Neutral Citation Number: [2022] EWHC 380 (QB)

Case No: QB-2022-000174

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Handed down in private pursuant to CPR r. 39.2: 22/02/2022
Made public: 24/02/2022

Before:

MR JUSTICE CHAMBERLAIN

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Between:

HER MAJESTY'S ATTORNEY GENERAL for ENGLAND and WALES	**Claimant**
- and -	
BRITISH BROADCASTING CORPORATION	**Defendant**

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- -

Sir James Eadie QC, Oliver Sanders QC, Jennifer Thelen and Emmanuel Sheppard (instructed by **the Treasury Solicitor**) for the **Claimant**
Zubair Ahmad QC and Dominic Lewis (instructed by the **Special Advocates' Support Office)** as **Special Advocates**
Adam Wolanski QC and Hope Williams (instructed by **BBC Litigation Department**) for the **Defendant**

Hearing dates: 16 February 2022

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Approved Judgment

Note: This judgment was handed down in private on 22 February 2022 so as to allow the Attorney General time to consider whether to apply for permission to appeal. No notice of any such application was received by the time specified in directions. The judgment was therefore made public on 24 February 2022 by posting on www.judiciary.uk and by communication to law reporters through the usual channels.

Mr Justice Chamberlain :

Introduction and summary

1 The BBC wants to broadcast a programme about an individual, "X". The programme is to include the allegations that X is a dangerous extremist and misogynist who physically and psychologically abused two former female partners; that X is also a covert human intelligence source (variously referred to as a "CHIS" or an "agent") for the Security Service ("MI5"); that X told one of these women that he worked for MI5 in order to terrorise and control her; and that MI5 should have known about X's behaviour and realised that it was inappropriate to use him as a CHIS. The BBC says that the broadcast of this story, and the identification of X by name, is in the public interest.

2 The Attorney General ("the Attorney"), acting on behalf of the Crown, has brought a claim for an injunction to prevent the BBC from broadcasting the programme. The Attorney's stance has been that she can neither confirm nor deny that X is or was a CHIS, other than in CLOSED proceedings under the Justice and Security Act 2013 ("JSA"). She submits, however, that irrespective of the truth of the allegation, the BBC's proposed broadcast would (a) involve a breach of confidence or false confidence, (b) create a real and immediate risk to the life, safety and private life of X and (c) damage the public interest and national security. The Attorney invites the court to restrain what she says would be a breach of confidence by the BBC and to grant relief to protect the rights of X under Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR").

3 The Attorney has also made clear that there would be no objection to a broadcast making allegations about MI5's use and management of agents without naming or otherwise identifying X or any particular individual. Nor would there be any problem with a broadcast making allegations about the conduct and dangerousness of X without identifying him as an alleged MI5 agent.

4 The Attorney's application for an interim injunction has been set down for a hearing on 1 and 2 March 2022. Part of that hearing will take place "in CLOSED", i.e. in the absence of the BBC and their legal team. The power to hold a CLOSED hearing arises under the Justice and Security Act 2013 ("JSA"). I decided to exercise that power after a hearing on 16 February 2022 at which I made a declaration under s. 6 JSA and gave the Attorney permission to withhold sensitive material under s. 8 JSA.

5 The procedure provided for by the JSA allows the BBC and its legal team to be see some of the material. The material which they do not see is shown instead to "special advocates", security-cleared lawyers who represent their interests. One of the tasks of the special advocates is to identify parts of the CLOSED material which can properly be disclosed to the BBC, sometimes in "gisted" or summarised form. The special advocates have already identified some such material. As is usual, there was a process by which the Attorney's lawyers considered the special advocates' requests and agreed what could be agreed. Outstanding points of dispute were determined by me. As a result of this process, the Attorney has provided some additional material to the BBC on 18 February 2022, in accordance with procedural directions I gave at an earlier stage.

6 The issue with which this judgment is concerned has nothing to do with the CLOSED part of the hearing on 1-2 March 2022. As everyone agrees, the CLOSED hearing will take place under the provisions of the JSA and CPR Part 82, without the BBC, or its legal team or the public being present. Once I have heard the application, I will give two

judgments, one OPEN and one CLOSED. The OPEN judgment will contain all my key conclusions, but insofar as it is necessary to say anything about the CLOSED evidence and arguments, I will do that in a separate CLOSED judgment made available only to the Attorney's team and the special advocates.

