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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Sunday Newspapers Ltd's Application (Judgment No 2) [2012] NIQB 26

AN APPLICATION BY SUNDAY NEWSPAPERS LIMITED

(JUDGMENT NO. 2)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY JR 20

WEATHERUP]

[1] By an application dated 27 May 2011 Sunday Newspapers Ltd seek to set aside an Order dated 9 August 2008 and subsequently renewed granting anonymity to the party known as JR20 upon an application for Judicial Review of a decision of the Secretary of State rejecting an appeal against the refusal of a firearms certificate and the removal of a firearms certificate. Ms O'Kane appeared for Sunday Newspapers Limited and Mr Macdonald QC and Mr Hutton appeared for JR20.

[2] The anonymity Order was granted because of the risk to the life of JR20. That risk had been assessed on the basis of material filed on behalf of JR20. The judgment in JR20s Application [2010] NIQB 11 dismissed the application for Judicial Review. Sunday Newspapers applied for the anonymity Order to be set aside but did not have access to the material on which the Order had originally been made. Upon the application by Sunday Newspapers a preliminary judgment was delivered on 29 July 2011. That judgment was preliminary only, as it concluded that the risk to the person with the benefit of an anonymity Order must be assessed as at the date of the hearing to discharge the Order. In the present case an up to date assessment

required up to date information to determine the continuing need for the anonymity Order.

[3] JR20's solicitors took up the matter in correspondence with the Police Service of Northern Ireland. They sought information about the risk to JR20. I refer to selected correspondence. On 26 January 2011 the solicitors asked the police to conduct a current threat assessment in respect of their client and advise whether the threat may have increased and whether the threat would be affected if it was publicly made known in the press that he no longer carried a personal protection weapon. That letter eventually led to a response from the police of 24 October 2011 to the effect that the last threat message had been received on 8 August 2010 and as far as could be ascertained the police were not aware of any threat against the client since the serving of that message. However the police did not address the questions asked.

[4] A further letter from the solicitors of 15 November 2011 referred to the pre-action protocol for Judicial Review which was being proposed in respect of the decision of the police not to advise on the request for information about the threat assessment. By a reply of 23 November 2011 the police indicated that the present case was considered to be exceptional and while they were providing a response they were guarding against judicial reviews if called upon to make threat assessments of others. The response referred to the questions posed by the solicitors and in respect of the threat to the client it was stated that the threat assessment would be based on any information available at the time it was carried out and in respect of the increased threat from publicity about the absence of a personal protection weapon it was stated that it was not possible to answer the question as that would involve engaging in speculation. Further correspondence led to a letter from police of 26 January 2012 indicating that the security services and the police did not currently assess the risk to the client to be above 'moderate'. The definition of 'moderate' was stated to be that 'an attack is possible but not likely'.

[5] JR20 contends that, as a matter of principle, where an Order is made granting anonymity and where no question is raised as to the propriety of that Order, some substantive ground must be shown by a party seeking to revoke the Order and a threshold crossed before a Court will engage in a review. An anonymity Order is said to induce an expectation in the anonymous litigant that should not lightly be disappointed. Further JR20 contends that the burden should be placed on the party seeking to remove the anonymity Order. Without these measures it is said that there may be repeated applications to set aside such Orders.

[6] JR20 further contends that Guardian News and Media [2010] 2 All ER 799, which established the right of the press to apply for review of anonymity Orders, is not comparable with the present case because there the issue arose on appeal in the original proceedings and not, as here, by way of an independent process after the completion of the original proceedings. In addition JR20 contends that there would be unfairness in the removal of anonymity because the original Order was justified

and should not be removed at a later date, as an applicant might not have proceeded with an application in the first place had it been known that anonymity may be lost.

