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Case No: FD19P00457 and FD17P00299

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2021

Before :

THE PRESIDENT OF THE FAMILY DIVISION

- -

Between :

Rashid Maqsood Abbasi **Aliya Abbasi**	**Applicants**
- and -	
Newcastle upon Tyne Hospitals NHS Foundation Trust	**Respondent**
PA Media	**Intervenor**

- -

Mr David Lock QC and Ms Katie Williams-Howes (instructed by **Imran Khan Solicitors**) for the **Applicants**
Mr Gavin Millar QC and Ms Fiona Paterson (instructed by **Sintons**) for the **Respondent**
Mr Vikram Sachdeva QC, **Mr Jack Anderson** and **Ms Rachel Sullivan** (instructed by **PA Media**) for the **Intervenor**

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(1) Takesha Thomas **(2) Lanre Haastrup**	**Applicants**
- and -	
Kings College Hospital NHS Foundation Trust	**Respondent**
PA Media	**Intervenor**

- -

Mr Bruno Quintavalle (instructed by **Moore Barlow LLP**) for the **Second Applicant**
Mr Gavin Millar QC and Ms Fiona Paterson (instructed by **Hill Dickinson LLP**) for the **Respondent**

Mr Vikram Sachdeva QC, **Mr Jack Anderson** and **Ms Rachel Sullivan** (instructed by **PA Media**) for the **Intervenor**

Hearing dates: 3, 4 and 5 February 2021

Approved Judgment

Sir Andrew McFarlane P:

Introduction

1. The focus of this judgment is upon the jurisdiction, if any, that the High Court Family Division has to maintain a Reporting Restriction Order ('RRO') prohibiting the naming of any medical clinicians as being involved in the care and treatment of a child who had been the subject of "end of life" proceedings before the High Court prior to their death, and where an RRO had been made at that time preventing the identification of any of the treating clinicians and staff until further order.

2. It is right to stress that this judgment does not purport to determine whether the High Court has jurisdiction to make an RRO within end of life proceedings during the child's life and/or extending for a short period following the child's death. Whilst the question of whether the High Court has any jurisdiction to make a RRO to protect the anonymity of treating clinicians at any stage of proceedings under the inherent jurisdiction relating to a child's care was raised, for the first time, in the latter stages of oral submissions, it is not necessary to determine that issue for the purposes of these two applications which each relate to the question of whether a RRO can be continued, or re-imposed, a significant time after the child has died. Judges of the Family Division have for some years made RRO orders in such cases without the existence of the underlying jurisdiction apparently being challenged. This judgment is therefore based upon the assumption that the jurisdiction to make the original RROs in these two cases exists. The validity of that assumption may fall to be determined in other proceedings on another day following a process during which the point has been made squarely and thoroughly investigated prior to the hearing and during submissions, which, as I have indicated, was not the case here.

The Applications

3. The court currently has before it two separate sets of applications relating to two different children. Each of the children, Zainab Abbasi and Isaiah Haastrup, was the subject of end of life proceedings under the inherent jurisdiction of the High Court, in which the issue was whether life-support should be withdrawn from them. Tragically each of the two children died; Zainab Abbasi dying after the issue of proceedings but before the court could conduct a substantive adjudication, and Isaiah Haastrup dying following the removal of life-sustaining ventilation at the conclusion of a full legal process including an application to the Court of Appeal. In both cases, widely drawn RROs were made during the proceedings with the consent of, or at least without opposition from, the children's parents. Each of the two RROs is of unlimited, open-ended, duration and each purports to cover all those who are employed by the relevant NHS hospital trust and who played any part in the provision of care or treatment to the child. Now, each of the two respective sets of parents seeks to be released from the RRO so that they may speak publicly about their experiences and, in doing so, be free to identify NHS staff who were involved in caring for their child. By coincidence the two applications were made within a short time of each other. Whilst the factual circumstances underlying each case are inevitably different, the same legal issues largely arise. The two cases have therefore been heard together with the agreement of all parties.

4. The detailed factual background to each of these cases is of limited relevance to the issue before the court. Insofar as the two sets of parents may seek to criticise individual clinicians, neither has revealed to the court the identity of those whom they would wish to name or, other than in general terms, the nature of any criticism. It is of note that both sets of parents have expressly declined to seek findings of fact at this hearing. However, the following brief summary may assist in understanding the description of the core position of each of the parties before the court that then follows.

Zainab Abbasi: background

5. Tragically, Zainab Abbasi was born in June 2013 with a rare and profoundly disabling inherited neurodegenerative disease (Niemann-Pick Type C). In addition she contracted swine flu in 2016 which resulted in lung damage.

6. Both of Zainab's parents are medically qualified, in particular, her father, Dr Rashid Abbasi, is a Consultant Respiratory Physician working in the NHS. For much of Zainab's life the treatment plan delivered by the Newcastle upon Tyne Hospitals NHS Foundation Trust was controversial as between the treating consultants and the child's parents. In essence, the treating team recommended only palliative care, whereas the parents favoured more active treatment. Further, and particularly so in the later months, the parents became more and more critical of the overall regime under which the hospital's Paediatric Intensive Care Unit ('PICU') operated and the way in which care was delivered to their daughter by individual staff members. Matters deteriorated to the extent that the hospital sought to prohibit the father from attending the ward and when he did so, the police were called and he was forcibly removed.

7. In August 2019 the hospital issued proceedings in the Family Division seeking a declaration that it was in Zainab's best interest for life-sustaining treatment to be withdrawn. At an early hearing Lieven J made a RRO which included a prohibition on the publication of the parties' names and any information which may lead to their identification or the identification of any person who had the care of Zainab. The case was set down for final hearing on 19 September 2019 but, on 16 September, Zainab sadly died.

8. On 31 July 2020, Lieven J varied the RRO (by consent) to allow for the publication of the parties' names.

9. Dr and Mrs Abbasi remain profoundly critical of the care that their daughter received and, more generally, of the actions of those in charge of the PICU. Moreover, they consider that the unit is operated in a wholly dysfunctional manner to a degree that is detrimental to the care of the young patients for whom it is responsible. They believe that other families have been similarly affected by the negative impact of this allegedly dysfunctional regime. They therefore wish to publicise the care that was given to their daughter and, in doing so, use the names of those involved in the provision of her treatment so that the parents, as whistle-blowers, may bring these issues to the more general attention of the public in the hope that an investigation will follow which will result in radical change.

Isaiah Haastrup: background

10. Isaiah Haastrup was born in February 2017. During the process of birth his brain was deprived of oxygen for a very significant period with the result that, by the time he was born, his central nervous system was in a profoundly compromised position and permanently dependent upon a ventilator to sustain life. In March 2018, in accordance with an order made in the High Court and following refusal of permission to appeal to the Court of Appeal, Isaiah died after he was removed from the ventilator.

11. A claim by Isaiah's parents for damages for clinical negligence relating to the circumstances of his birth has recently been settled. The NHS trust has accepted responsibility and an agreed figure of damages has been paid to the parents.

12. The Senior Coroner for London is undertaking an Inquest into Isaiah's death. The court has been told that the focus of the inquest is upon the circumstances surrounding Isaiah's birth, rather than the decision to withdraw life support and his subsequent death. It was, apparently, only on the second and final day of the Inquest that the question of reporting restrictions was addressed. Having considered the terms of the High Court RRO relating to Isaiah, the coroner adjourned the inquest pending clarification from the High Court as to the scope and continuation of the RRO in Isaiah's case.

The Position of the Parties

13. The position of each of the parties can be briefly stated. Both sets of parents seek orders immediately discharging the RRO applicable to their child's case. The two relevant NHS hospital trusts, which have been jointly represented by counsel before this court, oppose the discharge applications. They maintain that, with some contextual amendment to reflect the circumstances as they now are, following each child's death, the RROs should remain in force indefinitely. Alternatively, the hospital trusts have made a cross-application for the court to make a new RRO in each case in the event that the parents are successful in their discharge applications. The deceased children are, inevitably, no longer parties to the court proceedings and have not been represented. Finally, the court has received written and oral submissions on behalf of 'PA Media' (formerly The Press Association) as intervenors. PA Media, through leading counsel Mr Vikram Sachdeva QC, supports the hospital trusts in asserting that the court must have jurisdiction to regulate and, if necessary, prevent the publication of information identifying individual clinical staff and, on the facts of these two cases, it is submitted that neither application for the discharge of the injunctions is made out.

