RESTRICTIONS ON OPEN JUSTICE:

A GUIDE FOR PUBLIC LAW PRACTITIONERS

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The views expressed in this guide are our own.

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A INTRODUCTION

1. This is a practical guide to restrictions on open justice in the context of public law proceedings in England and Wales. It covers:

    1.1. the basic principles of open justice;

    1.2. why restrictions on open justice might be sought;

    1.3. the most common kinds of restriction;

    1.4. the general criteria for granting these;

    1.5. the procedure for making an application at different stages of the proceedings; and

    1.6. in broad outline only, the options for enforcement in case of breach of an existing restriction.

2. We have written the guide for three main reasons.

3. First, in our experience, these issues come up relatively regularly in public law and human rights practices. While some practitioners feel comfortable and confident in dealing with them, others feel they are suddenly in the unfamiliar landscape of media and information law and would value some additional guidance. Similarly, while some courts and judges deal regularly with applications for restrictions on open justice, others may appreciate additional assistance from the parties in navigating the relevant rules, principles and authorities.

4. Second, applying for appropriate restrictions on open justice at the right time and using the right procedure matters for clients. If applications are made too late or are refused, it may prove impossible to prevent clients' private or otherwise sensitive information from entering the public domain. These risks are increasing as courts hearing public law claims become increasingly conscious of the importance of the open justice principle, and the need for rigour and consistency in its application.

5. Third, as far as we are aware, there is no text providing practical guidance on how to apply for restrictions on open justice in public law cases.

6. As this guide is aimed at public and human rights law practitioners, it focuses on the principles and procedures that apply to judicial review proceedings in the Administrative Court,[1] and claims in the King's Bench Division of the High Court (**"**KBD**"**) and in the County Court raising issues under the Human Rights Act 1998 (**"**HRA**"**) (which we'll refer to as "human rights claims").[2] It also considers the position in relation to appeals in these cases. The guide does not cover restrictions on open justice in other kinds of public law proceedings, like inquests and inquiries, statutory appeals in the First-tier Tribunal and Upper Tribunal, and Court of Protection proceedings.

7. We have written this guide primarily for practitioners making applications for restrictions on open justice. We hope that it will also assist those trying to understand the effect of, and/or consider their position in relation to, applications for restrictions by (other) parties or restrictions which have already been ordered.

8. The guide represents a starting-point rather than a comprehensive survey.[3] The procedural rules and law we set out are applicable as at September 2023.[4]

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[1] The guide is also relevant to, though it does not deal comprehensively with, judicial review claims in the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC").

[2] The principles and procedure applicable to human rights claims are, of course, the same as they would be for private law claims in the same jurisdictions.

[3] More detailed information can be found in: Gavin Millar & Andrew Scott, *Newsgathering: Law, Regulation, and the Public Interest* (OUP, 2016) (ch 10); Sian Harrison & Mark Hanna, *McNae's Essential Law for Journalists*, 26th ed. (OUP, 2022) (chs 11-13, 15 and 19); *Borrie & Lowe: The Law of Contempt*, 4th ed. (LexisNexis Butterworths, 2010) (ch 4); *Tugendhat and Christie: The Law of Privacy and The Media*, 3rd ed. (OUP, 2015) (ch 13); and Charles Hollander, *Documentary Evidence*, 13th ed. (Sweet & Maxwell, 2018) (ch 6). In particularly complex or sensitive cases, input from a specialist practitioner at an early stage is advisable.

[4] We will try to update it in line with future changes to the rules or new authorities, but (as with any publication) cannot guarantee that it will always be up to date.

B THE OPEN JUSTICE PRINCIPLE

B.1 Overview

9. Put simply, open justice is the principle that the courts administer justice in public, at hearings which anyone may attend within the limits of the courts' capacity and on which the press may report: *Khuja v Times Newspapers* [2017] UKSC 49; [2019] AC 161, [12]. Open justice is "a constitutional principle of the highest importance" (*Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, [84]) which is "at the heart of our system of justice and vital to the rule of law" (*R (Guardian News & Media) v City of Westminster Magistrates Court* [2012] EWCA Civ 420; [2013] QB 618, [1]).

B.2 Elements of the open justice principle

10. The principle of open justice has a number of key features. They include the following:

    10.1. Justice "should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on" and can know how cases are decided: *R (C) v Secretary of State for Justice* [2016] UKSC 2; [2016] 1 WLR 444, [1] and [38].

    10.2. This scrutiny is often "performed by the media… acting on behalf of the body of citizens": *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65; [2011] QB 218, [38]. So open justice also encompasses the right of the press (and others) to observe and report on legal proceedings, which has been described as an "an essential ingredient of the rule of law": *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 WLR 1645, [4].

    10.3. The names of parties, witnesses, and others involved in proceedings should be made public: *C*, [1] and [36].

10.4. The courts should not "hear and take into account evidence and arguments that [members of the public] have not heard or seen": *C*, [1]. In consequence, evidence or information communicated to a court is presumptively available to the public: *Westminster Magistrates*, [85].

10.5. Judicial decisions/judgments should also be made publicly available: *Mohamed (No 2)*, [37]-[41] and [189].

11. Open justice applies not only where there is (or has been) a hearing, but also to proceedings which settle before any hearing takes place (*Fallows v NGN* UKEAT/0075/16; [2016] ICR 801, [60]-[61], [74]); where a final order is made without a hearing (*UXA v Merseyside NHS Foundation Trust* [2021] EWHC 3455 (QB); [2022] 4 WLR 30, [2]); and to applications, including for interim relief in judicial review cases, which are dealt with on the papers (*R (Taveta Investments) v Financial Reporting Council* [2018] EWHC 1662 (Admin), [37]; *UXA,* [2]-[3], [13]-[15]).

B.3 Purposes of the open justice principle

12. The Supreme Court has summarised the two main purposes of the open justice principle as follows: "[t]he first is to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly … [the second] is to enable the public to understand how the justice system works and why decisions are taken": *Dring v Cape Intermediate Holdings* [2019] UKSC 38; [2019] 3 WLR 429; [2020] AC 629, [42]-[43].

B.4 Sources of the open justice principle

13. Open justice is a common-law principle, but Articles 6 (the right to fair trial) and 10 (the right to freedom of expression) of the European Convention on Human Rights (**"**ECHR**"**) are also relevant. Article 6 provides a right (subject to limited exceptions) to a public hearing and public judgment in the determination of one's civil rights. Article 10 encompasses not only the qualified right to impart information

to others but also the "right to know". That means that, in the context of the justice system, "the courts … have a concomitant obligation to make information available" to the public: *Mohamed (No 2)*, [180].

B.5 Application of the open justice principle in public law proceedings

14. The open justice principle carries particular weight in litigation against the state. In this context, the principle "represents an element of democratic accountability" which supports the rule of law: *Mohamed (No 2)*, [39]. Open justice and public access to court documents is of greater importance in public law claims because they are more likely to involve matters of wider public interest/concern: *R (Corner House Research) v Director of SFO* [2008] EWHC 246 (Admin), [18].

B.6 Provisions giving effect to the open justice principle

15. The open justice principle is primarily given practical effect by rules of court; the most prominent example is the Civil Procedure Rules ("CPR") applicable in the High Court (King's Bench Division and Administrative Court) and in the Court of Appeal, and the associated Practice Directions ("PDs"). These rules are not exhaustive: subject to any statutory provisions, all courts have an inherent jurisdiction to determine how the open justice principle should be applied: *Westminster Magistrates*, [69]. The most relevant general rules, principles and practices are as follows:

    15.1. *Public hearings*. The general rule is that proceedings are public, and the courts are under a duty to take "reasonable steps to ensure that all hearings are of an open and public character": CPR 39.2(1)(2A).[5] Hearings must also be recorded, and members of the public can obtain a transcript on payment of a fee: CPR 39.9(1)(3). Daily cause lists, naming the parties, are published online and on noticeboards at court.

[5] See also rule 27 of the Supreme Court Rules and (for the UTIAC) rule 37 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

15.2. *Identification of parties and witnesses on court documents*. The full names of each party are included in all statements of case: PD7A [4.1], CPR 16.2(1)(d) and PD16 [2.6]. This requirement applies equally to public law claims: see PD7A [3.1], PD8A [4.1] and CPR 54.6. Claimants are required to include their address on the claim form: see, in respect of human rights claims, PD16 [2.2]; and in respect of judicial reviews, p 1 of the N461 claim form and para [7.12.2] of the *Administrative Court Guide*.[6] Witness statements must include the full name of the witness and other categories of identifying information: PD32 [18.1].

15.3. *The register of claims.* Courts may keep a publicly accessible register of claims which can be inspected by anyone on payment of a fee: CPR 5.4(4). Registers of claims issued in the High Court in London (including in the KBD) are available at the Royal Courts of Justice, but are not kept in the district registries outside London: PD 5.4A [4.1]. There is also an electronic public search facility (CE File), which includes records of claims filed in the KBD.[7] The Administrative Court does not keep a register of claims.

15.4. *Non-party access to witness statements.* Different rules apply to judicial reviews and human rights claims. In judicial reviews, non-parties can apply to access witness statements under CPR 5.4C(2). This provision is explained at [46] below. In human rights claims, witness statements standing as evidence in chief are open for inspection by non-parties during a trial (without the need for an application) under CPR 32.13(1).

15.5. *Non-party access to other documents filed at court.* Non-parties may obtain from the court (by making a written request) a copy of a statement of case or of a judgment or order given or made in public (whether at a hearing or without a hearing): CPR 5.4C(1); CPR 5.4D(1). With the court's permission they can also obtain any other document filed by a party, or communications

[6] *Administrative Court Guide 2023*. In the UTIAC see e.g. rules 2(2) and 21(4) (appeals) and 28(4) (judicial review).

[7] https://efile.cefile-app.com/publicsearch/login.

with the court: CPR 5.4C(2); PD5A [4.3].[8] Applications can also be made for documents which fall outside the scope of CPR 5.4C: see [46].

15.6. *A general requirement that orders restricting open justice be published.* Orders for private hearings or the anonymisation of parties must be published on the judiciary.uk website: CPR 39.2(5). This enables non-parties to challenge them if they want to.

16. These rules and principles are not absolute. Each could be subject to restrictions or exemptions which we consider below. It is worth keeping all of them in mind when considering what restrictions on open justice may be necessary in a particular case.

C REASONS FOR SEEKING RESTRICTIONS ON OPEN JUSTICE

17. The basic reason for seeking restrictions on open justice is usually simple. There is certain information in or about the proceedings which a client reasonably thinks should go no further than the judge and other parties.[9] In public law claims, this is likely to be for one of two reasons:

17.1. concerns about privacy or confidentiality (of a party or someone connected to them), or

17.2. concerns about a risk of other kinds of harm to a party or a witness.

18. Reasons of the first kind tend to arise where the proceedings involve private information which is not in the public domain, or concern claimants who would be particularly affected by being identified in connection with proceedings. For example:

[8] See also rule 39(3) of the Supreme Court Rules.

[9] The extent to which, and the circumstances in which, it may be possible to withhold information from other parties to the proceedings is beyond the scope of this guide.

18.1. A challenge to the lawfulness of ongoing immigration detention may require the claimant to rely on detailed medical records outlining their history of self-harm / attempted suicide.

18.2. A claim against a local authority on behalf of a child with special educational needs may involve extensive discussion of their behavioural issues and difficult family situation.

18.3. A challenge to a decision by the police to disclose to third parties information which is said to be private will necessarily involve discussion of that information.

19. Reasons of the second kind tend to arise where a party or witness fears being identified and/or located on the basis of information revealed in proceedings, and/or being exposed to reprisals for having participated in them. For example:

19.1. A challenge to a negative Conclusive Grounds decision by a potential victim of trafficking may expose the claimant to a risk of re-trafficking if their former traffickers were to identify and locate them.

19.2. A housing claim involving a victim of domestic violence may expose the claimant to a risk of harm from their abusive former partner if they could be located based on court documents.

19.3. A witness in a claim about a sensitive social or political issue, which had already provoked serious online threats against the claimant, may also be exposed to a risk of harm if identified.

20. It is important to identify and understand the precise concerns that arise in the particular case, as these will shape both the type(s) of restriction it is appropriate to seek and the best way to prepare the application.

21. There is also a range of other, wholly understandable, reasons why claimants and witnesses may want restrictions on open justice -- but which are unlikely to found

a successful application. As the Court noted in the seminal case of *Scott v Scott* [1913] AC 417 (p 463):

> *"The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses … but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."*

22. The reality that litigation and media reporting about it may be embarrassing, intrusive and upsetting is not, of itself, a sufficient basis for seeking restrictions on open justice.

23. Finally, it is important to note that specific statutory restrictions on open justice – which can be extremely far-reaching – can be made on national security grounds under the Justice and Security Act 2013 and CPR 82. The rules and authorities governing these kinds of restrictions are beyond the scope of this guide.

D TYPES OF RESTRICTION

D.1 Overview

24. There are four main types of restriction to consider. They are:

    24.1. orders for anonymity;

    24.2. restrictions on reporting particular information;

    24.3. restrictions on access to the court file;[10] and

    24.4. the holding of (all or part of) a hearing in private.[11]

[10] The Administrative Court Guide now refers to these as "access to court file orders" (*Administrative Court Guide 2023*, [7.12.3]).

[11] These are by no means the only types of restrictions available: see e.g. *Libyan Investment Authority v Société Générale SA* [2015] EWHC 550 (Comm) and *Kalma v African Minerals Ltd* [2018] EWHC 120 (QB) (in relation to the establishment of a "confidentiality club" for limiting disclosure of the names of anonymised witnesses even as between the parties).

25. Again, the combination of restrictions it is appropriate to seek will depend on the nature of the concerns arising in the case and the severity of the potential consequences if orders are not obtained.

