Neutral Citation Number: [2023] EWCA Civ 331

Case No: CA-2021-001660 AND CA-2021-001673

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
The President of the Family Division
[2021] EWHC 1699 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE KING DBE
and
LADY JUSTICE CARR DBE

- -

Between:

(1) RASHID MAQSOOD ABBASI **(2) ALIYA ABBASI**	**Appellants**
-and-	
NEWCASTLE UPON TYNE HOSPITALS NHS FOUNDATION TRUST	**Respondent**
LANRE HAASTRUP	**Appellant**
- and -	
(1) KING'S COLLEGE HOSPITAL NHS FOUNDATION TRUST **(2) TAKESHA THOMAS**	**Respondents**
(1) THE ROYAL COLLEGE OF NURSING **(2) THE BRITISH MEDICAL ASSOCIATION** **(3) THE FACULTY OF INTENSIVE CARE MEDICINE** **(4) THE ROYAL COLLEGE OF PAEDIATRICS AND CHILD HEALTH** **(5) THE PAEDIATRIC CRITICAL CARE SOCIETY**	**Interveners**

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Bruno Quintavalle (instructed by **Andrew Storch Solicitors**) for the **Appellants**

Gavin Millar KC and Fiona Paterson (instructed by **Sintons Law and Hill Dickinson Solicitors**) for the **Respondents**
Fenella Morris KC (instructed by **The Royal College of Nursing**) for **the First Intervener**
Jenni Richards KC (instructed by **The British Medical Association**) for **the Second Intervener**
Alex Ruck Keene KC (Hon) (instructed by **Bevan Brittan**) for **the Third Intervener**
Alistair Robertson and Hannah Sladen of **DAC Beachcroft** for **the Fourth and Fifth Interveners**

Hearing dates: 15 and 16 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the court to which we have all contributed. These appeals concern the principles to be applied when a court considers an application to vary or discharge a Reporting Restriction Order ("RRO") made long before in end-of-life proceedings in the High Court. Such orders often protect the identities of all those involved in the care of a patient in respect of whom an application to withdraw treatment is made. That is usually to protect the privacy of the patient, of the patient's immediate family and of those concerned in the treatment of the patient as well as to safeguard the integrity of the proceedings. Such proceedings are apt to generate a great deal of passionate debate which spills over into harassment of those involved in the proceedings, picketing of hospitals and interference with the working of the hospitals. There are too many who involve themselves in these kinds of debate who lack all sense of proportion and display intolerance of anyone who disagrees with them. Some are not willing to admit that there may be two legitimate points of view. Nonetheless, the circumstances in which it is lawful or ethical to withdraw treatment is the subject of legitimate debate.

2. The context of the appeals is the modern practice in the Family Division of the High Court of granting indefinite anonymity orders to a wide range of medical (and non-medical) carers in cases of this kind. On 23 June 2021 Sir Andrew McFarlane P ("the President") dismissed separate applications by the parents of two children to discharge the RROs made in each case: [2021] EWHC 1699 (Fam).

3. Rashid and Aliya Abbasi are the parents of Zainab, who was six years old when she died on 16 September 2019. That was shortly after proceedings had been issued by Newcastle Upon Tyne Hospitals NHS Foundation Trust ("Newcastle") for a declaration under the inherent jurisdiction of the court that it would be in Zainab's best interests for life-sustaining treatment to be withdrawn and for only palliative care to be provided. Lanre Haastrup is the father of Isaiah who died on 7 March 2018. He had been born on 18 February 2017. The King's College Hospital NHS Foundation Trust ("King's") obtained a declaration in proceedings under the inherent jurisdiction of the High Court that it would be in Isaiah's best interests that his treatment, in particular his ventilation, be withdrawn. Indefinite RROs were made in both cases. They were made in support of the integrity of the proceedings and the administration of justice and to protect the interests of those affected by the proceedings. But they now have the effect of preventing the parents meaningfully discussing or writing publicly about the circumstances in which their respective children were treated and died, or mainstream media from doing so if the parents were to spark interest in the circumstances of the cases. In Zainab's case they could not name the small cohort of medical professionals protected by the RRO or give away information that would enable them to be identified. In Isaiah's case the range of medical staff and other staff protected is very wide indeed and the difficulties even greater.

4. Zainab's parents and Isaiah's father, supported by Isaiah's mother, Ms Takesha Thomas, appeal against the orders made by the President.

5. We have had the benefit of written submissions from several interveners, namely the Royal College of Nursing, the Faculty of Intensive Care Medicine, the Royal College

of Paediatrics and Child Health, the Paediatric Critical Care Society and the British Medical Association.

The Facts

Zainab

6. Zainab was born on 27 June 2013 with a rare and profoundly disabling inherited neurodegenerative condition known as Niemann-Pick Type C. She also contracted swine flu in 2016, which resulted in lung damage.

7. Zainab's parents are both medical professionals. They had disagreements with Newcastle, under whose care Zainab was throughout her life. At one point the police were called to remove her father from the ward where she was being treated. Her parents favoured more active treatment than the palliative care being recommended by the treating team.

8. On 28 August 2019 Newcastle commenced the best interest proceedings. A few days before the substantive hearing was due to take place Zainab died.

9. Since Zainab's death, her parents have remained critical of Newcastle's treatment of their daughter. Their complaints are both systemic (concerning the regime operated in the Paediatric Intensive Care Unit) and operational (relating to individual members of staff). They consider that the unit is so dysfunctional that the care of its patients is compromised. Other families will have been affected as they have been. They wish to publicise the care given to Zainab and to name those involved. They hope that, by bringing these matters to the more general attention of the public, an investigation will follow, resulting in radical change.

Isaiah

10. Isaiah was born with a severe hypoxic brain injury on 18 February 2017 at King's College Hospital. That injury was the result of negligence on the part of the hospital staff. He was deprived of oxygen for a significant period during birth. He was initially cared for in the Neonatal Intensive Care Unit and then moved to the Paediatric Intensive Care Unit at King's. Isaiah remained fully dependent on intensive care support for his needs and was unable to breathe independently.

11. King's obtained the declaration that it was in Isaiah's best interests to withdraw treatment on 29 January 2018. Following an unsuccessful attempt by his parents to appeal, Isaiah died on 7 March 2018 after the removal of ventilation.

12. Isaiah's parents have been critical of King's care surrounding Isaiah's birth. King's accepted liability for his brain injury and have settled the parents' claim for compensation. An inquest, which will focus on the circumstances of his birth, was opened but was adjourned in July 2020 pending clarification of the scope of the reporting restrictions in place. At the inquest it was the position of King's that the reporting restriction order extended to the coronial proceedings. If correct, that would result in the anonymisation of all those whose conduct was under scrutiny at the inquest in much the same way as sometimes happens at inquests involving members of the armed forces or police who have used lethal force.

The RROs

The Abbasi RRO

13. Newcastle applied for a reporting restriction order to protect the identity of Zainab, her family, the Trust, the hospital and a small number of clinicians concerned in her case. Newcastle pointed to the recent cases of Charlie Gard (*Great Ormond Street Hospital for Children NHS Foundation Trust v Yates (No 2)* [2017] EWHC 1909 (Fam); [2017] 4 WLR 131) and Alfie Evans (*Evans v Alder Hey Children's NHS Foundation Trust* [2018] EWCA Civ 805; [2018] 2 FLR 1269) and said that identification of the hospital or members of the clinical team caring for Zainab would result in intense attention from the public. Those two cases attracted interest from campaigning groups and from individuals who behaved badly during the proceedings, with accompanying social media threats to medical and legal professionals involved. If something similar happened, it would adversely affect not only the care provided to Zainab but also the care being provided to other children in the hospital. Newcastle's position initially was that balancing the media's free speech rights against the privacy rights of Zainab and her family, it was necessary and proportionate to make the order sought "until the proceedings have been concluded". These arguments referred to articles 10 and 8 of the European Convention on Human Rights ("the Convention"), which protect the right to free speech and private and family life respectively.

14. On 6 September 2019 MacDonald J ordered that all further attended hearings in the proceedings would be in public. He imposed a temporary RRO. Newcastle applied for a continuation of that order, relying on a statement from two of Zainab's treating doctors. They stated, in summary, that without anonymisation of Newcastle itself, identification of the hospital, treating team, family and Zainab would be possible. The ability to provide care for Zainab could be compromised. In its position statement, Newcastle asserted the article 8 rights of the persons in relation to whom the RRO was being sought.

15. Zainab's parents' solicitors stated that they were neutral in respect of the question of whether Newcastle should be named. PA Media submitted that Newcastle should be named because naming the Trust would not create any significant risk of Zainab's identity being revealed to the public or her article 8 rights being infringed. Zainab's guardian also submitted that anonymisation of Newcastle would be an "unusual step" in a case such as this.

