Balancing clinician's privacy rights with public disclosure; getting the balance right

Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust [2023] EWCA Civ 331

Court of Appeal

Rebecca Gladwin-Geoghegan[*] and Dr Steve Foster[**]

Introduction

A recent decision of the Court of Appeal involved the continuing problem of balancing a person's right to freedom of expression (protected by Article 10 of the European Convention on Human Rights) with the right to private life (contained in Article 8) in the context of medical treatment. This balancing exercise must be carried out without providing 'trump' status to one particular right,[1] although information relating to medical privacy rights has been given special protection by the domestic courts.[2] In general, therefore, the courts must weigh the respective interests and claims in the specific case, applying the principles of necessity and proportionality to the facts and deciding whose rights are stronger in where the balance lie; including any balance of convenience when considering interim remedies.

In the context of medical law, this conflict is usually between patients' privacy rights and press freedom, although in the current case it was the privacy rights of medical clinicians treating patients that was at issue. In this case,[3] the Court discharged reporting restriction orders protecting the identities of clinicians and other treating staff involved in the care of two children, who were now deceased, and who had been the subject of end-of-life judicial proceedings. In doing so the Court had to consider the above principles in resolving the dispute, but in particular the wishes of the patients' parents who wished to sell the story to the press.

The facts and decision in *Abbasi* and *Haastrup*

Two sets of parents appealed against the refusal to discharge reporting restriction orders protecting the anonymity of clinicians and other treating staff involved in the care of their now deceased children. Each of the children had been the subject of end-of-life proceedings in the High Court, where the court had to decide whether life-support should be withdrawn. The children had subsequently died but in both cases restricting orders were made during the proceedings of unlimited, open-ended duration. In the first case the orders provided anonymity for four named clinicians and in the second case it provided anonymity for a wide range of health service staff who had played any part in the provision of care or treatment of the child. The parents, who had been critical of the care their children had received in hospital, sought to be released from the protection orders so that they could speak publicly about their experiences and be free to identify the NHS staff involved in the treatment. On the other hand, the relevant National Health Service Trusts maintained that the restriction orders should remain in force indefinitely so as to protect appropriate rights of confidentiality and privacy.

[*] Associate Head of School (Marketing and Recruitment), Coventry Law School
[**] Associate Professor in Law, Coventry Law School
[1] *Re S (Publicity)* [2004] UKHL 47.
[2] *Campbell v MGN* [2004] UKHL 22, re-iterated recently by the Supreme Court in *Bloomberg v ZXC* [2022] UKSC 5.
[3] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331

At first instance, the President of the Family Division held that the court had jurisdiction to review the continuation of the orders, and conducting the balancing exercise between the two competing interests, found that the detailed and substantial case for protecting staff anonymity comfortably outweighed the parents' basic assertion of their right to freedom of expression.[4] Thus, he ordered the continuation of the orders, with some amendment to reflect the changed position following the death of the children.5 The parents then appealed against that decision, submitting that there was no jurisdiction to make the restriction orders in the first place, or to continue them in the absence of an identifiable cause of action, or to make orders preventing the naming of individuals who were neither parties nor witnesses.

Allowing the appeals, the Court of Appeal first considered the question of whether the court had the jurisdiction to make the orders. The Court of Appeal noted that the applications in the end-of-life proceedings were brought under the High Court's inherent jurisdiction in this area. Under this jurisdiction, a court enjoyed all the powers available to it under that inherent jurisdiction and by virtue of s.37 of the Senior Courts Act 1981, which confirmed that it might grant injunctions when seized of proceedings whenever it was 'just and convenient to do so'. In the Court of Appeal's view, those powers could be exercised to protect the integrity of the proceedings and those involved in, affected by or connected with them, and that that jurisdiction was now exercised, in so far as competing European Convention rights were concerned were concerned, by reference to those rights.[6] The Civil Procedure Rules did not expand or confine those powers, and it was no significance in this case that at the time the restriction orders were made and when the discharge applications were considered that the Civil Procedure spoke of protecting the identity of *parties* and *witnesses* and only later of any *person*. The High Court had always been able to make orders to protect people who were neither parties nor witnesses, and there was no need for distinct causes of action to be identified to enable a court to make appropriate orders, including restrictive reporting orders. Further, the Convention rights of those affected by the proceedings must be considered, so, if seized of the proceedings, the court might make such orders as were just and convenient.[7]