7 The dispute I have to resolve concerns the other part of the hearing on 1-2 March 2022, normally referred to as the OPEN hearing. The word OPEN in this context just means that the hearing will take place in the presence of both sides and their legal teams. There is a general rule that every OPEN hearing takes place in public. Indeed, a hearing *may not* take place in private, even if the parties consent, unless and to the extent that *the court* decides that it *must* be held in private: see CPR r. 39.2(1). A hearing must be held in private if, and only to the extent that, the court is satisfied of one or more of a list of specified matters *and* that it is necessary to sit in private to secure the proper administration of justice. The specified matters include that (a) publicity would defeat the object of the hearing, (b) it involves matters of national security or (c) it involves confidential information and publicity would damage that confidentiality: CPR r. 39.2(3).

8 In this case, the Attorney submits that the OPEN hearing on 1-2 March should take place either wholly or substantially in private. The effect of her submission, if correct, is that the public would be told nothing about the nature of the proposed broadcast or about these proceedings except that:

> "the [Attorney] is seeking an injunction against the [BBC] to prevent it publishing a news report which the [Attorney] submits would damage national security and breach Convention rights, without sufficient countervailing public interest, and which the Defendant says is in the public interest to broadcast" (see para. 6 of the Attorney's skeleton argument for the hearing on 16 February 2022).

9 As will be apparent from para. 1 of this judgment, I have rejected this submission and concluded that the OPEN part of the proceedings on 1-2 March 2022 should be conducted in public. The Attorney has not convinced me that there is a sufficiently compelling reason for departing from the principle that OPEN proceedings take place in public, the "open justice principle".

10 I had planned to give my reasons orally at the conclusion of the hearing on 16 February 2022, but that was not possible because among the materials I considered were CLOSED materials. That being so, CPR r. 82.17, read with CPR r. 82.2, requires that the judgment be in writing, so that it can be checked to ensure that nothing in it inadvertently reveals sensitive material. I therefore indicated that I would reduce my judgment to writing and that I would do so quickly, so as to ensure that the hearing on 1-2 March can go ahead as planned.

What information does the Attorney's claim cover?

11 The BBC complains that the Attorney has been insufficiently precise about the information which is said to be covered by the alleged duty of confidence. In para. 6 of the Particulars of Claim, she pleads as follows:

> "7. The Defendant owes the Claimant a duty not to publish or disclose without authority true or false information relating to national security which is confidential.
>
> 8. The allegations set out in the Letter [a letter from the BBC to the Home Office outlining the contents of the proposed broadcast], and the Report [the proposed broadcast] contains, information falling within paragraph 7 above."

12 The relief sought is an injunction restraining the BBC from (among other things) "publishing or disclosing or causing or permitting to be published or disclosed any copy of the Letter or the Report or any copy or part thereof or any information or extract contained therein or derived therefrom" without the express prior written agreement of the Attorney.

13 The Attorney says that this form of relief is appropriate because it is not clear exactly what the proposed broadcast will contain. The proviso allowing for publication with the express prior written consent of the Attorney would enable the BBC to publish a story along the lines outlined in para. 3 above.

14 The BBC responds that this is not good enough. They point to CPR 53 PD, para. 8.2, which makes clear that in a claim for breach of confidence the claimant must specify in the particulars of claim (in a confidential schedule if necessary to preserve confidentiality) (1) the information said to be confidential and (2) the facts and matters upon which the claimant relies in support of the contention that it was (or is) confidential information that the defendant held (or holds) under a duty or obligation of confidence.

15 The BBC submits that the Particulars of Claim in this case do neither of these things. There is no confidential schedule and therefore nothing which identifies the information the Attorney says is confidential. Importantly for present purposes, there is nothing to suggest that the fact that the BBC proposes to publish the identity of X unless restrained by the court is itself confidential or, if that is alleged, why.

16 The BBC also complains that the form of relief claimed would give the Government the right to approve the contents of its broadcast in advance, which is objectionable in principle for any press or media organisation, especially one with a Charter obligation of independence from the Government.

17 The appropriateness of the relief sought is one of the matters that I will have to determine at the hearing on 1-2 March 2022. It is not among the matters I have to resolve now. I mention the dispute at this stage, however, because the lack of particulars of the information said to be confidential is relevant to the present issue: whether the OPEN part of the interim relief hearing should take place in private or in public.

Should the decision about what can be referred to in public be postponed until after the hearing on 1-2 March 2022?

