Neutral citation: [2024] EWFC 231 (B)

Case No: ZE23F00310

IN THE EAST LONDON FAMILY COURT

11, Westferry Circus,
LONDON,
E14 4HD

Date: 6 June 2024

Before :

HER HONOUR JUDGE MADELEINE REARDON

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G v S (Family Law Act 1996: publicity)

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Dr Jackson, appearing *pro bono*, instructed by Advocate, for the applicant Mr G
Ms Gallagher, instructed by Ms Wood of Lawrence Stephens Solicitors, for the respondent Ms S

Hearing date: 29 April 2024

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JUDGMENT

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

HER HONOUR JUDGE MADELEINE REARDON :

Introduction

1. On 7 March 2024 the applicant and respondent agreed to compromise the applicant's application to extend a non-molestation order made under FLA 1996 s42. During the course of the proceedings the respondent had also made an application for a non-molestation order, which she withdrew at a hearing in February 2024. The compromise was agreed on the basis that there would be no admissions made by either party and the court would make no findings.
2. The applicant now wishes to speak publicly, and in his own name, about the proceedings and the evidence filed by each party. The respondent says that he should not be permitted to do so.

3. There is a dispute between the parties as to:
    a. The default position or starting point, as a matter of law, when a party to proceedings under FLA 1996 wishes to speak publicly about his or her experience of the proceedings;
    b. Depending on the starting point, whether the court should lift any restriction in order to permit the applicant to speak publicly, or impose a restriction to prevent him from doing so.
4. Both parties were represented by counsel at the hearing. I am grateful to both counsel, and particularly to Dr Jackson who acted on a *pro bono* basis, for their extremely helpful research and submissions.

Background

5. The applicant is Mr G. The respondent is Ms S. They met in 2021, married and began living together in October 2022, and separated in March 2023.
6. The respondent has a daughter, D, from her marriage to her ex-husband. D will turn four later this year. She lived with the parties during the period of their cohabitation.
7. The marriage was unhappy from the start. Each party alleges that the other behaved in a controlling, aggressive and violent manner during their cohabitation. Of some relevance to the issues of publicity, each party also alleges that since the separation the other party has perpetuated a campaign of harassment against them, involving wider family members and others. The court has not determined any of these allegations.
8. After the parties separated, on 13 April 2023, the applicant applied for a non-molestation order against the respondent. An order was granted on a without-notice basis on 14 April 2023, for a period of 12 months, and a return date hearing was listed on 31 August 2023.
9. On 10 May 2024 the respondent applied for a non-molestation order against the applicant. She did not ask for the application to be considered on a without-notice basis and so it was listed, together with the applicant's application, on 31 August 2023. At that hearing directions were made for each party to file evidence in response to the other's allegations, and a pre-trial review hearing was listed.
10. On 18 December 2023 the respondent applied to withdraw her application, saying that she had become drained and disillusioned with the court process.
11. On 7 March 2024 the respondent agreed not to contest the extension of the applicant's non-molestation order for a period of a further six months. It is recorded on the order made on that date that the respondent considered this to be a "proportionate" approach to take, as the court could not in any event accommodate a contested hearing before October 2024.
12. The hearing on 7 March 2024 took place before District Landes. The applicant sought permission to speak publicly about the proceedings. The respondent made it clear that she would oppose the application. The issue of publicity was transferred to me and listed for hearing on 29 April 2024.
13. Shortly before this hearing, the applicant applied for an adjournment on the basis that he had recently discovered that a potential charge against the respondent on an offence of assault against him was still pending, and therefore he was concerned that publication of information about the proceedings might prejudice any pending criminal trial. The respondent opposed that application. I was informed at the hearing that both parties agreed that in fact there was no, or minimal, overlap between the subject-matter of the criminal proceedings and the FLA proceedings; and that it was agreed that publication, if permitted, would not give rise to any risk

of prejudice as far as the criminal proceedings were concerned. I have therefore proceeded on that basis.

The law

14. The allegations in these proceedings include an allegation made by the respondent of sexual assault. It is common ground that s1(1) of the Sexual Offences (Amendment) Act 1992 prevents that information from being made public.
15. The Administration of Justice Act 1960, s12 provides as follows:

> "(1)The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—
>
> (a)where the proceedings—
>
> (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
>
> (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;
>
> […]
>
> (e)where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
>
> (2)Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication."

