 – 439, Lord Atkinson at 463 and Lord Shaw at 477, *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295 [2008] 1 QB 103 *per* Sir Anthony Clarke MR at [2] – [3], *Secretary of State for Home Department v AP (No2)* [2010] UKSC 26 [2010] 1 WLR 1652 *per* Lord Rodger at [7], *Gray v UVW* [2010] EWHC 2367 (QB) *per* Tugendhat J at [6] – [8], *JIH per* Lord Neuberger MR at [21].

9. In approval hearings under CPR 21.10 the default position is reversed and an anonymity order is usually made to protect the identity of the claimant, but that is a special case and the principle does not apply more widely: *JX MX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96 *per* Moore-Bick LJ at [35(v)].

10. An underlying source of a power to impose an anonymity order is the obligation under section 6(1) of the Human Rights Act 1998 to act compatibly with Convention rights (being those rights granted under the European Convention on Human Rights ("ECHR") which are specified in section 1 of the 1998 Act), read with the court's general power to grant an injunction under section 37(1) of the Senior Courts Act 1981: *In re British Broadcasting Corp* [2009] UKHL 34 [2010] 1 AC 145 *per* Lord Brown at [57]. That can mean that the court is required to balance the article 8 ECHR right to respect for private and family life that is enjoyed by a party to civil proceedings against the right to freedom of expression that is enjoyed by the press and public to receive information about civil proceedings under article 10 ECHR: *Re S per* Lord Steyn at [17]. Where the court, after carrying out that balancing exercise, concludes that the non-disclosure of a person's name is necessary to secure the proper administration of justice and to protect the interests of that person, then the court must make an order that the identity of the person shall not be disclosed: CPR 39.2(4). Where such an order is made, and unless the court otherwise directs, a copy of the court's order must be published on the website of the Judiciary of England and Wales: CPR 39.2(5). That aids open justice and transparency. It ensures that there is openness and transparency as to the cases where anonymity orders are made, and it enables the press (or others) to be able to apply to set aside or vary the order if it is considered that anonymity is unjustified: CPR 39.2(5).

11. Where an anonymity order is made, a reporting restriction order will also generally be made under section 11 of the Contempt of Court Act 1981. That provision states:

> "11 Publication of matters exempted from disclosure in court.

> In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

12. It is the reporting restriction order under section 11 of the 1981 Act that gives teeth to the anonymity order. An order permitting a party to be referred to, in court documents, by a cipher would be of no practical utility if somebody who happened to know the name of the party could publish their identity. It is the reporting restriction order that prohibits that. Accordingly, an anonymity order and a reporting restriction order will generally go hand in hand. The former requires that an individual is referred to, in the proceedings, by a cipher. The latter prohibits the reporting of that individual's name as the individual who is referred to in those proceedings by that cipher. Generally, an order will also be made regulating access to the court file under CPR 5.4C. That avoids the anonymity order being defeated by disclosure of the anonymous person's name within the public court file. This is all explained in the Administrative Court Guide 2024 at section 7.12.

TPIMs

13. The Terrorism Prevention and Investigation Measures Act 2011 permits the Secretary of State, if certain conditions are met, to impose terrorism prevention and investigation measures. These are "requirements and restrictions and other provision" which may be made by virtue of schedule 1 to the Act: section 2(2). These can include, amongst other measures:

    (1) A requirement to reside at a specified residence and to remain at that address between specified hours (para 1(2) of schedule 1)

    (2) A requirement not to leave a specified area (and/or enter a specified area) without the permission of the Secretary of State (paras 2(3)(a) and 3(2)(a) of schedule 1).

    (3) A prohibition on holding any bank account, other than a single account with a bank that is notified to the Secretary of State (para 5 of schedule 1).

    (4) A prohibition on using electronic communication devices without the permission of the Secretary of State (para 7 of schedule 1).

    (5) A prohibition on association with specified persons (para 8 of schedule 1).

    (6) A prohibition on specified work or studies (para 9 of schedule 1).

    (7) Requirements to report to a police station (para 10 of schedule 1).

    (8) Requirements to submit to polygraph testing, drug testing, and being photographed (paras 10ZA, 10ZB and 11 of schedule 1).

