Appeal No. UKEAT/0113/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 & 16 July 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

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(1) A
(2) B — APPELLANTS

(1) X
(2) Y
(3) TIMES NEWSPAPERS LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

Revised

APPEARANCES

For the Appellants	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Neves Solicitors LLP Aurora House Deltic Avenue Milton Keynes MK13 8LW
For the First and Second Respondents	MR DAVID READE (One of Her Majesty's Counsel) and MR NIRAN DE SILVA (of Counsel) Instructed by: Moon Beever 21a John Street London WC1N 2BF
For the Third Respondent	MR ADAM WOLANSKI (of Counsel) Instructed by: Times Newspapers Ltd 9th Floor 1 London Bridge Street London SE1 9GF

SUMMARY

PRACTICE AND PROCEDURE - Disclosure

The Claimants were employed by the First Respondent company. They made complaints to the ET of sexual harassment, including allegations of sexual offences committed by the Second Respondent. The allegations were entirely denied. The Claimants were protected by section 1 of the **Sexual Offences (Amendment) Act 1992**. Pending adjudication on the allegations the Respondents sought Restricted Reporting Orders ("RRO") and Anonymity Orders pursuant to section 11 **Employment Tribunals Act 1996** and ET Rule 50, having particular regard to the Second Respondent's ECHR Article 8 right of privacy, including honour and reputation. The Claimants also sought Anonymity Orders, to bolster their protection under the **1992 Act**; but only if the Respondents were not granted such Orders.

The ET granted the RRO, to continue until the after (any) hearing on remedy; but refused Anonymity Orders.

The Claimants appealed against the RRO on the grounds (amongst others) that the ET had failed to give 'full weight' to the principle of open justice, as required by Rule 50(2); and against the refusal of Anonymity Orders to the Claimants. The Respondents cross-appealed on the refusal of Anonymity Orders, but conditional on the success of the Claimants' appeal in respect of Anonymity Orders. The Third Respondent was given leave to join in the appeal.

The EAT considered the correct approach when carrying out the balancing exercise under Rule 50(2). It accepted that the ET had not given full weight to the principle of open justice; but rejected the Appellants' further contentions that the ambit of Rule 50 was limited to cases where publicity might adversely affect the administration of justice. It also held that any Order should not extend beyond the promulgation of the decision on liability. The application for an RRO was remitted to a freshly constituted Tribunal. The appeal in respect of the refusal of an Anonymity Order was dismissed.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimants against the Decision of the London (Central) Employment Tribunal (Employment Judge Wade) sent to the parties on 15 February 2018, whereby:

(1) a Restricted Reporting Order ("RRO") in favour of the Respondents was granted until the Tribunal's decision on liability and (if applicable) remedy, in respect of their claims which include allegations of sexual harassment contrary to section 26 of the **Equality Act 2010** ("EqA");

(2) Anonymity Orders were refused.

2. The hearing on liability is listed for early September. Times Newspapers Ltd has been given permission to join in the appeal. In the meantime, successive Orders of this Tribunal have imposed a temporary RRO in respect of this appeal.

3. The two Claimants were employed by the First Respondent company. The Second Respondent is a public figure with a well-known family name. In each case the claims of sexual harassment include allegations of sexual offences committed by the Second Respondent on each Claimant. Those allegations are entirely denied.

4. The Claimants are protected by section 1 of the **Sexual Offences (Amendment) Act 1992** ("the 1992 Act"), whereby there is a lifetime prohibition on publication of any matter which is likely to lead to members of the public identifying the alleged victims of sexual offences.

5. The jurisdiction for the grant of an Anonymity Order and/or RRO pending promulgation of a Judgment in a Tribunal hearing is provided by Rule 50 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules") made pursuant to section 11 of the **Employment Tribunals Act 1996** ("ETA"). Section 11 is headed "*Restriction of publicity in cases involving sexual misconduct*". As material it provides:

> **"(1) Employment tribunal procedure regulations may include provision -**
>
> > **(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and provision -**
> >
> > **(b) for cases involving allegations of sexual misconduct, enabling an employment tribunal, on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal."**

6. By subsection 2, publication of "*any identifying matter*" in contravention of an RRO is a criminal offence. By subsection 6, identifying matter "*in relation to a person, means any matter likely to lead members of the public to identify him as a person affected by, or as the person making, the allegation*". Sexual misconduct means "*the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex*".

7. Rule 50 provides as material:

> **"(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include -**
>
> > **(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;**
> >
> > **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;**
> >
> > **(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;**

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

…

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998."

8. The Second Respondent applied for these Orders on the basis that it was necessary in order to protect his Convention rights under Article 8 of the European Court of Human Rights ("ECHR"). The parties agreed that an RRO cannot be made in favour of the First Respondent, being a limited company; but that if an Order were made in favour of the Second Respondent its name would in consequence be prohibited as 'identifying matter'.

9. As Rule 50(2) makes clear, the application and this appeal engage Article 10 (freedom of expression) and the principle of open justice founded on common law and Article 6. All subsequent references to open justice comprise both sources.

