



Neutral Citation Number: [2019] EWCA Civ 549

Case No: B6/2018/0380

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY DIVISION**  
**ROYAL COURTS OF JUSTICE**

**Mr Justice Baker**  
**[2017] EWFC 76**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/04/2019

**Before:**

**LORD JUSTICE UNDERHILL**  
**(VICE-PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION)**  
**LADY JUSTICE KING**  
and  
**LORD JUSTICE MOYLAN**

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**Between:**

**XW**  
**- and -**  
**XH**

**Appellant**

**Respondent**

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**Desmond Browne QC, Lucy Stone QC, Adam Wolanski and Duncan Brooks** (instructed by  
**Stewarts**) for the **Appellant**

**Martin Pointer QC, Rebecca Carew Pole and Georgina Howitt** (instructed by **Sears Tooth**  
**Solicitors**) for the **Respondent**

Hearing date: 6th March 2019  
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**Approved Judgment (Reporting Restrictions Order)**

**Lady Justice King:**

1. This is an application for a reporting restrictions order made on behalf of the Appellant (“the wife”) in advance of the hearing of her appeal in financial remedy proceedings due to take place later in the year.
2. On 19 June 2018, at the conclusion of the trial resulting in the order from which the wife now appeals, Baker J (as he then was), in order to prevent the ‘jigsaw identification’ of the parties’ son (“AB”), made a reporting restrictions order, anonymising names of various protagonists and redacting parts of his judgment.
3. By this application, the wife seeks an order which will ensure that the hearing of the substantive appeal proceeds with similar safeguards designed to protect the identity of AB. The Respondent (“the husband”) whilst initially opposed to the making of the order, revised his position during the course of argument and now supports the application of the wife.

*The Law*

4. Applications for reporting restrictions orders in financial remedy cases have different starting points depending upon whether the hearing is in the Family Court or the High Court at first instance, or on appeal to the Court of Appeal.
5. At first instance, pursuant to Family Procedure Rules 2010 r.27.10 (FPR) cases are heard in private, although accredited members of the press have the right to attend such hearings (FPR r.27.11(2)(f)). By contrast, on an appeal to the Court of Appeal, the general rule in respect of all appeals, regardless of the subject matter, is that they are heard in public (CPR 39.2(1)).
6. There are, however, exceptions to that general rule. By CPR 39.2(3), the exceptions include that a hearing or any part of it may be in private if:
  - “c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
  - d) a private hearing is necessary to protect the interests of any child or any party.”
7. Whilst it is common ground between the parties that a reporting restrictions order is necessary in order to protect the interests of their son, the court must, nevertheless, before making such an order, consider the application against the backdrop of the established law and, specifically in relation to an application in this court, of the test recently set out by the Court of Appeal in *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523 (“*Norman*”).
8. It follows that the court must, and I do, have in mind the principles identified by Lord Neuberger in *H v News Group Newspapers Ltd: Practice Note* [2011] EWCA Civ 42, [2011] 1 WLR 1645 which apply to all such applications:
  - “21. In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication

of details of a case which are normally in the public domain, certain principles were identified by the Judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows:

(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.

(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available,

although some editing of the judgment or order may be necessary.

(10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one”.

9. In *Norman*, Gloster LJ emphasised the necessity for proper procedure to be respected; this means that a formal application with supporting evidence is necessary and must be served on the media via the Press Association’s CopyDirect service. (See the headnote of *Norman* at *Per curiam*).
10. It is important to note that an exception is made to this general requirement where the parties agree to the making of what is a fairly routine order, namely the anonymisation of the names and dates of birth of any minor children together with other identified personal information such as the names of their schools. In my judgment, the anonymisation of the children’s names in this court is rightly commonplace. The names of children are of absolutely no public interest and in my view, save in exceptional circumstances, children should routinely be granted this limited protection from any public spotlight which may be trained upon their parents’ financial affairs.
11. The question then is when should the court go further and, either, pursuant to CPR 39.2(3), order a hearing to be heard in private, or, rather less drastically, order a public hearing but with substantial anonymisation and redaction of the resulting judgment supported by a reporting restrictions order?
12. Gloster LJ emphasised the importance of open justice in the context of appeals saying:

“[56] The principle of open justice and its importance has been consistently and repeatedly emphasised by the courts in the context of applications for private hearings, anonymisation and injunctions restraining publication. Only exceptional circumstances justify the departure from the normal principle.”
13. On the facts in *Norman*, the court concluded that the interest in reporting the proceedings outweighed such Article 8 rights as the wife in that case may have had to privacy and confidentiality. Gloster LJ said at [76]:

“(iii) As the authorities which I have referred to above make clear, there is a strong and well-established public interest in reporting court proceedings. The correlative obligation of the litigant’s right to a public hearing under article 6 must be that the litigant, save in circumstances where his article 8 rights clearly outweigh the public interest in reporting, has to accept the reality that information relating to his private affairs will be in the public domain, as a result of his claim.”

