IN THE COURT OF PROTECTION **CASE NO.: 13471388**

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005 **[2021] EWCOP 63**

IN THE MATTER OF TH

BEFORE HHJ HILDER

BETWEEN

PH and RH

Applicants

-and-

(1) BRIGHTON AND HOVE CITY COUNCIL
(2) BRIGHTON AND HOVE CLINICAL COMMISSIONING GROUP
(3) CARETECH LIMITED
(4) NHS ENGLAND
(5) TH
(by his litigation friend, the Official Solicitor)

Respondents

-and-

THE BRITISH BROADCASTING CORPORATION and SKY UK LIMITED

Media Applicants

APPROVED NOTE OF JUDGMENT
given orally at a hearing on 23rd November 2021

Counsel for the Media Applicants: Ms Claire Overman (instructed by RPC)

Counsel for the Applicants: Dr Oliver Lewis (instructed by RKB Law)

Counsel for the Third Respondent: Ms Nicola Kohn (instructed by Radcliffes Le Brasseur)

Counsel for the Fifth Respondent: Ms Alexis Hearnden (instructed by Bindmans LLP)

JUDGMENT OF HHJ HILDER:

1. This matter was listed for hearing before me today to determine an application made by the BBC on Form COP9 dated 4th October 2021, and by Sky orally on 9th November 2021, to disapply the anonymity provisions in a Transparency Order made on 13th August 2019. There is also an application by the Third Respondent that that application be refused, made by COP9 dated 8th November 2021.

2. The Transparency Order in issue was made in respect of substantive proceedings concerning Tony Hickmott. It provides at paragraph 6:

   (6) The material and information (the Information) covered by this Injunction is:

   (i) any material or information that identifies or is likely to identify that:

   (a) TH is the subject of these proceedings (and therefore a P as defined in the Court of Protection Rules 2017), or that

   (b) any person is a member of the family of the subject of these proceedings (namely TH) and;

   (ii) any material or information that identifies or is likely to identify where any person listed above lives, or is being cared for, or their contact details.

3. That information, according to paragraph 7, cannot be published or communicated by any means (orally, in writing, or electronically), and persons bound cannot cause, enable, assist or encourage others to publish or communicate this information.

4. The substantive matter, with the Media Application already made, was transferred to me on 4th November. On 9th November there was a hearing at which I made two orders. Firstly, in the substantive proceedings, I gave directions, including the listing of further hearings at roughly monthly intervals, until the anticipated date of Mr Hickmott's change of care provision in May 2022. The next hearing is scheduled for 7th December. Secondly, in the Media Application, I made further directions which provided for the filing of evidence and the listing of this hearing. This hearing has been conducted remotely by MS Teams but in public subject to the Transparency Order as made on 13th August 2019 and varied on 9th November 2021.

5. For the purposes of the issue before me today, I have considered the following information for the Media Applicants:

    (i) a document setting out their grounds dated 4th November;
    (ii) a statement by Mr Otter dated 8th November;
    (iii) Ms Overman's position statement dated 17th November; plus
    (iv) helpful oral submissions.

6. For Mr and Mrs Hickmott, who are the substantive Applicants, who support the Media Applicants in their application, I have considered:
    (i) the position statement by Ms Weereratne QC and Dr Lewis dated 5th November;
    (ii) a statement by Mr and Mrs Hickmott dated 12th November;
    (iii) a skeleton argument by Ms Weereratne QC and Dr Lewis dated 17th November; and
    (iv) helpful oral submissions from Dr Lewis.

7. On behalf of the Third Respondent, CareTech, the current provider, I have considered:
    (i) statements by Emma Harrison dated 5th November and 12th November (and insofar as there may have been any issue with that latter statement being filed and served late, the parties sensibly took no issue with it and it was admitted at the beginning of this hearing);
    (ii) an extract of a position statement from Ms Kohn, namely paragraphs 18-25 of the position statement for the previous hearing;
    (iii) her skeleton argument dated 17th November; and
    (iv) her very helpful submissions today.