10. It is common ground between the parties that the decision involves a balancing exercise akin to the exercise of a discretion, and that this Tribunal should not intervene unless the Judge has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a Judge could reasonably reach; see **Fallows v News Group Newspapers Ltd** [2016] ICR 801, per Simler P at paragraphs 51 to 52, following **AAA v Associated Newspapers Ltd** [2013] EWCA Civ 554. This permits interference where the Judge has, in the course of the balancing exercise, taken into account irrelevant factors and/or failed to take account of relevant factors.

11. Although expressed in a variety of ways in the grounds of appeal and argument, the essential contentions in respect of the RRO are that the Judge in the balancing exercise

effectively gave no weight to the principle of open justice; did not give full weight to Article 10; overstated the role of Article 8; and took into account considerations which were irrelevant. In all respects the submissions of the Claimants and Times Newspapers marched in step. As to the refusal of the Anonymity Order, the Claimants contend that the Judge should have taken account of their concerns that the protection of the **1992 Act** would or might be breached by publication of the Tribunal's substantive Judgment, or by social media platforms unfamiliar with that **Act**.

The Judgment

12. The Judgment begins by recording that a temporary RRO protecting the Respondents had been made with both parties' consent on 11 October 2017; and that the hearing was to decide if it should be continued.

13. The first ground of appeal is that the Judge proceeded on the erroneous assumption of consent, the Claimants having only agreed to temporary Orders so as to afford sufficient hearing time for the application. That ground was rightly not pressed with any force in oral submissions. The Judge evidently did not treat the consensual temporary Order as anything other than a helpful and pragmatic arrangement pending full argument.

14. Under the heading "*The applications to be decided*", the Judge began:

> **"7. The parties agree, and it is indisputable, that open justice, enshrined in Convention Article 6, is a fundamental principle vital to the rule of law. Although the respondents initially sought an order that the hearing take place in private, this was sensibly not pursued. This means that there is no restriction on who attends the hearing and justice will be seen to be done.**
>
> **8. Instead, both parties seek privacy orders which give effect to their Article 8 right to private life at the expense of the press right to freedom of expression under Article 10."**

A The Claimants submit that the Judge in effect treated that fundamental requirement as satisfied by the abandonment of the application for the hearing to be in private.

B 15. The Judge then noted that the Claimants sought an Anonymity Order as additional protection to that automatically afforded by the **1992 Act**. This was because of the concerns already noted. However, they resisted the making of any such Orders in favour of the Respondents. If such Orders were contemplated, their second position was that no Orders C should be made for any of the parties. Conversely, the Respondents did not object to the Claimants' application for Anonymity Orders and sought the same for themselves.

D 16. The Judge then considered the witness statements of each Claimant, and of the solicitor for the Second Respondent. There had been no cross-examination. The Claimants expressed their concerns for themselves and their young children if they were named in connection with E the details of the sexual harassment which they alleged. The Judge cited those parts of the solicitor's statement which referred to the Second Respondent's advanced age; the strain of the proceedings; his bafflement at the allegations; the prominence both of his family and of his role in public life; the effect of the publication of his allegations on his wife and adult children; his F business interests; and his work for a range of good causes. The Judge observed that the statement was made "*apparently without the benefit of having spoken to him directly*" (paragraph 15). That observation is not reflected in the statement and neither counsel who G appeared below - Mr Milsom and Mr De Silva - recalled anything said at the hearing to that effect.

H 17. Turning to the law, the Judge stated that:

> **"16. … The task for this tribunal is to balance the conflicting interests of the Article 8 right to privacy against the Article 10 right to freedom of expression, including freedom of the press and decide what, if any, privacy orders should be made. Rule 50 makes this clear."**

A The Claimants submit that this again disregards the principle of open justice contrary to the requirement in Rule 50(2).

B 18. Under the heading "*Parity*", the Judge then stated:

> **"18. There is no case law that the parties can find on the question of whether it is right to grant privacy to one side only; the only reported cases where there is no parity have a corporate body as a respondent. The 1992 Act supports the idea that parity is not necessary in that it provides for restricted reporting in favour of the alleged victims only. However, that is in a criminal setting where the victim is a witness and not the prosecutor and so has less power to control the proceedings."**

C The Claimants submit that the question of parity was irrelevant to the balancing exercise, since the **1992 Act** reflected the decision of Parliament to give such protection to alleged victims of sexual offences, but not to alleged perpetrators.

D 19. The Judge then set out two paragraphs respectively headed "*Arguments in favour of a Restricted Reporting Order/anonymity*" and "*Arguments against privacy orders*"; see

E paragraphs 19 and 20. Paragraph 19 begins:

> **"19. This hearing was not about whether the Tribunal should make orders derogating from the Article 6 principle of open justice but from the principle of freedom of expression in Article 10. …"**

F Paragraph 20 begins:

> **"20. Rule 50 emphasises that "full weight" must be given to the right to freedom of expression. …"**

G The Claimants submit that these observations again disregard the requirement that full weight must be given to the principle of open justice.

