Neutral Citation Number: [2023] EWHC 1952 (Fam)

Case No: FD23P00035

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

KRD

Applicant

and

PTL

Respondent

- -
- -

Mr Adam Wolanski KC and Ms Clara Hamer (instructed by **Hughes Fowler Caruthers**) for the **Applicant**
The Respondent represented himself

Hearing dates: **25 May 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 June 2023 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 16 June 2023. It consists of 38 paragraphs. The judge gives leave for it to be reported in this anonymised form. Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Lieven DBE :

1. This is an application concerning the reporting of a Family Court matter. There are two applications before me; one by the Applicant Mother dated 6 January 2023 for a Reporting Restriction Order ("RRO") preventing the identification of the Mother and Father's three children, and the second by the Father to relax the provisions of section 12 Administration of Justice Act 1960 ("AJA") to permit him to disclose information from the proceedings to the world at large.

2. The Mother was represented before me by Mr Adam Wolanski KC and Ms Clara Hamer, the Father represented himself.

3. The background to this case concerns three children. The oldest child is not currently subject to an application in the Family Court but would be affected by publicity in a way similar to the two younger children. There has been extensive and highly conflictual litigation concerning the children over a number of years. This culminated in a decision by District Judge Saunders sitting at the West London Family Court in January 2023 after a four day hearing that the Father should have no direct contact with the children. District Judge Saunders set out a very detailed judgment in which she explained the background to the matter and her reasons for her conclusions.

4. In very brief terms, the parties divorced in 2015, arrangements with the children broke down in late 2017 and litigation commenced in 2018. The Father's position has consistently been that the Mother has alienated the children from him and that the judges and professionals involved have accepted the Mother's case entirely wrongly. There was a hearing before District Judge Gibson in October 2018 who made an order for contact building up to unsupervised contact. For various reasons, those arrangements broke down and there were then further proceedings culminating in the judgment of District Judge Saunders.

5. The Father has made clear that he wishes to have information published which sets out what he says are the failures of the family justice system and the many professionals who have been involved in the case.

6. The matter came before Mrs Justice Arbuthnot on 31 January 2023 when she made a temporary RRO and directed, amongst other things, that the Father specified by 14 March 2023 whether he sought to relax the provisions of section 12 AJA and, if so, exactly what information he wished to disclose.

7. The Father did not set out in any one document precisely what he wished to disclose, but he did make clear in his Skeleton Argument to this court the scope of the matters which he wishes to allow to be reported.

8. The approach advanced by the Mother, through Mr Wolanski, was to invite the court to adopt a process similar to that used under the Family Court Transparency Pilot which commenced on 30 January 2023 and is currently being operated in three pilot courts in England and Wales (Leeds, Cardiff and Carlisle). The President of the Family Division has issued Transparency Reporting Pilot Guidance which is being used in the three pilot courts. The present case does not strictly fall within that Guidance, but it is accepted by both parties that it is appropriate to adopt a similar approach in this case.

9. The process being adopted in the pilot courts is that a "pilot reporter" (a member of the press or legal blogger) can attend the court and make a request for a Transparency Order ("TO") allowing them to report the case subject to various restrictions intended to preserve the anonymity of the children concerned. Mr Wolanski has submitted to the court a draft RRO that is intended to mimic the provisions adopted in the pilot court. One key matter from that procedure is that it is not open to a party, in this case either of the parents, to publish any information about the case. The approach in the pilot courts is only to allow reporters, as defined, to speak to the parties as set out in the President's Guidance.

10. The Father indicated that he was content with the principle of this approach, albeit he considered that the restrictions on reporting which were contained in Mr Wolanski's draft were too restrictive and that in various respects, a reporter should be allowed to report more information about the case.

11. There are statutory restrictions on publishing information about proceedings concerning children. Section 12 AJA has the effect of preventing publication of evidence and other materials which relate to the proceedings. This prohibition is without limitation of time. Section 97(2) Children Act 1989 ("CA") prohibits the publication of material which is intended to, or likely to, identify a child involved in such proceedings. This prohibition lasts only until the conclusion of the proceedings.

12. Section 12 AJA states:

> *" **12 Publication of information relating to proceedings in private.***
>
> *(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;*
>
> *(b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;*
>
> *(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;*
>
> *(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;*

(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.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).”

