IN THE WESTMINSTER MAGISTRATES' COURT

NATIONAL CRIME AGENCY

Applicant

And

X Y

Respondents

And

MARTIN BENTHAM

JUDGMENT

Note: In this judgment I explain my reasons for ordering access to documents in redacted form. The basis of Mr Bentham's application is that the documents concerned were referred to at a hearing in open court on 2nd December 2019. The question as to whether that hearing should have been in open court is the subject of a pending application for Judicial Review by the Respondents in proceedings CO/913/2020. The NCA have indicated that they do not oppose the grant of permission to apply for judicial review on the basis that a High Court decision on the point is desirable. I agree.

In order to protect the position in the event that the High Court rules that the hearing should not have been in Open Court I have decided that it is appropriate to impose a stay on the order giving access to Mr Bentham. This judgment (and the fact of a stay) may be reported, but the redacted documents will not be provided to Mr Bentham until the expiry of that stay, or further order of this court or of the High Court. The judgment is anonymised in order to permit its publication whilst preserving the protection of those matters which I have ruled should be protected. EA

Application

1. This is an application by Mr Bentham the Home Affairs Editor working for the Evening Standard newspaper to have access to documents that were referred to in open court on 2nd December 2019 during the making of a number of Account Freezing Orders ("AFO") by District Judge (Magistrates' Courts) Goldspring at the instigation of the National Crime Agency ("NCA") under section 303Z3 Proceeds of Crime Act 2002 ("POCA").

2. The AFOs made are in relation to ten bank accounts held in the name of one or other of the Respondents, a husband and wife, X and Y. Earlier AFOs had been made in the preceding year or so in relation to the same accounts by the magistrates' court sitting in private.

3. The application is opposed by the Respondents whilst the NCA, accepting that the magistrates' court has an inherent jurisdiction to permit a non-party to have documents referred to in open court on the open justice principle, adopts a neutral position as to whether the court should exercise its jurisdiction in favour of Mr Bentham.

Background

4. During the hearing of an application to make the AFOs on 2nd December 2019, an officer of the NCA gave evidence and verified the contents of two written applications dated 25th November 2019. The NCA also provided counsel Mr Andrew Bird's written skeleton argument dated 28th November 2019. The court relied on these documents in reaching its decision to make the order.

5. A letter dated 29th November 2019 had been sent by the Respondents' solicitors which said that, subject to the hearing happening in closed court, they would not oppose the making (renewing) of the AFOs. The district judge read the letter during the hearing and ruled that it should take place in open court. The NCA had told the solicitors representing X and Y that they did not accept their request for a closed hearing. The Respondents were informed of the date of the hearing, knew the position of the NCA, yet were not represented at the hearing, nor did they appear.

Representation

6. The NCA was represented by counsel Mr Andrew Bird, the Respondents by James Lewis QC and Bart Casella instructed by Banks Kelly Solicitors, Mr Bentham represented himself.

Hearings

7. The court heard Mr Bentham's application and the start of Mr Lewis' response on 6th March 2020 before the matter was adjourned to 13th March 2020 for further argument. Judgment was reserved. On 6th May 2020 I asked for any redactions that the Respondents would want in the event that I allowed Mr Bentham access to the documents relied on by the NCA. I gave Mr Lewis seven days to provide these. Due to pressure of work during the COVID 19 crisis, judgment was not given until 18th May 2020.

Evidence

8. I had a bundle of material. I was provided with the investigator's statements that were before the judge granting the application for an AFO on 2nd December 2019. Counsel's Mr Bird's submissions for the 2nd December hearings (divider 5 of the bundle). I also had correspondence at divider 6 of the bundle and the NCA's proposed

redactions of the applications. I was later provided by email with redactions proposed by the Respondents and an argument from Mr Bentham why the redactions should not be ordered by the court.

Submissions

9. I was provided with written submissions and a number of authorities which were relied on in oral argument. I am grateful to counsel and Mr Bentham for their assistance.

Arguments

10. Mr Bentham argued he should be shown the documents referred to in open court on 2nd December 2019. He relied on the principle of open justice which he said entitled him to be given access to the documents or at the ones with the redactions proposed by the NCA.