14. It follows that the central issue of law which falls for determination relates to the jurisdiction of the High Court to maintain, or to re-impose, a RRO protecting the anonymity of clinicians and other treating staff involved in the care of a deceased child, who was the subject of 'end of life' proceedings under the inherent jurisdiction, where the RRO will remain in force for a significant period following the child's death.

Legal context

(a) The Reporting Restriction Orders

The order in each of these two cases is in substantially the same terms. The relevant provisions of the order in Isaiah Haastrup's case are:

Haastrup RRO:

"*1. Duration*
Subject to any different Order made in the meantime, this Order shall have effect during the lifetime of the Third Respondent (whose details are set out in the Schedule to this Order) and thereafter until further Order.

2. *Who is bound*

This Order binds all persons and all companies (whether acting by their directors, employees or agents or in any other way) who know that the Order has been made.

3. *Publishing Restrictions*

This Order prohibits the publishing or broadcasting in any newspaper, magazine, public computer network, internet website, social networking service, sound or television broadcast or cable or satellite programme service ('publishing') of:

a) the name and/or personal details of:

i. The Applicant's clinical staff involved in the care of the First and Third Respondents during the First Respondent's ante- natal care and labour and the Third Respondent's delivery.

ii. The Applicant's clinical and nursing staff who have cared and continue to care for the Third Respondent since his birth.

iii. The Applicant's clinical and nursing staff who have cared for the First Respondent since 17 February 2017.

iv. The Applicant's non-clinical staff who have cared and continue to care for the Third Respondent since his birth.

v. Any clinician who has a provided second opinion or advice to the Applicant regarding the Third Respondent's diagnosis, prognosis, treatment and management.

vi. Any clinician whom the Applicant's clinical staff have consulted and or communicated with regarding a possible transfer of the Third Respondent to another hospital.

b) any picture being or including a picture of the above; and/or

c) any other material that is likely or calculated to lead to the identification of the above.

4. No publication of the text or a summary of this Order (except for service of the Order under paragraph 7 below) shall include any of the matters referred to in paragraph 3 above."

15. The order made in Zainab Abbasi's case describes the information that may not be published as follows:

> "This Order prohibits the publishing or broadcasting in any newspaper, magazine, public computer network, internet website, social networking website, sound or television broadcast, any cable or satellite programme service of:
>
> (a) any material [or] information that identifies or is likely to identify:
>
> (i) Z, who is the subject of these proceedings; and/or
>
> (ii) any member of Z's family; and/or
>
> (iii) any person caring for Z; and/or
>
> (iv) any doctor or other medical professional caring for Z;
>
> and/or
>
> (v) where any person listed above lives; and/or
>
> (vi) any institution at which Z is treated or cared for; and/or
>
> (vii) the Applicant NHS Trust
>
> whose details of which (sic) appear in the Record of Information appended to this Order.
>
> (b) any picture of any of the above."

(b) Jurisdiction: The NHS Hospital Trusts' case

16. Mr Gavin Millar QC, leading Miss Fiona Paterson, as counsel jointly instructed by the two hospital trusts, submits that it is plain that the hospitals' position in law is <u>not</u> based on any of the following:

a) The tort of misuse of private information;

b) Continuing reliance upon the inherent jurisdiction proceedings with respect to the welfare of the now deceased child;

c) A bespoke power in the High Court under its inherent jurisdiction;

d) The State in some manner vertically imposing a restriction on the right of free speech otherwise enjoyed by these parents.

17. Mr Millar puts the case the following way. The issue before the court relates to the exercise of rights under Article 8 (family life) and Article 10 (freedom of expression) in the European Convention on Human Rights ('ECHR'). There is a conflict between the rights of two groups of individuals, namely, the hospital staff and the parents in each case. In ECHR terms it is, therefore, a 'horizontal' dispute. It is not a dispute between the State and the parents (in ECHR terms a 'vertical' dispute).

18. Where such a horizontal dispute comes before a court, and the court has jurisdiction to provide a remedy, there is then a positive obligation on the court, as a public authority, not to act in a way which is incompatible with the ECHR. Reliance is placed upon Human Rights Act 1998 s 6:

> "6. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

19. Notwithstanding the death of the child who was the subject of the inherent jurisdiction proceedings with respect to each child, the proceedings still continue. There is in each case an extant RRO order. The parents have each made an application within the proceedings for the discharge of that order. The horizontal dispute between the parties is therefore properly before the court and, by virtue of Senior Courts Act 1981, s 37 ['SCA 1981'], the court has jurisdiction to grant an appropriate remedy.

20. The relevant elements of Senior Courts Act 1981, s 37 state:

> "37. (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

> (3) …
>
> (4) …
>
> (5) …
>
> (6) This section applies in relation to the family court as it applies in relation to the High Court."

21. If, as Mr Millar submits is the case, the court therefore has jurisdiction to entertain the dispute between these parties as to the exercise of their respective Article 8 and Article 10 Rights, he argues that the court must determine that dispute by applying the balancing model first identified by the Court of Appeal and the House of Lords in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593 in particular in the speech of Lord Steyn (with whom the House agreed) at paragraph 17:

> "17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

22. Mr Millar drew a distinction between the decision in *Re S* and that in *Guardian News and Media Group* [2010] UKSC 1 by pointing to the contrast drawn by Lord Justice Sedley in *Carter v Ashan* [2005] EWCA Civ 990 between 'constitutive jurisdiction' and 'adjudicative jurisdiction' at paragraph 16 of his judgment. Constitutive jurisdiction being a court's power to decide an issue and adjudicative jurisdiction being the manner in which the decision is made.

23. The Supreme Court decision in the *Guardian News Media* case involved anonymity orders that had been made in the course of proceedings before the Administrative Court which were continued by the Court of Appeal (see paragraphs 3 and 4). Lord Rodger SCJ, giving the unanimous judgment of the court, at paragraphs 28 and 29 said:

> "28. Under the Human Rights Act 1998 article 8(1) requires public authorities, such as the court, to respect private and family life. But M does not need to ask for the anonymity order to prevent the court itself from infringing his article 8 Convention rights. Suppose the court considers, whether in the light of submissions or not, that, by publishing its judgment in the usual form, it will itself act unlawfully under section 6 of the Human Rights Act because it will infringe a party's article 8 Convention rights. In that eventuality, the court does not deal with the matter by issuing anonymity orders to other people; rather, it ensures that it acts lawfully by taking appropriate steps of its own. That presumably explains why, for instance, the letter M, instead of the appellant's name, is used in the judgments below. In

this way the courts avoid what they perceive to be the problem that they would act unlawfully if they named M in their judgments and so infringed his article 8 rights.

29. In fact, however, in these cases the courts have gone further: they have not only used initials in their judgments but have made anonymity orders addressed to other people - in effect, to the press. Having the power to make orders of this kind available is one of the ways that the United Kingdom fulfils its positive obligation under article 8 of the Convention to secure that other individuals respect an individual's private and family life. In *Von Hannover v Germany* (2005) 40 EHRR 1, 25, para 57, the European Court of Human Rights reiterated that:

> "although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves…. The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole…" (internal citations omitted).

So, when M applied to the courts below for an anonymity order, he was asking them to exercise their power to secure that other individuals, viz the press and journalists, showed respect for his private and family life."

24. Mr Millar submits that the *Guardian News Media* decision establishes that the court has 'constitutive' jurisdiction in an appropriate case and that *Re S* explains how the 'adjudicative' jurisdiction is to be deployed.

25. As an example of a court acting as Mr Millar submits that this court should now act, reliance is placed upon *Re BBC* [2009] UKHL 34 in which the House of Lords had previously granted an anonymity order. Some 10 years later, on the BBC's application to discharge the order, the House of Lords was required to consider what jurisdiction it had to determine the issue. Lord Brown described the approach to be taken:

> "57. Whether in the present case the House correctly struck the balance at the time of making the anonymity order in October 2000 is altogether less important than the question whether it is now appropriate to continue it or discharge it and it is upon that question that I propose to focus. Just before doing so, however, I should perhaps note that there can be no question here as to the House's power to make such an order if the ultimate balancing exercise requires it. Mr Millar QC's submissions to the contrary - largely based upon an enlarged Court of Appeal's recent judgment in *In re Trinity Mirror plc (A intervening)* [2008] QB 770 - are in my opinion misconceived. *In re Trinity Mirror* was concerned with the Crown Court's powers to make anonymity orders (in particular under section 45(4) of the Supreme Court Act 1981). As pointed out at para 22 of the Court of Appeal's judgment, the Crown Court's powers are more restricted than those of the High Court which arise under section 6 of the 1998 Act read in conjunction with section

> 37 of the 1981 Act (as in *In re S (A Child)* [2005] 1 AC 593 itself). The full width of the section 37 power, to grant injunctions whenever just and convenient, is no less available to your Lordships' House than to a High Court judge."

