Hilary Term
[2016] UKSC 2
On appeal from: [2014] EWCA Civ 1009

JUDGMENT

R (on the application of C) (Appellant) *v* Secretary of State for Justice (Respondent)

before

Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

27 January 2016

Heard on 26 October 2015

Appellant
Stephen Knafler QC
Roger Pezzani
(Instructed by Guile Nicholas)

Respondent
Kate Olley

(Instructed by The Government Legal Department)

Intervener (Media Lawyers Association)
Jude Bunting
(Working on a direct access basis)

LADY HALE: (with whom Lord Clarke, Lord Wilson, Lord Carnwath and Lord Hughes agree)

1. The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge. The rationale for the second rule is not quite the same as the rationale for the first, as we shall see. This case is about the second rule. There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property. The first issue before us is whether there should be a presumption of anonymity in civil proceedings, or certain kinds of civil proceedings, in the High Court relating to a patient detained in a psychiatric hospital, or otherwise subject to compulsory powers, under the Mental Health Act 1983 ("the 1983 Act"). The second issue is whether there should be an anonymity order on the facts of this particular case.

The facts

2. The appellant is now 46 years old. He has had mental health problems for much of his life and in his twenties these became so severe that he was compulsorily admitted to a psychiatric hospital under section 2 of the 1983 Act. There he met and formed a relationship with another patient but it did not last. Shortly after his release from a second period in hospital he murdered her and her new boyfriend. It was a particularly savage killing which must have caused untold suffering to the victims and has continued to cause great grief to their families. In January 1997 he was convicted of murdering them both, the jury rejecting his defence of diminished responsibility, a verdict at which the trial judge expressed himself "astonished". His first conviction was set aside on appeal, in the light of fresh evidence as to his mental condition; but when he was retried in November 1998 he was again convicted of murder, the jury again rejecting his defence of diminished responsibility. He was sentenced to life imprisonment, with a tariff originally set at 15 years but reduced on review to 11 years. The reviewing judge commented that "the outstanding feature of the case … is the obvious sub-normality or mental abnormality of the defendant".

3. This tariff expired in May 2007. But in August 2000 the appellant had been transferred to a high security psychiatric hospital, pursuant to a direction of the Secretary of State under section 47 of the 1983 Act. This permits the Secretary of State to transfer a person serving a sentence of imprisonment to be detained in hospital for psychiatric treatment if the grounds for doing so exist. The effect of an ordinary transfer is the same as the effect of an ordinary hospital order made in criminal proceedings under section 37 of the 1983 Act (section 47(3)). However, the Secretary of State may couple a transfer direction with a restriction direction under section 49 of the 1983 Act and did so in this case. This means that if the grounds for detaining the patient in hospital no longer exist, the Secretary of State may return the patient to prison to serve the remainder of his sentence (section 50(1)(a)). While the patient is in hospital, however, a transfer with restrictions has the same effect as a restriction order imposed by a court under section 41 of the 1983 Act (section 49(2)). This means, among other things, that the usual power of the patient's responsible clinician to grant him leave of absence from the hospital under section 17 of the 1983 Act, and the power of the hospital managers to transfer him to another hospital under section 19 of the Act or the regulations made thereunder, and the power of the responsible clinician or the hospital managers to discharge him from hospital under section 23 of the Act, can only be exercised with the consent of the Secretary of State (section 41(3)(c)). The Secretary of State also has his own powers, to lift the restrictions if they are no longer required to protect the public from serious harm (section 42(1)), or to discharge the patient, either absolutely or conditionally (section 42(2)), and to recall a conditionally discharged patient to hospital (section 42(3)). But if a transferred prisoner is no longer suitable for hospital treatment, the Secretary of State may, instead of returning him to prison, exercise the same powers of releasing him on licence or subject to supervisions as he could have exercised had the patient been remitted to prison (section 50(1)(b)).