26. We note at the outset that the term "anonymity order" can be used to describe two types of order. First, there are "permissive" orders which authorise the taking of steps to prevent names or identities being revealed in the proceedings.[12] The classic example is an order for the use of a cipher instead of a party or witness's name. On their own, an order of this kind will not prevent the party or witness from being publicly identified (e.g. by a journalist) outside the proceedings if their identity is already known or can be discovered without breach of the order.[13] To prevent this, it is necessary to seek an order of the second kind: "restrictive" orders which prevent anyone from publishing or disclosing identifying information. These are reporting restrictions orders ("RROs").[14] Often both types of order will be sought together but an application for a permissive order does not have to be accompanied by an application for a reporting restriction.[15] For clarity, we use the

[12] The Administrative Court Guide now refers to these orders (or at least to the subset of these orders made pre-issue – see [119]) as "withholding orders": *Administrative Court Guide 2023*, [7.12.3]. In Part 7 claims, these orders are sometimes referred to as "Rule 16 orders". CPR 16.2 and PD16 set out what a Part 7 claim form must include; the rules/PD permit a court to dispense with certain of these requirements, thereby making a "Rule 16 order".

[13] *Khan v Khan* [2018] EWHC 241 (QB), [81]; see also *Lupu v Rakoff* [2019] EWHC 2525 (QB); [2020] EMLR 6, [21] per Nicklin J, expressing the view that identifying someone protected by an anonymity order would not of itself place someone in contempt of court. See also *Imam v London Borough of Croydon* [2021] EWHC 736 (Admin), [37], observing that anonymity without reporting restrictions "would prevent anyone reading the Trial Judgment from knowing the Claimant's name notwithstanding there would be no restriction either on them finding it out by other means (e.g. by applying for a transcript of the hearing or by inspecting the parties' statements of case) or on anyone publishing it."

[14] These are sometimes referred to as "restricted reporting orders" (Administrative Court Guide 2023, [7.12.3]).

[15] For a discussion of the distinction between these types of order see *CVB v MGN Ltd* [2012] EWHC 1148 (QB); [2012] EMLR 29, [47]-[49]; *Lupu v Rakoff*, [21]-[24]). In *Lupu* Nicklin J expressed the view that seeking a permissive anonymity order without a reporting restriction was pointless (at [41]); c.f. *AEP & ors v Labour Party* [2021] EWHC 3821 (KB) where Johnson J took a different view on the basis that no one other than the defendant knew the applicants' identities and therefore a reporting restriction was not needed in that case (at [22]-[23]). A key issue may be whether there is evidence that any third party knows an applicant's identity and is likely to publish it in connection with the proceedings (*AEP & ors v Evans* [2023] EWHC 935 (KB), [23]). The Administrative Court Guide now states that in most cases a party will not be permitted to issue a claim form anonymously unless the grounds for making a reporting restriction order are made out, but that this role is not "invariable" (*Administrative Court Guide* 2023, [7.12.6]).

term “anonymity order” to refer only to the first of these categories; we call the latter category “reporting restrictions” or “RROs”.

27. Most types of restriction will be sought on a permanent basis. However, several judgments have suggested that these orders, and in particular RROs, should have an end date unless an open-ended order can be shown to be necessary in the circumstances: see *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin); [2023] 2 Cr App R 15, [78]; *TT v Essex County Council* [2023] EWHC 826 (Admin), [87]-[88].[16] As this is not yet widely or systematically required, and as it may pose real practical difficulties for litigants, it may be worth seeking an open-ended order in the first instance or including an end-date some considerable time in the future. If an order is silent on duration, the default position is that they are indefinite, i.e. they will remain in place until further order. That does not, however, mean that restrictions may not be revisited and consequently revoked or lifted: this may occur, for example, following a substantive hearing, following a change of circumstances, or in the context of a subsequent appeal (see further [133]).

28. The sections that follow outline the nature of each of the main types of restriction and identify the source(s) of the court's power to impose them. The principles which govern the courts' decision about what restrictions, if any, to impose are dealt with separately in section E.

D.2 Anonymity orders

29. The most common form of anonymity order directs that a person's name be replaced, wherever it would otherwise be used in connection with the case, with a combination of letters known as a “cipher” (e.g. “XYZ”).[17] It is usually advisable to use a three-letter cipher because this makes it easier to distinguish cases -- there

[16] The other main exception is reporting restriction orders which postpone reporting on proceedings until a particular time or event (see [42.2]).

[17] A party's name can never be withheld from the court or, save in exceptional circumstances (which do not arise in the kinds of claims of claims covered by this guide), other parties to litigation: *ABC v Google LLC* [2019] EWHC 3020 (QB); *SMO (a child) v TikTok* [2020] EWHC 3589 (QB).

are many cases called "AA" and "BB", for example. The use of initials is not appropriate because it risks identifying the subject of the order.

30. The model order annexed to the Master of the Rolls' Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003 (which practitioners should use where possible) includes the following wording for an anonymity order:

> *"There be substituted for all purposes in these proceedings, in place of references to the Claimant by name, and whether orally or in writing, references to the letters 'AAA'."*

31. Where an order like this has been made, all parties and the court will use the cipher in the title of the case (on documents, in listings, and in any judgment), and wherever else the relevant person's name appears -- including orally in court. Any documents which have already been filed using the person's full name can be replaced with copies using the cipher, and specific provision can be made for this in the order (see [125]). Additional orders can also be made to ensure that non-party access to documents on the court file is only granted where a document has been properly anonymised (see section D.3 on restrictions on access to the court file).

32. Anonymity orders may also provide for references to other identifying details to be redacted or substituted. Common examples include:

    32.1. A person's home address. The Practice Guidance (Interim Non-Disclosure Orders) contains the following proposed wording: "the Claimant be permitted to [give] an address c/o the Claimant's solicitors".

    32.2. A person's occupation, job title, personal history or similar personal details. This aims to prevent what is known as "jigsaw identification",[18] either by someone with extrinsic knowledge that would let them identify the party

[18] Jigsaw identification occurs where there are separate items of information in the public domain which, taken on their own, do not identify a person but do so, or risk doing so, when pieced together: see e.g. *MNB v NGN* [2011] EWHC 528 (QB), [33]; *A Local Authority v A Mother* [2020] EWHC 1162 (Fam), [18].

based on those details, or by someone acquiring such knowledge through a Google search.

33. Various sources of the power to make anonymity orders (of different kinds, and in different sorts of case) have been identified. Although the details are still the subject of judicial and academic disagreement, commonly cited options include the following:

33.1. CPR 39.2(4), which provides that "[t]he court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary in order to secure the proper administration of justice and in order to protect the interests of that person."[19]

33.2. PD16 [2.5], which provides that the court can dispense with the requirement that Part 7 claim forms contain a full address (this provision does not apply in judicial review cases).

33.3. The common law, which has been held to confer on the courts a power to permit the withholding of a name from the public and press: *A v BBC* [2014] [2014] UKSC 25; [2015] AC 588, [32].

33.4. The court's case management powers and the overriding objective, taken with s 6 HRA: *NT1 v Google LLC* [2018] EWHC 261 (QB), [25]-[26].

33.5. An inherent jurisdiction or power held by every court and tribunal: *Khuja*, [14]; *Clifford v Millicom Services* [2023] EWCA Civ 50; [2023] ICR 663 ("*Millicom* (CA)"), [31].

[19] In the UTIAC, see rule 14.

D.3 Reporting restrictions

(i) Overview

34. Reporting restrictions (RROs) are exactly what they sound like: restrictions on what anyone can publish/disclose about the proceedings and the information derived from them. Reporting restrictions are binding on anyone who has notice of them.

35. The terms "publish" and "publication" have a broad meaning in this context: they cover "oral or written statements to the public or a section of the public": *CWD v Nevitt* [2020] EWHC 1289 (QB); [2021] EMLR 1, [53].[20]

36. Reporting restrictions can be important for two reasons. First, the use of a cipher may not prevent a person from being identified or located. This is because of "jigsaw identification", which we discussed at [32.2] above. To give a few more examples:

    36.1. In an education case against a local authority, the name of the child's school, the child's age, and a general description of the child's needs -- all of which would be readily apparent from the papers or on attending the hearing -- could enable any member of the local community, or any individual (including a journalist) who went on to make enquiries, to identify the claimant.

    36.2. In a challenge to a Conclusive Grounds decision, the claimant's age and nationality, their account of where they were trafficked from and their experiences on arrival in the UK, and the general location of their supported

[20] See ss 19 and 2(1) of the Contempt of Court Act 1981, by which "publication" means any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public. In *Nevitt,* Steyn J expressed the view that for the purposes of the Contempt of Court Act "publication" would not include disclosure to one other person. The Court of Appeal (when considering the meaning of publication for purposes of the statutory reporting restrictions in s 39 of the Children and Young Persons Act 1933) has held that publication does not extend to private communications: *R (M) v Chief Constable of Sussex* [2021] EWCA Civ 42, [130]. Despite this, divulging information covered by an RRO even to one other person remains a risky proposition – particularly if, for example, the order uses the language of "disclosure" in addition to or instead of that of "publication".

accommodation, could be sufficient for former traffickers to identify and locate them.

37. Second, and as noted at [26] above, the anonymisation of a party or witness by way of a cipher does not prevent anyone from publishing information which may identify them as a subject of the proceedings. For example, if someone was aware of (or was able to work out) the identity of an anonymised claimant, they would not, without more, be in contempt of court if they wrote a blog expressly naming them as the claimant.[21]

38. Reporting restrictions are designed to prevent this from happening by precluding the publication (by anyone who is aware of the RRO) of the person's name or other details which are liable to result in a person's identification in connection with proceedings.[22]

39. Reporting restrictions are often ordered by the court; however, in some cases they will arise automatically by operation of statutory provisions. Below are some brief remarks specific to each category of RRO.

(ii) Non-automatic reporting restrictions

40. Where an RRO is made by the court, usually on a party's application, a common form of order is:

> *"Until further order, the publication in connection with these proceedings of the [name/identity] of [insert e.g. "the Claimant"] or of any information liable to lead to [his/her/their] identification in connection with these proceedings is prohibited."*

41. Since an RRO is, in effect, a *contra mundum* injunction (meaning that, in principle, it could be a contempt of court for anyone with notice of it to breach the order) it is

[21] In some circumstances, publishing this information would still constitute a civil wrong (e.g. a misuse of private information).

[22] Of course this does not prevent the relevant details from being discussed in open court or set out in court documents. Any restrictions on this kind of conduct would come from an anonymity order.

important that it is formulated in terms which are "clear and certain". The court "must ensure that the language of its order makes plain what is permitted and what is prohibited": *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, [30].[23] Depending on the facts of the case, it may therefore be helpful to list matters which cannot be reported, such as a person's place of work, their job title, or the identities of their family members/associates (see [32]).[24] This also helps give effect to the general principle that an RRO should enable the media and others to know with certainty what they may and may not report: see e.g. *NT1 v Google LLC* [2018] EWHC 261 (QB), [13](5).

42. The source of the power to make reporting restrictions varies depending on the circumstances, but may include:

42.1. Section 11 of the Contempt of Court Act 1981, which – if the court has already acted under another power, allowing "a name or other matter to be withheld from the public"[25] – gives it the power to prohibit the publication of a "name or matter in connection with the proceedings". Section 11 does not itself confer any power upon courts to allow "a name or other matter to be withheld from the public in proceedings before the court", but it applies in circumstances where such a power has been exercised: see *A v BBC*, [59]; *Re Guardian News and Media* [2010] UKSC 1; [2010] 2 AC 697, [31] and [59].

[23] See also *Smith v Backhouse* [2023] EWCA Civ 874, [15(v)] and [34] (and the authorities cited therein).

[24] In some cases it may be appropriate to set out the specific information which cannot be reported in a confidential schedule which can be served on specified parties or persons (e.g. media organisations). For example, in a case where the media is already aware of sensitive information, including because the case has taken place in open court, this is likely to be the best way to ensure the order can withstand challenge and would be enforceable in the event of a breach. Similarly, in a case where the order specifically seeks to prevent a party from disclosing particular information (e.g. certain aspects of the report of a regulator), setting this out in a confidential schedule is the best way to ensure the order is clear, effective and enforceable. A confidential schedule is unlikely to be necessary where all that an RRO restrains is the identification of a party in connection with proceedings.

[25] This means a s 11 order can only be made where the court has already made an anonymity order (see section D.2), or where a court has otherwise acted to preserve anonymity (even without making a formal order).

42.2. Section 4(2) of the Contempt of Court Act, pursuant to which a court can order that "the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary" for the purpose of avoiding a substantial risk of prejudice to the administration of justice in the proceedings in which the order is made, or other proceedings. This type of order could be made where, for example, information revealed in a judicial review could, if published, prejudice ongoing criminal proceedings.

42.3. CPR 39.2(4), which gives the court the power to prohibit the disclosure of the "identity of any person".[26] This is regarded as being broader than s 11 of the Contempt of Court Act because, unlike s 11, it applies even if information has been revealed in open court: *NT1*, [25]-[26].

42.4. Section 39 of the Children and Young Persons Act 1933. This empowers a court to direct that any of the following information is not published: the name, address or school of any child or young person concerned in proceedings;[27] any particulars calculated to lead to the identification of a child or young person so concerned; or a picture of any child or young person so concerned.[28]

42.5. The court's implied power under the HRA to take such steps as are required to ensure compliance with s 6 (which makes it unlawful for a court to act incompatibly with Convention rights) – taken with, for example, Article 2 (the right to life), Article 3 (the prohibition of torture, inhuman and degrading treatment), and/or Article 8 (the right to respect for private and family life), taken with the Court's inherent jurisdiction: *Re S (A Child) (Identification:*

[26] In the UTIAC see rule 14.