Moving to the balancing exercise involving Articles 8 and 10 of the Convention, the Court of Appeal noted that case law demonstrated that an intense fact-sensitive evaluation and balancing exercise must take place when the court was asked to curtail freedom of speech to safeguard rights contained in Article 8. Those authorities demonstrated the high value attached to freedom of speech and the practical reality would be that compelling evidence was needed to curtail the legitimate exercise of free speech.[8] In this case, the rights of the staff concerned the risk, through social media, of harassment and potentially violence if they were identified. These risks resulted not directly from what was planned by the parents or the mainstream media, but the uncertain behaviour of others, and careful analysis of the realities of that future risk was needed.[9] It was noted that when the Trust's identity was disclosed in the first case, there was no evidence of any adverse consequences for clinicians, whether protected by the orders or not; and in the second case, there was no evidence of harassment of staff at the time of the end-of-life proceedings, despite the name of the hospital being in the public domain.[10] Thus, the absence of continuing serious problems despite the identification of the hospitals was a striking feature, and

---

[4] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2021] EWHC 1699 (Fam) [114].
[5] Ibid, [116].
[6] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331, [45-62] *Applying S (A Child)*, n 1.
[7] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [63-68], applying *Attorney-General's Reference (No 3 of 199)* [2010] UKHL 34, and *Guardian News and Media Ltd, Re* [2010] UKSC 1.
[8] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [104-111].
[9] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [104].
[10] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [105].

whatever might have been the position at the time of the original proceedings and the restrictive orders, the risk to the clinicians and staff by being identified by the parents and press was low.[11]

The Court of Appeal then noted that by contrast to the findings on private life rights, the parents' rights to freedom of expression would be seriously compromised by the continuation of the orders. In particular, the Court disagreed with the President of the High Court at first instance that there was a lack of specificity regarding the substance of the allegations the parents wished to make or the identity of those they wished to name when doing so.[12] The Court then noted that the wider systemic concerns affecting the operation of the NHS laid before the court could not justify the creation of a practice, not anchored to the specific circumstances of a case, of granting indefinite anonymity to those involved in end-of-life proceedings. Such generic restrictions on free speech were highly controversial and should be considered in the political context by Parliament, rather than the courts.[13]

The Court of Appeal thus concluded that the rights of the parents in wishing to tell their story outweighed any Article 8 rights of clinicians and staff as were still be in play, long after the orders were made in the end-of-life proceedings. Accordingly. The orders would be discharged, and the order stayed pending any application for permission to appeal.[14]

Balancing free speech with confidentiality

Under the Human Rights Act 1998, the courts, as public bodies under s.6, will need to strike an appropriate balance between the protection of privacy/confidentiality interests and press freedom. More specifically, s.12 of the Human Rights Act requires the courts to have particular regard to freedom of expression where freedom of expression is threatened in legal proceedings. With respect to that balancing exercise, in *Douglas v Hello! Magazine,*[15] the Court of Appeal stated that s.12 requires the court to consider Article 10 of the Convention in its entirety, including the exceptions permitted within Article 10(2). Thus, it was not appropriate for the court to give freedom of speech additional weight over and above any competing right, such as the right to private life. Thus, in *Re S (Publicity)*[16] the House of Lords confirmed that freedom of expression under Article 10 does not have an automatic 'trump' status under the Act. In this case an order had been sought restraining the identification of a murderer (who was the child's mother) and her victim (the child's brother) in order to protect the welfare of a child who was in care. It was held that the court should conduct a balancing exercise between the child's right to private life and the right of freedom of expression. Their Lordships stressed that s.12 did not require the court to give pre-eminence to either article and the judge had to consider the magnitude of the interference proposed and then what steps were necessary to prevent or minimise that interference.[17]

Although the courts may start from the position that any interference with freedom of expression needs to be justified on strong grounds, they are prepared to compromise it in favour of a stronger countervailing claim. This is especially the case where an individual's right to life or physical safety

---

[11] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [90-103).]