16. On 12 September 2019 Lieven J made a reporting restriction order ("the Abbasi RRO"), which provided:

> "**IMPORTANT: PENAL NOTICE**
>
> **(1) This order contains injunctions. You should read it carefully. You are advised to consult a solicitor as soon as possible. You have the right to ask the court to vary or discharge this order.**
>
> **(2) If you disobey this order you may be found guilty of contempt of court and may be sent to prison or fined or your assets may be seized.**

…

IT IS HEREBY ORDERED THAT:

1. Duration

a. Paragraph 3(a)(vii) [prohibiting naming Newcastle] of this order shall have effect until the conclusion of these proceedings and shall be discharged thereafter, subject to any further order.

b. The remaining parts of this order shall have effect until further order.

2. Who is bound

This order binds:

i. the parties and their representatives,

ii. the witnesses,

iii. all persons who attend all or any part of an attended hearing,

iv. all persons who by any means obtain or are given an account or record of all or any part of an attended hearing or of any order or judgment made or given as a result of an attended hearing

v. all persons who are provided with or by any means obtain documents and information arising from this application, and

vi. any body, authority or organisation (and their officers, employees, servants and agents) for whom any such person works or is giving evidence.

3. Publishing restrictions

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

a. any material or information that identifies or is likely to identify:

i. Z, who is the subject of these proceedings; and/or

ii. Any member of Z's family; and/or

iii. Any person caring for Z; and/or

iv. Any doctor or other medical professional caring for Z; and/or

v. Where any person listed above lives;

vi. Any institution at which Z is treated or cared for;

vii. The Applicant NHS Trust,

whose details of which appear in the Record of Information appended to this order;

b. any picture of any of the above.

4. The persons bound by this order shall not by any means (and so orally or in writing or electronically by way of social media or in any other way) directly or indirectly cause, enable, assist in or encourage the publication or communication of the matters referred to in paragraph 3 above.

5. No publication of the text or a summary of this order (except for service…) shall include any of the matters referred to in paragraph 3 above.

6. What is not restricted by this Order

a. Nothing in this order shall prevent any person from:…

v) publishing information relating to any part of a hearing in a court in England and Wales (including a coroner's court) in which the court was sitting in public and did not itself make any order restricting publication…"

…

8. Variations of this order

The parties and any person affected by this order may apply to the Court for an order (and the Court may of its own motion make an order) that:

a. varies or discharges this order or any part or parts of it, or which

b. permits the publication of any of the Information on the basis that it is lawfully in the public domain or for such other reason as the Court thinks fit."

17. The Record of Information referred to in paragraph 3a lists Zainab and her parents, Newcastle, the Hospital and four clinicians. Despite the very wide language of

paragraph 3a (iii) and (iv) of the RRO, it did not extend to "any person caring for" Zainab or "any doctor or other medical professional caring for" Zainab because the Record of Information contains the closed list of four.

18. On 31 July 2020 Lieven J varied the Abbasi RRO by consent to permit publication of the names of Zainab and the parties to the proceedings. That included her parents. Otherwise, the restrictions remained undisturbed. We note with respect to this order that: (a) the anonymity of Newcastle fell away when the proceedings concluded (the onus was placed on the Trust to apply to continue the order and it did not do so); (b) the Record of Information continues to provide anonymity for only four individuals; and (c) the order recognised that it would be for other courts concerned with the circumstances surrounding the case to make their own judgment about the need for anonymity in the context of their proceedings. Although not expressed as being against the whole world, that is the effect of the order because it binds anyone who gains knowledge of the facts of the case. The order does not on its face link the prohibited publication, whether of the identities of people, Newcastle or the hospital, with Zainab's case but clearly would be interpreted in that way.

The Haastrup RRO

19. On 10 and 17 August 2017 the identities of Isaiah's parents and the hospital at which Isaiah was being treated were openly reported in a local newspaper. In early October 2017 the Communications Department of King's was contacted by the BBC which wanted to run a story about Isaiah and the litigation, to be broadcast in the week commencing 9 October 2017.

20. Against this background, King's sought an order preventing the publication of any material that might identify those who had cared for or were at the time caring for Isaiah or his mother, the authors of second opinions and the clinicians with whom King's had liaised over a transfer of Isaiah. King's said that the proposed order would not prevent the publication or broadcast of an account of the proceedings. King's was concerned about the recent case of Charlie Gard and referred to the experience of Great Ormond Street Hospital's staff in that context. The application was supported by a witness statement from the in-house solicitor. It was advanced on the basis that King's was concerned for the welfare of those who formed the subject of the proposed order, were they to be identified or identifiable. That, in turn, could lead to care provided to Isaiah and other patients being compromised, as well as a distressing intrusion into the privacy of the individuals concerned. King's referred to the press coverage which had already taken place and expressed concern that other patients' security and confidentiality could be compromised. It argued that it was necessary and proportionate to impose restrictions as set out in the draft order provided. The position statement of King's presented its argument in support of the RRO on the competing article 8 rights of those it sought to protect and the article 10 rights of the media, as well as the welfare of Isaiah and his mother.

21. Isaiah's parents, the BBC and CAFCASS all indicated that the application for reporting restrictions was not opposed.

22. On 6 October 2017 MacDonald J made a reporting restriction order ("the Haastrup RRO"). The Third Respondent referred to in the order was Isaiah and the First Respondent his mother. It provided:

"**IMPORTANT: PENAL NOTICE**

THIS ORDER CONTAINS INJUNCTIONS. YOU SHOULD READ IT CAREFULLY. YOU ARE ADVISED TO CONSULT A SOLICITOR AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO ASK THE COURT TO VARY OR DISCHARGE THIS ORDER.

IF YOU DISOBEY THIS ORDER YOU MAY BE FOUND GUILTY OF CONTEMPT OF COURT AND MAY BE SENT TO PRISON OR FINED OR YOUR ASSETS MAY BE SEIZED.

…

ORDER

1. *Duration*

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

2. *Who is bound*

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

3. *Publishing Restrictions*

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

a) the name and/or personal details of:

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

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

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

> iv. Any clinician who has a provided [sic] second opinion or advice to the Applicant regarding the Third Respondent's diagnosis, prognosis, treatment and management.
>
> v. Any clinician whom the Applicant's clinical staff have consulted and or communicated with regarding a possible transfer of the Third Respondent to another hospital.
>
> b) any picture being or including a picture of the above; and/or
>
> c) any other material that is likely or calculated to lead to the identification of the above.
>
> 4. No publication of the text or a summary of this Order (except for service of the Order…shall include any of the matters referred to in paragraph 3 above.
>
> 5. *Restriction on seeking information*
>
> This Order prohibits any person from seeking any information relating to the Applicant's staff from any of the following:
>
> a) the Applicant NHS Trust;
>
> b) any member of the Third Respondent's family (including, but not limited to, the First and Second Respondents);
>
> 6. *What is not restricted by this Order*
>
> Nothing in this Order shall prevent any person from:
>
> a) Publishing information relating to any part of a hearing in a Court in England and Wales (including a Coroner's Court) in which the Court was sitting in public and did not itself make any Order restricting publication;
>
> …
>
> 8. *Further applications about this Order*
>
> The parties and any person affected by any of the restrictions in paragraphs 3 to 5 above may make application to vary or discharge it to a Judge of the High Court on not less than 48 hours' notice to the parties. Any such application shall be supported by a witness statement endorsed with a Statement of Truth."

23. This RRO is broader than the Abbasi RRO. It is not concerned only with those involved in the end-of-life care of Isaiah or the proceedings; it anonymises all clinical staff involved in the ante-natal care of Isaiah's mother and all those involved in his birth. It

anonymises all clinical and nursing staff who have cared for him since birth. It similarly anonymises all non-clinical staff. It then anonymises any clinician who has given a medical opinion concerning Isaiah in terms which include the circumstances of his birth (which would include those who advised in the negligence dispute) and not only his continuing care and the end of life proceedings. Unlike the Abbasi RRO it does not provide a list of those protected which would create obvious difficulties for anyone knowing of the order who was covered by it. There is no definition of what is meant by "non-clinical staff" or by "care" in paragraph 3(a)(iii).

24. Each of these RROs was effectively made by consent. There were no contested issues at the time and therefore no reasons against making the orders in their respective terms.

The applications to discharge

25. In 2020 the parents of Zainab and Isaiah applied separately to discharge, or to be released from, the RROs.

26. Dr Abbasi said that he and his wife wished to "tell their story", to speak publicly about their experiences and to identify NHS staff while so doing. He provided two witness statements dated 11 August and 18 December 2020. His evidence included the following:

> "Now, almost a year after Zainab's death, we feel it is important to be able to talk publicly about our daughter, her death, and our experiences during the long periods of her illness….it is in the public interest for the public to know the facts…We believe that that there are lessons to be learnt from Zainab's case, for the public and for the medical profession. We went through a terrible ordeal, which was made much worse for us by the behaviour of certain doctors. We do not want any other families to be put through a similar ordeal in the future, or even at present. We want to do what we can to warn families of that danger, and to appeal to the consciences of the medical profession to prevent that from happening again."