H 20. There was some dispute as to whether the identified arguments reflected rival submissions of the parties or whether to some extent they incorporated the Judge's own

observations. Some parts of the grounds of appeal proceeded on the latter basis. I am satisfied that the arguments sections were intended to be a record of the parties' submissions. I shall need to refer to two particular subparagraphs from paragraph 19, namely:

> **"19.7. The fame of the second respondent is relevant in that there is a much greater risk than usual that family members, charity supporters, investors and acquaintances on both sides would find out about the allegations because they would be reported. Also, case law has established that privacy includes a person's reputation and honour and this is an important consideration for the second respondent who is well known, as well as for the claimants. The stakes are high and they all potentially have a long way to fall.**
>
> **19.8. The respondents did not choose to initiate the claims or to engage in proceedings which are normally public so there is no hypocrisy in their then seeking privacy. Case law therefore suggests a little more leniency towards the respondents."**

21. The Judge concluded that she should continue the existing RRO. Her first conclusion was that it was not workable to have an RRO in respect of one side only. Under the heading "*Parity*", her reasons were:

> **"22.1. Where one party is named, it is likely that the other will be identified as well through the "jigsaw" effect. The claimants say that they do not mind if their former work colleagues discover their identities, but of course there is a danger that their families will work the situation out as well given that the claimants resigned with immediate effect, from jobs which they apparently loved, around the time of the alleged incidents.**
>
> **22.2. Also, it is likely that in practice parity would come about indirectly because details of the other party would be prohibited "identifying material".**
>
> **22.3. It is desirable to avoid satellite disputes over exactly what the identifying material is by imposing restrictions in respect of all parties.**
>
> **22.4. Where the precise details of one side are known, but not the other, there is a danger of misidentification of the alleged victim which could be damaging.**
>
> **This means that since the claimants already have an RRO equivalent under the 1992 Act, the second respondent should have the same."**

22. Under the heading "*Restricted Reporting Order*", her reasons for continuing the current Order were:

> **"23.1. Such an order is proportionate, avoiding the danger of unsubstantiated allegations being spread widely whilst not hushing up an important issue.**
>
> **23.2. The claimants already have the protection of the 1992 Act but the second respondent would not have parity without a RRO.**
>
> **23.3. An RRO is a measure carrying the least infringement to Article 10.**
>
> **23.4. It protects the parties' Article 8 rights until judgment. As has already been said, these are serious and sometimes shocking allegations about sexual activity which sits at the very centre of private life.**

23.5. It enables a hearing to take place without fear of misreporting; the trial will be difficult enough as it is.

23.6. The order only lasts until judgment at which point fresh submissions can be made.

23.7. Above all, it holds the "innocent until proved guilty" line meaning that neither side need worry that the allegations will be publicly discussed and speculated on in the press until the Tribunal has made its decision. The stakes are very high, and what really matters is the outcome and the answer to the question whether the second respondent committed the serious sexual assaults alleged."

23. The Judge ordered that the RRO should remain in place until after the remedy decision (if any). Thus "*if the claimants win at the liability hearing, the RRO will still be in place giving the parties plenty of time to make submissions*" (paragraph 26).

24. The application for an Anonymity Order was refused. The Judge stated that "*Anonymity is a serious incursion into open justice*" (paragraph 24). Her reasons against such an Order were that:

"24.1. The second respondent did not have powerful arguments for anonymity, or if he did he did not take steps to communicate them to the Tribunal by attending or providing a witness statement. His close family is all adult and as a high-profile individual he will have had to deal with such adversity before. This case is not about private consensual sexual activity which should be even more closely protected.

24.2. The claimants' argument for anonymity was fatally flawed by the fact that they only wanted it if the respondent did not have it too.

24.3. If the names are anonymised, there will [be] a reduced opportunity for the press to pick up the thread at the point of judgment and make an application for privacy orders to be lifted. This is undesirable, because first they have not yet had the chance to make any submissions under Rule 50(4) and, second, these issues are very topical and [the] public is interested. Anonymity is a step change, taking the case out of its context and dumbing down the human drama. In practical terms, there is no known press or wider public interest at present, there is no need to take the case underground to this extent.

[24].4. This means that if the RRO is lifted and there are other victims it is more likely that they will be encouraged to come forward quickly."

25. As to concerns about Judgments appearing on the website, the Judge understood that the ET website was not up to date nor would it be in September, so that the likelihood was that the substantive Judgment would not appear on it until the parties had a chance to make further submissions under Rule 50.

Submissions of the Claimants / Times Newspapers

26. On behalf of the Claimants, Mr Christopher Milsom, supported by Mr Adam Wolanski for Times Newspapers, starts with the fundamental principle of open justice. This is traced in unbroken line from its trenchant reaffirmation by the House of Lords in **Scott v Scott** [1913] AC 417 to the Supreme Court in **Re Guardian News and Media Ltd** [2010] 2 AC 697 and **Khuja v Times Newspapers Ltd** [2017] 3 WLR 351. See also the Court of Appeal in **R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court** [2013] QB 618, **Global Torch Ltd v Apex Global Management Ltd** [2013] 1 WLR 2993; see also **Practice Guidance (Interim Non-disclosure Orders)** [2012] 1 WLR 1003.

27. Relevant to this appeal, counsel point to the following particular aspects of the principle:

(1) Outside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to part from it in the interests of justice: see e.g. **Global Torch** at paragraph 34 and **Khuja** at paragraphs 14 and 18. Derogations from the general principle can only be justified in exceptional circumstances when they are strictly necessary to achieve their purpose. The burden of establishing any derogation lies on the person seeking it; and must be established by clear and cogent evidence: **Practice Guidance** at paragraphs 10 to 15.

