

Thursday, 23 February 2023

1

2 (10.00 am)

3 LADY SMITH: Good morning, and welcome to this hearing
4 that's been fixed today to enable those who have
5 presented applications for permission to disclose
6 evidence of a protected person, and also to enable
7 people to present that, and to enable those who oppose
8 that application to present oral submissions in support
9 of their opposition.

10 The way things are going to run today is I'm going
11 to begin by inviting Mr Hamilton, who appears for
12 Associated Newspapers and others to address me.

13 Then I'll move to Mr McNaughtan, who appears for the
14 Lord Advocate.

15 Then I'll move to Mr Scott.

16 Then we'll probably have a break at that point,
17 although if, after Mr McNaughtan has spoken, it seems
18 appropriate to stop then, we will have the break then.
19 But either before or after Mr Scott we will have
20 a break.

21 Finally, I will invite Counsel to the Inquiry,
22 Mr Brown, to address me. I hope that helps people work
23 out exactly what's going to happen here.

24 I should maybe also, at the outset, let you know
25 that you will not get a decision from me today. In

1 terms of my General Restriction Order, any decision
2 would have to be in writing in any event. But it is
3 also important on an issue such as this that, having
4 listened to everything that everybody has to say, I take
5 a little time to consider it and reflect on it and I'll
6 issue my decision in writing later.

7 As I've said, what I would like to do, if I may, is
8 turn first of all to Mr Hamilton who appears for
9 Associated Newspapers and others.

10 Mr Hamilton, whenever you are ready, I'm ready to
11 hear you.

12 MR HAMILTON: Thank you, my Lady. Can I check -- I'm not
13 sure my microphone is on.

14 LADY SMITH: Are the two little red lights on?

15 MR HAMILTON: No, I don't think they are.

16 LADY SMITH: Ah, just a moment.

17 Submissions by Mr Hamilton

18 MR HAMILTON: Thank you, my Lady.

19 Can I check, first of all, that my Lady is content
20 that this is done from a sedentary position as opposed
21 to standing?

22 LADY SMITH: Whatever is most comfortable for you,
23 Mr Hamilton, I am happy with that.

24 MR HAMILTON: I am obliged, my Lady.

25 My Lady, I appear in this matter on behalf of

1 a range of media interests. Just for the record, that
2 includes The Telegraph Media Group, News Group
3 Newspapers, Scottish Television, the Scotsman, and
4 that's National World Publishing Limited, Reach plc, who
5 publish the Daily Record, Newsquest, who publish the
6 Glasgow Herald, or the Herald, the Times and The
7 National, the BBC, Bauer Media and
8 Associated Newspapers, publishers of, amongst other
9 things, the Scottish Daily Mail. Those interests have
10 come together to present a concerted position. I am
11 instructed in this matter by Mr Deane of BKF Solicitors.

12 LADY SMITH: Thank you.

13 MR HAMILTON: My Lady, by way of introduction, it will be
14 obvious that my principal motion today is to move the
15 chair to apply exception VI of the GRO in recognition
16 that the criterion of the name of the protected person
17 being in the public domain is now met. And it may be
18 helpful to those listening -- I'm very conscious,
19 my Lady, that there will be victims and others listening
20 to these proceedings, so it may be helpful if I simply
21 read out what that exception is so that we're all clear.

22 LADY SMITH: That's very helpful, because of course not
23 everybody will have the General Restriction Order in
24 front of them. Thank you.

25 MR HAMILTON: Indeed so.

1 The General Restriction Order would not allow the
2 name of the protected person to be published, but there
3 was contained within the --

4 LADY SMITH: Can I just pause there a moment, Mr Hamilton.

5 MR HAMILTON: Yes.

6 LADY SMITH: I promise I won't keep interrupting you.

7 MR HAMILTON: No, no.

8 LADY SMITH: To understand the General Restriction Order in
9 its entirety, you do have to start by recognising that
10 what it says is that Inquiry evidence identifying
11 a protected person cannot be disclosed without my
12 permission. That's the starting point, okay?

13 MR HAMILTON: Yes.

14 LADY SMITH: We are talking about Inquiry evidence here, and
15 that could be documentary or oral evidence.

16 MR HAMILTON: Yes.

17 LADY SMITH: Then you are taking me to VI of the exceptions
18 in which certain things are said now, so do carry on.

19 MR HAMILTON: Yes, at the time that order was put in place
20 a range of exceptions were obviously attached to that,
21 envisaging precisely this type of scenario where matters
22 came into the public domain.

23 LADY SMITH: Yes.

24 MR HAMILTON: The terms of exception VI are:

25 "The chair may permit the identities of protected

1 persons to be disclosed and/or published where such
2 identities, and the fact that they have made or have
3 been subject to allegations of abuse, are already in the
4 public domain."

5 Then it goes on:

6 "Or, otherwise, if she considers it appropriate in
7 all the circumstances to do so."

8 I would simply note in passing that that is an "or"
9 and not an "and". My principal submission is, if this
10 matter is in the public domain, which I say it is, and
11 I will go on to explain why that is, then the terms of
12 exception VI are met. So whilst there are a range of
13 complexities that we will doubtless get into, a starting
14 position is that if it's in the public domain it's open
15 to my Lady to do that.

16 LADY SMITH: Just run that past me again, Mr Hamilton. I am
17 not sure I am following you here.

18 We start with the possibility, the chair may permit,
19 may permit --

20 MR HAMILTON: Yes, absolutely.

21 LADY SMITH: -- if the identity is protected, the particular
22 identity protected, is already in the public domain?

23 MR HAMILTON: Yes.

24 LADY SMITH: So the important words -- and this isn't
25 a statute --

1 MR HAMILTON: No, no.

2 LADY SMITH: -- this is an order using a power under the
3 2005 Act. I have decided that I may, where matters are
4 already in the public domain, where the identities are
5 already in the public domain, allow disclosure,
6 notwithstanding that prima facie the person is one of
7 the protected persons, within one of the categories of
8 protected person.

9 MR HAMILTON: Precisely so. Precisely so. So it's
10 a discretion that exists, but the importance of that is,
11 I think in the written submission, I had simply
12 corrected the perception that this was an application
13 for disapplication of my Lady's order. It isn't. It is
14 simply seeking to utilise the express terms of that
15 order, including the exceptions which were specifically
16 set down at the time of the order.

17 So it is not to disapply the order. It is actually
18 to apply the order, on that view.

19 LADY SMITH: Right.

20 MR HAMILTON: It is important that that exception was
21 included at that time, and we don't need to go to it at
22 the moment, but my Lady will perhaps have seen in the
23 written submissions I made reference to section 12 of
24 the Human Rights Act, which relates to the question of
25 interim interdict in proceedings that impact on

1 Article 10 concerns, and that's what we're dealing with
2 here on behalf of the media.

3 In section 12, there are two matters that the court
4 will look at when considering an infringement of
5 Article 10. One of those is the public domain. So the
6 question of whether it's in the public domain or not is
7 a matter that the courts routinely look at when
8 considering whether or not there should be publication.
9 I suppose for a very obvious reason: if it's out, it's
10 out, in shorthand.

11 I simply make the point that in relation to
12 exception VI, it's not surprising that exception VI is
13 there. In fact, it is entirely consistent that
14 exception VI was included with the normal run of events
15 in considering Article 10 cases.

16 But all I seek to do is to rely upon that exception,
17 if my Lady is persuaded that these matters are already
18 in the public domain.

19 I'll come back to that in greater detail in
20 a moment, my Lady. If I can just say by way of a road
21 map as to how I'm going to deal with matters, yesterday
22 afternoon for the first time I was given sight of the
23 submissions on behalf of the Lord Advocate. That has
24 two consequences.

25 The first is that the previous focus on the

1 potential privacy concerns under Article 8, which was
2 the main thrust of the written submissions, it was
3 envisaged, my Lady, in a vacuum, that there may have
4 been an objection taken by, for example, some victims,
5 or, indeed, the protected person that there was some
6 Article 8 right to privacy concern that would arise. So
7 the written submissions, in anticipation of that,
8 addressed the balancing question between Article 8 and
9 Article 10.

10 That is no longer really the thrust of the argument
11 this morning because, as it happens, no such argument is
12 taken against publication on that basis. I would
13 therefore simply adopt the detailed written submissions
14 in relation to any matters of privacy which arise.

15 My Lady will be aware that the only submissions that
16 have actually been made on behalf of victims are
17 submissions which are in support of publication, not
18 opposing it.

19 I would, however -- in a moment I will return to one
20 aspect of that argument, which was the public interest
21 argument, which was contained in the written
22 submissions, and I will just amplify those slightly, and
23 with my Lady's permission go to a number of paragraphs
24 in the written submission, because those listening will
25 not have that in front of them and it would be helpful

1 for those listening to understand it.

2 So that's the first consequence.

3 The second is that there is a new argument, which is
4 not foreshadowed in the written submissions at all,
5 which is on the question of the Contempt of Court Act.
6 My Lady will have seen that the Lord Advocate's
7 opposition is predicated on reliance on section 2 of the
8 Contempt of Court Act and the suggestion that
9 publication may give rise to a significant risk of
10 prejudice.

11 That, therefore, will have to be the focus of my
12 submissions orally this morning, and it will be the
13 principal matter that I want to address.

14 Before doing so, I said that I would come back to
15 the question of public interest just before leaving
16 that. My Lady will maybe see at -- I'm referring to
17 paragraphs 26-34 of the written submissions. Just to
18 put this matter in context, and I don't want to move
19 from the public interest argument too quickly, lest it
20 give any impression that that is not insisted upon as
21 a major component of the submission this morning, but it
22 will be clear, paragraph 27, what is said is:

23 "The present matter is one of an individual who is
24 alleged to have committed serious sexual offences
25 against children in his care when a teacher at a leading

1 private school in Scotland over many years. It is now
2 apparent that allegations of similar offences exist in
3 multiple schools in South Africa, it is therefore
4 a matter of the highest public concern and interest and
5 impacts on the confidence many will have in our
6 schooling system and in the ability to hold alleged
7 abusers to account.

8 "Further, it has been placed in the public domain as
9 a consequence of evidence to a major and high-profile
10 public Inquiry, funded by public money, which will
11 report to Parliament and to the Scottish people. The
12 protected person has further been named on the floor of
13 the House of Commons, the public chamber within which
14 the concerns of the public and constituents are rightly
15 raised."

16 It was on that basis that it was submitted that
17 there can be no question that the freedom of expression
18 sought is on a matter of profound public concern, and
19 I can't imagine that that's a controversial proposition.

20 LADY SMITH: It all depends what you are including in the
21 matter. I suppose, Mr Hamilton -- you will no doubt
22 address me on this -- but what you're seeking here is to
23 add to the many factors that are in the public domain,
24 the identity.

25 MR HAMILTON: Yes.

1 LADY SMITH: To say that the abuse of children is a matter
2 of profound public concern is, if I may say, obvious.
3 I've been looking at that for years.

4 MR HAMILTON: Yes.

5 LADY SMITH: To say that it's a matter of profound public
6 concern that the identity of an alleged abuser is known
7 is a different issue.

8 MR HAMILTON: It is, my Lady. But when my Lady comes to
9 consider the identification, the degree of public
10 interest is a central component, and all I seek to do is
11 to underline that.

12 My Lady will see at 28 that the widespread nature of
13 that interest and concern can be evidenced, and is, in
14 terms of examples that are included in the appendix --
15 I don't intend to go to those, I am sure my Lady has had
16 an opportunity to see them or, if not, will have
17 an opportunity.

18 I also draw attention to the fact that there are
19 criminal proceedings elsewhere, and I appreciate that
20 that is a matter that we'll come back to. But for the
21 purposes of the public interest, that matters, as does
22 the fact that extradition to this jurisdiction to face
23 multiple additional criminal charges of sexual and
24 physical abuse of children is an ongoing matter. That
25 is under appeal, as I understand it, but the only point

1 I make in this context is that it's obviously, as
2 my Lady says, and plainly a matter of the highest public
3 interest as a live criminal prosecution.

4 There is also, of course, public interest in the
5 concern over the delays in that process, which will be
6 more eloquently spoken to by others.

7 My Lady will see at paragraph 31 that I note that in
8 the course of the extradition proceedings the protected
9 person has been publicly named, and from those
10 extradition proceedings, it is understood that there has
11 been admission to aspects of that criminal conduct and,
12 indeed, an expression of remorse.

13 I note, my Lady, that -- and it is accepted by the
14 Lord Advocate -- the ordinary position would be that in
15 a public prosecution a name would be published.

16 Now, my Lady raises a question as to why the
17 addition of the name matters. At paragraph 33 I address
18 that, and I do it by reminding the chair that there is
19 the highest judicial recognition that the ability of the
20 media to report fully is in itself a matter of public
21 interest, and additionally engages the public in matters
22 of public importance.

23 It is worth going to the authority of Guardian News,
24 which my Lady will see there, a very short passage.
25 Does my Lady have that in the tab?

1 LADY SMITH: Just give me a moment. Yes.

2 MR HAMILTON: It's tab 7, my Lady. This, of course, is
3 a Supreme Court case. It's a well-thumbed opinion of
4 Lord Rodger. I won't take up time, my Lady, with the
5 particular details of the case. But the important part
6 for the purposes of answering the question my Lady has
7 asked is at paragraph 63. Does my Lady have that?

8 LADY SMITH: Yes, I do, thank you.

9 MR HAMILTON: Yes, and just reading paragraphs 63-65:

10 "What is in a name? [says Lord Rodger] A lot, the
11 press would answer. This is because stories about
12 particular individuals are simply much more attractive
13 to readers than stories about unidentified people, it's
14 just human nature, and this is why, of course, even when
15 reporting major disasters, journalists usually look for
16 a story about how particular individuals are affected.
17 Writing stories which capture the attention of readers
18 is a matter of reporting technique and the European
19 Court holds that Article 10 protects not only the
20 substance of ideas and information but also the form in
21 which they are conveyed. More succinctly, Lord Hoffmann
22 observed in Campbell, 'Judges are not newspaper
23 editors'."