4. In August 2007, the appellant was transferred from the high security hospital to a private sector medium secure psychiatric hospital, where he remained until October this year. From 2008, he had unescorted leave within the hospital grounds (which does not require the consent of the Secretary of State). From 2009, he also had escorted leave in the community, where he did voluntary work. In July 2012, his responsible clinician applied to the Secretary of State for consent for the appellant to have unescorted leave in the community. It is uncontroversial that unescorted leave in the community is usually an important component in assessing a patient's suitability for discharge from hospital. That consent was refused by letter dated 13 December 2012.

5. Patients subject to restriction orders or directions may apply annually to the First-tier Tribunal under section 70 of the 1983 Act. The Tribunal has a duty, under section 73 of the Act, to discharge a patient who is subject to a restriction order, either absolutely or conditionally, if the grounds for detaining him in hospital no

longer exist. But if the patient is subject to a restriction direction, the Tribunal has no power to discharge him. Instead, under section 74(1), the tribunal must:

> "(a) notify the Secretary of State whether in its opinion, the patient would, if subject to a restriction order, be entitled to be absolutely or conditionally discharged under section 73; and
>
> (b) if the tribunal notifies him that the patient would be entitled to be conditionally discharged, may recommend that in the event of his not being discharged under this section he should continue to be detained in hospital."

Where (a) applies, the Tribunal shall direct the absolute or conditional discharge of the patient if, within 90 days of the notification, the Secretary of State informs the Tribunal that it may do so (section 74(2)).

6. On 25 April 2013, the First-tier Tribunal, having heard the appellant's case, notified the Secretary of State that he would have been entitled to a conditional discharge. In their view, he was not then suffering from mental disorder of a nature or degree which made it appropriate for him to be detained in hospital for medical treatment; it was not necessary for his own health or safety or for the protection of other persons that he should receive such treatment, provided that his discharge was conditional; and appropriate medical treatment was available for him, provided that the discharge was conditional and subject to the conditions they proposed, which included supervision, supported accommodation and further treatment. The Tribunal also recommended, pursuant to section 74(1)(b), that if he were not discharged he should remain in hospital.

7. The Secretary of State could have sought to appeal that decision but did not do so. Instead, he followed his policy that the release of persons sentenced to life imprisonment should be determined by the Parole Board. Accordingly he referred the case to the Parole Board. Section 74(5A) of the 1983 Act provides that applications and references to the Parole Board may be made in respect of a patient subject to a restriction direction where the Tribunal has recommended that a patient who would otherwise be entitled to a conditional discharge should remain in hospital if not discharged.

8. Following the Tribunal's decision, the appellant's responsible clinician again applied for the Secretary of State's consent for him to have unescorted community leave. Consent was again refused in a letter dated 11 July 2013. In October the Secretary of State agreed to retake that decision, but in a letter dated 18 October

2013, consent was again refused. The claimant applied for judicial review of that decision in November 2013; in December 2013, the High Court ordered that the appellant be anonymised in the proceedings; this was continued at the end of December when permission to apply for judicial review was granted.

9. The claim was heard by Cranston J in January 2014: [2014] EWHC 167 (Admin). He rejected the appellant's challenge to the lawfulness of the Secretary of State's decision. He had earlier invited the parties' submissions on whether the appellant should remain anonymous. In response, the responsible clinician wrote to the judge to request that the anonymity order remain in force for the following reasons:

> "1. The hospital is a secure mental health hospital which provides care and treatment for a large number of patients with various offences and who continue to pose risks to staff and others.
>
> 2. Naming the hospital would lead to enhanced procedural, physical and relational security having to be put in place.
>
> 3. The hospital staff would need to be vigilant to monitor the safety of the individual in terms of the media interests and the impact this may have on [the patient] and on other patients who are detained in hospital with him and their attitude to him.
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> 4. High profile nature of the case which would attract media interest leading to contact with the hospital and consequences of managing this interest on a daily basis.
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> 5. Distress caused to relatives of the victims in this case.
>
> 6. Impact of media interest on [the patient's] care, treatment and progress at the hospital.
>
> 7. Previous concerns in relation to the safety of [the patient] if his whereabouts were made public."