13. Section 12 was considered by Mr Justice Munby (as he then was) in Re B [2004] EWHC 411 (Fam); [2004] 2 FLR 142:

“82(v). Section 12 does not of itself prohibit the publication of:

(a) the fact, if it be the case, that a child is a ward of court and is the subject of wardship proceedings or that a child is the subject of residence or other proceedings under the Children Act 1989 or of proceedings relating wholly or mainly to his maintenance or upbringing;

(b) the name, address or photograph of such a child;

(c) the name, address or photograph of the parties (or, if the child is a party, the other parties) to such proceedings;

(d) the date, time or place of a past or future hearing of such proceedings;

(e) the nature of the dispute in such proceedings;

(f) anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;

(g) the name, address or photograph of the witnesses who have given evidence in such proceedings;

(h) the party on whose behalf such a witness has given evidence; and

(i) the text or summary of the whole or part of any order made in such proceedings.”

14. While s.12 AJA does not prohibit publication of 'the nature of the dispute', it does prohibit publication of summaries of the evidence. As set out in *Re B*, at [82(vi)]:

> *"Section 12 prohibits the publication of:*
>
> *(a) accounts of what has gone on in front of the judge sitting in private;*
>
> *(b) documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment (this list is not necessarily exhaustive);*
>
> *(c) extracts or quotations from such documents;*
>
> *(d) summaries of such documents."*

15. These prohibitions apply whether or not the information or the document being published has been anonymised.

16. In *A v Ward* [2010] 1 FLR 1497, Munby LJ identified two additional issues:

> *"80. The present case in fact raises two critical issues which I did not have to consider in Re B and which are accordingly not considered in that summary:*
>
> *i) The first is whether section 12 applies not merely to the various types of documents which I referred to in Re B but also (and, if so, to what extent) to the information contained in such documents.*
>
> *ii) The second is whether section 12 applies not merely to documents prepared for the purpose of the proceedings but also to documents which, although put on the court file (for example by being attached as exhibits or annexures to a witness statement), have not themselves been prepared for the purpose of the proceedings.*
>
> *…*
>
> *112. Where, then, is the line to be drawn? The key is provided, of course, by the statutory principle, reproducing the common law principle to be found in Martindale, that what is protected, what cannot be published without committing a contempt of court, is "information relating to [the] proceedings". And from the various authorities I have been referred to one can, I think, draw the following further conclusions about what is and what is not included within the statutory prohibition:*
>
> *i) "Information relating to [the] proceedings" includes:*
>
> *a. documents prepared for the purpose of the proceedings; and*

b. information, even if not reduced to writing, which has emerged during the course of information gathering for the purpose of proceedings already on foot.

ii) In contrast, "information relating to [the] proceedings" does not include:

a. documents (or the information contained in documents) not prepared for the purpose of the proceedings, even if the documents are lodged with the court or referred to in or annexed to a witness statement or report; or

b. information (even if contained in documents falling within paragraph (i)(a)) which does not fall within paragraph (i)(b);

unless the document or information is published in such a way as to link it with the proceedings so that it can sensibly be said that what is published is "information relating to [the] proceedings".

113. Put shortly, it is not a breach of section 12 to publish a fact about a child, even if that fact is contained in documents filed in the proceedings, if what is published makes no reference to the proceedings at all. After all, as Lord Denning MR said in In re F, it is not a contempt to publish information about the child, only to publish "information relating to the proceedings in court". Or, as Scarman LJ put it, "what is protected from publication is the proceedings of the court".

114. In other words one has to distinguish between, on the one hand, the mere publication of a fact (fact X) and, on the other hand, the publication of fact X in the context of an account of the proceedings, or the publication of the fact (fact Y) that fact X was referred to in the proceedings or in documents filed in the proceedings. The publication of fact X may not be a breach of section 12; the publication of fact Y will be a breach of section 12 even if the publication of fact X alone is not.""

17. In all cases of this nature there is a balance between Articles 8 and 10 of the European Convention on Human Rights:

"**ARTICLE 8 Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

ARTICLE 10 Freedom of expression

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

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

18. There is copious caselaw on how to approach this balance, but the single most important principle was set out by Lord Steyn in *Re S* [2004] UKHL 47 at [17] where he said:

> *"… 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."*

19. There is a particular issue in this case about the risk of the children identifying themselves and their family if they were to come across any reporting of the proceedings. In *K (A Child: Wardship: Publicity)* [2013] EWHC 2684 (Fam) the court took into account the *"risk that the child concerned may recognise herself from media reporting. The older the child the greater that risk"* (at [67]), and acknowledged *'that a child or young person may experience embarrassment and distress as a result of knowing that details of her life story are in the public domain even [if] the story has been anonymised'* (at [69]) (although the court also noted at [49] what had been said by Neill LJ in *Re W (A Minor) (Wardship: Restrictions on Publication)* [1992] 1 FLR 99 that, *"Any restraint on publication which is imposed is intended to protect the ward and those who care for the ward from the risk of harassment. The restraint must, therefore, be in clear terms and be no wider than is necessary to achieve the purpose for which it is imposed. It is also follows that, save perhaps in an exceptional case, the ward cannot be protected from any distress which he may be caused by reading the publication himself)".*