[27] Meaning a person by or against or in respect of whom the proceedings are taken, or who is acting as a witness.

[28] These orders expire automatically when a young person reaches the age of 18: *R (JC) v Central Criminal Court* [2014] EWCA Civ 1777; [2015] 1 WLR 2865. In some cases, consideration should be given to seeking the RRO on an additional/alternative basis.

Restrictions on Publication) [2004] UKHL 47; [2005] 1 AC 593, [20]-[23]. See further section E.3 for how applicants can rely on Convention rights.

42.6. The senior courts' inherent jurisdiction: see *Abbasi v Newcastle Upon Tyne Hospitals NHS Foundation Trust* [2023] EWCA Civ 331, [66]-[67].

(iii) Automatic reporting restrictions

43. In certain situations, statutory reporting restrictions will apply automatically without the court making any order. Examples likely to be relevant to public law cases include the following:

43.1. *Victims of specified sexual offences, including human trafficking.* Section 1 of the Sexual Offences (Amendment) Act 1992 applies both where an allegation has been made that an offence under the Act has been committed (s 1(1)), and where a person is accused of such an offence (s 1(2)).[29] In both cases, it prohibits – during the lifetime of the alleged victim – the publication of any matter likely to lead to their identification as the person against whom the offence is alleged to have been committed. This includes information enabling a "jigsaw" identification to be made, and "encompasses publication of prohibited material by anyone by whatever means publication occurs, and extends to bloggers and twitterers or any other commentators".[30] Importantly, the relevant offences – set out in s 2 – include not only a wide range of sexual offences, but also any offence of human trafficking under s 2 of the Modern Slavery Act 2015. The Act is therefore significant in cases involving victims of trafficking.

43.2. *Victims of Female Genital Mutilation.* Section 4A and Schedule 1 of the Female Genital Mutilation Act 2003 provide that, where an allegation of

[29] The scope of this provision remains unsettled. In particular, there may be some doubt about whether it applies unless a person has been charged: see the *obiter* remarks of HHJ Matthews in *Plymouth City Council v ABC* [2022] EWHC 2426 (Ch), [30]. However, this interpretation seems to be narrow because an allegation may be made to police without this leading to criminal proceedings; it appears strongly arguable that this ought not to deprive a complainant of the protection conferred by statute.

[30] *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434; [2013] 1 WLR 1979, [9].

FGM has been made, the publication of matters likely to lead to the identification of the alleged victim is prohibited during their lifetime. This protection may be disapplied in the context of criminal proceedings only if specific conditions are met.

43.3. *Victims of forced marriage.* Section 122A and Schedule 6A of the Anti-social Behaviour, Crime and Policing Act 2014 confer on victims of alleged forced marriage similar protections to those for victims of FGM (immediately above).

43.4. *Children subject to family law proceedings.* Section 97(2) of the Children Act 1989 provides that "[n]o person shall publish to the public or any section of the public any material which is intended, or likely, to identify any child as being involved in" family/adoption proceedings, or to identify the child's address or school.

44. Again, these provisions give rise to automatic restrictions which do not need to (and indeed should not[31]) be reflected in the body of a court order. They can simply be recognised as applicable in the recital to an order, at the start of a judgment, or at the start of a public hearing (as appropriate).

45. Before relying solely on an automatic reporting restriction, it is important to consider whether the applicable provision is wide enough to cover the information an applicant seeks to protect. Sometimes it may be necessary to make an application for a non-automatic reporting restriction as well.

D.4 Restrictions on non-party access to the court file

46. As noted earlier (see [15]), the general principle is that people who are not involved in proceedings can access documents filed by parties. In particular, for a case governed by the CPR:

[31] Because none of the relevant provisions actually confers power on the court to make an RRO; they create a prohibition rather than empowering the court to do so.

46.1. Non-parties may obtain from the court a copy of a "statement of case" or of a judgment or order given or made in public, whether at a hearing or without a hearing: CPR 5.4C(1); CPR 5.4D(1). A "statement of case" is defined as "a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence": CPR 2.3(1). In general, this is taken to include (in the context of a claim for judicial review) the statement of facts and grounds, summary grounds of defence and detailed grounds of defence: see *R (Corner House Research) v Director of Serious Fraud Office* [2008] EWHC 246 (Admin), [25]-[26].[32] A statement of case does not include any document that is filed with or related to it, such as schedule or appendix; they are treated as separate documents which are not automatically available under CPR 5.4C(1) but may be able through the route set out below at [46.2].[33] A written request for these documents will be granted as of right, subject to any contrary order, once the defendant has filed their acknowledgement of service or defence (or, absent a defence, once the claim has been listed for hearing or judgment has been entered): CPR 5.4C(3), CPR 5.4D(1).[34] In such cases, the parties are (absent an order to the contrary) unlikely to be notified that a request has been made.

46.2. Non-parties may also, via an application under CPR 23 and if the court gives permission, obtain "from the records of the court a copy of any other document filed by a party or of communications between the court and a party or another person": CPR 5.4C(2); PD5A [4.3]. "Court records" available under CPR 5.4C are likely to include application notices, "any written evidence filed in relation to an application," and "an appellant's or respondent's notice of appeal": PD5A [4.2A]. They will not necessarily

[32] The N461 Form is a statement of case within the meaning of CPR 2.3, as is the statement of facts and grounds because it is an extension of and forms part of the claim form.

[33] *Duchess of Sussex v Associated Newspapers* [2020] EWHC 2160 (Ch); [2020] 1 WLR 4762, [46]-[47].

[34] That is the stage at which the court's function of administering justice commences - the open justice principle is triggered at this point: *Qadir v Associated Newspapers* [2012] EWHC 2606 (QB); [2013] EMLR 15, [40].

include “every single document generated in connection with a case and filed”: *Dring* (SC), [23]. There is no express requirement that parties or others affected be informed that an application for documents has been made.

46.3. CPR 5.4C is also the rule under which non-parties can access (on application) witness statements in judicial reviews (whether these have been filed in support of an interim application or of the substantive claim): *Dring v Cape Intermediate Holdings* [2018] EWCA Civ 1795; [2019] 1 WLR 479, [41].[35] However, non-parties are unlikely to be able to obtain witness statements prior to the final hearing because the objective of the open justice principle is only engaged at the point at which the court considers the evidence: *R (Yar) v SSHD* [2021] EWHC 3219 (Admin), [15]-[18].

46.4. Access to witness statements is easier in human rights claims, where witness statements standing as evidence in chief are open for inspection by non-parties during a trial – as of right, and without an application – under CPR 32.13(1). While the rule does not extend to exhibits, the court has an inherent jurisdiction to permit non-parties to inspect them: *Dring* (SC), [44], [48]-[49]. This rule does not apply in judicial review proceedings, or to witness statements filed in support of interim applications; access in these contexts must be on application under CPR 5.4C(2).

46.5. Non-parties (in judicial review or human rights claims) may also apply for copies of documents which technically fall outside of CPR 5.4C. The “default position” is that non-parties should be permitted to access documents “placed before a judge and referred to in the course of proceedings”; it is irrelevant whether a judge has been asked to read or says they have read them: *Dring* (SC), [38], [40] and [44]. But there is no “right” to access such documents: “it is for the person seeking access to explain why he seeks it and how granting him access will advance the open

[35] This decision was reversed in part by the Supreme Court but not on this point.

justice principle", and the court may then have to balance competing interests: *Dring* (SC), [45] and [47].

46.6. The position in respect of skeleton arguments is in practice somewhat different: parties are often asked for these directly (for example by journalists) and the starting point is that they should be made available on request unless there are compelling reasons to the contrary.[36] As a result, parties generally make copies available.[37] Under its inherent jurisdiction, the court can also order that they be made available to non-parties.

47. In the Supreme Court, all documents held by the Court may be inspected by the press or members of the public on application to the Registrar: rule 39(3). The Registrar may refuse an application "for reasons of commercial confidentiality, nationality security or in the public interest" (rule 39(3)), and may impose terms or conditions (such as redactions) where this is "necessary in the interests of justice or in the public interest" (rule 39(4)).[38]

48. The range of documents that can be accessed as part of the open justice principle can give rise to concerns, even where an anonymity order has been sought or granted. For example, if a non-party can access documents which directly or indirectly identify a party or witness who has been anonymised, this will often undermine the effectiveness of the order.[39] These concerns may prompt an application for orders restricting or preventing non-party access.

49. The restrictions that may be sought fall into two broad categories:

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[36] See Bar Council, "Provision of documents to journalists, law reporters and other non-parties" [pdf] (June 2022), para 15.

[37] In the Court of Appeal, a Practice Direction requires that parties provide two extra copies of their skeleton argument and court officials will then provide these to an accredited journalist and a court reporter: PD 52C, 33.

[38] PD7 further specifies that persons who inspect documents on the court file "must comply with any anonymity orders, data protection requirements and/or conditions imposed by the Registrar under rule 39": [7.2.6].

[39] Even where anonymity has not been sought, some documents may contain private or sensitive information which is not going to be directly referred to in open court in the proceedings; restrictions on access to the court file can help ensure that this information does not enter the public domain.

49.1. Orders preventing non-parties from accessing (a) any documents or (b) particular categories of document filed in the case which might otherwise be available as of right or on application.

49.2. Restrictions on non-parties accessing documents unless these have been redacted or adapted in accordance with an anonymity order. Where this type of restriction is sought, redacted/adapted copies of the documents in question should be filed (and the order may specifically require this).

50. In either case, applications normally rely on one or both of the following.

50.1. CPR 5.4C(4), which empowers the court to order that a non-party may not obtain a copy of a statement of case under CPR 5.4C(1); to restrict the persons or classes of persons who may do so; to order that copies may only be obtained if edited in a particular way (e.g. to replace names with ciphers); or to make such other order as it thinks fit.[40]

50.2. The court's inherent jurisdiction, taken with s 6 HRA (which prohibits the court from acting incompatibly with Convention rights).

51. Whether CPR 5.4C enables the court to impose restrictions on access to documents other than statements of case remains unclear.[41] In general, it is therefore sensible to rely on this provision alongside the court's inherent jurisdiction.

52. In human rights claims, applications to restrict the availability of witness statements standing as evidence in chief at trial[42] may also rely on CPR 32.13(2), which

[40] Applications under this rule can only be made by parties or persons identified in a statement of case. If an applicant does not fall into this category, they should rely on the power set out in the second bullet point.

[41] The commentary to the White Book 2022 suggests this is confined to statements of case (in reliance on *ABC Ltd v Y Ltd (Practice Note)* [2010] EWHC 3176; [2012] 1 WLR 532); see also *R (Duke of Sussex) v SSHD* [2022] EWHC 682 (Admin), [17]. There are, however, many examples of the courts relying on CPR 5.4C(4)(d) to order restrictions on access to other categories of document (for example, *Meng v HSBC* [2021] EWHC 342 (QB); [2022] QB 71).

[42] As indicated above, this provision does not apply to judicial review hearings.

provides that "anyone can ask for a direction that a witness statement is not open to inspection".

53. If there is a risk that the court may refuse to prevent non-party access to documents, an applicant can seek in the alternative an order that they be given notice of any application by a non-party to access documents under CPR 5.4C(2). This ensures that they have an opportunity to respond/object if a non-party seeks access: see e.g. *Daedone v BBC* [2023] EWHC 113 (KB), [40].

D.5 Private hearings

54. Holding a hearing (or part of a hearing) in private means that nobody but the parties and their representatives[43] can attend, and a non-party cannot obtain a transcript of the hearing. A private hearing is considered to be the most significant derogation from open justice: see e.g. *CVB v MGN Ltd* [2012] EWHC 1148 (QB); [2012] EMLR 29, [23] (and see further [86]).[44] The court will generally seek to use other forms of restriction instead, and/or to limit the extent to which a hearing is held in private. In many cases, it will be sufficient for only part of a hearing to be held in private – where, for example, submissions are being made concerning information which cannot (yet) be made public.[45] As a result, it is very rare for the trial of a human rights claim to take place wholly in private,[46] and we are not aware of any substantive judicial review hearing taking place wholly in private. By contrast, where applications for restrictions on open justice are determined at a hearing, it is relatively common for those hearings to be in private (or partly in private) to avoid revealing in open court information that an applicant seeks to protect.

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[43] And any other person specifically authorised by the court.

[44] With the exception of the kinds of restrictions which can only be imposed under the Justice and Security Act 2013 as part of a "closed material procedure" (which, as noted above, is beyond the scope of this guide).

[45] See e.g. the procedure adopted in the interim relief hearing in a judicial review concerning the publication of information by the Financial Reporting Council: *R (Taveta) Investments Ltd v Financial Reporting Council* [2018] EWHC 1662 (Admin), [42]-[43].

[46] Even in the context of claims in the tort of misuse of private information or for harassment under the Protection from Harassment Act 1997, this is unusual: see e.g. *AXB v BXA* [2018] EWHC 588 (QB); *SKA & PLM v CRH* [2012] EWHC 2236 (QB).

55. A private hearing is not a complete substitute for other orders: for example, the fact that a hearing was held in private would not - in the absence of reporting restrictions - prevent a party from publishing information about the hearing, including the identities of parties and witnesses (see s 12 of the Administration of Justice Act 1960).[47] Nor would an order for a private hearing prevent a non-party from obtaining documents from the court file. As a result, in the most sensitive cases other measures are likely to be required in addition to an order for a private hearing.

56. The power to hold hearings in private is regulated by CPR 39.2(3), which provides that a hearing (or any part of it) must be held in private if and only to the extent that the court is satisfied that one or more criteria is met. The senior courts[48] also have an inherent power to sit in private where necessary for the proper administration of justice: *Khuja*, [14]. In the Supreme Court, rule 27(1) provides that "Every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing".