10. Cranston J dealt with the issue in a single paragraph (para 35):

> "… previous proceedings about this claimant are publicly available and I cannot see the justification for anonymity: the public have a right to know what I have decided about his claim for judicial review: *R (M) v Parole Board* [2013] EWHC 1360 (Admin), [2013] EMLR 23, paras 47-49. However, Dr H has written requesting that the hospital's identity and that of the staff be concealed, to protect both the claimant and the other patients from potential intrusion. That is a reasonable request and there be an order of anonymity to that extent."

11. The claimant was refused permission to appeal in relation to the dismissal of his claim but granted it in relation to the refusal of anonymity. The Court of Appeal dismissed his appeal. The original anonymity order has, however, remained in force pending the determination of his appeal to this court.

12. To bring the history up to date, in September 2015, the Parole Board directed the release of the appellant on life licence. It explained that

> "the Risk Management Plan which is put forward is robust, that your risks of causing serious harm in the community are now minimal and that any increase in risk is highly likely to be detected before any danger arises, that your risks can be safely managed in the appropriate community setting which is now proposed and that the point has been reached at which it is no longer necessary for the protection of the public that you should continue to be detained."

Hence his release was conditional upon a place being available at a particular care home which specialises in rehabilitation services. The Parole Board also imposed a number of conditions in addition to the standard conditions contained in all life licences. These included a requirement to comply with the conditions in a protocol governing his residence in the care home. Both the Parole Board and the care home required him to continue to undertake psychiatric treatment under a psychiatrist, a psychologist and a community psychiatric nurse. He also agreed to change his name:

> "I understand that my case has received a high level of media attention, and in order to facilitate my successful reintegration into the community, changing my name may protect me and those around me from unwanted media attention which could undermine the effectiveness of my placement and its aims. I agree to arrive at [the care home] using my intended new name and change my name by deed poll in the first week of arrival. I

will then manage all my affairs under this name from the point of discharge."

13. The appellant was in fact released from hospital in October 2015.

The Civil Procedure Rules

14. These are civil proceedings in the High Court, governed by the Civil Procedure Rules, rule 39.2. Rule 39.2(1) to (3) deal with the publicity of the hearing. It is worth quoting these in full, although the publicity of the hearing is not the issue in this case:

> "(1) The general rule is that a hearing is to be in public.
>
> (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.
>
> (3) A hearing, or any part of it, may be in private if -
>
> (a) publicity would defeat the object of the hearing;
>
> (b) it involves matters relating to national security;
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
>
> (d) a private hearing is necessary to protect the interests of any child or protected party;
>
> (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

> (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate;
>
> (g) the court considers this to be necessary, in the interests of justice."

A "protected party" is a party, or intended party, who lacks capacity, within the meaning of the Mental Capacity Act 2005, to conduct the proceedings (CPR rule 21.1(c) and (d)). Some compulsory patients lack this capacity and some do not.

15. Rule 39.2(4) deals with anonymity:

> "(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

16. The rationale for a general rule that hearings should be held in public was trenchantly stated by Lord Shaw of Dunfermline in the leading case of *Scott v Scott* [1913] AC 417, at 477. He quoted first from Jeremy Bentham:

> "'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.'"

He also quoted the historian Henry Hallam:

> "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not

> found both in its judicial institutions and in their constant exercise."

17. This longstanding principle of the common law is reflected in article 6(1) of the European Convention on Human Rights:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

It has been held acceptable to provide that a whole class of hearings, such as those relating to children, should normally be held in private: *B v United Kingdom* (2002) 34 EHRR 19. As the right is that of the litigant, this provision has normally become relevant in cases where the court proposes, in pursuance of one the exceptions to the normal rule, to sit in private, but the litigant wishes the case to be heard in public.

18. However, in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The interest protected by publishing names is rather different, and vividly expressed by Lord Rodger in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 63:

> "What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. … The judges [have recognised] that editors know best how to present material in a way that will interest the readers of their particular publication, and so help them to absorb the information. A requirement to report it in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on.