26. Mr Millar submitted that the important consideration was the substance of the jurisdiction, rather than form; once an issue on disputed rights was before the court, that is sufficient to establish jurisdiction. Here there is an application to discharge existing injunctions, it must follow that the court has jurisdiction to evaluate that application and determine it by undertaking the *Re S* balancing exercise.

27. In undertaking the balancing exercise Mr Millar does not assert a general right to anonymity for all paediatric care staff in all circumstances. Rather, he points to the discrete and specific purpose for which the parents seek publicity in each of these two cases, namely that the identity of specific individuals is expressly linked to their involvement in the care of the individual child. The proposed publication is for the purpose of identifying staff as being involved in the care and treatment of the child prior to their death in circumstances where the parents are highly critical of that care.

28. Mr Millar places significant weight upon evidence of the potential for there to be a highly negative impact on individuals, and upon the staff collectively, in the event that the parents' stories are taken up and given prominence in social and/or mainstream media. Reference is made to the adverse impact on the staff involved in the high profile cases of Charlie Gard (*Great Ormond Street Hospital v Yates* [2017] EWHC 1909) and Alfie Evans (*Evans v Alder Hey Children's NHS Foundation Trust* [2018] EWCA Civ 805).

29. In support of the case for the two hospital trusts the court has received statements from the following:

- Dr Mike Linney (Registrar of the Royal College of Paediatrics and Child Health 'RCPCH')
- Dr Sonya Daniel (on behalf of the Faculty of Intensive Care Medicine)
- Dr Hilary Cass (a retired Consultant Paediatrician who is now the Paediatric Adviser to the NHS Practitioner Health Programme)
- Rosalind Hooper (Head of Legal Services at the Royal College of Nursing)
- Mr Andrew Welch (Medical Director and Deputy Chief Executive of the Newcastle upon Tyne Hospitals NHS Foundation Trust)
- Dr Simon Broughton (Clinical Director of Child Health at Kings College Hospital NHS Foundation Trust).
- Dr James Fraser President of the Paediatric Critical Care Society.

30. None of the witnesses in support of the hospitals' case had had any direct involvement in the care of either child. The material contained in the witness statements that have been submitted is substantial. The following are the principal points made in these statements:

i) Naming staff will be detrimental to the hospital staff and the hospital's ability to deliver care to children;

ii) Concern as to the invasion of privacy into the private lives of staff;

iii) Experience from other cases demonstrates that, once named, staff may become vulnerable to physical attacks and/or personal attacks in social or mainstream media;

iv) The experience of previous cases and wider research indicates that publicity is likely to have an adverse impact on the mental health and wellbeing of staff;

v) The two hospitals concerned are busy regional/national centres for paediatric care and both are teaching hospitals. Any step which may significantly destabilise the staff is likely to have a detrimental impact upon the many children and families who depend on these hospitals to provide care for very sick children;

vi) Staff working in PICU need to function at optimal levels at all times;

vii) There is a wider concern that the impact of publicity may inhibit decision making by staff in the future or may adversely impact upon recruitment to these crucial front-line services;

viii) In the event of adverse criticism, paediatricians and other staff are not in a position to respond by publishing any response to specific allegations;

ix) Publication of a person's name can now, relatively easily, lead to identification of their address, phone number, email and other information which can then be published on social media;

x) The parents, in any case, will know the identity of all of the treating clinicians. Formal complaints/disciplinary processes exist and, in an appropriate case, treatment decisions can be challenged in the courts through civil proceedings or at an Inquest.

31. It is, again, important to note that neither set of parents sought to challenge this impressive and consistent body of evidence within the proceedings.

32. In each case the NHS hospital trusts assert ECHR Article 8 rights on behalf of their staff members. They do so on the basis that neither set of parents has identified any individual staff members whom it is proposed will be named (despite express requests to do so) and on the basis that no individual staff member has consented to be named and thereby waived what rights they may have under Article 8.

33. Mr Millar submits that the issues that may be brought into the balancing exercise can be drawn from a fairly wide area. There is no presumption in favour of Art 10 rights in a horizontal dispute. Even where a case is heard in open court, that factor does not, of itself, determine whether anonymity should be afforded to a witness. In these cases all but a few of the staff were not witnesses at all. They are not public figures and have not sought publicity. The court should apply an intense and very close focus on the

activities of the NHS and, in particular, the activity on a PICU which is, of its nature, private.

(c) Jurisdiction: Dr and Mrs Abbasi's case

34. Mr David Lock QC, leading Ms Kate Williams-Howes, on behalf of Dr and Mrs Abbasi submits that the RRO in Zainab's case should be immediately discharged and that the hospital's application for a replacement injunction should be dismissed.

35. The premise which is at the core of Mr Lock's submissions is that a court will only have jurisdiction to determine a horizontal dispute as to the balance which is to be struck between the competing ECHR rights of individuals where there is a legally recognised cause of action that has been brought before the court.

36. Where, as here, the court is being asked to impose a restriction upon the parents' rights under ECHR Art 10 to freedom of expression, no restriction can be imposed unless it is one that has been 'prescribed by law' as required by Art 10(2):

> "2. The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, …"

37. Mr Lock submits that there are many decisions of the European Court of Human Rights ('ECtHR') which demonstrate the need for any judicial decision arbitrating upon conflicting Art 8 and Art 10 Rights to be undertaken within a jurisdiction which has been 'prescribed by law' (for example *Axel Springer v Germany* [2012] 55 EHRR 6.

38. Mr Lock asserts that the previous existence of best interest proceedings relating to a now deceased child does not permit the court to entertain a later application concerning the continuation of a reporting restriction injunction. Whilst reserving his position as to whether the court has power under the inherent jurisdiction in any event to prevent the naming of parties or witnesses in proceedings during the life of the child, if it does have such powers they only exist to serve the purpose of the litigation, namely adjudication upon issues relating to the child's terminal treatment. Mr Lock submits that, at the point at which the purpose of the proceedings comes to an end with the death of the child, so too does the jurisdiction (if it exists) to grant injunctions.

39. During Mr Millar's submissions the court had asked what the position would be if there had been no previous proceedings before the High Court during the life of the child. Mr Millar accepted that the hospital staff could not now bring a free-standing action under the Human Rights Act 1998. An action might be considered based upon the tort of misuse of private information. He accepted that the claimants would have to have some form of procedural vehicle in which to bring the issue before the court. However, he submitted that such considerations were not relevant here where there were proceedings under the inherent jurisdiction with respect to each child and those provide the necessary vehicle to enable the court to determine the current dispute. Mr Lock, however, focusses upon Mr Millar's concession that, absent a freestanding claim under the tort of misuse of private information, the hospital staff would have no right to claim an injunction if there were no other extant proceedings. Mr Lock therefore submits that

it cannot be right to use concluded proceedings, which were issued for a different purpose, to establish jurisdiction with respect to the grant of a continuing injunction.

40. Mr Lock's starting position is ECHR, Art 10:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Mr Lock asserts that the onus is upon those who wish to proscribe free speech to establish a basis in law for doing so and to prove their case. The primary case that Mr Lock promotes is that the hospitals are simply unable to establish a process by which to bring this issue before a court for determination in a manner that is 'prescribed by law'. He therefore challenges Mr Millar's focus upon the court undertaking a *Re S* compliant balancing exercise as that balancing stage, which is to establish whether a proposed limitation on free speech is 'necessary in a democratic society', can only be undertaken within a procedure which is, itself, 'prescribed by law'.

41. The developing tort of misuse of private information has clear limits as defined in *Campbell v MGN Ltd* [2004] UKHL 4. Mr Lock's contention that the two hospital trusts cannot bring their present claims on the basis of misuse of private information is accepted by Mr Millar and does not therefore require further elaboration.

42. Mr Lock cautions against confusing SCA 1981, s 37, which, he submits, does no more than give the court jurisdiction to provide a remedy, with the establishment of a free-standing jurisdiction to determine a party's right to be afforded that remedy.

43. More generally, Mr Lock pointed to the fact that the leading paediatric consultants are publicly named on the hospital's web-pages. The general law does not prohibit a patient who is unhappy with treatment speaking out and naming the staff involved and there would be no breach of any legal right held by a named doctor were this to occur. Whilst a doctor is under a duty of confidentiality, a patient is not. If a patient's words are defamatory, then the doctor will have a legal remedy. Any other staff member is in the same position as each is publicly identified in their work by the name badge that they are required to wear.