(2) The principle is not limited to the requirement that Court proceedings should be held in open Court to which the press and public are admitted; but also requires that nothing should be done to discourage the publication to a wider public of fair and accurate reports of proceedings. Thus press reporting of legal proceedings is an extension of the concept of open justice and inseparable from it: **Khuja** per Lord Sumption at paragraph 16, citing **Attorney General v Leveller Magazine Ltd**

[1979] AC 440, 450. Furthermore, as Mr Wolanski in particular emphasised, essential features of this aspect are that the reporting should be with names (**Re Guardian** at paragraph 63 and **Khuja** at paragraph 29) and contemporaneous.

(3) In its application of the principle the Court must make the presumption that the reporting will be fair and accurate; and that newspaper editors and broadcasting authorities should be trusted to fulfil their responsibilities and not in such a way as to interfere with the administration of justice: **R v B** [2006] EWCA Crim 2692 at paragraph 25. Within the limits of the law of defamation, the way in which the story is presented is a matter of editorial judgment: **Khuja** at paragraph 35.

(4) A necessary consequence of the principle of open justice is toleration of the fact that the hearing and reporting of the case in public may well be painful, humiliating or a deterrent both to parties and witnesses: **Scott** at page 463 and **Khuja** at paragraph 12.

(5) Whilst there is no legal presumption to that effect, the public must be taken to understand the difference between an allegation of criminal misconduct and its proof: **Khuja** at paragraph 8. The person on the receiving end of such allegations will always be at a significant risk of reputational damage. However, if the allegations are false he will have obtained his vindication through the judicial process: **Global Torch** at paragraph 33.

(6) These principles are not to be set aside merely because Article 8 and the consequent balancing exercise come into play. Whilst each case is fact specific, on some facts Article 8 rights may be entitled to very little weight: **Khuja** at paragraph 23.

(7) There is no lower bar in respect of interlocutory Orders: **Global Torch** at paragraph 34.

(8) The fact that the person seeking a Restricted Reporting Order has a public profile is not a material consideration: "*Each person must be treated equally. The public position comes into the account neither on one side or the other*": **Crawford v Crown Prosecution Service** [2008] EHWC 854 (Admin) at paragraph 36.

28. As to the purpose of section 11 and Rule 50, Underhill P (as he then was) stated in **F v G** [2012] ICR 246:

> **"17. … in the case of an RRO under rule 50 it can be inferred from the terms of the rule itself that its aim is to allow the tribunal to protect parties, and indeed witnesses, from intrusive publicity which may affect the administration of justice so long (but only so long) as proceedings are pending: see the discussion in *Tradition Securities and Futures SA v Times Newspapers Ltd* [2009] IRLR 354, para 5 (p356). It does not appear to be designed to protect personal or confidential information as such: if it were, orders made under it would not automatically lapse when the proceedings were concluded. …"**

29. In the absence of any suggestion that the administration of justice would be affected, e.g. by the fact of publicity putting pressure on the Second Respondent to settle the claim, this provision provided no basis for an Order to be made. In short, and unlike the **1992 Act**, section 11 was not a privacy statute.

30. Mr Milsom then pointed to recent decisions of the EAT (Simler J) which have recognised and applied these aspects of the principle of open justice in the context of applications for anonymity/RRO after the promulgation of the Tribunal's decision (**BBC v Roden** [2015] ICR 985) and after settlement of the claim (**Fallows v News Group Newspapers Ltd** [2016] ICR 801).

31. He submits that, contrary to Rule 50(2), the Judge failed to give full or any weight to the principle of open justice. The effect of her cited observations was wrongly to treat the principle of open justice as being satisfied by the withdrawal of the application for the substantive

hearing to be in private. That ignored the inseparable aspect of open justice which requires the publication of fair and accurate reports of legal proceedings to the wider public. Thus the significance of such open publication was not confined to the Article 10 right to freedom of expression. In consequence, the Judge took no account of the aspects of the open justice principle noted above; and took account of irrelevant matters. Thus there was no basis to take account of:

(1) "*avoiding the danger of unsubstantiated allegations being spread widely whilst not hushing up an important issue*" (paragraph 23.1);

(2) the protection of the Second Respondent from "*serious and sometimes shocking allegations about sexual activity which sits at the very centre of private life*" (paragraph 23.4);

(3) the "*fear of misreporting*" (paragraph 23.5);

(4) public discussion and speculation on the truth of the allegations (paragraph 23.7).

32. The words "*sits at the very centre of private life*" could have no application to allegations of sexual offences which were entirely disputed. This was not a case where a Respondent was contending that there had been consensual sexual activity, or some misunderstanding. Indeed, allegations of this nature did not engage Article 8 at all. Mr Milsom observed that the defendant to a claim in tort for sexual assault would receive no protection if the proceedings were in Court.

33. Futhermore, the Judge had taken account of the position and status of the Second Respondent, thereby defeating the requirement of equality before the law (see paragraphs 23.7 and 24.1, and the argument cited in paragraph 19.7). On the same theme of equality, the Judge

had also appeared to adopt the argument that case law suggested "*a little more leniency towards the respondents*" (paragraph 19.8). There was no support for that proposition.