> Ultimately such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."

19. Of course, there are now many more ways of disseminating information, through the electronic media, to which that last comment does not apply. However, Lord Rodger also pointed out that the identities of claimants "may not matter particularly to the judges. But the legitimate interest of the public is wider than the interests of judges qua judges or lawyers qua lawyers" (para 38). Furthermore, the fact that the parties have agreed to anonymity cannot absolve the court from balancing the interests at stake for itself. Indeed that is when there is the greatest need for vigilance (para 2).

20. It is now trite law that restrictions on publicity involve striking a balance between the right to respect for the private life of the individuals concerned, protected by article 8 of the European Convention on Human Rights, and the right to freedom of expression, protected by article 10 of the Convention: *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593; *In re British Broadcasting Corp* [2009] UKHL 34; [2010] 1 AC 145; *In re Guardian News and Media Ltd*, above. There are even cases where anonymity is required because of the risk of death or really serious ill-treatment, in violation of the rights protected by articles 2 and 3 of the Convention: *A v British Broadcasting Corp (Secretary of State for the Home Department intervening)* [2014] UKSC 25; [2015] AC 588.

The arguments

21. It is necessary to draw a distinction between ordinary civil proceedings in which a mental patient may be involved, whether as claimant or defendant, and proceedings which are about the compulsory powers of detention, care and treatment under the 1983 Act. It is a striking fact that none of the experienced counsel in this case could remember a case of this nature in which the patient had not been granted anonymity, except where the patient himself wished his name to be published (as, for example, in *R (Von Brandenburg) v East London and The City Mental Health NHS Trust* [2003] UKHL 58; [2004] 2 AC 280).

22. If this be so, it is not difficult to understand why. Patients detained in hospital, or otherwise subject to compulsory powers, under the 1983 Act have the right to make periodical applications to the First-tier Tribunal (Health, Education and Social Care Chamber) for their release. Section 78(1)(e) of the 1983 Act, in its original form, permitted the Lord Chancellor, when making procedural rules for Mental

Health Review Tribunals, to make provision "for enabling a tribunal to exclude members of the public, or any specified class of members of the public, from any proceedings of the tribunal, or to prohibit the publication of reports of any such proceedings or the names of any persons concerned in such proceedings". When the First-tier Tribunal took over the jurisdiction of Mental Health Review Tribunals in England (but not in Wales) under the Tribunals, Courts and Enforcement Act 2007, that Act permitted the Tribunal Rules Committee to make rules about whether hearings should be in private or in public and imposing reporting restrictions (section 22 and Schedule 5, paragraphs 7(b) and 11(2)).

23. Accordingly, rule 38(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) provides that all hearings in mental health cases "must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public". Rule 14(7) provides that "Unless the Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public".

24. When the 1983 Act was passed, the only way of challenging the decision of a Mental Health Review Tribunal was either by asking the Tribunal to state a case for the determination of the High Court of any question of law arising before them (under section 78(8) of that Act) or by way of judicial review (which became the more common practice). After the 2007 Act, an appeal lies on a point of law to the Upper Tribunal. Rule 37(1) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) provides that all hearings must be in public, with some exceptions, which include the Tribunal's power, in rule 37(2), to direct that a hearing, or part of it, is to be held in private. However, rule 14(7) repeats the rule in the First-tier Tribunal that "Unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public". There is thus a presumption of anonymity in both tiers of the tribunal system. The issue for them, therefore, is whether to make an exception if the patient wants to waive his anonymity: see the principles helpfully discussed in *AH v West London Mental Health Trust* [2010] UKUT 264 (AAC) and [2011] UKUT 74 (AAC).