27. Dr Abbasi referred to national and international press coverage of the case which followed the variation to the Abbasi RRO in July 2020. He stated his belief that there was a high level of public interest around the behaviour of the NHS and the police, together with "incredible sympathy" with Zainab and her family. The coverage had been "intelligent and responsible". He criticised the breadth of the Abbasi RRO which, amongst other things, prevented him from responding to criticisms about his own behaviour. He went on:

> "We certainly do not want the allegations and criticisms we make to undermine public trust in the medical profession to which we ourselves belong, or in the NHS. We believe this should not be the case…Identifying a handful of professionals without revealing their personal details and addresses would be an act of holding individuals to account for their actions…it will reassure other staff members…that they…are not given a collective bad name to protect a few…"

28. He concluded in his first statement that he and his wife wished to be able to voice their concerns about the *professional* conduct of certain clinicians involved in Zainab's treatment and care, acknowledging that no one should invade their *private* lives.

29. In his second witness statement, Dr Abbasi set out in detail the matters that he wished to air. He repeated that he wanted to be able to talk freely and share the family's experience over the years to increase awareness. He had concerns about whether the paediatric profession closes ranks in the face of external criticism. Unlike the case of Charlie Gard, for example, they were not seeking to pressure the clinicians who treated Zainab into changing their opinions or decisions. They were seeking to have an open discussion about how those clinicians decided that her life should be ended and how they managed the conflict with the views of her parents. Finally, he stated:

> "If we wished to demean, discredit or threaten the treating team, we had years to do so. This was not our intention…we do not seek to vilify or personally attack any member of Zainab's treating team. We want to increase transparency and accountability around how these doctors behaved in this delicate situation and have discussions about the withdrawal of care…"

30. Mr Haastrup provided witness statements dated 21 December 2020 and 25 January 2021. In the first, he set out a detailed description of the circumstances surrounding Isaiah's birth, his opposition to the end-of-life route that was proposed by King's, and the manner of Isaiah's death. He felt that the rationale for that course was driven by financial reasons and not medical viability. For the Paediatric Intensive Care Unit, Isaiah was a hopeless case and there was no reason to make any effort. He emphasised that his was not a "vexatious application" but one that he had thought about carefully. In his view the clinicians were "detached from [the] society…which they are meant to serve". From what he saw, clinicians are "immediately protected from being accountable when things go wrong until scores are dead." He believed that justice for Isaiah demanded that clinicians are held accountable not only internally but also publicly. Good clinicians would welcome this. Clinicians should not have a special status beyond the normal status of other public servants. Justice had not only to be done, but to be seen to be done. So far as social media was concerned, he had not posted directly or indirectly any comment on social media since Isaiah's death. He was aware of pro-life organisations who had taken a keen interest and posted material concerning the case. However, "the interest in the case has naturally died down" and he did not envisage further publications:

> "Within this, a plurality of opinions should be permitted. I do not believe these organisations are out to vilify any particular individual but are interested in a wider purpose for the state to respect the sanctity of life and to that extent I support them."

31. In his second statement, Mr Haastrup clarified that his purpose was not to "name and shame" specific clinicians involved. He believed that he should have the residual power to be able to speak openly about the matter. Enough time had now passed and there should no longer be reporting restrictions in place.

32. Newcastle and King's argued that the RROs should remain in force, alternatively (by way of cross-application) that fresh RROs should be imposed. PA Media (formerly the

Press Association), as intervener, supported the Trusts' position. Given the commonality of the issues arising, the applications were heard together.

33. The Trusts relied on statements from: a Registrar of the Royal College of Paediatrics and Child Health; a doctor on behalf of the Faculty of Intensive Care Medicine; the Paediatric Adviser to the NHS Practitioner Health Programme; the head of legal services at the Royal College of Nursing; the medical director and deputy chief executive of Newcastle; the clinical director of child health at King's and the President of the Paediatric Critical Care Society. There was no focus on, or evidence relating to, any individual clinician or health care provider nor even in respect of the four individuals protected by the Abbasi RRO. The evidence relied upon was generic. The individual circumstances of the four were not referred to in the arguments before us nor are they referred to in the judgment of the President. Indeed, the Record of Information referred to in the Abbasi RRO was omitted from the appeal bundles and was provided in response to a request from the court.

34. These generic statements made the following main points:

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

ii) There was concern as to the invasion into the private lives of staff;

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

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

v) The two hospitals in question are teaching hospitals. Any step destabilising staff was likely to have a detrimental impact on the many children and families depending on the hospitals to provide care for very sick children;

vi) Staff working in Paediatric Intensive Care Units need always to function at optimal levels;

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

viii) In the event of adverse criticism, paediatricians and other staff are unable to respond by publishing any response to specific allegations;

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

x) The parents knew the identity of the treating clinicians. Complaint and disciplinary processes exist. Where appropriate, decisions can be challenged in the courts.

The Judgment Below

35. The President was satisfied that the High Court had jurisdiction to review the RROs by virtue of the existence of the orders themselves. Each RRO remained in force, having been granted with effect until further order during the currency of the original best interest proceedings. In those circumstances the President concluded that the RROs must have preserved the original inherent jurisdiction under which they had been made, notwithstanding the children's deaths, insofar as that jurisdiction enabled the court to consider the continuation or discharge of the orders. Otherwise, the RROs would only be reviewable by means of out-of-time appeals. That was a wholly unsatisfactory state of affairs.

36. Turning to the substantive dispute between the article 8 and 10 rights in play, the President accepted that he was required to conduct a balancing exercise in the manner set out in *Re S* [2004] UKHL 47; [2005] 1 AC 593. He held that the existence of this analytical framework satisfied the requirement that any interferences with Convention rights be prescribed by law. He also observed that it gave equal weight to articles 8 and 10. Given this, he considered that it was time to draw a line under the remarks of Sir James Munby P in *A v. Ward* [2010] EWHC 16 Fam; [2010] 1 FLR 1497 insofar as they suggested that anonymity should not be afforded to a class of individuals in the absence of "compelling reasons". Such a requirement would undermine the presumptive parity between articles 8 and 10 which lay at the heart of *Re S*.

37. The President observed that the parents' desire to "tell their story" engaged their rights under article 8 as well as article 10. He also noted that the subject matter of their intended expression was likely to raise issues of public importance which would be of interest to the press in its role as public watchdog. However, he ultimately found that the parents had provided insufficient detail about the nature of their allegations for him to be able to gauge and therefore attach greater weight to that public interest.

38. On the other side of the balance, the President found that the risk of harassment associated with publicly naming the clinicians was substantial. His concern was not what the parents themselves might say but rather what other, less scrupulous individuals might do with the knowledge of the clinicians' identities. This consequential risk established a twofold justification for interfering with the parents' rights. First, it engaged the countervailing article 8 rights of the clinicians, whose personal and professional wellbeing would be jeopardised by the threat of online vilification and possibly even in-person abuse. Secondly, this threat would in turn undermine the morale, recruitment and retention of clinical staff and thereby impair the hospitals' ability to deliver effective care. That was a broader policy concern which engaged the legitimate aims of public safety and the protection of health under articles 8(2) and 10(2).

39. In the President's view, the detailed and substantial case for protecting staff anonymity comfortably outweighed the parents' basic assertion of their right to freedom of expression. The outcome of the balancing exercise was therefore plain to see and did not require an intense focus. As a result, the President ordered the continuation of the RROs.

Grounds of Appeal

40. Both appeals were argued by Mr Quintavalle although he had appeared below only in the Haastrup case. He refined the pleaded grounds on which permission to appeal was granted in his written and oral argument. They fall into two broad groupings.

41. First, that there was no jurisdiction to make the RROs or to continue them in the absence of an identifiable cause of action. Mr Quintavalle submitted that section 37 of the Senior Courts Act 1981 ("the 1981 Act") (the general power of the High Court to grant injunctions) is subject to jurisdictional limits contained in the Civil Procedure Rules Part 39.2 and Family Procedure Rules Part 27.11. There was no jurisdiction to make orders preventing the naming of individuals who were neither parties nor witnesses.

42. Secondly, that in balancing the various rights in play in these cases the President erred in granting a class claim based on general evidence. Moreover, his approach amounted to "prior restraint" because he required the parents to give greater specificity about what they intended to say. Overall, the balance the President struck between articles 8 and 10 was wrong and he failed to give sufficient weight to the open justice elements in play in these cases.