8. Finally, for Mr Hickmott himself through his litigation friend, the Official Solicitor, I considered:
    (i) Ms Hearnden's position statement dated 9th November;
    (ii) her skeleton argument dated 17th November; and

(iii) her very helpful submissions today.

9. The other parties in the substantive matter were excused from attending on the basis that they either supported the Official Solicitor's position or were neutral.

10. There is broad agreement as to the framework of the law at least, except as regards whether there was a "good reason" threshold. I have determined today that there is no such threshold, for the reasons given separately. So I adopt the summary of law set out by Ms Hearnden in her skeleton argument.

11. The standard approach of public hearings subject to a Transparency Order, as in this case, is intended by the Court of Protection to reconcile the personal nature of information which is likely to be disclosed in Court of Protection proceedings, and the public's need to understand and have confidence in the Court's decision-making process. I have regard to the fact that the general rule in Court of Protection proceedings is that hearings are conducted in private. But the *ordinary* position, as set out in the rules and Practice Direction 4C, is that hearings are in public with a Reporting Restriction Order.

12. The anonymity provided by Reporting Restriction Order, however, may be relaxed. The test for relaxation is, as described by the Media Applicants, the "familiar" balancing test between Articles 8 and 10 of the European Convention on Human Rights. Article 8, of course, protects privacy and family life; Article 10 protects freedom of expression. And the classic exposition of the balancing exercise is that of Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication) 2005 1 AC 593* at [17] in the following terms:

> *First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.*

13. The Media Applicants say that they wish to be able to name Mr Hickmott and his parents, and to receive copies of some documents from Mr Hickmott's parents. They say that Mr Hickmott's situation has already been widely reported in national and online media. And,

as exhibited to Mr Otter's statement, they have provided examples and links to that existing publicity, which includes:

(i) Mr Hickmott's name and photograph;

(ii) the name of one parent and their location; and

(iii) the name and location of the institution where Mr. Hickmott is currently being cared for.

14. There has also been a decision of Charles J in the Administrative Court in 2004, published as _R (Hickmott) v Brighton and Hove Council_ *[2004] EWHC 2474 (Admin)*, in respect of judicial review proceedings taken in the name and on behalf of Mr Hickmott by the Official Solicitor acting as his litigation friend. I have been provided with a copy of that 105-page judgment, which includes quite extensive detail of Mr Hickmott's characteristics and circumstances as they were at that time.

15. The Media Applicants go on to say that, therefore, the substance of these proceedings is already in the public domain, such that there cannot be much more Article 8 right engaged in reporting the additional information of Mr Hickmott's situation now, being the subject of Court of Protection proceedings: linking him to the proceedings is merely the final piece of the story. He is in the public eye precisely because of the matters that form the subject of these proceedings. It is not that the proceedings are the story; it's that the story has moved into proceedings. And, because of the information already in the public domain – the Media Applicants say – the Transparency Order restrictions effectively prevent any reporting, because of the risk of jigsaw identification. So the Media Applicants cannot sensibly conduct reasonable reporting of this matter. The interference with their Article 10 rights is therefore disproportionate, and moreover not actually what the Transparency Order was intended to achieve.

16. The Media Applicants point out that Mr Hickmott's parents support their application. I have been referred to Charles J's decision in _V v Associated Newspapers Limited and others_ *[2016] COPLR 236* at [163](ii), pointing out the importance of family support. Mr

Hickmott's parents want to raise awareness of their son's situation, and their need to resort to these proceedings forms an important part of the narrative of their struggles on his behalf.

17. Substantively, the Media Applicants say that the facts of this extraordinary matter cry out for scrutiny through responsible reporting. Mr Hickmott has been detained for almost two decades. Such an approach to the duty of care to persons with incapacity is obviously a matter of public interest. There can be no informed scrutiny, and no lessons learned, if the public and decision-making bodies do not know that the matter ultimately required the involvement of the Court of Protection.

