Scottish Child Abuse Inquiry

Decision

By

The Right Honourable Lady Smith

Chair of the Scottish Child Abuse Inquiry

Re: Applications for Permission to Identify a "Protected Person"

Counsel to the Inquiry: Andrew Brown KC

For Associated Newspapers & Ors: Duncan Hamilton KC ; BKF & Co, Glasgow.

For "Justice Support Group": George Scott.

For the Lord Advocate: David McNaughtan KC ; the Crown Agent.

<u>7th March 2023</u>

Introduction

The Scottish Child Abuse Inquiry ("SCAI") is a public inquiry established under the Inquiries Act 2005 ("the 2005 Act") on 1 October 2015. It was established because of public concern that children had been abused when in care in Scotland over many decades. As its terms of reference ("ToR"[1]) explain, the overall aim and purpose of

[1] Terms of reference — Scottish Child Abuse Inquiry

SCAI is to raise public awareness of the abuse of children in care, over a period that dates back to within living memory. SCAI's work affords an opportunity for public acknowledgement of the suffering of children in care, creates a forum for the validation of their experiences, identifies whether any such abuse occurred due to failures in duty or systems, examines the impact of abuse, considers whether failures have been corrected and whether any changes to the law, policies or procedure are required. SCAI seeks to respond to its ToR through its extensive investigations and, as the ToR requires, is in the process of creating a national public record and commentary on the outcome of our work.

The ToR defines "children in care" as including children who were at boarding schools in Scotland.

This is a decision in response to certain applications presented in relation to our boarding schools investigations and case study. Given the extent of public interest in the matters raised, I decided to hold a public hearing at which oral submissions in support of the applications and in response to them could be made. I undertook to give my decisions in writing, after the hearing, and this I now do.

Public access to inquiry proceedings and information

Section 18 of the 2005 Act obliges the chair of a public inquiry to ensure that the public have access to the "proceedings at the inquiry" and are able to "obtain or view a record of evidence and documents given, produced or provided to the inquiry". Accordingly, section 18 places me under a duty to take reasonable steps to put inquiry evidence about the nature, extent, and consequences of the abuse of children in care, into the public domain. The duty applies to the inquiry's oral evidence and also to its documentary evidence such as written statements. It means that, in normal course, the identities of relevant individuals who provide evidence or are referred to in evidence are disclosed.

Section 18 sets a starting point. It is that the press and any other interested members of the public are entitled to know the information in inquiry evidence not just about *what* appears to have happened but also about *who* was involved – or said to have been involved – in matters that are considered to be of such public concern as to justify them being explored by a public inquiry. Likewise, the press and others are entitled to communicate that information and the public are entitled to have it communicated to them. That accords with those of the rights enshrined in Art 10 ECHR[2] that enable the press to report freely. It also reflects the importance that is afforded to our constitutional principle of open justice in the court context. Whilst a public inquiry is not a court process and has no power to determine any person's civil or criminal liability[3], it is "not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."[4]

To put it another way, a public inquiry cannot be said to be administering justice but the work it does in the public interest in relation to a matter of public concern may have impact on the administration of justice and it engages Art 10 in the manner set out in section 18 of the 2005 Act.

[2] 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. (*European Convention of Human Rights*)

[3] Inquiries Act 2005, section 2(1).

[4] Inquiries Act 2005, section 2(2).

The duties under section 18 of the 2005 Act are, however, not absolute. They are subject to "any restrictions imposed by a notice or order under section 19" which empowers the chair of a public inquiry to issue an order restricting "disclosure or publication of any evidence or documents given, produced or provided to an inquiry" if certain conditions apply.[5] The power may be used to restrict disclosure of evidence about a person's identity.

The General Restriction Order

Recognising that there are certain sets of circumstances that often arise in the course of SCAI's work in relation to which restricting the disclosure or publication of inquiry evidence will usually be justified, I have exercised my power under section 19 so as to provide that inquiry evidence and/or documents which identify certain categories of persons must not be disclosed or published except where I give my permission for such disclosure to be made, expressly and in writing. For that purpose, I have ordered that any evidence provided to SCAI which identifies a "protected person" must not be disclosed. One of the categories of persons whose identities are protected in this way is that of alleged abusers. That protection may avoid or mitigate prejudice to specific private interests of the alleged abuser (e.g. damage to reputation), to the public interest in avoiding harmful pre-trial publicity for the sake of the proper administration of justice if a trial seems likely, and to the person's right to a fair trial in the event of prosecution.