14. Lewison LJ in his judgment in *Norman*, emphasised the differences between financial remedy proceedings at first instance and proceedings in the Court of Appeal:

“[83] (i) The fact that a judge at first instance has made or has refused to make an order for anonymity does not bind the Court of Appeal or determine how the appeal will be heard, although the Court of Appeal will pay close attention to the judge’s decision: *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 WLR 770 at [67].

ii) At first instance proceedings are governed by the Family Procedure Rules, whereas in the Court of Appeal proceedings are governed by the CPR. The starting point under the FPR is that ancillary relief proceedings are heard in private. The starting point under the CPR is that proceedings are heard in public. The Court of Appeal does, however, have the power to sit in private, both under the CPR and under the Domestic and Appellate Proceedings (Restriction of Publicity Act 1968).

iii) Decisions of the Court of Appeal are likely to have wider impact than decisions at first instance and are therefore inherently more likely to raise matters of public interest.

iv) Except in rare cases, the Court of Appeal proceeds on the basis of the facts as found by the judge. At first instance the parties may adduce a mound of evidence, some of which may be hotly contested, in order to persuade the judge to make findings adverse to one party or favourable to another. Much of this material may be rejected by the judge, or turn out not to be relevant to the matters that the judge has to decide. Even where the judge has made findings of fact, they may not be relevant to the questions that the Court of Appeal has to decide. Thus the factual detail before the first instance judge is likely to be wider ranging than the material relevant to an appeal.”

15. Lewison LJ went on:

“[86] I would therefore hold that the default position in the Court of Appeal should remain as it is. A hearing will take place in public, the parties will be named and the hearing and any consequential judgment may be reported unless there are cogent reasons why the court thinks it right to depart from that position...”

16. Gloster LJ during the course of her lead judgment reviewed the authorities to date [54 onwards] concluding that they demonstrate “the correct approach to be a two stage process: the court first has to assess whether an individual’s article 8 rights are engaged at all, and, if so, it then has to go on to conduct the ‘ultimate balancing test’ as described by Lord Steyn in *In re S*, at para [17]”.

17. The ‘ultimate balancing test’ referred to by Gloster LJ is the balancing by the judge of Article 8, rights of the family, and Article 10, freedom of expression, Convention rights as described by Lord Steyn in the paradigm passage in *Re S (a child) (Identification: Restrictions on Publication)* [2005] 1 AC 593:

"17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

18. *K v L* [2012] 1 WLR 306, [2011] EWCA Civ 550 is the only case which has been reported to date which specifically considered the need for substantial anonymisation and redaction in the interests of a child in a hearing in the Court of Appeal. In that case, at the conclusion of the substantive judgment dealing with the merits on appeal, Wilson LJ (as he was then) concluded as follows:

"[25] Second, although in the normal way the court conducted the hearing of this appeal in public, it acceded at the outset to a joint application by the parties for an order which prevented publication of the names or photographs of themselves or the children, of the name of the town in which the members of the family all currently continue to reside or of any other information likely to lead to identification of the children. ....I wish to stress that it is very rare for this court to order anonymisation of any publication in respect of an appeal to it against an order for ancillary relief. Such an order is more easily justified for the protection of the rights of children under Article 8 of the ECHR when, at the centre of the appeal to this court, whether under the Children Act 1989 or otherwise, lies an issue about the optimum future arrangements for them.

[26] In making their application for an order for reporting restrictions in the present case, counsel drew to our attention the summary of the relevant principles recently given by Lord Neuberger, the Master of the Rolls, in this court in *JIH v. News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 2 All ER 324, at [21]. My colleagues persuaded me that, by reference to those principles, it was appropriate to make the order. We did so in order to protect the rights of the three children under Article 8. We considered that their rights outweighed the general interest in a publication of these proceedings which identified them,

whether directly or by the identification of one or other of their parents. The fact is that the children live with a mother who is *abnormally* wealthy but who over many years has, together with the father, assiduously sought to create for them a *normal* life in which they and the family's friends are unaware even of the broad scale of her wealth and over which she has been astute to cast no trappings indicative of it. For example, the wife does not provide, and, for reasons entirely unrelated to cost, does not wish to begin to provide, the security customarily provided for their children by wealthy celebrities. We concluded that, unless we made the order, the *normality* of the current lives of the children would be forfeit, with results likely to be substantially damaging, perhaps even grossly damaging, to them.”