20. See also *Re J (a minor)* [2016] EWHC 2595 (Fam) per Hayden J:

> *"It follows, to my mind, that were M to talk about her son in the media, advancing what Mr Baker has referred to as her 'alternative view of the case', there is the real risk that, contrary to my findings and in a way which is inimical to J's best interest, M will misrepresent his 'gender identity' to the world. That after all is what M's 'alternative view' of the case is. The expression of that view, therefore, not only risks J's privacy but his emotional wellbeing. As will be clear from my extensive judgment, given space and independence, J has moved from presenting as a girl to asserting his male identity. This process has been gradual and public. It has been witnessed by his peers and teachers. His school has been tremendously supportive. This is the landscape in which J's Article 8 rights, asserted on his behalf by his father and Guardian, fall to be considered. There is, in my evaluation of the competing rights and interests here in play, a high and wholly unacceptable risk that the mother will either unknowingly or otherwise, broadcast some detail of her and J's life together which will identify J to those who know him and who hear or read such information. Again, the highly unusual facts of this case render that, self evidently, far more likely than would be the case in many other circumstances. The potential consequences incorporate not only the violation of J's privacy but the inestimable harm to him caused by hearing, or hearing of, his mother asserting, in the public domain, her wholly unjustified conviction that her son is gender dysphoric or identifies as a girl. Moreover, it is difficult to see how by advancing her views in the public domain M can fail to damage the fabric of her relationship with her son. That relationship as I have said in the substantive judgment is, above all else, J's right."*

21. When balancing rights in this context, the interests of any child concerned are a 'primary' consideration but are not paramount: *ZH v Tanzania* [2011] UKSC 4 at [33]. The child's best interests must accordingly be considered first, although they may be outweighed by the cumulative effect of other considerations: *In re J (A Child) (Reporting Restrictions: Internet: Video)* [2013] EWHC 2694 (Fam) at [22]. In In *re J*, Sir James Munby granted a contra mundum injunction until the child's 18th birthday which restrained the naming of the child but not the publication of images of the child.

22. In *Griffiths v Tickle* [2021] EWCA Civ 1882; [2022] EMLR 11 the Court of Appeal explained at [48] that:

> *"The "nature of the impact on the child" of a publication that interferes with their privacy rights is to be measured objectively; the mere fact that the child is too young to understand does not mean there is no such impact: Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176, [2016] 1 WLR 1541 [20] (Lord Dyson MR). But when measuring that impact the court should not simply assume, or treat it as inevitable, that publicity would have an adverse impact; in each case, the impact of publication on the child must be assessed by reference to the evidence before the court: Clayton v Clayton at [51]. This would seem to follow inescapably from the granular analysis required by the Re S approach."*

23. Necessarily in each case the court will have to have close regard to the particular facts and the particular potential impact on the children in question.

24. One of the Mother's principal concerns is that the children may come across the reporting of the case, albeit anonymised, and may realise that it concerns them and their parents. The Mother has therefore asked that the Father gives an undertaking that he will not discuss with the children any actual or potential publication of information concerning the proceedings or draw the children's attention to any such publication. At the present time the Father has no direct contact with the children, but I accept that that situation may change. The Father has been happy to accept an undertaking that he will not so discuss any reporting with the children and I have accepted that undertaking.

25. A difficulty with mimicking the approach that has been taken in the pilot courts is that in this case the hearings have already taken place; a judgment has been written and no application was made by any reporter at the time. The order in this case therefore has to retrospectively try to reproduce what would have been decided if the case had been in a pilot court and an application had been made before the case concluded. Mr Wolanski's draft order, in the main, achieves that outcome. There are however a limited number of points in dispute.

26. The first dispute arises at paragraph 15 of the draft order where there are restrictions placed on the identification of certain individuals and bodies who may have been named in the proceedings.

27. The Father requests that the independent social worker Mr Power, the local authority social worker, and the GP should all be named. In accordance with the principles in the Transparency Pilot Guidance, independent social workers, so long as they are not currently working with the children, can be named in any reporting. This follows the principle that they are professionals appointed by the court to produce reports, and thus are independent experts who can reasonably be expected to be named in any judgment. However, the normal position would be that a local authority social worker and a clinician cannot normally be named. I see no reason in this case to depart from those normal principles. If a reporter wishes to report this case and believes that there is a public interest in naming either the social worker or the GP, then the reporter can make an application to this court, and I will consider the application on the individual facts of the case.