E PRINCIPLES GOVERNING THE GRANT OR REFUSAL OF RESTRICTIONS ON OPEN JUSTICE

E.1 Overview

57. Once the appropriate restriction(s) and the source(s) of the court's power to grant them have been identified, the next question is how the court will make its decision. This involves the application of general principles which apply in all courts and tribunals and are relevant to all types of restriction.

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[47] "The publication of information relating to proceedings before any court sitting in private shall not of itself be a contempt of court except in the following cases, that is to say— … (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."

[48] And the County Court, so far as the exercise of the power is not inconsistent with statute or statutory court rules: *Langley v North West London Water Authority* [1991] 1 WLR 697.

58. The case law suggests that there are two principal bases on which restrictions can be justified: "maintenance of the administration of justice" and "harm to other legitimate interests": *Various Claimants v Independent Parliamentary Standards Authority* [2021] EWHC 2020 (QB); [2022] EMLR 4, [36]-[37]; *Rakoff*, [28]-[30]. These categories are not mutually exclusive. The first category covers cases where, without restrictions, the administration of justice would be frustrated – generally because the court's process would destroy what the claimant seeks to protect, by publicly revealing it.[49] The second covers cases where fully open proceedings would cause significant interference with a person's rights and/or interests. Most public law cases in which applications are made to restrict open justice fall into this latter category.

59. In these cases the starting-point is that, where a person applies for restrictions on open justice,[50] there will be a conflict between (on the one hand) the rights and interests of the applicant and (on the other) the rights of others and the common-law principle of open justice.

60. For their part applicants may rely on the right to a private and family life (Article 8 ECHR), the right to life (Article 2 ECHR), the right to not to be subjected to torture/inhuman or degrading treatment (Article 3 ECHR), and/or the common-law duty of fairness.

61. On the other side of the equation there will always be the strong public interest in open justice (see section B). In addition, restrictions on open justice engage the right to freedom of expression (Article 10 ECHR) of members of the public,

[49] One example might be a challenge to the impending publication of a regulatory report (e.g. an Ofsted inspection report), where without restrictions on open justice the content of the report would enter the public domain in the course of the proceedings, thereby undermining the very purpose of the challenge.

[50] Note that a court may also make such orders of its own motion, and may in some circumstances be compelled to do so by virtue of its obligation under s 6 HRA not to act incompatibly with Convention rights.

including the media, because they restrict the information that can be published/received.[51]

62. How conflicts between competing rights and principles are resolved depends, in particular, on (a) the rights/interests relied on by the applicant (and the strength of any evidence in respect of the same), (b) the status and personal characteristics of the applicant, and (c) the nature of the restriction sought.[52] Below we set out the overarching approach of the courts and then explore each of these factors in turn.

E.2 General test applied on an application for restrictions on open justice

63. While there are some differences in the framing of the applicable tests for different restrictions (see below), the overarching question is, in essence, whether the restriction sought is necessary to secure the proper administration of justice and/or to comply with Convention/common-law rights. An important corollary is that derogations from open justice must be proportionate, in that they must go no further than is necessary to achieve the purpose for which they are granted.

64. In all cases, applicants bear the burden of establishing that the restriction sought is necessary and proportionate through clear and cogent evidence. The decision whether or not to grant a restriction is not an exercise of discretion. It admits of only one legally correct outcome: the court is obliged either to make or not to make the order sought: see e.g. Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003, [11].

[51] Other litigants' right to a fair trial, which encompasses a right to a public hearing (Article 6 ECHR), may also be curtailed by some restrictions on open justice. However, this aspect of Article 6 is rarely considered as a discrete issue because the open justice principle covers the same territory; if it is necessary to derogate from open justice to the extent of having a private hearing, the concomitant restriction on Article 6 will also be necessary: see *A v BBC* [2014] UKSC 25; [2015] AC 588, [42]-[44], [57]. For this reason, we have not considered Article 6 in this section.

[52] This is our own loose categorisation of relevant factors, offered for the convenience of the reader. It is neither official nor exhaustive.

E.3 Factors relevant when applying the general test

(i) Rights / interests relied on by the applicant

Article 8 ECHR

65. Pursuant to s 6 HRA, the courts are under a positive obligation to take reasonable steps to safeguard Convention rights in the context of proceedings before them, including in respect of actions which may be taken by private parties in and in relation to the proceedings. Where a court imposes restrictions on open justice on Convention rights grounds, these orders are generally regarded as being made in fulfilment of the court's positive obligations: see *Attorney General v BBC* [2022] EWHC 826 (QB); [2022] 4 WLR 74, [44]; *CVB v MGN Ltd*, [21].

66. An applicant ordinarily relies on Article 8 ECHR where they wish to:

66.1. prevent the disclosure of private information about them (i.e. information in respect of which they have a reasonable expectation of privacy) (the "private information limb");[53] and/or

66.2. prevent the intrusion into their private and family lives which may arise from their being identified as the subject of information revealed in proceedings (the "intrusion limb").[54]

67. Where Article 8 is relied on, and where the main countervailing consideration is interference with the Article 10 rights of the public and the media, the court will undertake the so-called "ultimate balancing" test, summarised in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593 as follows (at [17]):

> *"First, neither article [i.e. neither Article 8 nor Article 10] has as such precedence over the other. Secondly, where the values under the two*

[53] That is the test for the engagement of the informational limb of Article 8: *Re JR 38* [2015] UKSC 42; [2016] AC 1131.

[54] On the distinction between aspects of Article 8 see *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081, [52], [57]-[62].

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." [55]

68. While this test on its face refers only to balancing Convention rights, in practice it is also treated as decisive of whether the applicant's Article 8 rights justify the derogation from open justice they are seeking at common law: see *Global Torch Ltd v Apex Global Management Ltd* [2013] EWCA Civ 819; [2013] 1 WLR 2993, [26].[56] The courts have said that "this question is not to be answered on the basis of 'rival generalities' but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case": see (*Marandi*, [43(6)]). Although the competing rights do not exist within a presumptive legal hierarchy, the court "starts from the position that significant weight is attached to free and open access to, and reporting of, court proceedings": *ECGEGC v PJFPGF NHS Trust* [2022] EWHC 1908 (QB), [39]; *Global Torch*, [24]-[25]. The applicant therefore faces an uphill battle.

69. As noted above, restrictions on open justice are often sought under the "private life" limb of Article 8 – on the basis that (a) the proceedings concern or will require reference to information which is private within the meaning of this Article, and (b) being publicly identified as the subject of this information, or having it made public at all, would represent an unlawful interference with the applicant's rights.

70. There are a number of categories of information in respect of which it is well established that a person will ordinarily have a reasonable expectation of privacy. These include information about a person's health, their sexuality and sexual activity, and the fact a person is or has been the subject of a criminal investigation

[55] See also *XXX v Camden London Borough Council* [2020] EWCA Civ 1468; [2020] 4 WLR 165, [17]-[24].

[56] That is, it is said to encompass the question of "whether there is a sufficient public interest in maintaining the open justice principle to justify curtailment of the competing right". The reverse is also true: the application of the open justice principle (including derogations from it under statute and the common law) will normally satisfy the requirements of the Convention: *A v BBC* [2014] UKSC 25; [2015] AC 588, [57].

but not charged (and information about that investigation): see *ZXC v Bloomberg LP* [2022] UKSC 5; [2022] AC 1158, [52], [146]. In many cases concerning these categories of information, an applicant's Article 8 rights will carry considerable weight. However, there is no general exception to the application of open justice in cases which involve private information (*JIH v NGN*, [21]); nor does the fact that private information is involved necessarily mean that a court will resolve the ultimate balancing exercise in the applicant's favour.[57] This will depend on what the evidence shows about the seriousness of the prospective interference (in particular, the likely impact on the applicant's private/family life if the relevant information becomes public); on the strength of the competing Article 10 rights; and on any other relevant factors of the kinds discussed in sections E.4 and E.5.[58]

71. The other type of application identified above relies on the "intrusion limb" of Article 8. This is not (or not only) about protecting private information, but about how publicity around the case more might result in interference with the applicant's private and family life more generally: for example they may fear widespread negative publicity, online harassment, or verbal or physical attacks. The stronger the evidence of the seriousness and probability of these consequences, the stronger the case will be.[59] However, it is not necessary to produce objectively verified evidence to establish an interference with Article 8 rights (c.f the position when relying on Article 2 or 3 of the ECHR – see immediately below): *Millicom Services v Clifford* [2022] EAT 74; [2022] ICR 1204 ("*Millicom* (EAT)"), [101].[60] In addition, an applicant can, in principle, rely on subjective fears – because living with those fears can, if the consequences are sufficiently serious, engage Article

[57] For example, the Court of Appeal has emphasised that there is no presumption that restrictions on open justice should be granted where a case concerns or will make reference to medical information: *XXX v Camden London Borough Council* [2020] EWCA Civ 1468; [2020] 4 WLR 165, [27].

[58] It is worth noting that, in practice, the courts often conclude that some form of restriction (commonly, an anonymity order or restrictions on the making of particular information) is justified in cases concerning alleged wrongful use of private information, including by public authorities. This is because otherwise the claimant would be publicly associated with the information, which would defeat the purpose of the claim.

[59] For an example of a case where restrictions on open justice were partially discontinued when the focus shifted from the private information limb of Article 8 to the intrusion limb, see *R (TT) v Registrar General for England and Wales* [2019] EWHC 1823 (Fam); [2020] 1 FCR 114, [18]-[80].

[60] An appeal against the judgment was dismissed by the Court of Appeal and a cross-appeal allowed: *Clifford v Millicom Services* [2023] EWCA Civ 50; [2023] ICR 663.

8: see e.g. *RXG v MoJ* [2019] EWHC 2026 (QB); [2020] QB 703, [36](viii); *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trus*t [2021] EWHC [2021] EWHC 1699 (Fam); [2022] Fam 180. But where the concern is about a risk of future breaches of Article 8 rights, those risks must be "real and not entirely speculative" and the court has to consider "the type of risk that is involved, how likely it is to happen, and what the likely consequences might then be": *Abbasi* (CA), [88]-[89].

Articles 2 and 3 ECHR

72. The courts' positive obligations under the Convention mean that they are required to take reasonable steps to avert a "real and immediate" risk of a threat to life or of serious physical harm arising from a person being identified in proceedings before them. Such risks may arise, for example, from giving evidence against someone; having one's whereabouts revealed; or being associated with certain causes. In this context "real" means no more than "objectively verified" or "well founded", and "immediate" means no more than "present and continuing": *In re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135, [20]. The threshold is high and the test is not readily satisfied: see e.g. *Adebolajo v Ministry of Justice* [2017] EWHC 3568 (QB), [23].

73. Articles 2 and 3 ECHR are unqualified rights. However, the positive obligations arising under these rights are not limitless: the state only has to do what is reasonable in the circumstances. All other things being equal, it is likely to be reasonable for a court to grant anonymity and/or reporting restrictions in order to mitigate a real and immediate risk of Article 2/3 harm. It is not completely clear whether in assessing reasonableness there is also scope for balancing a real and immediate risk of serious physical harm or death against competing rights or interests (there are conflicting authorities): see *Attorney General v BBC*, [36]-[45]. In practice, where a court accepts that not granting anonymity and/or reporting restrictions would create or materially increase an Article 2/3 risk, it is very likely to conclude that granting these orders falls within the scope of the state's positive obligations: *In re Officer L*, [29].

74. Where the application is made on behalf of a witness rather than a claimant, the common-law position may be more generous than that under Article 2/3: see immediately below. In such cases, the House of Lords has encouraged courts to start by considering the common-law test "with an excursion, if the facts require it, into the territory of Article 2": *In re Officer L*, [29].

Common-law fairness and protecting the interests of justice

75. Applicants for restrictions on open justice can also rely on the common law. The common law recognises the need to protect the interests / administration of justice in both current proceedings and future proceedings that may come before the courts: *Millicom* (EAT), [69]; (CA), [32]-[33]. The Court of Appeal in *Millicom* emphasised that it is essential to consider applications which rely on the common law through that lens, without conflating this with a Convention rights-based analysis: *Millicom* (CA), [29]-[32].

76. Part of common-law fairness is the duty of fairness to witnesses, which arises because a witness has no interest in the outcome of the proceedings and therefore a stronger claim to the court's protection (see further [80] below). This specific duty is often invoked where a witness fears reprisals from giving evidence. The protection of the common law is not, however, limited to witnesses. Common-law principles can also be the basis of a restriction on open justice (and anonymity in particular) by or in relation to anyone if it can be shown to be in the interests of justice, or if not granting the order would prejudice the administration of justice: *Millicom* (EAT), [75], [102].[61] Relevant considerations may include:

    76.1. The harm which (objectively, on the evidence available) is liable to be caused if the restrictions sought are not granted. This may include harm to life and limb, distress or humiliation caused by particular information becoming public.

[61] This point was not in dispute on appeal; indeed the Court of Appeal endorsed the proposition that "there is no reason in principle why the court should ignore risks of harm to non-participants [in the proceedings]": see *Clifford v Millicom Services* [2023] EWCA Civ 50; [2023] ICR 663, [35].

76.2. Subjective fears of harm, even if these are not well-founded. The common law is more generous than the Convention (e.g. under Articles 2 and 3 ECHR) in that it takes account of such fears: *In re Officer L*, [22]; see also *Millicom* (CA), [37]-[40].

76.3. The impact on the proceedings if the restrictions sought are not granted. This includes if they would deprive the court of important evidence, for example because a key witness would (reasonably) refuse to testify, or if a party would (reasonably) consider themselves forced to abandon the proceedings: see *Millicom* (CA), [45]-[48].

77. The court will balance these considerations against the extent and consequences of the restriction(s) sought.[62] As with applications made in reliance on Convention rights, an applicant must establish that the restriction is necessary: *Millicom* (EAT), [75]; CA, [31].