16. The application of s12 to proceedings under FLA 1996, and other non-Children Act family proceedings, was considered by the Court of Appeal in *Allan v Clibbery* [2002] EWCA Civ 45.
17. The first issue for the Court of Appeal was whether the Family Proceedings Rules 1991 (the predecessor of FPR 2010) were *ultra vires* in providing that applications under FLA 1996 should be heard in private. The Court held that they were not. FPR 2010, r.10.5 repeats the provision in the earlier rules that any hearing relating to an application for an occupation order or a non-molestation order will be in private unless the court directs otherwise. There has been no challenge to that position within this application.
18. The second issue in *Allan v Clibbery* was whether the fact that the proceedings were heard in private meant that there could be no reporting of the proceedings without the permission of the court. The Court held that this was not the case. The starting point was the importance of the principle of open justice, and the restriction in AJA 1960, s12 was expressly limited. If a case did not fall within the scope of s12 AJA 1960 or any other statutory restriction on publication[1], as *Allan v Clibbery* did not, the only potential restriction on publication arose as a consequence of the implied undertaking of confidentiality with respect to material obtained under compulsion.
19. It was necessary for the Court of Appeal to decide whether, and to what extent, the implied undertaking of confidentiality arose in proceedings under FLA 1996. The Court held that in such

[1] Such as, for example, CA 1989, s97 or the Judicial Proceedings (Regulation of Reports) Act 1926, s1(1)(b).

proceedings there was no automatic rule, contrary to the position in both Children Act and finanicial remedy (then "ancillary relief") proceedings, that protected information from the proceedings from being published. Whether they were so protected would depend upon the type of proceedings and whether they come within, or part of the information comes within, the ambit of section 12, or whether the administration of justice would otherwise be impeded or prejudiced by publication (per Butler-Sloss P at paragraph 75).

20. At paragraph 77 Butler-Sloss P said:

> "It does not, in my view, follow that a hearing of a [FLA 1996], s36 application which is in private, even one which is is to some extent inquisitorial with the requirement that 'the court shall have regard to all the circumstances', is to remain for ever entirely confidential. Part IV applications do not necessarily come within section 12 nor is the element of compulsion, thereby triggering an implied undertaking, always present. In my judgment the court must look at the application before it and come to a conclusion whether that application falls within the ambit of section 12 or within the recognised categories of cases, those of children and ancillary relief issues, or whether there are other factors as a result of which, if the proceedings are not treated as secret, there will be prejudice to the administration of justice. Family proceedings are not and should not be seen to be in a separate category from other civil proceedings, other than in recognised classes of cases or in other situations which can be shown manifestly to require permanent confidentiality."

21. The application in *Allan v Clibbery* was for an occupation order under FLA 1996, s36. The parties did not have children. The Court of Appeal had limited information about the evidence filed, which was not before it. It appeared however that the primary issue for the judge at first instance had been whether the court had power to make an occupation order at all, in circumstances where the appellant, who was the respondent to the application, had argued that the home in question was not a home in which the parties were living together as husband and wife, or a home in which they at any time so lived together or intended so to live together" (FLA 1996, s36(1) as it was then worded; the words "lived together as husband and wife" have since been replaced with the word "cohabited"). The appellant's argument was successful and the application failed on that basis, with the result that the court did not go on to consider the factors in s36(6). Thorpe LJ took the view that in those circumstances the implied undertaking of confidentiality had not arisen (paragraph 116):

> "That being the narrow issue I find it difficult to discern a sufficiently clear duty in the court to give rise to a corresponding duty on the parties to refrain from ulterior use of the litigation material."

22. He went on to observe (paragraph 118):

> "I agree with the President that cases such as the present are likely to form relatively rare exceptions to the general rule. This case has attracted a great deal of interest and comment amongst the specialist practitioners. Insofar as they look to our judgments for clear signposts as to the way ahead, the best generalisation that I can offer for cases not involving children is that, wherever the nature of the proceedings is at least quasi-inquisitorial, the duty to the court will probably be discernible."