The terms of my order are set out in my General Restriction Order[6] ("GRO"). Its validity has not been challenged. It is important to note the limits of the GRO. They are clear from its terms and they go no further than I am empowered by section 19 to provide. That is, it only restricts the disclosure or publication of <u>inquiry evidence or</u>

[5] Inquiries Act 2005, section 19(1).
[6] General Restriction Order

documents. It does not restrict the disclosure of information or documents that are not inquiry evidence or not inquiry documents.

Its terms include that I may, notwithstanding the generality of the order, permit the identity of a protected person to be disclosed and/or published where that person's identity and the fact that s(h)e is the subject of allegations of having abused children in care are already in the public domain[7]. The nature and circumstances of the disclosure in the public domain may, for example, show that the "cat is out of the bag" and cannot realistically be tied back into it again. I may decide to disclose the identity without a specific application, such as when it is brought to my notice that significant relevant material is already in the public domain, or I may give such permission in response to a specific application. It is important to appreciate, however, that whether or not to grant such permission will always depend on the particular facts and circumstances of the individual case.

A misunderstanding

Importantly, the GRO does not restrict or purport to restrict the disclosure of a person's identity where someone has found out about it by other means i.e. other than by inquiry evidence. Section 19 does not empower me to go beyond protecting inquiry evidence. My power to regulate what can be disclosed in or about its evidence and documents does not and cannot operate as, for example, press censorship on a report of what has been discovered through a journalist's own separate investigations. The GRO does not seek to do that nor does it purport to do so. I stress this because it appeared that, despite the clear terms of the GRO, a widespread misunderstanding had emerged to the effect that the identities of protected persons could not be disclosed by the press or anyone else at all irrespective of the source of their information.

[7] See the GRO "Exceptions" , paragraph vi.

During the hearing in relation to the applications for permission to identify an alleged abuser, he was referred to as "the protected person" and in this decision I will , other than in the section headed " Decision", also use that term when referring to him.

SCAI's Investigations: Boarding Schools

SCAI's work includes investigating the nature, extent and causes of abuse of children at boarding schools. Evidence in our case study on boarding schools was presented in the course of oral hearings between 16 March 2021 and 17 February 2022. It included the specific presentation of evidence about the abuse of children who boarded at Fettes College, Edinburgh. Reference in evidence was also made to the abuse of children who boarded at the Edinburgh Academy. The evidence included allegations that a particular male teacher who had been employed at the Edinburgh Academy Junior School (1968 – 73) and then at Fettes College Prep School (1973 - 1979) ("the schools") abused boys at the schools both physically and sexually. The teacher was not identified in the course of oral evidence nor was he was identified in SCAI's published transcripts and statements. As an alleged abuser, he was a "protected person". Whilst he was, in the course of evidence, referred to as "Edgar" (which is not his name), in his published statement and in the relevant transcripts, a cipher has, thus far, been used.

Criminal and extradition proceedings

The protected person, who is now 83 years old, is South African. He returned to live there in 1979 and continues to do so. He is accused of having committed numerous offences against numerous children who he is said to have abused at the schools. On 15 March 2017, a petition warrant containing seven charges was granted in respect of him. On 27 October 2017, a petition warrant containing one further charge was granted. I understand that the complainers in those petition charges include

individuals who had not provided written or oral evidence to SCAI before or during the case study hearings.

On 24 August 2018, an extradition request was sent to the South African authorities. The protected person is understood to have challenged his extradition and a hearing has been assigned for 17 March 2023. It is not known when the extradition proceedings – already prolonged – will be completed nor can their outcome be predicted. The possibility of him never returning to the UK seems very real and certainly cannot be ruled out.

The Fettes evidence finished on 17 December 2021 and following that, more of the schools' former pupils reported to the police that they had been abused by the protected person. Again, they are understood to include individuals who had not provided evidence to SCAI before or during the case study hearings. A third petition warrant containing a further 45 charges was granted on 18 May 2022. Subsequent to that and following further reports to the police of the protected person having abused children at the schools, a fourth petition warrant containing 29 charges was granted on 7 February 2023. Again I understand the complainers to include individuals who have not provided evidence to SCAI.