34. As to parity, this was another irrelevant factor. The protection afforded to the Claimants by the **1992 Act** was the consequence of Parliament's decision to provide such protection to alleged victims of sexual offences. As to the concern of a jigsaw effect, the Claimants did not have that concern. Subject to his points on the Anonymity Order, the **1992 Act** would provide the necessary protection against such identifying material.

35. All in all, the evidence on behalf of the Second Respondent was exiguous and provided no basis for an RRO. If granted in this case, it would be granted in every case. As to the duration of the Order, section 11(1)(b) of the **ETA** limited the duration of an RRO made pursuant to the statute and rules "*until the promulgation of the decision of the tribunal*". Accordingly it should not have been extended beyond the liability decision, i.e. until the remedy decision (if any).

36. As to the appeal against the refusal of an Anonymity Order, it was not clear that the **1992 Act** would apply to the Tribunal's Judgment. Section 6 excluded from the definition of publication "*an indictment or other document prepared for use in particular legal proceedings*". Protection was also potentially needed from social media platforms unfamiliar with the **Act**.

The Respondents' Submissions

37. In response Mr David Reade QC readily acknowledged the various aspects of the principle of open justice; and thus accepted that if the claim had been brought in the ordinary

Court, e.g. as a claim in tort for sexual assault, there would have been no basis for a reporting restriction or anonymity. However by virtue of section 11 the position was different when such a claim was brought in the ET. Parliament had thereby empowered a further statutory exception, where the facts so justified, from the full rigour of the open justice principle. Section 11(1)(a) makes provision to prevent the identification of "*any person affected by or making the allegation*" and section 11(1)(b) provides for the application of "*any party to proceedings before it*". In the latter case the restriction is limited to the period pending promulgation of the Tribunal's substantive decision. Rule 50(1) then permits the Tribunal to impose such restrictions "*so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person*". The present case concerned the latter, i.e. his Article 8 rights. The test is necessity, not 'strict necessity' in the sense identified by authority for cases outside the area of statutory or other established exceptions. Rule 50(2) then set out the balancing exercise.

38. As to the purpose of section 11, the observations of Underhill P in **F v G** and **Tradition Securities** related to Rule 50 before its revision in the **2013 Rules**. The revision introduced the reference to the protection of Convention rights and the balancing exercise: see the discussion of the Underhill Review and the subsequent Rule revision in **Fallows** at paragraphs 36 to 38. In consequence Rule 50 was not confined to circumstances of publicity which might affect the administration of justice.

39. As to Article 8, it was well established that the "*right to be protected in one's honour and reputation*" fell within its scope; see e.g. **A v B** [2010] ICR 849 per Underhill P at paragraph 11. As to the weight given by the Judge to the principle of open justice, Mr Reade submitted that this was fully reflected in the Judgment: see e.g. paragraph 24, "*Anonymity is a*

serious incursion into open justice". The Judge's focus on the balance between the Article 8 and 10 rights was consistent with the approach endorsed by high authority (**Re Guardian News**) and gave full effect to the principle of open justice.

40. As to the balancing exercise, the Judge had not afforded special treatment to a public figure. At most she was acknowledging the greater risk of people finding out about the allegation given his prominence, with consequent damage to his reputation, pending an adjudication as to the truth of those allegations. In any event, her observation that "*The stakes are very high*" (paragraph 23.7) was a reference back to the arguments which related to the position both of the Claimants and the Respondents (paragraph 19.7).

41. The Judge properly took into account the gravity of the allegations. Her reference to allegations "*which sits at the very centre of public life*" must be read with paragraph 23.7, and the concerns of public discussion and speculation on the allegations. The "*very centre*" was the individual's honour and protection as protected under Article 8. As **Khuja** made clear, even under the general law there was no fixed presumption that members of the public would distinguish between allegations and proof.

42. It was equally right to take account of the risk of misreporting in the interim period before judgment on the allegations. Rule 50 existed to permit a restriction on reporting in this period and had a much broader range than the common law. In any event, the Supreme Court in **Re Guardian News**, having stated that the possibility of some sectors of the press abusing their freedom to report could not in itself be a sufficient reason for curtailing that freedom for all members of the press, continued: "*The possibility of abuse is therefore simply one factor to*

be taken into account when considering whether an anonymity order is a proportionate restriction on press freedom in this situation" (paragraph 72). The same applied to an RRO.

43. As to case law suggesting a little more leniency towards Respondents, this reflected **BBC v Roden**, where Simler P took account against the Claimant's reliance on Article 8 that he had chosen to bring proceedings in a public tribunal (paragraph 45(a)). This was the corollary. In any event, this was an argument on behalf of the Respondents and did not form part of the decision (paragraph 19.8).

44. As to parity, the Judge acknowledged that the **1992 Act** did not place accuser and accused in a like position. The conclusion that there should be parity was for the permissible reasons identified in paragraph 22. In any event her decision was based on the powers granted by Parliament under section 11 to allow protection to the alleged perpetrator of a sexual offence.

45. As to the decisions in **Roden** and **Fallows**, these were post-promulgation cases outside the direct purview of section 11. In **Fallows** Simler P recognised that "*reporting restrictions which last indefinitely are a much more substantial restriction on freedom of expression than restrictions imposed for a limited period*" and that cases where the Article 8 rights are so strong as to defeat the principle of open justice and rights of freedom of expression were "*likely to be rare*" (paragraph 42). The factors identified by her in the balancing exercise were those "*with relevance to this appeal*" (paragraph 48).