78. Reliance on the common law is likely to be particularly important in cases where the person for whose benefit the restriction is sought is outside the jurisdiction and may have difficulty invoking Convention rights: see *Millicom* (CA), [34].

(ii) Status and characteristics of the applicant

Status of an applicant in proceedings

79. The strength of an applicant's claim for anonymity and associated restrictions on open justice will depend in part on their status within the litigation: see e.g. *Kalma v African Minerals Ltd* [2018] EWHC 120 (QB), [11]. At one end of the spectrum are parties, who ordinarily have the weakest claim for restrictions on open justice. In short, the reason is that a claimant, in particular, has "accepted the normal incidence of the public nature of court proceedings": *R v Legal Aid Board, ex p. Kaim Todner* [1998] EWCA Civ 958; [1999] QB 966, p 978. The principle may have particular force in public law proceedings: as the High Court said in *R (Yalland) v*

[62] For a more detailed discussion of the factors which may weigh in the balancing exercise, see *Millicom* (CA), [42]-[44].

Secretary of State for Exiting the EU [2017] EWHC 629 (Admin) (at [23]), "[t]he starting point must be that in a Parliamentary democracy subject to the rule of law, a person who wishes to bring a public law challenge to the conduct of the Government on the ground that it is unlawful should normally be expected to do so openly and to identify himself or herself in the process."

80. Next are witnesses who are not parties. The courts recognise that the bar is lower for granting anonymity to a witness who has no interest in the proceedings. That is primarily because the courts and parties depend on witnesses' co-operation: *Kaim Todner*, p 978.

81. Finally, there are persons who are neither parties nor witnesses but who may be named in the proceedings, for example in evidence or submissions (which may then be repeated in judgments). They are likely to have the strongest claim for anonymity, because they are not involved in the litigation and may have no opportunity to challenge anything said about them: see e.g. *TYU v ILA Spa Ltd* [2021] UKEAT 2019_983; [2022] ICR 287, [44], [61]-[62]; see also *Marandi*, [44(5)-(6)] regarding the relevant factors in this context.

Characteristics of an applicant

82. Beyond those covered by automatic, statutory reporting restrictions (see [43]), there are no categories of person in public law claims who are automatically entitled to anonymity or similar protections. There are, however, three groups for whom the case for granting such protections will generally be very strong.

83. *Children*. Children are often granted anonymity and associated protections, both in cases which directly concern them and in cases relating to their parents. As Lord Bingham CJ noted in *McKerry v Teesdale & Wear Valley Justices* [2000] EWCA Crim 3553; [2001] EMLR 5 (at [17]), "the privacy of a child or young person involved in legal proceedings must be carefully protected, and very great weight must be given to the welfare of such child or young person." When conducting the ultimate balancing test (see [67]) the best interests of the child must be treated as a primary consideration, albeit not a predominant consideration – their interests may still be

outweighed by competing rights/interests: *Griffiths v Tickle* [2021] EWCA Civ 1882; [2022] EMLR 11, [47].[63] Cases involving children are given special mention in multiple places in the Supreme Court Rules in the context of anonymity: see [134.2].

84. *Victims of sexual offences, human trafficking or FGM.* Persons who have raised allegations (to law enforcement) about being victims of sexual offences, human trafficking or FGM are automatically protected by statute from being identified as complainants: see [43.1]-[43.2] above. They are not automatically entitled to anonymity in the form of the use of a cipher (which must be separately applied for). However, where the fact of their having made allegations risks being referred to in proceedings, the grant of anonymity is such an obvious and logical complement to the statutory protection that it is overwhelmingly likely to be granted.

85. *Asylum-seekers.* Applicants with an extant protection claim also have a strong claim to anonymity and/or reporting restrictions, though this is by no means a given: see *R* (*Kambadzi) v SSHD* [2011] UKSC 23; [2011] 1 WLR 1299**,** [6]. Until recently, the Court of Appeal routinely anonymised cases where a party had an extant asylum claim or appeal.[64] Although this changed in early 2022, a generous approach continues to be taken (and for good reason). The Court of Appeal's practice guidance says it will "continue its longstanding practice of anonymising judgments in most appeals raising asylum or other international protection claims, provided it is satisfied that the publication of the names of appellants in such cases may create avoidable risks for them in the countries from which they have come": *Practice Guidance - Anonymisation of Parties to Asylum & Immigration Cases in the Court of Appeal,* 23 March 2022, [5]. Other courts generally take a similar

[63] See also *K v News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827, [17]-[19] and *R (EA) v Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin); [2020] HRLR 23, [102]. The courts are alive to the importance of protecting children from being identified/publicity in high profile cases /cases concerning controversial matters: see e.g. *R (Dolan) v Secretary of State for Education* [2020] EWHC 1786 (Admin), [19]. This does not, however, mean restrictions on open justice will inevitably be granted: see e.g. *R (TT) v Registrar General for England and Wales* [2019] EWHC 1823 (Fam); [2020] 1 FCR 114, [81]-[97].

[64] *Practice Note (Anonymisation in asylum and immigration cases in the Court of Appeal)* [2006] 4 All ER 928.

approach.[65] Applications by asylum-seekers are also bolstered by the well-established principle of confidentiality in asylum proceedings, which recognises "[t]he need for those seeking asylum to have confidence that the information they provide will not be made public" – resulting in "a compelling public interest in ensuring that this confidentiality is protected": see *F v M* [2017] EWHC 949 (Fam); [2018] Fam 1, [52]. This is given "particular weight" in an Article 8 proportionality assessment: [60]-[61]. See also *G v G* [2021] UKSC 9; [2022] AC 544.

(iii) Nature of the restriction applied for

86. Some restrictions are greater derogations from open justice, and interfere more significantly with Article 10 rights, than others. The law requires that the courts only order the restrictions necessary to accomplish the objective pursued: see [63] above. As a result, hearings in private – which, as noted in section D.5, are considered the most stringent of the available restrictions on open justice – are more difficult to justify than a request for an anonymity order and/or reporting restriction. This should be taken into account when deciding which restriction(s) should be sought in a particular case.

87. In addition, restrictions made under particular rules or provisions may come with their own specific tests. Where these exist, we have identified them below. While the general principles outlined in preceding sections will be applied in all cases, it is worth ensuring that these are related back to the language of any specific test which applies.

88. *Anonymity orders and reporting restrictions*.

88.1. When an application for an anonymity order and/or an RRO is made under CPR 39.2(4), the question is whether the court "considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of" the person in question. The test that applies where an application is based on the court's implied powers under s 6 HRA taken

[65] For guidance specific to the UTIAC see *Upper Tribunal Immigration and Asylum Chamber Guidance Note 2022 No. 2: Anonymity orders and hearings in private*, 4 February 2022.

with the court's inherent jurisdiction is not codified but it is substantially the same.

88.2. Where an application for an RRO is made under section 11 of the Contempt of Court Act, the test is slightly different. Section 11 will only be in play where the court has already, under some other power (e.g. CPR 39.2(4)), directed that a "name or matter" be withheld from the public. In these cases, the test for reporting restrictions is whether the prohibition of publication "appear[s] to the court to be necessary for the purpose for which" the name or matter was withheld.

88.3. Where an application for anonymity and/or an RRO is made in reliance on Article 8, the court will consider whether "there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life": *JIH v NGN*, [21].

89. *Restrictions on non-party access to documents*. There is no specific test contained in CPR 5.4C(4) (or in CPR 32.13(2)) for restricting non-party access to documents on the court file/witness statements. The court will simply strike a balance between the competing rights/interests (where an applicant relies on qualified rights) in accordance with the principles set out in this section: see e.g. *R (Duke of Sussex) v SSHD* [2022] EWHC 682 (Admin), [7]. If an applicant relies on unqualified rights, the court will apply the test referred to above under Articles 2/3 ECHR.

90. *Private hearings.*

90.1. CPR 39.2 sets out the test that a court must apply when considering an application for a private hearing (or when considering whether to sit in private of its own motion). It provides, so far as is relevant, that:

> *(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set*

out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party; […]

(g) the court for any other reason considers this to be necessary to secure the proper administration of justice.

90.2. In the Supreme Court, rule 27(1) requires the Court to consider whether a private hearing is "necessary in the interests of justice or in the public interest".

F PRACTICALITIES OF MAKING AN APPLICATION

F.1 The documents needed

(i) Overview

91. When seeking an order for restrictions on open justice, three (and in some cases four) documents will be needed:

91.1. A document containing the application. This may take the form of an application notice, but in judicial review proceedings the application might also be included on other forms (see below).

91.2. Evidence in support of the application. Generally this takes the form of a witness statement from a solicitor or the person affected, but in judicial

review proceedings it is sometimes sufficient to include the information in the statement of facts and grounds.

91.3. A draft order setting out the restrictions sought.

91.4. In some cases, written submissions.

92. We discuss each of the relevant documents, followed by the issue of notification of the media, below.

93. We note at the outset that restrictions on open justice cannot simply be agreed between the parties; save where they arise automatically, they must be ordered by the court: *JIH v NGN,* [21] (this is also expressly reflected in the *Administrative Court Guide* at [7.12.5]). As a result, it is not sufficient simply to agree and file a consent order.

94. Before filing an application, it may also be sensible – depending on the profile and circumstances of the person on whose behalf the restrictions are sought – to ensure that they have been expressly advised about the nature of the restrictions, the factors the court will take into account, and the importance of not doing anything to undermine the case for making the restrictions and keeping them in place.

(ii) Application document

95. In general, the standard application notice in the relevant forum[66] will be appropriate. In judicial review proceedings, there are two situations where an application can be made on a form other than an application notice.

95.1. When acting for a claimant and making an application for restrictions on open justice at the same time a claim for judicial review is issued, the application can be included in section 8 of the N461 claim form. The main thing to be aware of here is that, absent any request for urgent

[66] In the KBD or the County Court this will normally be an N244 Application Notice.

consideration, the application may not be considered for some time: see further section F.2(ii)-(iii) below.

95.2. When making an application for restrictions on open justice at the same time as an application for urgent consideration and/or interim relief, the former application can instead be included in the N463 form. However, making an application for urgent consideration solely for the purpose of seeking restrictions on open justice risks being regarded as an inappropriate use of the procedure.[67]

95.3. When acting for a defendant and making an application for restrictions on open justice alongside an acknowledgement of service, the application can be included in section 4 of the N462.

96. In completing the application document, it is important to consider whether the application should be determined on the papers or at a hearing. This is likely to depend on how strong the application is, whether it is particularly unusual or complex, and whether it is or is likely to be opposed. A decision on the papers is the norm in most judicial review proceedings; in human rights claims it is more likely that there will be a hearing. If asking for an application to be dealt with on the papers, it is sensible to expressly reserve the right to renew at an oral hearing in the event of an initial refusal (see fn 87 on p 56).

(iii) Witness statement

97. A supporting statement will usually be a crucial part of the application. In particular, if separate written submissions and not included, the supporting statement needs to do the work of persuading a judge that the relevant criteria are met (see section C) – in particular, that it is necessary to grant the restrictions sought.

98. As noted above, the statement will often be made by the solicitor with conduct of the case. In general, the statement should:

[67] See the Divisional Court's warning about misuse of the urgent applications procedure in *Re an Application for Judicial Review* [2021] EWHC 1895 (Admin);

98.1. Identify, in broad terms, the restrictions on open justice being sought.

98.2. Set out the key factual background, including, for example, the kind of private information likely to be discussed in the proceedings or contained in relevant documents and the impact its disclosure would have on the person affected; or the reasons the person concerned would be placed at imminent risk of ill-treatment if the orders sought were not made. It is important that this reflects the views and feelings of the person affected, and avoids boilerplate language.

99. In addition, if the statement will not be accompanied by separate written submissions, it should:

99.1. Identify, in summary form, the relevant statutory provisions, including any which give rise to automatic reporting restrictions, (see section B); the applicable legal principles (see section C); and any particularly important authorities.

99.2. Apply these principles to the facts, for example by explaining the legal significance of the impact of disclosure or publication in terms of Article 2, 3 or 8, or common-law fairness.

99.3. Explain why the restrictions sought are no more than is necessary, including why less restrictive measures would not be sufficient to avoid the consequences feared. For example, the statement might explain how anonymisation will enable proceedings to take place in open court, without the need for a private hearing; how anonymising a party will mean that there is less of a need (or no need) to impose reporting restrictions;[68] or how adapting or redacting a document will avoid the need for any order preventing non-party access to that document. It may be worth citing case

[68] See the discussion in *JIH v NGN* [2011] EWCA Civ 42; [2011] 1 WLR 1645, [25], [32]-[35]. However, that some judges will take the view that anonymity orders should not be sought without an RRO as they stand or fall together: see *Lupu v Rakoff* [2019] EWHC 2525 (QB); [2020] EMLR 6, [41].

law in which judges have made the point that anonymity is generally preferable to a hearing in private.[69]

99.4. Explain what has been done to ascertain the position of the other party/parties to the claim, and set out their position if known.

100. It may be appropriate, for example in particularly sensitive cases, to place some pieces of information (e.g. a claimant's name and address, where anonymity is sought) in a confidential schedule to the statement – because, as explained in section D.4, it will in principle be obtainable (on application) by non-parties. It would then be necessary to seek an order that the schedule not be made available to non-parties and/or that if a non-party applies to access the statement that the application should be on notice.[70] The alternatives are either (i) to keep the information in the statement, on the basis that, for example, the draft order limits access to documents on the court file which have been duly anonymised; or (ii) to draft the statement without referring to the key identifying information at all (where this is possible and appropriate).[71]

101. In some cases, it will also be helpful to have a statement from the person directly affected (e.g. the claimant or prospective witness). This is a judgement call: an example might be where the application relies heavily on the emotional or psychological impact of failing to make the orders sought, as this is obviously more persuasive if explained directly by the person concerned. The courts have sometimes criticised legal representatives and their clients for not filing evidence from the person who is seeking the restrictions.