    (9) A requirement to attend appointments (para 10A of schedule 1).

(10) A requirement to wear apparatus to enable the subject's movements and activities to be monitored (para 12 of schedule 1).

14. The conditions that must be met before imposing a TPIM (in a non-urgent case) include that the court's permission is obtained: section 3(5)(a) and section 6. They require, amongst other matters, that the Secretary of State reasonably believes that the subject has been involved in terrorism-related activity: section 3(1). They do not require proof of the commission of any offence.

Anonymity order in TPIM proceedings

15. Schedule 4 to the Act makes provision in respect of proceedings under the Act. Paragraph 6 of schedule 4 states:

> "6 Rules of court: anonymity
>
> (1) Rules of court relating to TPIM proceedings or appeal proceedings may make provision for—
>
> (a) the making by the Secretary of State or the relevant individual of an application to the court for an order requiring anonymity for that individual, and
>
> (b) the making by the court, on such an application, of an order requiring such anonymity;
>
> and the provision made by the rules may allow the application and the order to be made irrespective of whether any other TPIM proceedings have been begun in the court.
>
> …
>
> (3) In sub-paragraphs (1)… the references, in relation to a court, to an order requiring anonymity for the relevant individual are references to an order by that court which imposes such prohibition or restriction as it thinks fit on the disclosure—
>
> (a) by such persons as the court specifies or describes, or
>
> (b) by persons generally,
>
> of the identity of the relevant individual or of any information that would tend to identify the relevant individual.
>
> (4) In this paragraph "relevant individual" means an individual on whom the Secretary of State is proposing to impose, or has imposed, measures."

16. Part 80 of the Civil Procedure Rules contains rules about TPIM proceedings in the High Court: CPR 80.1(1)(a).

17. CPR 80.15 states:

> "80.15 Applications for anonymity
>
> (1) The TPIM subject or the Secretary of State may apply for an order requiring anonymity for the TPIM subject.
>
> (2) An application under paragraph (1) may be made at any time, irrespective of whether any TPIM proceedings have been commenced.
>
> (3) An application may be made without notice to the other party.
>
> (4) The reference in this rule to an order requiring anonymity for the TPIM subject is to be construed in accordance with paragraph 6(3) of Schedule 4 to the Act."

18. The Act and the rules closely follow equivalent provisions in respect of control orders imposed under the Terrorism Act 2005: para 5 of the schedule to the 2005 Act and CPR 76.19.

Modification of overriding objective

19. In TPIM proceedings the overriding objective in CPR Part 1 is modified so that it must be read and given effect in a way that ensures that information is not disclosed contrary to the public interest: CPR 80.2(2).

The hearing

20. I directed that the hearing on 31 October 2024 be listed in public, but with the respondent's name ciphered on the court list. That was, in part, a precautionary measure to protect the respondent's Convention rights in circumstances where they are unaware of these proceedings and so are unable to make an application for anonymity. It was also in part because to do otherwise would defeat the object of the application, which (in part) is to seek an anonymity order. For the same reasons, I have ciphered the respondent's name in this judgment. These measures are required by CPR 39.2(4). It is not necessary to make a reporting restriction order because there is no prospect that any person reporting on the proceedings knows the respondent's identity. Nor is it necessary to make any order in respect of documents on the court file because substantive proceedings have not been issued, and the application notice for the anonymity order is not available to a non-party under CPR 5.4C, and, in any event, CPR5.4C does not apply to these proceedings unless the court otherwise orders: CPR 80.30.

21. I directed, pursuant to CPR 80.16, that the hearing would take place without the respondent being served with notice of the date, time and place fixed for the hearing. That is because doing so would defeat the object of the Secretary of State's application

which is to impose an anonymity order on the respondent before they become aware of these proceedings.

22. The hearing commenced in public, and members of the public (but as far as was apparent no press) were present for part of the hearing. The press had not been put on notice of the application, or of the hearing which was listed at very short notice. If there had been further time, it would have been better if the press had been put on notice of the hearing.

