# Towards transparency in the family justice system

*Adam Wolanski examines the case law underlying the proposals for greater openness in family proceedings*

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The Department of Constitutional Affairs published 'Confidence and confidentiality: Improving transparency and privacy in family courts' in July. It proposes extensive reform of the regime of public access to, and reporting of, family cases. The consultation on this paper lasted until the end of October.

This article summarises the current law on public access to and reporting of family cases, describes the background to the current proposals, including increasing judicial willingness to allow publicity of family cases, and asks how far the proposals will go to achieve their objective of enhancing public confidence in a system damaged by charges of secrecy.

## The existing law: a summary

### Access to courts hearing family cases

Family cases are often assumed to be out of bounds to the press. This is not strictly correct.

(1) In the Family Proceedings Court (magistrates court) the press may attend most cases, other than adoption proceedings, unless specifically excluded for a particular reason.

(2) In the County Courts and the High Courts the press may attend contested divorce cases, judicial separation cases and nullity cases. However, in all other cases the presumption is that cases will be heard in private, although the judge has a discretion to allow the press in.

(3) In the Court of Appeal and House of Lords, hearings are in open court but reporting restrictions often apply and judgments are generally anonymised.

(4) In cases involving children in the Administrative Court there are no restrictions on access, although reporting restrictions are routinely imposed under s39 of the Children and Young Persons Act 1933.

### Reporting restrictions

Restrictions upon the reporting of family cases are contained within a variety of provisions, principally:

(1) Section 12 of the Administration of Justice Act (AJA) 1960, which preserves the common law, making it potentially a contempt of court to communicate information about the substance of a case heard in private where (amongst other things) the proceedings are brought under the High Court's inherent jurisdiction with respect to minors or under the Children Act 1989. In *Re B* [2004] Munby J summarised the effect of s12. The section prohibits the publication of almost any information from the proceedings, including the evidence relied upon, but not details such as the identity of the parties or witnesses.

(2) Section 97(2) of the Children Act 1989, which makes it a criminal offence to identify to the world at large a child as being the subject of proceedings under which an order may be made under that Act.

(3) The Judicial Proceedings (Regulation of Reports) Act 1926, which restricts (amongst other things) the publication of reports in relation to judicial proceedings for the dissolution of a marriage or civil partnership.

**(4)** Section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, under which reporting restrictions may be imposed in proceedings between spouses for maintenance or financial provision.

**(5)** Section 71 of the Magistrates Court Act 1980, under which it is a criminal offence to publish information relating to court hearings in family proceedings, except for the identity of the parties, grounds of the application or concise statements of submissions.

In so far as cases involving children are concerned, the usual practice is that hearings are heard in private. Rule 4.16(7) of the Family Proceedings Rules 1991 provides that, 'unless the court otherwise directs', a hearing of proceedings under the Children Act 1989 'shall be in chambers'. The Strasbourg court (in *B v United Kingdom* [2001]) has endorsed the approach of the English practice rules, which impose a presumption that such cases are heard in private, stating that:

> ... such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice.

However the ECTHR stressed that the court must consider in each case, if asked, whether access to press and public could be allowed.

## Judicial moves towards 'transparency' in family cases

Judges have a discretion to relax the automatic restrictions so as to allow access to family courts by the media and public and to allow the release of documents into the public domain. This is seldom exercised. As Munby J pointed out in his article 'Access to and reporting of Family Proceedings' (*Family Law*, December 2005), there is a real question mark as to whether the present practice of the courts is in this regard Convention-compliant. How often, he asked, do judges, when deciding whether to relax the restrictions, apply the 'intense focus' called for by Lord Steyn in *Re S* [2005]?

Nevertheless, judges have recognised that there is considerable pressure for greater openness – 'transparency' – in the family courts. This has come notably from groups campaigning on 'family justice' issues that have mounted a sustained attack on the 'secrecy', and therefore unaccountability, of the family courts. It has been widely acknowledged that recent high-profile cases in the criminal justice system (Sally Clark, Trupti Patel, Angela Cannings) have given rise to concerns about similar miscarriages of justice in the family justice system.

Judges have also expressed frustration at the unfairness of attacks on 'secrecy' within the family justice system. In the case of *Re B* [2004] Munby J relaxed the restrictions of s12 AJA 1960 to the extent of allowing a mother who believed that a care order removing her children from her had been wrongly made to publish a limited amount of evidence and information from the case, without identifying the participants. Munby J said that:

> Those who without justification attack the family court system can all too easily do so by feeding the media tendentious accounts of proceedings whilst hypocritically sheltering behind the very privacy of the proceedings which, although they affect to condemn, they in fact turn to their own advantage. It is all too easy to attack the system when the system itself prevents anyone correcting the misrepresentations being fed to the media.