43. The Trusts have not sought to revive their cross-applications for fresh injunctions. Rather, Mr Millar KC sought to uphold the President's refusal to discharge the RROs, essentially for the reasons he gave, and with an expanded response to the criticisms now made of those reasons.

Interveners' submissions and evidence

44. The Interveners all endorse the President's decision to maintain the RROs. They support his jurisdictional analysis and make the following points in support of his finding that the potential impact of harassment on publicly named clinicians would be severe:

    i) Recent years have seen increased public hostility towards staff involved in the care of patients who are the subject of contested end-of-life proceedings;

    ii) This hostility risks undermining the trust between clinicians and parents which is so crucial to effective communication and decision-making in sensitive end-of-life cases;

    iii) This hostility also risks causing substantial emotional and psychological distress, which in turn threatens to disrupt the quality of care provided to patients;

    iv) Across the NHS, many working days are already lost as a result of doctors and other healthcare professionals suffering from anxiety, stress, depression and other psychiatric illnesses. There is a staffing crisis which has been exacerbated by the Covid-19 pandemic;

    v) Surveys have shown that the public support granting and maintaining RROs in favour of clinicians in cases such as these; and

vi) The need for public scrutiny is reduced by the fact that clinicians are already subject to rigorous professional regulation.

The Jurisdiction Issues

45. In making the RROs the High Court was exercising powers under its inherent *parens patriae* jurisdiction (parent of the nation) which is of ancient origin. It enables the court to protect those who cannot protect themselves. It was described by Lord Eldon LC in *Wellesley v. Duke of Beaufort* [1827] 2 Russ. 1 (at 20):

> "it belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of the individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them."

46. Under that jurisdiction the High Court may make orders to protect those engaged in, affected by or connected with the proceedings before it and to protect the integrity of the proceedings themselves. Similar inherent powers have been vested in the High Court and its predecessors for centuries.

47. Discussion of "jurisdiction" may give rise to confusion if two different concepts are conflated. The first (jurisdiction strictly so called) is whether the court has power to make an order. The second is whether it is appropriate to exercise that power. The High Court, by contrast with inferior courts and tribunals, is a court of unlimited jurisdiction, but the exercise of the power it has in any area must be exercised on a principled basis established in authority. Moreover, the court's wide jurisdiction may be subject to statutory limitation.

48. There can be no doubt that the High Court has jurisdiction to make RROs in end-of-life cases under its inherent jurisdiction. That jurisdiction is now exercised, in so far as competing Convention rights are concerned, by reference to those Convention rights. The interplay of the inherent jurisdiction and the Convention was considered by the House of Lords in *Re S*.

49. *Re S* was a care case. S's brother had died of salt poisoning and their mother was indicted for his murder. S's guardian applied to the High Court for an injunction preventing the publication of S's name or school, or the name or photograph of his mother, in any report of the Crown Court proceedings. The order was made *ex parte* but then set aside on application by the press, with a stay to enable an appeal. The case reached the House of Lords. Much of the argument focused on the cases decided under the inherent jurisdiction, albeit with reference to Convention rights. The Court of Appeal had observed that the inherent jurisdiction only provided "the vehicle which enables the court to conduct the necessary balancing exercise". Lord Steyn, with whose opinion all members of the Committee agreed, said (at [23]):

> "The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the

> jurisdiction to restrain publicity in a case such as the present is now derived from Convention rights under the ECHR. This is the simple and direct way to approach such cases."

50. He recognised that the earlier case law on the inherent jurisdiction was "not wholly irrelevant" and might remain of some interest in relation to the ultimate balancing exercise. A study of the earlier case law revealed that the approach adopted historically under the inherent jurisdiction was "remarkably similar" to that adopted under the Convention. The case turned on balancing the article 8 rights of S and the article 10 rights of the press in the context of the principle of open justice. At [17] he distilled the four propositions which emerged from *Campbell v. MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457:

> "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test." (original emphasis)

51. Lord Steyn noted that in the criminal sphere numerous automatic statutory reporting restrictions existed, for example in relation to the identity of complainants in sexual offences (section 1 of the Sexual Offences (Amendment) Act 1992) and other discretionary powers to restrict reporting. He said at [20]:

> "Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by process of analogy, except in the most compelling circumstances, further exceptions to the principles of open justice."

In recognising that the court might do so in exceptional circumstances Lord Steyn recognised that the court would have *jurisdiction*, but that it should refrain from exercising that jurisdiction; and in that sense had no power to do so.

52. The approach in *Re S* was applied in *In re British Broadcasting Corporation* [2009] UKHL 34; [2010] 1 AC 145 in a different context. The case had its origins in a rape trial in which the trial judge had excluded DNA evidence on which the Crown's case wholly depended. He accepted a submission from the defence that he was obliged to exclude it by virtue of section 64(3B) of the Police and Criminal Evidence Act 1984. The Attorney General referred the case to the Court of Appeal under section 36 of the Criminal Justice Act 1972 for a ruling that the judge was not obliged to exclude the evidence but had a discretion. Such references do not affect the underlying acquittal, whatever their outcome. The Court of Appeal agreed with the trial judge, but the House of Lords did not: *Attorney General's Reference (No.3 of 1999)* [2001] 2 AC 91. Having come to that conclusion, the House of Lords made an anonymity order in favour of the acquitted defendant.

53. That was not the end of the story. Part 10 of the Criminal Justice Act 2003 makes it possible to retry acquitted persons where the Court of Appeal is satisfied that there is "new and compelling" evidence available and that a retrial would be in the interests of justice (sections 78(1) and 79(1)). The BBC wished to commission and broadcast programmes to explore controversial acquittals which, they suggested, at least merited consideration of the use of this power. The defendant's acquittal was the subject of a proposed pilot episode.

54. The BBC applied to the House of Lords to lift the anonymity order made earlier.

55. There were doubts about the jurisdictional basis upon which the House had made the original anonymity order under the statutory scheme and rules governing Attorney General's references, but those doubts did not affect the approach to be adopted on an application to discharge it. At [13] Lord Hope noted that section 6(1) of the 1998 Act ("It is unlawful for a public authority to act in a way which is incompatible with a Convention right") has an important part to play when a court is considering "how it should exercise a power that has been conferred on it by statute … or vested in it by an inherent jurisdiction. But it cannot confer on a court a power that it does not otherwise have."

56. This last observation confirms that section 6 of the 1998 Act does not create a free-standing cause of action. He continued:

> "… the House has an inherent jurisdiction to make such orders as are necessary for the purposes of the proceedings which are before it. So I would be reluctant to hold that the House did not have the power to make the order, even if, as seems to me to be reasonably clear, it did not have power under the Rules to do so. I agree therefore with Lord Pannick that the decisive issue is whether setting aside of the order would be incompatible with D's rights under article 8 of the Convention."

57. Lord Hope posed two questions. Would disclosure of the defendant's identity engage his article 8 rights? And if so, does his right outweigh the right of freedom of expression under article 10 of the BBC? He concluded that the article 8 rights were engaged but were outweighed by the article 10 rights of the BBC. Lord Brown of Eaton-under-Heywood at [54] also explained that the arguments about the original jurisdiction of the House to make the order were sterile:

> " … [O]n any view the House was bound at the time this anonymity order was made, as it is bound today, to act compatibly with any Convention rights arising (section 6 of the 1998 Act) which in this context involved and involves striking the appropriate balance between D's article 8 privacy rights on the one hand and the BBC's (and for that matter everyone else's) article 10 rights to freedom of expression and communication on the other."

That, he said, is what had been decided in *Re S*. At [57], Lord Brown observed that whether the House had originally struck the right balance when making the anonymity order was less important than "the question whether it is now appropriate to continue it

or discharge it". He referred to the width of the power available to the High Court "which arises under section 6 of the 1998 Act read in conjunction with section 37 of [the 1981 Act]." He then observed that the "full width of the section 37 power, to grant injunctions whenever just and convenient" was available to the House of Lords. The House unanimously discharged the order.

58. Section 37 of the 1981 Act reflects the common law powers vested in the High Court and confirms that it may grant injunctions when seized of proceedings whenever "it appears to the court to be just and convenient to do so".

59. *In re Guardian News and Media and others* [2010] UKSC 1; [2010] 2 AC 697 concerned the anonymity of individuals designated by the Treasury as being suspected of facilitating acts of terrorism under the Terrorism (United Nations Measures) Order 2006. Lord Rodger of Earlsferry delivered the judgment of the Supreme Court. At [28] he noted that the 1998 Act requires public authorities, including courts, to protect the article 8 right to respect for private and family life. A court might do that by using a cipher instead of a name in its judgment. However, in the cases under consideration in *Guardian News and Media* the Court of Appeal had gone further and made an order addressed to the press which prevented publishing the fact that the person known as M was the subject of a designation. At [29] he continued:

> "Having the power to make orders of this kind available is one of the ways in which the United Kingdom fulfils its positive obligation under article 8 of the Convention to secure that other individuals respect an individual's private and family life. In *Von Hannover v. Germany* (2004) EHRR 1, 25 para 57, the European Court of Human Rights reiterated that:
>
> > 'Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves… the boundary between the state's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole …'
>
> So, when M applied to the courts below for an anonymity order, he was asking them to exercise their power to secure that other individuals, viz the press and journalists, showed respect for his private and family life."