11. He relied on the case of *R (Guardian News & Media) v Westminster Magistrates' Court* [2013] QB 618 which stated that the default position in the case of documents being referred to and placed before a judge in the course of proceedings was that access should be permitted if it was for a proper journalistic purpose. The case says that the court should "*carry out a fact-specific proportionality exercise, evaluating the potential value of the material in advancing the purpose of the open justice principle against any risk of harm which access might cause to the legitimate interests of others*". The purpose of the open justice principle was to enable the public to understand the justice system and to hold up it to public scrutiny.

12. Mr Bentham explained that there was a strong public interest in disclosure. The AFO regime was a new power which was being extensively used. In this case, the AFOs related to a very large sum of money, £20million, which as he put it in argument, is suspected of being of dubious provenance. It would appear to Mr Bentham that on the face of it the NCA's case is that this is "dirty money" which had entered the UK financial system. He said there was a strong public interest in providing information about illicit flows of money into the United Kingdom. Mr Bentham said that his interest was not prurient.

13. He argued that the burden was on the Respondents to show that it was necessary to depart from the open justice principle. Mr Bentham said there was no evidence that publication would lead to harm of the Respondents' interests.

14. He added that there was frequent disclosure of the existence of large Freezing Orders imposed by the Commercial Court which involved allegations that money had been obtained unlawfully. In summary he said he was seeking the disclosure of the redacted documents for a serious journalistic purpose which would advance the principle of open justice.

15. Mr Lewis, on behalf of the Respondents contended that there were no procedural rules which provided for Mr Bentham's application (divider three, page 12 onwards). The

proceedings are civil and therefore the Criminal Procedure Rules do not apply and nor do the Civil Procedure Rules although they could be informative.

16. He set out the principles which did apply, saying, that the court had an inherent jurisdiction unless inconsistent with statute or rules of court to decide what the principle of open justice required. There was no right of access to documents placed before a court, a journalist had to show how the access would advance the principle of open justice.

17. When considering the application for access, the court had to carry out a fact-specific balancing exercise "by weighing the potential value of the information sought in advancing the purpose of the open justice principle against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others" (paragraph 11 of the Respondents' skeleton argument). The essential purpose is to "enable the public to understand and scrutinise the justice system of which the courts are the administrators" (*R Guardian News & Media Ltd v Westminster Magistrates' Court* (*op cit*).

18. In relation to the Civil Procedure Rules Mr Lewis argued that non-parties should not seek access unless they can show good reason why it would advance the open justice principle, that "there are no countervailing principles, and that granting the request will not be impracticable and disproportionate".

19. Mr Lewis relied on the Civil Procedure Rule 39.2(3) which he said preserved the confidentiality of confidential information. The principle of open justice applied in relation to documents placed before the court but there was a distinction drawn between documents which are and documents which are not placed before the court. In the latter case, access should be granted only if there are "strong grounds for thinking that it is necessary in the interests of justice to do so" (*Dian AO v David Frankel & Mead*).

20. Mr Lewis considered the Criminal Procedure Rules at paragraph 34 of his argument onwards. He set out CrimPR 5.7(7) and said that the relevant Criminal Practice Direction stated it was a discretionary power to supply a non-party with information about the case or to allow the non-party to inspect or copy a document. CPD 5B.9 set out the considerations the court should take into account.

21. The burden of satisfying the request for access rests on the Applicant. Considerations include the nature of the information being sought, the purpose for which it is required, the stage the proceedings had reached, the value of the documents in advancing the principle of open justice including enabling the media to discharge its role and any risk of harm which access to them may cause to the legitimate interests of others.

22. An important consideration is the stage that the proceedings have reached. The court also needed to have regard to Articles 8 and 10 of the European Convention on

Human Rights. Article 8 is the right to freedom to privacy and 10 the right to freedom of expression.

23. Mr Lewis set out at his paragraph 23 onwards, various recent cases involving the press reporting of investigations. I will not repeat the detail here.