The third and fourth petition warrants remain "live" because the period of 12 months from their having been granted has not yet expired. Prosecution of the protected person in relation to the charges referred to in the third petition could go ahead if commenced before 18 May 2023 and prosecution of the protected person on the charges in the fourth petition could go ahead if commenced before 7 February 2024.

The protected person has also appeared before a magistrate in South Africa in relation to charges of having assaulted children at a school there where he taught for

many years after having returned from Scotland. That court appearance is understood to have taken place on 30 January 2023 and the case is due to call in court again in April 2023. It is not known whether that prosecution will take precedence over the extradition proceedings but it seems that the possibility of it doing so cannot be ruled out.

The media: references to the protected person, the allegations against him, and disclosures of his identity

During the case study hearings and immediately thereafter, there was widespread media interest in the allegations that the protected person had abused many children at the schools. Most of the reports referred to the protected person as "Edgar". The media interest continued thereafter. It has intensified.

In June 2022, episode 2 of a BBC Radio 4 podcast by Alex Renton, called "In Dark Corners" mentioned "Edgar" and his abuse of children at Fettes. Reliance was placed on material gleaned from SCAI transcripts so his apparent effort to adhere to the terms of the GRO is understandable. The radio presenter, Nicky Campbell, heard it, realised that Alex Renton was talking about a teacher he knew when he was a pupil at the Edinburgh Academy, and invited Alex Renton to feature in an episode of his own podcast, "Different with Nicky Campbell". In an episode released on 27 July 2022, the two journalists discuss allegations that the protected person abused children at the schools. The allegations they discussed included evidence that was not inquiry evidence; Nicky Campbell had not provided evidence to SCAI at all and neither man had provided evidence to SCAI about those allegations. A follow-up episode of Nicky Campbell's podcast was released on 5 October 2022.

On 9 January 2023, a follow-up episode to "In Dark Corners" was released. In it there was reference to the BBC having viewed court affidavits in South Africa in which the protected person had made significant admissions to offences he was

alleged to have committed when employed as a teacher in Scotland. The affidavits were sworn in relation to the extradition proceedings. The fact and nature of the admissions in them has, since then, been repeatedly referred to in media reports. The court documents identify the protected person including by use of his real name.

On 16 January 2023, Ian Blackford MP disclosed the name of the protected person in the House of Commons. Accordingly, his name now appears in Hansard, a publication which is freely available online. Also, whilst most media reports have continued to refrain from naming the protected person or referred to him as "Edgar", the Times, the Sunday Post and, at least initially, some Scottish editions of other newspapers, have identified him by using his real name. He has been identified in the South African press. His real name has appeared on social media including Twitter. It has appeared on websites including some hosted outwith the UK.

The reports include details about the protected person and about the details of the alleged abuse that are additional to the details covered in the evidence provided to SCAI. They are not confined to the reporting of inquiry evidence. Examples include reports that refer to an affidavit having been sworn by the protected person in South Africa in connection with the extradition proceedings, about it containing significant admissions of his having abused children at the schools and elsewhere, about why and when he first travelled to Scotland from South Africa, why he returned there, his employment since returning, about his having retired and about how he was spending his retirement.

The overall extent of the disclosure of the identity of the protected person including by use of his real name is extensive. And the disclosures in which his name is used are in the context of widespread reporting of the extensive abuse he is alleged to

have perpetrated against many children at the schools in which he is referred to by his pseudonym.

The Applications

I have received applications from Associated Newspapers and a number of other media organisations[8]. They seek permission to publish the name of the protected person and state they have made their applications because without such permission "to publish would be in contravention of the General Restriction Order". From that, I take it that they are asking for permission to publish inquiry evidence insofar as it identifies the protected person and I approach my considerations on that basis. As I have already explained, the GRO only prevents them publishing inquiry evidence insofar as it identifies the protected person.

However, there seems to have been a misunderstanding. Many of the organisations thought the GRO prevented them from identifying the protected person at all. That is, for the reasons I have explained above, not right. They did not appreciate that they were only prevented from publishing or disclosing inquiry evidence. Some media outlets have, accordingly, thus far refrained from identifying the protected person. That said, others have not and his name is stated in various media publications, by individuals on social media and on websites.