25. The other specialist jurisdiction dealing with people with mental disorders or disabilities is the Court of Protection. This decides whether or not, because of mental disorder, a person lacks the capacity to make certain kinds of decision for himself and if so, how such decisions are to be taken on his behalf. These include decisions about his care and treatment. Rule 90(1) of the Court of Protection Rules 2007 (SI 2007/1744) lays down the general rule that hearings are to be held in private. If the hearing is in private, the court may authorise the publication of information about the proceedings (rule 91(1)). The court may also direct that the whole or part of any hearing be in public (rule 92(1)). But in either case the court may impose restrictions

on publishing the identity of the person concerned or anyone else or any information which might lead to their identification (rules 91(3) and 92(2)). The starting point in the Rules, therefore, is both privacy and anonymity. However, from January 2016, there will be a six month "transparency pilot", in which the court will generally make an order that any attended hearing will be in public; but at the same time it will impose restrictions on reporting to ensure the anonymity of the person concerned and, where appropriate, other persons.

26. Thus, in all the other jurisdictions dealing with the detention, care and treatment of people with mental disorders and disabilities, the starting point is usually privacy and always anonymity, although either or both may be relaxed. This reflects the long-standing practice of the High Court in what were then called lunacy proceedings. In the leading case of *Scott v Scott* [1913] AC 417, it was acknowledged that proceedings relating to wards of court and to lunatics were different from ordinary civil and criminal proceedings. Viscount Haldane LC explained the position thus (p 437):

> "The case of wards of court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor is not sitting merely to decide a contested question. His position as an administrator as well as a judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge. … In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. … It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic."

27. The Earl of Halsbury did not consider these two acknowledged cases as true exceptions to the general rule, for "neither of these, for a reason that hardly requires to be stated, forms part of the public administration of justice at all" (p 441-2). Earl Loreburn referred to "the parental jurisdiction regarding lunatics or wards of court" (p 445). Lord Atkinson similarly referred to the judges as "representatives of the Sovereign as parens patriae" exercising "on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter" (p 462). Lord Shaw of Dunfermline, the most vehement exponent of the principle of open justice, added (p 483) that, in this parens patriae jurisdiction,

> "The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognised that an appeal for the protection of the court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

28. Maurice Kay LJ cited these passages in his judgment in the Court of Appeal, but dismissed them on the ground that they were not dealing with the same sort of decisions as this: "The sort of statutory powers with which we are concerned did not exist at the time and public law litigation of this kind was virtually unknown." ([2014] EWCA Civ 1009, para 7). It is correct that the Judge and Masters in Lunacy, when dealing with the affairs of a person found lunatic by inquisition, were usually concerned with the protection and administration of his property. But the parens patriae jurisdiction extended to both the person and the property of the lunatic, until the Mental Health Act 1959 came into force. By that Act, the jurisdiction of the Court of Protection over the property and affairs of a person who lacked the capacity to manage them for himself was placed on a statutory footing. The procedure for finding a person lunatic by inquisition was no longer thought necessary and the royal warrant under the sign manual delegating the parens patriae powers of the Crown to the judges was revoked (see B Hoggett, "The Royal Prerogative in relation to the Mentally Disordered: Resurrection, Resuscitation or Rejection?", in MDA Freeman (ed), *Medicine, Ethics and the Law* (1988)). However, the Mental Capacity Act 2005 has now extended the jurisdiction of the Court of Protection to cover the care and welfare of persons who lack capacity, including whether they should be deprived of their liberty in their own best interests.

29. Nor is it correct that there were no statutory powers of the sort with which we are now concerned at the time of *Scott v Scott.* The Secretary of State's power to transfer a prisoner to hospital is clearly descended from similar powers in the Criminal Lunatics Act 1884, while the contemporary predecessors to other compulsory powers in the 1983 Act can be discerned in the Lunacy Act 1890 and the Mental Deficiency Act 1913. The judicial safeguards for patients in those Acts were conducted in private.

30. However, it is correct that there is a difference between cases where a court or tribunal is administering the property, care or treatment of a patient in his own best interests and cases which are concerned with the proper management of a patient who has in the past been dangerous. In *R (M) v Parole Board (Associated Newspaper Ltd intervening)* [2013] EWHC 1360 (Admin); [2013] EMLR 23, the Divisional Court discharged an anonymity order made in favour of a prisoner convicted of murder who had brought judicial review proceedings challenging the decision of the Parole Board not to recommend his transfer to open conditions. There was a public interest in knowing how such decisions were made. However, the court accepted that there might well come a time when the claimant's identity and

whereabouts would have to be protected "in order to secure his safety and to facilitate his re-entry into society" (para 49). That case concerned a prisoner, not a psychiatric patient, and there was no significant interference with his article 8 rights (para 53).