23. The majority view in the Court of Appeal was, however, that the mere fact that the proceedings might be described as quasi-inquisitorial, as a result of provisions such as that in MCA 1973, s25 and FLA 1996, s36(6) requiring the court to consider "all the circumstances", did not inevitably give rise to the implied undertaking of confidentality. Keene LJ said (paragraph 125):

> "So far as publication is concerned, I find myself in agreement with the description given by the President of the law applicable in litigation generally, including the legal principles governing the occasions when the implied undertaking arises. Applying those principles to

proceedings in the Family Division, I accept that in ancillary relief proceedings such an undertaking would normally operate because of the duty on the parties to make full disclosure: *Livesey (Formerly Jenkins) –v- Jenkins* [1985] 1 A.C. 424. But the requisite element of compulsion to disclose will not exist in all family proceedings. I share the President's view as expressed in paragraph 77 hereof that such an element will not necessarily exist in cases arising under section 36 of the Family Law Act 1996, merely because of the provisions of subsection 6 of that section. I doubt whether the duty of the court under that subsection to have regard to all the circumstances, including certain specified matters, creates in all circumstances a sufficient obligation and degree of compulsion on the parties to disclose information to give rise to the implied undertaking."

24. The decision of the Court of Appeal in *Allan v Clibbery* therefore leaves open the issue which arises in this case, which is whether the starting point on an application for a non-molestation order under FLA 1996, s42 is that the proceedings are to be treated as secret and publication is prohibited even after the proceedings have come to an end. S42(5) requires the court to consider "all the circumstances, including the need to secure the health, safety and wellbeing of the applicant and.. any relevant child". That wording suggests a quasi-inquisitorial jurisdiction, but the judgments of the majority in *Allan v Clibbery* would suggest that that does not necessarily give rise to the implied undertaking. Neither counsel has been able to identify any authority on this point, or indeed any authority subsequent to *Allan v Clibbery* which deals with issues of publicity in FLA 1996 proceedings.
25. There is, however, considerable, and divergent, High Court authority on the operation of the implied undertaking, and its effect on publicity issues, in financial remedy proceedings, particularly since the 2009 rule change which permitted accredited media representatives to attend most hearings in family proceedings (now FPR 2010, r.27.11). For example, in *Cooper-Hohn v Hohn* [2015] 1 FLR 19 Roberts J referred to the reasoning of the Court of Appeal in *Allan v Clibbery* in respect of the confidentiality of financial disclosure, and went on to say:

    "I also accept that *Lykiardopulo*[2] is good and sound authority for the proposition that the fundamental principles governing ancillary relief or financial remedy proceedings, the confidential nature of the financial information disclosed within them and the need to protect that information remains good law, notwithstanding that the media now has access to these private hearings."

26. However, in *Xanthopoulos v Rakshina* [2023] 1 FLR 1388 Mostyn J expressed the view that the *Allan v Clibbery/ Lykiardopulo* reasoning had been superseded:

    "Therefore, in my judgment, the rule change which allows journalists and bloggers into the proceedings has the effect of completely overturning the reasoning of the Court of Appeal which carved out an exception to the general rule concerning the reportability of proceedings heard in private."

27. As the FRC Subgroup of the Transparency Implementation Group has observed[3], in most cases heard in the Family Court or Family Division "the practical starting point… appears to be automatic anonymisation". There is however, as yet, no Court of Appeal authority to resolve this issue.
28. Irrespective of where the starting point lies and where the burden falls in terms of applications either to permit or restrict publicity, once the issue has been raised the task for the court will be to balance rights to private and family life under ECHR Article 8 against rights to freedom of speech under Article 10. The way in which the balancing exercise is to be conducted was set out

[2] [2011] 1 FLR 1427. In this Court of Appeal decision the issue was whether perjury on the part of one of the parties should displace what was accepted on both sides to be a starting point of confidentiality.

[3] Transparency in the Financial Remedies Court, April 2023.

in the speech of Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 at paragraph 17:

> "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."

The positions of the parties

29. The applicant wishes to speak publicly about his involvement in FLA 1996 proceedings, particularly in the context of a documentary about domestic abuse and Honour-Based Violence in which he has been invited to participate. He would be willing to agree not to name the respondent, or to reference D at all.
30. The applicant's primary position is that these proceedings, whilst heard in private, are not subject to any restriction in respect of publication and he is therefore free to speak publicly about the proceedings without finding himself in contempt of court. He says that if the respondent wishes to prevent this, the appropriate route for her to do so is through an application for a reporting restriction order which, he says, should not be granted.
31. If he is wrong in his primary case and in fact the default position restricts publication, the applicant argues that in the circumstances of this case that restriction should be relaxed.
32. Despite his primary position, the applicant has taken the responsible approach of agreeing that he will not, in fact, publish any information about these proceedings until this application is determined.
33. The respondent's case is that publication of information about these proceedings would be a contempt of court, either because s12 AJA 1960 applies or, in the alternative, because unlike *Allan v Clibbery*, this is a case where the subject-matter of the proceedings gives rise to the implied undertaking of confidentiality. She says therefore the applicant requires the permission of the court to publish any information about the proceedings. That should be refused because, the respondent says, her Article 8 rights to privacy heavily outweigh in this case the applicant's Article 10 rights to freedom of speech and any general public interest arguments in favour of publication.