A 46. As to duration of the RRO, the Judge had taken a permissible and pragmatic course of keeping it in place until after any remedy decision. As she stated, this would give the parties time to make submissions after the liability judgment.

B 47. As to refusal of Anonymity Orders, the Judge was right not to grant that further protection in addition to the RRO. If the Claimants' appeal on that ground were granted, the Respondents' contingent cross-appeal sought that it be granted to all parties, in particular on the C ground of parity.

Reply

D 48. In reply, Mr Wolanski submitted that the introduction of the reference to Convention rights in the revised Rule 50 embraced both Articles 8 and 6. In respect of the weight to be given to Article 8, the observations in **Khuja** were apposite. A parallel could be drawn with applications under **Civil Procedure Rules 1998** Rule 39, where the individual's reputational E rights had very limited weight: see **Global Torch**.

F 49. Section 11 **ETA** and Rule 50 did not make a major difference to the general position. An example of where an Order could be made was there was credible evidence that the Respondent would settle the case rather than contest it in reported proceedings. This would impinge on the proper administration of justice. That was not the present case. The fact that G section 11 provided only for orders until promulgation of the judgment demonstrated that this, not privacy, was the concern of the provision: see **Tradition Securities**.

H 50. Mr Milsom submitted that the revision of Rule 50 provided no assistance to the Respondents. Section 11 was an enabling provision. Parliament must be taken to have

legislated with the common law in mind. The language of the Rule and in particular sub-rules 1 and 2 reflected the common law, and the very limited weight which it gave to Article 8 against the principle of open justice. Whilst accepting that reputation and honour fell within the reach of the Article, what mattered was the scale of the infringement. The present case self-evidently fell far short.

Analysis and Conclusions

51. In my judgment it is necessary to start the analysis with consideration of the authorities which deal with the purpose and ambit of section 11 **ETA** and the Rules made thereunder. This includes consideration of decisions of this Tribunal in 1997-1998, two of which are referred to in **Tradition Securities**.

52. In **A v B ex parte News Group Newspapers Ltd** [1998] ICR 55 Morison J considered the statement of the Government Minister when promoting the clause in the House of Lords and observed:

> **"… As is clear from the words of the statute, and the rules made pursuant thereto, Parliament has taken the view that press reporting of the names of those involved in a case of alleged sexual misconduct, with, what might be called, the usual salacious details, might have the effect of interfering with the due administration of justice, in the sense of deterring the particular complainant or others in a similar position from making well-founded complaints of unlawful discrimination. …" (Page 66G-H)**

53. Then in **M v Vincent** [1998] ICR 73 the same Judge observed that RROs:

> **"… apply, and are intended to apply, only whilst the tribunal proceedings are afoot. It is, as this court has already indicated in *A v B* …, an order which is there to prevent the excesses, if there are going to be, of the press or other media whilst the case is proceeding, which might put undue pressure on persons who are involved. Where serious allegations of this sort are made, it is better for all concerned that the tribunal rule on the matter, and find out where the truth lies before the persons become identified." (Page 76C-E)**

54. Those cases concerned claimants, i.e. alleged victims of sexual misconduct. In **R v London (North) Industrial Tribunal ex parte Associated Newspapers Ltd** [1998] ICR 1212,

A Keene J (as he then was) had to consider the position of those "affected" by the allegation. This included the alleged perpetrator of sexual assaults. Noting the decisions in **A v B** and **Vincent** and the citations from *Hansard* he observed that:

> **"Most of the emphasis in those various passages seems to be on the need to prevent complainants from being deterred from bringing complaints by fear of publicity about their private lives. On the other hand, section 11(6) … does not restrict the restricted reporting orders to preventing simply the identification of the complainant, nor does the wording of the [Act] confine the power expressly to any particular sub-group of cases "involving allegations of sexual misconduct", such as those where there is a risk of prejudice to the proper administration of justice." (Page 1219D-F)**

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55. In that case, leading counsel for the newspapers cited a further passage from the Minister's speech in the House of Lords, namely:

> **"In conclusion, I hope that all noble Lords will agree with me that the new clauses offer valuable protection to the victims of and witnesses to sexual harassment and indeed to anyone who is falsely accused of such harassment. The Government strongly condemn sexual harassment and hope that these new powers will make the process of bringing an industrial tribunal complaint involving such allegations less distressing, thereby encouraging those who would previously have been deterred from bringing such cases to do so." (Page 1221B-C)**

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56. Noting that the principle of the freedom of the press to report fully and contemporaneously should only be constrained where and to the extent clearly necessary, Keene J observed that this:

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> **"… does argue for a narrow interpretation of the words in section 11, rather than a wide one. It is difficult to see that article 10 of the Convention on Human Rights adds significantly to this, given that the principle to which I have referred is so firmly embedded in English common law." (Page 1224H)**

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He continued:

> **"Applying this approach to the interpretation of section 11, one can see that the power to make a restricted reporting order will normally exist so as to prevent anything likely to lead to the identification by members of the public of the victim of the alleged sexual misconduct and the alleged perpetrator. (I stress in passing that at this stage I am dealing simply with the legal power to make an order and not with the exercise of that discretionary power.) …" (Page 1225A-B)**

