

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY SUNDAY NEWSPAPERS LIMITED

Sunday Newspapers Ltd's Application [2011] NIQB 136

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY

JR 20

WEATHERUP J

[1] This is an application dated 27 May 2011 by Sunday Newspapers Limited for the Court to review and to set aside an anonymity Order initially granted on 9 September 2008 whereby the applicant was to be known as JR20 in respect of an application for leave to apply for Judicial Review. The application for Judicial Review concerned decisions of the Secretary of State of 27 June 2008 to refuse the JR20's appeals against the revocation of a firearms certificate and the refusal to renew a firearms certificate.

[2] When the application for Judicial Review was made in 2008 it included not only relief in respect of the decisions of the Secretary of State about the firearms certificate but sought a direction that the proceedings be considered in Chambers and be anonymised to protect the life of the applicant. Affidavits by the applicant and his solicitor set out grounds for anonymity based on personal security reasons that concerned the applicant's right to life under Article 2 of the European Convention. Previous proceedings involving the applicant had been subject to an anonymity Order for similar reasons and

the applicant was known as JR10 (See JR 10's Application [2007 NIQB 56]). The papers came before me on 9 September 2008 and I directed that the matter be listed for a leave hearing and that the case be given a JR number and hence it was listed as JR 20. On 14 September 2008 two additional affidavits were filed on behalf of the applicant and they contained sensitive information about the applicant and sought to provide a background to the claim that his life was at risk.

[3] The leave application was heard on 26 September 2008 at which time the proposed respondents, the Secretary of State and the Chief Constable of the Police Service of Northern Ireland, were represented. The application proceeded under the JR20 title on the basis of a claim that disclosure of the name of JR20 would be incompatible with his right to life. The anonymity Order was not opposed by the respondents. Leave was granted on that date. Affidavits were filed on behalf of the police and on behalf of the Secretary of State to deal with the substantive firearms certificate issue. In January 2010 JR20 applied for discovery of documents and the respondents raised objections on the grounds of public interest immunity. The discovery issue was referred to Morgan J who acted as discovery Judge. The respondents disclosed first of all certain complete documents, secondly, certain redacted documents and thirdly, sent additional documents to Morgan J in respect of which the PII claim was made, with the respondents contending that discovery of those documents should not be ordered. On 21 August 2009 Morgan J ruled that the disclosure of the third category of documents was not necessary. Accordingly, documents in the first and second category only were included in the papers on the hearing of the Judicial Review.

[4] I gave judgment in the substantive application on 26 January 2010, neutral citation [2010] NIQB 11. I dismissed the applicant's challenge to the decision of the Secretary of State. On 10 May 2010 there was confirmation of the continuing anonymity Order.

[5] On 27 May 2011 this present application was made. The application is grounded on the affidavit of Olivia O'Kane, solicitor for Sunday Newspapers, in which she avers that Sunday Newspapers are not aware of the grounds on which the anonymity Order was originally granted and seek clarification from the Court as to whether its continuance is necessary. Ms O'Kane set out certain propositions that were not disputed by JR20, namely that an Order for anonymity should involve a limited and proportionate restriction on the freedom of the media to report cases where the individual seeking the Order established that it was necessary to serve the ends of justice; that the fundamental constitutional principle of open justice should not be eroded and any derogation from the principle should only be permitted when it was necessary; that the general rule in theory and practice was that judicial proceedings will be held in public and the parties will be named and their names could be published in newspaper reports and law reports; that by

lifting the anonymity Order the Court would allow members of the public to receive relevant information about the individual which they could use to make connections between items of information in the public domain which otherwise appeared to be unrelated and in that way the true position would be revealed and the public could make an informed judgment.

[6] The grounding affidavit exhibited an e-mail from the Deputy News Editor of the Sunday World who had made an enquiry about the identity of JR20, referred to certain criminal proceedings and questioned whether the defendant in those criminal proceedings was JR20. The journalist referred to various factors in connection with the circumstances of the criminal proceedings and suggested that there was a public interest in connecting the matters arising in the criminal proceedings with JR20.

[7] Ms O’Kane also made reference to paragraph [22] of the judgment in JR20’s Application and the fact that in the course of considering the application in connection with the firearms certificate the police and the security services had not been satisfied that there was a real and immediate risk to the life of the applicant and had proceeded on that basis in the course of considering the matter.

[8] JR20’s solicitors filed an affidavit opposing any alteration of the anonymity Order based on the applicant’s right to life under Article 2 of the European Convention. It was confirmed that the application for anonymity was made in the interests of protecting the life of the applicant and that there was considered to be a real and immediate risk to the life of the applicant and that the risk continued. Mr Hutton, who appeared on behalf of JR20, relied on the information that had been filed in the original proceedings in 2008, namely the affidavits of the applicant and his solicitor and the other witnesses, to establish the continuing necessity for the anonymity Order. The affidavits were not available to Sunday Newspapers.