[12] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [104-111].

[13] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 3311 [116-129).

[14] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [130, 131].

[15] [2001] 2 WLR 992.

[16] [2005] 1 AC 593.

[17] Similarly, in *Re LM*, *The Times*, 20 November 2007, it was held that a restriction on the reporting of an inquest into a child's suspicious death should not be granted as there was insufficient evidence of any lasting harm to the child's siblings so as to override freedom of expression. On the other hand, the court held that it was necessary to place a restriction on the press identifying the siblings as such a measure constituted a proportionate response to their privacy interests under Article 8

would be at risk. Thus, in *Venables and Thompson* v *Newsgroup Newspapers*,[18] granting indefinite orders to restrain publicity of the claimants' identities, the High Court held that although it recognised the enormous importance of upholding freedom of expression, in the instant case it was necessary to grant such injunctions. In the instant case, the claimants (who, when young, had been found guilty of murdering a very young boy) were at serious risk of attack and the court had to have particular regard to Article 2 of the Convention, and the right of confidentiality should be placed above the right of the media to publish freely information about the claimants. This principle has been upheld in subsequent cases,[19] including a further claim for anonymity by one of the claimants above. Thus, in *Venables v News Group Papers Ltd,*[20] refusing an application to lift the anonymity orders, the High Court held that although the first claimant's rights under Articles 2 and 3 of the European Convention was not a trump card, the test was whether there was a real risk of harm of the degree described in Articles 2 and 3 being occasioned to the claimants by the release of information. In common with every other citizen, the man had a right to be protected from serious threats to his life that might arise from individuals seeking to take the law into their own hands.[21] Noting that it was extremely rare for criminals to be protected in such a manner, the court noted that the circumstances had not changed sufficiently since 2001 to justify varying the injunction and reducing the level of confidentiality.

In other cases the court must balance the respective strengths of each claim, giving due weight to any competing interests or rights, and having regard to any public interest served by disclosure. For example, in *Tiller Valley Foods* v *Channel Four Television*,[22] an interim injunction was refused preventing the defendants from broadcasting a programme made with the help of a journalist who had posed as an employee and who had reported on allegations of bad and unhygienic practices at the claimant's factory. In the judge's view the information was not confidential simply because images of the factory had been taken without the claimant's consent, and in any case its disclosure was justified in the public interest. However, in these cases the court might impose conditions on the dissemination of that public interest information. Thus, in *BKM v BBC*,[23] a court refused an injunction to restrain the broadcast of a film exposing failings in the care provided at care homes, because the use of clandestine filming in this case was necessary in the public interest in investigating standards in care homes. However, it placed a condition that the broadcast should not interfere with the privacy of the residents more than was necessary (in this case by obscuring the identities of the residents). There may also be a more general public interest in compromising privacy, beyond balancing free speech with individual privacy interests. For example, in *Brent LBC* v *K* [24] it was held that there was a clear public interest in permitting a local authority to disclose to another authority the fact that a person working in a care home had been found guilty of assaulting her child. Thus, despite the potential disadvantages to the mother's enjoyment of her private and family life, the need for public safety and the interests of the woman's patient outweighed any Article 8 rights and justified disclosure.