I have also received an application from George Scott, representing a group of over 40 individuals who he describes as "victims and/or related professional helpers" . The group seeks to help people who were impacted by the activities said to have been perpetrated by the protected person at the schools. It calls itself "Justice

[8] These applications were made on behalf of Associated Newspapers, Bauer Media, the BBC, Newsquest, Reach plc, National World Publishing Ltd, STV, News Group Newspapers Ltd, and the Telegraph Media Group.

Support". That application, in effect, also asks that I now permit the protected person's identity to be disclosed.

Opposition to the applications

The applications were opposed by the Lord Advocate and by the protected person.

Submissions in support of the applications

On behalf of **the media organisations**, Mr Hamilton KC referred to the issue raised by the media's applications being of the highest public concern and interest; it impacted on the confidence that many would have in our schooling system and the ability to hold alleged abusers to account. Regarding whether an alleged abuser should be identified, the high degree of public interest was, he said, a central component.

He referred to paragraph vi of the exceptions to the GRO as involving a " public domain test" and submitted that it was met. The identity of the protected person was already "out there". His real name was readily accessible on the internet including on websites hosted outwith the UK. There was widespread naming of the protected person on social media including via a post by another MP which has attracted 5000 views. His name was freely available in court documents in South Africa to which a journalist had been able to obtain access. The name of the protected person was openly stated in the House of Commons on 16th January 2023, a statement which was broadcast live on the BBC Parliament channel and recorded in Hansard. Following that statement, his name was published in a number of newspapers.

Putting his point rhetorically, Mr Hamilton asked "If all of this is not public domain, what is?". He did, however, accept that I had a discretion and showing that a protected person's identity was already in the public domain would not

automatically result in the granting of permission to disclose. He was right to recognise that.

The ability of the press to report freely was, Mr Hamilton submitted, of the highest public importance (*Guardian News and Media Ltd and ors [2010] UKSC 1*). Art 10 ECHR[9] was clearly engaged, their right to impart information was a constitutional principle (*MH v Mental Health Tribunal for Scotland [2019] CSIH 14 at paragraphs 36 and 42)* and the need for any restriction of it required to be convincingly demonstrated (*BBC Petitioners No 3 2002 JC 27, at paragraph 13)*. The question was not whether the press *needed* to identify a person, the point about Art 10 was that it conferred *the right* to do so; any restriction of that right and freedom required, accordingly, to be very narrowly construed. Further, it was important to remember that the right to press freedom arising from Art 10 also involved the right of the public to receive the information. Disembodied reporting should be avoided, the press should be able to name accused persons and they should be able to show photographs (*Guardian News and Media Ltd and others at paragraphs 63 to 65; MH v Mental Health Tribunal for Scotland at paragraphs 20, 27, 36, 42).*
I have no difficulty in accepting Mr Hamilton's summary of the relevant principles. However, the devil is, as it is so often, in the detail of the particular facts and circumstances of the individual case.

There was, he submitted, a strong public interest in holding to account a teacher in the position of the protected person and, in the particular circumstances of this case, in the freedom of the press to disclose the identity of the protected person. Granting the permission sought would support the principles of open justice.

Turning to the Lord Advocate's interest in the prosecution of crimes in Scotland and her overarching responsibility to protect the administration of justice including the protection of an accused person's right to a fair trial[10], Mr Hamilton accepted that there may be circumstances where restricting disclosure of the identity of an alleged abuser so as to avoid or mitigate the risk of prejudicing a fair trial is appropriate. He submitted that it would not, however, be appropriate to do so in the present case.

Anticipating the Lord Advocate's submission would be that if permission were granted that would give rise to a "substantial risk that the course of justice in the proceedings ….will be seriously impeded or prejudiced"[11] thereby bringing into play the provisions of the Contempt of Court Act 1981, Mr Hamilton submitted that, on the facts of the present case, the test of "substantial risk" would not be met. It was a deliberately high test and would not be made out. There were no imminent criminal proceedings in Scotland. Whilst there might be a trial in the future, the prospects of that happening were very uncertain because (i) there were separate criminal proceedings now taking place in South Africa in respect of alleged criminal activity by the protected person in that jurisdiction; (ii) those proceedings could take precedence; (iii) there are ongoing appeal proceedings in South Africa in relation to the Scottish extradition request and it is unclear when those proceedings will be completed; (iv) if the appeal proceedings succeed, there will never be a trial in Scotland; (v) even if the extradition request is granted in South Africa, no Scottish trial will take place in early course . The reality was that there may never be a criminal trial in Scotland or any such trial could be years away. Also, the identity of the protected person as an alleged abuser is already in the public domain yet the Crown have not, to date, claimed that that creates, for the purposes of section 2 of the Contempt of Court Act, a substantial risk of prejudice. No contempt of court