44. In this context the well-known 'what's in a name?' passage in *Guardian News and Media Limited v Ahmed* [2010] UKSC 1, paragraphs 63 to 65 is of importance:

> "63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much 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. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising 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.

64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that

> "from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer.

65. On the other hand, if newspapers can identify the people concerned, they may be able to give a more vivid and compelling account which will stimulate discussion about the use of freezing orders and their impact on the communities in which the individuals live. Concealing their identities simply casts a shadow over entire communities."

45. In circumstances where it is not possible for those seeking the court's injunctive protection to establish a substantive legal right to such a remedy, Mr Lock submits that the court would be acting without principle by granting an injunction to protect this non-private identifying information from disclosure. The court cannot and should not deploy the *Re S* balancing exercise in a jurisdictional vacuum; in Mr Lock's words 'the court does not have a portable palm tree'. If there is no substantive legal right or cause of action, that is a matter for Parliament and not the court.

46. If, contrary to his primary case, the court is obliged to conduct a balance of rights in line with *Re S*, Mr Lock submits that that balance comes down firmly in favour of permitting publication of the names of staff for the following reasons:

    a) Zainab's parents have Art 8 rights to tell their own story and Art 10 rights to be free to do so;

    b) They understand that they need to progress their claims in a modest and restrained manner;

    c) The issues involve matters of intense public interest, in particular relating to the operation of the hospital's paediatric department;

    d) The court proceedings before the Family Division did not concern the matters that the parents now wish to raise.

    e) The applicants rely on the provisions on section 12 HRA where an application is made to restrain their freedom of speech

47. Mr Lock relied upon the judgment of Mr Justice Munby (by then Munby LJ) at first instance in *Re Ward* [2010] EWHC 16 (Fam) as an example of how the balancing exercise should be undertaken in a case such as the present where groups of social workers, experts and treating clinicians sought protection by injunctive relief from being identified. Paragraphs 180 and 181 are of particular relevance:

> "180. In particular, the arguments founded upon the fear of being exposed to targeting, harassment and vilification, with consequent risk to families and careers, and the consequentially disadvantageous effects all this may have on the child protection and family justice systems, are, broadly speaking, about as valid but certainly no more valid than in the other two cases. Again here, as there, the evidence is, by and large, general rather than specific and as striking for what it does not say as for what it does. One can sympathise with conscientious and caring professionals who cannot understand why they should be at risk of harassment and vilification for only doing their job – and a job, moreover, where participation in the forensic process is not, as it were, part of the 'job specification' as in the case of social workers and expert witnesses. But the fact is that in an increasing clamorous and decreasingly deferential society there are many people in many different professions who, however much they might wish it were otherwise, and however much one may deplore the fact, have to put up with the harassment and vilification with which the Internet in particular and the other media to a lesser extent are awash. And the arguments based upon the risk of unfounded complaints being made to the GMC has, as it seems to me, no more weight in the case of the treating clinicians than in the case of the expert witnesses.
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> 181. The question, at the end of the day, is whether having regard to all the evidence and other material before the court, the balance comes down in favour of conferring anonymity. And the fact is that in the case of the treating clinicians, as in the case of both the expert witnesses and the social workers, the claim for injunctive relief here is not being put by reference to the particular circumstances or particular vulnerabilities of specific individuals. On the contrary, the treating clinicians disavow any concerns in relation to Mr and Mrs Ward. The claim in all three cases

> is, in reality, a 'class' claim, that is, a claim that any professional who falls into a certain class – and in the case of both the social workers and the treating clinicians the membership of the class is very large indeed – is, for that reason, and, truth be told, for that reason alone, entitled in current circumstances to have their identity protected, in plain language to have their identity concealed from the public. That is a bold and sweeping claim, to be justified only by evidence and arguments more compelling than anything which Mr Lock or his clients have been able to put before me."

48. A further argument relied upon by Mr Lock is based on ECHR, Art 6. He contends that the hospital is unable to succeed in its claim without establishing a case on the facts of the individual case. Where, as here, there has been no fact-finding procedure, the parents' rights to a fair trial under Art 6 would not be met if the court relied upon the evidence adduced by the hospitals. On this point, however, it is relevant that the parents have expressly asserted that a fact-finding hearing is not necessary.

d) Jurisdiction: Isaiah Haastrup

49. Mr Haastrup and Ms Thomas had the benefit of Legal Aid funding for a relatively short period prior to the hearing which was, however, long enough to support the instruction of solicitors and counsel, Mr Bruno Quintavalle, who prepared full and clear written submissions on their behalf. By a simple coincidence of timing, the damages payment arising from the clinical negligence claim made with respect to Isaiah's birth was received shortly before the hearing and resulted in the removal of Legal Aid cover. The court is grateful to the solicitors and Mr Quintavalle who agreed to continue to act on a Pro Bono basis so that Mr Haastrup's and Ms Thomas's submissions could be presented to the court orally.

50. Mr Quintavalle adopted and endorsed Mr Lock's core submissions. Going further, however, he submitted (for the first time towards the close of the oral hearing) that the original RRO should not have been made in the form that it was made and anonymity should not have been granted to individuals who were neither parties nor witnesses. The Family Court, he submitted, has no jurisdiction to grant a RRO to cover the identification of anyone who is not a witness or who has otherwise been named in the proceedings, save, possibly at a very early interim stage before any witness statements have been filed. The original RRO was therefore made without jurisdiction and should be discharged. To do otherwise would be an abuse of process.

51. Mr Quintavalle also submits that the case for publication of the names of the professionals involved is strongly supported by guidance and authority. The guidance relied upon is '*Practice Guidance January 2014: Transparency in the Family Courts: Publication of Judgments*' issued by Sir James Munby as President of the Family Division. The guidance, which as the title indicates, is focused on the publication of judgments, specifies that judgments arising from 'any application for an order involving the giving or withholding of serious medical treatment' fall into the category where, if a judgment already exists, 'the starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the judgment should not be published' (paragraph 17). The guidance goes on to require that public authorities and expert witnesses should be named in the judgment approved for publication, 'unless there are compelling reasons why they should not be so named' in all cases which are to be published (paragraph 20).

52. Pausing there, it is right to note that the subject matter of the 2014 guidance is the publication of judgments, and is therefore not directly focussed upon the issues in the present applications. There are a number of filters through which a name that is to be published must pass before it will appear in a published judgment. The first, and most significant, is that the individual professional will only be mentioned in the judgment if the judge considers that to do so is relevant. In a case involving medical treatment, the judge would not embark upon naming each and every member of the caring team of doctors, nurses, physiotherapists, caring assistants and other staff who may have treated the child. The process of judgment writing gives the judge a substantial editorial role in determining which, if any, of the caring staff are to be identified. Secondly, and importantly, that editorial role would be undertaken only after the judge had conducted a full hearing in which any contested findings of fact had been litigated. Even if a professional is identified in such a judgment, publication of the judgment will not occur if there are compelling reasons for not doing so. If published, the name of the professional will be withheld on the same basis, namely there being compelling reasons.

53. Mr Quintavalle relies upon the 2014 Guidance to support a submission that, at the very least, the names of the clinicians who gave evidence in the original proceedings should be published, there being no compelling reason to the contrary.

54. To further support his argument Mr Quintavalle relies upon a line of first instance decisions of Sir James Munby, which are neatly summarised at paragraph 24 of his judgment as President of the Family Division in *Re J (A Child)* [2013] EWHC 2694 (Fam):

> 'The court may likewise, by an appropriate injunction, afford anonymity to other participants in the process, for example, an expert, a local authority, or a social worker. Such injunctions, however, will not readily be granted: see the discussions in *A v Ward* [2010] EWHC 16 Fam), [2010] 1 FLR 1497, and *In re X and others (Children) (Morgan and others intervening)* [2011] EWHC 1157 (Fam), [2012] 1 WLR 182, sub nom *Re X, Y and Z (Expert Witness)*, [2011] 2 FLR 1437. As I put it in *A v Ward*, para [181], any such application in relation to an expert or a social worker must be justified by reference to "the particular circumstances or particular vulnerabilities of specific individuals." What I referred to as a 'class' claim, that is, "a claim that any professional who falls into a certain class – and in the case of … social workers … the membership of the class is very large indeed – is, for that reason, and, truth be told, for that reason alone, entitled in current circumstances to have their identity protected, in plain language to have their identity concealed from the public", will not succeed. Anonymity should not be extended to experts, local authorities and social workers unless there are compelling reasons. Again, I shall return to this below.

