Neutral Citation Number: [2020] EWHC 3589 (QB)

Case No: QB-2020-004576

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be as shown opposite:

Date: 30/12/2020

Before:

THE HON. MR JUSTICE WARBY

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Between:

SMO (a child) **by their litigation friend, Anne Longfield** **[acting as a representative claimant pursuant to CPR 19.6]**	**Claimant**
- and -	
(1) TIKTOK INC. **(2) TIKTOK INFORMATION TECHNOLOGIES LIMITED** **(3) TIKTOK TECHNOLOGY LIMITED** **(4) BYTEDANCE LTD** **(5) BEIJING BYTEDANCE TECHNOLOGY CO., LTD** **(6) MUSICAL.LY**	**Defendants**

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Charles Ciumei QC and Helen Morton (instructed by **Scott+Scott UK LLP**) for the **Claimant**

The **Defendants** were not present or represented

Hearing date: 30 December 2020

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Approved Judgment

I direct that that copies of this version as handed down may be treated as authentic.

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Mr Justice Warby:

1. This is a pre-action application for anonymity on behalf of a child claimant in an intended claim for breach of privacy.

2. The Children's Commissioner for England, Anne Longfield, intends to bring an action on behalf of a 12-year-old child against six corporate defendants said to be involved in or responsible for the operation of the social media platform TikTok and its "effective predecessor" Musical.ly. The Commissioner acts as the claimant's litigation friend. The allegation is that the defendants have misused the claimant's private information and processed the claimant's personal data in breach of the duties imposed by the General Data Protection Regulation (GDPR) 2016/679/EU and the UK GDPR. The remedies sought are a declaration, damages, injunctions, and orders for erasure of the data in question. The damages claimed are for "loss of control of personal data".

3. The intention is for the claimant, through the Commissioner, to bring a representative action pursuant to CPR 19.6, claiming those remedies on behalf of the claimant and all other children under 16 years of age who are or were users of TikTok and/or Musical.ly. The scheme is clearly inspired by the representative action brought by the claimant in *Lloyd v Google LLC*, and approved by the Court of Appeal in a judgment ([2019] EWCA Civ 1599 [2020] QB 747) an appeal against which is currently pending in the Supreme Court.

4. The application now before me is for permission to issue the proceedings under a pseudonym. The application relies on CPR 16 and 39.2, and is made without notice, as is appropriate for such an application: *CVB v MGN Ltd* [2012] EWHC 1148 (QB). The notice of application for that purpose was filed via the electronic CE File system shortly after 4pm on Sunday 20 December 2020, supported by a witness statement of Tom Southwell, a partner in the claimant's solicitors' firm. At that stage, the claimant was also seeking an order restricting third-party access to documents on the Court file, pursuant to CPR 5.4C – sometimes known as "sealing the file". The application notice sought an immediate hearing, in private.

5. The following day was the last day of the Legal Term. The case is unusual, and the application also. For those reasons, and because Part 53 requires the claim to be issued in the Media and Communications List, the application was referred to me by the Senior Master and the assigned Master. I first saw it mid-morning on Monday 21 December 2020, as I was finalising a judgment for hand-down at 2pm. In addition to the application notice and evidence there was a skeleton argument from Leading and Junior Counsel.

6. Having read the papers, it was clear that those representing the claimant do not wish to press on with the case until the outcome of the appeal in *Lloyd v Google* is known. But they were keen to issue the claim before the year end. The papers explained that the urgency stemmed from the fact that the end of the Brexit transition period on 31 December 2020 will bring about changes in the law which are, or are at least said to be, relevant to the intended claim. One change relates to the GDPR. It is said that under the law as it stands before the end of the period this Court has jurisdiction over that aspect of the claim and over the Second Intended Defendant, which is a company registered in England and Wales. The position from 1 January 20201 is "less clear"; jurisdiction will be decided on the basis of the common law rules "which may prejudice

the ability of the claimant to bring the claim and/or defend any jurisdictional challenge brought by the Intended Defendants". I quote from the first witness statement of Mr Southwell. Secondly, the evidence suggests, service of proceedings on the Third Intended Defendant in 2020 will be possible under the Judgments Regulation without further procedures; in 2021 the Court's permission will be required. The third point about the changes in the law is of greater significance. It is put this way in the skeleton argument for the claimant:

> "Further, and crucially, if these intended proceedings are issued prior to 1 January 2021, any judgment given is enforceable in Member States without further procedures. If the proceedings are issued from 1 January 2021 onwards, local laws of each Member State will apply which could severely impact and/or prejudice to Claimant's ability to enforce."