24 There's also reference to Lord Hope and the BBC
25 case:

1 "This is not just a matter of deference to editorial
2 independence, the judges are recognising that editors
3 will best know how to present material in a way that
4 will interest the readers of their particular
5 publication and so help them to absorb the information.
6 A requirement to report in some austere abstract form
7 devoid of much of its human interest could well mean
8 that the report would not be read and the information
9 would not be passed on. Ultimately such an approach
10 could threaten the viability of newspapers and
11 magazines, which can only inform the public if they
12 attract enough readers and make enough money to survive.
13 Lord Steyn put the matter succinctly in *Re S*, when he
14 stressed the importance of bearing in mind that, 'From
15 a newspaper's point of view a report of a sensational
16 trial without revealing the identity of the defendant
17 would be a very much disembodied trial. If the
18 newspapers choose not to contest such an injunction,
19 they are less likely to give prominence to reports of
20 the trial. Certainly readers will be less interested
21 and editors will act accordingly. Informed debate about
22 criminal justice will suffer. *Mutatis mutandis* the same
23 applies in the present case as a report of the
24 proceedings challenging the freezing orders [which is
25 what this case was about] which did not reveal the

1 identity of the appellants would be disembodied.
2 Certainly readers would be less interested and realising
3 that, editors would tend to give the report a lower
4 priority. In that way informed debate about freezing
5 orders would suffer. On the other hand, if newspapers
6 can identify the people concerned they may be able to
7 give a more vivid and compelling account which will
8 stimulate discussion about the use of freezing orders
9 and the impact on the communities in which the
10 individuals live, concealing their identities simply
11 casts a shadow over entire communities'."

12 I simply draw the court's attention to the fact that
13 there is a public interest, not just in the subject
14 matter, not just in the generality, but that there is
15 an acceptance that Article 10 extends to matters such as
16 naming. That's not determinative of the matter,
17 my Lady, of course it isn't, but it is an important
18 consideration, and that was accepted and reinforced by
19 the Lord President in the MH case.

20 LADY SMITH: Before you go to MH, don't I have to recognise
21 that Lord Rodger was careful to tie his remarks to the
22 cases that were before the court and the particular
23 facts of the cases that were before the court?

24 Are you saying that a report of -- well, it wouldn't
25 be a report of proceedings, you see. It would be

1 disclosure of the identity of a person identified in
2 Inquiry evidence, that that without the actual name,
3 without the identifying features in it, would result in
4 a disembodied report?

5 MR HAMILTON: To some extent it would.

6 LADY SMITH: Well, there have already been numerous reports
7 of the evidence which did not breach my GRO that set out
8 months ago --

9 MR HAMILTON: Yes.

10 LADY SMITH: -- quite a clear picture of what it was this
11 Inquiry had been told about the activities of the
12 protected person.

13 MR HAMILTON: My Lady, that goes to the heart of, if you
14 like, the conceptual way to approach Article 10 in my
15 submission.

16 The point that's been made is not that a report
17 can't be made. As, indeed, my Lady says, there have
18 been reports throughout the years of this Inquiry.

19 LADY SMITH: Are you saying they were disembodied reports?

20 I'm not trying to be difficult, Mr Hamilton,
21 I'm really just trying to understand the point.

22 MR HAMILTON: Yes. So the position of a disembodied report
23 was the position from Lord Steyn, and what he was
24 describing was what I say is the case, which is that
25 insofar as a full report naming an individual, for

1 example in a criminal trial, he says not being able to
2 name that individual will lead to disembodied reporting.

3 To the extent that there is any infringement and any
4 restriction on what is happening in a public judicial
5 forum, then Article 10 is engaged. So not naming I say
6 is something which does emphatically impact on
7 Article 10, and I simply draw my Lady's attention to the
8 fact that what has been said about naming is that it is
9 a matter of real importance that, where at all possible,
10 the media is able to do that.

11 That's not to say that other reports can't be
12 written, but that is the other end of the telescope.
13 That's to say: why do you need to do this? The point
14 about Article 10 is that there is a right to do it,
15 unless displaced by something which is fairly
16 compelling, and usually on a statutory basis.

17 Because the same case of *Re S* makes very clear that
18 where there are a range of statutory exceptions to the
19 freedom of reporting, that should be very narrowly
20 construed, and that any addition to that should be very
21 restrictively approached.

22 That's the generality of the point I make in
23 relation to name, and I rely on that authority which has
24 been accepted, as I say, in the highest courts in this
25 jurisdiction.

1 It's worth noting and reflecting on the discussion
2 about statutory exceptions. That is of direct relevance
3 to what I'll go on to submit in relation to the approach
4 to section 2 of the Contempt of Court Act. That, in my
5 submission, would be a good example of where there are
6 statutory protections and that those will be in place.
7 But that, I would say -- and I will come on to say -- is
8 a reason why this Tribunal should not have an additional
9 order standing the existence and the application of
10 section 2 as a statutory restriction on freedom of
11 reporting.

12 My Lady, that's all I want to say about the public
13 interest arguments that are ventilated in the note --
14 forgive me, my Lady. (Pause)

15 My Lady, I was going to come on to MH later, but
16 given that it's been raised, would my Lady prefer that
17 I do that now?

18 LADY SMITH: Please do. Yes, I think I stopped you going
19 there to ask you about what Lord Rodger had said, thank
20 you.

21 MR HAMILTON: Yes, it's relevant for a number of different
22 purposes in this morning's hearing. But my Lady will
23 see tab number 6.

24 LADY SMITH: Yes.

25 MR HAMILTON: I was simply going to take my Lady to the fact

1 that at paragraph 20 of the Lord President's opinion,
2 which is on page 10, dealing with, it's a Mental Health
3 Commission case, and I don't think there's any need to
4 take my Lady to the background of the case given the
5 pressing time, but at paragraph 20 the Lord President
6 says:

7 "All of this points to a continuing requirement for
8 the courts to continue to publish information on the
9 cases coming before them. A lawyer might still query
10 the need for a party's name to be published. Insofar as
11 the development of the law is concerned, the identity of
12 a party may be seen as irrelevant, however the need to
13 identify the parties was comprehensively explained by
14 Lord Rodger in Guardian News, when he answered his own
15 question 'what is in a name?' by saying 'a lot'. The
16 press are required to name names in order to attract
17 readers and hence promote continued scrutiny of the
18 civil justice system."

19 I simply take my Lady there as confirmation of the
20 position outlined in the previous authority.

21 LADY SMITH: The issue, of course, that's being dealt with
22 by the Lord President there is whether parties to a case
23 coming before a court should be identified. Now, just
24 to be clear, we're not talking about parties to a case
25 coming before an Inquiry.

1 MR HAMILTON: No.

2 LADY SMITH: No case comes before an Inquiry at all.

3 MR HAMILTON: No, that's right. No, no, but I rely on the
4 principle.

5 LADY SMITH: Just to be clear, the protected person here is
6 not comparable to a party in a litigation?

7 MR HAMILTON: No, but nevertheless it comes to the principle
8 of being able to name, in my submission, is the same.
9 Because it comes, again, from -- under Article 10, it's
10 the Article 10 right which is what's important in that
11 context. That is, as my Lady is aware, a dual right for
12 the media to impart information under Article 10 and the
13 right of the public to receive information under
14 Article 10.

15 So, as a matter of principle, I say that applies.

16 Then paragraph 21, the Lord President goes on:

17 "Before considering what derogations or exceptions
18 from the general principle of open justice are
19 available, it's important to distinguish in two
20 procedures."

21 He talks about the court's power at common law,
22 excluding the public, and he talks about the
23 anonymisation of opinions, which we don't really need to
24 go to.

25 In fact, I don't think we need to get into

1 paragraph 21 particularly.

2 What is clear in this judgment, if my Lady sees in
3 paragraph 36, which is actually the opinion of
4 Lord Justice Clerk, it's worth just noting that the
5 strength of the principle of open justice is again
6 enshrined there:

7 "As is clearly identified in A v Secretary of State
8 for the Home Department the rule of open justice is
9 a constitutional principle departure from which requires
10 a compelling justification, and should extend only to
11 the degree that the public interest of necessity
12 dictates."

13 Again, that emphasis on necessity takes us straight
14 into the Article 10 jurisprudence, because that is the
15 language of Article 10.

16 LADY SMITH: Right.

17 MR HAMILTON: That derogations from Article 10 are only
18 where it is necessary.

19 My Lady, in terms of the substance of what I wanted
20 to say in relation to the public domain, there are three
21 essential positions that I want to put to the Inquiry
22 this morning.

23 The first is that the evidence that the name of the
24 protected person is in the public domain is clear,
25 unequivocal and evidenced. That being so, the

1 application under the terms of exception VI should be
2 granted.

3 Secondly, this is where we come on to consider the
4 Lord Advocate's position, the contempt of court
5 provisions, properly understood, do not support or
6 require the name of the protected person to be
7 additionally anonymised by this Inquiry.

8 LADY SMITH: Sorry, just say that again, Mr Hamilton.

9 MR HAMILTON: The contempt of court provisions, properly
10 understood, do not support or require the name of the
11 protected person to be additionally anonymised by this
12 Inquiry.

13 The contempt of court provisions, in my submission,
14 are a freestanding and separate statutory protection
15 which operate outwith this Inquiry.

16 The appropriate approach, therefore, is to allow
17 that statutory regime, complete with the full statutory
18 protections for the administration of justice, to
19 operate.

20 That's the second position that I put.

21 The third, that in any event the position from the
22 Crown, attempting to rely on the terms of section 2 of
23 the Contempt of Court Act 1981 is flawed. That's for
24 two reasons.

25 First, the test in section 2 is not met on the facts

1 of this case. The granting of this application,
2 particularly in light of what is already in the public
3 domain, would not cause -- as it must for the Lord
4 Advocate to be correct -- a substantial risk that the
5 course of justice in the proceedings in question will be
6 seriously impeded or prejudiced. That is the test in
7 section 2, and I say that's not met.

8 It is also flawed for a second reason, which is that
9 even if my Lady is against me on that, the very fact
10 that the section 2 provisions are live, and it is
11 absolutely freely conceded and agreed that they are
12 live, and that they apply -- and that's agreed -- that
13 makes the continuation of the GRO in relation to the
14 name of the protected person both unnecessary and
15 disproportionate for the purposes of Article 10
16 jurisprudence.

17 LADY SMITH: Why? You say the very fact that proceedings --
18 I think the statutory language is "active" rather than
19 "live", it doesn't matter.

20 MR HAMILTON: Active.

21 LADY SMITH: That they're active, that makes the
22 continuation, as you put it, of the General Restriction
23 Order regarding the protected person unnecessary and
24 disproportionate. Tell me why.

25 MR HAMILTON: I'm going to come on to that in some detail in

1 a moment, my Lady. But to answer the question directly:
2 my position is that the statutory regime, which is the
3 exception, is a scheme that was developed under the
4 Contempt of Court Act by Parliament, specifically to
5 take into account the impact of convention rights. We
6 will see that in the authorities in a minute. That was
7 the purpose.

8 What the Lord Advocate seeks to do is to say because
9 section 2 applies, that's a reason why this Inquiry
10 should have a restriction. I say that it works exactly
11 in the opposite direction: because section 2 applies,
12 because section 2 means that if the media does anything
13 that breaches section 2 they will be subject to the full
14 might and weight of a prosecution for contempt. That is
15 the protection that Parliament says should exist.

16 In that context, when this Inquiry, as it must,
17 starts to consider whether the order remains
18 proportionate and necessary as an infringement of
19 Article 10, the existence of section 2 and its
20 application is a compelling reason why the restriction
21 in relation to naming should be lifted.

22 LADY SMITH: You're saying that's a strong disincentive to
23 doing anything?

24 MR HAMILTON: I'm saying it's more than that. Section 2
25 is -- that is in perpetuity the law. That is something

1 that must be obeyed at all times by every single media
2 organisation seeking to publish anything. It is their
3 risk that they take, because Parliament says that that's
4 the right balance between an Article 10 right and the
5 protection of the administration of justice.

6 LADY SMITH: You add that they know that if they overstep
7 the mark and breach section 2, they could be punished
8 and punished quite severely?

9 MR HAMILTON: They absolutely do.

10 LADY SMITH: And we see examples of that in previous cases.

11 MR HAMILTON: We do.

12 LADY SMITH: But, of course, proceedings would need to be
13 taken against them. It's not automatic.

14 MR HAMILTON: That is right. Although there are fairly
15 recent examples of a relatively keen approach to that,
16 shall we say, in Crown Office.

17 The point is, that is not something that's to be
18 prayed in aid of a further restriction. It is the very
19 reason that there shouldn't be another restriction,
20 because that exists. That is what the appropriate means
21 of balancing freedom of expression and the
22 administration of justice looks like. It is something
23 that, regardless of anything that this Inquiry does or
24 does not do, exists. That's the safety net.

25 Against that, what the Lord Advocate would have to

1 say is that even with section 2 in play, even with the
2 power to prosecute, and even with sanctions in
3 a criminal court, even with that, it would be necessary
4 and proportionate to further infringe Article 10 rights
5 of the media with the ongoing restriction. That's why
6 I say that it isn't either necessary or proportionate,
7 for precisely the opposite reason than the one that the
8 Lord Advocate gives.

9 The Lord Advocate's sole legal reason, amidst other
10 things that are said, but the justification that my Lady
11 is asked to accept for the ongoing restriction is, we
12 think it breaches section 2. Well, if it breaches
13 section 2, section 2 gives you a remedy. That's the
14 answer.

15 That is a matter, in my respectful submission, for
16 a prosecution in a different place.

17 That may well mean that there are some extremely --
18 it may well mean that there remain very significant
19 restrictions on the media. That may be true. It may
20 well mean that the media has to run, as it runs in every
21 major criminal trial and daily, a range of risks of
22 things it can't publish, difficult decisions for
23 editors, legal advice and all the rest of it. But
24 that's the regime, that's what operates. It will be no
25 different to that. And if the media get it wrong and

1 they overstep, they will be prosecuted and they will be
2 punished.

3 My Lady, that was the third of the matters I was
4 going to go to, but it has been helpful to deal with
5 that now, perhaps.

6 In relation to the first, which was the question of
7 the public domain, my Lady will remember that my primary
8 position is that it's already out. And if it's already
9 out, then it is open to my Lady simply to resolve the
10 matter on that basis. Particularly in light of the
11 exchange of a few moments ago, because there is that
12 safety net and there is that protection and there is
13 that statutory regime.

14 In relation to the written submissions, my Lady, I'm
15 going --

16 LADY SMITH: You will know that as against that, the Crown
17 say: well, it's been quite restricted, it's been fairly
18 contained, and we know that a lot of -- you laugh,
19 Mr Hamilton, but a lot of newspapers have not identified
20 the protected person, a lot of media outlets have not
21 identified the protected person. I know how many
22 individual reports might be able to be pointed to where
23 he has been identified, but there are a lot where care
24 has been taken not to do so.