In cases such as the present one, the courts must assess the interference with privacy interests, including the risk of any harm or distress to any of the parties. For example, in *T* v *British Broadcasting Corporation*,[25] the High Court granted an injunction to prevent the identification of a vulnerable mother in a broadcast about adoption. The programme reported on the practice of 'current planning' where a child who was taken from his natural parents would be fostered pending a decision whether to adopt or not. The programme showed details of the process as it has been applied to T, who was suffering from a mental disorder, and her daughter, showing footage of the last contact between the two and indicating that T had problems with anger management. In granting the injunction the court held that it was not

[18] [2001] 1 All ER 908. In December 2001 a newspaper was found guilty of contempt when it broke the terms of the court order – *Attorney-General* v *Greater Manchester Newspapers Ltd*, *The Times*, 7 December 2001.
[19] See *X (Mary Bell) and another* v *News Group News-papers and another* [2003] EMLR 37.
[20] [2019] EWHC 494 (Fam).
[21] Both Articles 2 and 3 of the European Convention impose a positive obligation on the state to protect an individual's life from threats posed by other individuals: *Osman v United Kingdom* (2000) 30 EHRR 245
[22] *The Times*, 23 May 2004.
[23] [2009] EWHC 3151 (Ch).
[24] [2007] EWHC 1250 (Fam).
[25] [2007] EWHC 1683 (QB).

necessary to ask whether the programme was not in the best interests of T before conducting that exercise. In this case, there was medical opinion to the effect that the programme would cause greater distress than any benefit to T and such evidence was relevant. T was vulnerable and unable to truly consent to or appreciate the programme, and there was a real risk that she would be greeted with a hostile and abusive reaction from viewers (although that need not be proved for the injunction to be granted). In the court's view the broadcast constituted a massive intrusion into her privacy and autonomy, undermining her dignity as a human being and the broadcaster's Article 10 rights would not be proportionate to the exposure of T's raw feelings and her relationship with her daughter. Further, the public interest could be served without identification.

On the other hand, the claim in favour of publication might be particularly strong where the information in question promotes not only freedom of expression but also some other Convention rights. For example, in *Torbay BC* v *News Group Newspapers*,[26] the High Court discontinued an injunction and allowed the publication of a girl's story concerning her pregnancy at the age of 12. The court recognised that the right to communicate one's story was protected not only by Article 10 of the ECHR, but also by Article 8, which protected an individual's physical and social identity. Although the father's rights justified maintaining the injunction as far as he was concerned, it did not prevent the girl or the press from telling his story anonymously, and an injunction wide enough to do that would infringe the girl's and the newspaper's rights. Again, in *BKM v BBC,*[27] it was held that although clandestine recording in a care home for the elderly engaged and interfered with the residents' right to private life, there was not a sufficiently serious infringement to outweigh the right to freedom of expression as the public interest in such a film justified the recording. The use of clandestine filming in this case was necessary in the public interest in investigating standards in care homes and the care home was unlikely to succeed at full trial in proving that the broadcast should not be shown. However, in refusing the injunction the court placed a condition to the effect that the identity of the residents be obscured so that the broadcast should not interfere with the privacy of the residents more than was necessary.

The outcome of such conflicts are, thus, often difficult to predict, depending as they do on the particular facts, with the courts attempting to reach a proportionate outcome. For example, in *H* v *Associated Newspapers*; *H* v *N*,[28] the Court of Appeal made an order that a newspaper should not identify either a former health worker who had retired from the health service because he had been diagnosed HIV positive, or the health authority for which he had worked. Nevertheless, the court held that the risk that those who knew the details of the claimant's retirement would suspect that that he was the healthcare worker in this particular action did not justify the restraint imposed on the newspaper not to disclose his specialty. That restraint, in the court's opinion, would inhibit debate on a matter of public interest and was not justified. Similarly, an order restraining the newspaper from soliciting information that might directly or indirectly lead to the disclosure of the identity or whereabouts of the claimant and his patients was, in the court's opinion, a particularly draconian fetter on freedom of expression and, therefore, too wide to be justified.[29] Further, in *Re Attorney General's Reference No 3 of* 1999[30] the House of Lords discharged an anonymity order relating to a defendant acquitted of rape, finding that the defendant's right to privacy was outweighed by the broadcaster's right to freedom of expression. The House of Lords held that although the defendant had an expectation of privacy – because such information suggested he may have been guilty - there was a legitimate reason for interference. This was because it was in the public interest to make a programme about his acquittal and the fact that it was related to the