7. All of this may be correct, but it did not explain why the application was made only ten days before all these changes came into effect, and on the very last normal working day of the legal year. An explanation for that was given in the skeleton argument. This said that it was "not possible" to make the application sooner due to the need to arrange third-party funding. This had been a detailed and complex undertaking which "only became sufficiently far advanced" on Friday 18 December 2020. The skeleton argument did not give detail, which is reasonable; that would be a matter for evidence. But the witness statement did not add anything.

8. It is inevitably inconvenient to confront the Court with an application filed on the last day of term, demanding an immediate hearing. During the pandemic, the Court's resources have become unusually stretched. The normal case load has been managed, with few exceptions. But this was far from a routine application. The claim was novel if not unique. It was to be brought against a multiplicity of parties, all but one of them foreign to England and Wales. If it might be prejudicial to the claimant and those whom it was intended to represent for the proceedings to be issued in 2021, undue haste to get them issued in 2020 might be correspondingly prejudicial to the defendants, or some of them. Besides the dearth of evidence about the reasons for lateness, there were a number of aspects of the claimant's paperwork that seemed to call for consideration.

    (1) The only information provided about the claimant was their age. Permission to issue proceedings anonymously is one thing. A right to bring a claim on behalf of a person whose identity is known but kept secret from the Court has never yet been recognised.

    (2) Reliance was placed on the practice in relation to settlements affecting, where anonymity is the norm (*JX MX (A Child) v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96); but that is an exception to the general rule of open justice, which did not seem to me analogous to this case.

    (3) The evidence seeking to justify anonymity for this particular claimant was in very general terms, saying little more than that the attention the case itself was likely to attract would "include attention directed toward the claimant".

(4) I could see no need to hear the application in private; as no identifying material was being put before the Court, it should be easy to ensure that no such material was made public during the hearing.

(5) I could not see the justification for a "blanket" order sealing the file which was sought by the application notice. If the application succeeds, the court file can be anonymised and third-party access to the "open" parts of the file could not be harmful.

9. Other demands on my own time and that of the other Media and Communications List Judges meant that there was very little time available to review the evidence and argument fully, consider all the implications, and conduct a satisfactory hearing. On the evidence before me I simply could not assess whether the urgency and last-minute nature of the application were due to unreasonable delay on the part of those representing the claimant. Accordingly, on the afternoon of Monday 21 December 2020 I made an order "on the papers" fixing a hearing during the vacation, but within the calendar year. I have heard the application today, Wednesday 30 December 2020, remotely via Microsoft Teams, but in open court, in public, in the presence of one reporter.

10. In response to observations I made in the reasons for my Order dated 21 December, the claimant's representatives have submitted further evidence (two statements from Mr Southwell and one from the Commissioner), a revised draft order, and a supplemental skeleton argument. The application to seal the file is no longer pursued; the only issue is anonymity. Part of the evidence is confidential (a short statement from Mr Southwell giving the claimant's name, address, and other details).

11. Mr Southwell's second statement provides details of the process by which agreement on funding was arrived at. Without waiving privilege, he has been able to provide information about the nature of the negotiations, the timing, and the sources from whom advice was taken. On the evidence now before me, I do not consider that there has been undue delay such as should deter me from resolving the application forthwith.

12. Some of the claimant's paperwork devotes attention to the importance of keeping the claimant's address a secret. I do not regard that as an issue of particular significance in the context of this case. It is said that its disclosure might give rise to a risk of harm, regardless of the facts of the case, as it would increase the risk of attention from people who intend the claimant serious harm. That appears to me to be unsupported by the evidence. In any event, the claimant's address is not a weighty aspect of open justice, save in so far as it may lead to the identification of the claimant. The real issue is whether the claimant should be identified. If not, an order for non-disclosure of the address would seem to follow.