18. As a matter of reality, the Media Applicants say, there is a public interest in humanising the story. The "what's in a name" speech in *In Re Guardian News and Media [2010] 2 AC 697* at [63] has been referred to, and also the judgment of Hayden J in *M v Press Association [2016] EWCOP 34* at [30]. The wider public interest in highlighting Mr Hickmott's case as an example of an endemic issue concerning inappropriate confinement of individuals with learning disabilities is a matter which needs to be publicly aired. To illustrate the wider context, the Media Applicants referred me to the Care Quality Commission Review of May 2019, and the recent debate in the House of Lords.

19. The Media Applicants acknowledge concerns about the impact which lifting the restriction on identification may have but themselves raise concern at any suggestion that the media wishes to embark on any kind of witch hunt, publicly naming and shaming the Third Respondent or anyone else. They firmly deny any such agenda. They merely wish to investigate impartially and report impartially, and, if the investigation leads them to be critical of any part of the system, that they be allowed to articulate that. They urge that the Court proceeds on the basis that the media will report responsibly, fairly and accurately, as in the case of *In Re BBC [2018] 1 WLR 6023,* determined by the Lord Chief Justice. They offer reassurance that their interest lies in how official institutions have allowed Mr Hickmott's situation to continue, and that they have no intention of identifying individual carers or other patients. (That said, the Media Applicants also remind the Court that hospitals are not immune from scrutiny. The Transparency Order is to protect the subject of the proceedings, not to confer general rights of anonymity. And there is much that it does not prohibit.)

20. Mr Hickmott's parents support the Media Application on all fours. They say that, given the duties to arrange aftercare for Mr Hickmott, the conduct of the Local Authority and the CCG is a matter of considerable public interest. But for the Court of Protection proceedings, the media would be free to continue to use all the relevant names as it has up to the point when these proceedings commenced. And why, they ask, should the situation be different because of the court proceedings? They point me to the current Parliamentary interest in progression of the "Transforming Care" agenda, including setting up of a panel of experts, chaired by Baroness Hollins, and the CCG report in October 2020. They point out that Mr Hickmott is believed to be the person who has been the longest cared for in the circumstances for which those bodies are now under scrutiny.

21. The parents are clear that Mr Hickmott himself lacks capacity to form any view on the issue, but they tell the Court that they consider his "wishes and feelings" would be that he wants to go home. They submit, therefore, that he would want every effort to be made to shine a light on his situation. They do not accept that there has been any adverse effect on their son by any of the information in the public domain to date. They say it is positively advantageous to him to have well-reported, clear information in the public domain. It is not accepted on their behalf that there is any need for there to be overwhelming, clear, direct positive benefit to his situation for the application to succeed; and, in any event, where there are conflicting recollections, they emphasise their view that there was no previous adverse reaction. They do not accept that, if there is press publicity, it would be adverse. They emphasise that Mr Hickmott's interests must be front and centre, not the statutory bodies' interests. Specifically, it is asserted on their behalf that it is difficult to see any relevance at all in the fact that the hospital has no powers in respect of community-based options, and that public scrutiny is an element of living in a democratic society. They exhibit to their statement a letter from the currently preferred next provider, Lets for Life, suggesting that the publicity sought by the applications would actually be advantageous to future care planning.

22. The parents welcome the high-level strategic support that is now in place from NHS England, but they say that is not enough. Mr Hickmott's story is important in its own right, and the fact that there has now been progress does not mean that there should not also be the granting of the Media Application. Insofar as there is any concern about scrutiny of the hospital, it is pointed out that it is already under intense scrutiny from the CQC's reports

on 23rd November 2020, which rated it "inadequate," and August 2021, which rated it as "requiring improvement." So, they say, it would be over-dramatic to say that further press coverage would impact on Mr Hickmott's care: the carers are professionals. It has never been about individual staff members.