28. The Father also seeks for the police, who have apparently been involved in the case at some point, to be named. Following the spirit of the Transparency Pilot Guidance I can see no reason why, by parity of reasoning, the relevant police force cannot be named, however there is no justification on the facts as I know them for the naming of any individual police officer.

29. The second issue concerns what documents and other materials the reporter can be shown. In the Transparency Guidance a very careful balance is struck between giving the reporters enough information to allow them to meaningfully report, but to preserve the essential privacy and Article 8 rights of individuals involved in the proceedings, both children and their parents. In the Pilot Guidance, reporters are entitled to see documents drafted by the advocates, or litigants in person if self-representing, and indices from the court bundle. This then allows the pilot reporter to

make further applications for documents if they consider it necessary for effective and proportionate reporting.

30. In the present case, because there are already in existence unapproved transcripts of some of the hearings before District Judge Mauger, District Judge Saunders and District Judge Alun Jenkins and of the judgments of District Judge Gibson Mauger and District Judge Saunders, the Mother has accepted that those court documents can in principle be shown to a reporter subject to a process by which the two three judges concerned are asked to approve the transcripts and for their permission to publish their judgments with redactions which are consistent with the order which I will make. If they refuse that permission, then the matter can come back to me for further consideration.

31. However, the Father wishes to have permission to show further documents and material to the reporter. This includes both photographs which he suggests are relevant to any reporting, and recordings of conversations he had with one of the children which he suggests provides evidence of parental alienation by the Mother. Mr Wolanski points out that some of the recordings were covert and were done without the permission, and indeed the knowledge, of the child in question.

32. The approach in the Pilot is that reporters can see limited documentation. If they consider it is necessary and proportionate for their reporting to see further documentation then they have to make an application to the judge. This again balances the Article 10 rights of the journalist with the Article 8 rights of the family. Again, I consider this to be the appropriate approach here. If the reporter wishes to see the further material, then s/he will have to make a specific application.

33. The third issue concerns specific identifying information relevant to the case. The principle that lies behind the Guidance and draft TO being used in the pilot is that nothing should be revealed in reporting which is likely to lead to the identification of the children. There is no dispute that the names of the Father's partner or former partner_would be likely to lead to such identification and therefore is appropriately excluded. The other piece of information which the Mother seeks to be excluded relates to her heritage which she says is likely to lead to her identification and that of the children. Given the particular facts of the case, I can see some possibility in this regard and I will therefore restrict the identifying information to reference to the fact that the Mother's family is from Northern Europe.

34. The fourth and most contentious area relates to a schedule of prohibited information to do with the personal circumstances of the family. This part of my judgment will need to be further redacted before my judgment is published. This information both goes to the Mother's own Article 8 rights and very importantly to information which could harm the children if in the public domain. I appreciate that the children will be anonymised in any reporting, and the intention is that members of the public, certainly those who do not know the family, will not be able to identify the children or the family. However, the children themselves if they read the judgment or come across any media reporting may well be able to identify their own family. This information could well cause them very great distress and indeed psychological harm.

35. The Father says that the children are already aware of this information, or at the very least that the oldest child is aware of it. However, even if that were correct, the fact

that such personal information is placed in the public domain is something that could well have a damaging effect on the children. Balancing the Article 8 and Article 10 rights in this case I can see minimal genuine public interest in this part of the case and, in my view, the balance lies strongly in favour of not putting this information into the public domain.

36. The next piece of disputed information is "the mother's historic substance or alcohol abuse or other difficulties". This is of course very personal information for the Mother. However, if any reporting can make no reference to this aspect of the Mother's history then the Father's complaints about the process and why he feels the courts were wrong to rely on the Mother's evidence, and why he feels this is a case of parental alienation, become very difficult to understand. It also appears from the evidence, although I only have written evidence from the Mother on this point, that the children are likely to have some knowledge of the difficulties the Mother has faced in the past. It seems to me the appropriate way forward, given that the Mother has accepted that there can be reporting of the case in principle, is to gist these issues along the lines of "the mother has had issues in the past with substance and alcohol abuse and some other vulnerabilities". If I were not to allow a gist in this form, then much of the Father's case and of the judgments themselves would become meaningless.

37. The next piece of disputed information concerns the children's own very personal circumstances. I can see no justification for allowing reporting of those matters. They are neither critical to any public interest in this matter nor to the way the Father frames his complaints against the family justice system. I am very conscious of the fact that the children are of an age to be using social media and that makes them particularly vulnerable to the spread of information. In my view the Article 8 right of the children to maintain their privacy in this regard outweighs any Article 10 consideration.

38. The final disputed piece of information is the content of the audio recordings between the Father and one of the children which I referred to above. For the reasons that I set out above, I do not consider the content of these conversations should be given to any reporter at this stage and should not be the subject of any publication.