13. Transparency as to party identity is an aspect of the law of open justice. The underlying substantive principles are by now well-established and widely known. They are summarised in the Master of the Rolls' *Practice Guidance on Interim Non-Disclosure Orders* [2012] 1 WLR 1003 (Civil Procedure 2020, 53PG), *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 [2011] 1 WLR 1645 [21], and *CVB*. I have applied them recently in other contexts: see *Zenith Logistics Services (UK) Ltd v Coury* [2020] EWHC 774 (QB) [2020] 1 WLR 2983 [37-40] (*Tomlin* Orders) and *R v Wright (Nigel)* [2021] EMLR 3 [38-39] (anonymity for blackmail victims). In both cases, I

referred to the authoritative decision of the House of Lords in *Scott v Scott* [1913] AC 417, where the open justice principle was reaffirmed. At 446, Earl Loreburn identified the underlying rationale for any exceptions:-

> "in all cases where the public has been excluded with admitted propriety the underlying principle . . . 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."

14. The common law exceptions did not include the rights or interests of children, other than in the context of wardship. But by virtue of the Human Rights Act 1998 there is now, effectively, a statutory exception. The Court must act compatibly with the Convention Rights, including the right to respect for private life protected by Article 8. And Article 6 provides that the general rule of open justice may be departed from "where the interests of juveniles or the protection of the private life of the parties so require." This does not provide any automatic protection for children, regardless of the circumstances: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [46] (Lord Kerr), *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 [19] (Ward LJ). A balance must always be struck, and attention must be paid to the specifics of the individual case, not just generalities. But, as Mr Ciumei QC has pointed out in presenting his client's case, Article 3(1) of the United Nations Convention on the Rights of the Child and other international and domestic instruments require the Court to accord "a primacy of importance" to the best interests of a child: *ZH (Tanzania)* ibid.

15. The key procedural rule in play on this application is CPR 39.2. Rules 39.2(1) to (3) lay down the general rule that a hearing is to be in public, which may only be derogated from if and to the extent that the Court is satisfied of one or more of certain matters, specified in rule 39.2(3) "and that it is necessary to sit in private to secure the proper administration of justice". One of the specified matters is "(d) a private hearing is necessary to protect the interests of any child …". But the wording of the rule requires, in addition, that a private hearing should be considered necessary to secure the proper administration of justice. The same dual requirements are to be seen in the rule governing non-disclosure of party identity. CPR 39.2(4) provides:

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

16. I readily accept that this action is likely to attract a good deal of attention. It is a direct challenge to the practices of a very well-known and highly influential social media platform. It is reasonable to suppose that some of that attention would be focussed on the claimant, if their identity was known. But that is not enough of itself to justify anonymity. Nor is the mere fact that the claimant is 12 years old. It is necessary to consider the nature of the likely attention, and the harm that it could cause.

17. The evidence as the risk of harm is more detailed and considered than it was. I attach particular weight to the evidence of the Commissioner, who has relevant experience and expertise. The office she holds is a creature of statute, having been established

under the Children Act 2004, and further strengthened by the Children and Families Act 2014. Ms Longfield was appointed to the office in 2015, after 20 years as the Chief Executive of the children's charity 4 Children, and a year in the Prime Minister's Strategy Unit in the Cabinet Office.

18. The Commissioner's witness statement identifies a risk of direct online bullying by other children or users of the TikTok app; and a risk of negative or hostile reactions from social media influencers who might feel their status or earnings were under threat. Both appear to me to be realistic assessments. That is not to say that such behaviour is inevitable, but it is reasonably foreseeable.

19. The claimant is not, from an objective standpoint, engaging in any disreputable activity, worthy of condemnation. She intends to go to a Court asserting – rightly or wrongly – that her privacy rights and those of others like her have been infringed in ways that call for a remedy. But TikTok is a hugely popular app. This is a very early stage but, from what I have seen of it, the intended claim involves serious criticisms of what may be key aspects of the platform's mode of operation. Opposition from some users of TikTok is only to be expected. It is fair to anticipate that some such opposition would be strongly-worded.

20. The claimant is not – according to the evidence - a particularly vulnerable individual, but nor is there evidence of any unusually robust character traits. Everyone knows that 12-year-olds do not, generally, have the emotional resilience of older children or of adults. I accept the Commissioner's evidence that children are particularly sensitive to the sort of attention and scrutiny to which she has referred, and that such attention can have a marked and detrimental impact on a child's mental health, and emotional and educational development. I would characterise the risk of harm as significant.