23. All issues of principle were dealt with in the public part of the hearing. That included Ms Giovannetti making it clear that the anonymity order was sought in part to protect the respondent's Convention rights, but also to avoid the risk that the proceedings might be undermined by making measures more difficult to administer. The reasons why it was said that the proceedings might be undermined raised matters which, if revealed publicly (at anything other than a high level of generality), might defeat the object of the application. Accordingly, part of the hearing was held in private (as is permitted by CPR 39.2(3)(a) and CPR 80.18) to enable Ms Giovannetti to develop submissions on those points. The broad concern about the proceedings being undermined includes that there might be local public opposition if the respondent's proposed address becomes known, and that might make it more difficult for the Secretary of State to take practical steps that are necessary to implement a TPIM. It is not necessary to set out the detail underpinning that concern in this public judgment. In the light of the assumptions I am content to make (that the Secretary of State's concerns are well-founded), and the conclusion I have reached on the application, it is not necessary to deal with these matters in a separate private judgment and I have not done so. This, therefore, is the only judgment on the application. I have taken fully into account the evidence served in support of the application even though it is not appropriate to set that evidence out in this judgment.

24. Ms Giovannetti submits that a court has power to impose an anonymity order pursuant to its positive obligations under the Human Rights Act 1998 to protect the respondent's Convention rights, and also pursuant to an inherent jurisdiction to safeguard the court's own procedures, and also pursuant to CPR 80.15. Although the latter does not explicitly grant a power to make an anonymity order, she submits that power is implicit in the right it undoubtedly does provide to make an application for an anonymity order. She submits that if an anonymity order is not granted there is a risk that a TPIM could be more difficult to administer. She drew attention to the fact that an anonymity order of the sort that is sought here has been made on other occasions.

Consequences of making the order that is sought

25. The proposed order would have at least 10 significant consequences.

26. First, it involves a departure from the open justice principle which, as in any case, requires strong justification.

27. Second, it is an order for the anonymity of one party that would be granted at the request of the opposing party, without the party affected having a prospective opportunity to make representations.

28. Third, the order binds the respondent. It is one thing for an anonymity order to bind the anonymised party where they have sought the order, and where the order is in place for their own protection. It is quite another where, as here, the order is sought for broader reasons and with the intention of binding the respondent, whether they want to be anonymous or not.

29. Fourth, the order would impact not just on the freedom of expression of the press and the public, but also on the respondent's common law right to free speech and Convention right to freedom of expression. It engages section 12 of the Human Rights Act 1998, which states:

> "12 Freedom of expression.
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression…
>
> …"

30. Fifth, the order is made in the context of the Secretary of State considering the imposition of significant restrictions on the respondent's fundamental rights and freedoms (see paragraph 13 above). The imposition of an additional obligation which prevents them from being able to publicise the fact that they are being made subject to these restrictions is a significant further restriction which is not explicitly authorised by the legislation.

31. Sixth, the order also prevents the respondent from publicising their address (or even the town in which they live), even if that was done in a way that did not reveal that they are the respondent in these proceedings. For example, they would presumably be in breach of the order if they permitted their address to be included in the voter's register.

32. Seventh, the order is in the nature of an injunction, in that it is an order that prohibits a person from doing something (see the Glossary to the Civil Procedure rules).

33. Eighth, it follows that the mechanism for enforcement of the order is a contempt application under CPR Part 81. The consequences of breaching the order potentially include a finding of contempt, imprisonment, confiscation of assets or a fine: CPR 81.9(1). Imprisonment may be for up to 2 years: section 14(1) of the Contempt of Court Act 1981. Although the order has that effect there is no penal notice to make that consequence clear.

34. Nineth, the order also binds the world. It is, in effect, an order *contra mundum*.

35. Tenth, although the order binds the world, there is no current and clear proposal for publishing the order (whether on the Judiciary website or otherwise).

36. Further, the order as drafted risks self-defeat. If the order is not made available to the public, it puts anyone reporting on the proceedings in jeopardy of breaching an order which they are not able to know about. If the order is made available to the public then it breaches its own terms, because it includes the respondent's name in paragraph 1 (I have omitted their name when quoting the order in paragraph 3 above).

