In the matter of D

Queen's Bench Division
Dyson J
17 November 1997

The courts will make orders protecting the anonymity of parties or witnesses when there is a real risk that without protection the person will suffer real significant mental or physical harm.

Facts

D was a single, male Brazilian national with advanced HIV disease. He entered the United Kingdom with leave to remain as a visitor. After his leave to remain expired in September 1994, D remained in the United Kingdom unlawfully. In 1997 D became very ill, requiring intensive treatment in hospital. After discharge from hospital, he remained weak and was unable to continue working. He was also too ill to travel and leave the United Kingdom. D applied to the Home Office for exceptional leave to remain, outside the immigration rules, on the ground of his illness. He also applied to Brent London Borough Council for residential accommodation under National Assistance Act 1948 (NAA) s21. The basis of his application was that as an unlawful overstayer he was not entitled to state welfare benefits, or public housing. Consequently, since he was physically unable to work, had lost his accommodation, had no financial resources of his own and was medically unfit to travel out of the United Kingdom, he would not have access to either shelter or food unless residential accommodation was provided for him. Thus, he was likely to suffer severe damage to his health on account of the combination of being HIV-positive and destitution. His application for exceptional leave to remain had not been determined by the Secretary of State for the Home Office when on 18 September 1997 Brent London Borough Council refused D's application for assistance under NAA 1948 s21. On 22 September 1997 he issued proceedings seeking a judicial review of that refusal. On 23 September 1997 Butterfield J granted leave and further made an order under Contempt of Court Act 1981 s11 protecting D's identity from publication. The final decision on D's substantive case is reported at (1998) 1 CCLR 234. D's case had already attracted considerable publicity by the time of the leave application and although D had not been explicitly identified in the media there had been some limited disclosure of his identity. The *Evening Standard* applied to the Court to rescind the provisions of Butterfield J's order which protected D's identity from publication. Its evidence clearly established that cases involving foreign nationals, such as D, whose residence in the United Kingdom was illegal, and who sought assistance from the state or local authorities, were a matter of public concern and public interest.

Held:

1 Whether the proposed derogation from open justice involves the holding of proceedings *in camera* or the lesser derogation of protecting the identity of a party to proceedings, the test to be applied is the same, namely, whether the proposed derogation from open justice is necessary in order to prevent a real risk that the administration of justice will be rendered impracticable. That test will, however, obviously be more easily satisfied where anonymity is sought than where what is applied for is that the proceedings be held *in camera*. Indeed, there will be circumstances in which an application to hold proceedings *in camera* will fail because concerns that the administration of justice will be

rendered impracticable if the proceedings are conducted openly in the normal way can be met by according anonymity to one or more witnesses. A

2 It is right that the test for anonymity should be strict and that the power to grant anonymity should be exercised sparingly, having regard to the importance of open justice and freedom of speech emphasised on many occasions in decisions of the highest authority and also having regard to European Convention of Human Rights art 10. The test will, however, be satisfied if the applicant shows that there is a real risk that, without the protection of anonymity, he will suffer real significant physical or mental harm. B

3 A medical report by Dr Andrew Reid, a registrar in HIV medicine at Middlesex Hospital, contained the opinion that given D's physical and mental condition 'public knowledge of his situation would be extremely destructive to him psychologically and would endanger him psychologically'. Although the court would have greater confidence in relying on the expert opinion of a psychiatrist when a question arises as to a person's present and future psychological condition and although it would have been preferable if this part of D's case had been supported by a psychiatrist, there was no reason to doubt that a specialist in HIV medicine, an illness which is gravely debilitating both physically and psychologically, had the competence to express an opinion about the likely effect of publicity on D's psychological condition. D therefore satisfied the test. C D

4 D's identity was known to various people who dealt with his application to Brent London Borough Council. These included those who looked after him while he was an in-patient at hospital, certain members of the press who had gone to where he lived and had ascertained his identity and probably others (in that D's name had been added in manuscript by a person unknown to the back of Butterfield J's order of 23 September 1997 granting leave and anonymity). However, disclosure of D's identity had been limited compared with the substantial disclosure that would be likely to result were the order rescinded and was not sufficient to render futile the maintaining of the prohibition on publicity. E F

Cases referred to in judgment: G

Attorney-General v Observer and Guardian Newspapers; sub nom *Attorney General v Newspaper Publishing* [1990] 1 AC 109; [1991] 2 WLR 994; [1991] 2 All ER 398; (1991) 135 SJLB 508; (1991) 141 NLJ 528; (1991) *Times*, 12 April; *Independent*, 23 April; *Guardian*, 12 April, HL.