55. Mr Quintavalle accepts that in *Re J* the President was focussed upon the issue of transparency within the Family Justice system (as the extensive and illuminating discourse at paragraphs 25 to 40 demonstrates). He submits, however, that identical principles apply here.

56. It is of note that in the judgment in *Re J*, given in September 2013, the President considered the developing influence of the internet (paragraphs 41 to 43). He noted the speed with which publication on the web had developed by observing that submissions given to him in proceedings in 2004 coincided with the launch of Facebook and all that

followed in very quick succession thereafter. At paragraph 43, Sir James, having briefly summarised some of the key characteristics of publication via the internet, observed:

> 'All of this, it goes without saying, poses enormous challenges. The law must develop and adapt, as it always has done down the years in response to other revolutionary technologies. We must not simply throw up our hands in despair and moan that the internet is uncontrollable. Nor can we simply abandon basic legal principles. For example, and despite the highly objectionable nature of much of what is on the internet, we must, at least in the forensic context with which I am here concerned, cleave to the fundamentally important principles referred to in paras [37]-[40] above.'

57. Mr Quintavalle relies further upon the judgments given by Mr Justice Munby (by then Lord Justice Munby, but sitting to complete the case at first instance) in *Re Ward* [2010] EWHC 10 (Fam) and an earlier judgment (again at first instance) in the same case, *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765. The proceedings related to an application for a care order, based upon allegations of physical harm relying upon medical evidence, which had been found not to be proved. The applications falling for determination in *A v Ward* were for contra mundum injunctions to maintain the anonymity of the experts, the social services staff and the treating clinicians who had undertaken the care of the child. Munby J considered that the arguments relied upon in relation to each group were 'much of a muchness' and applied *mutatis mutandi* to each. By the time the judgment turned to the treating clinicians, the case for anonymity had already been rejected with respect to the two former groups. At paragraphs 180 and 181 the case relating to the treating clinicians is described:

> 'In particular, the arguments founded upon the fear of being exposed to targeting, harassment and vilification, with consequent risk to families and careers, and the consequentially disadvantageous effects all this may have on the child protection and family justice systems, are, broadly speaking, about as valid but certainly no more valid than in the other two cases. Again here, as there, the evidence is, by and large, general rather than specific and as striking for what it does not say as for what it does. One can sympathise with conscientious and caring professionals who cannot understand why they should be at risk of harassment and vilification for only doing their job – and a job, moreover, where participation in the forensic process is not, as it were, part of the 'job specification' as in the case of social workers and expert witnesses. But the fact is that in an increasing clamorous and decreasingly deferential society there are many people in many different professions who, however much they might wish it were otherwise, and however much one may deplore the fact, have to put up with the harassment and vilification with which the Internet in particular and the other media to a lesser extent are awash. And the arguments based upon the risk of unfounded complaints being made to the GMC has, as it seems to me, no more weight in the case of the treating clinicians than in the case of the expert witnesses.
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> The question, at the end of the day, is whether having regard to all the evidence and other material before the court, the balance comes down in favour of conferring anonymity. And the fact is that in the case of the treating clinicians, as in the case of both the expert witnesses and the social workers, the claim for injunctive relief here is not being put by reference to the particular circumstances or particular

> vulnerabilities of specific individuals. On the contrary, the treating clinicians disavow any concerns in relation to Mr and Mrs Ward. The claim in all three cases is, in reality, a 'class' claim, that is, a claim that any professional who falls into a certain class – and in the case of both the social workers and the treating clinicians the membership of the class is very large indeed – is, for that reason, and, truth be told, for that reason alone, entitled in current circumstances to have their identity protected, in plain language to have their identity concealed from the public. That is a bold and sweeping claim, to be justified only by evidence and arguments more compelling than anything which Mr Lock or his clients have been able to put before me.'

58. Mr Quintavalle therefore submits that the principles of open justice described and endorsed in the judgments of Sir James Munby in this line of cases and in the 2014 Guidance should apply in full to the present applications, with the consequence that anonymity should not be granted on the basis of the class claim that is argued for by the NHS Trusts.

(e) PA Media position

59. For PA Media, Mr Vikram Sachdeva QC made short and focussed oral submissions. Firstly, he endorsed the practice currently undertaken by most of the judges of the Family Division by which clinicians involved in these cases were not named. That was also the practice in the Court of Protection and, he submitted, there is no basis for there to be a distinction between the COP and the Family Division on this point.

60. The basic position of PA Media, as described by Mr Sachdeva, is that 'it would be absurd if there is no jurisdiction to anonymise clinicians and family members following the death of a child in these cases'. There would be a chilling effect on clinicians if they knew that there was no power to provide anonymisation. Mr Sachdeva therefore endorsed the submissions of Mr Millar on the question of jurisdiction.

61. Mr Sachdeva drew attention to the decision in the case of *Re M* both at first instance [*Manchester University Foundation NHS Trust v N* [2020] EWHC 6 (Fam) (Lieven J)] and on appeal [*Re M (Declaration of Death of a Child)* [2020] EWCA Civ 164 (Sir Andrew McFarlane P, Patten and King LJJ)]. In both judgments consideration is given to the judgments of Sir James Munby in *A v Ward* and *Re J*, now relied upon by Mr Quintavalle. At first instance, Lieven J dealt with the issue of whether or not the class of treating clinicians and staff should be anonymised and protected by a RRO. After quoting from the relevant paragraphs in Sir James Munby's judgments, Lieven J said:

> '11. Ultimately, in all these cases, the matter comes down to a balance between competing interests. There is an undoubted, and critical importance, in open justice and transparency of the court system. There is also a critically important public interest in the freedom of the press to report without restriction, protected by article 10 ECHR. There is a more specific public interest on the facts of this and similar cases, in the public understanding what is happening in these sensitive cases, and the very difficult factual and human issues involved. Often, there is an important public interest in protecting the identity of the child and the wider family. However, in this case the parents have waived their and M's confidentiality, and the Guardian raises no objection to this.

12. However, there are competing interests. Firstly, that of the treating professionals to their private life (protected by article 8). Secondly, there is a strong public interest in professionals who are doing a difficult and extremely important job (the care of critically ill children) in being able to do that job without feeling that their privacy and their ability to work is being jeopardised. Not least, the public interest lies in ensuring that appropriately qualified people do not avoid these type of cases because of the fear of becoming the target of hostile comment, and that comment even extending to their families.

13. My task is to balance those interests. In my view the public interest in open justice is very largely protected in the present case by the fact that the proceedings are in public and the judgment is in public. Further, relevant to the facts of this case is that the Hospital is named, as is the child. There is therefore no question of secret justice, or the public not being fully informed as to what is happening to M and in the proceedings generally.

14. It is, in my view, difficult to see why either open justice or the public interest is harmed, save to a minimal degree, by the anonymisation of the treating professionals. This is not a medical negligence case, and although the Father has made allegations about the treatment, those are not substantiated by evidence and not pursued by Mr Quintavalle. On the other side of the balance, I do take into account the fact that this is not a case where there have been (so far as I am aware) hostile comments either in the press or social media about the hospital staff, and there has not been any harassment towards them. There has been some, but not extensive, press comment, although it is not possible to know whether this will increase or decrease after the judgment. However, these type of cases concerning the treatment of very ill young children, raise very strong views and there is a well documented history of hostile and distressing comments about treating staff in other cases. I also note that the Father has made some very damaging, and wholly unevidenced, allegations against staff. I do not consider it appropriate to wait until such hostile comment, or worse, arises and then decide that an RRO should be granted. That is to shut the door after the horse has bolted.

15. I accept Mr Farmer's point [PA Media journalist] that many people may find it traumatic to be named in the press in the course of litigation, and that is no ground to grant anonymity. However, the position of treating professionals is somewhat different. There is a significant public interest in allowing them to get on with their jobs, and in minimising the disturbance to them and their other patients whilst they are providing that care.

16. These cases are necessarily fact specific and I do not purport to set down general guidance. I do however somewhat differ from the views expressed by the President in *A v Ward* as set out above. This may be because the facts of the case differ. In my view there is an important distinction between professionals who attend court as experts (or judges and lawyers), and as such have a free choice as to whether they become involved in litigation, and treating clinicians. The latter's primary job is to treat the patient, not to give evidence. They come to court not out of any choice, but because they have been carrying out the treatment and the court needs to hear their evidence. This means they have not in any sense waived their right to all aspects of their private life remaining private. In my view there is a strong public interest in allowing them to get on with their jobs without being publicly named. I

do not agree with the President that such clinicians simply have to accept whatever the internet and social media may choose to throw at them. I note that the President's comments were made before the well publicised cases of *Gard* and *Evans*, and perhaps at a time where the risks from hostile social media comment were somewhat less, or at least perceived to be less. There may well be cases where the factual matrix makes it appropriate not to grant anonymity and each case will obviously turn on its own facts. But in my view the balance in this case falls on the side of granting the order.'