25 What is your response to that?

1 MR HAMILTON: Yes.

2 LADY SMITH: Because it's not every single report about
3 these matters has identified the protected person.

4 MR HAMILTON: No, absolutely not. My Lady is entirely
5 correct, absolutely not every report. Indeed, many
6 media organisations have taken the view that, standing
7 my Lady's order, that's the right approach.

8 But, again, the test of it being in the public
9 domain, in my submission, is not one that says not every
10 newspaper has done this. What we need to have
11 an appreciation of is the degree to which this is now
12 available in an interconnected world where people can
13 view things on the internet. But it's not even just
14 about what's abroad.

15 Perhaps I can take my Lady back to the written
16 submissions at paragraphs 9-13, because it gives
17 a flavour.

18 Those listening to this won't have access to the
19 various appendices, and I won't, unless my Lady wants me
20 to, go to them, in one case because it might risk
21 actually naming the protected person, but in essence the
22 evidence of the protected person's name being in the
23 public domain in my respectful submission is very clear
24 and very compelling. The name is freely available,
25 right now, on the internet. It is on a range of sites

1 outwith this jurisdiction, but obviously available from
2 here. Those are a few examples, put together at very
3 short notice, are included as appendix A.

4 Beyond that, the naming of the protected person is
5 widespread on social media. Those examples are included
6 as appendix B. One of those, just to take that as
7 an example, is another Member of Parliament.

8 At the time that that was captured for the purposes
9 of putting it into this Inquiry, that, I see, had 5,000
10 views, even from that one person.

11 I have already noted, my Lady, that the name of the
12 protected person is freely available within the court
13 documents relating to the extradition proceedings
14 against that person in the High Court in South Africa,
15 and the associated coverage of that. That's available
16 online, and it's in appendix C.

17 Perhaps, most compellingly --

18 LADY SMITH: You say freely available in court documents --
19 and these are court documents in the other jurisdiction
20 that you're referring to?

21 MR HAMILTON: Yes.

22 LADY SMITH: Those court documents aren't public documents,
23 are they?

24 MR HAMILTON: I think certainly the reporting of the court
25 documents ...

1 I'm told they may be. The answer to that, my Lady,
2 is I'm not sure about that, it may be that others --

3 LADY SMITH: Are you telling me a member of the public could
4 go into the court building in South Africa and get hold
5 of them?

6 MR HAMILTON: I am not, my Lady, saying that. I don't know
7 enough about the procedure in South Africa. But what
8 I can say to my Lady, because it's in the appendix, is
9 that there is coverage of what is in those documents
10 online. So if my Lady takes it as no higher than that.

11 LADY SMITH: Ah, well, that doesn't tell me that
12 legitimately a member of the public could get hold of
13 them or see them.

14 The reason I ask, Mr Hamilton, and don't get me
15 wrong, I'm not suggesting that I have knowledge of the
16 relevant law directly or am qualified in any way in it,
17 but we do understand that there is legislation broadly
18 comparable to our freedom of information legislation,
19 that says specifically that what is not accessible to
20 the public is information about court proceedings,
21 information that the court holds and suchlike. And
22 that's why I ask.

23 MR HAMILTON: Yes.

24 LADY SMITH: I know that there has, somehow, been access to
25 an extent of court documentation in the other

1 jurisdiction which, frankly, surprises me. You
2 certainly wouldn't get access to it in this
3 jurisdiction.

4 MR HAMILTON: Let me just have a look at appendix C.

5 That matter, I'm sure, my Lady, can be further
6 examined.

7 I would simply draw attention, at appendix C there
8 is a report, I think, from the BBC --

9 LADY SMITH: Yes, I have read it, and they plainly have seen
10 documents that are documents lodged in the court process
11 in the other jurisdiction.

12 MR HAMILTON: Yes.

13 LADY SMITH: That's there. My question, rather, is whether
14 those are documents which have been legitimately
15 obtained or not?

16 MR HAMILTON: I suppose the answer to that, my Lady, would
17 be, first of all, like my Lady, I'm no expert in
18 South African procedure, doubtless further investigation
19 if anything turns on it can go into that.

20 More to the point, regardless of how something comes
21 into the public domain, my point is it's in the public
22 domain.

23 LADY SMITH: Right.

24 MR HAMILTON: And, you know, there are a whole range of ways
25 that media organisations have information, doubtless

1 both here and in South Africa. But the point is: it's
2 out there.

3 In relation to the naming of the protected person in
4 this country, my Lady will obviously be aware of the
5 fact that that has happened, that it happened when
6 Ian Blackford MP named the protected person on
7 16 January on the floor of the House of Commons. In
8 doing so, the protected person was therefore named live
9 on television via the BBC Parliament channel, as live
10 coverage of Parliament.

11 The name, therefore, also appears in Hansard.
12 Hansard, again, freely available online to the public,
13 and the name of the protected person is available for
14 any person in Scotland, or around the globe, to access.
15 And that's appendix D. And nothing about -- it's never
16 going to change. That's important because that is
17 something, because of the privileges extended to the
18 House of Commons, that is always going to be the case.

19 Finally, there was -- my Lady is entirely correct
20 that some newspapers took one view and other newspapers
21 took a different view -- as a direct consequence of
22 Mr Blackford's decision to name under parliamentary
23 privilege, the publication by some newspapers reporting
24 those parliamentary proceedings and naming the protected
25 person. That is in appendix E.

1 So the internet, social media, potentially court
2 documents, but certainly the reporting of court
3 documents, the House of Commons, television, Hansard and
4 newspapers.

5 In my respectful submission, my Lady, if that's not
6 the public domain, it's difficult to understand what is.

7 My Lady raised the phrase, which I had also noted,
8 that the Crown position is essentially that the horse
9 hasn't bolted, but that the identity of the protected
10 person has been -- I think the phrase is "relatively
11 contained". In my respectful submission, that is not
12 a sustainable position on the weight and the substance
13 of the evidence of publication.

14 If, my Lady, it is accepted that this is in the
15 public domain, then that has the simple and powerful
16 consequence of meaning that the terms of exception VI
17 are met.

18 LADY SMITH: I still have a discretion --

19 MR HAMILTON: My Lady, I'm not suggesting you are
20 compelled --

21 LADY SMITH: I can be satisfied that identification is in
22 the public domain, and let me assure you, Mr Hamilton,
23 it's something I look at regularly for various reasons
24 in all sorts of different circumstances, and sometimes
25 the answer has to be: the GRO no longer applies. In

1 other cases the answer has to be: no, actually the
2 public domain exposure, or the whole circumstances are
3 such that it remains in place. Or it remains in place
4 for the time being.

5 MR HAMILTON: My Lady, I'm not suggesting that it's anything
6 other than discretionary.

7 LADY SMITH: Thank you.

8 MR HAMILTON: I'm simply emphasising that we can only go by
9 the exceptions as they are published --

10 LADY SMITH: Of course, of course.

11 MR HAMILTON: -- and the published exception, that is the
12 criterion, and I say that that is met.

13 My Lady, if I can turn, then, to the question of
14 section 2 of the Contempt of Court Act, if it goes
15 beyond that, and the new submissions on behalf of the
16 Crown are to the effect that even though this is in the
17 public domain, and even if the terms of exception VI are
18 made out, the application should nevertheless be refused
19 on the basis that it's a breach of section 2 of the
20 Contempt of Court Act. I say that that's flawed for
21 three reasons.

22 The first is, as I think I've already indicated,
23 that the only decision for this Inquiry obviously
24 relates to the GRO and to exception VI. That is the
25 decision for my Lady this morning, that's the only

1 decision.

2 If, as the Crown says, the publication subsequently
3 breaches section 2, that's a matter for another place
4 and for the Crown to prosecute in a criminal court. It
5 is deliberately a separate regime and a separate
6 decision-making process. It is governed by statute, and
7 it deliberately places the onus on the media
8 organisations to assess the risk of contempt and to act
9 accordingly. That's the careful balance between freedom
10 of expression and the administration of justice decided
11 by Parliament, and to give effect to convention rights.
12 It's the very basis of how the Contempt of Court Act
13 1981 came into being. We will see that, my Lady, in the
14 BBC petitioners case, which -- I don't know whether
15 my Lady has any difficulty in accepting that as
16 a proposition that it was for the purposes of the
17 convention, but --

18 LADY SMITH: Yes, if you just give me the reference for the
19 BBC.

20 MR HAMILTON: Yes, of course. So it is number --

21 LADY SMITH: It's your fifth authority.

22 MR HAMILTON: Thank you very much.

23 My Lady will see, we'll come back to BBC Petitioners
24 for a different reason later. But paragraph 13,
25 my Lady:

1 "As this court has recalled on a number of
2 occasions, the 1981 Act was enacted to bring our law
3 into line with the requirements of the European
4 Convention."

5 LADY SMITH: Yes.

6 MR HAMILTON: "In interpreting and applying its provisions
7 we must bear in mind not only the terms of the
8 convention but the jurisprudence of the European Court
9 of Human Rights."

10 That's the express background. And, as I think
11 I said earlier, my Lady, the monitoring of section 2 by
12 Crown Office in relation to trials and other matters
13 obviously happens every day and in relation to the
14 protected person it will happen outwith this Inquiry and
15 regardless of anything, any decision taken by it. That,
16 in my submission, is the established and appropriate
17 statutory mechanism, and instead of the Crown relying on
18 section 2 as a basis for maintaining a separate order,
19 in fact the reverse is true.

20 The second point, my Lady, is that the facts of this
21 case, as we understand them, do not, in any event, meet
22 the deliberately high test in section 2. My Lady
23 probably has a copy of section 2 of the Act. But for
24 those listening, 2(2) is the strict liability rule,
25 which is set out in (1):

1 "... applies only to a publication which creates
2 a substantial risk that the course of justice in the
3 proceedings in question will be seriously impeded or
4 prejudiced."

5 That is a deliberately high test.

6 My Lady, when I looked last night at a range of
7 authorities, happily I don't have to lodge any others,
8 because the case of Montgomery, which is lodged on
9 behalf of the Lord Advocate, is sufficient for this
10 purpose.

11 I don't know if my Lady has Montgomery there?

12 LADY SMITH: Yes, I have.

13 MR HAMILTON: I'm sure my Lady remembers Montgomery very
14 well, but in essence this was the Chhokar murder, a very
15 vexed case and a very high-profile case. Indeed, if we
16 go to -- essentially we're looking at Lord Hope and
17 Lord Clyde. Lord Hope, this is on page 666 at point E.
18 Does my Lady have that?

19 LADY SMITH: Yes, it's just my page numbers are copied from
20 SCCR, but if you give me the paragraph numbers that's
21 fine.

22 MR HAMILTON: Yes, unfortunately there aren't any paragraph
23 numbers on this.

24 LADY SMITH: Ah, yes, sorry, it is before the court was
25 numbering its paragraphs.

1 MR HAMILTON: It is in section B of the judgment.

2 LADY SMITH: Are you looking at the body of the judgment or
3 are you looking at the rubric?

4 MR HAMILTON: My Lady, I was proposing simply to -- it
5 becomes apparent ...

6 LADY SMITH: It's just such a long report, you're going to
7 have to give me more guidance than that.

8 MR HAMILTON: Yes, indeed.
9 I am sorry, my Lady, it will take just a moment to
10 pull up.

11 LADY SMITH: That's all right. (Pause)
12 Whose judgment is it?

13 MR HAMILTON: This is the judgment of Lord Hope.

14 LADY SMITH: Right, I have the beginning of Lord Hope. He
15 does use some side headings.

16 MR HAMILTON: Part B is entitled "Pre-trial publicity".

17 LADY SMITH: Right, I'm there, and he starts there by
18 referring to Mr Ogg.

19 MR HAMILTON: Mr Ogg, precisely so. If my Lady goes further
20 on he talks about the facts of that particular case,
21 which we don't need to go to particularly, but can
22 my Lady see the headline, the subheading, "The facts"?

23 LADY SMITH: Just a moment, we can get there. Yes.

24 'FRANK': Lady Smith, can I have a quick word. I'm one of
25 the victims, my name is 'Frank'. I would like to have

1 a quick statement and then I'll go.

2 LADY SMITH: 'Frank', I would ask you to wait until I've

3 finished hearing from Mr Hamilton --

4 'FRANK': I'll be very brief.

5 LADY SMITH: 'Frank', I'm so sorry, please --

6 'FRANK': While we've been having this long convoluted

7 discussion, there has been a witness come forward who --

8 LADY SMITH: 'Frank', I can't hear you now.

9 'FRANK': The circumstances under which --

10 LADY SMITH: 'Frank', stop.

11 Would you show 'Frank' out, please?

12 There's no problem in 'Frank' coming back if he

13 wants to address me on the issues I'm hearing today, but

14 I can't let him interrupt Mr Hamilton any further.

15 Mr Hamilton, thank you.

16 MR HAMILTON: Thank you, my Lady. I think, my Lady, I was

17 taking you to the subsection, it starts "The facts",

18 which is in part B. It is only about five or six

19 paragraphs down.

20 LADY SMITH: Yes, I have that.

21 MR HAMILTON: My Lady will see it starts:

22 "Their Lordships were provided with volumes ..."

23 Then the next paragraph is, "The Lord Justice

24 General, Lord Rodger ..."

25 LADY SMITH: Yes.

1 MR HAMILTON: Reading from there, this is simply to give
2 my Lady a sense of the scale of the issue in that case,
3 which in my submission was no less stark than this:

4 "The Lord Justice General, Lord Rodger of
5 Earlsferry, set out in his opinion some of his more
6 significant passages from the articles which appeared in
7 the press in order to give a flavour of what they
8 contained. I do not need to repeat the exercise. It is
9 sufficient to say that the volume of the material is
10 very considerable and the tabloid and broadsheet
11 newspapers and television broadcasts in which it
12 appeared have a wide circulation throughout Scotland.
13 When account is taken of the types of the print media
14 involved and the times of day when the television news
15 items were broadcast, it can be assumed that the
16 coverage which has been given to this case was observed
17 and absorbed at one time or another by most of the adult
18 population in Scotland during the relevant period."

19 We are talking there about something that is at the
20 very highest end of the scale. He goes on:

21 "Various themes were developed as one story followed
22 another, one of these was the public dispute between
23 Lord McCluskey and the Lord Advocate. Another was the
24 similarity which was believed to exist with the
25 Stephen Lawrence case. The suggestion was made that the

1 murder was the product of a racist attack and the issue
2 of race hung over the fact that the killers of
3 Surjit Singh Chhokar had not been brought to trial and
4 convicted. After the defendants were indicted on
5 2 July 1999 articles appeared which linked the
6 indictment to the campaigning for justice by the
7 deceased's family. A report was published containing by
8 the deceased's father that two of his son's murderers
9 had been let off and the third had been found guilty
10 only of assault."