24. Mr Lewis applied the principles to Mr Bentham's application in paragraph 36 onwards. Although in his written argument there was still doubt as to whether the documents had been placed before the court, by the time of oral submissions, it was clear that they had been. The documents considered by the judge included a statement from an officer who gave evidence and Mr Bird's written submissions. The magistrates' court is not a court of record so there was no transcript of the reasons given by District Judge (MC) Paul Goldspring on 2nd December 2019 and there is only a very short note of his reasons.

25. In summary Mr Lewis contended that Mr Bentham had to satisfy the court of three matters. Firstly, that the open justice principle would be advanced by the disclosure of the documents in the circumstances of the case; secondly, that the open justice principle trumped the countervailing arguments against the access and thirdly that the granting of the disclosure would not be impractical or disproportionate. He said the answer to the first matter raised was no. He expanded on the three matters in oral argument on 13th March 2020.

26. Mr Bentham had to satisfy the court that the documents he sought should be disclosed to him to advance the principle of open justice yet Mr Lewis explained that Mr Bentham had not said why he had brought the application whilst the investigation is on-going. He had not said how the disclosure would advance open justice and had not addressed the competing interests and how harm to the Respondents interests could be avoided, nor had he considered how the disclosure was proportionate.

27. The countervailing argument was that the children were named in the documents and bank account details were given. To have the material disclosed would damage the reputation of the Respondents. The allegations are that the Respondents are money launderers and corrupt. Mr Lewis pointed out the threshold for the AFO was a low one, that of suspicion. The skeleton and application are full of detail which if disclosed would cause great damage to the Respondents. He argued that the hearing should never have been held in public in any event. As Mr Bentham did not attend the hearing, "the cat was not out of the bag but trying to get out". The Respondents had an Article 8 right to confidentiality of their financial affairs.

28. In terms of proportionality, the stage the proceedings had reached should be put in the balance. It was an interlocutory decision with no final decision made. He strongly prayed in aid that the CPR and Civil PR indicated that this type of hearing should be in private. It was disproportionate when weighing up the effect on the Respondents and their family and reputation. It was not proportionate to give access at an

interlocutory stage. The 2nd December 2019 hearing was perfunctory. The Respondents in effect consented and there was no hearing on the merits.

29. Mr Lewis relied finally on a very recent case in the Administrative Court, National *Crime Agency v Mansoor Mahmood Hussain and others* [2020] EWHC 432 (Admin). This case concerned an unexplained wealth order ("UWO") and an interim freezing order ("IFO"), made under the Proceeds of Crime Act 2002. During the proceedings the press challenged the decision to hear the UWO Application in private. Although this challenge was withdrawn, the NCA considered that the challenge raised fundamental issues of principle in relation to the operation of the UWO jurisdiction and the need for privacy to protect the integrity of the investigation as well as to protect the rights of the respondent to the UWO. This was considered by the High Court in the judgment from paragraph 72 onwards.

30. The test to be applied before granting an UWO is relatively low. The court must be satisfied that there is reasonable cause to believe that the respondent holds the property and that the property is worth more than £50K. The court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient to enable the respondent to obtain the property. The other part of the test is that the court must be satisfied that there are reasonable grounds for suspecting that the respondent has been involved in serious crime or a person connected with the respondent is or has been involved.

31. In *NCA v Hussain and others*, counsel for the NCA pointed out that the open justice principle was occasionally derogated from by statute. UWOs fell in to that category; guidance and statutory material anticipate that applications for UWOs will "generally be made without notice and determined in private" (paragraph 75). A revised Practice Direction provides at paragraph 11.1 that the application for an UWO and a related IFO "will be heard and determined in private, unless the judge hearing it directs otherwise". The presumption is that the hearing will be in private. That is the starting point.

32. Mr Justice Murray agreed with the submissions made by counsel for the NCA set out in paragraph 84 (v) of the judgment. If the content of the confidential information was made public, it was likely to have a personal and reputational impact on the respondent. "The notion that the press or any other member of the public should be able to hear the NCA's suspicions as to the respondent's character and criminal involvement…in circumstances where the respondent is not even aware of the fact that the hearing is happening, let alone has the opportunity to seek to protect his confidentiality and reputation, is obviously unfair to the respondent, not to mention contrary to the interests of justice". (vi) "Indeed, even if the application is on notice, for similar reasons …There is no justification for a respondent's character being put forward for the type of public trial by media that often follows any media interest, at such an early stage of the investigation".