18 I have considered carefully whether to leave the question of publicity for further argument, in private, on 1-2 March 2022, but I have reached the conclusion that it would be wrong to do so. The principle of open justice requires not only that the conclusions

reached by courts be given in public. It also requires that the process by which those conclusions are reached should take place in public, unless there is a compelling reason for taking a different course. That applies with particular force to a case where the Government is deploying public resources, in what it says is the public interest, to restrain a publicly funded broadcaster from broadcasting information whose publication *it* claims to be in the public interest.

19 There have already been two hearings in this case which have taken place mostly in private. Part of the hearing on 1-2 March 2022 will take place in CLOSED. The Attorney has been given every opportunity to provide evidence, OPEN and CLOSED, as to why the OPEN part of the hearing should take place in private. I have heard full argument on that question. It can and should be answered now.

The structure of my reasons

20 The reasons for my rejection of the Attorney's argument in favour of a private hearing can be grouped under four heads:

(a) There is no apparent legal basis for restraining the BBC from broadcasting a story which does not identify X. That being so, there can be no good reason for holding the interim relief hearing in private, provided that nothing is said which might directly or indirectly identify X during the course of that hearing.

(b) Some elements of the story have already been published in an article in The Daily Telegraph on 21 January 2022, which quotes what appears to be a Government source.

(c) In the light of (b), and more generally, no convincing case has been made out that publication of a story which does not identify X would cause real damage to national security.

(d) The public interest in open justice outweighs any risks established by the Attorney's evidence.

(a) No apparent legal basis

21 It is an unspoken premise of the Attorney's argument that, if the application for interim relief succeeds, the public should be told nothing at all about the proposed broadcast, or the subject matter of the present proceedings, beyond the vague and exiguous summary I have set out at para. 8 above. But there is nothing in the Particulars of Claim which explains why the Attorney would be entitled to restrain publication of the allegation that an *unidentified* MI5 CHIS acted in the way alleged.

22 Insofar as the claim depends on the rights of X under Articles 2, 3 and 8 ECHR, there is some arguable support in the authorities for a relaxed approach to the requirements for establishing a breach of confidence (although the precise application of this case law to the facts of this case is, of course, a matter to be determined on 1-2 March 2022). But there nothing on the face of the pleading, nor in the evidence, to suggest that publication

of the story *without identifying X* would give rise to a risk to X's life or safety or would have effects on his right to respect for his private or family life. So, any claim to be able to restrain publication of a report which does not identify X would have to be based on a more general legal obligation – outside the context of Articles 2, 3 and 8 ECHR – not to publish anything about the operation of the security or intelligence services (or perhaps about their use of CHIS) which would damage national security.

23 Nothing in the skeleton arguments or oral argument in the hearings on 26 January or 16 February 2022 suggests any legal basis for such a broad obligation. The point can be tested in this way. Suppose that the BBC had proposed to publish its story without naming X. Would the Attorney nonetheless have sought injunctive relief to prevent the publication? The Attorney's counsel's note on 27 January (which states that the Attorney would have no objection to a report "making allegations about MI5's use and management of agents without naming or otherwise identifying X") might have suggested a negative answer. Sir James Eadie QC, for the Attorney, said at the hearing on 16 February 2022 that the type of report envisaged there was a more general one. I find it difficult to see how the BBC could meaningfully publish such a report without saying something about the information it was based on. But, even if injunctive relief had been sought to restrain publication of a story about X that did not name him, I can see no basis on which such relief could have been granted.

(b) The Daily Telegraph article

24 On 21 January 2022, The Daily Telegraph published an article under the headline "Exclusive: Government seeks to gag BBC over spy story". The article reported that the Attorney was seeking an injunction to prevent the BBC from "allegedly identifying a spy working overseas". The article reported the BBC's view that the story was "overwhelmingly in the public interest". The case was said to echo the Spycatcher affair. The Attorney's position was said to be that the broadcast presents "a risk to people's lives". An unnamed source was quoted as saying that there was "huge disquiet" about the broadcast. The article continued as follows:

> "The source said: 'It is really serious – there are serious risks. The programme would be a massive compromise for our security'.
>
> Identifying the spy concerned would have 'very serious consequences for the BBC' and would be 'a risk to people's lives', the source said, adding: 'These people are doing very, very difficult jobs in incredible circumstances. They are risking their lives. This is not James Bond - these are real people."