[26] [2004] EMLR 8.
[27] [2009] EWHC 3151 (Ch)
[28] [2002] EMLR 425. See also *A Health Authority* v *X* [2002] 2 All ER 780, where the Court of Appeal stressed it was for a court of law and not the area health authority to resolve the conflict between the private/public interests in the confidentiality of medical records and some other public interest.
[29] See also *Green Corns Ltd* v *Claverley Group Ltd* [2005] EMLR 31. Here, it was held that where a newspaper had published the addresses of homes for troubled children, which had resulted in a campaign by local residents to have the homes abandoned, it was necessary to place a restraint on the publication of addresses in subsequent newspaper articles. The public interest did not justify the publication and republication of such sensitive information as the addresses of the children and their past mental and social problems.
[30] [2010] 1 AC 145.

removal of the double jeopardy rule; it was equally in the public interest to name him in order to give credibility to the programme. Their Lordships also noted that the defendant's acquittal had already been in the public domain and that he could not complain that that as a result of the programme an application was made to retry him for that offence. Although there was a danger of trial by media, his right to privacy did not outweigh the public interest in freedom of expression.[31] This case should not be read as giving press freedom a trump status and it is clear that factors such as prior publication were relevant in the case.[32]

The balancing exercise is, therefore, particularly difficult where freedom of expression conflicts with another fundamental right. For example, in *X* v *Y*[33] the court was faced with a conflict between the public's right to know and the confidentiality of hospital patients' medical files. In that case an injunction had been sought by the area health authority to stop newspapers from disclosing the names of two doctors who had contracted AIDS. This information had been given to the press by an employee who had disclosed hospital records. The defendants relied on the public interest defence but it was held that the public interest in disclosure was substantially outweighed when measured against the public interest in maintaining loyalty and confidentiality. In the court's view, the record of hospital patients, particularly those suffering from this appalling condition, should be kept as confidential as the courts can properly keep them. The deprivation to the public of the information sought to be published will be minimal, given the wide-ranging public debate concerning AIDS and doctors, which was then going on in the press.

Similar issues were discussed by the High Court in *A (A Protected Party) v Persons Unknown*,[34] where the Court granted a permanent injunction restraining the press and all other persons from publishing the names or identities of two individuals who, as children, had pleaded guilty to very serious offences committed against two young victims. The Court noted that the case had caused almost unparalleled public outrage directed at the individuals, and the real risk to their Convention rights under Articles 2, 3 and 8 made the interference with any Article 10 rights an absolute necessity. The Court stressed that neither Article 8 nor Article 10 had precedence over the other, and that an intense focus on the comparative importance of the rights being claimed was necessary. Following *Venables and Thompson*, it held that the court had jurisdiction in exceptional cases to extend confidentiality protection and impose press restrictions where there was convincing evidence that not doing so was likely to lead to serious physical injury or death for the person seeking confidentiality, and where there was no other way to protect them. These exceptional circumstances could include the young age at which offences had been committed, the need to support the offender's redemption and rehabilitation into society, the serious risk of potential harassment, vilification and ostracism, and the possibility of physical harm or harm to the offender's mental state. The Court noted that witness evidence, press coverage and internet posts all pointed to the conclusion that if the claimants' identities were revealed they would be at extremely serious risk of physical harm, as well as undoubted fear and psychological harm. Even releasing only their former identities would seriously destabilise the situation and allow revenge-seekers to engage in a hunt for the new identities. There were serious and real risks to their Article 2 and 3 rights, and the withdrawal of anonymity would have a potentially very serious effect on their rehabilitation, continuing education, mental health and well-being. Although those factors had to be balanced against the public interest in the perpetrators of very serious crimes being identified, the court's clear conclusion was that the instant case was one of absolute necessity due to the extreme likelihood of physical and mental

[31] Further, their Lordships took into account the fact that the rape victim had waived anonymity and that his name had been published since his acquittal.