60. Lord Rodger rejected a submission made on behalf of the press that article 8 "does not confer a right to have your reputation protected from being affected by what other

people say". He referred to the Strasbourg cases of *Karakó v. Hungary* (App. No. 39311/05) (2011) 52 EHRR 36, *Petrina v. Romania* (App. No. 78060/01) (14 October 2008) (unreported), and *Pfeifer v. Austria* (2007) 48 EHRR 175 at [35]. But it was necessary for an applicant "to show that the publication in question had constituted such a serious interference with his private life as to undermine his personal integrity" ([37] to [42]).

61. At [51] Lord Rodger echoed the words of Lord Steyn in *Re S* describing the fact sensitive evaluation needed to determine the ultimate balancing exercise in article 8 and 10 cases before continuing:

> "In this connexion it should be borne in mind that – picking up the terminology used in the *Von Hannover* case – the European court has suggested that, where the publication concerns a question "of general interest", article 10(2) scarcely leaves any room for restrictions on freedom of expression: *Petrina v. Romania* … para 40 ("l'article 10(2) de la Convention ne laisse guère de place pour des restrictions à la liberté d'expression dans le domaine … des questions d'intérêt général").

62. In the context of the dispute in the *Guardian* case the question was whether there was sufficient general public interest in publishing a report of proceedings which identified M to justify any curtailment of his and his family's right to respect for their private and family life: [52].

The Civil and Family Procedure Rules and open justice

63. We mention the Civil Procedure Rules ("CPR") in the context of the appellants' first ground (see [44] above). CPR Part 39.2 makes provision for the constitutional principle of open justice. CPR Part 39.2(1) sets out the general rule that a hearing is to be held in public. That may be departed from in limited circumstances but before ordering a private hearing a court must consider any duty to protect or have regard to a right to freedom of expression which may be affected. At the time the RROs were made and the President then considered the applications to discharge, CPR Part 39.2 provided:

> "(4) The court must order that the identity of any *party or witness* shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that *party or witness*." (emphasis added)

64. With effect from 6 April 2022 the scope of CPR Part 39.2(4) has been broadened. It now provides:

> "(4) The court must order that the identity of any *person* shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that *person*." (emphasis added)

65. The Civil Procedure Rules do not apply to "family proceedings" (CPR Part 2.1(1)), including those brought in the Family Division of the High Court. However, there is no

direct equivalent of CPR Part 39.2(4) in the Family Procedure Rules ("FPR") for present purposes. FPR Part 12, which applies to proceedings brought under the court's inherent jurisdiction, contains no similar provision. There is an equivalent to CPR Part 39.2(4) in the new FPR Part 7.30(5), but this only applies to applications in matrimonial and civil partnership proceedings issued on or after 6 April 2022. In the absence of an equivalent rule in the FPR anonymisation in family proceedings may be ordered as a matter of common law (*Xanthopoulos v. Rakshina* [2022] EWFC 30; [2022] 4 WLUK 138 at [102]).

Conclusions on the Jurisdiction Issues

66. The applications in the end-of-life proceedings to the High Court were brought under the court's *parens patriae* jurisdiction. The court enjoyed all the powers available to it under its inherent jurisdiction and by virtue of section 37 of the 1981 Act. Those powers could be exercised to protect the integrity of the proceedings themselves and those involved in, affected by or connected with the proceedings. In using this language, we do not intend to define the limits of the power. The CPR do not expand, still less confine, those powers. It is of no moment that the CPR at the time spoke of *parties* and *witnesses* and only later of any *person.* The High Court has always been able to make orders to protect people who are neither parties nor witnesses. See *Brearley v. Higgins & Sons* [2021] EWHC 1342 (Ch); [2021] 4 WLUK 505, applying *Khuja v. Times Newspapers Ltd* [2017] UKSC 49; [2019] AC 161. That approach was followed in *Tenke Fungurme Mining SA v. Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm); [2021] 12 WLUK 96 where the identity of leading counsel was withheld. The recent revision to CPR 39.2(4) reflects this.

67. There is, moreover, no need for distinct causes of action to be identified to enable the court to make appropriate orders, including RROs. The decisions in *Re S, BBC* and *Guardian news and Media* demonstrate that the Convention rights of those affected by the proceedings must be considered and, seized of the proceedings, the court may make such orders as are just and convenient under the inherent jurisdiction and section 37 of the 1981 Act. In particular, it may make such orders as it considers necessary to protect the integrity of the proceedings themselves and the administration of justice. Mr Millar readily accepted that if a hospital trust were seeking an injunction to prohibit the identification of its staff, unconnected with end-of-life proceedings or other underlying proceedings in which they were involved, it would have to establish a cause of action of some sort.

68. Furthermore, the High Court had jurisdiction to entertain an application to set aside the RROs made earlier, not only by virtue of the explicit terms of the orders but also, as in the *BBC* case, on the basis of an application from a person with a proper interest founded on a change in circumstances. As in the *BBC* case, the issue then becomes whether the orders should be maintained not on the grounds on which they were originally made but in the light of present circumstances.

The Original Orders

69. Mr Quintavalle had no complaint about the order originally made by Lieven J in the Abbasi case. As we have seen, it provided anonymity to Newcastle for a short time which was sufficient to protect the integrity of the proceedings and the immediate interests of the child and family, those involved in her care and those who might be

adversely affected by the proceedings. The protection afforded to staff was limited to four named individuals. Of course, while the identities of the Trust and hospital could not be published, there was protection for all the staff because if they were identified during the period when the Trust could not be, their identification would be likely to have revealed the identity of the Trust and therefore infringe the injunction.

70. The Haastrup order was different because the identities of the family, hospital and Trust were in the public domain. The aim of the order appears principally to have been to protect the hospital and its staff from harassment which would have had an adverse impact on the staff and on its patients, including Isaiah. We have noted that there was no closed list of those whose identities were protected indefinitely. The RRO was in wide terms. It protected those concerned with the ante-natal treatment of Isaiah's mother and with his birth. It protected those clinicians who had given advice in connection with the negligence claim. The order was in terms which left considerable ambiguity about its reach. That may well be the result of its having been made effectively by consent.

71. The details of the press reporting of Isaiah's case are in evidence. At the time of the end-of-life proceedings and his death and then again when the inquest opened in 2020 there was unexceptional press interest.

72. Neither of these orders has a termination date. That contrasts, for example, with the approach of the court in *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164; [2020] 4 WLR 52 where the extension of the reporting restriction order was limited by consent to a period of 28 days after the removal of ventilatory support, subject to further application.

73. There is no profit now in over analysis of the terms of the Haastrup RRO because we have no doubt that the High Court had jurisdiction to make such an order, even if its breadth might have been wider than needed. As both the *BBC* and *Guardian* cases emphasise the focus should be on the current state of affairs.

The Convention

74. The terms of articles 8 and 10 are well known:

> "Article 8 Right to respect for private and family life
>
> > 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> >
> > 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others…
>
> Article 10 Freedom of expression

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

75. Section 12 of the 1998 Act governs the circumstances in which a court may grant relief which affects article 10 rights. Section 12(3) is concerned with pre-trial applications for injunctions, prior restraint as it is known. It prevents the grant of such an injunction unless "the court is satisfied that the applicant is likely to establish that publication should not be allowed." That is a more exacting test than the ordinary *American Cyanamid* standard. Section 12(4) provides that a court must have particular regard to the importance of the Convention right to freedom of expression when considering whether to grant any relief which, if granted, might affect the exercise of that right. The cases in the House of Lords and Supreme Court which we have discussed hold that neither article has precedence over the other and that an intense fact-sensitive evaluation and balancing exercise must take place when the court is being asked to curtail freedom of speech to safeguard article 8 rights.

76. In the *Guardian* case Lord Rodger spoke at [17] of the need for "compelling" submissions about the impact of naming two of those subject to the Treasury orders to defeat the article 10 rights of the press to report on the proceedings with the names of those involved. He did so again at [74] in respect of another. In *A v. Ward* Sir James Munby P at [181] noted that the claim for anonymity was not being put by reference to the vulnerabilities or personal circumstances of any clinician or other professional but was being advanced as a class claim. That case also involved parents who wished to speak out about their experience in care proceedings. The professionals had disavowed any concerns about what the parents wished to say. Once more it was the possible consequences of the bad behaviour of others that was the concern. It was in those circumstances that Sir James concluded that the class claim could "be justified only by evidence and arguments more compelling than anything which [they] have been able to put forward". In the *BBC* case at [81] Lord Neuberger explained the well-established notion that justice should be administered publicly "and its effectiveness should not be constrained save for compelling reasons".