Attorney-General v Leveller Magazine [1979] AC 440; [1979] 2 WLR 247; (1979) 123 SJ 129; [1979] 1 All ER 745; (1979) 68 Cr App R 343; [1979] Crim LR 247, HL. H

H v Ministry of Defence [1991] 2 QB 103; [1991] 2 WLR 1192; [1991] 2 All ER 834; (1991) 141 NLJ 420; (1991) *Independent*, 22 March; *Guardian*, 27 March; *Daily Telegraph*, 1 April; *Times*, 1 April, CA.

R v Socialist Worker Printers and Publishers Ltd ex p Attorney-General [1975] QB 637; [1974] 3 WLR 801; 118 SJ 791; [1975] 1 All ER 142; [1974] Crim LR 711, DC. I

R v Westminster CC ex p Castelli (No 1) (1996) 28 HLR 125; [1996] 1 FLR 534; [1996] 2 FCR 49; (1996) 30 BMLR 123; (1995) 7 Admin LR 840; [1995] COD 375; [1996] Fam Law 81; (1995) *Times*, 14 August, QBD.

Scott v Scott [1913] AC 417. J

Taylor v Attorney-General [1975] 2 NZLR 675.

Legislation/guidance referred to in judgment:

Contempt of Court Act 1981 s11 – National Assistance Act 1948 s21 – European Convention on Human Rights art 10. K

This case also reported at:
Not elsewhere reported.

Representation

Stephen Knafler (instructed by Hodge, Jones & Allen) appeared on behalf of the applicant.

Kuldip Singh QC (instructed by Swepstone Walsh) appeared on behalf of the respondent.

Judgement

MR JUSTICE DYSON: 'D' is a single male Brazilian national. He has advanced HIV disease with a low CD4 count. He is extremely ill. He is not lawfully present in the United Kingdom, having overstayed after the expiry of the time for which he was given leave to enter as a visitor in September 1994. His application for exceptional leave to remain has not yet been determined by the Secretary of State. He applied to the London Borough of Brent for care and attention within the meaning of section 21 of the National Assistance Act 1948. On 18 September 1997 the council refused his application. On 22 September he issued proceedings seeking leave to apply for judicial review to challenge that decision. He also sought an order preserving his anonymity pursuant to section 11 of the Contempt of Court Act 1981. On 23 September Butterfield J granted him leave and further ordered that:

> *. . . no person shall publish or otherwise disclose (save to parties or their legal advisers) any information relating to this case likely to identify the applicant.*

The Evening Standard, which is published by Associated Newspapers, now applies to delete that part of the order of Butterfield J which prohibits publication or disclosure of any information likely to identify D. It is common ground that I should decide de novo whether such a prohibition is justified, and that my task is not to review the decision of Butterfield J. This is not least because there was little argument before him and, the press not being represented, no one sought to persuade him not to make the prohibition order.

It is clear from the evidence before me that cases such as that of D involving foreign nationals whose residence in the United Kingdom is illegal, and who seek assistance from the state or local authorities, are a matter of public concern and public interest. There has been high profile coverage in the press of a number of cases, particularly of persons who like D are HIV positive.

The Grounds

D's argument in support of anonymity is based on two grounds. First, it is said that if his identity is disclosed, there is a risk that he will be physically attacked and/or suffer serious harassment in this country and/or, if he is deported, in Brazil. Secondly, reliance is placed on certain medical evidence. I shall deal with these in turn. At paragraph 27 of his Form 86A in the judicial review proceedings, appears the following:

> *The applicant does not merely desire to protect his privacy or embarrassment.*
>
> *27.1 His dealings with the Home Office, hospital and local authority are all confidential as far as concerns those public bodies and there is accordingly a public policy reason for preserving confidentiality of the applicant's personal details in the court proceedings.*
>
> *27.2 As the Home Office policy document BDI 3/95 suggests, and as is obvious, the case of an illegal overstayer with full blown AIDS/advanced HIV and a*

contagious disease, seeking state assistance is likely to give rise to considerable press publicity. It can be expected that some of it will be hostile and that it will engender hostile feelings on the part of those who come into contact with the applicant, including those who may in due course share hostel or other similar accommodation with the applicant. There is accordingly a risk of physical attack on or serious harassment of the applicant.