Does s12 apply?

34. In my judgement, the short answer to this question is no.
35. Counsel for the respondent suggested that the presence of her daughter in the family home during the period of the parties' cohabitation brought the proceedings within the scope of s12, and pointed out that D was named in the respondent's application as a child for whom the applicant sought protection.
36. These were not proceedings under CA 1989 or ACA 2002. Although D is referenced very briefly in both parties' witness statements, there are no allegations by either party of any behaviour specifically directed towards her or any particular consideration of her welfare. There is no way, in my view, that these proceedings could properly be described as relating "wholly or mainly" to the maintenance or upbringing of D.

37. As the Court of Appeal observed in *Allan v Clibbery*, there will be some FLA applications, particularly perhaps applications for occupation orders which require the court to consider the detail of a child's living arrangements or where the child's needs are a significant factor, where s12 will apply. This is not such a case.

What is the default position in terms of publication in a case where s12 does not apply?

38. An application for a non-molestation order requires the court to consider "all the circumstances". However the majority view in *Allan v Clibbery* was that this quasi-inquisitorial duty on the court does not of itself create a sufficient degree of compulsion on the parties to give rise to the implied undertaking of confidentiality. The mainstream view in the Financial Remedies Court is that in those cases, the obligation to give full and frank disclosure of one's financial position means that the undertaking does arise. I have not been referred to any authority which might assist in deciding whether such an undertaking will usually arise in non-molestation applications.
39. As was recognised in *Allan v Clibbery* itself, a starting point which depends on the court's evaluation of the nature of the particular proceedings, whether they can properly be characterised as "quasi-inquisitorial", and whether an implied undertaking of confidentiality has arisen, is unsatisfactory. Applications under FLA 1996 are very common. The applicant may have an entitlement to means-tested public funding but the respondent almost invariably does not, and so these applications are often made and responded to by litigants in person. It is difficult to see how such litigants can be expected to know whether or not they are permitted to speak freely about their FLA proceedings if the answer to that question is not straightforward even for lawyers.
40. The focus of the Court of Appeal in *Allan v Clibbery* was on the circumstances in which the implied undertaking as to confidentiality would arise. It was not on the nature of the information usually provided by parties in applications under FLA 1996. These applications, for the most part (*Allan v Clibbery* appears to have been an exception) are founded on allegations of domestic abuse. They are typically made to secure the safety and wellbeing of the applicant in the immediate aftermath of a separation. Where the application is made without notice the applicant is required to satisfy a high bar and to demonstrate that the risks posed to them by the respondent's conduct are such that the interference with the respondent's Article 6 rights is justified. As a result the information contained in the applicant's witness statement is often detailed, intimate and raw.
41. It seems to me therefore that there will be many FLA 1996 cases in which the Article 8 rights of any party wishing to restrain publication are likely to outweigh by some distance the Article 10 rights of the person seeking to publicise the information. It is also likely to be the case that in most scenarios the harm caused by a default position in which there are no restrictions on publicity will be greater than the harm caused if the starting point is that the proceedings are confidential. The worst that is likely to happen with a starting point of confidentiality is that the party seeking publicity faces a delay in telling their story. If the default position is the other way round, there are real risks of significant harm.
42. For that reason I would suggest, albeit tentatively and in the absence of authority, that the starting point should be one of confidentiality in any application under FLA 1996 which involves allegations of domestic abuse or other harm, and that the burden of making the application should lie with the person seeking permission to publicise the information. That is certainly the

basis on which these applications are currently dealt with in the Family Court, and the parties are almost invariably anonymised in published judgments[4].