[7] Sunday Newspapers submits that the starting point is that judicial proceedings remain open and public and there should be a report of such proceedings. The Human Rights Act protects the right to freedom of expression which embodies the right of the public and the press to receive and impart information. Further it is submitted that Article 2 protection for the right to life was addressed in the House of Lords in Officer L [2007] 1 WLR 2135 in the context of witness anonymity and that where Article 2 was engaged there would be a real and immediate risk to life that would justify the grant of anonymity. It is said that that does not arise in the present case as there is no real and immediate risk to life and Article 2 is not engaged. Further, if the common law is to be applied to assess other factors, anonymity should not be granted.

[8] Officer L was concerned with the soldier witnesses at the Hamill Inquiry where there was held to be no Article 2 engagement and no common law unfairness in the disclosure of the identities of the soldiers. Lord Carswell stated that under Article 2 the proper question is whether the loss of immunity would increase the risk to the person concerned and if the answer was yes then the question was whether or not that risk was real and immediate and if so Article 2 protection came into the equation. The second issue was common law fairness in relation to witnesses where the same question arose, namely whether the loss of anonymity would increase the risk of whatever unfairness there might be to the party concerned to an extent that outweighed the principle of open justice.

[9] First of all, the starting point is openness of proceedings and the right of the press to report proceedings.

Secondly, there may be restrictions on publicity and the reporting of proceedings. Where that may arise Article 10 of the European Convention will be engaged to protect freedom of expression and so any restriction must be for a legitimate aim and by proportionate means.

Thirdly, legitimate aims include the prevention of crime and the protection of the rights of others. Restrictions on reporting the name of JR20 were designed to protect the individual concerned, to prevent crime by preventing attack, to protect the rights of others, namely by not putting JR20 at risk of assault or at risk to life.

Fourthly, as in the present case, the Article 2 right to life is a basis for imposing restrictions on publication of materials and arises where there is a real and immediate risk to life, real in the sense that it is objectively verified and immediate in the sense that it is present and continuing.

Fifthly, the press have a right to apply for the removal of an anonymity Order, as is apparent from Guardian News and Media [2010].

Sixthly, anonymity remains only so long as grounds for anonymity prevail. A review may be conducted of the anonymity Order and will consider the position at the date of review, including the information that is then available to the Court.

Seventhly, it is not for the press to satisfy a threshold on which a Court will undertake a review. I do not accept the submission of JR20 on this point and will discuss below.

Eighthly, there is not a burden on the press to establish grounds to set aside the anonymity Order nor is there a burden on the party with the benefit of the Order to establish grounds to continue the Order. Rather there is a balancing exercise to be conducted between the claim for openness and the claim for anonymity. Again I do not accept the submission of JR 20 on this point and will discuss below.

[10] On the issue of the press raising grounds for review of an anonymity Order, JR20 contends that the Sunday Newspapers must provide grounds to change the Order. The present case involves Article 2 and the press are not in possession of the information on the basis of which the original Order was made and cannot be expected to provide a basis for a change. All that the press can do is make a general plea for open justice. It is not for the press to cross a threshold for change, certainly in Article 2 cases, because in practice the press will not be adequately informed. JR20 contends that the absence of a threshold will result in repeated press applications for the review of anonymity Orders. However such a possibility can be regulated by the Court, not by imposing a threshold in Article 2 cases before the press can seek a review of the Order but rather by the Court refusing to re-open recent reviews unless it can be established that there has been a change of circumstances that warrant a further revision.

[11] JR20 contends that the approach being adopted is impractical. In the present case the police have made it clear that they will not provide a threat or a risk assessment. If there was a threat known to police they would notify JR20, a step that the police have taken in the past when information comes into their possession. Of course if the police obtain information about a real and immediate threat to any person they would be duty bound to initiate reasonable measures in relation to such a person. What is also clear from the police correspondence is that they will not speculate on whether the disclosure of a person's identity will increase the risk to that person. However the Court will ask whether withdrawal of anonymity increases the risk to the person concerned. The Court will have to make that assessment itself. The Court made an assessment of the risk to JR20 when the original Order was made on the basis of the information then available. At that time the Court did not have a formal security service risk assessment but had information that was considered reliable.