27.3 It is clearly possible that the applicant may be returned to Brazil. There appears to be evidence of the murder of 1200 homosexuals on account of their homosexuality in Brazil over the last decade. Additionally there appears to be evidence of violence against/murder of persons suspected of being HIV positive in Brazil (e.g. corpses with notes attached saying 'Now I can no longer spread AIDS'). If the applicant were to become notorious as the result of media attention his safe return to Brazil would become parlous.

In her affirmation Wendy Backhouse states that D has told her that one of the men with whom he is sharing his present accommodation has recently said to him that he hates all homosexuals and thinks that they ought to be killed. It is submitted by Ms Backhouse that the risk of harassment or assault will increase greatly if D is identified in any press reports, not just because he is a homosexual with advanced HIV/AIDS, but also because until and unless he is granted exceptional leave to remain, he will continue to be an unlawful overstayer claiming state assistance and as such likely to be depicted as an undeserving 'scrounger'. The risk of attack in Brazil is said to be even worse. Exhibited to the affirmation of Elspbeth Rees are newspaper cuttings from 1991 and 1992 which show that at that time at least, homosexuals were at risk of assault and murder in Brazil.

Ms Backhouse adds that she has made enquiries of two organisations in Brazil which offer support to homosexuals suffering from HIV/AIDS, and has been informed that whilst murders of homosexuals in Brazil are not an everyday occurrence, homosexuals are still the subject of crimes of violence on account of their homosexuality, and they suffer from harassment and discrimination in various forms. Information published in the United Kingdom about D and his case is likely to reach Brazil via the large Brazilian community in this country. In fact, reports of the case have already appeared in two publications which are published for Brazilians who live here.

I turn to the medical evidence. There is a letter dated 19 September 1997 from Dr Andrew Reid, Registrar in HIV medicine at the Middlesex Hospital. He describes D as having advanced HIV disease with a low CD4 count. D nearly died with severe life-threatening pancreatitis caused by the medication that had been prescribed for his illness. He required intensive care treatment during his admission at the hospital between 4 June and 9 July 1997. As a result of his pancreatitis, he has been left as an insulin-dependent diabetic and has become very weak. His diabetes is extremely unstable. Dr Reid describes him after such a life-threatening illness as being 'very frail physically and psychologically'. He will almost certainly remain permanently diabetic. Dr Reid goes on to explain how D requires careful monitoring to ensure that the medication for his HIV does not cause a recurrence of pancreatitis or destabilise his diabetes, and says that such monitoring could not be carried out in Brazil. Dr Reid's letter was written primarily in support of the judicial review proceedings, but at the end there is a short passage which is directly relevant to the application that is before me. He writes:

Not only has [D] had physical suffering, but also his experience has naturally

A *made him psychologically very vulnerable. Public knowledge of his situation would be extremely destructive to him psychologically and would endanger him psychologically.*

The Relevant Test

B Before I attempt to evaluate the two grounds relied on in support of maintaining anonymity, I need to consider what test D has to satisfy.

For Associated Newspapers, Mr Kuldip Singh QC submits that the general rule is that there should be no restriction on reporting about D or his case, unless such a restriction is necessary to ensure that the administration of justice is not rendered impracticable. He accepts that where there is cogent evidence that, in the C absence of such a restriction, D will suffer serious harm, then a restriction is necessary, but nothing less will suffice. For D, Mr Knafler contends for a somewhat different test. He submits that the court can and should protect the identity of a party whenever it is in the interests of the due administration of justice, either in the individual case or in the case of other actual or potential parties who are in D the same or similar position to that party. His precise formulation is in these terms:

Protection of the identity of a party is necessary in the interests of justice in an individual case where (a) there is a real risk that without protection the party E *would suffer positive physical or mental harm going beyond mere embarrassment or invasion of privacy but including truly exceptional distress, or (b) the party would be reasonably deterred (not prevented) from seeking substantive relief from the Court because of the aforesaid risk, or would be placed on the horns of an unacceptable dilemma.*