[10] See *Montgomery v HM Advocate 2001 SC (PC) 1 at p. 17D .*
[11] Contempt of Court Act 1981, section 2(2)

proceedings had been instituted. But even assuming that the current state of disclosure had created a risk of prejudice, the Lord Advocate would have to show that granting the permission sought would create an additional risk that was substantial.

George Scott made similar submissions, relying on the extensive media disclosure of the protected person's identity that had already occurred and the various means by which the man could readily be identified online and elsewhere. Regarding the protection of the administration of justice, he accepted that delays were inevitable but here, the delays were disproportionate; charges against the protected person had first been laid in 2016 but the Crown Office had, he said, written to him and another survivor advising that they were not taking any further action in relation to the extradition due to the age of the protected person and the detrimental impact that they would be likely to suffer. The protected person was, he and his group considered, "playing the game" and had lost all confidence in the Crown.

Regarding the importance of being free to identify the protected person, in his and the group's experience, when the man's real name is used in the public domain, it was, as he put it, very "revelationary". It made them feel they were getting somewhere and was a significant step to achieving justice. He observed that the extent of the activities of the protected person were such that were it not for him having been mentioned in SCAI's evidence and so subject to the GRO, his identity would have been widely published before now. His group also believed that granting permission would help to bring more victims forward both to add to the list of complainers in criminal charges, to add to SCAI's body of applicants, and to add to those who are pursuing civil claims. All this evidence needed to be heard. He and his group were worried that the GRO was an obstacle and was giving too much protection to the protected person.

I also heard brief **submissions from "Frank"** , an applicant who had given evidence to SCAI both by way of written statement and at the case study hearings relating to Fettes, in 2021. He supported Mr Scott's submissions and added some of his own. Identifying the protected person would, he felt, enable a lot of people to have a voice, to be heard and to be cured. The protected person was being evasive. Naming him would be of considerable assistance in helping those abused by him to recall what happened to them. It would be a "trigger to getting that stuff out which has been making a mess of your life for all these years."

Ben Mathewson, a South African solicitor who **represents the protected person** wrote to SCAI on 16th February 2023 opposing the applications. In the letter, he submits that his client's identity is in dispute given that when we were first in communication with him in 2020, we advised that differing first and middle names had previously been attributed to him. In so doing, he appears to have overlooked that whilst SCAI, in August 2020, provided his firm with the other names, it did so under explanation that these were aliases and that we were not referring to any persons other than his client i.e. the protected person. He referred to one of the charges relied on in the extradition proceedings as alleging conduct took place at a campus where the protected person did not teach. He referred to his client being subject to a current prosecution in the magistrate's court and stated that the magistrate had issued a order prohibiting the publication of any information relating to that charge prior to his client's appearance in court or prior to him having pleaded to it. He suggested that, in so doing, the magistrate was adhering to the GRO and that the same judicial respect should be shown by me for his order.

Mr Mathewson made no submissions at all about whether the extent of disclosure of the identity of the protected person in the public domain that has occurred affected the prospects of his client receiving a fair trial in Scotland.

On behalf of the **Lord Advocate**, Mr McNaughtan KC opposed the applications. He submitted that the GRO should continue to apply to the protected person. Central to his submission was that the Lord Advocate was concerned about the risk of prejudice to criminal proceedings in the event the applications were allowed. It was in the public interest for the GRO to be maintained. Its subsistence had not deterred individuals from presenting complaints to the police – many had done so, as evidenced by the current petitions involving 74 charges. If it were disapplied in relation to the identity of the protected person then the thinking of potential jurors might be influenced. Media exposure had been fairly contained thus far. Details of the abuse alleged to have been perpetrated by the protected person had been included in inquiry evidence and that evidence included statements by persons who were also potential Crown witnesses. The fact that the protected person's pseudonym had become enmeshed and repeated in media reports and its association with podcasts from two well-known journalists meant there might be less fading of the memories of potential jurors.