23. On the other hand, CareTech, the Third Respondent, says that if anonymity is lifted Mr Hickmott's privacy would be fatally undermined. There is no evidence that he wants his privacy invaded or the facts of his life published, and such publicity could make future arrangements for his care much more difficult to secure. The Third Respondent says that it's not relevant that a lot of the details have already been widely reported, because the decision that the Court has to make today is about these proceedings, and so I have to make a decision effectively afresh. And the need to be able to discuss legitimate concerns can be met adequately as the ordinary provisions of the Court of Protection Rules 2017 provide, by public hearings with anonymous reporting. The "what's in a name" argument is not determinative of whether Article 10 rights are adequately protected.

24. The Third Respondent says that the impact of granting the Media Application on the hospital staff would be significant. Ms Harrison's two statements set out her concerns about the effect on the service as a whole: that other patients may be put at risk; that previous publicity led to a breakdown in the relationship with Mr Hickmott's parents; that Mr Hickmott himself reflects his parents' anxiety and would pick up on the tensions surrounding publicity; and that the staff, or at least some of them, may be less willing to work with Mr Hickmott (some apparently having already asked to be released from having to provide care to him). Her statements include an account of how other patients saw filming in a car park, and were distressed and worried that their identity and whereabouts may be discovered. And they include an account of Mr Hickmott himself exhibiting an increase in behavioural disturbance. Insofar as Lets for Life is positive about the effect of publicity, it is pointed out that Lets for Life is not actually the commissioned care provider yet. Even if they are commissioned, they will only be providing housing, not care; and a care provider may have different views about which, as yet, we know nothing.

25. Ms Kohn's skeleton argument has also referred me to the framework for detention under the Mental Health Act 1983, and the rules for hearings and transparency in the mental health setting. I do not propose to recount that in detail, for the simple reason that the Court of Protection has its own set of rules.

26. Finally the Third Respondent emphasises that the public interest element of Mr Hickmott's story can be properly communicated without identifying him, and the Court should give considerable weight to the normal position of a person within Court of Protection proceedings having the protection of anonymity.

27. By and large, the Third Respondent's position is supported by the Official Solicitor on behalf of Mr Hickmott. The Official Solicitor acknowledges the legitimate public interest in cases of this type, where the "Transforming Care" agenda and the over-reliance on hospital settings for adults with learning disabilities are and should be under scrutiny. She also acknowledges that there is much in a name, that stories are more likely to be attractive to readers when they are attached to an identifiable individual but she opposes the Media Application, asserting that the existing Transparency Order correctly balances the competing interests. She points out that there is nothing to suggest that Mr Hickmott himself wishes to give up anonymity, and asserts that publicity is not likely to benefit him. Agreeing that it probably won't make it easier to commission care, and pointing out that NHS England has already appointed high level strategy support, the Official Solicitor points to the risk to Mr Hickmott's care arrangements if the hospital is subjected to media pressure, and asserts that preserving his current relationships is paramount for moving towards successful discharge as soon as possible.

28. I was referred to *R(C) v Secretary of State for Justice (Media Lawyers Association intervening) [2016] 1 WLR 444*, a claim for judicial review brought by a patient detained under the Mental Health Act 1983. In that case, it was pointed out that where a whole therapeutic enterprise may be put in jeopardy if confidential information is disclosed in a way which enables the public to identify the patient, then the balance comes down in favour of anonymity. The Official Solicitor reminds the Court that it is concerned with clinical and personal confidential information. Publishing Mr Hickmott's name may put him at risk of intrusion into his life, which would interfere with the ability of hospitals and professionals to provide care, and the evidence of Ms Harrison should be listened to carefully. The Official Solicitor contends that appropriate levels of scrutiny can be achieved within the requirements of the current Transparency Order and, further, she opposes any request to inspect or copy documents (but I think that is not so far as orders and position statements are concerned.)