F *Protection is necessary in the long term interests of justice where there is a real risk that if the individual party is not protected other persons in the same or a similar position would be reasonably deterred (not prevented) from seeking substantive relief from the Court because of a reasonable fear that as a result they would suffer positive physical or mental harm going beyond mere embarrass-* G *ment or invasion of privacy, but including truly exceptional distress.*

The starting point for an examination of the issues raised in this case is *Scott v Scott* [1913] AC 417. That was a case concerned with the question whether proceedings should be held *in camera*. One of the issues before me is whether the test to be applied in deciding whether to accord anonymity is the same as that H applied where the question is whether to hold proceedings *in camera*. In *Scott* their Lordships expressed themselves in somewhat differing terms. I find it convenient, as did Latham J in *R v Westminster City Council, ex parte Castelli* [1996] 2 FCR 49, 51H, to start by referring to what Lord Scarman said about *Scott* in *Attorney-General v Leveller Magazine* [1979] AC 440, 470H:

I

In Scott v Scott *your Lordships' House affirmed the general rule of the common law that justice must be administered in public. Certain exceptions were, however, recognised. The interest of national security was not one of them; indeed, it was not mentioned in any of the speeches. The House was divided as to whether* J *protection of the administration of justice from interference was an exception. A majority held that it was – though their respective formulations of the exception differed markedly in emphasis. Earl Loreburn held the underlying principle to be that the public were to be excluded if 'the administration of justice would be rendered impracticable by their presence' (p466). Viscount Haldane LC thought* K *that*

'to justify an order for hearing in camera *it must be* shown*'* [my emphasis] *'that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made' (p439).*

Lord Halsbury – maxime dubitans *(p442) – agreed with the Lord Chancellor, whilst also, in effect, agreeing with Lord Shaw of Dunfermline who thought the ground put forward by the Lord Chancellor was 'very dangerous ground' (p485).*

While paying heed to the dangers of extending this sensitive branch of the law by judicial decision, I think it plain that the basis of the modern law is as Viscount Haldane declared it was.

In *Scott* Viscount Haldane also said that the conducting of proceedings *in camera* was 'exceptional' and should not be permitted unless it was 'strictly necessary' to ensure that justice was done (see pages 436–439). Earl Loreburn expressed the principle in these terms at page 446:

It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera *may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture.*

The concept of impracticability finds an echo in the formulation by Lord Diplock in *Attorney-General v Leveller Magazine* [1979] AC 440, where he said at page 450:

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule.

In the *Leveller Magazine* case, the magistrates had allowed a witness to conceal his identity on the grounds of national security. One of the questions considered by their Lordships was whether in such a case the same test should be applied as is applicable in deciding whether to hold proceedings *in camera*. At page 451D, Lord Diplock said:

I do not doubt that, applying their minds to the matter that it was their duty to consider – the interests of the due administration of justice – the magistrates had power to accede to this proposal for the very reason that it would involve less derogation from the general principle of open justice than would result from the Crown being driven to have recourse to the statutory procedures for hearing evidence in camera . . .

Lord Russell of Killowen, at page 467E, said:

A *In my opinion it really goes without saying that behind the application (and the decision) lay considerations of the due administration of justice. In the first place an alternative to the via media adopted would be an application that 'Colonel B's' evidence be taken* in camera*, and in principle the less that evidence is taken* in camera *the better for the due administration of justice, a point with which*
B *journalists certainly no less than others would agree. In the second place a decision on anonymity – the via media – would obviously, and for the same reasons, be highly desirable in the interest of the due administration of justice as a continuing process in future in such cases. In the third place it appears to me that the furtherance of the due administration of justice was the only ground to support*
C *the decision of the magistrates.*

At page 471E Lord Scarman said:

In the present case the justices, instead of sitting in private, adopted the device of allowing a piece of evidence to be written down and requiring it not to be men-
D *tioned in open court. If they took this course in the interests of justice, they adopted what Lord Widgery CJ described as a convenient device, for it achieved a result, i.e., no mention of the name in open court, which otherwise would only be achieved by the court going into camera. In other words, it was a substitute for sitting in private. I agree with Lord Widgery CJ in believing this device to be a*
E *valuable and proper extension of the common law power to sit in private, and to be available where the court would have power at common law to sit in private but chooses not to do so. I think* R v Socialist Worker Printers and Publishers Ltd, ex parte Attorney-General *[1975] QB 637 (a blackmail case) was correctly decided.*