33. Mr Justice Murray, explained that consideration should be given to "(i) the very early stage of an investigation at which a UWO application will be sought by an enforcement authority, (ii) the relatively low threshold for obtaining a UWO under section 362B of POCA and (iii) the potentially disproportionate personal and reputational impact on a respondent of the fact that a UWO has been obtained if that fact is publicised". In the case of *Hussain and others* it was not necessary to undertake a balancing exercise weighing the Article 8 rights of the respondent against the Article 10 rights of the press.

34. Mr Bird for the Applicant had provided a number of skeleton arguments. He provided one for the original application dated 28th November 2019 which is set out in the bundle at divider 5 page 157. Others are to be found after the AFO had been made at dividers 1 and 1A of the bundle. Those were dated 11th February 2020 and 28th February 2020.

35. Mr Bird sets out the history of the AFOs. They had been made originally on different dates in 2018. On each occasion the court was satisfied the relevant threshold had been crossed. The test for the court was 'whether there were reasonable grounds for suspecting that the money held in the account was recoverable property or was intended for use in unlawful conduct' (section 303Z3(2) of POCA). The courts also had to be satisfied that it was appropriate and necessary for them to exercise their discretion in favour of making the AFO. The AFOs were made afresh for each account at various times before the hearing on 2nd December 2019.

36. Mr Bird set out the Rules which prescribe the procedure. The Applicant pointed out that AFO procedure is set out in the Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017. Evidence should be given on oath. A person who has been given notice of the application may attend and make representations.

37. In his written argument at page 161 onwards, Mr Bird set out what the banking evidence showed in relation to the moneys in this case.

38. Explanations for the sources of the funds have been given by the Respondents in interview and these were being investigated. The position of the case is that the NCA are investigating the funds but that there are indications that the funds came in a manner described as "the Azerbaijani Laundromat", a method of moving money from a ruling elite to the West where property etc is bought. It is clear from the description that it is a complex investigation and one that will take time.

39. Mr Bird provided a second argument dated 11th February 2020 (bundle divider 1 page 1) and a supplementary skeleton dated 28th February 2020 (bundle divider 1A onwards). In his second argument he pointed out that had Mr Bentham attended court on 2nd December 2019 he would have been able to hear the oral arguments and the application made by the NCA. He would have heard the rulings of the judge and seen

the orders being made and handed down. The evidence given by the officer would have been available to him.

40. Mr Bird accepted in paragraph 11 of the second argument at page 3, that the magistrates' court had "a common law inherent jurisdiction to permit a non-party to have any documents referred to in open court if the court considers it proper under the open justice principle". He referred to the leading case of *R (Guardian News & Media) v Westminster MC* [2013] QB 618. The Guardian News case rules that the default position is that in a case where documents had been placed before a judge and referred to in proceedings, "access should be permitted on the open justice principle, and where access was sought for a proper journalistic purpose the case for allowing it would be particularly strong; and that on an application for access to documents the court was to carry out a fact-specific proportionality exercise, evaluating the potential value of the material in advancing the purpose of the open justice principle against any risk of harm which access might cause to the legitimate interests of others".

41. Mr Bird set out a more recent case, that of *Dring v Cape Intermediate Holdings Limited* [2019] 3 WLR 429 in the Supreme Court where the court gave further guidance in relation to open justice. The Justices set out the court's inherent jurisdiction to determine what open justice required in terms of access to documents placed before the court. The default position was that the public should be allowed access "not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing". A non-party had no right to access but would have to explain why he sought access and "how granting him access would advance the open justice principle". The court was then to carry out a balancing exercise by "weighing the potential value of the information sought in advancing the purpose of the open justice principle against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate rights of others".

42. Mr Bird on behalf of the NCA accepted that Mr Bentham was a responsible journalist who had approached the application in a considered and appropriate way.

43. Mr Bird set out some of the factors the court might wish to consider. One consideration was whether a report on the case may be just a prurient interest in the financial affairs of wealthy private people which should not come within the scope of the open justice principle. The risk of harm could be considered by the court by looking at the documents themselves.