31. The closer analogy in this case, therefore, is with the position in the First-tier and Upper Tribunals, but Maurice Kay LJ also dismissed this on the basis that they "will often be deciding essentially medical issues" (para 10) whereas the issues in judicial review cases of this type are quite different and involve the assessment of risk. With respect, that too is not correct. The Tribunal is concerned with essentially three questions: is the patient suffering from mental disorder or mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for treatment; is it necessary for the health and safety of the patient or for the protection of other persons that he should receive such treatment; and is appropriate treatment available for him (section 72(1)(b)(i), (ii), (iia))? In the case of restricted patients there is a fourth question: is it appropriate for the patient to remain liable to be recalled to hospital for further treatment (section 73(1)(b))? In the case of transferred prisoners such as the appellant, there is a fifth question: if the patient would otherwise be entitled to be conditionally discharged, should he continue to be detained in hospital if he is not discharged (section 74(1)(b))? Thus the Tribunals are very much concerned with risk as well as with diagnosis.

32. In *R (Mersey Care NHS Trust) v Mental Health Review Tribunal* [2004] EWHC 1749 (Admin); [2005] 1 WLR 2469, para 14, Beatson J quoted with approval the Tribunal's reasons for finding that their privacy rules were a proper and proportionate departure from the principle of open justice and thus compatible with article 6 of the European Convention on Human Rights:

> "By definition the issues which the mental health review tribunal has to deal with involve personal and clinical confidential information affecting individuals who are often very vulnerable and not always in a position to make an informed decision as to what may or may not be in their best interests. Questions of capacity may frequently arise and clinical progress may be affected by the consequences of publicity."

33. Decisions on whether a restricted patient should be allowed leave of absence or transferred to another hospital also involve a mixture of clinical and risk factors. The two are often inseparable. Both community leave and transfer to a less secure hospital serve a mixture of therapeutic and risk assessment aims. They obviously aim to improve the patient's mental health, overall well-being and level of functioning. But they are also important components in assessing how well the

patient has progressed, whether he can safely be managed in the community, and how close he is to being fit for discharge. They inevitably involve examination of confidential medical information about the patient. Judicial review of the Secretary of State's decisions is no different, as is amply demonstrated by the substantive judgment of Cranston J in this case.

34. There is a further factor, which could be called the "chilling effect" of a risk of future disclosure. This has at least two aspects. First, it is important in all medical treatment, but perhaps particularly in the treatment of mental disorder, that a relationship of trust is established between the patient and the doctors, therapists and nurses who are looking after him. If a patient fears that his confidence may have to be breached in the course of legal proceedings about his future care and treatment, he may be less inclined to be as open and frank as he should be in his dealings with them. Openness is an important component, not only in his treatment, but also in the assessment of risk. Second, it may inhibit him from bringing proceedings with a view to relaxing the very significant deprivation of liberty involved in compulsory admission to hospital for medical treatment, which brings with it, not only the power to detain potentially indefinitely, but also the power to impose medical treatment without consent. As such it is only compatible with the right to liberty, protected by article 5 of the Convention (and much treasured by the common law), if subject to regular independent review.

35. There is, as already explained, no real risk that the patient's confidence will be breached against his will in the course of proceedings either in the First-tier and Upper Tribunals or in the Court of Protection. The real risk arises if a case reaches the High Court or Court of Appeal. This risk will apply to compulsory patients of all kinds, whether detained under the civil compulsory powers in Part II of the 1983 Act or under the criminal powers in Part III, should a case concerning them reach the Court of Appeal on appeal from the Upper Tribunal by either side. It will also apply to all restricted patients, whether detained under restriction orders or restriction directions, whose cases reach the Administrative Court by way of challenge to the Secretary of State's decisions.