25 The contents of this "exclusive" report were widely repeated in other press and media outlets.

26 At the initial hearing on 26 January, I indicated that it would be a matter of concern if the Attorney was seeking to hold part of the hearing in private while, at the same time, the Government were briefing the press about the case. But it was inappropriate to draw any conclusions at that stage and I invited the Attorney to file a witness statement addressing the media coverage of the case, which would be considered at the hearing on 16 February 2022.

27 The Attorney filed the statement of Louise Wallace, a lawyer in the Government Legal Department. The Attorney now concedes that The Daily Telegraph "appears to have had some kind of inside 'source'", but asserts that this was "someone acting without authority".

28 In my judgment, Ms Wallace's statement does not enable that conclusion to be drawn. This implies no criticism of Ms Wallace herself, who is no doubt reporting accurately what she has been told. But a statement made by a government lawyer "on instructions" is useful only to the extent that those who give the instructions are identified. This is why CPR 32 PD para. 18.2 provides that a witness statement must indicate (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief and (2) the source for any matters of information or belief".

29 In *Punjab National Bank (International) Ltd v Techtrek India Ltd* [2020] EWHC 539 (Ch), at [20], in a passage cited in the White Book at para. 32.8.2, Chief Master Marsh said this:

> "In my judgment, where the maker of a statement is relying on evidence provided by a witness who is an officer of, or employed by, an incorporated body, the requirements of paragraph 18 of Practice Direction 32 to provide the source of evidence is not complied with merely by saying that the source is the entity or officers of the entity. If the source of the evidence is a person, as opposed to the source being documents, the person or persons must be identified and named. A corporate entity cannot experience events and can only operate through the medium of real persons. A failure to identify the source in a manner that complies with paragraph 18.2 will mean that the court has to consider whether to place any weight on the evidence, especially where it touches on a central issue."

30 I would respectfully endorse that interpretation of CPR 32 PD para 18.2 as correct. It applies at with least much force to government departments as it does to corporate entities. When the issue being addressed is whether a particular press statement was made with authority, it will be important to identify in respect of any relevant department (i) which (named) individuals have authority to authorise such statements to be made; (ii) which (named) individuals have said what about whether such authority was given.

31 Without this information, phrases like "The Home Office is not aware…", "As far as No. 10 is aware" and "My clients have confirmed" (all of which appear in Ms Wallace's statement) are of very limited probative value. In any event, so far as the Attorney General's Office, Home Office, MOJ and DCMS are concerned, the statement does not actually say in terms (even on the basis of instructions from an unidentified person) that no-one from these departments was authorised to brief the press in the terms reported in the Daily Telegraph article.

32 The consequence is that there is no evidence before me to negative the inference which arises from the terms of the article itself: that the "source" referred to in that article is a Government source. Whether that person was acting with authority, and if so whose authority, is not a matter on which any reliable conclusion can be drawn at this stage. But

the evidence of Ms Wallace certainly does not establish that the statement was made "without authority" if that phrase is to be given any meaningful content.

33 These conclusions are relevant to the Attorney's application for privacy in two ways. First, the fact that a Government source (whether acting with or without authority) appears to have briefed the press about this case has an impact on the extent to which it is "necessary to sit in private to secure the proper administration of justice" within CPR r. 39.3. It would in principle be unfair to allow one party to put its own "spin" on a case without allowing the other party to put before the public even the basic factual elements of its defence.

34 Second, leaving aside any question of authority, the fact remains that the information (including the quotations and reporting from the "source") is now in the public domain. As I have said, after the "exclusive" article in The Daily Telegraph, the content of that article was very widely reported in other press and media outlets. The question of damage to national security which might flow from a broadcast about X's conduct which does not identify X has to be considered against that background.

35 In his oral submissions, Sir James identified three respects in which the broadcast (even if X were not named) would add to the material already in the public domain. I consider them in turn.

36 The first is that, given that the article identifies X as a "spy", revealing that he is said to be a CHIS gives an additional element of specificity, which might cause those who currently operate as CHIS or who might in the future do so to withdraw their cooperation. I accept that there is *some* difference between public knowledge that the story concerns a person said by the BBC to be a "spy" and public knowledge that the story concerns a person said by the BBC to be a CHIS, but the significance of the difference should not be overstated.

37 The second respect is that, because the article refers to X as working overseas, members of the public would not know whether X is said to have worked for MI5 or MI6. But it would not be difficult to ascertain that the BBC believe that X worked for MI5, given that the draft injunction order, which is in the public domain, refers to a letter form the BBC to the Home Office and it is public knowledge that the Home Office is responsible for MI5, but not MI6. In any event, it is difficult to see why anyone should imagine that the precise agency responsible for the agent in question should make any difference to the BBC's stance.