F Finally, at page 458A, Viscount Dilhorne said:

If the criteria which apply in relation to the exercise of the court's inherent jurisdiction to sit in camera *apply in relation to allowing or directing a witness to write down his name, then I do not think that those criteria are satisfied in this*
G *case; but I have come to the conclusion that they do not apply.*

Mr Knafler relies on these dicta of Viscount Dilhorne as well as *R v Socialist Worker Printers and Publishers Ltd, ex parte Attorney-General* [1975] QB 637, 651G–652H and *Taylor v Attorney-General* [1975] 2 NZLR 675, 682–683, in support of the proposition that a somewhat less strict test should be applied in determin-
H ing whether to protect the identity of witnesses at a hearing in public than in deciding whether to hold proceedings *in camera*. He points out that in the *Leveller Magazine* case it was said that *R v Socialist Worker Printers* had been correctly decided and that the Privy Council refused leave to appeal in *Taylor v Attorney-*
I *General*. In *R v Socialist Worker Printers* Lord Widgery CJ said:

There is such a total and fundamental difference between the evils which flow from a court sitting in private and the evils which flow from pieces of evidence being received in the way which was followed in this case [viz, by the identity of witnesses being protected].

J By parity of reasoning, Mr Knafler argues that there is a total and fundamental difference between the evils which flow from a court sitting in private and the evils which flow from the identity of a party to proceedings being protected.

In my judgment the test is the same in all these cases, namely whether the
K proposed derogation from open justice is necessary in order to prevent a real risk that the administration of justice will be rendered impracticable. It seems to me

that in the *Leveller Magazine* case Lord Scarman was clearly saying that the test is the same: viz, 'and to be available where the court would have power at common law to sit in private but chooses not to do so'. I think that what Lords Diplock, Russell and Viscount Dilhorne had in mind was not that the tests differed, but that the same test could be more easily satisfied where anonymity is sought than where what is applied for is that the proceedings be held *in camera*. That seems to me to be obviously right. There will be circumstances in which an application to hold proceedings *in camera* will fail because the legitimate concerns that the administration of justice will be rendered impracticable if the proceedings are conducted openly in the normal way can be met by according anonymity to one or more witnesses. I note that Viscount Dilhorne in *Leveller Magazine*, Lord Widgery in *Socialist Worker* and the court in *Taylor v Attorney-General* did not define the different test which is said to apply in cases which are not *in camera* cases. I see no basis for applying a different test in cases where what is in question is whether to protect the anonymity of a witness, from that which is applicable where the test is whether to protect the anonymity of a party to litigation, whether that party will be a witness or not. It was not suggested in argument that there was any material distinction between these two cases for the purposes of formulating the relevant test.

In my judgment it is right that the test for according anonymity should be strict, and that the power to grant anonymity should be exercised sparingly. The importance of open justice and freedom of speech has been emphasised time and again in decisions of the highest authority, not least in *Scott v Scott* itself. I have in mind also that English law should be interpreted so far as possible in accordance with the obligations of the Crown under Article 10 of the European Convention on Human Rights: see *Attorney-General v Observer and others* [1990] 1 AC 109, 283E–H. Article 10 is designed to safeguard the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority', subject to exceptions which satisfy the tests laid down in Article 10(2).

I propose therefore to apply the test formulated by Mr Singh, and not the more elaborate and slightly less stringent test contended for by Mr Knafler. As I said earlier, Mr Singh accepts that the test will be satisfied where there is cogent evidence that, absent anonymity, there is a real risk of serious harm. I think that the requirement that the harm be serious may be putting it too high; I prefer to speak of significant harm. In *H v Ministry of Defence* [1991] 2 All ER 834, 835G, Lord Donaldson MR said:

> *In order that the citizens be not deterred from seeking access to justice through courts it is occasionally necessary to protect them from the consequences of public scrutiny of evidence, and in particular medical evidence, of a nature that such scrutiny would prove not only embarrassing but positively damaging to them. This protection can be achieved in a number of ways. Which method is chosen depends upon the facts of each individual case.*

In my judgment, for the purposes of the present case, D has to show that there is a real risk that, without the protection of anonymity, he will suffer real significant physical or mental harm. It is unnecessary to consider whether the fact that, absent anonymity, a litigant would be reasonably deterred from seeking substantive relief from the court would suffice to satisfy the test, since it is not suggested that, if he loses the protection of anonymity, D will abandon these proceedings, unless compelled to do so as a result of the physical or mental harm that he may suffer by reason of the publicity that would follow. Nor do I need to express a view

as to whether the likely impact that the loss of D's anonymity will or may have on other persons in the same or a similar position is a relevant consideration. This is because there is no evidence before me as to what impact, if any, there would be on such persons in the event that D loses the protection of anonymity.