102. In a fast-moving case – and particularly in cases involving clients who are clearly vulnerable – there can be a strong temptation to dispense with a witness statement

[69] See for example: *XW v XH* [2019] EWCA Civ 549; [2019] 1 WLR 3757, [11]; *CVB v MGN Ltd* [2012] EWHC 1148 (QB); [2012] EMLR 29.

[70] Seeking an order that the entire statement be withheld from non-parties is regarded as a greater restriction on open justice, which is more difficult to justify.

[71] The most common example is where the application relates to the claimant, and the statement comes from the claimant's solicitor. In this case, the claimant's details can already be found in the claim form and the statement can simply refer to them using the cipher proposed.

and to trust that the defendant and the court will simply wave the application through. Although this sometimes works, it is unlikely to be worth the risk in any case where the restrictions sought are important to the client.

(iv) Draft order

103. Depending on when the application is made and on behalf of which party, the draft order dealing with restrictions on open justice will either stand alone or be, for example, part of a more extensive draft order concerning expedition or interim relief.

104. A few general suggestions:

104.1. For the reasons given at [93] above, the draft should not be framed as a consent order. If the other party/parties support or do not oppose the order sought, this can instead be reflected in the supporting witness statement and the recital to the draft order.

104.2. In preparing the draft order, it may be helpful to consider any relevant parts of the Master of the Rolls' *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003 (and the model order appended to that guidance), and the examples contained in the *Administrative Court Guide*.[72] The language may of course need to be adapted to reflect the particularities of the case and of the outcome sought.

104.3. The heading of the draft order should use ciphers if anonymity is being sought.

104.4. For similar reasons, the draft order should not record any other information it protects. If necessary, this information can be set out in a confidential schedule (see fn 24 on p 19).

104.5. It is important to include the key language from any relevant test (whether this is simply the general test identified in section E.2 or one of the specific

[72] See [7.12.9].

tests identified in section E.3(iii)) in the recital – for example, "upon being satisfied that it is necessary to secure the proper administration of justice".

104.6. If seeking further restrictions on open justice in circumstances in which an automatic reporting restriction also applies, it may be helpful to refer to the relevant automatic restrictions in the recital to the draft order.

104.7. For any order for a private hearing made under CPR 39.2(3), or any anonymity order made under CPR 39.2(4), it is good practice to include provision for the order to be published on the Judiciary website as this publication is required by CPR 39.2(5). If the order contains a confidential schedule, this paragraph should make clear that only the body of the order and not the schedule is to be published.

104.8. The order should give anyone affected by it liberty to apply to vary or discharge it, on notice to the parties.[73] This is one way of ensuring fairness to, for example, media organisations which may not have had a chance to be heard before the order is made: see subsection (vi) below.

105. We have provided an example of a draft order at the end of this guide.[74] We stress that this is only an example; the precise language of the order will depend on the circumstances of the particular case.

(v) Submissions

106. In most public law cases, if the applicable test(s) for restrictions on open justice are addressed in sufficient detail in the supporting witness statement it will not be necessary to file freestanding written submissions. However, if the restrictions being sought are particularly complex or unusual, it may be appropriate to file short written submissions.

[73] It can be useful to specify the notice period – at least 48 hours will usually be appropriate.

[74] The draft is prepared as though the order were being made by a claimant on issuing a claim for judicial review. It can of course be adapted to other contexts.

107. Where the application is made when filing a claim for judicial review, the most convenient course is likely to be to include short submissions on the restrictions sought in the statement of facts and grounds (including relevant factual matters in any witness statement). Similarly, if a defendant seeks restrictions on open justice to protect a witness or other non-party, it may be convenient to include submissions in the summary grounds of defence.

(vi) Notifying the media

108. A person making an application for restrictions on open justice is not required to give notice of that application to the media, and media organisations do not have a right to be heard before these orders are made.[75] That is the case not only in relation to anonymity orders but also RROs and orders for private hearings: *A v BBC*, [66]; *Executor of HRH Prince Philip v Guardian News and Media* [2022] EWCA Civ 1081; [2023] 1 WLR 1193, [17]-[18].

109. However, as the Court of Appeal has reaffirmed, "the media should normally, in fairness, be able to be heard at some stage where orders are made that engage article 10": *Prince Philip*, [18]. The courts often give effect to this duty of fairness by ensuring that orders derogating from open justice give liberty to anyone affected to apply (on notice to the parties) to vary or discharge the order; as noted above, it is good practice for a draft order to contain such a provision. In other cases the court may, of its own motion, direct that notice be given to the media before it determines an application for restrictions on open justice: see e.g. *Various Claimants v Independent Parliamentary Standards Authority* [2021] EWHC 2020 (QB); [2022] EMLR 4. This is more likely where applications for restrictions on open justice are considered at an on-notice hearing.

[75] Because these are not applications for relief made against any person/respondent: *A v BBC* [2014] UKSC 25; [2015] AC 588, [66]. But note the observations of Mostyn J in *Marandi v Westminster Magistrates' Court* [2023] EWHC 587 (Admin); [2023] 2 Cr App R 15, in which he stated that may be regarded as good practice where an applicant seeks a *contra mundum* RRO, [69].

F.2 Timing of applications

(i) Overview

110. The timing of an application for restrictions on open justice – including both when the application is made, and when the applicant asks for it to be considered by the court – is critical, and should be considered as early as possible. The reasons for this may seem obvious, but they can be easy to overlook when all involved are focused on the substantive issues in the claim.

111. Once a claim is issued or a defence/acknowledgement of service is filed using a party's full name (and listing their address), there are consequences in terms of information becoming publicly available in the absence of restrictions on open justice. Their range and potential significance grows over time, and will vary significantly from case to case. The key staging-posts are as follows:

111.1. First, the documents filed – including the full names, address(es), and other details of the parties – will be visible to court staff. In public law cases this is unlikely to be a concern unless the matter is exceptionally high-profile or sensitive.

111.2. Second, if a human rights claim is filed in the KBD in London (not the Administrative Court), the title of proceedings will be visible on the register of claims (see [15.3]), which is open for inspection by the public; it will also be accessible to those registered for the electronic public search facility mentioned at [15.3] above. The result is that, absent restrictions, someone who inspected the register could find out (and report) the fact that a person is involved in the proceedings. In most cases, this will not of itself be of concern. However, it is worth keeping in mind that if there is publicly available information naming someone as the claimant/defendant in claim number X against claimant/defendant Y, the proceedings (and the information subsequently revealed in the case) may be linked to them even if an anonymity order is later obtained.

111.3. Third, once an acknowledgement of service or defence has been filed,[76] the statements of case (at that point, the claim form and the statement of facts and grounds/particulars of claim) and any orders made will become available for inspection by non-parties without notice to the parties (see [46] above). In most cases, the risk of a non-party taking up this opportunity is likely to be very small. That is particularly true in the Administrative Court where there is no register of claims for non-parties to browse; they are only likely to become aware of a claim if someone involved has spoken about it publicly or to the media. However, in a high-profile or sensitive case it is always worth considering.

111.4. Fourth, as the proceedings evolve other documents added to the court file will be available to non-parties in accordance with the principles identified at [46]. Again, absent reporting restrictions their contents could also be published freely.

111.5. Fifth, as soon as any hearing in the case is listed, the title of the claim will appear in the cause list, providing a further opportunity for it to catch someone's eye.

111.6. Sixth, if and when any hearing takes place in open court, the public will be free to attend and report on the proceedings. Non-parties will also be able to apply to access documents read to or by the court at any hearing (see [46] above).

112. Early consideration of all these potential consequences, and what they could mean for the client and the case, will help inform a decision about when and how an application should be made. The principal options – pre-issue, on issuing, post-issue, and on appeal – and the specific considerations that apply at each stage are discussed below. As a general rule, the later an application is made, the more difficult it is for it to succeed – most often because, by later stages of the

[76] 14 days after service of particulars of claim in a human rights claim and 21 days after service of a statement of facts and grounds in judicial review proceedings.

proceedings, the information the application seeks to protect has already been published or made known.

113. If it becomes clear at the pre-action stage that an application for restrictions on open justice is likely, it is good practice to flag this in correspondence and to ask other parties to confirm what position they would take. Although (again) derogations from open justice cannot simply be agreed, where other parties support (or at least remain neutral on) an application this is likely to be helpful.

114. Where the prospective application will involve restrictions on non-party access to documents, it may – for example in particularly sensitive cases – be sensible to draft documents like statements of facts and grounds, particulars of claim, and witness statements so as to ensure that any information that should not be available to non-parties is put into confidential schedules or exhibits. Orders for restrictions on non-party access to documents can then, out of an abundance of caution, be sought in respect of only the confidential schedules/exhibits,[77] while ensuring that non-parties can still view the core documents in a case. As noted at [100], it may also be possible to minimise references to the information the application will seek to protect so they are easy to anonymise down the track.

(ii) Pre-issue applications

115. *Human rights claims.* Until 2022, it was commonplace for claimants seeking anonymity and other restrictions on open justice in Part 7 claims (including human rights claims) to make a pre-issue application for permission to issue anonymously and other restrictions. There was a well-established procedure for making these applications before a Master, and if an application was refused a party could decide not to issue proceedings. However, the position has now changed: the King's Bench Guide ("KB Guide") now states that applications for permission to issue proceedings anonymously should be made on issue (by way of an

[77] As explained above at [46.1], schedules or exhibits to statements of case are not presumptively available for inspection in the same way as the body of the document; however, as access may be obtained on application under CPR 5.4C(2) (see [46.2] above), restrictions are still worth seeking if the material is sensitive.

application notice), and not before: [4.11], [15.24].[78] Applications of this kind have always been rare in the County Court. While there is no specific guidance, it is likely that the County Court will follow the approach set out in the KB Guide.

116. *Judicial review proceedings.* Pre-issue applications for permission to issue anonymously have always been very rare in judicial review cases. However, the *Administrative Court Guide* now expressly contemplates making a pre-issue application for an order permitting a would-be claimant to issue a claim form without their name or address.[79] This is done by filing an application notice or, if the application needs to be decided within seven days, an N463 application for urgent consideration.[80] Claimants may wish to make a pre-issue application in rare cases where (a) documents filed on issuing will contain exceptionally sensitive information and/or there is particular risk (e.g. to personal safety) associated with their being identified in connection with a claim; and (b) the concerns/risks are such that they do not wish to wait for the Court to determine an application for anonymity (and other restrictions on open justice) when making a permission decision on the papers. This would be because, as explained in subsection (iii) below, there is a small risk that third parties could obtain a claim form and statement of facts and grounds before the orders sought are made (and documents are also viewable by staff in the court office). The *Administrative Court Guide* suggests that, in general, these applications will only be granted where the criteria for making an RRO are made out.[81] As the procedure is a new one at the time of writing, it will be important to check for new authorities before seeking to use it.

[78] We note that the Chancery Division appears not to have ruled out pre-issue applications: see *Business and Property Courts of England & Wales - Chancery Guide 2022*, [15.66]-[15.68].

[79] *Administrative Court Guide*, [7.12.3]-[17.12.4]. These are referred to as "withholding orders". On one reading of the Guide, the Court now expects all applications for anonymity orders to be made pre-issue, although this seems unlikely to be what is intended: see [119].

[80] *Administrative Court Guide*, [7.12.4], [16.2.2]-[16.2.3].

[81] *Administrative Court Guide*, [7.12.6]. For more information about RROs, see section D.3; for applicable principles, see section E.

(iii) Applications made on issuing or first responding to a claim

117. In general, this will be the best time to make an application for restrictions on open justice. It does not, however, provide any guarantees: there is always a chance that some or all of the information the application seeks to protect will become available to the public for some period of time, for example because the application is not granted in full or is granted later than requested. A timely and well-prepared application will, of course, help minimise this risk.

Considerations specific to judicial review proceedings

118. Unless an application has been made and granted pre-issue, proceedings should be issued naming the claimant even where they contain/are accompanied by an application for anonymity and/or other restrictions on open justice. As noted above, this can be done in section 8 of the N461 claim form or (where relevant) in section 5 of the N463 application for urgent consideration, and it is sensible to include brief submissions in the statement of facts and grounds.

119. The new additions to the *Administrative Court Guide* might, on one reading, appear to suggest that applications for anonymity (as distinct from other forms of restriction on open justice) should always be made pre-issue in this forum.[82] On balance it seems unlikely that this is intended because (a) dealing with a large volume of pre-issue applications – where many of these could properly have been made on issuing and dealt with alongside permission – would place considerable strain on the Court's resources; (b) there is often insufficient time to make pre-issue applications and have them determined judicial review cases; and (c) this practice would be polar opposite of what is required in the King's Bench Division generally (see [115]). As a result, absent further judicial clarification it seems reasonable to read the Guide as permissive rather than prescriptive.

[82] The Guide defines a "withholding order" as an order "permit[ting] a Claim Form to be issued without the claimant's name or address" (at [7.12.3]), but does not mention any other type of anonymity order; it then says "[a]pplications for withholding orders are made before filing the Claim Form" (at [7.12.4], emphasis added). It does however recognise that "[a]pplications for any other order may be made either before the Claim form is filed, or within the Claim Form… or later by Application Notice."

120. If representing a defendant, an application can be made alongside an acknowledgement of service and submissions included in the summary grounds of resistance.

121. The application is likely to be determined when the court first gives substantive consideration to the claim. Depending on the urgency, this may be when it considers an application for expedition; when it considers whether to grant interim relief; or when it considers permission on the papers. An application for restrictions on open justice may be, and indeed is often, granted even if permission is refused, on the papers or at an oral hearing; the two issues are separate and distinct.