19. Referring to *K v L* in *Norman* Gloster LJ said:

“[67] .....If, as in *K v L*, in the interests of children (or indeed the parties) it is necessary to restrict public reporting of family finances, or other evidence, such as medical evidence, then, applying the well-established approach set out in the authorities above, an appropriate order may be made. But it by no means follows, as Mostyn J appears to have been suggesting in *DL v SL* at paras 10-13, and in particular at para 10, that, so far as financial remedy appeals *in this court* are concerned, such appeals should be routinely categorised "as private business entitling the parties to anonymity as well as to preservation of the confidentiality of their financial affairs", or, even if the appeal is to be heard in public, entitling the parties "to anonymity and preservation of the confidentiality of their financial affairs....."

20. One can therefore draw from the judgments in *Norman* that:

- i) Ordinarily, in a financial remedy appeal, a formal application should be made to hear the appeal in private or for there to be a reporting restrictions order which will anonymise or prevent the publication of information in relation to an appeal. Mere anonymisation of the names of minor children will typically not require a formal application;
- ii) Only exceptionally will an order for anonymity supported by a reporting restrictions order be made in the Court of Appeal. The parties are not routinely entitled to anonymity and the preservation of confidentiality of their financial affairs;
- iii) Parties cannot waive the rights of the public by consent. The decision is that of the court having conducted the *Re S* balancing exercise;
- iv) Whilst the court will pay close regard to any such order which has been made by the first instance judge, such orders are not binding, not least because of the different starting points for the respective courts;

- v) When considering such an application, only rarely will the Court of Appeal go behind the facts as found by the judge;
- vi) Having concluded that the parties' Article 8 rights are engaged and having weighed up the competing Article 8 and Article 10 rights, the interests of a child may render it necessary to restrict public reporting of certain information in financial remedy cases.

*The hearing before Mr Justice Baker*

21. Sometime after handing down his substantive financial remedy judgment, the judge held a discrete hearing at which he heard argument about the need for, as well as the nature and extent of, any reporting restrictions order. The judge made a number of findings which provided the background to his analysis in conducting the balancing exercise between the competing Article 8 and Article 10 rights against the backdrop of the importance of open justice. There has been no appeal against the making of that reporting restrictions order, and this court will not go behind the findings of fact made by the judge which were informed by extensive oral evidence and argument heard over many days in the substantive financial remedy hearing.
22. Important for consideration of the hearing before this court are the following findings by the judge:
  - a) The judge held that there was little if any public interest in knowing the identity of the husband and his family and the details of the issues which had been ventilated in the trial. More particularly, the judge held that there was nothing in the conduct of either party which would justify such exposure. Neither party had been guilty of litigation misconduct which would "justify the withdrawal of confidentiality" (paragraph 20);
  - b) There was a public interest in the publication of the substantive judgment as it dealt with a number of important issues arising from financial remedy cases including the treatment of nuptial agreements, latent potential and special contribution;
  - c) Whilst there was a public interest in the publication of the judgment, it did not require it to be published in a version which identified the parties or other members of their family (paragraph 23). A right against unwanted intrusion arose in the case (*see PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081(*PJS*)). The judge said:

“It is certain that identification of the parties would cause some intrusion into the life of their son, and it is significantly likely that the intrusion would be on a scale that would cause harm to this vulnerable boy. I accept the wife’s evidence to the various risks and harm to her son which would arise if the judgment were to be published in a form which identified the parties. For the reasons set out at length by the wife in her statement and reiterated by Counsel for both parties...I am persuaded there is a particular need in this case for the court to take



all necessary steps to protect the family, and in particular the parties' son, from the risk of identification (paragraph 24).”

- d) The judge did not accept the submission on behalf of the husband that this was a case which fell into an exceptional category which was “incapable of camouflage” and that the judgment should not therefore be published at all. The judge concluded that, whilst redaction may “reduce the utility of the published judgment as it may obscure some of the detailed reasoning of the court’s decision of some of the issues, in particular the issues of special contribution. A substantial part of the judgment will, however, be published without redaction and I do not think that publication of the anonymised and redacted judgment will be pointless”. (paragraph 26.)

23. In light of his findings, the judge concluded that it was important to make a reporting restrictions order precluding the publication of certain information relating to the proceedings and for there to be a published but anonymised, redacted version of his judgment of December 2017.
24. The redacted judgment is found at [2017] EWFC 76 and the reporting restrictions judgment is found at [2018] EWFC 44.

### *Discussion*

25. The media were served with the present application and, although Mr Farmer (who had submitted both oral and written objections to the making of the order at the hearing in front of Baker J) was in court for part of the time, on this occasion he did not, nor did any other person or entity, on behalf of the press, make any submissions or seek to oppose the order sought by the husband and wife.
26. Mr Desmond Browne QC, on behalf of the wife relied on three elements in support of his submission that this is an “overwhelming case for anonymisation” and further that it is a case where, exceptionally, anonymisation and a reporting restrictions order should be made. The three strands upon which he relies are (i) the interests of the child of the family, (ii) disruption of the family’s normal lifestyle and (iii) the confidentiality of the wife’s family’s finances and trusts.
27. I deal with Mr Browne’s first two strands together as the judge’s findings that identification would cause harm to AB were substantially reliant upon both the direct interests of AB as well as the adverse effect that disruption of his family life would have upon him.
28. That the Article 8 rights of both the husband and wife and their son are each engaged is not in dispute.
29. In *PJS*, Lady Hale expressed the view that the interests of children who are likely to be affected by the publication of private information has not, until now, been given sufficiently close attention. In this regard she said:

“[72] But they deserve closer attention than they have so far received in this case, for two main reasons. First, not only are the children’s interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their parents.”