Application of the Test to this Case

I turn, therefore, to consider whether D has shown that there is a real risk that he will suffer significant physical or mental harm. I do not find the evidence about the possibility of a physical attack cogent. It seems to me that there is only a remote possibility that, if his identity is disclosed, he will be physically attacked in this country or, if it be relevant, in Brazil. The evidence simply does not justify a finding that there is a real risk of physical harm.

The crucial question in this case is whether the evidence, and in particular the medical evidence, shows that there is a real risk that, if his identity is disclosed, D will suffer significant psychological harm. Taken at face value, the letter of Dr Reid dated 19 September 1997 does support the existence of such a risk, viz, 'public knowledge of his situation would be extremely destructive to him psychologically and would endanger him psychologically'. In urging that I should view Dr Reid's opinion with scepticism, Mr Kuldip Singh makes a number of points:

(1) the likelihood of psychological harm was not relied on in the Form 86A where the case for anonymity was put solely on the basis of the risk of physical attack or serious harassment;
(2) Dr Reid is not a psychiatrist; and
(3) Dr Reid's report was written to persuade the immigration authorities and the council that D was in urgent need of support and that if returned to Brazil he would die within a very short time, whereas in the United Kingdom he has a reasonable prognosis if carefully looked after.

I have given anxious consideration to these points, but they do not cause me to reject the opinion of Dr Reid. There is little force in the first point, since Dr Reid's report was exhibited to the affidavit which was sworn in support of the leave application. It may be that D and his advisers should have made specific reference to the risk of psychological injury in the Form 86A document and in the body of D's affidavit, but their failure to do so does not in my view devalue the opinion of Dr Reid.

Mr Singh's second point carries more weight. Psychiatry is a specialist branch of medicine. Where questions arise as to a person's present and future psychological condition, a court is likely to have more confidence in relying on the expert opinion of a psychiatrist than a doctor who specialises in a different area, or indeed a general practitioner. But the court must have regard to all the circumstances of the case. There are no hard and fast rules. Dr Reid is a specialist in HIV medicine. He therefore has experience of a class of patients, many of whom have to endure an illness which is gravely debilitating both physically and psychologically. I see no reason to doubt his competence to express an opinion about the likely effect of publicity on D's psychological condition, although it would have been preferable if this part of D's case had also been supported by a psychiatrist.

As regards Mr Singh's third point, it is true that Dr Reid's report was written primarily in support of D's application for exceptional leave to remain and his application for judicial review of the council's decision, but I do not consider that this detracts from his opinion on the separate issue of the likely effect on D of publicity .

In deciding to accept the opinion of Dr Reid, I have also taken into account the

evidence of Ms Backhouse about how D has been reacting recently both to his illness, and the attentions of the press. I have not so far mentioned that the order of Butterfield J has not prevented the Evening Standard and the Daily Mail from continuing their investigations into his case. The details of these investigations are dealt with at paragraphs 14–23 of Ms Backhouse's affirmation. It is clear that reporters who work for these two newspapers know who D is. Ms Backhouse describes D's present position as follows in her affirmation:

> *30. As regards the applicant's medical condition, this remains as set out in the medical report exhibited to the applicant's affidavit.*
>
> *31. The applicant remains extremely vulnerable, both physically and psychologically. His diabetes is still not properly controlled such that his blood sugar level frequently drops to dangerous levels and he has collapsed on many occasions in the last few weeks. He still attends both the HIV clinic and the Diabetic Clinic on a weekly basis for careful monitoring of the medication he is taking.*
>
> *32. I spoke to the applicant at length on 4 November 1997 regarding the activities of the Evening Standard and Daily Mail reporters outlined above. The applicant is extremely depressed and is feeling increasingly isolated, anxious and vulnerable. He feels scared that he is being watched and followed at every turn by reporters, which is particularly difficult for him as he is often feeling unwell. His friends are withdrawing from him because of the interest of the press in the case and the natural desire by his friends not to become involved themselves.*
>
> *33. On 4 November he stated that he had been having suicidal thoughts. He already finds it difficult enough coping with the physical and psychological effects of his illnesses. If the press were at liberty to identify him, the stresses on the applicant would become intolerable.*