77. All of these cases demonstrate the high value attached to freedom of speech in our domestic common law order which is reflected in article 10 of the Convention. The use of the language of the need for "compelling" evidence to curtail free speech reflects

that importance recognised in domestic authority and Strasbourg caselaw. The cases cited by Lord Rodger in the *Guardian* case (see [66] and [67] above) are examples of the latter. The Strasbourg Court affirmed the importance of the right to freedom of expression in *Handyside v. United Kingdom* App. No. 5493/75, (1976) 1 EHRR 735 at [49] when it said, "freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man". It has said repeatedly that exceptions to freedom of expression must be construed strictly and the need for any restrictions must be established convincingly: see, for example, *Stoll v. Switzerland* App. No. 69698/01 at [101] summarising earlier authority.

78. The absence of hierarchical primacy between articles 8 and 10 shows that there is no separate legal test arising from the use of the word "compelling" in discussion of the balancing exercise. Rather, the practical realities of the balance in such cases will be that evidence of a compelling nature is needed to curtail the legitimate exercise of free speech. That explains the use of the term "as such" in Lord Steyn's formulation in *Re S* at [17] and the emphasis he gave to it (quoted above at [50]).

79. A similar debate over the use of the language of "exceptional circumstances" when describing the weight to be attached to article 8 interests in extradition cases was settled by the Supreme Court in *Norris v. United States of America* [2010] UKSC 9; [2010] 2 AC 487 at [12] and [56]. There was no legal test of exceptionality (there was a balance to be struck) but it would require an exceptional set of circumstances for the article 8 rights of the requested person or his family to defeat an extradition request.

80. Many of the reasons advanced in support of the continuation of the RROs do not bear on the article 8 rights of the NHS staff. The article 8 rights of clinicians, nurses or carers are different from concerns about systemic problems in the NHS. Those concerns are not only generic, in the sense that they do not relate to the facts of these cases or the circumstances of any individual. They also advance a case for indefinite anonymity which, if sound, would support such an order in all end-of-life cases, at least in those involving any controversy.

81. Nonetheless, at the heart of the dispute about whether the RROs should be discharged are the article 10 rights of the parents of the two children "to impart information and ideas without interference" by the court and through them also the rights of others. Article 10(2) allows those rights to be curtailed when necessary "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

82. These aspects of article 10.2 provide the Convention compliant basis for much domestic law including defamation, malicious falsehood, criminalisation of hate speech and some forms of harassment as well as the jurisdiction founded on articles 2 and 3 to prevent death or serious harm resulting from, for example, naming people in proceedings. It also enables article 8 rights to be deployed to curtail free speech, not only in circumstances of the nature this case involves, but also when appropriate to protect confidentiality and privacy.

83. The orders made at the time of the end-of-life proceedings might well have as part of their justification the prevention of disorder and crime. Reports suggest that there has been disorder and possibly crime associated with the conduct of people who have involved themselves in the furore surrounding end-of-life cases. The RROs were concerned with the integrity of proceedings, the welfare of the children in question and the wider immediate impact on the staff concerned in the cases and on the operation of the hospitals in circumstances where tensions were high. Experience suggested that social media could explode with vituperation and some people would translate their strongly held views into inappropriate behaviour.

84. The article 8 rights of the identified (Abbasi) and un-identified (Haastrup) NHS staff concern, firstly, the risk of harassment and potentially violence if they are identified and, secondly, potential damage to professional reputation.

85. The circumstances in which article 8 is being relied upon are rather different from the usual, because they concern a *risk* of behaviour that may result in a lack of respect for the private life of NHS staff; and a risk that results not directly from what is planned by the parents in these cases, or the mainstream media if they were to take up the stories, but the uncertain behaviour of others.

86. The Strasbourg Court has considered on numerous occasions future risks in the context article 3 (right not to be subjected to torture, inhuman or degrading treatment). That is an unqualified right. When considering what might happen in the future, for example if someone were extradited or removed to another country, the test of the Strasbourg Court is whether substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment in the receiving country contrary to article 3. In such circumstances, article 3 implies an obligation not to remove the individual to that country (*Ilias v. Hungary* (App. No. 47287/15) (2020) 71 EHRR 6, [125] to [126]). By contrast, when considering past action the allegation of treatment contrary to article 3 must be supported by strong evidence. The Strasbourg Court adopts the standard of proof "beyond reasonable doubt", which may include clear inferences and unrebutted presumptions of fact (*Salman v. Turkey* (App. No. 21986/93) (2002) 34 EHRR 17, [100]; *Bouyid v. Belgium* (App. No. 23380/09) (2016) 62 EHRR 32, [82]).

87. In many article 8 cases, for example in the immigration context, even when the claim is looking forward rather than at past conduct, it will be clear what the impact of the future action or decision under scrutiny would be. That was also true in *Re S, BBC* and *Guardian* cases where the immediate impact of identification was entirely predictable. So too in cases such as *PJS v. News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 where discrete private information about a well-known family would have had a clear adverse impact if published. The Supreme Court concluded that there was no sufficient countervailing public interest in the proposed information and prevented publication.

88. The same cannot be said in these cases. In so far as article 8 is engaged on one side of the balance there must be a careful analysis of the realities of the risk. We were shown no Strasbourg authority establishing generally how to balance the future risk of an interference with article 8 against a concrete interference with the right to free speech; still less how to balance the right to free speech against an indirect and speculative interference with article 8 rights not arising from the immediate exercise of the right to

free speech itself. It is difficult to construct a hard-edged rule, as there is when considering unqualified rights, because whatever approach is adopted, assuming that the risk is real and not entirely speculative, the court will be required to undertake a balance. By contrast, in article 3 cases, once the evidential threshold has been surmounted there is no balance to be undertaken. Yet the approach of the Strasbourg Court in the article 3 cases makes clear that the evaluation of risk in that context requires an objective assessment and a significant threshold. A similar point was made in In *Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135. The House of Lords considered whether serving or former police officers in Northern Ireland should be afforded anonymity when giving evidence, to safeguard their rights to life and to uphold the common law duty of fairness. At [20] to [29], Lord Carswell, with whom the rest of the House agreed, held that the risk must be "objectively well founded"; it "does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk".

89. *In Re F (A Child) (Placement Order: Proportionality)* [2018] EWCA Civ 2761; [2019] 1 FLR 779, a case concerning care and placement orders, Peter Jackson LJ approached risk of future harm in this way at [24]:

> "…there must be… an intense focus on the type of risk that is involved, how likely it is to happen, and what the likely consequences might then be. Only by carrying out this exercise is it possible to know what weight to give to the risks before setting them alongside other relevant factors."

That approach is necessary in a case such as the present when looking at the risk of article 8 problems developing in the future if the identities of the NHS staff involved in the birth and subsequent care of Isaiah, or the care of Zainab at the end of her life, are not indefinitely prevented from entering the public domain. To the extent that the President considered that such intense scrutiny was not needed in this case (see [40] above) we respectfully disagree.

Article 8 risks

90. It is a striking feature of the evidence supplied by the Trusts to resist the applications of the parents that it contains nothing specific about those they seek to protect. The risk, as we have identified, is of a social media reaction from third parties who might vilify individuals and lead to their harassment or physical peril. The right relied upon is a right to be protected from personal or possibly physical attack with its consequences on personal and private life.

91. There is also the underlying concern about the parents criticising the professional judgment of those involved and thus damaging their professional reputations. This latter point did not feature in Mr Millar's submissions. The evidence of the parents certainly suggests that they wish to be critical of the Trusts and their staff but article 8 cannot be deployed to protect professionals from criticism unless that criticism reaches the threshold identified in the Strasbourg caselaw and summarised by Lord Rodger in the *Guardian* case, namely that "the publication in question had constituted such a serious interference with his private life as to undermine his personal integrity": see [60] above. Even then, there will be matters to be balanced in a proportionality exercise. The context in which the Strasbourg cases have arisen have been after publication. The

complaint often is that the legal system did not provide proper sanction or recompense to the professional whose conduct was impugned.

92. There is no basis to conclude that the parents' proposed discussion of the events surrounding their children's cases would reach the required threshold. Indeed, Mr Millar did not seek to impugn the integrity of the parents or of their evidence which summarises what it is they propose to say. Neither did he seek to rely upon responsible reporting of the issues the parents wish to raise as the foundation for continuing the orders but on what might be described as an uncontrolled furore that might develop. The President expressly recorded that it was not the conduct of the parents or press that was of concern.