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57. In that case the Judge quashed the orders made to protect persons said to be indirectly affected by the allegations. The Tribunal's order in protection of the alleged perpetrator (T) of sexual assaults on the Claimant and a fellow employee (L) were undisturbed. He observed:

> **"… One can readily understand that she felt it necessary that T, against whom the allegations were being made, should be covered, and the same is true of Miss L. Both those obviously fell into the category of persons one would expect could well be affected in the giving of their evidence by publicity identifying them. In so far as Mr Robertson seeks to challenge their inclusion, his attack is, in my judgment, unjustified. …" (Page 1227D-E).**

58. In **Tradition Securities** Underhill J, sitting with members, observed that the purpose of affording protection to claimants was explicitly set out by Keane J in **Associated Newspapers**. However, there was no such explicit discussion in any authority, nor the Ministerial Statement as to the purpose of affording protection to alleged perpetrators. This was a little surprising since that protection was in marked contrast to the position of defendants in criminal prosecutions for sexual offences. It was submitted to him that a further purpose of the protection was to prevent unjust intrusion on the privacy of alleged perpetrators, irrespective of any risk to the administrator of justice. The Judge observed that:

> **"5. … Traditionally, the embarrassment and distress caused to a person confronted with what may ultimately be held to be false or exaggerated allegations of sexual misconduct would have been regarded as an insufficient reason for any restriction on the rule of open justice; and although there are some hints in the ministerial statements that a wish to mitigate such distress and embarrassment may have played a part in the enactment of the provisions in question, those hints are faint and are not picked up in the case law. However, what was submitted to us was that that traditional view may have to be revisited in the light of Article 8 of the Convention and that the very firm approach to intrusions on privacy deriving from *Scott v Scott* may have to yield to a more nuanced approach under which the different rights protected by Articles 8 and 10, and indeed Article 6, of the Convention have to be balanced in each case. …"**

However, the instant case did not require that question to be resolved and he and the members preferred to express no view about it.

59. As already noted, in **F v G** Underhill P referred back to the discussion in **Tradition Securities** and observed of Rule 50 that:

> **"17. … It does not appear to be designed to protect personal or confidential information as such: if it were, orders made under it would not automatically lapse when the proceedings were concluded. …"**

In further guidance for restrictions on reporting and/or anonymisation, he emphasised that it was necessary to pay "*full regard to the importance of open justice*" (paragraph 24). There followed the Underhill Review and the subsequent revision of Rule 50 with its express references to the protection of Convention rights and to a balance which must give "full weight" to the principle of open justice and to Article 10.

60. In my judgment, the present case requires this Tribunal to return to the question of whether, in its consideration of an application by the alleged perpetrator of a sexual offence under the revised Rule 50 for an RRO until promulgation of its substantive decision, the Tribunal is concerned only with the effect on the administration of justice; or whether it may take account of the applicant's freestanding concern to protect his qualified Article 8 rights, including his honour and reputation, pending adjudication on the allegations. For the following reasons my conclusion is that the Tribunal is not so constrained:

(1) The starting point is the rule that, outside the area of statutory and established exceptions, the open justice principle has universal application, except where it is strictly necessary to depart from it in the interests of the administration of justice.

(2) However section 11 **ETA** and Rule 50 provide one of those statutory exceptions. Thus Rule 50(1) imposes a less onerous test than the strict necessity test of the general rule, namely necessity "*in the interests of justice or in order to protect the Convention rights of any person*". Convention rights include the qualified or Article 8 right to honour and reputation. Nor does Rule 50(2) provide a test of strict necessity. Rather, it requires that "*full weight*" be given in the balancing exercise to the principle of open justice and to Article 10.

(3) The observations of this Tribunal in the cited 1997-1998 decisions provide support for the proposition that the jurisdiction is not so constrained; see the above citations from **Vincent** and **Associated Newspapers**.

(4) Limited as it is on this point, the ministerial statement admitted in those decisions pursuant to **Pepper v Hart** [1993] ICR 291 includes the observation that the clause which became section 11 offered "*valuable protection to the victims of and witnesses to sexual harassment and indeed to anyone who is falsely accused of such harassment*": see **Associated Newspapers** at page 1221B. Of course, that begs the question of whether the allegation is true or false; but that is a matter for adjudication in the substantive hearing.

(5) The observations of Underhill P in **Traditional Securities** and **F v G** predate the revision of Rule 50 with its specific reference to the protection of Convention rights. I also respectfully consider that this statutory time limitation of RROs until promulgation of the judgment is consistent with an approach which permits protection of the perpetrator in his Article 8 rights, independently of any adverse effects on the administration of justice, until adjudication on the truth of the allegation.

(6) The decisions concerning post-promulgation restrictions (e.g. **Roden** and **Fallows**) are to be distinguished for that very fact. By that stage the decision has been promulgated or the case has settled. In consequence those decisions fall outside the statutory exception limited in time by section 11(1)(b), and in consequence reflect the test of strict necessity and the limited weight given to Article 8 considerations in that balancing exercise: see e.g. **Fallows** at paragraphs 42 and 48 to 50.

(7) It does not follow from this approach that an Order will routinely be granted in a pre-promulgation application within Rule 50. It is a matter of judgment in each

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case, having regard to the particular evidence relating to Article 8 and giving full weight to the principle of open justice and to Article 10.