38 The third respect is that X's activities involve a particular kind of extremism. There is some evidence that CHIS working in this field are particularly sensitive and disclosure of X's area of activity could have a correspondingly greater impact on CHIS in this area. I accept that the proposed broadcast would add something of significance to what is already in the public domain in this respect. I will consider further the claimed damage to national security arising from the disclosure of this additional piece of information: see para. 54 below. At present, this judgment has been drafted so as not to disclose it.

(c) The claimed damage to national security

The Attorney's case

39 The Attorney's argument that the hearing should proceed in private depends on the following propositions.

40 First, the assessment of what information can be disclosed in public depends on balancing two important public interests: the public interest in open justice and the public interest in maintaining national security. The latter is constitutionally and institutionally a matter for the executive, subject to interference on public law grounds: see *R (Begum) v SIAC* [2021] UKSC 7, [2021] AC 765, at [53]-[62], [70] and [109].

41 Second, even the fact that the dispute is about the identification of an alleged security or intelligence service CHIS would cause unacceptable damage and should be kept private because it would cause those who are currently working as CHIS to be less likely to co-operate in future or make those who may be considering such work less likely to take it up. To make this good, the Attorney relies on the OPEN and CLOSED witness statements of Witness A (an MI5 officer) and on CLOSED material contained in a confidential schedule. Having made a declaration under s. 6 of the 2013 Act and permitted the Attorney to withhold sensitive material, I am entitled to take these CLOSED materials into account.

42 Third, the article in The Daily Telegraph on 21 January 2021 does not affect this analysis because the Claimant was not responsible for it and in any event, it alleges only that the person the subject of the BBC report is "a spy working overseas" and does not reveal that X is alleged to be an MI5 CHIS, let alone the particular field in which he is said to have worked.

Analysis

43 As to the first of the Attorney's propositions, I accept as a general proposition that great respect is due to the expert view of the executive. As Lord Reed makes clear in his judgment in *Begum*, that is for both constitutional and institutional reasons: under our constitution, it is not the judiciary but the executive, which is answerable to Parliament, which has the responsibility for assessing and addressing risks to national security; the executive also has available to it those whose experience and expertise make them well-suited to making judgments about whether something would or would not damage national security and about the extent of the damage. In this case the assessment comes from a senior and experienced MI5 officer and, in general, such an assessment is owed considerable respect.

44 But even on issues touching on national security, the invocation of national security is not always conclusive. To paraphrase Maurice Kay LJ in a closely related context, it is not simply a matter of a government party to litigation hoisting the national security flag and the court automatically saluting it: see *Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559, [2014] 1 WLR 4240, at [20]. The extent to which it is appropriate to defer to the executive depends on the legal context. And, even in contexts where great deference is appropriate in principle, the court is still entitled and

required to consider carefully the quality of the reasons given for any assessment before deciding what weight to give to it.

45 In this case, the legal context is quite different from that under consideration in *Begum*. There, the question in issue was the proper approach to the review by a specialist tribunal of a decision which Parliament had decided should be entrusted to the Secretary of State, who is accountable to Parliament. Here, the question whether to permit a private hearing is one which involves a balancing exercise between the public interest in open justice and the public interests relied upon in favour of privacy. The CPR, for equally good constitutional reasons, allocates the performance of *this* balancing exercise to the court, not the executive.

46 Of course, in striking the balance, the court should give appropriate (and considerable) respect to properly reasoned national security assessments. But the court must also be astute to consider and probe such assessments with care.

47 Turning to the assessment in this case, it is true that Witness A says this at para. 3 of his witness statement: "a disclosure which confirms that the BBC has sought to identify an individual who they strongly assert is or was a CHIS, even where that individual is not named and irrespective of the truth of the assertions, would in and of itself be damaging". But when the statement is read as a whole, this is a summary of what follows.

48 The section of Witness A's statement headed "Risk to MI5's ability to recruit and retain CHIS that would result from publication" deals almost entirely with the risks which would arise from the naming of X, not the risks of publishing the fact of the BBC's intention to identify X unless restrained by the court. Para. 13 deals with the risks which would flow from publishing the assertion that a particular (named) individual has acted as a CHIS.