Mr McNaughtan did, however, accept that no trial was imminent and, at any trial, there would be protections in place such as the trial judge's directions which could be clear and firm. However, the Lord Advocate was seeking to contain and minimise potential prejudice. If permission was granted the concern was that that would pose a real risk to the integrity of contemplated criminal proceedings.

The Lord Advocate relied on two "tests".

The first was the test set by section 2 of the Contempt of Court Act 1981[12]. It was accepted that the GRO was freestanding and independent from any test set by

[12] The Contempt of Court Act 1981 provides that conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regarding of intent to do

section 2 but those provisions were flagged up as something to which regard should be had. Mr McNaughtan, with appropriate caution, went no further than saying that if the Crown becomes aware of potential contempt then it is considered carefully and action taken as seems appropriate. So far as I am aware, the Lord Advocate has not instituted contempt proceedings in relation to the publicity about the protected person and it was not said that she was intending to do so. Mr McNaughtan submitted that she did not, however, wish fuel to be added to the potential fire of prejudice.

The second was that, in addressing matters of anonymity, the least restrictive option should be adopted (*MH v Mental Health Tribunal for Scotland at paragraph 27*). The GRO was the least restrictive option because it only restricted disclosure of inquiry evidence and was not a total ban on identification of the protected person. All that the Lord Advocate was doing was to seek that the least restrictive option be maintained.

Decision

I have decided to permit inquiry evidence that identifies the protected person to be disclosed and published by any person who wishes to do so. The cipher that currently appears over his name in the inquiry's published transcripts and statements will be lifted and any redactions that have been made to protect his identity will be lifted. As regards the latter, there are few such redactions because I considered it important to the overall purpose of the case study to disclose details that, whilst they might have assisted in identifying him, were essential to the public interest in understanding the particular circumstances surrounding the abuse he is alleged to have perpetrated and the handling of those allegations.

---

so and section 2(2) provides that it applies to any publication which "creates a substantial risk that the course of justice om the proceedings in question will be seriously impeded or prejudiced."

I have borne in mind the fundamental importance of press freedom, as is recognised by section 18 of the 2005 Act. I have also borne in mind the need for any restriction by me of that freedom to be justified under section 19. I accept that an important aspect of the right of the press to impart information may include the ability to identify a particular individual. Lord Rodger, in an oft quoted passage put it this way:

"What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected."[13]

"Disembodied" reporting, as he referred to it, is the result of restricting disclosure of identity and it should be avoided.

The GRO is also very important. It recognises that, in the context of this public inquiry, there may be very good reasons for restricting the disclosure of inquiry evidence including, for example, evidence that identifies certain individuals; it has, accordingly, been carefully drafted so as to afford legitimate protection to persons who fall into certain categories, if such protection is likely to be justified. The GRO also, however, recognises the need to limit restriction at times and in particular circumstances. Thus, it expressly anticipates that, in an individual case, the circumstances may have become such as to show it is not appropriate to continue to restrict disclosure of identifying inquiry evidence such as where there has been disclosure of it and/or associated information in the public domain.

[13] *In re Guardian News and Media [2010] 2AC 697, at paragraph 63.*

In this case, the nature and considerable extent of relevant information about Iain Wares that is in the public domain about his background, about the circumstances in which he came to and departed from the UK, about his employment as a teacher at the schools, about the nature and extent of the abuse the man known as Iain Wares is alleged to have perpetrated, and of the nature and extent of his admissions in the South African affidavit, of themselves, present a powerful case for granting the permission sought.

Further, the public interest in not just knowing that it is said that a teacher at the schools perpetrated dreadful and widespread abuse against children there, over a lengthy period, but in also knowing the identity of that teacher does, I accept, carry considerable weight. Added to that, I accept and take account of the fact that, as Mr Scott and "Frank" explained, it matters to them and, in Mr Scott's case, also to members of the group he represents.

But what about the public interest in the administration of justice and Wares' own interests in a fair trial? These are, I accept, also important considerations and often weigh heavily against disclosing the identity of a person who, in inquiry evidence, is alleged to have abused children in care, at least initially. I say "initially" because I may, for example, at a later stage decide to name an alleged abuser if I am satisfied, on the inquiry evidence, that the person did abuse children, particularly if it seems clear that there will be no trial.