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61. In the light of this analysis I do not accept the arguments of any of the parties to this appeal in their full measure. I accept the contention of the Claimants and Times Newspapers that the Judge in the balancing exercise did not give full weight to the principle of open justice. As I read the Judgment (and in particular paragraphs 7, 8, 19, 20 and 24) she effectively treated

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that principle as satisfied pending promulgation of the decision by the fact that the hearing would be in open Court. However it was necessary also to give full weight to the point, restated in **Khuja**, that press reporting of legal proceedings is an inseparable part of the concept of open

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justice. This aspect of open justice includes names and contemporaneity and proceeds on the basis that the reporting will be lawful, namely fair and accurate. The public interest in that part of the principle involves a consideration distinct from the Article 10 right to freedom of

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expression which the Judge did take into account. I also accept that, at least in the absence of evidence to support that fear, the Judge was wrong to take account of the "*fear of misreporting*" (see paragraph 23.5).

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62. As to parity, I accept that it would be wrong in the balancing exercise to take account of the imbalance in the **1992 Act**. The **Act** reflects the conclusion of Parliament that its protection should be given to the alleged victims, but not to the alleged perpetrators of sexual offences.

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That judgment of the legislature must be fully respected.

63. On one reading of paragraphs 22 and 23.2 of the Judgment, the Judge did not take

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account of parity on such a basis, but only did so on the pragmatic grounds that:

(1) it would strengthen the protection enjoyed by the Claimants under the **1992 Act** and avoid collateral disputes; and

(2) the **Act**'s prohibition of "identifying matter" would achieve such parity in any event.

However, on my interpretation, in particular taking account of the final sentence of paragraph 22.4 and paragraph 23.2, the Judge was wrongly influenced by considerations of parity with the **1992 Act**. In any event I do not consider that the pragmatic factors were relevant considerations. The **1992 Act** provides the requisite restraint on the publication of identifying matter, backed up by criminal sanction. Furthermore the Claimants did not seek further protection in this form.

64. Conversely, I do not agree that a Tribunal is required to proceed on the basis that distress and damage to reputation from the report of unproven allegations of sexual offences have to be ignored; nor that the public must be taken to understand the difference between such allegations and their proof; nor that if the allegations are false the judgment will necessarily provide a sufficient vindication. On the contrary, the considerations identified in paragraphs 23.1, 23.4 and 23.7 of the Judgment are all potentially relevant to the Second Respondent's Article 8 rights and to the balancing exercise required by Rule 50(2). Although paragraph 23.4 could have been more clearly worded, it is obvious that the Judge was not intending to suggest that the alleged sexual offences had anything to do with private life. The paragraph has to be read with paragraphs 23.7 and 24.1. The reference to private life was in respect of the Second Respondent's honour and reputation pending adjudication on the truth or falsity of the allegations.

65. As to the public and social status of the Second Respondent, it would have been wrong to give this any weight. That would conflict with the principle of equality before the law: **Crawford**. I do not accept that the Judge did so. I accept that her observation in paragraph 23.7 that "*The stakes are very high*" was a reference back to the arguments recorded in the second and third sentences of paragraph 19.7. These concern the reputation and the stakes both for the Claimants and for the Second Respondent. The conclusions do not adopt the argument recorded in the first sentence of that paragraph.

66. I should add that the principle of equality cuts both ways. In **Crawford** it was the media which unsuccessfully sought to rely on the public profile of the individual in question. The Court made clear that "*The public position comes into the account neither on one side or the other*" (paragraph 36).

67. As to leniency to the Respondents, this was a point raised in argument (paragraph 19.8) but not adopted by the Judge. I do not accept that Rule 50 or the case law support leniency in either direction.

68. As to the duration of the Order, I understand the pragmatic considerations which led to the decision that it should continue until after any decision on remedy. However, when set against the purpose of a restriction pending adjudication on the allegations, I consider that the reference in section 11 to the "*promulgation of the decision*" must be to the decision on liability.

Disposal

69. I do not accept Mr Milsom's submission that the application admits only of an answer in the Claimants' favour and that I should order accordingly. I accept that the correct approach might have led to a different answer. As is their right, the Respondents do not wish to confer jurisdiction on me to determine the application. Accordingly it must be remitted to the Tribunal for consideration afresh in the light of my judgment. Bearing in mind the considerations identified in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 and particularly the 'second bite', the application should be considered by a freshly constituted Tribunal.

70. As to the refusal of the Claimants' application for an Anonymity Order, I am not persuaded that the Judge's decision was flawed. It is routine for Judgments in criminal proceedings covered by the **1992 Act** to be anonymised accordingly. Tribunal Judgments can be in no different position. A Judgment does not fall within the section 6 exception for "*an indictment or other document prepared for use in particular legal proceedings*". Nor do I accept that the concern as to social media breach of the statutory provision should have compelled the Judge to make such an Order. The Judge was also entitled to take into account the Claimants' stance that they only wanted anonymity if the Respondent did not have it.

71. Accordingly, the appeal in respect of the RRO is allowed and the application remitted to a freshly constituted Tribunal. The appeal on the refusal of the Anonymity Order is dismissed; and there is no Order on the Respondents' contingent cross-appeal.