[32] In contrast, in *A v Norway*, decision of the European Court 9 April 2009, there was a violation of Article 8 when a recently released prisoner had been identified by newspapers as a suspect in a rape and murder investigation and who had brought an unsuccessful defamation action against the media. The domestic courts had dismissed his action by finding that the press had acted in the public interest in publishing photographs and the allegations of guilt. The European Court held that the applicant had been persecuted at time of his potential rehabilitation and such stories had caused psychological and moral harm to his integrity.

[33] [1998] 2 All ER 648.

[34] [2016] EWHC 3295 (Ch).

damage being caused to the claimants. There was therefore no choice but to grant anonymity on the grounds of the inevitable violation of the claimants' Convention rights

This begs the question whether information should continue to be treated as confidential and protectable where the information has already entered the public domain, thus destroying the essence of confidentiality on which the claimant's action is based. Thus, in *Attorney General v Guardian Newspapers Ltd*,[35] the House of Lords held that a public body could only maintain an injunction so as to protect confidential information if they could prove that there was an overriding public interest justifying an interference with freedom of expression. Further, if information had entered the public domain it could no longer be the basis of an injunction to preserve confidentiality.

The balance and medical law

Although the *Abbasi* and *Haastrup* cases relate to end of life care decisions relating to children, the approach taken by the court in respect of the RROs is of wider significance. It is anticipated that the approach adopted by the court will also extend to Court of Protection decision making where an adult lacks capacity to make a treatment decision, or other situations where anonymity is in issue in health or social care cases. Cases of this nature often attract significant media attention. Potentially of greater concern to clinical teams, is the threat of harassment and unscrupulous behaviour from the wider public through social media and groups who utilise the unfortunate circumstances of a particular patient to push their own agenda. Such behaviour was evident in the coverage and social media responses to Charlie Gard's[36] and Alfie Evans'[37] cases, which occurred in the years immediately prior to best interests proceedings being initiated in respect of Zainab Abbasi and Isaiah Haastrup.

Counsel for the Trusts utilised arguments relating to the risk of such behaviour and its profoundly negative impact on clinical teams to support the continuation of the Abbasi and Haastrup RROs. Sir Andrew MacFarlane, in the High Court,[38] was so persuaded as to the gravity of what he described as the *'highly negative impact of unfettered social media targeting'*[39] that he departed from the decision of Sir James Munby in *A v Ward.*[40] This case concerned the question of whether professionals, namely the medical team, social workers and expert witnesses, in care proceedings under Part IV of the Children Act 1989 should have their anonymity protected by *contra mundam* injunctions. It was held that in the absence of compelling reasons in support of anonymity, the fear or risk that if identified the clinical and care team would be subject to targeting, harassment and vilification would be insufficient to counterbalance the arguments for denying expert witness anonymity in the public interest. Indeed, the need for there to be 'compelling reasons' for anonymity can also be found in the 2014 Practice Guidance on Transparency in the Courts, Publication of Judgments.[41] Dispensing with the necessity to demonstrate 'compelling reasons' Sir Andrew MacFarlane asked

> why should the law tolerate and support a situation in which conscientious and caring professionals, who have not been found to be at fault in any manner, are at risk of harassment and vilification simply for doing their job? In my view the law should not do so.[42]

Of concern was not only the immediate risk to the clinical teams involved in the patients care, but also the wider profession. In addition to the potential for there to be a decline in the number of healthcare professionals willing to engage in work that exposes them to targeting, is the concern that best interests referrals may not be made when they should be, as they would have the effect of immediately exposing

---

[35] [1990] 1 AC 109.
[36] *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates (No 2)* [2017] EWHC 1909 (Fam).
[37] *Evans v Alder Hey Children's NHS Foundation Trust* [2018] EWCA Civ 805.
[38] [2021] EWHC 1699 (Fam).
[39] Ibid, [92].
[40] [2010] EWHC 16 (Fam).
[41] Sir James Munby, Practice Guidance: Transparency in the Family Courts, 16th January 2014,accessible at < www.judiciary.uk/wp-content/uploads/2014/01/transparency-in-the-family-courts-jan-2014-1.pdf> [accessed 30th June 2023]
[42] Supra n.38 [96]

clinical teams to such a risk. Weight was attached to the 'exponential' development in social media since the decision in *Ward* to justify departure from that case.