Although the last sentence of paragraph 33 may well be Ms Backhouse's own comment, it seems to me in the light of Dr Reid's report and the rest of paragraphs 30 to 33 of the affirmation that this comment is justified. In my judgment this case is a long way from cases such as *ex parte Castelli* where the claim to anonymity is based on embarrassment alone and is in effect a mere plea for privacy.

Mr Singh makes one final point. He submits that the identity of D is now sufficiently in the public domain for it not to be appropriate to maintain the prohibition on publicity. Thus, the identity of D is known to the various people who dealt with his application at Brent Council; those who looked after him whilst he was an in-patient at Middlesex Hospital; and certain unidentified members of the press, in particular at the Evening Standard and the Daily Mail who, because they had been looking for him in the right places, must know who he is. It is also the case that D's name has been added in manuscript on the back of the order of 23 September 1997, but the evidence does not disclose in what circumstances or by whom this was done. I accept that there has been limited disclosure of D's identity, but in my view this is minimal as compared with the disclosure that would be likely to result if I were to accede to Mr Singh's submissions. It is clear that, if free to do so, a number of newspapers would run full stories, probably with photographs. The issues raised by D's case have aroused a great deal of public interest, and understandably so. The order of 23 September 1997 did not prevent the Evening Standard from publishing a front page article about the case on the same day. Further articles appeared on the following day in the Daily Mail, the Daily Telegraph and the Sun. So far as I am aware there has been no

A discussion of the case in the media since then. In my judgment the limited extent to which the identity of D is already in the public domain is not sufficient to render futile the maintaining of the prohibition on publicity or to justify removing that prohibition.

B *The Form of the Order*

The only remaining issue is whether the scope of the prohibition as it currently appears in the order is unnecessarily wide. Mr Singh submits that the order in its present form prevents investigating journalists from discussing the case with anyone who knows or might know D (but does not know that D has brought proceedings against Brent). This is because such discussions might lead that person to realise that it is D who has instituted the proceedings. In other words, the order is drafted so widely that the media is unaware of what would or might lead to the identification of D, other than the obvious, and it prevents any real, proper or informed debate of the case. I have considered whether it would be sufficient simply to prohibit publication of D's name, address and photograph. I have decided, however, not to amend the terms of the prohibition. In my judgment Mr Singh's complaints about the inhibiting effect of the order are somewhat exaggerated. The prohibition is on a disclosure of information relating to the case which is 'likely' to identify D. If a journalist discloses information which would not appear to be likely to enable the recipient of that information to identify D, then there is no contempt even if, unexpectedly, the information does in fact enable the recipient to identify him. I accept that the order calls for subtle handling by the journalists in their investigations. There is, however, no evidence before me that the journalists are prevented by reason of the wording of the prohibition from carrying out investigations which they would wish and be able to carry out if the prohibition were restricted to the publication of D's name, address and photograph. I propose therefore to leave in place the order in its unamended form until the hearing of the substantive claim for judicial review or further order. I understand that the hearing is currently fixed for a date in December. The judge who hears the claim will he able to decide, in the light of his decision and subject to any appeal, whether to continue the order in its present or a modified form.

Conclusion

I am acutely conscious of the genuine public interest in the issues raised by D's case. It is no answer to the application by the Evening Standard to remove the prohibition to say that there has been and can continue to be full media coverage of those issues provided that nothing is said or done which will make it likely that D is identified. That is because I accept that freedom of speech means that in principle newspapers should be free to tell stories in a manner which will engage the interest of the general public. But the freedom of speech must give way where it would render the administration of justice impracticable. For the reasons that I have given, I am satisfied that it must yield in the present case, at any rate until the hearing of D's application for judicial review. I emphasise that this is not to spare him the embarrassment, discomfort or even the distress that would almost certainly be occasioned by the glare of publicity. It is because on the medical evidence, public knowledge of his situation would, to quote Dr Reid, 'be extremely destructive to him psychologically and would endanger him psychologically'.