30. Mr Browne also drew the court’s attention to Lady Hale’s observation in *PJS* that, as part of their own Convention rights to family life, parents have a right to decide when to raise difficult issues with their child, whether in relation to wealth or health (or both in this case). That, says Mr Browne, is the parent’s prerogative and is, as Lady Hale said:

“[74]...the least harmful way for these children to learn of these events is from their parents. Their parents have the resources to take wise professional advice about how to reveal and explain matters to their children in an age-appropriate way and at the age-appropriate time.”

31. In *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827, Ward LJ considered the approach to the balancing exercise in circumstances where the rights of children would be affected by a particular publication saying:

“[19]...It is clear that the interests of children do not automatically take precedence over the Convention rights of others. It is clear also that, when in a case such as this the court is deciding where the balance lies between the Article 10 rights of the media and the Article 8 rights of those whose privacy would be invaded by publication, it should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests. Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.”

32. In his reporting restrictions judgment, Baker J sets out at [11] in carefully anonymised detail, information about the son’s extremely serious medical condition and the way in which his parents manage his school and home life in order both to protect him, and to give him as normal a life as is possible in all the circumstances.

33. Baker J concluded, I repeat, as follows:

“24. In particular, it is certain that identification of the parties would cause some intrusion into the life of their son, and it is significantly likely that the intrusion would be on a scale that would cause harm to this vulnerable boy. I accept the wife’s evidence as to the various risks of harm to her son that would arise were the judgment to be published in a form which identified the parties. For the reasons set out at length by the wife in her statement, and reiterated by counsel for both parties in

their written and oral submissions, I am persuaded that there is a particular need in this case for the court to take all necessary steps to protect the family, and in particular the parties' son, from the risk of identification. I accept that any reporting restrictions order made by this court will have no authority outside the jurisdiction, but it is within the jurisdiction that the need for protection of the child arises."

34. I remind myself that the application before this court is not an appeal from Baker J's order; it is a free standing application and the starting point for this Court is, accordingly, different: to repeat, in the Family Court the proceedings will be heard in private and in the Court of Appeal they will be heard in public. Notwithstanding that that is the case, the background facts and circumstances which have led to the present application are identical to those before the judge in the High Court. This court will not go behind the findings of harm made by Baker J, the trial judge, who had been steeped in the case for many days, and in respect of whose findings there is no appeal.
35. In my judgment the parties' and AB's Article 8 rights have inevitably been engaged. Having considered the matter afresh, I am satisfied that the balance between the Article 10 rights of the media and the public interest in open justice and the Article 8 rights of the parties and of AB, on the facts of this case, tip heavily in favour of the making of the reporting restrictions order sought by the parties. It is imperative in AB's interests, that the delicate balance achieved by the husband and wife, which allows him some element of normality, remains undisturbed. Further, it must be for AB's parents alone to decide how and when he should be told of the implications of his illness, and only they should decide what he should be told and in what way, given his level of understanding.
36. As identified by the judge, there is undoubtedly a legitimate public interest in the issues raised in this appeal. Even so I am satisfied that the order proposed by the wife, and now supported by the husband, will allow those issues to be addressed in public hearing, in such a way as will satisfy the public interest whilst protecting the interests of this young child.
37. The third limb of Mr Browne's submissions relates to the confidentiality of the wife's family's finances and trusts. The hearing before this court focused heavily on the interests of AB and it was solely in order to protect him that the husband withdrew his opposition to the making of a reporting restrictions order during the course of the hearing. I have no doubt that he would object strongly to an order based wholly or substantially on the wife's desire to keep her family's finances confidential.
38. In the event, given my conclusion in relation to the Article 8 rights of AB and the importance of maintaining the balance of his day to day life, it is unnecessary for me to go on to consider that aspect of Mr Browne's argument which relates to the wife's family's finances as a basis for the making of an order.
39. In all the circumstances therefore, if my Lords agree, I would regard this as one of those exceptional cases where it is appropriate to make the orders for anonymisation and the restriction on reporting certain aspects of the case sought by the parties.

**Lord Justice Moylan:**

40. I agree.

**Lord Justice Underhill (Vice-President of the Court of Appeal Civil Division):**

41. I also agree.