[9] In the recent decision of the Supreme Court in Application by Guardian News and Media Limited and Others [2010] UKSC 1 the Guardian newspaper challenged anonymity Orders that had been made in proceedings in connection with persons who had been designated as terrorists under Article 4 of the Terrorism (United Nations Measures) Order 2006. Lord Rodger stated the approach to the continuation of such orders at paragraph 5

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“As far as anonymity orders are concerned the practical approach is that where an open ended order has been made as in this case it should remain in force throughout the proceedings at whatever level unless and until it is set aside either spontaneously on a change of circumstances or as a result of an

application by the press. That approach promotes certainty and avoids unnecessary application.”

[10] Those with the benefit of the Orders contended that the Orders were necessary because identifying them as claimants in the proceedings would infringe their rights to respect for their private and family life under Article 8 of the European Convention. However Lord Rodger commented on anonymity orders and Article 2 rights at paragraphs 26 and 27 -

“In an extreme case, identification of a participant in legal proceedings, whether as a party or (more likely) as a witness, might put that person or his family in peril of their lives or safety because of what he had said about, say, some powerful criminal organisation. In that situation, he would doubtless ask for an anonymity order to help secure his rights under articles 2 and 3 of the European Convention. Those Convention rights are not in play in these appeals however since counsel accepted that the applicants could not show that publication of their names would put any of them or their families at risk of physical violence.

States are of course obliged by articles 2 and 3 to have a structure of laws in place that will help protect people from attacks on their lives or from assaults, not only by officers of the state but also other individuals. Therefore the power of a court to make an anonymity order to protect a witness or a party from a threat of violence arising out of its proceedings can be seen as part of that structure. And in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield: a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation a court may make an anonymity order to protect the individual.”

[11] Lord Rodger considered the position of the press and Article 10 Convention rights at paragraphs 34 to 36 -

“In asserting this right to publish M’s name, the press are not asking to be supplied with information which would otherwise not be available to them. On the existing Strasbourg case law a right to obtain that

kind of information is not within the scope of article 10(1): *Leander v Sweden* (1987) 9 EHRR 433, 456, para 74. Here, however, the cases are heard in public and, if were not for the use of his initial and the anonymity orders M's name would be available to the press and they would be free to report it. Indeed the effect of the orders is that, even if the press are aware of M's name from other sources (which may well be the case), they cannot use it when reporting the proceedings. So, by making the orders, the courts have interfered with the article 10 Convention rights to the press to impart information which is either is, or normally would be, available to them.

Equally clearly, the court interferes with article 10 rights of the press when it takes a step, such as making an anonymity order, which interferes with their freedom to report proceedings as they themselves would wish - in the present case, by making their report refer to the situation of named, identifiable, individuals, including M.....

Nevertheless, under article 10(2), the right of the press to freedom of expression can be subject to restrictions which are prescribed by law and are necessary in a democratic society "for the protection of the rights of freedoms of others". The "rights of others" include the rights under Article 8."

[12] Against that background the position is as follows -

First of all, in general, the name of a party and a witness in legal proceedings should be published and the Article 10 right to freedom of expression gives the press the right to publish the names of those involved.

Secondly, the Court may restrain publication of the names if to do so would be incompatible with Convention rights, in the present case being the Article 2 right to life where the life of the person concerned is at real and immediate risk.

Thirdly, the press may apply to set aside an anonymity Order and the Court will consider whether the continuation of the Order remains necessary to protect the applicant's Convention rights.

Fourthly, the onus is on the person seeking the anonymity Order to establish that anonymity should be granted and on an application to remove

anonymity the onus is on the person who has the benefit of the Order to establish that it should continue.

[13] JR20 relies on the affidavits that were filed in 2008 and I found at that time that they established the need for anonymity on the basis of the Article 2 right to life. At that time the claim for anonymity was not opposed by the respondents. The respondents have not engaged in this application by Sunday Newspapers. In the judgment in JR20's Application [2010] NIQB 11 I referred to the police and the security service assessments as not establishing a real and immediate risk to the life of JR20, although they did recognise a threat to the applicant that was graded as moderate.

[14] In considering the approach in general to applications by the press to discharge an anonymity Order granted on right to life grounds, the risk to the person with the benefit of anonymity must be assessed as at the date of the hearing to discharge the Order. It is necessary to establish a real and immediate risk to the life of the person concerned, that is a risk that is real in that it is objectively verified and a risk that is immediate in that it is present and continuing. Such an up-to-date assessment would often require up-to-date information. In some cases it may be apparent from the information that was relied on initially that by its nature it will continue to justify the conclusion of a real and immediate risk to the person concerned. I consider that the present case is one where up-to-date information is required to enable an up to date assessment to be made of the continuing need for the anonymity Order. I have not been satisfied, on the basis of the information filed in 2008, that the continuation of the anonymity Order is necessary in 2011.

[15] Accordingly, in the circumstances of the present case I will discharge the anonymity Order unless JR20 provides up-to-date information to establish a real and immediate risk that would warrant the continuation of the anonymity Order. I afford the applicant time to do this and the anonymity Order will remain in place in the meantime. JR20 should submit by 31 August 2011 whatever information is considered appropriate so that the Court might complete an up to date assessment of the need for continuing anonymity. This matter will be listed for further consideration on 9 September 2011 in the light of the additional information that will have been received from JR20. The information should be lodged in Court and will not be disclosed to Sunday Newspapers Limited at this stage.