122. In some cases waiting until the permission stage, or even the grant of interim relief, may create unacceptable risks for the client or any other person concerned: for example, in the circumstances identified at [116]. In these cases, options include:

122.1. In limited circumstances – making a pre-issue application (see subsection (ii) above).

122.2. Asking the court to determine the application on the papers at an earlier point. This can be done (a) in correspondence, with reference to an application made in a claim form or acknowledgement of service (but there is a risk that this may not be placed before a judge and no decision will be made prior to permission), or, preferably (b) making a separate Part 23 application and seeking to have it determined on an expedited basis.[83]

122.3. If acting for a claimant who is seeking urgent consideration – including the application for restrictions in an N463 form. But, as we explain earlier, the urgent applications procedure should not be used solely for making an application for restrictions on open justice, save where there are extremely clear and compelling reasons for doing so.

122.4. Asking the court to list the application for a separate hearing.

[83] When doing this, there is no need to include the application in the N461 claim form.

123. If the court decides to determine an application at the start of an oral hearing (for example, a CMC or interim relief hearing), the client may be concerned about their name appearing on the daily cause list (online and at court), and/or about members of the public attending or reporting on the hearing. In these cases, options include:

123.1. Writing to the court to ask that the case be listed using the cipher suggested in the application – explaining that a request for anonymity will be determined at the hearing and that listing the case without a cipher would undermine the efficacy of the protections sought. In our experience, such requests are sometimes accommodated.

123.2. Making a formal application to the court, if this has not already been done (see [125]), for the case to be listed under a cipher and (if appropriate[84]) for the part of the hearing dealing with restrictions on open justice to be heard in private. This can be done orally at the start of the hearing if required, though it is of course preferable to submit a properly prepared application in advance. If the application is not dealt with on the papers ahead of the hearing it will be too late to have it listed under a cipher. However, the court will generally make an immediate (and sometimes provisional) decision on the request for a part-private hearing. If the court is not minded to order a private hearing this may affect the way the application, which will then be made in open court, is put.

Considerations specific to human rights claims

124. In a human rights claim, if representing a claimant an application should be filed (using an application notice) at the same time as filing the claim form.[85] The application is now likely to be determined on the papers (or at a short hearing) in the weeks following issue. The KB Guide states that the case file will be marked private until a decision has been made: [4.11]. Applications made by a defendant,

[84] This is not always necessary because it may be possible to make the application in open court without referring to names or other information it seeks to protect.

[85] See [3.37]-[3.40] of the KB Guide for information about the modalities of doing this.

on filing their acknowledgement of service or defence, are likely to be dealt with the in the same way. If the court considers the application at a hearing, the considerations set out immediately above apply.

Content specific to an early application

125. If an anonymity order is sought, the draft order should provide for the filing of anonymised versions of the claim form, grounds/particulars, and any other document which is already before the court. It is also worth considering seeking restrictions on non-party access to versions of documents which have yet to be anonymised (see [49.2]). Finally, if there is a chance that the application will end up being determined at an oral hearing (for example because this is what has been requested, or because the urgent listing of an application for interim relief has been sought and the court is likely to hear the application for restrictions at the same time), consider making provision for any oral hearing at which the application for restrictions on open justice is to be determined to be listed using a cipher and/or to be held in private. As noted above, the court may not make any directions until the day of the hearing, in which case it may be necessary to ask it to decide at the outset whether the application for restrictions can be heard in private.[86]

Outcome of the application

126. If an application for anonymity made at the time of issuing or first responding to a claim is granted, it is necessary (whether or not the application provided for this) to consider re-filing anonymised versions of any documents already on the court file.

127. If an application for restrictions made at the time of issuing or first responding to a claim is refused, it will be necessary to decide whether a challenge (by way of appeal or, in some cases, renewal to an oral hearing[87]) is possible and advisable.

[86] This is why it is common for the direction that any oral hearing of the application be in private to appear in the same draft order as other restrictions sought.

[87] This option will be available only if the application was determined on the papers, and the parties have not consented to this being the final means of disposal: see *R (on the application of Nolson) v Stevenage*

If it is not, or if any challenge fails, a decision has to be made about whether to pursue or continue to defend the claim without the restrictions sought. Even if the claim is withdrawn or otherwise finally determined, the initial details will remain accessible on the register of claims (if applicable) and non-party access to those few documents on the court file, via the avenues summarised at [111], will remain a possibility.

128. Finally it should be noted that, where a public law claim is settled before an application for restrictions on open justice (made at the time of issuing or otherwise) is determined, the court can be asked to determine the application at the same time it considers the parties' proposed consent order disposing of the claim. As noted at [93] above, the restrictions themselves cannot be ordered by consent.

(iv) Post-issue applications

129. Applications for restrictions on open justice are often made part-way through a case. In rare cases they have even been made (although rarely successfully) after a public judgment has been given: see further below. However, the longer the case has gone on, the more information is likely to have made its way into the public domain and hence the more difficult it will be to persuade the court of the efficacy and appropriateness of the restrictions sought. For example, while previous publicity/disclosure of sensitive information is not a bar to the engagement of Article 8 (see section E.3(i) above), this is a factor which may weigh heavily in the ultimate balancing test. Particular difficulties will arise if the case has already been reported on in the media, or if judgments referring to the information sought to be protected have already been published. For example:

129.1. Where the application is made primarily on the basis that disclosure or publication of the relevant information would cause a significant interference with Article 8 rights, the court may be inclined to consider that much of the

Borough Council [2020] EWCA Civ 379. This is why it is advisable to expressly reserve the right to renew at an oral hearing where initial consideration on the papers is otherwise expedient.

damage has already been done and that the minimisation of further harm cannot justify the concomitant limitations on the Article 10 rights of the public and the press.

129.2. Where the application is based on a real and immediate threat of Article 2/3 harm, but the relevant information has already been in the public domain for some time without any indication that person concerned has been put at risk, the court may be less inclined to find the restrictions are necessary.

130. *Imam v London Borough of Croydon* [2021] EWHC 736 (Admin) is a salutary example of the risks of a late application.[88] The claimant sought anonymity and reporting restrictions the day before the court's judgment was listed for hand-down; the application was refused. Among the factors that court held to be important were the fact that restrictions on open justice had not been sought or suggested at any previous stage of the proceedings; the fact that no explanation had been provided for seeking them only at such a late stage; and the fact that there had already been a public trial involving repeated references to the information sought to be protected. The Court took the opportunity to stress that "it is of considerable importance that litigants and those who advise them consider the issue at the earliest possible stage in litigation": see [41].

131. Any application made post-issue will therefore need to be carefully evidenced, and will need to address the question of what information is already in the public domain and how the applicable test(s) are satisfied despite this.

(v) Applications or continuing restrictions on appeal

132. For the reasons outlined above, any application for restrictions on open justice which is made for the first time at the appellate level is likely to be met with very considerable scepticism and to have very limited prospects of success.

[88] See also *XXX v Camden London Borough Council* [2020] EWCA Civ 1468; [2020] 4 WLR 165, where a similarly late application was refused (though anonymity was granted in relation to the judgment refusing the application). An appeal to the Court of Appeal was dismissed.

133. The position, of course, is different where restrictions on open justice were in place at first instance. As already noted, where the relevant order is silent as to duration it will be read as continuing in force until further order. However, the original order is unlikely to provide sufficient protection in the context of an appeal: for example, any restrictions on non-party access to documents is likely to relate only to documents held by the original court or tribunal. Appellate courts should normally (re)consider restrictions on open justice for themselves: *Pink Floyd Music v EMI Records* [2010] EWCA Civ 1429; [2011] 1 WLR 770, [66]-[69].[89] While the appellate court will generally pay close regard to the decision of the lower court on this issue, it would be risky to assume that restrictions imposed below will simply continue if no action is taken, or that an application to extend them will be waved through.[90]

134. As at first instance, it is advisable to raise the issue of restrictions on open justice as early as possible in the appeal process. This can be done by making an application for continued restrictions alongside the application for permission to appeal (or the notice of appeal if permission was granted by the lower court),[91] and making reference to the application and the reasons for it in any accompanying submissions (for example, a skeleton argument on permission to appeal). In some cases the appellate court will have specific procedures in place – for example:

134.1. In the Court of Appeal, where a new immigration or asylum appeal is registered it will initially be anonymised if it was also anonymised below. Where a decision is required on permission to appeal, the judge considering the matter will also decide whether anonymity should be continued: *Practice*

[89] If a first-instance judgment has been appealed on some bases but not others, the courts are likely to take the view that the appellate court is the best forum for arguments on open justice irrespective of which aspect of the case they arise from: see e.g. *Cokaj (Anonymity Orders: Jurisdiction and Ambit)* [2021] UKUT 0202 (IAC); [2021] Imm AR 1562. However, this is not to say that the court or tribunal at first instance loses jurisdiction; it may continue to determine an issue of open justice if appropriate in all the circumstances: ibid.

[90] For an example of the Court of Appeal refusing to continue an anonymity order made in the Administrative Court, see *Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426; [2018] 1 WLR 1471, [41]-[42].

[91] For example, the N161 Appellant's Notice (used for appeals to the Court of Appeal) allows other applications to be made in section 10 and supporting evidence to be identified in section 11.

Guidance - Anonymisation of Parties to Asylum & Immigration Cases in the Court of Appeal, 23 March 2022, [7].

134.2. In the Supreme Court, the parties are required to draw the Registry's attention to any existing restriction on open justice; the presumption is that it will then be extended: see PD2 [2.1.20], PD3 [3.1.11] and PD4 [4.2.10] (cases involving children); PD4 [4.2.7] (more generally). Provision is also made for any fresh application to be made as soon as possible after the filing of an application for permission to appeal: PD3 [3.1.11] and PD4 [4.2.10]; PD3 [3.1.12] and PD4 [4.2.11] (applications under s 4 of the Contempt of Court Act).

135. The applicable principles are likely to be the same as those underpinning the application to the court or tribunal below – though of course reference should be made to any forum-specific authorities, and for appeals to the Supreme Court reference should be made to the Supreme Court Rules rather than the CPR.

136. The extent of the evidence and submissions provided in support of the application will be a matter of judgement. If the circumstances which led the lower court or tribunal to grant the restrictions have not changed, it may be enough to set these out and to provide copies of the evidence supporting the original application, the order below, and any accompanying reasons. For additional security or in more complex cases, it may be helpful to provide a short statement from the solicitor with conduct of the case exhibiting these documents, summarising why the original application was made and granted, and confirming that the circumstances have not changed (or, if they have, explaining why they reinforce or do not dilute the case for the restrictions sought).

137. As at first instance (and unless any specific procedure applies on appeal), it is important to consider carefully when the appellate court should consider the application. The most common options are (i) on the papers when the court considers permission to appeal, or (ii) at the outset of the appeal hearing. If either of these presents risks for the person affected – for example, if the client is the

appellant and is concerned about non-party access to the appellate court's records or about the case being listed under their full name – the options identified at [122]-[123] above may also be considered.

138. It is worth noting that the Supreme Court keeps online lists of permission to appeal decisions[92] and current cases[93] which are available for much longer than a daily cause list. However, as long as parties comply with PD4 – which provides that appellants should use the title employed in the court below in their notice appeal, and should draw the Registry's attention to any previous anonymity order "so that the title adopted in the Supreme Court can take account of the need for anonymity" (see [4.2.5], [4.2.7]) – it seems clear that these lists will continue to use the same cipher(s) employed below.

G ENFORCEMENT

G.1 Overview

139. In general, both parties and non-parties (including the media) comply with restrictions on open justice. Any breaches – for example, a report of proceedings which discloses information covered by an RRO – may well be inadvertent, and may be capable of being resolved informally.

140. To minimise the risk of inadvertent breaches, it is good practice to ensure that reminders of any applicable restrictions on open justice are given at critical points in the proceedings. The most obvious example is to ask the court at the outset of any public hearing to remind everyone present of the restrictions in place. Additionally, there is generally a notice of hearing outside the courtroom; this should include reference to the fact that an RRO is in place.

[92] https://www.supremecourt.uk/news/permission-to-appeal.html
[93] https://www.supremecourt.uk/current-cases/

141. In the event of a sustained, serious or deliberate breach, it may become necessary to consider enforcement options. These will depend on the nature and source of the relevant restriction.

142. Breach of some types of restriction carry specific criminal sanctions. For example:

142.1. Breach of the automatic reporting restrictions imposed by the Sexual Offences (Amendment) Act 1992 (see [43.1]) is an offence punishable by a fine: s 5(1). There are a number of defences, including that the alleged victim had given written consent (s 5(2)) and that the person was not aware and had no reason to suspect that the publication contained a matter covered by the restrictions (s 5(5)).

142.2. Breach of reporting restrictions imposed under s 39 of the Children and Young Persons Act 1933 (see [42.4]) is also punishable by a fine: s 39(2).

143. These are treated as substantive criminal offences which may be prosecuted by the Crown Prosecution Service.[94] However, where the breach arises in the context of ongoing proceedings, it remains common to report it to the court (rather than the police) in the first instance.

144. This is because breaches of restrictions on open justice may also amount to a contempt of court. The scenario most likely to raise issues of contempt is deliberate breach of an RRO. As the law of contempt is a vast topic – forming the subject of entire books[95] – the following brief points are offered by way of introduction only.

[94] See the guidance at https://www.cps.gov.uk/legal-guidance/contempt-court-reporting-restrictions-and-restrictions-public-access-hearings. This will not prevent courts treating breach as a contempt if this is considered appropriate: see e.g. *Solicitor General v Mayfield* [2021] EWHC 1051 (QB), [24]; *Solicitor General v Berry* [2021] EWHC 335 (QB), [23].