62. In the course of my judgment in the Court of Appeal, with which the other two members of the court agreed, I referred to the challenge to the principle behind Lieven J's decision on the RRO in these terms:

> '101. Grounds 4 and 5 (set out at paragraph 61 above) relate to the RRO. It is submitted that, in so far as the judge made the order by identifying a class of professionals who should be protected, her decision was at odds with the approach described by Sir James Munby P in *A v Ward* [2010] EWHC 16 (Fam) and *Re J (A Child)* [2013] EWHC 2694 (Fam).
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> 102. It is not necessary to descend to detail on this point in a judgment which is already overly lengthy when dealing with permission to appeal. In short terms, in the decade since Sir James Munby considered this matter the world has changed. The manner in which social media may now be deployed to name and pillory an individual is well established and the experience of the clinicians treating child patients in cases which achieve publicity, such as those of Charlie Gard and Alfie Evans, demonstrate the highly adverse impact becoming the focus of a media storm may have on treating clinicians. The need for openness and transparency in these difficult, important and, often, controversial cases is critical but can, in the judgment of the court, be more than adequately met through the court's judgments without the need for identifying those who have cared for M with devotion since September 2019.'

63. Mr Sachdeva described the decisions of Lieven J and the Court of Appeal in that case as the single most relevant authority and, on behalf of PA Media, he urged the court to adopt the same approach in the present applications.

64. On the facts of the two cases before the court, Mr Sachdeva stated that PA Media did not argue in favour of the naming of the treating clinicians in either case. He submitted that it was most curious that neither set of parents had sought findings of fact during the present hearing in circumstances where there is an obvious dispute and where neither has been in any way explicit as to what they will say and who they will name if the RRO is discharged.

(f) Hospitals' response

65. Responding to Mr Lock's submissions, Mr Millar made a number of specific points. Firstly, he accepted that there are three requirements embedded within Art 10(2), namely that any restrictions on free speech are 'prescribed by law', for one of the legitimate aims and 'necessary in a democratic society'. These requirements apply in a 'vertical' dispute, where the State is seeking to impose restrictions, but they do not, in Mr Millar's submission, apply to a 'horizontal' dispute such as the present. Mr Millar relies firmly on the House of Lords decision in *Re S* where, in a dispute between the

rights of a child who sought to restrict the right of the media to report aspects of a criminal trial, the House of Lords unanimously held that the foundation of a court's jurisdiction in such cases was now derived from the Convention rights contained in the ECHR (see Lord Steyn at paragraphs 22 and 23).

66. Mr Millar submits that the Art 10 right to free speech is sufficiently laid down as to be clear in domestic law. The presence of the existing injunctions, and the hospitals' claim for those injunctions to continue or be replaced, involve a breach of, or restriction to, the ordinary domestic law on freedom of speech sufficient to trigger the court's jurisdiction to determine the issue. The certainty of law requirement is satisfied in this manner. The need for any intervention to restrict Art 10 rights to be 'prescribed by law' does not apply to such horizontal disputes which, as here, clearly involve consideration of whether a breach of the ordinary domestic law on free speech should continue.

67. Similarly, Mr Millar submits that the requirement for any interference to be 'necessary in a democratic society' does not apply in the context of Art 10(2) in a horizontal case where the State is not applying to restrict free speech. The need to consider proportionality does come in, but only as part of the balancing exercise, in a horizontal case where it is applied as a check on each side of the balance (see Lord Steyn in *Re S* at paragraph 17 – set out at paragraph 21 above).

68. Secondly, Mr Millar roundly dismisses Mr Lock's attempts to cast the hospitals' case as either being brought under the tort of misuse of private information or through the development of some completely new tortious jurisdiction. The present case, he submits, is both conceptually and in terms of legal principle wholly different to the jurisdiction that has developed from the House of Lords decision in *Campbell v MGN Ltd*. Here the court is discharging the positive obligation on a State under Art 8 to protect the Art 8 rights that have been brought before it on the facts.

69. Thirdly, and insofar as Mr Lock submitted that it was not permissible for the court to limit his clients' actions on the basis that, once the information is out, others may act in an unlawful or abusive manner, Mr Millar noted that no authority had been cited in support of the submission. In reality, he submitted, Art 10 cases often include a restriction on one person or agency because of consequences that may flow from the future actions of unknown others. The 'D Notice' process is one example. The approach of the ECtHR Grand Chamber in *Delfi AS v Estonia (Application 64569/09)* (see paragraphs 144 to 147) is another.

70. Finally, in response to Mr Lock, Mr Millar submitted that the fact that some of the names of the leading doctors at each hospital may be publicly known, misses the issue at the heart of the hospitals' case which is the publication of names *coupled with* a particular set of facts.

Discussion and conclusions

(a) The starting point

71. It is important to be clear in identifying the starting point for determining the central issue in these two applications. The starting point is that, in both cases, a RRO covering the treating clinicians and staff is currently still in force, having been made during the currency of the original inherent jurisdiction proceedings and during the life of each

child. Each of the two orders was expressly made on the basis that it would have effect during the life of the child and thereafter until further order and that it would, therefore, continue in force after the child's death.

72. All parties accept that the RROs are currently in force and have not otherwise expired. The original orders were not appealed either at the time or subsequently. This hearing has not been established to conduct an appeal against the validity of the RROs. If such an appeal were intended, it would have to be the subject of an application to the Court of Appeal, rather than to this court.

73. Although, in the latter stages of oral submissions, the High Court's jurisdiction to make a RRO with respect to NHS staff who were not parties to the original proceedings was questioned, the hearing had not been constituted to engage with that issue in terms of the parties' skeleton arguments or the provision of authorities. As an issue, rather than merely not being in focus, it was not on the radar screen to the extent that the court was simply unable to engage in detailed argument on the topic.

74. The extent of the court's inherent jurisdiction is developed or curtailed on a case by case basis under the common law. For some years, the High Court has accepted that in highly sensitive cases involving end of life decisions it has jurisdiction to make RROs protecting the anonymity of the treating staff. The decisions of the High Court in these two cases and in others demonstrates that the judges of the Family Division have assumed and accepted that the jurisdiction to make such orders in an appropriate case exists. Although the point was not argued four-square, the Court of Appeal endorsed the practice in *Re M*. For the purposes of this hearing, this court is entitled, indeed required, to accept, in accordance with the precedent that has now developed, that the court did have jurisdiction to make the original RROs in each case and that that must be the starting point in considering the current applications. If the existence of the jurisdiction to make RROs of this nature during the life of the child, and for such orders to extend beyond the death of the child, is to be challenged, then that challenge is for a different court on another occasion.

(b) Does the court have jurisdiction to determine the issue?

75. From that starting point, it follows that the court has before it two RROs which are currently in force and which are now the subject of contested applications either for revocation or renewal. If the court were to take the view that it did not have jurisdiction to entertain the parents' applications for discharge, then the effect would be that, subject to any appeal made out of time as to the making of the original orders, the orders would remain in force and the parents would continue to be bound by them. That would be a wholly unsatisfactory and untenable result. Where it is accepted that the court has made an order which is currently in force, the court, as a matter of first principles, must have jurisdiction to review the continuation of that order.

76. Mr Lock's primary submission is that the court will only have jurisdiction to determine a horizontal dispute between competing ECHR rights where there is a legally recognised cause of action that has been brought before it. Mr Millar accepts that, if there had been no previous proceedings and there were no existing court orders, that submission might be sound. Where, however, there is a live RRO, which will continue in force unless the court discharges or varies it, the question of whether or not there may now be a recognised cause of action that could support the making of a fresh

injunction, cannot impact upon the court's jurisdiction to determine issues about the existing injunction. The logical consequence of Mr Lock's submission is that, if, as he submits, the NHS staff cannot now rely upon a legally recognised cause of action to justify a continued injunction, then the court does not have jurisdiction to determine his client's application to discharge the existing injunction.

77. I stress that these observations relate solely to whether the court has 'constitutive' jurisdiction to entertain the present dispute. I accept that the question of whether or not the court may have jurisdiction to grant a fresh, free-standing, injunction application in favour of the NHS staff has some relevance to the issue of whether or not a continuation of the RRO orders is justified, but it does not go to the court's jurisdiction to hear and determine the present dispute.