44. The NCA had prepared redacted documents which it was prepared to disclose if the court so ordered. The redactions were set out in the argument from paragraph 16 onwards and were also dealt with in Mr Bird's supplementary skeleton argument. In the balancing exercise the risk of harm could be addressed by redaction.

<u>Discussion</u>

45. Applications for AFOs under section 303Z in Part 5 of the Proceeds of Crime Act 2002 are started on complaint (rule 16 of the Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules SI 2017/1297).

46. Section 121(4)(d) of the Magistrates' Court Act 1980 ("MCA 1980") requires that the hearing of a complaint should take place in open court. This is subject to any enactment to the contrary. There is no enactment in the Proceeds of Crime Act or any other statute to the contrary. The AFO Rules are silent as to whether, contrary to section 121(4)(d) of the MCA 1980, the application should be made in private.

47. There is nothing which determines the status of the hearing in the Criminal Procedure Rules which is to be expected as AFOs are in Part 5 of POCA which contains the rules for civil recovery of the proceeds of unlawful conduct. There is nothing that assists in the Civil Procedure Rules.

48. On the face of it, such applications, when on notice, should be heard in open court.

49. In relation to Mr Bentham's request for access. He is not a party to the proceedings. He is a third party who is asking for access.

50. There are no authorities directly on what the approach of the court should be to an application for access to the AFOs and the documents relied on.

51. I take guidance from the case of *R (Guardian News & Media Ltd) v Westminster Magistrates' Court* (*cit op*) which sets out the general approach to be taken to a press request for material relied on in court.

52. The court should carry out a fact-specific proportionality exercise, balancing the value of the material in advancing the purpose of the open justice principle against the risk of harm which it might cause to the respondents and others.

53. On 2nd December 2019 when the AFO was granted, Mr Bentham was not in court, he was covering the murders outside Fishmonger's Hall. He seeks a copy of counsel for the NCA Mr Bird's skeleton argument dated 28th November 2019 for the 2nd December 2019 hearing and copies of the two written applications by the NCA dated 25th November 2019. In fact, there are other applications that Mr Bentham is not aware of and if my decision is to redact the two written applications and the argument, that decision will apply, *mutatis mutandis*, to the other written applications.

54. I accept Mr Bentham's argument that if he had been in court on 2nd December 2019, he would have been able to apply for the documents he wants now. He may well have been granted access to them as the Respondents knew of the hearing and were not represented. It may be that if Mr Bentham had been in court he would have been able to report the proceedings and have named the Respondents. I have to look at his application as of today and not on what might have happened had he been present in court on 2nd December 2019.

55. On 6th May 2020 I sent an email to Mr Bentham saying that I was considering further redactions from the material, including the removal of the Respondents' names. I gave Mr Bentham a chance to address this approach. He responded the same day, strongly opposing the further redaction.

56. I also gave the Respondents a chance to consider the redactions which they contended should be made if I granted access. On 13th May 2020 they responded with a detailed ten page document which I have read.

57. In his response about possible redactions, Mr Bentham said he already knew the Respondents' names but did not write the story then as he wanted to explain the precise case against them as it was set out in the NCA's application and argument. A redaction removing their names, would prevent him from reporting the names of the participants in a hearing heard in open court when no anonymity order was made or sought at the time. An *ex post facto* redaction would be contrary to the principle of open justice and a "poor reward for making an application with the contrary purpose of increasing transparency in this case". I understood his viewpoint.

58. I accept that Mr Bentham has a proper journalistic purpose in wanting to have access to the documentation. He is concerned about the flow of 'dirty money' in to the United Kingdom and wants to provide information about what is happening. He also wants to show the AFO system at work which includes the role of the court in considering AFOs, an article will enable the public to scrutinise the role the courts play in what is no longer an unusual application. I find the open justice principle would be advanced by Mr Bentham being allowed access to the applications and the argument of Mr Bird.

59. I find that there is no right for Mr Bentham to have access to the material in question. He was not present at court on the day. He would have had to apply for access to the material if he had been and a court would have had to consider his application.

60. It is for this court to look at the countervailing arguments against access. I must look at the risk of harm to the Respondents at this stage in the proceedings of disclosure of their personal and financial details.