Had the disapproval of *Ward* been upheld by the Court of Appeal then *Abbasi* would have tipped the balance in favour of anonymity in a wide range of cases. However, the effect of the Court of Appeal decision is to revert back to the *Ward* position. What is important to note is that in the absence of best interests proceedings,[43] the clinical teams have no independent right to seek anonymity, save in circumstances where an individual may be able to pursue their own cause of action. Indeed, Lord Burnett went so far as to suggest that it would be '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.* '[44] This is because there would be no *'legal peg'*[45] upon which to hang the application. Consequently, the RRO needs to be viewed through the lens of the best interest's proceedings.

When granting an RRO the starting point is always to consider the interests of the patient that is the subject of the proceedings. Usually, any RRO would encompass the patient and their family so that they are not identified. The relevant public body, i.e. the Trust, would usually be disclosed, except in situations where the identification of the Trust would lead to the identification of the patient. Named individuals, i.e. members of the clinical team, may also be anonymised for the same reason. The RRO in Isaiah Haastrup's case went significantly further than this, including all of the clinical team involved in his and his mother's treatment. The rationale for anonymisation is to ensure the continuity of care and protect the patient and their families' privacy interests. The personal protection the anonymity order brings to the clinician is ancillary to main purpose of facilitating adequate and appropriate care for the patient. As such, it is arguably appropriate for RROs to come to an end upon the conclusion of the proceedings or the death of the child concerned, or very soon after, as the purpose of the RRO has at that stage been fulfilled.

However, by taking a rights based approach to the remit of an RRO, the courts have a careful balancing exercise to undertake and one which shifts beyond the immediate concern for the patient. Whilst initially an RRO would seem to invoke a consideration of the balance between the patient's Article 8 rights and wider freedom of expression under Article 10, *Abbasi* exposes the necessity to consider the Article 8 rights of the clinical team. Lord Bennett acknowledges that the RROs concerned the *'wider immediate impact on the staff concerned in the cases and on the operation of the hospitals in circumstances where tensions were high'.*[46] The protection afforded under the RRO is no longer merely facilitative of the care of the subject of the best interest's proceedings; it also encompasses a recognition that failure to make an RRO that extends to member of a clinical team, may involve in an infringement of their personal rights. When weighing up potential competing interests there needs to be intense scrutiny and in whose favour the balance tips will be dependent upon the individual circumstances of the case.

Taking the clinical teams rights in isolation, any interference with their Article 8 right, is based upon a future risk of harm and the potential for exposure to professional scrutiny. The threshold for professional scrutiny to amount to an infringement of a person's Article 8 right, is a very high threshold to overcome[47] and is unlikely to be satisfied in the circumstances of this type of case. Indeed there may be a significant public interest in facilitating professional scrutiny of the conduct of clinical teams.

---

[43] Or other care proceedings where anonymity is considered

[44] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [122].

[45] Ibid.

[46] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [83]

[47] *Re Guardian News and Media and others* [2010] UKSC 1 at [60]: Lord Rodger summarises the Strasbourg jurisprudence, explaining that the publication in question must constitute such a serious interference with his private life as to undermine his personal integrity.

Consequently the focus of the arguments relating to the individual rights of the clinical teams in *Abbasi*, relates to the future *risk* of harm from the wider public. Unlike cases such as *Re S,*[48] *Guardian,*[49] and *BBC,*[50] this risk of harm is speculative in nature. The Court of Appeal in *Abbasi* were directed to no Strasbourg jurisprudence in this area and consequently, there is no specific guidance on how a speculative risk of harm and therefore a potential incursion on a person's Article 8 rights, should be balanced against a concrete incursion on another's freedom of speech under Article 10. What the Court of Appeal did conclude was that a balance will need to be struck. A court will be required to very carefully consider the realities of the risk and it will be incumbent upon those asserting their rights,[51] to adduce evidence as to these realities.