11 We're dealing with material that is very widespread,
12 it seems to have permeated most of the country and is
13 of, arguably, a very prejudicial nature.

14 If my Lady goes on, and I hope -- unfortunately
15 there's then the next part is about -- does my Lady see
16 a heading starting "Stuurman test"?

17 LADY SMITH: Yes.

18 MR HAMILTON: Then about halfway down that, the attention is
19 paid to *Stuurman v Her Majesty's Advocate* 1980, it said:

20 "The test was applied to a case of pre-trial
21 publicity, the directions which the trial judge gave to
22 deal with this matter were not said to have been
23 defective in any way. The argument was that no
24 direction by the trial judge, however careful, could
25 reasonably be expected to remove the risk of prejudice

1 to a fair trial. The reasons which Lord Justice General
2 (Emslie) gave for rejecting this argument were these.
3 The publications occurred almost four months before the
4 trial diet was called. In considering the effect of
5 these publications at the date of the trial, the court
6 was well entitled to bear in mind that the public memory
7 of newspaper articles and news broadcasts and of their
8 detailed content is notoriously short. And, that being
9 so, that the residual risk of prejudice to the prospects
10 of fair trial for the applicants could reasonably be
11 expected to be removed by careful directions, such as
12 those which were in the event given by the trial judge.

13 "The passage indicates that when the test is being
14 applied in practice all the circumstances of the case
15 required to be taken into account, it's only by having
16 regard to all the circumstances that it can be
17 determined whether the directions by the trial judge can
18 reasonably be expected to remove the prejudice. This
19 point is illustrated also by its application in
20 *McFadyen*, the three matters to which
21 Lord Justice Schiemann referred in *Attorney General v*
22 *MGN*, the length of time since publication, the focusing
23 effect of listening to evidence over a prolonged period
24 and the likely effect of the directions by the trial
25 judge are all taken into account in practice in the

1 application of the Stuurman test in cases of alleged
2 oppression due to pre-trial publication. Applied in
3 this way the test is, in my opinion, well suited for use
4 in the context of a complaint which is made under
5 Article 6 and it fits in with the Strasbourg court."

6 Obviously slightly different because it is pre-trial
7 publicity, but the point remains --

8 LADY SMITH: And a different test being addressed there: can
9 a fair trial take place or would it be oppressive to
10 continue with this prosecution?

11 MR HAMILTON: Absolutely so.

12 Nevertheless, in terms of the approach that can be
13 assumed when considering prejudice, things like the
14 passage of time, things like directions, things that are
15 noted as being protections for that process are
16 nevertheless relevant. I simply take my Lady there as
17 an example of what it can be expected of a jury in any
18 subsequent trial.

19 Later on, again still with Lord Hope, there is
20 another subheading "The result in the present case". If
21 my Lady sees that, so that is on page 1106 at
22 paragraph F.

23 LADY SMITH: Paragraph F?

24 MR HAMILTON: F.

25 LADY SMITH: I have it, thanks.

1 MR HAMILTON: What is said there by Lord Hope:

2 "I'm not persuaded that judges in the court below
3 were in error in their assessment of the effect of
4 publicity that has been given in this case and of the
5 question of whether despite that publicity the jury can
6 be said to have acted impartially. And there is talk
7 that recent research conducted for the New Zealand Law
8 Commission suggests that the impact of pre-trial
9 publicity and of prejudicial media coverage during
10 a trial, even in high-profile cases, is minimal."

11 Then there's a reference there.

12 "The lapse of time since the last exposure may
13 increasingly be regarded with each month that passes in
14 itself as some kind of safeguard. Nevertheless, the
15 risk that the widespread, prolonged and prejudicial
16 publicity that occurred in this case will have had
17 a residual effect in the minds of at least some members
18 of the jury cannot be regarded as negligible. The
19 principal safeguards of the objective impartiality of
20 the tribunal lie in the trial process itself and the
21 conduct of the trial by the trial judge. On the one
22 hand, there is the discipline to which the jury will be
23 subjected of listening to and thinking about the
24 evidence, the actions of seeing and hearing the
25 witnesses may be expected to have a far greater impact

1 on their minds than such residual recollections as may
2 exist about reports about the case in the media. This
3 impact can be expected to be reinforced on the other
4 hand by such warnings and directions as the trial judge
5 may think it appropriate to give them as the trial
6 proceeds, in particular when he delivers his charge
7 before they retire to consider their verdict. The
8 judges in the court below relied on their own
9 experience, both as counsel and as judges, of the way in
10 which juries behave and of the way in which criminal
11 trials are conducted. Mr O'Grady submitted that there
12 was no basis upon which one could assess the likely
13 effect of any directions for the trial judge. He said
14 that this was something that was incapable of being
15 proved, but the entire system of trial by jury is based
16 on the assumption that the jury will follow the
17 instructions which they receive from the trial judge and
18 that they will return a true verdict in accordance with
19 the evidence. The Scottish judges are not alone in
20 proceeding on this assumption. In the Supreme Court of
21 Canada ..."

22 There is reference there to a case which said:

23 "The jury directions are often long and difficult,
24 but the experience of trial judges is that juries do
25 perform their duty according to law."

1 Another Canadian case:

2 "The dicta underlined that the confidence that may
3 be had in the ability of a jury to disabuse itself of
4 information that it is not entitled to consider."

5 In the High Court of Australia, again it is said:

6 "The law proceeds on the footing that the jury
7 acting in accordance with the instructions given to them
8 from the trial judge will render a true verdict in
9 accordance with the evidence and to conclude otherwise
10 would be to underrate the integrity of the system of
11 trial by jury and the effect on the jury of the
12 instruction from the trial judge."

13 Similarly, an example then taken from the Irish
14 High Court, and where Lord Hope, what he says with that
15 is:

16 "I considered the judges in the court below were
17 entitled to draw on their own experience and I see no
18 reason in the light of my own experience to disagree
19 with their assessment."

20 Again, just for completion, Lord Clyde, right at the
21 very end of the case, which Mr Deane will give me the
22 page number for shortly.

23 LADY SMITH: Yes.

24 MR HAMILTON: Page 1112, and down at paragraph E, starting:

25 "The Lord Justice General ..."

1 LADY SMITH: Yes.

2 MR HAMILTON: Just for completion, my Lady:

3 "The Lord Justice General recognised in the
4 circumstances of this case particular care will have to
5 be given by the trial judge in warning the jury of the
6 dangers of partiality and directing them to proceed on
7 the evidence which has been led in the trial and on that
8 evidence alone. Their concentration on the evidence as
9 the trial proceeds can be expected to become the
10 principal preoccupation in their minds that on the basis
11 of the evidence led in the case that counsel will make
12 submissions to the jury, the directions of the judge to
13 them will no doubt reinforce the recognition on their
14 part that consistent with the oath which they've taken
15 they must put aside anything they may have heard of the
16 case in the past outside the court, confine their
17 attention to the evidence which they have heard and base
18 their verdict solely upon that evidence. A position
19 which he accepts."

20 Again I know it's in a slightly different context,
21 but all I ask my Lady to do is when considering the
22 merits, because that is what Lord Advocate is inviting
23 the chair to do today, to accept that there is a risk,
24 or that section 2 will be breached if the order -- or
25 may be breached if the order is not maintained. It is

1 against that backdrop that any question in my Lady's
2 mind about what the impact of any prejudice would be
3 matters.

4 LADY SMITH: Yes, I wondered whether what lay behind your
5 reliance on Montgomery, Mr Hamilton, I was thinking
6 about this before, was that in effect you wanted to say:
7 look, my strong prediction would be if the issue of
8 oppression had to be tested, the decision is going to be
9 a fair trial can still take place, for all the reasons
10 that we find in Montgomery against a background of
11 previous public interest and previous extensive
12 publicity, as was relied on by counsel for the accused
13 in that case.

14 MR HAMILTON: Yes, in Montgomery, of course, and I didn't --

15 LADY SMITH: Yes, I get that, you've referred to it.

16 MR HAMILTON: Just, as it happens, it's a very useful
17 authority for that purpose.

18 Again, I didn't want to clutter the court with any
19 additional papers, but my Lady may remember the case of
20 Cox in which Lord Prosser said:

21 "Juries are healthy bodies, they do not need
22 a germ-free atmosphere."

23 The point is this is only relevant insofar as
24 my Lady is invited to consider that section 2 would be
25 made out. I simply say it's against that high test and

1 in that context that the facts of this case would have
2 to be tested. Those facts are, as I understand them, as
3 follows.

4 First, there are no imminent proceedings in
5 Scotland. The Advocate Depute cannot point to any such
6 proceedings and in his written submissions, in all
7 fairness, doesn't even attempt to do so.

8 We are therefore in a position where there may be
9 future proceedings but those remain, shall we say, at
10 best very uncertain in light of a number of factors.

11 The first is the separate criminal proceedings in
12 South Africa. My understanding is that the protected
13 person is due in court on 13 April in relation to
14 a separate matter, in relation to the sexual abuse of
15 children in South Africa.

16 LADY SMITH: There has been an order, has there not, from
17 that Magistrates' Court --

18 MR HAMILTON: Yes.

19 LADY SMITH: -- which has the effect of protecting his
20 identity in those proceedings?

21 MR HAMILTON: Yes, which is to be contrasted with the
22 extradition proceedings.

23 LADY SMITH: Yes.

24 MR HAMILTON: It's my understanding, my Lady -- here, again,
25 we may get into choppy waters about not understanding

1 South African procedure sufficiently -- that quite
2 rightly the South African proceedings will take
3 precedence over the extradition, as indeed I assume
4 would be the case here.

5 LADY SMITH: I don't know.

6 MR HAMILTON: If convicted, and if the protected person
7 appeals, then there may be further delay and resolution
8 of the extradition matter may be even further down the
9 line.

10 There is an ongoing appeal in any event against
11 extradition, so that even when the various criminal
12 matters in South Africa find their way to a conclusion,
13 appeals and all, we then return to the extradition
14 matter, then there is an ongoing appeal in relation to
15 that. If that appeal is successful, then presumably
16 there will be no Scottish trial at all.

17 Even if the full South African appeals procedure in
18 relation to that is eventually exhausted, and the
19 protected person is extradited to this jurisdiction,
20 I don't think it's controversial to say that there's no
21 realistic prospect of a trial here in early course. It
22 will be a period of months, if not years, before
23 progress is made on that matter.

24 Against the backdrop of timing being important,
25 my Lady will remember that we talked about the Schiemann

1 case, it was about four months we were talking about.
2 In my submission, it's very clear that the actual
3 reality here is that there may never be proceedings, but
4 if there are, at the very least they will be a very
5 considerable distance into the future, likely measured
6 in years.

7 So if my Lady is considering the merits on
8 section 2, in my respectful submission, that should
9 weigh heavily.

10 Secondly, in terms of any prejudice, the name of the
11 protected person is already in the public domain. Now,
12 is it claimed that there is already a substantial risk
13 of serious prejudice? Is the Lord Advocate saying that
14 that exists now that a trial couldn't go ahead, or any
15 of these things? No. And that's in a situation where
16 the name is in the public domain. And it's against that
17 backdrop that I simply submit that I don't see the
18 evidence that the rest of the media doing what others
19 have already done, and continue to do -- naming the
20 protected person -- they've done it in this
21 jurisdiction, abroad, online, in Parliament, on
22 television. So the rest of the media doing that now, in
23 circumstances where no trial in this jurisdiction is
24 likely in the foreseeable future, I would submit that
25 that does not meet the high test of there being any real

1 risk of impediment, never mind a substantial risk of
2 serious impediment or prejudice, which is a test that
3 must be met.

4 Therefore, it would be for the Lord Advocate to
5 persuade my Lady that there is an additional risk posed
6 by what's already plainly -- what would then happen as
7 opposed to what's already plainly and obviously out
8 there. And if there is no additional risk, or a slight
9 additional risk, in my respectful submission the
10 argument melts away. Unless that additional risk is
11 both identified and explained as a substantial risk of
12 serious impediment, the test isn't met.

13 There's also another question, my Lady, which is, is
14 it suggested, given that this name is for all time out
15 there now, not least because it's in the parliamentary
16 record, not least because all of these articles are
17 online, and will continue to be online, is it suggested
18 that should a trial ever commence that the protected
19 person would proceed through the Scottish criminal
20 justice system without being named? That would appear
21 to be the logic of the position, and, if it is, it's
22 untenable. We don't do secret trials.

23 If it's not that position, and given that the name
24 of the protected person, and at least some of the
25 details of his alleged conduct, are for all time in the

1 public domain already, why would it be reasonable to
2 name then and not now?

3 The third matter, my Lady, we've touched on briefly,
4 and I will try to be as swift as I can with it, and it's
5 this. If I'm wrong and the test under section 2 is met,
6 then, as we've discussed, my position is that the
7 existence and the application of the protections of
8 section 2 mean precisely the opposite from that
9 contended for by the Advocate Depute. This is the point
10 that we touched on in relation to the Article 10
11 jurisprudence about if because section 2 exists and
12 applies, the continuing restriction in this Inquiry, it
13 would be unnecessary and disproportionate, it is agreed
14 that the normal default position in relation to active
15 proceedings is that the accused can be named. That's in
16 the Lord Advocate's submission, that is obvious and
17 accepted. That is the presumption. And it exists as
18 a necessary protection in a democratic society, both for
19 the accused and for those administering the system.

20 It ensures open justice, and it avoids secret
21 prosecutions. The Crown further accepts and argues --
22 and we accept -- that there are active proceedings for
23 the purposes of the Act, section 2 is in place and it
24 applies. And it's because it applies and because it's
25 in place that there is no need for the name of the

1 protected person to be subject to an order from this
2 Inquiry.

3 LADY SMITH: In short, we're back to you saying: well, if
4 section 2 is met or is likely to be met you don't need
5 the GRO. Is that what you're saying?

6 MR HAMILTON: Yes, it is, but the final point on that is
7 simply to emphasise why it is disproportionate and why
8 it is unnecessary.