In his careful submissions, Mr McNaughtan really went no further than saying that there could be prejudice if I granted the permission sought. He did not, for instance, suggest that doing so would create a substantial risk that the course of justice would be seriously impeded or prejudiced – the contempt of court test. He was wise not to do so as the facts before me do not support such a conclusion.

So far as the possibility of potential jurors being influenced is concerned, Mr McNaughtan did not submit that their memories would not fade; he only suggested that their memories may fade less than they would if no well-known journalists were involved. Also, he recognised – as he had to do – that if a trial was to take place, it would not happen any time soon and may never happen at all. The ongoing extradition proceedings, the opposition to those proceedings, the fresh prosecution in South Africa and Wares' age are all fraught with uncertainty and lead me to the inevitable conclusion that there is likely to be ample time for the dimming of the memories of potential jurors leaving them with little recollection of what was in press reports and the like. And the protection afforded by the clear and appropriate directions that any trial judge can be expected to give to a jury is a powerful factor.

Later on in the same day that the applications were heard, the opinion of the court in the appeal *Natalie McGarry or Meikle v HMA [2023] HCJAC 8* was issued. In 2022, the appellant had been convicted of two charges of embezzlement and sentenced to imprisonment for 2 years. Pre-trial publicity included reports that the accused had previously pled guilty to the charges some 3 years before and ultimately been allowed to withdraw those pleas with reports focussing on that withdrawal, puzzlement that she was allowed to do so and carrying the implication that she must surely be guilty. Her circumstances were remarkably comparable to those of Wares, whose sworn affidavit admitting to having abused children and the circumstances surrounding it are in the public domain as a result of press reports.

Natalie McGarry appealed against conviction on the ground that the pre-trial publicity was such as to deprive her of a fair trial. Her appeal was refused. The Court referred to a number of matters as countering any suggestion that she had not a fair trial. They included that the sheriff had given clear and detailed directions to the jury that they must only take account of the evidence put before them and had

done so repeatedly. Jurors were sensible adults and were, furthermore apt to focus on the trial evidence. Reliance was placed on Lord Bracadale's observations in his note dated 18th November 2011, in the case of *Sheridan v HMA:*

"the focusing effect of listening to evidence over a prolonged period ….will be a powerful safeguard. The focusing effect of listening is not a polite fiction. It is within the daily experience of judges and counsel that juries do become engrossed in the evidence and return verdicts which reflect the evidence……..listening to the evidence and hearing it being tested in cross-examination in the immediacy of the court environment will be likely to focus the minds of jurors on what they are hearing in court. That is more likely, in my view, to dispel notions that they may have picked up from reading prejudicial material, rather than to reinforce preconceived views. In addition, the jury will have regard to the evidence as a whole, which is a significant consideration."

The *McGarry* case involved a long trial and a multiplicity of witnesses and documents. The court said that the "focussing effect of all this would have been significant." and found it "impossible" to say that the trial was unfair.

In all these circumstances, I am not persuaded by the submissions for the Lord Advocate. I cannot properly conclude there is a substantial or even a significant risk that giving permission now for inquiry evidence identifying Iain Wares to be disclosed or published will so add to information about him that has already been and may yet be disclosed (because it is not and never has been caught by the GRO) as to give rise to a substantial or even significant risk of impeding the administration of justice or the chances of a fair trial.

Turning finally to the submissions tendered on behalf of Mr Wares, I reject his suggestion that there is a genuine issue as to the identity of his client. At no time since it was confirmed to Mr Mathewson, in August 2020, that all the nomenclature

in question related solely to his client (Iain Wares) has it, until now, been suggested otherwise. The challenge he makes to the specification of a campus referred to in one of the charges in one of the extradition petitions can no doubt be dealt with in the extradition proceedings but I do not see it as relevant to the issue I have to determine. Nor do I accept it as having been shown that the magistrate before whom Wares appeared in January issued the order to which he referred because of the GRO, particularly since his order did not relate to non-disclosure of inquiry evidence and the reach of the GRO does not extend to South Africa where neither I nor the Scottish courts exercise any jurisdiction.

The permission I give to disclose or publish inquiry evidence that identifies Iain Wares is given with immediate effect.