Source of power to make an order

37. Nothing in the 2011 Act explicitly empowers the court to make an anonymity order, nor is there anything that explicitly indicates the factors that a court should consider when deciding whether to impose an anonymity order. The Act does authorise the making of court rules in relation to the making of an application for an anonymity order (para 6(1)(a) of schedule 4). It also authorises court rules for the making of such an order (para 6(1)(b) of schedule 4). The rules make provision for the former (CPR 80.15) but not, explicitly, the latter. Nothing in CPR 80.15 explicitly authorises the making of an anonymity order (only the making of an application) or identifies the factors that should be considered when deciding whether to impose an anonymity order. So, ether the power to make an anonymity is implicit in the Act or the rules, or it is necessary to look elsewhere.

Human Rights Act 1998

38. For the reasons explained at paragraph 10 above, the 1998 Act provides both a source of a power to make an anonymity order and a structured framework to guide the exercise of that power, as explained in *Re S*. An application for an anonymity order under CPR 80.15 could therefore be made on the basis that the making of an anonymity order is required by the 1998 Act.

39. The positive obligations owed by public authorities (and hence the court) under articles 2, 3, 4 and 8 ECHR (at least) could each, in principle, require the imposition of an anonymity order to protect a person against a risk to their enjoyment of Convention rights (whether that is a risk to life or well-being or respect for private and family life). In each such case, the purpose of an anonymity order is to protect the Convention rights of the subject of that order. There is therefore no difficulty, in principle, with a proposed respondent to a TPIM seeking, and being granted, an anonymity order to protect their Convention rights.

40. Inherent within the right to respect for private life, is the right to personal autonomy: *Campbell v MGN Ltd* [2004] 2 AC 457 *per* Lord Hoffmann at [51]. Thus, an adult with mental capacity is entitled to exercise an autonomous choice about the extent to which they publish information about themselves. For example, victims of sexual offences sometimes make a choice not to take advantage of the statutory anonymity that is available under the Sexual Offences (Amendment) Act 1992. It is thus difficult to conceive of circumstances in which the rights and freedoms enjoyed under the 1998 Act would justify the court imposing an anonymity order against the wishes of the subject of that order, at least where that person is an adult with mental capacity. To do so is likely to be incompatible with personal autonomy that is protected by article 8 ECHR in the absence of any competing Convention right. Moreover, in such a case there would be no Convention right that would justify the making of an anonymity order in the first place.

41. That does not mean that there is a fundamental difficulty in granting an anonymity order to protect the Convention rights of a proposed respondent to a TPIM, on the application of the Secretary of State without notice to that respondent. There are good reasons why the application for a TPIM may be made without notice. Otherwise, the proposed respondent might be able to take steps to frustrate the application before a TPIM is in place. Where a without notice application for a TPIM is made, the respondent is not able to seek anonymity to protect their own Convention rights. The Secretary of State may, in those circumstances, be under a positive obligation to seek an anonymity order to safeguard the respondent's rights – because by the time the TPIM is granted it will be too late. For the same reason, the court might be required to grant an anonymity order. Once the TPIM has been made, the respondent may well wish to remain anonymous. This is likely to be why the statutory regime explicitly authorises the Secretary of State to make an application for an anonymity order, and to do so without notice: paragraph 6(1)(a) of schedule 4 to the Act, and CPR 80.15(1) and (3). The Supreme Court has said that it "makes sense for an interim anonymity order to be made at the ex parte permission stage": *AP per* Lord Rodger at [8] (in respect of control orders, but the same applies to TPIMs).

42. It is at least possible that there will be cases where the respondent does not wish to remain anonymous once they are made aware of the order, and the application in this case proceeds on the basis that is a possibility here. In such a case, article 8 ECHR will not be engaged. It is then difficult to see how the 1998 Act could justify the continuation of the order.

Court's inherent jurisdiction / common law

43. I was not shown any authority to support the proposition that the court retains an inherent jurisdiction or common law power to make an anonymity order. Statutory provision has been made authorising (but not requiring) the making of rules of court for applications for anonymity orders, and the making of anonymity orders. Rules of court have been made to regulate applications for anonymity orders, but not for the making of anonymity orders.

44. Given that the field has been occupied by statutory provision, including (in part) the making of rules of court, considerable caution would be required before resorting to the court's inherent jurisdiction, or the development of the common law, to make an order that is not permitted by the statutory framework.