43. I am fortified in that decision by the practical implications of the course which the applicant invites me to take. As Dr Jackson accepted during the course of argument, if the starting point is that the information contained in these proceedings is not private, any person wishing to restrain publication would have to issue an application for a reporting restriction order, probably simultaneously with the application for the non-molestation order, in order to be confident that the respondent would not be able to disclose sensitive and private information to the world as a whole. I cannot see how such a process could feasibly be accommodated within the court system, and just as importantly any such requirement would operate as a significant deterrent for applicants, who are often seeking the protection of the court at a time of significant vulnerability.

Should the applicant be permitted to publish information about this case?

44. My decision that the starting point is one of confidentiality means simply that the applicant must seek the permission of the court to publish information about the proceedings. It does not establish a presumption that the respondent's Article 8 rights will prevail: in the balancing exercise conducted by the court, neither article has precedence over the other.
45. In favour of publication are the following factors:
    a. The open justice principle means that there is a legitimate public interest in the publication of information about court proceedings generally.
    b. The applicant argues that there is a particular public interest in the publication of information about proceedings which concern someone who is (on his case at least) a male victim of domestic abuse. He has been asked to provide an interview for a proposed documentary; it may be assumed that the intention behind this is to increase public awareness and understanding of this issue.
    c. Both parties say that the other has already disclosed information about the proceedings to third parties within their community. The applicant describes the respondent's actions as "a year-long smear campaign" which has led to him receiving serious threats of physical violence.
    d. The applicant wishes to exercise his right under Article 10 to "tell his story". In *Griffiths v Tickle* [2021] EWCA Civ 1882 the Court of Appeal endorsed Lieven J's observation that the mother in that case, who wished to speak publicly, had "a right to speak to whomsoever she pleases about her experiences" and that if she were prevented from doing so "the level of interference in the mother's rights should not be underestimated."
46. The factors pointing towards privacy are as follows:
    a. These proceedings, like many FLA applications, involved a detailed consideration of the most intimate aspects of the parties' relationship and lives. The witness statements contain information about each party's physical, sexual and mental health, their relationships with others including wider family members, and distressing and traumatic experiences in their pasts. This is information of a highly sensitive and personal nature which most people would not choose to make public, provided within proceedings which the respondent would have fully expected to remain confidential.

[4] I have been able to find only one reported FLA case since *Allan v Clibbery* in which the parties are named: *Dolan v Corby* [2011[EWCA Civ 1664. There is no reference to issues of anonymity or publicity in the judgments in that case.

b. The applicant's assurance that he will not name the respondent provides her with little protection in circumstances where it is inevitable that anyone who knows the family will be able to identify her from information published by the applicant in his own name.
c. The respondent accuses the applicant of controlling behaviour towards her. There has of course been no finding to that effect, but if the respondent is right there is a risk that the applicant may use publicity, or the threat of it, as a means to exert continuing control.

47. It is relevant, in my view, that the context of this application is that the FLA proceedings were compromised without any findings being made by the court. That means that there has been no determination of the parties' allegations against each other. If there had been, and if the court were satisfied that the applicant's complaints of a "smear campaign" by the respondent were well-founded, the arguments for publication as a means of correcting misinformation would be stronger. In circumstances where one party wishes to speak publicly and one does not, and where there is no judgment to provide an authoritative account, there is a likelihood that publication by one party of the particular information they choose to put into the public domain will present a one-sided and misleading picture.
48. For those reasons, I have reached the conclusion that in the particular circumstances of this case, the respondent's Article 8 rights outweigh the applicant's rights under Article 10 and the wider public interest in publication, and that the application should be refused.
49. I have considered whether the applicant should be permitted to speak anonymously about his experience of these proceedings, in the context of the proposed documentary or otherwise. I am of the view that it would be very difficult, particularly in circumstances where there appears already to be considerable interest within the parties' community about the breakdown of their marriage, to ensure real anonymity, and therefore that in order to eliminate, or at least reduce, the risk of jigsaw identification there would need to be a careful review of the information which is to be put into the public domain. If that is something which the applicant wishes to do then he should make a fresh application so that these issues can be considered.

Publication and citation

50. The primary purpose of publishing this judgment is to promote transparency. Pursuant to the Practice Direction on the Citation of Authorities [2001] 1 WLR 1001, I intend this judgment to be citable for the limited purposes set out in paragraph 6.2(b) of that Practice Direction: that is, to demonstrate current authority at this level on an issue in respect of which no decision at a higher level of authority is available.