29. So at this point I turn to the balancing exercise as set out by Lord Steyn in *Re S*. It seems to me that the following factors point in favour of granting the application:

i. Firstly, the circumstances of this case unquestionably fall into the domain of proper public interest. A man has been detained for many years beyond the point when clinicians considered him fit for discharge. Resource pressures are at least a part of that story, there being nowhere else to meet his needs. I have no doubt that this is an issue on which there should be open public debate on an informed basis.

ii. Secondly, Mr Hickmott's parents openly seek the proposed reporting. It's their story too. Unless the application is granted, they won't be able to set out the extent of their struggles to restore their family life.

iii. Thirdly, there is already a great deal of information about Mr Hickmott in the public domain. In particular, I note that that includes his name, his photograph, his parents' location, the hospital where he is currently detained and many details of his case in the 2004 Administrative Court judgment. I note that that judgment is now some fifteen years old, and that probably the audience of a published Administrative Court judgment is rather smaller than the audience of the BBC or Sky News. However, I am deeply concerned that so extensive is the information already in the public domain, and so particular are the facts of this case, that very limited skills of Google searching would be required to identify one from the other. And therefore I do consider the Media Applicants' contention that current restrictions effectively prohibit *any* reporting of this matter for fear of jigsaw identification as being a matter of significant weight. I note what Peter Jackson J said in *Hillingdon LBC v Neary [2011] EWHC 413 (Fam)* at [16](3): "*it is in no one's interests for proceedings to be stultified by the withholding of information that is already in the public domain*." I am concerned that where the facts of this matter are much known about in advance, and are likely to be known about if and when proceedings come to an end, that the maintaining of the Transparency Order at this point effectively creates a 'black hole' of information which, in some, invites misinterpretation rather than accurate information and debate.

iv. And finally, I do take into account the humanising effect of the name. I accept the naming proposition as it is referred to in the authorities. However, I give that less weight than the other factors, given that the focus of this issue is the length of the

detention rather than any other personal characteristic. I am not convinced that the story of such extended detention could not be appropriately reported without a name were it not for the extent of the information which is already in the public domain.

30. On the other hand, the factors in favour of retaining anonymity seem to me to be as follows:

i. Firstly, it is the "ordinary" approach of the Court, to adopt the language of the Practice Direction. There is no positive evidence that Mr Hickmott himself wishes to depart from that. I note that although the judicial review proceedings were brought in his name, they were brought through a litigation friend, and he would not effectively have had any real choice in that matter, quite appropriately so. This is not a matter where Mr Hickmott himself has previously courted publicity.

However, I don't give this factor an enormous amount of weight, because the "ordinary" position of the Court is just a starting point. It would make no sense of having jurisdiction to take another view if it remained determinative. It's generally agreed that Mr Hickmott himself has no capacity to make decisions on this point, and it seems to me that there is no positive evidence that Mr Hickmott would oppose the application either. There is simply no clear evidence before me of past detriment to him from previous episodes of publication from which I can draw any inferences.

ii. A much weightier factor in favour of anonymity is the risk that granting this application may destabilise Mr Hickmott's current care arrangements and make his future care more difficult to arrange. That is a consideration which weighs heavily on me.

The Third Respondent has put in witness evidence saying that some carers have already requested not to be allocated to provide care to Mr Hickmott because of the previous publicity. Ms Harrison says there are likely to be further instances of such requests. She says that it will result in reduced opportunities for Mr Hickmott, for example, being able to go out on community drives and escorted walks.

On the other hand, I bear in mind Dr Lewis's submissions in particular, on the generality of that evidence, and the lack of specificity of the incidents on which there are said to have been detrimental effects on Mr Hickmott. I don't accept that the Third Respondent has not had an adequate opportunity to put in such evidence if it wished to. It has already filed two statements and expressly did not seek an adjournment today.