93. Therefore, it is necessary to return to the more conventional aspects of article 8.

94. In the Abbasi case, Newcastle did not adduce before the President any evidence of the specific positions of the four clinicians who continue to be protected by the RRO. That was of a piece with the generic nature of the class claim advanced. The evidence of the Medical Director spoke in general terms about all clinicians and staff. One of the reasons why Newcastle originally sought anonymity for itself and the hospital in which Zainab was being cared for was the ease with which staff involved in the case might then be identified. The strength of that point is obvious. The identities of senior clinicians and departmental structures are generally in the public domain, easily accessed on the internet, and necessarily so for the benefit of patients. The evidence touches on what all know to be the case, that with relatively little information about a person, someone else versed in internet searching might be able to track down all sorts of further details, including addresses and telephone numbers etc. In the light of what had happened in other cases, the RRO was appropriately made when the end-of-life proceedings were in progress. Yet there is no evidence that when Newcastle's identity was free to be disclosed, or more generally in connection with these proceedings before the President, there were any adverse consequences for any clinicians who worked in Newcastle in the relevant department or in connection with Zainab's care, whether protected by the RRO or not.

95. There were, in the event, no concluded end-of-life proceedings because Zainab died before a judge considered Newcastle's application. That occurred 18 months before the President heard the application to discharge the order.

96. The Haastrup RRO did not protect the identities of the Trust or hospital concerned because they were already in the public domain. We have summarised the basis on which the RRO was sought (see [19] to [20] above). The application followed local press coverage and was made shortly after the death of Charlie Gard on 28 July 2017 with all the attendant problems surrounding his end-of-life proceedings at the forefront of the minds of all concerned. The need for some protection was justified. We have noted the breadth of the original order. It covered all those concerned with Isaiah's birth as well as those who cared for him afterwards or were involved in the end-of-life proceedings. It is understandable why the staff involved in Isaiah's birth were swept into the protection of the RRO because of the direct link between the negligence surrounding his birth and the events that followed.

97. There is no evidence of physical harassment of staff at the time of the end-of-life proceedings, or other disturbing behaviour, despite the identity of King's being in the

public domain. There is evidence of extensive press reporting and some internet activity but not of any harassment or problems associated with it.

98. The press interest in Isaiah's care and treatment by King's continued both before and after his death on 7 March 2018. The following were drawn to the attention of the President:

i) 23 February 2018: The Sun: "They should be ashamed - Dad of brain damaged tot Isaiah Haastrup slams doctors as High Court upholds decision to switch off life support";

ii) 8 March 2018: Daily Mail: "I'm sorry I couldn't protect you: Father posts heart breaking pictures as his brain-damaged one year old son dies just hours after doctors take him off ventilation following European court ruling";

iii) 8 March 2018: BBC website: "Isaiah Haastrup parents announce death of brave baby boy";

iv) 8 March 2018: Sky News website: "Brain-damaged baby Isaiah Haastrup dies after doctors withdraw life support - Isaiah Haastrup's dad describes his son's final moments on social media with images, after losing a legal fight to keep him alive";

v) 15 March 2018: The Sun: "Tragic Tot Who was Isaiah Haastrup, why was the baby on life support and what have his parents Takesha and Lanre said?"

vi) 31 May 2018: The Guardian: "Funeral of brain-damaged baby Isaiah Haastrup takes place in south London";

vii) 19 August 2020: Southwark News: "Isaiah Haastrup: Inquest Hears of Midwifery Failings During Birth of Baby at Centre of Right to Life Battle";

viii) 2 September 2020: News Shopper: "Isaiah Haastrup: parents of baby want to name medics".

99. A group called Steadfast LifeAID set up a Facebook page - Life for Isaiah Haastrup - where allegations were made against clinical staff, describing them as "murderous". That remained open in August 2020.

100. The President heard the application to discharge the RRO more than three years after Isaiah's death.

101. The essential case of both Newcastle and King's is that if the parents of Zainab or Isaiah name any of the relevant staff, that might precipitate a groundswell of online harassment from interested third parties which could spill over into physical confrontation or even danger. The Trusts place considerable reliance on the events surrounding the end-of-life proceedings of Charlie Gard and Alfie Evans. They certainly provide clear evidence of the real possibility of conduct impinging on the article 8 rights of staff before, during and immediately after end-of-life proceedings. It was part of the firm foundations for the making of RROs at the time. They do less to inform an assessment of article 8 risks associated with lifting the RROs at a later date.

102. The absence of continuing serious problems in these cases despite the identification of the hospitals in question is a striking feature. Newcastle did not think it necessary to seek to extend its anonymity or that of the hospital after the conclusion of the proceedings. It had itself originally indicated in its application that protection was needed generally only until the conclusion of the proceedings (see [13] above). Instinctively, it might be thought that Zainab's death without clinicians withdrawing treatment would reduce the risk of any serious adverse activity should their identity become known. Yet, even in the case of King's there is no evidence of continuing adverse activity. Moreover, the fear expressed by Newcastle, namely that malevolent actors would track down clinicians and staff, did not occur in either case.

103. Whatever may have been the position at the time of the original proceedings and RROs, on analysis the risk to the article 8 rights of and the NHS staff generally in the Haastrup case, or the four clinicians in the Abbasi case, by their being identified by the parents and then by the press is low. The possibility of serious and improper secondary activity following the public discussion of the parents of these cases is speculative. After this time and in the light of events, in our judgment features that can properly be said to engage article 8 no longer carry great weight in the ultimate balancing test.

Article 10

104. By contrast, the rights to freedom of expression which the parents wish to exercise would be seriously compromised by the continuation of the RROs.

105. The President laid considerable weight on his view that there was a "lack of any specificity" regarding the substance of the allegations that the parents wished to make, or the identity of those they wished to name when doing so. He recognised in terms that there was no requirement on the parents to tell the court what they wanted to say. His point was that the greater the degree of specificity the easier it would be to identify and assess the strength of the article 10 interests in any balance. Clearly, the more information a court has when balancing rights, the easier it is to undertake an intensive scrutiny on each side to conduct the ultimate balancing test. The President was not suggesting that before relying on article 10 a person was required to provide copy to the court or to get pre-approval for publication. The point travels no further than that if a person comes to court and speaks in general terms of article 10 rights when there are powerful qualified rights on the other side of the balance, the article 10 rights may not weigh very heavily.

106. However, on the facts, we are unable to agree with the President's view that there was a lack of specificity in what the parents of Zainab and Isaiah wish to say. Taking Dr Abbasi's evidence first, by way of example, he wishes to speak about or publish the following matters:

i) The allegedly inappropriate attitude on the part of clinicians in the form of a reluctance to treat Zainab's respiratory disorders because of her underlying neurodegenerative condition;

ii) Alleged inaccuracies or lies on the part of those clinicians who gave evidence in an emergency telephone hearing on 15 September 2019;

iii) The alleged refusal of Zainab's treating physician to meet the family's senior paediatric respiratory consultant who provided an opinion that Zainab could be treated in a time-limited way with a further high dose of steroids;

iv) The decision to move Zainab to palliative care, and in particular the recording of a management meeting on 19 August;

v) The circumstances of his arrest;

vi) The audio recording of his meeting with the clinical team at the hospital after his arrest. The full recording was placed in evidence in the proceedings.

107. The Abbasis could, at least in theory, name anyone outside the four protected by the RRO. But they are subject to the prohibition from publishing anything that would identify any of the four indirectly. Within that qualification lies the difficulty in their publishing anything meaningful.

108. Newcastle is aware of the nature of the concerns because of complaints already made through its internal complaints systems. Dr Abbasi has explained that his motivation is not personal vilification (a proposition accepted before us by Newcastle), but rather an improvement in systems and procedures and prevention of repetition of what he sees as the failures of Newcastle and its treating staff. He wishes to stimulate a public debate.

109. Mr Haastrup has identified the areas of public, as well as private, concern about which he wishes to talk. These include:

i) The negligence of King's during Isaiah's birth;

ii) The alleged financial motivation for taking the end-of-life route;

iii) The circumstances surrounding Isaiah's last day of life.

110. The Trusts argue that there are various internal complaints mechanisms open to the parents (some have been utilised) which diminishes any need they may feel to speak publicly about their concerns. That is true but it does not confront the free speech arguments. Their interest is not limited to seeking such redress as might be available through those mechanisms, including at least theoretically disciplinary proceedings. They wish to ventilate what happened publicly, to explain their own positions and points of view and to stimulate public debate.

111. The Trusts also suggest that some discussion could take place in public without naming any individual or infringing the RROs by providing information that might reveal the identity of protected persons. The same point was advanced in the *Guardian* case at [63] where Lord Rodger asked and answered a rhetorical question:

> "What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. … Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the

> substance of ideas and information but also the form in which they are conveyed."