9 If I could return, my Lady, to the BBC Petitioners
10 case, which Mr Deane will remind us where it is.
11 Authority 5. This was in the context of a section 4(2)
12 challenge, but it was a murder trial, my Lady will see,
13 and it's Lord Justice General Rodger, but the reason
14 that it's a useful authority is it does give
15 a generality which is applicable. Perhaps I could
16 simply read from -- it's really paragraphs 12-14 and
17 then briefly at 17. Paragraph 12 reads:

18 "In Britain the general rule is that trials take
19 place in public, this promotes not only the interests of
20 the individual accused by ensuring that others can see
21 whether he has been tried fairly, but also the interests
22 of the wider public who can see and if appropriate
23 endorse, criticise, applaud or castigate the conduct of
24 the courts."

25 It is quoting from the State v Mamabolo, which

1 appropriately is from the Constitutional Court of South
2 Africa:

3 "The reporting of court proceedings in the media
4 serves these two important but separate purposes. Not
5 surprisingly therefore the need for the public to have
6 access in this way is reflected in section 1 of the
7 European Convention on Human Rights, which provides that
8 the press and public may be excluded only to the extent
9 strictly necessary in the opinion of the court and
10 similar circumstances of publicity would prejudice the
11 interests of justice. Similarly Article 10 of freedom
12 of expression provides in paragraph 2 ..."

13 This is Article 10(2), that the exercise of the
14 freedom of expression may be:

15 "Subject to such formalities, conditions,
16 restrictions or penalties as are prescribed by law and
17 are necessary in a democratic society for maintaining
18 the authority and impartiality of the judiciary. As
19 this court has recalled on a number of occasions, the
20 1981 Act was enacted to bring our law into line with the
21 requirements of the European Convention and in
22 interpreting and applying its provisions we must bear in
23 mind not only the terms of the convention but the
24 jurisprudence of the European Court of Human Rights.
25 A convenient summary of the court's application of

1 10(2), which is relevant to this, is to be found in
2 their judgment in Observer and Guardian v United Kingdom
3 at paragraph 59:

4 "'The Court's judgments relating to Article 10 --
5 starting with Handyside ... and concluding, most
6 recently, with Oberschlick ... and including, amongst
7 ... others, Sunday Times ... and Lingens ... enounce the
8 following major principles.

9 "'(a) freedom of expression constitutes one of the
10 essential foundations of a democratic society, subject
11 to paragraph 2 of Article 10. It is applicable not only
12 to "information" or "ideas" that are favourably received
13 or regarded as inoffensive or as a matter of
14 indifference but to those that offend, shock or disturb.
15 Freedom of expression, as enshrined in Article 10, is
16 subject to a number of exceptions [this is the important
17 bit] which, however, must be narrowly interpreted and
18 the necessity for any restrictions must be convincingly
19 established.

20 "'(b) these principles are of particular importance
21 as far as the press is concerned. While it must not
22 overstep the bounds set inter alia in the "interests of
23 national security" or for "maintaining the authority of
24 the judiciary", it is nevertheless incumbent on it to
25 impart information and ideas on matters of public

1 interest. Not only does the press have the task of
2 imparting such information and ideas, the public also
3 has a right to receive them. Were it otherwise the
4 press would be unable to play its vital role of "public
5 watchdog".

6 "(c) the adjective "necessary" within the meaning
7 of Article 10(2) implies the existence of a "pressing
8 social need". The contracting states have a certain
9 margin of appreciation in assessing whether such a need
10 exists, but it goes hand in hand with a European
11 supervision embracing both the law and the decisions
12 applying it, even those given by independent courts.
13 The court is therefore empowered to give the final
14 ruling of whether a "restriction" is reconcilable with
15 freedom of expression as protected by Article 10.'" "

16 Then paragraph 14:

17 "In enacting the provisions of the 1981 Act which we
18 have quoted and which we have to apply, Parliament
19 recognised the need for the press and media to be able
20 to impart to the public information about proceedings in
21 our courts. In particular, to allow this to be done,
22 section 4(1) contains an exception to the strict
23 liability rule. The effect is that is, even where the
24 contemporaneous publication of a fair and accurate
25 report of court proceedings creates a substantial risk

1 ..."

2 So even when it creates a risk:

3 "... that the course of justice would be seriously
4 impeded or prejudiced, the publisher is not to be guilty
5 of contempt ... under the strict liability rule. This
6 exception in favour of the freedom of the media to
7 report proceedings is not unlimited, however. For one
8 thing, it applies only to the contemporaneous
9 publication of reports ... and only to reports which are
10 fair and accurate. It does not apply, for instance, to
11 delayed reports or to comments about the proceedings --
12 where appropriate, they are covered by the strict
13 liability rule."

14 Again, the backstop is strict liability rule under
15 section 1 as applied by section 2.

16 Then at the bottom of that paragraph:

17 "Of course a court which is called upon to make
18 an order under section 4(2) must bear in mind that
19 restrictions on the publication of the proceedings of
20 our courts are exceptions to the general rule in favour
21 of publication. As we've explained in part at least the
22 public interest is distinct from the interests of the
23 parties in having the proceedings conducted under the
24 eyes of the public. A court must be careful to bear
25 that wider public interest in mind, especially in those

1 cases where for whatever reason the parties would wish
2 the court to make an order postponing publication."

3 It's the last sentence that's important:

4 "Even in these situations the court must consider
5 not only whether such an order is necessary but also
6 what the appropriate scope of any order must be."

7 In other words, narrowly construed, and that's
8 straight into the proportionality aspect of all
9 qualified rights, of which Article 10 is one. That's
10 why I say it has to be necessary and it has to be
11 proportionate. In the context of section 2 applying, it
12 is, "That is what is necessary, that is what is
13 proportionate". The effect of that is that any other
14 order in this Inquiry becomes unnecessary and
15 disproportionate.

16 My Lady, those are my submissions.

17 LADY SMITH: Thank you very much, Mr Hamilton.

18 It is now nearly 11.30, and although I'd predicted
19 our break might be a little later, I think we'll take
20 a morning break just now for about 15 minutes. I'll sit
21 again then and, as I say, the next submissions I hear
22 will be from Mr McNaughtan. Thank you.

23 (11.28 am)

24 (A short break)

25 (11.50 am)

1 LADY SMITH: Before I turn to the next submissions, two
2 things I want to say.

3 First, some of you may have noticed that the
4 identity, the name, of the protected person was spoken
5 out earlier. It's not to be repeated outside this room,
6 I hope that's obvious. But in case there's any doubt
7 about that I wanted to confirm it.

8 Secondly, the running order actually is going to be
9 Mr Scott next, and then I'll hear from Mr McNaughtan for
10 the Lord Advocate after that.

11 I think you are content with that, Mr Scott, is that
12 right?

13 MR SCOTT: Yes, my Lady.

14 LADY SMITH: Are you ready to go ahead now?

15 MR SCOTT: Yes.

16 LADY SMITH: Whenever you are ready to go, feel free to
17 address me, thank you.

18 Submissions by Mr Scott

19 MR SCOTT: First, my Lady, thank you very much indeed for
20 convening a hearing to deal with this matter and to hear
21 our part. Our part of it as primarily lay people is to,
22 in many cases, a few months on from having given
23 evidence, written and to yourself in this room, it's
24 kind of a bit of an update on how things, particularly
25 possibly the GRO, how we feel it's impacting how matters

1 are going.

2 LADY SMITH: Yes, can I just say at the outset I considered
3 it very important that I hear directly from you if you
4 were prepared to do that, and I'm grateful to you for
5 coming to make your submissions today. Thank you.

6 MR SCOTT: Thank you.

7 And thank you for the Inquiry's assistance with
8 arrangements, et cetera, as well. And ignore my
9 sarcastic emails to my liaison person.

10 LADY SMITH: We never ignore emails, Mr Scott.

11 MR SCOTT: Well, I wish you would sometimes.

12 I say in my submission, if I just run through it
13 quickly, and there is a couple of points that I would
14 like to add as a result of seeing the submission from
15 Mr Deane and Mr Hamilton and from the Lord Advocate.
16 I'm not complaining about this, but I didn't have much
17 time to digest stuff yesterday. I was travelling and
18 what have you --

19 LADY SMITH: That's fine.

20 MR SCOTT: -- but I got the basics from one of the legal
21 team, which I'm grateful for.

22 I represent a group which I said was 38 victims,
23 survivors, that since writing on 30 ... or near
24 30 January, is now 42.

25 I think what I was applying for, in not such

1 an obviously legalistic way as Mr Deane and Mr Hamilton,
2 was that the General Restriction -- your General
3 Restriction Order of August 2022, that we seek your
4 agreement to, I put it, lift the restriction insofar as
5 it relates to the identity of the protected person.

6 I have kind of, as a consensus of our group, listed
7 a number of matters which obviously you'll be aware of,
8 my Lady. But they essentially go along with what you've
9 been hearing this morning.

10 The protected person's real name, I would say, is in
11 any event well out in the public domain. His identity
12 has been announced in various open and public
13 situations. Of course the Right Honourable
14 Ian Blackford MP, who is my constituency MP as it
15 happens, and I've said that it's on record in Hansard,
16 but I would like to amplify -- I make the point in my
17 submission, but would like to amplify, having listened
18 to Mr Hamilton, that I received a telephone call not
19 long after I gave evidence here, in that kind of era,
20 from another survivor, who also gave evidence, and he
21 said:

22 "George would you go in front of your computer and
23 put into Google, 'the protected person's pseudonym,
24 Fettes college, abuse'."

25 And the protected person's real name populated the

1 computer field.

2 LADY SMITH: I know exactly the exercise you have done

3 Mr Scott, I wonder if in fact it's the other way round,

4 and it doesn't matter, it's what you search, there is

5 a way of searching, I accept that, that it's known.

6 MR SCOTT: I think what that would illustrate is that

7 Google's, or an internet search engine's, algorithm, was

8 indicating that there had been a lot of searching from

9 whoever, so it was populating that as a suggestion. It

10 even spelt the protected person's Christian name

11 correctly, with the two you-know-whats.

12 Also, I mention in that part of my submission about

13 court papers. So if I could clarify my submission --

14 LADY SMITH: Yes.

15 MR SCOTT: -- and something Mr Deane and Mr Hamilton were

16 saying, and I do apologise, I was getting rather fidgety

17 at that point, but a journalist, who I wouldn't like to

18 say who, went to the Cape Town High Court court office

19 and asked if they could look at the court file as

20 relating to extradition, and they asked if they could

21 have copies, which they took photographs, and they sent

22 to me.

23 LADY SMITH: I see.

24 MR SCOTT: So the argument I'm using with my comparatively

25 limited legal knowledge from various jurisdictions is

1 that it's open court. It's no longer sub judice.

2 As far as the group of victims is concerned, the
3 process rolls on, and we've really liked and found it
4 rewarding, and quite illuminating to engage with the
5 Inquiry. It's quite cathartic, but we have concerns
6 that the administration of justice process may be
7 fettered by the remit of the Inquiry.

8 You may remember, my Lady, that I was kind of
9 mulling that point and asking you strange questions when
10 I was giving my evidence. Because I personally could
11 see that this would happen.

12 The other thing I would like to say as regards --
13 and I can't, obviously, elaborate the argument that
14 Mr Hamilton made, the long and complex argument about
15 the contempt of court, but when I was considering
16 participation in the "In dark corners" documentary,
17 which you will know, as I waived anonymity with the
18 Inquiry, I've waived anonymity for myself if the press
19 and media have wanted me to participate in something.
20 I was concerned that the Crown Office may take a dim
21 view, and I'm aware enough of contempt of court in
22 various jurisdictions, so I contacted my link person at
23 the Crown Office, who indeed is the head of historical
24 child abuse, and I said: look, I'm worried about
25 contempt of court here, and I don't know fully about it

1 but I'm aware enough to know this could be an issue if
2 I go blabbing off too much to the BBC and they record
3 this radio documentary.

4 The answer was, and it was a phone call, and I was
5 standing in the car park of a Co-op in Skye with my
6 mobile phone towards the end of August/beginning of
7 September last year, I wish you had been standing there
8 with me, she said the Crown Office doesn't have much
9 worry about any serious adverse effect that may happen
10 in the criminal prosecution. It's very far off, and
11 words to the effect of, "Well, it would be up to the
12 trial judge -- should the protected person ever make it
13 into the Scottish system, it would be up to the trial
14 judge to ensure that there was no prejudice to the
15 jury".

16 So the Crown Office's position was: okay, contempt
17 of court, that's fine.

18 And if I may comment, again, elaborating on very
19 questions that you -- or Mr Brown asked me when I gave
20 evidence, the Lord Advocate's overarching responsibility
21 to protect the administration of justice. Now, when
22 I was asked how did I feel as a survivor and a victim,
23 as to how the Crown Office were handling things,
24 I'm aware enough to know that there are long delays and
25 that there are legal considerations that are

1 confidential, and that there are conventions. But the
2 charges were first laid at the High Court in Edinburgh
3 preceding the petition in 2016.

4 Now, the delay is really disproportionate.
5 I'm talking to -- well, 'Frank', a minute ago. The
6 Crown Office had written to 'Frank', a Fettes survivor,
7 and another Academy survivor, and I can't really
8 remember but he emailed me, saying that they were to
9 take no further action relating to the prosecution of --
10 the extradition of the protected person, because it
11 wasn't in the public interest. He was elderly, and it
12 would take a long time, and it would be stressful for
13 us.

14 Two of the people that received that letter -- which
15 I received -- had actually figured on the charge sheet
16 in 2016. Now, to me, to us, we lost all confidence in
17 the Crown Office, and it's not to do with just delays
18 and complex things and what have you, it's to do with
19 what we perceive as incompetence and covering that up.
20 So I am afraid that, having read the Lord Advocate's bit
21 on overarching responsibility to protect the
22 administration of justice, that's not what we say.
23 I'm sorry, I must amplify that point.

24 As regards the Inquiry process, but more
25 particularly the prosecution in South Africa and the

1 extradition, to us it's evident that the protected
2 person is playing the system, particularly if you read
3 his lawyer's submission yesterday.

4 LADY SMITH: That's the short letter that his lawyer in
5 South Africa sent --

6 MR SCOTT: Yes, a three-page letter, I don't know whether
7 somebody would read it out for the purposes of -- or
8 Mr Brown would cover it if he sums up, or whatever.

9 LADY SMITH: We all have it.

10 MR SCOTT: Yes, okay. It's like he's playing the system and
11 arguing about your locations, and it's just simply the
12 names of locations, it's technicality. This guy is
13 known in South Africa as "Mr Loophole".

14 Now, I want the administration of justice to, if you
15 like, preempt things like that, and not be needlessly
16 delayed by things like that.