The sum total of the evidence by Ms Harrison falls some way short of satisfying me that there is a realistic risk to Mr Hickmott, to the stability of his care arrangements, or to the ability to make future care arrangements for him. Where there have been incidents of challenging behaviour in the past, I am not satisfied that they have been linked to instances of publication of information. The causation is not made out. I have taken Ms Harrison's evidence 'at face value', to use Ms Kohn's phrase, but taking it in its totality, I am not persuaded that I can consider that the risk to him weighs particularly heavily.

I have considered in particular Peter Jackson J's observation at [17](b) of *London Borough of Hillingdon v. Neary* [2011] EWHC 413 (Fam), whereby he was entirely able to reject the possibility of irresponsible journalistic practices. I have also considered the much more recent decision of *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust [2021] EWHC 1699 (Admin)*, where the current President of the Family Division roundly says that the decision in *Re Ward (a Child) [2010] 1 FLR 1497* is wrong, and asks why should the law tolerate and support a situation in which conscientious professionals who are not found in fault in any manner are at risk of harassment and vilification? I am not satisfied that there is any evidence before the Court to reach a conclusion that there is such a risk. More positively, I am satisfied that the Media Applicants intend to report responsibly and, of course, anything beyond that is beyond the ability of this Court to control.

31. Taking all of those factors into account, I have come to the conclusion that it is appropriate to grant the Media Application. However, I do think that it is reasonable for those who provide care to Mr Hickmott to have some time to consider what practical steps they need to take to protect him from unnecessary exposure, for example, to television reports. Therefore, the order that I am going to make, lifting the restrictions, will not take effect until 6pm tomorrow.

IN THE COURT OF PROTECTION **CASE NO.: 13471388**

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

IN THE MATTER OF TH

BEFORE HHJ HILDER

BETWEEN

PH and RH

Applicants

-and-

(1) BRIGHTON AND HOVE CITY COUNCIL
(2) BRIGHTON AND HOVE CLINICAL COMMISSIONING GROUP
(3) CARETECH LIMITED
(4) NHS ENGLAND
(5) TH
(by his litigation friend, the Official Solicitor)

Respondent

-and-

THE BRITISH BROADCASTING CORPORATION and SKY UK LIMITED

Media Applicants

ORDER in respect of the MEDIA APPLICATION

MADE BY Her Honour Judge Hilder

AT First Avenue House, 42-49 High Holborn, London WC1V 6NP

MADE ON 23rd November 2021

ISSUED ON 24th November 2021

UPON an application by the Media Applicants (the “Media Application”), seeking the disapplication of certain anonymity provisions in the Court’s Transparency Order dated 13th August 2019 (the “Transparency Order”)

UPON the Applicants supporting the Media Application; the Official Solicitor as litigation friend to the Fifth Respondent opposing the Media Application (the Third Respondent supporting the Official Solicitor and the First and Second Respondents deferring to the Official Solicitor’s views); and the Fourth Respondent being neutral

UPON hearing Counsel for the Media Applicants, for the Applicants, and for the Third and Fifth Respondents at a hearing on 23rd November 2021

AND UPON the Media Applicants confirming that they will note on the file of any televised report by them identifying TH or his parents in connection with these proceedings or issues within these proceedings (a “Relevant Report”) that, no less than 24 hours before broadcast by the Media Applicants of that Relevant Report, a notification must be sent to [redacted e-mail address] of the date on which that Relevant Report will or may be broadcast

IT IS ORDERED that:

1. Paragraphs (5)-(9), (10)(ii), and (11) of the Transparency Order shall cease to have effect from 6pm on 24th November 2021.

2. PH and RH shall be permitted to disclose to the Media Applicants in unredacted form, and the Media Applicants shall be permitted to publish or otherwise communicate the contents of, the following documents in PH’s and RH’s possession produced for or in connection with the Court of Protection proceedings concerning TH:

   2.1. All Court Orders in Case No. 13471388 (contained within section D of the bundle);

   2.2. All Position Statements **[A10-A71]**;

   2.3. The grounds of the Applicants’ application dated 19th July 2019 **[D21-37].**

3. There be no order for costs.