Conclusion in principle

36. The question in all these cases is that set out in CPR 39.2(4): is anonymity necessary in the interests of the patient? It would be wrong to have a presumption that an order should be made in every case. There is a balance to be struck. The public has a right to know, not only what is going on in our courts, but also who the principal actors are. This is particularly so where notorious criminals are involved. They need to be reassured that sensible decisions are being made about them. On the other hand, the purpose of detention in hospital for treatment is to make the patient better, so that he is no longer a risk either to himself or to others. That whole

therapeutic enterprise may be put in jeopardy if confidential information is disclosed in a way which enables the public to identify the patient. It may also be put in jeopardy unless patients have a reasonable expectation in advance that their identities will not be disclosed without their consent. In some cases, that disclosure may put the patient himself, and perhaps also the hospital, those treating him and the other patients there, at risk. The public's right to know has to be balanced against the potential harm, not only to this patient, but to all the others whose treatment could be affected by the risk of exposure.

Application in this case

37. This was a horrendous crime which caused incalculable distress to the families of the victims. All victims have certain rights under the Domestic Violence, Crime and Victims Act 2004, mediated through the providers of probation services. When a transfer direction is given in relation to an offender sentenced for a sexual or violent offence, the provider must take all reasonable steps to find out whether the victims wish to make representations about the conditions to which the offender should be subject if discharged and to be provided with information about the conditions to be imposed if he is discharged (section 42). If they do, the Secretary of State must inform the probation provider if he is considering lifting the restriction, discharging the patient or varying the conditions of a conditional discharge. The Tribunal must inform the provider if an application or reference is made to it. The probation provider must forward any representations made by the victims to the Secretary of State or Tribunal (section 43). The Secretary of State or the Tribunal have to inform the provider of the outcome. If a victim has expressed a wish to be informed, the provider must take all reasonable steps to inform him (a) whether or not the offender is to be subject to any conditions in the event of his discharge, (b) if he is, of the details of any condition relating to contact with the victim or his family, (c) the date on which any restriction direction is to cease to have effect, and (d) such other information as the provider considers appropriate in all the circumstances of the case (section 44). These rights, though limited, should enable the providers to reassure the victims' families in this case that the arrangements made for the discharge of the patient will not put them at risk in any way.

38. The public too have an interest is knowing how difficult and sensitive cases of this sort are decided, both by the Secretary of State and by the court. But that public oversight is protected by holding the hearing in public, so that the kinds of evidence and arguments considered are known, even if the identity of the patient concerned is not. Understandably, the Secretary of State has adopted a neutral stance on this appeal. It is the media interest, so vividly described by Lord Rodger in *In re Guardian News and Media*, with which we are principally concerned.

39. In favour of anonymity are all the general considerations about harm to the patient's health and well-being, the "chilling effect" of a risk of disclosure, both upon his willingness to be open with his doctors and other carers, and upon his willingness to avail himself of the remedies available to challenge his continued deprivation of liberty, long after the period deemed appropriate punishment for his crimes has expired. Added to those are the specific risk elements in this case identified in the letter from his responsible clinician (see para 9 above). The existence of a risk to the appellant from members of the public is also acknowledged in the letters of the Secretary of State and reflected in the Parole Board's requirement that he change his name. He is much more likely to be able to lead a successful life in the community if his identity is not generally known. The risk of "jigsaw" identification, of people putting two and two together, will remain despite the change of name.

40. Putting all these factors into the balance, I conclude that an anonymity order is necessary in the interests of this particular patient. His regime before he left hospital, involving escorted leave in the community, demonstrated the need for anonymity and the case is even stronger now (as foreseen in *R (M) v Parole Board*). Without it there is a very real risk that the progress he has made during his long years of treatment in hospital will be put in jeopardy and his re-integration in the community, which was an important purpose of his transfer to hospital, will not succeed. I would therefore allow this appeal and maintain the anonymity order in place.