49 One sentence of para. 15 might be said to go further: "public revelation that the BBC have sought to identify an alleged CHIS's identity and role and, further, that they are willing to disclose such information, will lead to existing CHIS concluding that MI5 is unable to keep their identities secure." But the thrust of the paragraph, and Witness A's statement in general, concerns the risks arising from identifying X as someone alleged to be a CHIS. In any event, the single sentence of para. 15 which I have identified raises more questions than it answers.

50 No existing or potential CHIS who was even moderately informed would suppose that MI5 have a veto on what private parties, or the press, can say in public. Any such person who thought about the matter rationally would understand that if he said to a third party that he is a CHIS, and that third party chose to disclose it to the press or media, and the press or media chose to publish it, MI5 would not be able to control whether his identity would be kept secure, save by bringing legal proceedings.

51 Equally, those who are currently or might in the future become CHIS, and who have followed the coverage of this case in The Daily Telegraph and other outlets, might already be worrying that the BBC received its information about the "spy" there mentioned by a deliberate or careless act of the intelligence agencies themselves. If so, they might be reassured to learn, in circumstances such as these where the BBC allege

that X is a CHIS, and X told a third party that he was a CHIS, and the BBC obtained this information from the third party, that MI5 is nonetheless doing its best, at considerable expense, to keep X's identity secret.

52 Even if there are some CHIS who would be likely to be concerned by a broadcast which does not name X, and consequently less likely to cooperate in the future, there may be others who would be reassured in the ways I have suggested.

53 These points are not addressed by Witness A. I cannot therefore know whether they have been properly considered. The basis for the assessment in para. 3 of the statement is unclear. This affects the weight that can be attached to it. Overall, the Attorney has not adduced convincing or compelling evidence to establish the claimed risk to national security from disclosure of the fact that BBC proposes to name X unless restrained by the court.

54 At a late stage in the preparation of this judgment, an issue arose as to whether it would be contrary to the interests of national security to reveal publicly the particular field of activity in which X is alleged to have worked, even if the other matters referred to in this judgment are made public. So as not to delay handing down this judgment, I will deal with that issue separately. For the time being, this judgment has been drafted so as not to identify the field in question and nothing in this judgment should be taken as determining whether reference to the field of activity should remain private.

(d) The balance between the public interest in open justice and the public interests said to favour privacy

55 In the final analysis, I have to balance the public interest in open justice against the public interests which are said to justify a derogation from it. The applicable principles are set out in the Master of the Rolls' *Practice Direction: Interim Non-Disclosure Orders* [2012] 1 WLR 1003 and the case law cited there. These include the principles that there is no general exception to open justice where privacy or confidentiality is in issue (see [12]); and the burden of establishing any derogation from the general principle lies on the person seeking it and it must be established by clear and cogent evidence (see [13]).

56 The impact on the principle of open justice of requiring the interim relief hearing to take place in private is likely to be very substantial indeed. I have set out at para. 8 above the sum total of what the public would be told about these proceedings if I were to accede to the Attorney's application that the interim relief hearing be conducted entirely or substantially in private. In that scenario, the Attorney would have expended significant public resources seeking to restrain publication of the proposed broadcast; yet the press, media and public would be unable to understand the factual context of the arguments deployed or, therefore, form an informed view about the correctness of the decision reached.

57 This latter point is one of considerable importance. The relief the Attorney is seeking here involves an interference with the freedom of expression of the BBC and, more importantly, the correlative right of members of the public to receive the information the BBC proposes to broadcast. Both these rights are protected at common law and by Article

10 ECHR. Ultimately this court, and possibly the appellate courts, will have to decide whether the Attorney has adduced sufficient reasons for the interference. But courts do not exist in a vacuum. Their decisions are properly subject to criticism in the press and in Parliament. That cannot happen if the key facts are not publicly known.

58 I have carefully considered the evidence adduced by the Attorney for derogating from the principle of open justice. I have no doubt that the evidence represents the sincere views of those who made the relevant statements. In my judgment, however, for the reasons I have given, the Attorney has not carried the burden of establishing by clear and cogent evidence that such a significant derogation from the principle of open justice is required or justified in this case.

59 This means that the OPEN part of the interim relief hearing will take place in public. The hearing will take place in circumstances where the public can be informed about many of the key aspects of the case, with the exception of X's identity.

60 I shall invite the parties to agree a memorandum identifying the information which can and cannot be referred to, so as to ensure that nothing is said at the hearing which would identify X, whether directly or indirectly. I will adjudicate in writing on any remaining issue of dispute before the start of the OPEN part of the interim relief hearing.