78. Further, whilst the primary purpose for which the proceedings under the inherent jurisdiction, namely to determine the all-important issues concerning the welfare of each child, no longer exists, it must be the case that the proceedings still continue because there is a continuing RRO made in each case in the course of those proceedings. Both sets of parents have made their applications within the original proceedings. The RROs were made in the original proceedings and do not have any independent existence or standing outside of them.

79. It follows that, on two bases, the court must have constitutive jurisdiction to decide the issues between the present parties within the respective inherent jurisdiction proceedings. The two bases being, firstly, the need for the court, if called upon, to review the continuation of orders that it has made that continue to be in force, and, secondly, because the original proceedings continue insofar as the RROs were made within them and those orders continue to be in force.

(c) How should the balance be struck?

80. Moving on to the manner in which the jurisdiction to review the RROs is to be exercised ('the adjudicative jurisdiction'), Mr Millar submits that the court is required to determine this horizontal dispute, in accordance with the ECHR and the HRA 1998, by applying the balancing model described by the House of Lords in *Re S* and by marking the outcome of that balancing exercise by deploying the power under SCA 1981, s 37 accordingly.

81. Although, as I have already recorded, Mr Lock's submission about the absence of a recognised cause of action upon which the NHS staff could rely were focussed on whether this court now has jurisdiction to determine the issue and, as Mr Millar submits, conduct the *Re S* balancing exercise, the parents' argument may be recast into a submission that, even if the court has jurisdiction to entertain the issue, it should not undertake a *Re S* balancing where the right underpinning one side of that balance is not 'prescribed by law' [Art 10(2)].

82. Mr Millar relied upon paragraph 48 of the Court of Appeal decision in *Re S* in which Hale LJ (as she then was) said:

> '... An action for breach of confidence cannot be the only context in which the courts have to strike a fair balance between the rights of individuals under article 8 and article 10. <u>While the courts cannot invent a new cause of action between private</u>

> persons, the same issues arise whenever it has jurisdiction to restrain publication. If anything, the current context is stronger than the purely private law context of an action for breach of confidence (such as arose in Campbell v MGN Ltd [2003] QB633).' [emphasis added]

Mr Lock relied upon the first half of the emphasised sentence, whereas Mr Miller counters by asserting that Hale LJ is not dealing with the circumstances of the present applications where the court does have jurisdiction because of the positive obligation established by HRA 1998, s 6.

83. In considering the second half of the key sentence in paragraph 48 of Hale LJ's judgment, reference must also be made to paragraph 40, where the approach to the issue of jurisdiction in circumstances where the HRA 1996 had come into force is considered. The issue in *Re S* related to the existence and extent of the inherent jurisdiction, as exercised in the Family Division, to restrain publication. At paragraph 40, Hale LJ said:

> 'Now that the Human Rights Act 1998 is in force, the relevance of the jurisdiction may simply be to provide the vehicle which enables the court to conduct the necessary balancing exercise between the competing rights of the child under article 8 and the media under article 10.' [emphasis added]

This is an important observation in the context of the present dispute. It was accepted by the House of Lords (paragraph 23) as valid and, in my view, describes precisely the process that Mr Millar has submitted applies here.

84. It was of note that neither in writing, nor during his oral submissions, did Mr Lock engage with Mr Millar's assertion that, if a balance has to be struck and the court has jurisdiction to do so, then the approach described by Lord Steyn in *Re S* must be adopted.

85. On this point, I accept Mr Millar's submission. The three requirements included within Art 10(2), of which 'prescribed by law' is one, apply to vertical disputes in which the state is seeking to restrict freedom of expression, for example in the interests of national security, but do not apply to a horizontal dispute between individuals, or groups of individuals, such as the present. Insofar as there are reported ECtHR decisions indicating that 'prescribed by law' is taken into account even in a horizontal dispute, that is so because, by the time a case reaches the ECtHR, the court in Strasbourg is investigating how the state (in the form of its courts) determined the horizontal dispute and, to that extent, the court process (which is a vertical intervention) must be one that is prescribed by law.

86. Here, under HRA 1998, s 6, the court, as a public authority, must not act in a way which is incompatible with a Convention right. The domestic law therefore prescribes that the determination of the question in the present case concerning the continuation, or otherwise, of the RROs must be compatible with the Convention. That is through the court discharging the positive obligation created by s 6 by striking the balance between the Art 8 and Art 10 rights in play in accordance with the approach in *Re S*.

87. Further, and separately, in my view, the parents' case comes up once again against the fact that, in the course of properly constituted proceedings, and on the basis of the accepted existence of a jurisdiction to do so, the court has already made the injunction

orders, the continuation of which is now disputed. These orders are in existence and were validly made (the 'starting point') on the basis that they would continue until further order. The determination of whether a 'further order' should now be made is therefore one which, within the inherent jurisdiction, will be undertaken within a process that is prescribed by law.

(d) 'Class' anonymity

88. Mr Quintavalle's submissions against the granting of anonymity to a group of individuals based on their membership of a 'class', for example 'treating clinicians', rather than any individual vulnerabilities or other features, require careful evaluation.

89. The first observation to make is that all of the material relied upon in this regard relates to the openness of proceedings before the Family Court and not to the separate and distinct context in focus here, namely the treatment given to a child in hospital. It relates to (or in the case of the guidance, assumes) that judgment has been given by a court following contested proceedings where facts have been found. In such circumstances, the only names potentially in play for anonymisation would be treating clinicians identified in the judgment, and not the entire group of treating clinicians and staff. The exception to this is *A v Ward* where, again after an extensive fact-finding process, the court had concluded that allegations of physical harm based on medical evidence were not established.

90. Secondly, and importantly, the references relied upon represent the court's approach up to 2014. Although that was only 7 years ago, much has occurred in the context of the burgeoning of internet and social media publishing during that short time. Also, as Sir James Munby's judgment demonstrates, much had already changed during the preceding 7 years. Again as Sir James noted, the potential for 'harassment and vilification' of professionals via social media existed then and, as is well established, has developed exponentially since then.

91. In particular, the court is itself aware from direct involvement in the cases of Charlie Gard and Alfie Evans, treating clinicians as a group and any individual member of that group are all seen as legitimate targets for the most vile and unbounded threats and denigration across social media.

92. Taking that point further, this court now has extensive, reliable and unchallenged evidence (listed at paragraph 30) establishing the highly negative impact of unfettered social media targeting both on the safety and well-being of individual staff but more generally on the system as a whole. I take that evidence very seriously indeed. I accept that the principal points listed at (i) to (x) at paragraph 30 are, at least for the purposes of these applications, generally established. The situation thus described is a long way, and the wrong way, down scale of seriousness, from that described by Sir James Munby in *A v Ward*.

93. Thirdly, all of the authoritative material relied upon in this regard emanated from Sir James Munby sitting at first instance, or in guidance as President. No authority has been produced to indicate that the approach taken in this line of cases has either been endorsed by the Court of Appeal or followed by other judges of the Division. Indeed, it is of note that the practice in recent times, as represented by the orders made in these two cases and in *Re M*, is for judges to grant RROs protecting the anonymity of treating

clinicians and others in a manner which is wholly contrary to the approach taken in *A v Ward*. That practice has been endorsed by the Court of Appeal in *Re M*.

94. It is to be noted that Sir James Munby's conclusion, that 'compelling' reasons are required before anonymity could be afforded to the class of individuals involved in providing treatment to a child, is not supported by reference to any domestic or Strasbourg authority. Moreover, it is a conclusion which is at odds with the express stipulation made by Lord Steyn in *Re S* that neither Art 8 nor Art 10, as such, has precedence over each other. The importation of the need to establish compelling reasons would automatically afford precedence to Art 10 in every such case.

95. Standing back and looking at the issue as it is presented now, in 2021, the time has come to draw a line under *A v Ward* insofar as it purported to establish that anonymity is not to be afforded to a class of professionals unless there are compelling reasons for doing so. The approach in law is that set out by Lord Steyn in *Re S* and in respect of the requirement for 'compelling reasons' the judgment in *A v Ward* must be regarded as *per incuriam* and should not be followed. In accordance with *Re S*, there should be no default position, or requirement for 'compelling reasons', in such cases. Any such application should turn on its own facts, including the overall context, where that is made out, as to the significant negative impact that the unrestricted and general identification of treating clinicians and staff may generate.