17 LADY SMITH: When you say "this guy", do you mean the
18 protected person or the protected person's lawyer?

19 MR SCOTT: The protected person's lawyer. Sorry, I'm trying
20 to be vague.

21 LADY SMITH: No, no, that's fine.

22 MR SCOTT: I was also -- bells were ringing when Mr Hamilton
23 was talking about the disembodied reporting, which may
24 be caused by the use of the pseudonym. If I could give
25 you one example, let's come -- very important, we feel,

1 that's come off the ground. This is a few months ago.
2 It's in relation to the broadcast of "In dark corners".
3 The BBC received an email saying that oh yes, this
4 person who had attended Fettes had been attacked by the
5 protected person in the swimming pool as well.

6 I think the Inquiry has taken enough evidence, and
7 the alleged perpetrator of those other things is not
8 a protected person. You know, the member of public
9 there was mixing up our protected person -- because of
10 the use of the pseudonym -- with the swimming coach, you
11 know, Bill Stein. That's quite important.

12 I think 'Frank' was rather excitable this morning
13 because, as we have been in this room, Radio 2 or
14 Radio 5 has received a call from another confused
15 victim, and I understand that he may be able to clarify
16 that a little bit later.

17 LADY SMITH: Thank you.

18 MR SCOTT: From an emotional personal point of view, and on
19 behalf, I think, of all the other victims in our
20 group -- and it's become a self-help group that uses
21 WhatsApp as a medium of communication, but we've begun
22 to meet now, and have group aims and issue, if you like,
23 rules and regs for what we do and don't do, so we've
24 become a credible organisation. Not a lot of people
25 jumping around, you know, in indignation.

1 One thing that is incredibly important -- and, of
2 course, my Lady, you will have taken this from people
3 giving evidence, is that when many people hear,
4 particularly when they hear the name, it is very
5 revelationary for them. That's the moment that they
6 realise they're not on their own. They haven't imagined
7 it. They're not exaggerating it. All those thoughts
8 were going through my mind when I was making a statement
9 a couple of years ago with [REDACTED], and all the rest of
10 it.

11 LADY SMITH: Sorry to interrupt you, Mr Scott,
12 I'm interested in that. You say when people hear the
13 name it's very revelationary.

14 MR SCOTT: Yes.

15 LADY SMITH: Are you talking about when they hear the name
16 amongst a group, or when they --

17 MR SCOTT: No broadcast.

18 LADY SMITH: -- see the name being used in the media?

19 MR SCOTT: Yes, yes. Broadcast.

20 LADY SMITH: It's to do with any media publication of the
21 real identity of the protected person?

22 MR SCOTT: Yes, please, my Lady, that is not a contrived
23 thing. Because I was well into this process, and the
24 civil case process, and engaging with Police Scotland.

25 When on the internet I heard the Carte Blanche

1 broadcast, the first time I heard the protected person's
2 name on the radio -- this is quite recently -- I found
3 it extremely revelatory.

4 Another victim who I met this morning for the first
5 time, I believe he is in the room, said exactly, you
6 know, the same. The name wasn't broadcast in his
7 instance, but it was a broadcaster that gave him the
8 name privately, and he had that same effect. Now that
9 was privately. Me, a bit after the fact, so to speak,
10 I had that, you know, when I heard Carol, whatever her
11 name was, and her presenter, outside the protected
12 person's house in South Africa.

13 LADY SMITH: Tell me, if you can, if it's okay, a little bit
14 more about these feelings that you describe overall as
15 "revelatory". How does it feel?

16 MR SCOTT: You feel we're getting somewhere, after all
17 the -- if you like, the shenanigans with the police and
18 the Crown Office, which I would maintain we should not
19 have to endure in our position. We feel when that name
20 comes out it's another step towards achieving justice.
21 It's like restorative justice, and we feel the fact that
22 that's been mentioned means that more people will come
23 forward. And this is happening in South Africa at the
24 moment. If I take you to, in my supplementary
25 submission, the email I received from Stephen, and, you

1 know, what I typed out on email, but that's what we
2 agreed was the situation.

3 Just -- not for the record, as such, but I had one
4 go at describing that on his behalf, because we're
5 dealing with a slight time difference, and we've never
6 met and what have you, and he said, "That is spot on".
7 Actually, just a small point to illustrate how much on
8 the same page, certainly I can talk about on behalf of
9 40, 42 of us, most of them victims of this protected
10 person. We have a journalist who is a victim of another
11 of the English -- it's no secret, David Price. And
12 that's -- we're pretty much unanimous on our feelings,
13 because we discuss them.

14 And it's not just our feelings, but the effect that
15 that's having in the jigsaw, and what we're experiencing
16 when we're having communications via sometimes our legal
17 teams in the civil case, or statements that are made, we
18 are thinking that the two private school establishments
19 involved here are fairly duplicitous and fairly
20 legalistic, which we understand to a point, with their
21 communications, but it's not helping.

22 Having a kind of confusion on this seems to build up
23 a de facto, maybe unintentional, smokescreen and more
24 delay, et cetera, et cetera.

25 I can't help but feel, I almost expressed this to

1 you in October, I think it was October 2021. Had [the
2 protected person] not been covered, or -- sorry, had the
3 protected person -- my apologies.

4 LADY SMITH: Don't worry.

5 MR SCOTT: Had the protected person not been mentioned
6 within the context of the SCAI investigations, his name
7 would have now been published given the wealth of
8 evidence available on his abuse.

9 And I go to refer to the media coverage of
10 John Watt. It's well out in the media. He was
11 convicted a few months ago. The victim, again, I mean
12 she contacted me this morning to say how she was
13 frustrated with the extradition process with John Watt,
14 but it was like lightning compared to our protected
15 person, in comparator terms. And our aim, and I'll
16 leave Mr Hamilton and the Lord Advocate's
17 representative, I'll leave them to sort of, as it were,
18 battle that out -- Mr McNaughtan -- but we're asking ...
19 maybe you don't have to ... Mr Hamilton was saying
20 disapply your GRO, but we're basically asking for a way
21 that isn't prejudicial to any potential possible trial,
22 which seems a long way off, to bring more victims
23 forward.

24 Now, Mr Brown, on Day 261, using evidence from
25 'Frank', from me, did a calculation, which I did with

1 another victim, and Nicky Campbell and Alex Renton did
2 on a podcast, which is public common knowledge,
3 obviously we're all using the protected person's
4 pseudonym, and half of a class of 20, over 10/11 years
5 in Edinburgh, two years previously in South Africa,
6 another 27 years, where he may have been a wee bit more
7 contrite for a while, you've got to give weight to the
8 fact that bringing these victims out, which is likely,
9 they likely exist, we're talking about many, many
10 hundreds of people. 100-200 in Scotland, 300 or 400
11 plus in South Africa. Which is why Right Honourable
12 Mr Blackford has dubbed him, the protected person,
13 "Savile 2".

14 LADY SMITH: When you are talking about bringing more
15 victims forward, are you talking about bringing more
16 victims forward for the purposes of any prosecutions, so
17 as to add to the list of existing complainers, or are
18 you talking about bringing more people forward to speak
19 to us?

20 MR SCOTT: Both. I personally have difficulty with the
21 distinction, I'm aware of the distinction, but to me the
22 police, the Inquiry, the civil actions, kind of merge
23 into one.

24 Now, there's three different legal areas involved,
25 civil and public Inquiry, criminal. But they do merge

1 into one, and if more victims were to engage with the
2 Inquiry or the police or take civil action, I think
3 that's very important.

4 Civil action, not just revenge against these
5 establishments, but in situations with a lot of public
6 interest and a lot of emotion involved, they'll only
7 really take notice if their publicity is facing attack,
8 as it were, constructive public interest attack, and if
9 they think their pockets are going to be hurt.

10 So it's always to us the same process, although
11 we're aware generally, broadly aware, of the various
12 rules and restrictions -- procedures inherent in each
13 strand, as it were.

14 LADY SMITH: You should, perhaps, add to that list that the
15 three obvious places people might go: one is the police,
16 to report a crime; the other is here, to talk to us
17 about having been abused in care; the other is taking
18 civil action, so litigating in the civil courts. But
19 because you people were at a boarding school and not
20 a different type of care institution, you can't seek
21 redress from the redress scheme in Scotland because
22 you're excluded. So there isn't a fourth avenue?

23 MR SCOTT: Yes, I would suggest that was discriminatory,
24 because we couldn't help being sent to these places. It
25 wasn't really my choice when I was 10.

1 And, indeed, just by the by, I have been asked to
2 present to and attend a Holyrood working group as to my
3 experiences as an adult survivor. I think it's at the
4 end of this month. It's a cross-party group for
5 survivors of -- you know, adult survivors of childhood
6 abuse. And I make comments on behalf of our group about
7 that, because there are some of us who aren't terribly
8 affluent -- I'll just refer you to my means enquiry,
9 my Lady.

10 LADY SMITH: I know.

11 MR SCOTT: So I will be making that point about redress to
12 members of the Scottish Parliament at the end of this
13 month.

14 LADY SMITH: Yes.

15 MR SCOTT: Which I think is pretty dreadful that it isn't
16 a level playing field. And we couldn't help being sent
17 to these posh -- so-called posh places. And it hasn't
18 necessarily followed that we've all had a life of
19 privilege.

20 LADY SMITH: Indeed.

21 MR SCOTT: And that decision would seem to be ill founded on
22 those grounds. That's how it appears about the redress.
23 If redress is open, it should be open -- and be means
24 tested, yes. But to be precluded because: oh, you went
25 to a posh school, which is what it looks like, is not

1 on, if I may just comment. Put on the record.

2 Now, I've lost my ...

3 LADY SMITH: Sorry, you were talking about, you were saying
4 you were just asking for a way to bring more victims or
5 survivors forward and we've looked at the three places
6 they may go, to any or all of them.

7 MR SCOTT: Yes, oh I was going to do a characteristic quip
8 about if more people engage with the Inquiry, and if the
9 five people I cited is right about the calculations,
10 then unfortunately you are going to be sat here for
11 a very long time. Which I realise actually is
12 probably -- you need to get on with it. That's not
13 a chivvying "get on with it", but it could go on and on
14 and on, but the evidence must be heard. I don't need to
15 tell you that, my Lady.

16 But I don't think I have anything to add. I have
17 made the points that have come up from the disclosure
18 yesterday of the other submissions and bits of evidence,
19 listening with interest to Mr Hamilton and his
20 instructing solicitor. So I think I can dry up, unless
21 you want me to cover, or you would suggest there's
22 anything else in my submission, or supplemental, that
23 I should cover, I think I've covered it.

24 I haven't mentioned the parallel proceedings from
25 a similar abuser in England. And I think there was

1 a point made in one of the other submissions -- it may
2 be the Lord Advocate's -- that it wouldn't seem to be
3 terribly relevant.

4 The way I read it, and I may be wrong, is that there
5 has been no publicity relating to the abuser. Well,
6 there has, there has been a lot. You will have picked
7 that up. The name, David Price, is not protected.

8 But the investigation in England is obviously
9 differently constituted to this one, it's probably got
10 less far-reaching tentacles or powers. But nobody can
11 understand why there seems to be this distinction, other
12 than the GRO.

13 Basically I'm worried, we're worried that that's it:
14 GRO is -- proper use of the GRO -- sorry. Proper
15 getting round the GRO -- and forgive my terms there --

16 LADY SMITH: I get what you mean.

17 MR SCOTT: -- would be good for the process. That's all I
18 can say. We all feel very passionately about that, and
19 I can only add a layperson's waffle to that.

20 We think that this protection, this far on, and
21 given what's been going on abroad, we know it's unique.
22 Criminal prosecution over two jurisdictions and a public
23 Inquiry going on. It's quite unique. But I think we're
24 frustrated that he is being afforded what we perceive as
25 too much protection. But I'll dry up now, and thank you

1 very much indeed for allowing me to come to the Inquiry,
2 for allowing me to submit this on behalf of the group,
3 and listening to my diatribe.

4 LADY SMITH: Mr Scott, that has not been a diatribe, it has
5 been really helpful to hear your perspective and the
6 perspective that you represent of so many people. It's
7 really important, and I'm very grateful to you for doing
8 that.

9 MR SCOTT: Thank you very much, my Lady.

10 LADY SMITH: Thank you.

11 I think, 'Frank', you are here, and we are going to
12 let you have a microphone, and if you want to let me
13 know of anything that you would wish to add to what
14 Mr Scott has already put forward on behalf of survivors
15 I would be delighted to hear it now.

16 'FRANK': Hello, can you hear me okay?

17 LADY SMITH: Yes, if you keep the microphone closer to you,
18 that would be no problem.

19 Submissions by 'Frank'

20 'FRANK': I am kind of yin to George Scott's yang,
21 I'm a little bit more artsy and less legal, so I think
22 it's quite good that you hear the emotional side of this
23 argument. I mean George has that, but I am a little bit
24 more of a mess, so it is probably better to say that.

25 First of all, I would like to apologise for my

1 outburst earlier.

2 In my excuse, there's two reasons for that.

3 One, that I didn't realise that I was going to be
4 afforded the opportunity to speak, and there was current
5 information which George alluded to from Nicky Campbell.

6 But also that I'm actually working, so I need to fly
7 off to another job, so the clock was ticking. So I do
8 apologise, and I understand how it must look appalling
9 from where you are sitting.

10 LADY SMITH: Apologies accepted, 'Frank'.

11 'FRANK': Thank you. That's good.

12 Right. First of all, I picked up on a point that
13 George saying what coming forward would mean to victims.
14 That it's not just a question of legal or the Child
15 Abuse Inquiry or any of these things, that these people
16 have lived with this and they feel, having -- I've
17 identified the cause of their problem. If they feel
18 strongly enough about it to actually come forward it is
19 good for them, and that we, by doing this, by
20 publicising [the protected person's] identity that you
21 are going to helpfully enable a lot of people who -- to
22 have actually a voice and to be heard, and to be cured.

23 [The protected person] ...

24 LADY SMITH: Could you just use the expression "protected
25 person", because we're all calling him the protected

1 person, that would be helpful.

2 'FRANK': The protected person has been just ridiculously
3 evasive in all of this. I've repeatedly said on the
4 site that if he had any kind of morality whatsoever, he
5 should get on a plane and fly back to Scotland to face
6 the music. But he instead has been lawyered up with the
7 most heinous Mr Fix-it, which we don't even know how
8 he can afford, because he claims to be poor as a church
9 mouse.

10 So there is a lot of hubris coming out of South
11 Africa from that court, and that as agents of light we
12 need to knock this nonsense on the head.