[12] On the issue of the burden of proof, I conclude, on reflection since the preliminary ruling, that the issue is better expressed in terms of the balance of competing interests rather than a burden of proof. To that extent I revise what I said in paragraph [12] of the first judgement in this application where I referred to the onus being on the party with the benefit of the Order. I am mindful of the fact that in order for the Court to balance the competing interests the Court must have information on which it can rely to complete a balancing exercise between the

interest in freedom of expression and the interest that is relied on to seek a restriction on that freedom. There is an onus on the competing parties to provide information that will inform that balancing exercise.

[13] In the present case JR20 provided information for the Article 2 grounds and the Order was made. In the course of the hearing of the judicial review it became apparent that when the application for the firearms licence was on appeal before the Secretary of State the police provided a threat assessment or a risk assessment to the Secretary of State which indicated that JR20 was at moderate risk. Thus JR20 was not then considered to be at real and immediate risk and Article 2 was not involved at the stage when a decision was made on the appeal to the Secretary of State. The updated assessment from the police is to the same effect and indicates that JR20 is considered to be at moderate risk. Thus this is not an Article 2 case as there is no real and immediate risk to JR20.

[14] The police will not assess if the loss of anonymity will increase the risk to JR20 as that is said to be speculation. Nevertheless this exercise involves assessing whether there will be increased risk if anonymity is to be removed. Will the loss of anonymity increase the risk to JR20? Quite possibly is as far as I can go. Would that increased risk put JR20 at real and immediate risk to his life? I just cannot say. I cannot be satisfied that there will be a real and immediate risk to the life of JR20 if his anonymity is removed.

[15] JR20 further claims that this anonymity Order should be maintained on the ground of fairness. The matters relied on are first of all that the Order was made initially when JR20 launched his application for Judicial Review and had JR20 known at that time that his anonymity would be removed later then JR20 may not have proceeded with the application. I do not accept this ground. JR20 cannot reasonably and legitimately have expected an anonymity Order would last forever but only for as long as necessary to protect whatever interest justified the making or continuance of the Order. There can be no unfairness to a party with the benefit of such an Order in there being a later review of the Order. If for any reason there were to be such unfairness in undertaking a review in a particular case then that unfairness would be taken into account. There is no such unfairness in the present case.

[16] The other aspect of unfairness relied on by JR20 was the subjective fears on the part of JR20. I do not doubt that such fears exist in the light of JR20s history. However subjective belief alone is not enough but is an ingredient in determining unfairness.

[17] In the present case the assessment is of moderate risk and while that is not an Article 2 risk it is nevertheless a factor that must be taken into account in considering fairness. If there would be an increased risk to JR20 by disclosure of information about the application for Judicial Review that should be taken into account in relation to fairness. I have no reason to believe that those who I have been

informed pose a threat to JR20 have ceased to be a threat even if it remains a moderate threat and not one that is real and immediate. I assume the current threat will continue for at least the immediate future.

[18] In assessing fairness to JR20 I take account of the nature of the Judicial Review proceedings. They involved JR20's challenge to the withdrawal of a personal protection weapon. The weapon was not withdrawn because JR20 was not under threat but was withdrawn for other reasons. Disclosure of the identity of JR20 would not only involve publication of his identity but also the circumstances of the application for Judicial Review and those circumstances would reveal that JR20 had lost his personal protection weapon and had challenged that removal and had been unsuccessful. Those posing this moderate threat to JR20 would, I expect, become aware in due course that JR20 had no personal protection weapon. Those circumstances are an important part of the context in conducting this balancing exercise. In those circumstances, where the effect of revoking the anonymity Order would be to disclose to those who are ill disposed to JR20 that he did not have a personal protection weapon, which they may or may not have known JR20 ever had, may embolden them in ways that I cannot determine. In balancing the interests of open and public justice and the reporting of legal proceedings on the one hand and the safety of JR20 on the other hand, the balance falls against disclosure of information that would identify JR20 in the circumstances on the grounds of fairness to JR20. Accordingly I propose to maintain the anonymity Order.