It seems likely that in most cases where an end of life decision in respect of a child is being made that a real risk will be established at least during the currency of the best interest's proceedings and up to the death of the child. The prospect of future harm by improper secondary activity is a factor that should properly be weighed in the balance in determining the extent of anonymity. This is due to the propensity for such cases to attract significant public attention. However as time progresses, the reality of such a risk materialising diminishes, along with the weight that should be attached to it in determining how the balance of competing rights should be struck. This is particularly the case when compared to the Article 10 rights of the parents and wider public. Therefore in the absence of compelling reasons, i.e. evidence of particular factual circumstances which suggest that more weight should be afforded to the clinical teams' interests in the overarching balancing exercise, the balance is likely to tip against the continuation of anonymity.

Conclusions

So what weight should be attached to the wider systemic problems that fall outside the remit of an individual clinician's Article 8 right, but which were highly influential in the High Court? Seemingly very little if any at all, according to the Court of Appeal. Lord Burnett identifies that systemic problems, [52] by their very nature would arise any time the courts were to consider a question of this nature, and by extension other cases involving clinical or care related decision making. To recognise that there was some countervailing interest due to a generic concern, would in effect establish that indefinite anonymity should be afforded to clinical and care teams in all cases which expose systemic problems. Such a broad acceptance of anonymisation would amount to a significant incursion on freedom of expression, proper public debate and principles of open justice. Any such general anonymisation in cases such as this would need to *'be considered in the political context of Parliament'*[53] following the approach that was adopted in *Re S.* Although arguments were made that anonymity due to these systemic problems could be construed as a matter of public safety or the protection of health and morals under Article 10.2, so as to justify derogation from the parent's and wider public's right to freedom of expression under article 10, the Court of Appeal strongly disagreed, suggesting that the circumstances fell significantly short of any interpretation of Article 10.2 by Strasbourg. As such, these wider concerns felt within the relevant professions will not feature in the balancing exercise courts will be required to undertake in the grant of an RRO.

Those persons working in a clinical or care context may perceive the decision of the Court of Appeal to be a clear message from the judiciary that they should 'put up and shut up.' However, it is important to remember that individual interests of clinical teams are being recognised in the manner outlined above and that other remedies in both criminal and civil law do exist which are both preventative and remedial in nature. Moving forward, it is likely that orders recognising the need for clinician anonymity

[48] n. 1.
[49] n. 47.
[50] n. 23.
[51] The Trusts in this case, on behalf of the clinical teams.
[52] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [117].
[53] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [119].

during the currency of the proceedings will be more common place. However, the orders will be more limited in nature than the Abbasi and particularly the Haastrup RROs. From Lord Burnett's approval of Lieven J's approach in Abbasi, it would appear that RROs relating to this type of case will follow these guiding principles. First, that RROs should be as refined as possible and anonymity afforded only to those individuals that have been identified as requiring protection. Second that the continuation and terms of the RRO need to be reviewed as a particular case progresses and refined or amended when appropriate to do so. Third, that indefinite anonymity at least so far as clinicians and other professionals concerned would be extraordinary. It will be obligatory for those seeking to assert the continuation of anonymity on the basis of some risk, to adduce evidence of that risk in support of anonymity. Last, it also appears as though as a matter of best practice,[54] RROs at least in respect of clinical teams and other professionals, should automatically come to an end after a defined period of time, subject to any application for an extension. In the event that such an application is made, the judge will be required to evaluate the competing interests of all the relevant parties and make a determination in respect of in whose favour the balance tips.

The case raises important general issues regarding the balance between two conflicting ECHR rights, but as pointed out in the second section of this piece, is more important in the content of physicians' privacy and its conflict with free speech and open justice. In that sense, a further appeal or subsequent dispute in the Supreme Court, could provide clarity with respect to the breadth of RROs, and their compatibility with ECHR jurisprudence.

[54] Following the approach in *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164.