45. In *Re S* the Appellate Committee unanimously took the view that in the light of the undoubted jurisdiction to make an anonymity order under the 1998 Act, "the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases": *per* Lord Steyn at [23]. *Re S* arose in a different context (the protection of the identity of a child in family proceedings rather than a respondent to TPIM proceedings), but the underlying rationale applies. The same point was made, but also in respect of the common law, in *Khuja v Times Newspapers Ltd* [2017] UKSC 49 [2019] AC 161 *per* Lord Sumption at [18]: "The dependence of this area of law on statute and the extent of statutory intervention mean that it is fair to speak of a statutory scheme occupying the ground to the exclusion of discretions arising from the common law or the court's inherent powers."

Modified overriding objective: CPR 80.2(2)

46. CPR 80.2(2) requires the court to ensure that information is not disclosed contrary to the public interest. There are circumstances in which this might justify the making of an order that prevents the disclosure of an individual's identity, even where such an order would not be justified under the Human Rights Act 1998. For example, the identity of a deceased covert human intelligence source might be protected on grounds of national security, even where revealing that person's identity would not interfere with any person's Convention right (cf *Metropolitan Police v Information Commissioner* [2009] UKIT EA_2008_0078 at [21]).

47. CPR 80.2(2) is concerned with protecting information that would otherwise fall to be disclosed in the course of an application for a TPIM. Together with an obligation to ensure that the court is given the information necessary properly to determine the proceedings (CPR 80.2(3)) and the more detailed provision for the handling of closed material (CPR 80.24 and allied provisions), it enables the Secretary of State (subject to the court's rulings) to rely on sensitive material without disclosing it to the respondent and without that material entering the public domain. CPR 80.2(2) therefore enables the court to regulate TPIM proceedings in a way that ensures they can be justly determined without prejudicing the public interest. It does not provide a freestanding general power to prevent the publication of information which is known to the publisher otherwise than because of disclosure in TPIM proceedings. CPR 80.2(2) could justify a court decision to refuse to require the Secretary of State to make disclosure of a particular person's identity, or their address, where that would be damaging to the public interest. It could not be used to prevent the respondent to the proceedings from publicising their own identity or their own address if they wished to do so.

Implicit power in Act or CPR 80 to make order

48. The provision in CPR 80.15 for the making of an application for an anonymity order assumes that there is power to grant an anonymity order. There is no reason why that power should necessarily derive from the Act or the rules. There is, as I have explained, a well-established jurisdictional basis for the making of anonymity orders, which ultimately derives from section 6(1) of the Human Rights Act 1998 read with section 37 of the Senior Courts Act 1981. The power to apply for an anonymity order fits well with that framework. The ability to make an application for an anonymity order does not necessarily require the creation of a new additional power for the making of such an order for it to have utility. The 2011 Act created a power to make rules for the making of an anonymity order, but a choice was made not to exercise that power. Given that

choice, it would be wrong to imply into the Act or CPR 80.15 a power to make an anonymity order (according to some unspecified criteria) which is separate from the well-established power to do so under the 1998 Act.

Authorities on anonymity orders in this context

49. Although there has been no previous discussion of the specific issues that are raised on this application, the courts have considered the use of anonymity orders in the closely related areas of control order proceedings (also asset freeze proceedings).

50. In *Times Newspapers Ltd v Secretary of State for the Home Department* [2008] EWHC 2455 (Admin), Ouseley J considered an application to lift an anonymity order made in control order proceedings. He made reference in his judgment to concerns expressed by the Secretary of State that publicity would make it more difficult to administer the regime, but did not say that this would, in isolation, justify the continuation of an order. In that case, the subject of the proceedings wanted the order to continue to reduce the risk that he would be subject to harm. After setting out the submissions that were advanced, Ouseley J turned "apparently rather abruptly" to his conclusion: [30]. He decided that the case for maintaining anonymity was compelling, but deliberately did not set out his reasons in the public judgment. In the course of his judgment he said "there are many reasons why an anonymity order is empowered by the [Prevention of Terrorism Act 2005], which go far beyond, and may not always even include, the administration of justice in Control Order hearings or other trials: the effective operation of the Control Order before and after any hearing at which it is upheld is the major public interest behind the anonymity provision": [23]. For the reasons I have already given, I am not satisfied that the TPIM regime gives rise to a separate power to make an anonymity order beyond that which arises under the 1998 Act. In particular, the statutory regime does not permit the making of an order (which would have the consequences I have set out) solely for the purpose of the effective operation of the TPIM. I will return to *Times Newspapers* below, in the light of its consideration by the Supreme Court in *AP*.