13 The other thing is that, as victims, the Edinburgh
14 legal community, which unfortunately, you know, there's
15 a lot of lawyers in this room, it's a very close-knit
16 community, and that we don't necessarily feel as victims
17 that we are represented fairly in that. There seems to
18 be an awful lot of backroom discussions in legal
19 circles, and I, for one, find this not appropriate, and
20 I would ask if that any lawyers are involved in this,
21 join the forces of light, don't cook up some little
22 nasty little scheme to let these schools and colleges
23 get off the hook in this, because that's what they've
24 done all the way through.

25 To give you an example, if you want to see

1 an example of how the schools behaved, look at the
2 pastry-cutter announcements that they've made about how
3 "we're so sorry for the victims". It's just
4 pastry-cutter legal jargon. If you want to see how to
5 do it properly, look at the Rondebosch South African
6 School statement. Its contrast is black and white.

7 I'm a little bit worried about the legal
8 establishment in Edinburgh closing ranks, because a lot
9 of the people who went to these public schools are now
10 part of that, so this evil needs to be combated.

11 Now, quickly just two points. The reason why I was
12 going to talk to you about earlier on, was that there
13 was an email into Nicky Campbell which talked about,
14 amongst other things, Dawson, but the protected person
15 was mentioned by the by in the following statement, and
16 if you don't mind I'll read it out. It's a short
17 paragraph:

18 "I also remember the teacher at the prep school who
19 ran his hand up the inside of my trouser shorts, but
20 can't recall his name, 'feels'(?), but I do know that he
21 left to go to Fettes and was wondering incredibly how he
22 got a new job in teaching."

23 If you need any evidence as to why "the protected
24 person" ought not to be "the protected person", that's
25 it. Because if I was to say to you "cat", you would

1 have a picture of a cat in your mind. If I was to say
2 to you "dog", you would have a picture of a dog in your
3 mind, it would just spring to mind. If I say "the
4 protected person", nothing. If I was to say the
5 person's name, that it flashes a picture of the person's
6 face in your head and that triggers all those memories.
7 That is the difference between knowing the protected
8 person's name and not knowing the person's name. It's
9 a trigger to getting that stuff out, which has been
10 making a mess of your life for all these years.

11 Now, if that's not a good enough reason for naming
12 him, then I don't know what would be.

13 And, finally, before I sign off, because I'm going
14 to have to push off and photograph a load of people,
15 which I don't know how I'm going to do now, there's only
16 one way forward, going forward. I mentioned it in my
17 statement before, there's only one way to stop this
18 nonsense, and that is to mandate -- make it legally
19 enforceable that these schools and colleges report what
20 happens when it's reported to them instead of covering
21 up. It's the only way forward.

22 Anyway, I do apologise for my hectoring tone, but
23 it's the only way I could get through it.

24 LADY SMITH: If that works for you it works for me, 'Frank',
25 and you are much calmer than you were earlier. Thank

1 you for that.

2 Thank you, seriously, for what you have added.

3 That's really helpful.

4 Mr McNaughtan.

5 Submissions by Mr McNaughtan

6 MR MCNAUGHTAN: Thank you, my Lady, and thank you also to
7 'Frank', Mr Scott and Mr Hamilton for their submissions
8 earlier in the morning.

9 My Lady, I appear on behalf of the Lord Advocate,
10 along with Ms Lawrie my learned junior, we are
11 instructed by Ms Cockburn of the Crown Office and
12 Procurator Fiscal service.

13 My Lady, in terms of section 19 of the Inquiries Act
14 of 2005 and as recognised in the General Restriction
15 Order itself, the chair may issue restriction orders in
16 the Inquiry only to the extent that they are required by
17 law or are conducive to the Inquiry fulfilling the terms
18 of its reference or are necessary in the public
19 interest.

20 In these applications, my Lady, the Lord Advocate is
21 concerned about the risk of prejudice to criminal
22 proceedings in the event that the applications are
23 allowed and the identity of the protected person is
24 disclosed. My Lady, the Crown submits that it's in the
25 public interest for the GRO to be maintained in its

1 current form in relation to the protected person. In my
2 submission, that's because it's in the public interest
3 for the protected person to be brought to trial in
4 Scotland and to avoid pre-trial publicity that might
5 impact on a fair trial in this case in terms of
6 Article 6 of the European Convention on Human Rights.

7 My Lady, the applicant seeks to have the GRO
8 disapplied, at least in part, on the basis of
9 exception VI, on the basis that the identity of the
10 protected person, and the fact that he has been made the
11 subject of allegations of abuse, is in the public
12 domain.

13 However, as my Lady noted in discussions with
14 Mr Hamilton earlier today, in terms of exception VI the
15 chair may permit the identity to be disclosed only if
16 appropriate in all the circumstances to do so.

17 LADY SMITH: Mr McNaughtan, could you just pull the
18 microphone a little bit closer to you. I'm just
19 hearing, but of course it's really important that
20 everybody in the room is able to hear you.

21 Now you have done that, Mr Hamilton, when Mr Scott
22 was speaking, you very helpfully moved left, as I look
23 at you, and I could see him. That's great. And now
24 I can see Mr McNaughtan.

25 Now I've completed that stage management, can we

1 carry on.

2 MR MCNAUGHTAN: As I say, my Lady, in terms of exception VI,
3 the chair may permit the identity to be disclosed if
4 appropriate in all the circumstances to do so. My Lady,
5 my submission this morning is I will invite my Lady to
6 have regard to the written submissions on behalf of the
7 Lord Advocate together with all the other submissions
8 and all the other material available to my Lady and find
9 that it's not appropriate in all the circumstances to
10 lift the restriction on the identity of the protected
11 person in this instance.

12 I would seek to follow up on some points from the
13 written submissions from the Lord Advocate and also some
14 of the comments that have been made in oral submissions
15 this morning.

16 The first point I would seek to make, my Lady, is
17 that the anonymisation of the protected person has not
18 prevented complainers from coming forward to speak to
19 the police. My Lady will have seen from the written
20 submissions for the Lord Advocate that, following the
21 Inquiry's oral hearings and the associated media
22 reporting many individuals have made complaints about
23 the protected person to the police. That has resulted
24 in the Crown preparing the third and fourth petitions,
25 which have a total of 74 charges in them.

1 LADY SMITH: Yes, so that's the third and fourth extradition
2 petitions which, in the usual way, in turn rely on
3 charges that feature in criminal petitions sitting in
4 Scotland, and there are two of them that are still
5 active.

6 MR MCNAUGHTAN: Indeed so, my Lady. Just to give my Lady
7 the dates of that while we're on it. The third petition
8 is dated 18 May 2022, and there are 45 charges on that
9 petition. The fourth petition is dated 7 February of
10 this year, and there are 29 further charges on that
11 petition. That's the 74 charges that I referred to
12 previously.

13 In my submission, my Lady, the fact that the
14 protected person has been reported anonymously, both in
15 the transcripts of the evidence and in media reports,
16 has not prevented complainers and potential witnesses
17 coming forward -- potential witnesses in the criminal
18 proceedings coming forward to speak to the police.

19 LADY SMITH: I suppose, Mr McNaughtan, you could add to that
20 that if you look at our transcripts, you won't even see
21 the pseudonym that was used within this room. You
22 simply see a cypher.

23 MR MCNAUGHTAN: Indeed so, my Lady.

24 LADY SMITH: A three-letter cypher, we use three-letter
25 cyphers normally.

1 MR MCNAUGHTAN: In my submission, my Lady, there are
2 sufficient details in the public domain, without the
3 publication of the protected person's real name, to
4 allow further complainers and potential witnesses to
5 come forward to speak to the police, and indeed the
6 Inquiry, as was canvassed by my Lady earlier this
7 morning. We know from the chapter of evidence about
8 Fettes College there was reference to the protected
9 person's conduct at Fettes in the 1970s, there was
10 reference to the fact he had worked at Edinburgh Academy
11 before his time at Fettes. Again, those were referred
12 to by Mr Scott, I think that was Day 261 of the
13 proceedings on 17 December 2021.

14 In my submission, my Lady, I'm using the term
15 "disapplying the GRO", lifting the restriction in
16 relation to the identity of the protected person would
17 not bring about any benefit in the sense of allowing
18 further witnesses to come forward. They have done so,
19 and they can continue to do so without any change being
20 made to the GRO.

21 LADY SMITH: Can you say that quite so absolutely as you do,
22 Mr McNaughtan, because we don't know what we don't know,
23 and we don't know what actually would happen if
24 permission was given.

25 MR MCNAUGHTAN: I see that, my Lady. What I can say is that

1 a large number has come forward to speak to the police
2 with the restriction order in place as it is.

3 LADY SMITH: Yes.

4 MR MCNAUGHTAN: The second point that I make this morning,
5 my Lady, is the flipside of that, and looking at the
6 damage that the Crown is concerned about should the
7 restriction order be -- or should these applications be
8 granted. That is the concern that lifting the
9 restriction order in relation to the protected person
10 may influence the thinking of potential jurors. So here
11 we're not looking at witnesses or complainers, we're
12 looking at potential jurors in criminal proceedings.

13 Just to give a flavour of this, my Lady has it in
14 more detail in the Lord Advocate's written submissions,
15 but just to highlight this morning the concerns that the
16 Crown has about that. Detailed evidence of the abuse
17 carried out by the protected person has been carried out
18 by the Inquiry and has been published in the transcripts
19 available on the Inquiry's website. Some of the
20 witnesses in the Inquiry who gave oral evidence of abuse
21 by the protected person are complainers in the criminal
22 prosecution. The media has reported the allegations of
23 the abuse by the protected person, albeit in the main
24 anonymised by reference to the Inquiry's pseudonym.

25 This is a point that is made in the written

1 submissions, my Lady, while the Inquiry's pseudonym was
2 intended for publications relating to the work of the
3 Inquiry, it's now become enmeshed in --

4 LADY SMITH: Sorry, Mr McNaughtan, where are you in your
5 written submission.

6 MR MCNAUGHTON: I'm not in the written submissions.

7 LADY SMITH: Sorry, I thought you were just referring to
8 a part of your written submissions.

9 MR MCNAUGHTAN: No, I'm not referring to them, my Lady.

10 LADY SMITH: You rely on the detail of the nature, the
11 details of the abuse, being in our transcript and if
12 I permitted identification of the protected person it
13 would be absolutely plain who it was that did those
14 specific things?

15 MR MCNAUGHTAN: Yes. That's a point that's made in the
16 written submission, my Lady, is that in some ways the
17 fact that the Inquiry's pseudonym has been used in
18 reporting more generally, including reports of alleged
19 admissions made by the protected person in South Africa
20 relating to alleged offending in Scotland, a situation
21 has come about -- and again looking back to the evidence
22 reported from the Inquiry -- a situation has come about
23 in some respects similar to that of Lord Advocate v
24 Scottish Daily Record and Sunday Mail, again I don't
25 propose to take my Lady to that in any detail, but it's

1 simply that there has been publication of details of
2 facts which might be expected to be the subject of
3 evidence at a trial, including statements made by
4 potential witnesses, and that was a factor which caused
5 concern, admittedly in a slightly different context, but
6 I would invite my Lady to have regard to that concern on
7 the part of the Lord Advocate when considering all of
8 the circumstances for this morning's hearing.

9 LADY SMITH: We're in slightly different circumstances here
10 because charges have been drafted and laid --

11 MR MCNAUGHTAN: Yes.

12 LADY SMITH: -- and you don't put the specifics of those
13 charges before me so as, for example, to show where
14 there could be a match between the evidence that the
15 Inquiry has, and the evidence that the Crown will be
16 seeking to rely on. Isn't that right?

17 MR MCNAUGHTAN: Not in the detail, my Lady. But what I can
18 say is that witnesses in the Inquiry, there are some of
19 them who are complainers in the criminal proceedings.

20 LADY SMITH: Yes.

21 MR MCNAUGHTAN: And the evidence that would be led at trial,
22 there will be a significant overlap between that and
23 what has been heard in the Inquiry and reported on in
24 the Inquiry.

25 LADY SMITH: Are you able to give me any indication of the

1 extent of overlap between applicants to the Inquiry and
2 complainers in the 74 charges?

3 MR MCNAUGHTAN: If my Lady would bear with me? (Pause)

4 Yes, my Lady, I think the difficulty is that because
5 people have been -- witnesses in the Inquiry have often
6 preserved their right to anonymity, it's not known where
7 they might match up, and I can't give my Lady any
8 definite flavour of what the percentage of the 74
9 charges, what percentage may have given evidence in the
10 Inquiry, other than to say that --

11 LADY SMITH: Let's say, Mr McNaughtan, for argument's sake,
12 all the complainers in relation to the 74 charges were
13 individuals who have not provided evidence the Inquiry.
14 Would you be making the same submission?

15 MR MCNAUGHTAN: Obviously the restriction order can only
16 relate to evidence given at the Inquiry, which I think
17 is my Lady's point --

18 LADY SMITH: Yes.

19 MR MCNAUGHTAN: -- but I come back to the point that --
20 coming back to the point about the timings of the
21 petitions and the fact of active proceedings.

22 LADY SMITH: Just to tease that out a little bit further,
23 and it is important that everybody understands the
24 limits of any restriction order that I can properly make
25 under the provisions of the Inquiry's legislation, and

1 I can only make an order to protect Inquiry evidence and
2 say, for instance, as in this case, "A particular
3 category of person cannot be identified by way of
4 disclosing Inquiry evidence".

5 If you take, for argument's sake, let's say
6 a journalist who is interested in this matter, because
7 they were themselves at one of the schools in this case
8 where this protected person had a job, but is not
9 an Inquiry applicant, has not provided evidence to the
10 Inquiry in any way, and was themselves the target of
11 that person's abusive activity, that journalist
12 broadcasts their own experience and the details of their
13 own experience. In so doing, he or she is not breaching
14 the General Restriction Order because they are not
15 broadcasting Inquiry evidence. The whole point of the
16 ability to protect Inquiry evidence is so as to give
17 an all-round protection to, if you like, the whole
18 workings of the Inquiry, its investigations, the
19 evidence it's gathered, the evidence that it has
20 presented in public and so on, but for various reasons
21 that's as far as any 2005 Act order goes, and that's why
22 it's very carefully drafted in the terms that it is.

23 MR MCNAUGHTAN: Yes.

24 LADY SMITH: In circumstances like this, isn't the Crown
25 always going to have to live with actual or possible

1 publication of information and detail about matters
2 that, at the same time the Inquiry is getting evidence
3 about, but it's from different sources.