The Convention balancing exercise

112. We are conscious that the President performed a balancing exercise which he considered was "plain to see" but in doing so he took into account matters which did not fall to be weighed in the balance when considering the article 8 Convention rights of the hospital staff, namely the systemic health service impacts referred to in the evidence before him.

113. We will first consider the ultimate balancing test resting squarely on the Convention rights in play and then consider the external factors.

114. In both of these cases we consider that the true article 8 rights of the staff now engaged, a significant period after the conclusion of the proceedings, are of limited weight, for the reasons we have given. The article 10 rights of the parents are strong. In both cases the parents wish to discuss and publish details of their experiences and concerns in an area of general public controversy. The moral and ethical questions surrounding the treatment of children and adults in positions analogous to Zainab and Isaiah generate intense public debate. For the reasons explained by Lord Rodger in the *Guardian* case (see [61] above) in such circumstances article 10 rights are powerful indeed. Moreover, in the Haastrup case there can be no justification for prohibiting Isaiah's parents from talking about the circumstances of Isaiah's birth, including Ms Thomas's treatment. Those involved in clinical negligence claims resulting in death would need a factually quite exceptional case to secure anonymity in civil proceedings or at an inquest touching the death.

115. At this stage, taking account only of the evidence before the President touching the respective Convention rights of the various health service staff and parents, in our judgment the parents' right to free speech decisively prevails.

The systemic and wider issues

116. The President was understandably influenced by the body of evidence provided by interested organisations about the adverse impact generally on the NHS in concluding that the balance in favour of continuing the RROs was "plain to see".

117. This evidence was clearly directed towards establishing a general proposition that in end-of-life cases indefinite anonymity should be accorded to all those at least closely involved in the treatment and decision-making concerning the patient. We have already observed that the evidence of impact on health staff in this case is all generic. The effect of the decision in these cases to continue the indefinite injunctions against the world has, in effect, created a generic class of anonymisation which endures after the end of proceedings and which is divorced from the individual circumstances of the cases or the individuals involved.

118. In analogous circumstances the House of Lords in *Re S* at [20] emphatically held that it is not for the courts "except in the most compelling circumstances" to create new exceptions to the principles of open justice (quoted at [51] above).

119. These cases concern open justice, the importance of which was once again recently explained in the judgment of Lord Reed in *A v. BBC* [2014] UKSC 25; [2015] AC 588 at [23] *et seq*. The proceedings in Isaiah's case were in public and Zainab's would have been. There was a need for RROs at the time, but indefinite orders have the effect of adversely affecting open justice because they prohibit for all time an open and informed discussion of what occurred. Conferring lifelong anonymity though indefinite orders irrespective of the individual circumstances of those protected and thereby creating a broad-ranging new class of restriction on free expression is something which the courts should do only in "the most compelling circumstances". The reason is that such generic restrictions on free speech are highly controversial and should be considered in the political context by Parliament. In family proceedings, just as in criminal proceedings, Parliament has intervened to provide general constraints on open justice and free speech. Examples are section 12(1)(a) of the Administration of Justice Act 1960 and section 97(2) of the Children Act 1989. The inherent jurisdiction of the courts, section 37 of the 1981 Act and section 6 of the 1998 Act empower the court to make appropriate orders, in both the short and long term, when the individual factual circumstances justify them.

120. The reasoning of the House of Lords in *Re S* pointing to judicial restraint in creating new classes of restrictions applies here.

121. The courts will be astute to protect from harm individuals caught up in litigation when it is appropriate to do so. In appropriate circumstances that protection will include the use of injunctions to mitigate the risk of future harm. The civil and criminal law both provide protection from various aspects of online attack, some preventive and other to provide a remedy for legal wrongs. To that extent nobody is obliged simply to 'put up with' abuse. However, the courts cannot shut down legitimate debate save when the rights of those affected by that debate, or put differently, the adverse consequences, are of such strength as to outweigh the right to free expression. Experience has shown that end-of-life proceedings can generate a fire storm on social media, sometimes fanned and taken advantage of by organisations and individuals with strongly held beliefs about the morality of withdrawing treatment. The fire storm often overwhelms calm debate. RROs become essential to protect the integrity of the proceedings and those caught up, directly and indirectly, in them. Indefinite orders are a different matter. They require careful scrutiny, clear evidence and an intense evaluation of competing interests.

122. We have seen that the President adopted the approach advanced upon him by the Trusts and medical interests to take into account the systemic problems in the NHS and the systemic impact, as they saw it, of a failure to accord indefinite anonymity to those involved in end-of-life cases. It is impossible to imagine a free-standing application (unconnected with an individual case) on behalf of hospitals, learned societies etc. to accord anonymity to swathes of professionals engaged in work such as this. There would be no legal peg on which to hang it. We have real doubts whether these factors fell into account at all in determining the application by the parents to discharge the injunctions. But, in our view, they could carry very little weight in a balance with article 10 rights on the other side.

123. In the *Guardian* case Lord Rodger referred to *Von Hannover* and *Petrina* to support that proposition that "where the publication concerns a question 'of general interest', article 10(2) scarcely leaves any room for restrictions on freedom of expression". The

Strasbourg Court has considered what is meant by general public interest in this context. It is concerned with matters which affect the public to such an extent that the public may legitimately take an interest in them and also with matters which attract the public's attention or which concern it to a significant degree. That is so especially if those matters affect the well-being of citizens or the life of the community, or are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about: see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* App. No 931/13 at [171]; and *Sürek and Özdemir v. Turkey* App. Nos. 23927 and 24277/94 at [61].

124. The issues arising from end-of-life cases fall into this broad category.

125. The President referred to public safety and protection of health in the context of this aspect of the balancing exercise he was invited to undertake. No Strasbourg authority was cited by Mr Millar to the President or, indeed, to us to support the proposition that in Convention terms a right to freedom of expression could be curtailed because of the sort of systemic concerns identified in the evidence and submissions before the President and us. This is not really a matter of public safety in the sense described in article 10.2. That term is linked in the article and in the case law of the Strasbourg Court with interferences justified on grounds of national security, territorial integrity and the prevention of disorder and crime. The core concerns advanced before the President were that naming health care professionals might undermine morale, make it more difficult to recruit into the relevant speciality and increase pressure on staff and hospitals. We are aware of no Strasbourg case which has come close to allowing concerns about morale, recruitment or general well-being of health staff to provide a justification for curtailing the right to free expression about individual experiences whilst being cared for, or on matters of general public interest. It would be a strong thing for public debate to be curtailed in these circumstances and, in line with established domestic authority (the *Ullah* principle), the domestic courts should not run ahead of Strasbourg in finding a principle in the Convention which has not emerged in Strasbourg.

126. Even if these matters fell to considered in the balance, they are not capable of justifying interference with the article 10 rights of the parents.

127. We commend the approach of Lieven J in the Abbasi case of limiting the duration of the anonymity given to Newcastle and placing the onus on the Trust to seek an extension. We also commend her approach in focusing on a limited number of individuals who required protection albeit that we recognise that when an order is made urgently such a refined focus may not be possible initially. We also commend the approach in the *Re M* case where the order came to an end automatically unless an application was made successfully to extend it. The period of 28 days in that case was the considered conclusion of all concerned on the facts in play. Circumstances may call for different periods.

128. There will be different considerations affecting protecting the long-term anonymity of family members if their identities are not in the public domain and they seek protection.

129. That approach chimes with the Practice Note: Applications for Reporting Restrictions Orders dated 18 March 2005 from the Official Solicitor. That practice note is

commended in Practice Direction 12L as providing "valuable guidance which should be followed". It is also of a piece with the Practice Guidance: Interim Non-Disclosure Orders [2012] 1 WLR 1003 issued by the Master of the Rolls in connection with civil proceedings.

Conclusion and disposal

130. The orders made in these cases provide for the indefinite continuation of injunctions against the world prohibiting publication of the names of a small number of clinicians in the Abbasi case and a wide range of health service staff in the Haastrup case. The intense focus on the specific rights being claimed delivers the clear conclusion that the article 10 rights of the parents in wishing to "tell their story" outweigh such article 8 rights of clinicians and staff as may still be in play, long after the RROs were made in the respective end-of-life proceedings. The wider systemic concerns which affect the operation of the NHS laid before the court by representative bodies cannot justify the creation of a practice, not anchored to the specific circumstances of the case, of granting indefinite anonymity to those involved in end-of-life proceedings. Such a step is one that is controversial and intensely political and suitable for Parliament rather than the courts.

131. In the result the appeals must be allowed and the two RROs under consideration discharged. The order discharging the RROs will be stayed pending our resolution of any application for permission to appeal, or further order.