51. In *Guardian News*, an application was successfully made to set aside anonymity orders in proceedings relating to orders freezing the assets of suspected terrorists. The court said that the power to make an anonymity order was section 6 of the Human Rights Act 1998 read with the court's general power to grant injunctive relief under section 37 of the Senior Courts Act 1981: *per* Lord Rodger at [30] – [31]. The case involved a classic *Re S* balance between article 8 and article 10 rights. There was no suggestion that the effective operation of the asset freezing regime would, in itself, justify the making of anonymity orders. At [78] Lord Rodger said:

> "Many of the same issues would obviously arise if an application were made to set aside the anonymity orders made in any outstanding control order proceedings. The same principles would also have to be applied, but there may be arguments and considerations in those cases which were not explored at the hearing in this case. Conceivably, also, the position might not be the same in all of the cases. We would accordingly reserve our opinion on the matter of anonymity orders in control order cases."

52. In *AP*, the issue was whether the Supreme Court should extend an anonymity order that had been made in control order proceedings. The Secretary of State, and the person who was subject to the control order, sought the continuation of the order. The Secretary of State advanced an argument which resonates with the submissions in this case. He said that the order "allows the police and the other officials to carry out their duties without attracting significant attention or any possible hostility from the local community. In this way the officials can perform their duties more effectively." It was not directly suggested that this argument provides a justification for the imposition of the order, just a recognition of one beneficial consequence of the order. The Supreme Court said that it was "not altogether easy to know just how much weight to attach in any given case to these somewhat general points" but noted that Ouseley J had appeared "to give some weight to them, in the context of other general considerations" in *Times Newspapers*. In those circumstances, the Supreme Court considered, "in the absence of any competing view" that "some weight" should be given to the fact that anonymity helps to make the administration of control orders more effective: *per* Lord Rodger at [11].

53. The Supreme Court did not indicate that the fact that anonymity helps make control orders more effective is, itself, a justification for making an anonymity order, or that it could justify the making of an anonymity order where article 8 (or articles 2, 3 or 4) are not engaged. I read the observations of Lord Rodger as indicating that when conducting the article 8/10 balance, "some weight" can be given to this factor. That, however, assumes that the article 8/10 balance is engaged (as it was in both *Times Newspapers* and *AP*). That will only be the case where the primary reason for making the anonymity order is to protect the respondent's right to respect for private and family life (or some other Convention right).

Should the order be made?

54. The present application does not create any real risk that the respondent will be identified as the subject of the application or as a person in respect of whom the Secretary of State is considering a TPIM. The application notice is not available for inspection from the court file without a court order. The court list for the hearing of the application was ciphered. Nothing was said during the public part of the hearing which tended to identify the respondent. It follows that the fact of this application does not require the making of a more general anonymity order.

55. The reason why the application is made at this stage is that the Secretary of State wishes to inform the respondent of her intention to consider making a TPIM so that they can make representations. It is in the interests of the respondent that they should be able to make representations. The Secretary of State considers that an anonymity order is necessary in order to enable that process to take place.

56. The Secretary of State is concerned that offering the respondent an opportunity to make representations will increase what Ms Giovannetti described as the "circle of knowledge" in respect of the potential TPIM application against the respondent, which will increase the possibility that the respondent's identity will be published. There are two components to that increased circle of knowledge.