96. I would, with every due respect to Sir James Munby, go further and record that I do not agree with his evaluation of the situation as it was even in the context of 2014. In particular, I would dissociate myself from the following passage in *A v Ward*, which, in my view, is simply wrong:

> 'One can sympathise with conscientious and caring professionals who cannot understand why they should be at risk of harassment and vilification for only doing their job – and a job, moreover, where participation in the forensic process is not, as it were, part of the 'job specification' as in the case of social workers and expert witnesses. But the fact is that in an increasingly clamorous and decreasingly deferential society there are many people in many different professions who, however much they might wish it were otherwise, and however much one may deplore the fact, have to put up with the harassment and vilification with which the Internet in particular and the other media to a lesser extent are awash.'

Why should the law tolerate and support a situation in which conscientious and caring professionals, who have not been found to be at fault in any manner, are at risk of harassment and vilification simply for doing their job? In my view the law should not do so, and it is wrong that the law should require those for whom the protection of anonymity is sought in a case such as this to have to establish 'compelling reasons' before the court can provide that protection.

The Balancing Exercise

97. In determining where the balance lies, the approach remains as stated by Lord Steyn in *Re S*, without gloss, so that neither the Art 8 rights of the NHS staff, nor the Art 10

rights of the parents, as such, have precedence. An intense focus is therefore required on the comparative importance of the specific rights being claimed with respect to each.

(i) The Parents' Art 10 and Art 8 rights

98. In favour of the Abbasi parents' application is their desire to exercise the right to free speech in order to describe and comment upon the care given to their daughter. They are dissatisfied with the care provided and wish to name the doctors and others who cared for and treated her. Separately, they also wish to criticise the treatment that they, themselves, received from hospital staff. This Art 10 right to free speech falls to be protected by the court (in balance with other rights). The parents have, the court is told, no intention of acting unlawfully, but, if they did, then those affected would be able to seek redress under the law of defamation.

99. Further, it is said, and I accept, that it is important in society for material of public interest to be given to the Press so that it may perform the vital role as public watchdog and alerting the wider public to matters of legitimate concern.

100. Mr and Mrs Haastrup seek to name the treating clinicians who gave evidence to the court about their child. They assert that evidence of this nature should be given in public and that, just as would be the case with an expert witness, there should be no anonymity.

101. Mr Quintavalle argues, and I accept, that the 'right to tell one's story' is embraced not only by Art 10 but by Art 8 as well. Mr Haastrup now wishes to tell his story and to do so by naming those employed by the NHS Trust who were involved in it.

102. In evaluating the case of both sets of parents, it is, in my view, necessary to have regard to the absence of any fact-finding process and, indeed, to the lack of any specificity in either case regarding the substance of the allegations that they wish to make or the identity of those whom they wish to name when doing so. The court is told, for example, that Dr and Mrs Abbasi wish to accuse certain of the treating clinicians of telling lies by raising safeguarding concerns against them as parents, yet no detail has been provided. Mr Haastrup's need to tell his story publicly is relied upon, but, in so far as it relates to those providing treatment to his son in the weeks following the traumatic birth, no detail is given.

103. The absence of a fact-finding process certainly robs the parents of the very solid ground that would be created if one had taken place and which had resulted in a vindication of their claims, but the point goes much further where, as here, there is simply no particularity at all about the factual claims that are to be made or the story that is to be told. Without such detail, the court has no means of evaluating what, if any, public interest there may be in what is to be said if the RRO is lifted. Whilst the parents can properly rely upon a general right to free speech, and are not obliged to tell the court what they wish to say, where they choose not to give particulars then it is not possible to afford additional weight to that right by reference to the public importance of the content of the message that each parent wishes to broadcast.

104. A factor that is potentially in favour of affording additional weight to the parents' case is the acceptance that, if there were no existing RRO, those representing the hospital staff would have to issue a free-standing application which, Mr Millar accepts, would need to be based upon an existing recognised cause of action. They have not done so

and, for the reasons that I have given, there was, in law, no requirement for them to do so because of the continuing existence of the current injunctions. This court has not been invited to evaluate what the prospects of success would be in the event that a free-standing application were now made. In those circumstances, given the court's jurisdiction to proceed on the basis of the present injunctions, this point cannot of itself carry great weight in the balance.

(ii) The treating clinicians' Art 8 rights

105. On the other side of the balance lie the private life rights under Art 8 of the two groups of NHS doctors and staff. In this regard, for the reasons given at paragraph 91, those for whom protection is sought are entitled to look to the law to respect their right to a private life and for that to be balanced, without precedence to the claims of others, and without the need to establish some compelling reason before the court may act.

106. Here, substantial weight must be given to the strong and coherent body of evidence that has been adduced and which is summarised at paragraph 30. I do not repeat that summary here, but the potential for individuals to become vulnerable to physical or personal attacks and to suffer adversely in terms of their mental health and wellbeing, requires to be taken seriously. The experience of professionals and the court around the cases of Charlie Gard, Alfie Evans and others, lead this factor now, in 2021, to attract significantly more weight than would have been the case even a decade earlier.

107. More generally, and considering the public interest, the potential negative impact upon morale, integrity of the staff group and its ability to function, and upon staff recruitment and retention, for those providing care for the most vulnerable and sick children, is of real concern.

(iii) Intense focus

108. For the reasons that I have given, the parents' respective cases in favour of the right to name the treating clinicians and staff is not one that lends itself readily to the application of intense focus. Their claims, in each case, lack any particularity or granular detail, and amount to a bald assertion of the right to speak freely about the care given to their child and, in the Abbasi case, to the manner in which they say that they were treated by staff. Their rights in this regard require respect and rightly are therefore in the balance, but the absence of any detail prevents the court going further and evaluating the weight to be afforded to those rights in any more sophisticated or informed manner.

109. Conversely, the evidence for additional weight, both with respect to the potential impact on individuals and on matters of public policy relating to the provision of health care to very sick children, is, as I have said, strong.

110. When the strong and detailed case in favour of the continued protection of staff anonymity is put against the unelaborated and simple assertion of the right to free speech, the result of the balancing exercise is plain to see and does not require an intense focus to detect.

(iv) Justification for interference/restriction

111. That is not, however, the final stage in the process of evaluation. The third proposition in *Re S* is that the justifications for interfering with or restricting each right must be taken into account.

112. The justification for interfering with the parents' Art 10 and Art 8 rights to free speech is two-fold. Firstly, that there are countervailing Art 8 rights attaching to the individuals in the two staff groups. The staffs' Art 8 rights include, but go beyond, the basic right to a private life. In this case, on the unchallenged evidence, it includes the right not to be made vulnerable to personal attacks in social media or to physical attack as a consequence. It includes the right to go about their job without being adversely impacted so that their mental health or wellbeing is affected. It includes the right not to be exposed to those other than the parents identifying their address, phone number, email and other information which may then be published on social media.

113. The second manner in which interference with the parents' rights are justified in this case relates to aspects of public policy and, by reference to the text of Art 10(2) concerning the interests of 'public safety' and 'the protection of health'. For the reasons that I have given, accepting Mr Millar's submissions, reference to the matters set out in Art 10(2) are not required in a horizontal dispute such as the present. Where, however, matters within Art 10(2) are relevant, as I find they are here, the court must be entitled to rely upon them (rather than, as in a vertical case, having to find them established as a requirement).

(v) The ultimate balancing test

114. Finally, the proportionality test, or ultimate balancing test, must be undertaken. Again, for the reasons that I have given, the balance here is firmly in favour of the maintenance of anonymity. Whilst to retain the RROs is a continuing infringement of the parents' rights, it is both necessary and proportionate to do so. In addition to the factors so far taken into account, on the question of proportionality, regard is to be had to the existence of other remedies by which the parents may seek to achieve their aim. Where there are grounds for legitimate complaint, formal disciplinary processes may be invoked. A remedy by way of civil proceedings may be available. Less formally, each hospital will have an internal complaints procedure and other avenues of redress may be available.

Conclusion

115. For the reasons that I have now given, I am satisfied that the court has jurisdiction to consider the continuance of the RRO made in each of these two cases. I have held that the dispute about the continuance of each order falls to be determined by evaluating the competing rights under ECHR Art 8 and Art 10 in accordance with the approach described by Lord Steyn in *Re S*. The result of that process is that I hold that continuation of the RRO in each case is justified and proportionate.

116. I therefore refuse the application made by each parent for the discharge of the order in their respective cases. The orders in each case will be amended to reflect the changed position following the death of the children and will be reissued on the basis that they will remain in force 'until further order'.