61. The very recent case of *Hussain* (*op cit*) on UWOs and privacy is based on a different part of POCA. Furthermore, the starting point for applications for UWOs is that the proceedings will take place in private. That is not the case for AFOs and Part 5 of POCA.

62. In terms of the balancing of the value of the material, I have accepted above that Mr Bentham has a proper journalistic reason for wanting to have access to the documents redacted by the NCA. He says the open justice principle outweighs any other consideration and the Respondents' arguments should not be given weight.

63. I bear in mind that the test for the making of an AFO, is whether the court has 'reasonable grounds to suspect that the money in the accounts is recoverable money'. I accept this is a low threshold. The investigation is continuing, no findings have been made, nor has there been a decision to forfeit the money.

64. If there is to be a forfeiture hearing at the end of the investigation, that would happen in open court. The proceedings at that point and any court finding could be reported. Any redaction now is just delaying the publication of the Respondents' names not preventing them in the long term.

65. I find the risk of harm is the following:

66. Mr Bentham wants access to documentation which says that the frozen funds are derived from international corruption and are laundered through a myriad of limited companies. The harm to the reputation of the Respondents by the disclosure of such information would be high. I accept the Respondents' financial and business interests would be damaged very much at a stage when the court has only reasonable grounds to suspect that the money is recoverable property. I note that the Respondents' daughters are referred to. That would damage their reputations.

67. I have to balance the risks to the Respondents against the open justice principle claimed by a journalist who has an important story to tell, in the public interest. My finding that Mr Bentham has a proper journalistic purpose means the case for allowing access is "particularly strong" (*Guardian News & Media*).

68. I have concluded that a proportionate approach which would allow Mr Bentham to fulfil the proper journalistic purpose would be for him to have access to the material which would be further redacted. The further redactions proposed would allow Mr Bentham to tell the story without any reference to the names and personal details of X and Y

69. This approach allows Mr Bentham to write an article about 'dirty money' coming in to this country. It enables him to explain the court proceedings at the same time enabling the public to scrutinise the court whilst the interests of the Respondents are protected at this stage in the proceedings. Later on, if a forfeiture hearing is held, he would be able to report the unredacted account of the hearing and applications.

<u>Conclusion and Redactions</u>

70. Having balanced the competing interests, I order access to a redacted document. Mr Bentham has an important story to tell, at this early stage in the proceedings, he does not need the names of the Respondents to tell the story. On the other hand, I find that the redactions proposed by the Respondents go too far.

71. The court orders access to the documents without the names of the Respondents and their precise relationship with Azerbaijan. Other identifying features should be

removed, such as the names of the companies and the precise addresses mentioned in the documentation. There should be no way of identifying X and Y.

72. I accept the NCA's suggested redactions in relation to the identification of officers and the like. I would suggest the Respondents' names should be replaced by initials, such as 'X' and 'Y'. There should be no references to their children and to avoid jigsaw identification, the only reference to their family relationships should be something along the lines of "X is related to senior government officials in Azerbaijan".

73. The connection of Y to 'Z Ltd' should be removed as this would lead to her identification. The list of corporate entities at page six of the Application in the section headed, "Section 2, Grounds for suspicion" should also be removed for the same reason. The sentence would read, that "X and Y received £13,897,280.00 from 21 corporate entities". The following paragraph at the top of page seven, should have removed the names of the entities but the sentence can say, "a number of the entities have been directly linked to the reporting of the 'Azerbaijan laundromat'". Reference to corporate entities in Mr Bird's skeleton argument of 28th November 2019 should also be removed.

74. In relation to the outstanding overseas banking evidence and the details of the beneficial ownership of the list of companies set out at pages eight and nine of the applications, rather than naming the companies it should say: "Danish banking records in relation to companies in the list of 21 entities is sought" or some such and "details of the beneficial ownership of various companies in Belize, the Marshall Islands and the Seychelles is outstanding".

75. The risk of harm has been minimized by the redaction of the documents by the NCA. Reporting is not being prevented but delayed.

Senior District Judge (Chief Magistrate) Emma Arbuthnot

15th May 2020