57. The first component is that a number of public servants are likely to be involved in the process of seeking and processing the representations and taking consequential practical steps in advance of any application for a TPIM. However, the Secretary of

State has control over which public servants are included in the process. She may restrict the pool to a small number of trusted public servants and impress upon them the confidentiality of the information. Further, any wrongful disclosure of the information would be liable to result in disciplinary sanctions, or potentially prosecution for misfeasance in a public office or prosecution under section 1(3) of the Official Secrets Act 1989. It is difficult to see that an anonymity order would, in practice, create any significant additional disincentive against an unlawful disclosure. Anyway, if this were the real source of concern then the order could be drafted in more narrow terms so that it applied to those public servants within the circle of knowledge, but did not restrict the respondent's free speech.

58. The second component to the increased circle of knowledge is that the respondent will be informed, and they may choose to tell others about the proposed application. Once the respondent is informed then they can, if they wish, make an application for an anonymity order which would no doubt be supported by the Secretary of State. But if they choose not to seek an anonymity order, and to tell others about the proposed application without the protection of an anonymity order then that is their autonomous choice. The Secretary of State has not identified any clear power to make an order that would prevent the respondent from publicising the fact that they may be subject to a TPIM. Even if there were such a power, having particular regard to the respondent's right to freedom of expression, it would not be appropriate to make an order that had that effect. For the reasons explained below, that would be a disproportionate interference with the respondent's right to freedom of expression.

59. Even if it were otherwise permissible to make an anonymity order, the order that is sought by the Secretary of State goes well beyond an anonymity order within the meaning of para 6(3) of schedule 4 to the Act, and CPR 80.15(3). Those provisions define an anonymity order as an order that prevents the disclosure of the identity of the respondent in these proceedings. The order that is sought by the Secretary of State would prevent the respondent from publishing their address (or even just the town in which they live), even if they did so in a way that did not tend to identify that they are involved in these proceedings. That falls outside the ambit of an anonymity order, is a significant interference with the respondent's rights under articles 8 and 10 of the Convention, and would require cogent factual and legal justification.

60. I recognise that significant weight must be accorded to the Secretary of State's assessment of risks to national security. I am content to assume (but emphatically without deciding) that the respondent is a dangerous terrorist, that a TPIM may well be justified, that there is a risk that if the respondent publicised their address then that would make it more difficult for her to impose a TPIM, that that would be damaging to the interests of national security, and that (in the light of *AP*) this is a factor that can be given "some weight" in an article 8/article 10 balancing exercise. None of that provides a legal basis for restricting the respondent's free speech and freedom of expression if article 8 (or article 2 or 3 or 4) is not engaged. Even if there were such a basis (for example under the court's inherent jurisdiction or by reference to CPR 80.2(2)), it would be necessary to have particular regard to the respondent's right to freedom of expression: section 12(3) of the 1998 Act. I do not consider that such an order would be a proportionate interference with the respondent's right to freedom of expression. There are alternative options, which would not interfere with the respondent's freedom of expression, but which would go some considerable way to achieving the same aim.

The respondent could be asked whether they would wish to be anonymous for their own protection; if so, the route to an anonymity order is much more straightforward. Alternatively, the respondent could be offered the opportunity to make representations, without revealing to them precisely where they would be accommodated.

61. Further, I do not consider that the order strikes a fair balance between the interests of national security and the respondent's right to freedom of expression. The Secretary of State is entitled (if the statutory conditions are met) to impose significant restrictions on the respondent's life, but to then stop the respondent from being able to publicise what has happened to them would require stronger justification than has been provided. The fact that the imposition of a TPIM might become practically more difficult or expensive or resource intensive (none of the evidence shows it would be impossible) is not sufficient.

62. None of this necessarily throws doubt on the justification for previous anonymity orders that have been made in TPIM proceedings. All such orders were made at the point the substantive TPIM application was made. Such orders can, in principle, be justified on a precautionary basis to protect the respondent (although it would still be necessary to address the justification on a case by case basis – there is no warrant for a blanket approach). It may well be that in all such cases the respondent (once aware of the proceedings) wanted the protection of anonymity. I was not told of any application to set aside any of those orders by the respondents.

63. The difference here is that the order is sought at an earlier stage where there is no significant risk to the respondent, where the order is sought in large measure to make the Secretary of State's (vitally important) job easier, rather than to protect the respondent, and where the order is intended to bind the respondent whether they want that or not.

Outcome

64. The application is refused.