4 MR MCNAUGHTAN: Indeed so, I accept that fully, my Lady.

5 LADY SMITH: And it could happen.

6 MR MCNAUGHTAN: But the concern the Lord Advocate has is, as
7 I say, that given the nature of what is in the public
8 domain that has come from the Inquiry and the fact that
9 the Inquiry's pseudonym for the protected person has
10 become repeated and enmeshed in media reports, the
11 concern is that there's less of a fade factor. The
12 protected person has now been associated with the
13 podcasts from Nicky Campbell and Alex Renton, the
14 pseudonym of the protected person is well known and now
15 linked to well-known public figures and the concern the
16 Lord Advocate has is that there will be less of a fade
17 factor in relation to the case when the case comes to
18 trial, because of that element of celebrity and the
19 level of evidence that has been reported. It may be
20 that that has the potential to impact on the minds of
21 jurors in the future.

22 Of course, I accept entirely what Mr Hamilton points
23 to in the Montgomery case, that there will be
24 protections in place from the trial judge and I don't
25 seek to downplay that in any way. But simply inviting

1 my Lady to consider all the circumstances in the context
2 of the applications before my Lady this morning, and to
3 have a look at the potential for prejudice to be caused
4 to a future trial were the identity to be released in
5 terms of the GRO.

6 LADY SMITH: I mean, just picking up the matter of
7 protections that can be put in place by way of
8 directions from the trial judge. Of course, this has
9 come even more to the fore in the 21st century when, in
10 the real world, a trial judge is always aware of the
11 risk, if not likelihood, that in a particular case
12 jurors may previously have read reports or seen things
13 online -- typically social media, in the modern world --
14 that tell them quite a lot about the matters that
15 they're going to hear evidence about, and maybe about
16 the accused person or persons as well, and ways have to
17 be found of firmly directing juries -- it can often be
18 more than once during the trial, beginning, the middle
19 and at the end by many judges, and certainly the days
20 that I was sitting in that role, one was beginning to do
21 it very much so.

22 But rarely is it felt that the exposure in the
23 public domain has been so much and so extreme that there
24 cannot be a fair trial, which really is what it comes to
25 when you're looking for a substantial risk of prejudice

1 to the administration of justice.

2 MR MCNAUGHTAN: I see that, my Lady. Effectively, as in the
3 Crown's written submissions, media reporting thus far
4 has been in the main anonymised, there has been some
5 disclosure of the real name. But largely contained, and
6 effectively the Crown seeks to avoid adding fuel to that
7 fire.

8 I fully take on board what -- my Lady, we're agreed
9 on by the protections in place by the trial judge, but
10 it's really to seek to contain and minimise potential
11 prejudice. That is the reason why the Crown makes the
12 submission it does this morning.

13 Effectively, as set out in the written submission,
14 as my Lady's alert to, if the GRO is altered to reveal
15 the identity of the protected person, that would be, as
16 the Crown say in the written submissions, the last piece
17 of the jigsaw of identification. The concern is that
18 that poses a real risk to the integrity of contemplated
19 criminal proceedings in Scotland.

20 LADY SMITH: Are you saying on behalf of the Lord Advocate
21 that her judgment really is that there's a substantial
22 risk that the course of justice in the proceedings in
23 relation to the protected person will be seriously
24 impeded or prejudiced?

25 MR MCNAUGHTAN: I think, my Lady, there's two tests that we

1 have in mind this morning.

2 One is the section 2 test, which is what my Lady is
3 asking me about, and I fully take on board what
4 Mr Hamilton said earlier today, that the General
5 Restriction Order is freestanding and independent from
6 the test to be considered in terms of section 2, and the
7 Crown is not submitting that section 2 of itself
8 prevents any change to the restriction order.
9 I'm simply flagging it up as something in all the
10 circumstances for my Lady to have regard to.

11 LADY SMITH: I see that, but are you saying that it should
12 carry considerable weight, which takes me back to
13 whether --

14 MR MCNAUGHTAN: Indeed so.

15 LADY SMITH: -- you can say hand on heart that there's
16 a substantial risk here.

17 MR MCNAUGHTAN: That's on the basis that ordinarily, as
18 I say, there would be a fade factor if there's a gap
19 between the date of reporting and the date of trial. In
20 this case I say it's less of an issue -- sorry, it's
21 more of an issue, that there won't be the fade factor,
22 because of the celebrity involvement by Nicky Campbell
23 and Alex Renton in relation to naming the protected
24 person by his Inquiry pseudonym. Then that can be
25 coupled with the transcripts of the evidence which, as

1 I say, may well constitute evidence that would be given
2 at trial. That link of detailed evidence, publicly
3 available, the identity, the revealing the identity of
4 the protected person would be that last piece of the
5 jigsaw, and it could give rise to a real risk of
6 prejudice, and that's the concern the Lord Advocate has.

7 LADY SMITH: Okay. What if a trial judge who, no doubt,
8 will be informed about the particular circumstances
9 here, specifically says to a jury: you must not look at
10 all at any transcripts published by the Scottish Child
11 Abuse Inquiry.

12 MR MCNAUGHTAN: Yes.

13 LADY SMITH: And you address that matter, you grasp it
14 upfront. You say: everybody knows that these charges
15 relate to schools where there has been a consideration
16 of whether or not abuse occurred in those schools at the
17 Scottish Child Abuse Inquiry and there are transcripts
18 of the evidence given to them, do not look. I am
19 telling you, I am directing you not to look.

20 Now, jurors get into trouble if it's found out that
21 they then breach directions such as that from a judge.
22 Are you saying in the face of that there is still a risk
23 that they will do it and go about searching for where
24 they will be able to identify whether what they have in
25 front of them for trial is what was heard in evidence in

1 this Inquiry?

2 MR MCNAUGHTAN: No, my Lady. Those directions would be
3 sufficient. But my concern is not so much with jurors
4 at the time of the trial going off to look out
5 extraneous information from the trial. My concern is
6 that the transcripts of the evidence that are available
7 at the moment may be read by potential jurors, media
8 reports obviously may be read by potential jurors, and
9 they will all have a memory of those come a trial, and
10 that may weigh on the thinking of a potential juror,
11 even with that perfectly proper direction to be given by
12 the trial judge. It's simply human nature that if you
13 have read something it may stay with you, no matter how
14 much you are told to disregard it.

15 The position of the Crown in relation to the 1981
16 Act is that if the Crown becomes aware of issues of
17 potential contempt they're considered carefully and
18 action will be taken as appropriate. Again, it's
19 a freestanding thing, it's separate from the
20 consideration of my Lady this morning, but I do flag it
21 up as something in the wider circumstances to be taken
22 account of.

23 LADY SMITH: Mr McNaughtan, how would you characterise the
24 public interest -- which, after all, the Lord Advocate
25 represents -- insofar as I need to take account of it?

1 MR MCNAUGHTAN: It's the public interest in seeing this man
2 brought to trial and to have a fair trial. That's the
3 public interest that I rely on.

4 I think that the public interest --

5 LADY SMITH: That's the public interest generally in all
6 trials in our jurisdiction being fair trials, but also
7 the protected person's own interest in any trial to
8 which he is subjected being a fair trial --

9 MR MCNAUGHTAN: Yes.

10 LADY SMITH: -- and we mustn't forget that.

11 MR MCNAUGHTAN: Yes.

12 LADY SMITH: Is the fact that this is a public Inquiry,
13 publicly funded because of a matter of serious public
14 interest, relevant?

15 MR MCNAUGHTAN: It may be. I mean, obviously the public
16 interest in having a hearing in relation to historic
17 child abuse is a matter in the public interest. But
18 that's separate to the interests -- the public interest
19 in having the protected person prosecuted in a fair
20 trial. Because obviously the terms of reference of the
21 Inquiry are such that no determination is made in
22 respect of either civil or criminal liability.

23 So, yes, there is a public interest in a full
24 hearing of the evidence in the Inquiry. But that's
25 separate to the interests in a fair system of justice

1 for prosecution.

2 LADY SMITH: It really comes back to that, so far as the
3 Lord Advocate's interest is concerned, is that right?

4 MR MCNAUGHTAN: Yes. Indeed so, my Lady.

5 As I say, the time limits in respect of the
6 petitions are a feature here because, as my Lady will
7 understand from schedule 1 to the Contempt of Court Act,
8 proceedings are active for a period of a year. And in
9 this case we have two petitions which are active at
10 present, but the first one will cease to be active on
11 18 May this year and the second one in February of next
12 year.

13 LADY SMITH: The first one is not far away, and if the dates
14 we've been told so far as next steps in South African
15 proceedings are concerned are correct, there doesn't
16 seem to be any real likelihood of a final decision
17 having been reached on the extradition petition by May.
18 Is that not right?

19 MR MCNAUGHTAN: Indeed so, my Lady, that's absolutely right.
20 That's why the Crown invites my Lady to have regard to
21 the circumstances of potential prejudice when certain
22 proceedings are no longer active for the purposes of
23 a prosecution.

24 LADY SMITH: You still have the second petition running
25 until next February.

1 MR MCNAUGHTAN: Indeed so, next February, which has 29
2 charges on it.

3 My Lady, I think the only other points I would seek
4 to raise in response to submissions this morning, simply
5 to highlight some of the observations of the Inner House
6 in the MH v The Mental Health Tribunal for Scotland
7 case, which was referred to in the submission for the
8 Scottish media, it's reported at 2019 SC 432, simply to
9 highlight a couple of passages where the court is
10 concerned with the balancing of rights and what might be
11 done when looking at revealing identities.

12 Does my Lady have the judgment?

13 LADY SMITH: I have it, yes.

14 MR MCNAUGHTAN: If I can take my Lady to paragraph 27, which
15 is in the opinion of the Lord President, at paragraph 26
16 it was concerning cases in which the disclosure of
17 a person's identity would threaten his or her life, in
18 27:

19 "In non-life/torture threatening situations, it is
20 for the court to balance the competing rights; eg
21 respect for privacy or property ... on the one hand with
22 open justice/transparency and freedom of expression on
23 the other. This may be a finely balanced exercise, but
24 the starting point, or presumption, remains open
25 justice."

1 And the Lord Advocate takes no issue with that:

2 "It's not enough for an order to be convenient or
3 even desirable, it must be a matter of necessity in
4 order to avoid the subordination of the ends of justice
5 to the means. In approaching the issue in any
6 particular situation the court should choose the
7 least-restrictive option, the most restrictive being
8 closed doors, including the advising, and the least
9 being the anonymity of the names and the opinion
10 published by the courts, with no section 11 order."

11 Section 11 being the reference to the Contempt of
12 Court Act, my Lady.

13 In this case that's all the Lord Advocate is
14 seeking, all the Lord Advocate is asking my Lady to do
15 is to maintain the anonymity of the protected person.

16 Then reading on to --

17 LADY SMITH: You say the Lord Advocate is actually asking
18 for the least restrictive option?

19 MR MCNAUGHTAN: Yes.

20 LADY SMITH: That's on the basis that once you properly
21 understand the GRO, it is, in any event, the least
22 restrictive option because it is not a total ban on
23 identification --

24 MR MCNAUGHTAN: Indeed so, my Lady.

25 LADY SMITH: -- it's a ban on disclosing Inquiry evidence

1 that identifies?

2 MR MCNAUGHTAN: Yes.

3 LADY SMITH: Right. Thank you.

4 MR MCNAUGHTAN: Then the only other paragraph from that
5 judgment I would take my Lady to is at paragraph 42,
6 which is in the opinion of Lord Malcolm. Again, it
7 largely repeats that point.

8 But taking it from a slightly different angle:

9 "If the discussion was confined to a competition
10 between Article 8 ECHR privacy rights and press freedom
11 of expression under Article 10 there would force in the
12 above analysis. However, long before Article 8 and the
13 relatively recent development of privacy law our courts
14 insisted upon a general principle to which great weight
15 must always be attached, namely judicial proceedings are
16 held in public and parties are named in court and in
17 judgments."

18 Then, reading a couple of lines down:

19 "Any qualification must be justified as clearly
20 necessary in the interests of justice."

21 Of course that's the same factor that my Lady has to
22 bear in mind for these applications:

23 "Where a derogation is justified [this is the last
24 couple of lines] it should be the least required to
25 satisfy the circumstances of the case. In short, the

1 general principal must be upheld, unless to do so would
2 thwart the essential purpose of the courts, namely to
3 administer justice fairly and in a manner which fosters
4 the trust and confidence of the public in our laws and
5 the judicial system."

6 My Lady, obviously there are checks and balances in
7 place, and we'll discuss the role of the trial judge in
8 that. But effectively the Lord Advocate's position is
9 that we don't want to do anything to add fuel to the
10 potential fire of prejudice. Again, as I say, the
11 concern that the Lord Advocate has is that naming the
12 protected person would have the potential to thwart
13 an essential purpose of the courts, and that's to
14 administer justice in the criminal proceedings in the
15 trial of the protected person. Again, we're coming back
16 to the point my Lady has already.

17 In all the circumstances, my Lady, I would invite
18 my Lady to refuse the applications for the identity of
19 the protected person to be disclosed, and I do so on the
20 basis that it is in the public interest to keep the
21 current GRO in place and, secondly, that it's not
22 appropriate in all the circumstances to permit the
23 identity of the protected person to be disclosed.

24 LADY SMITH: Thank you very much, Mr McNaughtan. Thank you.

25 Finally, Mr Brown.

1 Submissions by Mr Brown

2 MR BROWN: My Lady, I have very little to add, save as
3 a starting point to acknowledge that Mr Hamilton in his
4 written submissions notes at paragraph 36 that the GRO
5 already and properly identifies protected persons.

6 The issue before your Ladyship is whether or not
7 exclusion VI, as a matter of your Ladyship's discretion
8 on the particular facts and circumstances of this case,
9 as ventilated under reference to the principles your
10 Ladyship has heard, satisfies you that that exception
11 should be applied.

12 That is not something that I can add to the
13 submissions that your Ladyship has heard this morning.

14 LADY SMITH: Thank you.

15 Thank you very much, Mr Brown. Thank you.

16 As I indicated at the outset, I'm going to take
17 these submissions away, reflect on them and I will issue
18 my decision in writing as soon as I can.

19 I do appreciate that many people on both sides of
20 the fence, if I can put it that way, are anxious to have
21 an answer sooner rather than later, but it can be unwise
22 to rush to judgment on complex matters, and this is
23 a complex matter, and a very important one. But
24 I promise it will be given priority.

25 Thank you.

1 (1.01 pm)

2 (The Inquiry adjourned)

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