[95] See e.g. *Borrie and Lowe: The Law of Contempt* (4th edn, LexisNexis, 2010) and *Arlidge, Eadie & Smith on Contempt* (5th edn, Street & Maxwell, 2019).

G.2 Civil versus criminal contempt

(i) The basic distinction

145. Contempt is traditionally divided into two categories: civil and criminal.[96] Civil contempts are generally committed by parties disobeying court orders or breaking the terms of undertakings given to the court.[97] Criminal contempts are generally committed via other acts, including publications, which intentionally interfere with the administration of justice – for example, by deterring witnesses from giving evidence or prejudicing the conduct of a fair trial.[98] It is often difficult to decide which category a potential contempt falls into, and the maintenance of the distinction has attracted serious and sustained criticism. For present purposes, it suffices to note that a breach by a party of an order imposing restrictions on open justice is likely to be treated as a potential civil contempt.[99] Where a non-party (e.g. a media organisation or blogger reporting on proceedings) breaches an order purporting to bind on the world at large – most commonly an RRO – the categorisation is less clear. Authoritative commentary suggests that the potential contempt is likely to be criminal in character.[100] However, in several cases – dealing with breaches of orders made under s 4 of the Contempt of Court Act[101] (see [42.2]) and s 46 of the Youth Justice and Criminal Evidence Act 1999[102] –

[96] Though this classification is increasingly contentious: see e.g. Borrie and Lowe, ch 1 [1.3] and ch 6 section VII.

[97] Borrie and Lowe, ch 6 [6.72]; Arlidge et al., ch 3 [3-1].

[98] Ibid, and see further Arlidge et al., ch 3 [3-29] (stressing that criminal contempt can be committed even in the context of civil proceedings).

[99] Arlidge et al. suggest that "In England, the approach of the courts appears to be that even though a civil contempt may take on characteristics which are sometimes said to be 'criminal' in nature, breaches of court orders and undertakings are nonetheless still classified as civil": ch 3 [3.22]. The exception may be breaches of orders made under ss 4 or 11 of the Contempt of Court Act, which Arlidge suggests are likely to be treated as criminal (whether committed by a party or a non-party): see [3-105]ff. In addition, where in all the circumstances the breach affects not just the rights and interests of the parties but undermines the administration of justice more broadly, it may properly be treated as criminal: see e.g. *Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103, [23].

[100] See Arlidge et al., ch 6 section IIIA and [6-218].

[101] *HM Attorney-General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477.

[102] *Solicitor General v Mayfield*.

courts have dealt with contempts of this kind without providing a clear answer on categorisation.

146. The difference between potential civil and potential criminal contempt remains important, as it has consequences for both the procedure to be followed and (at least to some extent) the applicable test.

(ii) Potential civil contempt

147. In cases of civil contempt, it is enough that a party has deliberately done something which breaches a court order (including one imposing restrictions on open justice); it does not need to be shown that they intended to disobey or to interfere with the administration of justice.[103]

148. In *HM Attorney-General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477, the Divisional Court – considering an alleged contempt arising from breach of an RRO[104] – held that, at least in cases involving media reporting, contempt can be committed even without actual knowledge of the relevant order. It is enough if the alleged contemnor is reckless, in the sense that they foresee the possibility that such an order exists (and that publication would breach it) but proceed without any further inquiry, thereby taking "an unreasonable risk": see [54]-[57]. As it was unclear whether the case was treated as one of civil or criminal contempt, this reasoning is now liable to be applied in either context.

149. Even where an alleged contempt is civil in character, the breach of the order must be made out beyond a reasonable doubt (which is the criminal standard of proof): *Re Bramblevale Ltd* [1970] Ch 128; *Dean v Dean* [1987] 1 FLR 517.

150. In terms of procedure, civil contempt proceedings can be initiated by way of an application for an "order for committal". The procedure in jurisdictions where the CPR apply is set out in Part 81. Where the application is made in the context of existing High Court or County Court proceedings, it should be made under Part 23;

[103] Borrie and Lowe, ch 6 [6.10]; Arlidge et al., ch 3 [3-107] and [3-273].
[104] Made specifically under s 4 of the Contempt of Court Act – see [42.2] above.

in other cases (for example, a potential contempt in the context of Court of Appeal proceedings) it should be made to the High Court under Part 8. In some cases the court's permission is required to proceed.[105]

151. In practice, it is usually preferable to start by drawing the potential contempt to the attention of the judge who made the relevant order and seeking a hearing to deal with the matter. This enables the court to decide if it wishes to take action of its own motion[106] or if it considers some other formal step, such as an application in accordance with Part 81, to be required.

(iii) Potential criminal contempt

152. In cases of potential criminal contempt, the conventional understanding is that it needs to be shown (beyond a reasonable doubt) that the alleged contemnor:[107]

152.1. did something which created a real risk of prejudice to the administration of justice (the *actus reus*); and

152.2. intended to prejudice (or interfere with or impede) the administration of justice, in a particular case or generally (the *mens rea*).

153. As to the *actus reus*, if a non-party breaches an order restricting open justice this may well – depending on the circumstances – be found to create a real risk of prejudice to the administration of justice.

154. As to the *mens rea*, it is now well established that the requisite intention can, if appropriate, be inferred from knowledge of the existence of an order combined with deliberate breach: *Solicitor General v Cox* [2016] EWHC 1241 (QB); [2016] 2 Cr App R 15. While recklessness as to prejudice to the administration of justice is

[105] Where the application relates to interference with the due administration of justice outside existing High Court or County Court proceedings, or where it involves an allegation of knowingly making a false statement in an affidavit or other document verified by a statement of truth: CPR 81.3(5).

[106] All courts of records have inherent jurisdiction to punish for contempt (though this is limited to superior courts of record for contempts committed outside the courtroom); some other courts (e.g. the County Court) have a statutory contempt jurisdiction.

[107] These requirements are summarised here in the simplest possible terms, but are of course the subject of considerable academic debate and judicial discussion.

not technically sufficient, in deciding whether intention can be inferred the court may take account of the extent to which prejudice to the administration of justice was a foreseeable consequence of the person's actions. Where it is inevitable or near-inevitable, this may be enough to found an inference of intent.[108] In addition (and importantly), in *Attorney-General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 the Supreme Court – dealing with a case of criminal contempt[109] – held that where there had been a deliberate breach of an order which bound the alleged contemnor and of which he was "well aware", it was not necessary to show "an ulterior intention to interfere with the administration of justice" (though such an intention could in any event have been inferred on the facts): [28].[110] This authority – particularly if taken with the approach in *Yaxley-Lennon* whereby recklessness as to the existence or terms of (for example) an RRO is taken as sufficient even absent actual knowledge (see [148] above) – could make criminal contempt consisting of breach of an order restricting open justice significantly easier to establish.

155. A further important exception to the need for *mens rea* arises where the potential contempt attracts the "strict liability rule" established by the Contempt of Court Act.[111] This is "the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so": s 1 (emphasis added). The rule applies only:

155.1. to a "publication", which is broadly defined as including "any speech, writing, programme… or other communication in whatever form, which is addressed to the public at large or any section of the public" (s 2(1));

[108] See Arlidge et al., ch 5 [5-207].

[109] See [16].

[110] The judgment of this "first instance panel" was upheld on appeal to a differently constituted bench: [2021] UKSC 58; [2022] 1 WLR 367. The panel's findings on the need for specific intent were not appealed or otherwise doubted.

[111] For a detailed discussion see e.g. Arlidge et al., ch 4.

155.2. where the publication "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" (s 2(2)); and

155.3. where the proceedings in question are "active" within the meaning of the Contempt of Court Act (s 2(3)-(4) with Sch 1).

156. There is extensive case-law and commentary on the interpretation of each of these requirements. Where they are met, a person can be guilty of criminal contempt[112] irrespective of their intentions – subject to a range of statutory defences.[113]

157. In terms of procedure, the institution of proceedings for criminal contempt is usually a matter for the Attorney General – or sometimes for the court of its own motion.[114] This limits the costs risk to the party adversely affected – which is appropriate where the overriding concern is to protect the administration of justice. Guidance published by the Attorney General's office suggests that parties should bring potential criminal contempt to the attention of the judge in the first instance, who can then decide whether to take action or to make a formal referral to the Attorney General.[115] Thus, where there has been a sufficiently serious breach of an order restricting open justice, the appropriate first step is likely to be the same as for a potential civil contempt. In these cases, the court may positively discourage the making of an application under Part 81.

G.3 Injunctions to restrain contempt

158. It may be possible to obtain an injunction to restrain action which would amount to contempt of court – including to prevent a breach (or further breach) of a restriction

[112] For the proposition that the contempt liability established by the strict liability rule is criminal in character, see Arlidge et al., ch 3 [3-102].

[113] See Contempt of Court Act 1981 s 3 (innocent publication), 4 (contemporary reports of proceedings), 5 (discussion of public affairs).

[114] See Arlidge et at., ch 3 [3-183]. Indeed s 7 of the Contempt of Court Act expressly provides that proceedings for contempt under the strict liability rule may only be instituted with the consent of the Attorney General or a court of appropriate jurisdiction.

[115] See https://www.gov.uk/guidance/the-law-officers-approach-to-contempt-of-court-referrals.

on open justice.[116] There is some authority to suggest that the Attorney General's involvement is not required in seeking an injunction, even where it would be necessary in order to pursue the completed act of contempt.[117]

159. Rather than applying the familiar *American Cyanamid* test, the court is likely to ask whether it can be "sure" – to the criminal standard (beyond a reasonable doubt) – that (i) the acts which are said to amount to contempt will be carried out if not restrained, and (ii) if those acts are carried out, they will amount to contempt: see e.g. *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB); [2010] EMLR 9, [34]-[43]; *WFZ v BBC* [2023] EWHC 1618 (KB), [25]-[26], [66]-[67], [73]-[74].

H CONCLUSION

160. Open justice is a cornerstone of our legal system. Understanding and navigating its application in public law cases is a valuable and increasingly important skill. We hope the overview offered by this guide will help public law practitioners find new or renewed confidence in doing so.

[116] See e.g Arlidge et al., ch 6 [6-1].

[117] See the discussion at Arlidge et al., ch 6 section I(F); see also *WFZ v BBC* [2023] EWHC 1618 (KB), [24].

IN THE HIGH COURT OF JUSTICE **Claim No.**
KING'S BENCH DIVISION (ADMINISTRATIVE COURT)

BETWEEN:

THE KING

(on the application of [insert 3-letter cipher])

Claimant

-and-

[INSERT]

Defendant

EXAMPLE OF AN ORDER FOR RESTRICTIONS ON OPEN JUSTICE IN A JUDICIAL REVIEW CLAIM

UPON the Claimant's claim for judicial review dated [insert] and the Claimant's application for restrictions on open justice

AND UPON reading the Claimant's claim form, the Statement of Facts and Grounds and the witness statement of [insert]

[*If considered at an oral hearing*] **AND UPON** hearing counsel for [insert]

[*If a claimant or witness is someone to whom an automatic reporting restriction applies*] **AND UPON** [insert status of person on whose behalf restrictions are sought – e.g. "the Claimant" / "a prospective witness for the Claimant"] being a person to whom [insert relevant provision – e.g. "s 1(1) of the Sexual Offences (Amendment) Act 1992"] applies

AND PURSUANT TO [*if provisions of the ECHR are being relied on*] s 6 (1) of the Human Rights Act 1998 (taken with Article [insert] ECHR), [*if seeking a private hearing of an application for restrictions on open justice*] CPR 39.2(3), [*if seeking restrictions on access to the court file*] CPR 5.4C(4), [*if seeking an anonymity order*] CPR 39.2(4) and/or the Court's inherent jurisdiction; [*if seeking a reporting restriction order*] CPR 39.2(4), s 11 of the Contempt of Court Act 1981 and/or *if applicable* s 39 of the Children and Young Persons Act 1933 and the inherent jurisdiction of the Court, the [Judge/Master] being satisfied that it is necessary to secure the proper administration of justice and/or to protect the interests of [insert]

IT IS ORDERED THAT

[*If seeking a private or part-private hearing of the application for restrictions (where it is envisaged that this request will be considered and determined at the outset of that hearing)*]

1. The hearing of the application [insofar as it requires reference to or discussion of information tending to identify [insert] be held in private].

[*If seeking anonymity*]

2. The claimant's name is to be withheld from the public and must not be disclosed in any proceedings in open court.

3. There is to be substituted for all purposes in these proceedings in place of references to [insert – e.g. "the Claimant" / "the prospective witness identified in the Claimant's application"] by name, and whether orally or in writing, references to the letters "[insert 3-letter cipher]".

[*If seeking a non-automatic reporting restriction*]

4. Until further order, there must be no publication of the identity of [eg. the claimant] or of any matter likely to lead to the identification of [the claimant] in any report of, or otherwise in connection with, these proceedings. [This information includes but is not limited to the information set out in Confidential Schedule to this Order.]

[*If seeking restrictions on access to the court file*]

5. A non-party may not obtain or inspect a copy of any statement of case or any other document filed with the Court and to which they may have access pursuant to CPR 5.4A-D or otherwise, unless it has been produced or edited so as to comply with paragraphs [insert those dealing with anonymity] of this Order and/or any subsequent direction made by the Court.

6. [No copy of the Confidential Schedule to [insert document – e.g. "the Statement of Facts and Grounds" / "the witness statement of [insert]"] be provided to a non-party from court records without further order.]

[*If an order is being made under CPR 39.2(3) (private hearing) or CPR 39.2(4) (anonymity); and unless there is a very good reason to depart from the requirements of CPR 39.2(5)*]

7. A copy of this order be published on the website of the Judiciary of England and Wales.

[*In all cases*]

8. Any person wishing to apply to vary or discharge this order must make an application to the Court, served on each party at least [X] days before the application is heard.