21. In this context I attach special weight to the evidence about the attitudes of the claimant's parents, and what might happen if the anonymity sought is not granted. The parents are said to have "significant concerns" about the potential impact on the claimant of being identified. The assessment of the parents deserves respectful attention.

22. When assessing whether a derogation from open justice is necessary, it is always essential to consider whether a lesser measure would be enough. The Commissioner makes the point, which I accept, that opting out of social media activity is not a realistic means of avoiding the risks she identifies. Children are nowadays required to have internet access for educational purposes – all the more important during the pandemic. And withdrawal from social media engagement, if it was otherwise a reasonable thing to expect of the claimant, would not prevent the claimant's peers from engaging with hostile online comments and reporting or repeating them to the claimant.

23. For the purposes of this case, it is appropriate to pose the question identified by Lord Rodger in *In re Guardian News and Media Ltd* [2010] UKSC 1 [2010] 2 AC 697 [52]:

> "whether there is sufficient general public interest in publishing a report of the proceedings which identifies [the Applicant] to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

24. In my judgment, in this case, in the circumstances as placed before me in the evidence, is that there is no sufficient general public interest. As Lord Reed pointed out in *A v British Broadcasting Corporation (Secretary of State for Justice Intervening)* [2015] AC 5588 [85], key factors when balancing the public interest in open justice against competing considerations are "the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."

25. The purpose of open justice is to "enable the public to understand and scrutinise the justice system" (*Guardian News and Media Ltd* [79]) and, in particular, (1) to "enable public scrutiny of the way in which courts decide cases" and hold Judges to account, and (2) "to enable the public to understand how the justice system works and why decisions are taken": *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38 [2019] 3 WLR 429 42-43] (Baroness Hale).

26. Sometimes, as in *Re Guardian News and Media*, it is important for the media to be able to put a name to a participant in the legal process, in order to engage the interest of the public and support the beneficial purposes of open justice. This is not a case in which that aim could justify the risk of harm. The Commissioner will take steps to publicise the case, in order to ensure that represented parties become aware of it. The topic is in any case one that will interest the public, whether or not the claimant is identified by name.

27. This is not a case in which the identity or other singular attributes of the claimant are central, or even important aspects of the claim, that therefore need to be known and understood by the public. The main characteristics of importance appear to be age and use of TikTok, and those are shared with all the represented parties. The evidence is that the damages claim will not be peculiar to the circumstances of the claimant, as for instance with a claim to compensate for distress. As in *Lloyd v Google*, the claim will be for a standard "tariff" figure to compensate the claimant and each of the represented parties for the abstract "loss of control" over personal data. In all likelihood, the main focus of attention for those who wish to understand and scrutinise the workings of the justice system in the intended litigation will be the activities or alleged conduct of TikTok and the role of the defendant companies in its operation.

28. It is not said in terms that the claimant's parents would not support her participation if their child was identified, or that no other child would take the claimant's place. And as *Scott v Scott* makes clear, it is necessary to be wary of broad appeals to keep identities secret to avoid the unpleasantness often attendant on taking part in Court proceedings. I do nonetheless attach weight to the argument advanced by the claimant's lawyers, that if the Court required the claimant to be named that could have a chilling effect on the bringing of claims by children to vindicate their data protection rights. On that footing, the grant of anonymity supports the legitimate and important aim of affording access to justice, and the order is necessary in order to secure the administration of justice.

29. This is a public judgment, and I have not made, nor have I been asked to make, any reporting restriction order. That is why, as Tugendhat J pointed out in *CVB*, there has been no need to give notice of this application to the media or any other person who

might be affected. That said, the hearing was conducted with discretion, and I have so far not disclosed any information about the claimant other than their age. Nor is there anything on the Court file that would or (so far as I can see could) lead to the claimant's identification.

30. In the course of argument, however, it was accepted on behalf of the claimant that the public can be told that the claimant is a 12-year-old girl from London. Disclosure of that information is a lesser measure than total elimination of all personal information other than her age, and one that does not create a material risk of the harms identified above.