In *Re H (Children)* [2005] an application for permission to appeal was unsuccessfully made on the grounds that the case had been seriously misreported in the press. Thorpe LJ said:

> Cases involving children are currently heard in private in order to protect the anonymity of the children concerned. However, the exclusion of the public from family courts and the lack of knowledge about what happens in them, easily lead to the accusation of 'secret justice'. Moreover, judges communicate in carefully reasoned judgments, not soundbites.

Against this background there have been cases in which greater press access to family cases (generally after applications by the media) has been permitted, including the following:

*Birmingham City Council v H* **[2005]**
This case concerned care proceedings involving evidence from the controversial paediatrician Sir Roy Meadows in which the judge, after intervention by the BBC, released all the previous judgments in the case in anonymised form into the public domain.

*Portsmouth Hospitals NHS Trust v Wyatt and ors* **[2004]**
Also known as the 'Baby Charlotte' case, in which the judge, after intervention by media organisations, permitted full reporting of the proceedings over whether or not the local health care trust should be allowed to refuse to resuscitate a seriously sick child against the wishes of its parents. The trust and the parents consented to having the matter heard in public, but Cafcass (the agency responsible for representing the interests of the child) objected. The judge permitted identification of the parties.

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*Re MB* **[2006]**
This case involved a severely disabled child's right to life. Holman J opened the case to the public after intervention by the BBC, but imposed a ban on identifying the parties.

At the end of the case the judge commented:

> I have not personally felt that the presence of the media has been intrusive in the court room; nor, so far as I could observe, has it been oppressive to, or added to the burden upon, the parents, even when giving their evidence.

*Clayton v Clayton* **[2006]**
In this case the the Court of Appeal took what it described as:

> ... a small step towards greater transparency and rebutting the slur inherent in the charge that the family courts administer 'secret' justice.

Mr Clayton wished to be able openly to discuss the 'shared care arrangement' he had reached with his ex-partner over their child. Hedley J restrained him from doing so, primarily on the basis that s97 of the Children Act made it unlawful for him to identify his child as having been the subject of Children Act proceedings. The Court of Appeal overturned the order, ruling that s97 did not prevent the identification of children as having been the subject of proceedings after those proceedings had come to an end. The Court said that, in future, judges would need to consider at the end of each child case whether restrictions on identifying the parties were justified. In Mr Claytons's case, it had not been demonstrated that by discussing the case he would cause any harm to his daughter.

*BBC v Rochdale MBC* **[2005]**

Two social workers unsuccessfully applied to restrain the BBC from identifying them as the social workers who had given evidence in proceedings concerning alleged satanic abuse in the early 1990s. The judge in the original case had severely criticised their evidence and methodology. With the passage of time, the media's right to report the case outweighed any Article 8 right to protect their privacy as participants in the proceedings. Ryder J confirmed that s12 AJA 1960 did not prevent the identification of experts who had given evidence in proceedings.

Since *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs intervening)* [2004], in which the Court of Appeal accepted criticism of its practice of automatically applying reporting restrictions, the Court of Appeal has only anonymised judgments in exceptional cases.

## Towards legislative change

In March 2005 the House of Commons Constitutional Affairs Select Committee devoted a chapter in its report on the family justice system to transparency. It noted the considerable concerns about the privacy of proceedings, and said that the judiciary, senior members of which had given evidence to the committee, 'proved very receptive to this criticism'. It went on:

> ... a greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary.

The rules on disclosure were modified in a limited way in 2005. The Family Proceedings (Amendment No 4) Rules 2005 (SI 1976 of 2005), which came into force on 31 October of that year, have introduced into Part X of the FPR 1991 a new R10.20A which provides for limited exceptions to the blanket rule against disclosure. It permits the disclosure of information from proceedings to certain institutions and individuals, such as close family members and health care professionals, but not to the world at large. Similarly, s97(2) of the Children Act 1989 was amended by s62 of the Children Act 2004 to allow individuals involved in proceedings concerning children to tell others, such as MPs, doctors and the police, that their children are involved in proceedings.

In December 2005, in 'Access to and reporting of Family Proceedings', Munby J suggested that two further changes be made. First, that s12 AJA 1960, in so far as it applies to children cases, simply be revoked. The press would then be able to report anything that happens in court, as long as it does not identify the children involved and therefore contravene s97. Judges would be given a discretion to order further reporting restrictions where necessary.

Secondly, he suggested that the press – but not the public in general – be granted access to the family courts. Again, the court would have a discretion to exclude the press, and there would be limits on what could be reported.

## The end of 'secrecy'?

What is proposed is a trade-off for the press: greater access to the courts for the media, yet a more restrictive regime for reporting. Will this enhance public confidence in the system by answering 'the slur inherent in the charge that

the family courts administer "secret" justice'?

The proposal is that there will be a presumption that the vast majority of family cases will be heard in public, at least so far as allowing representatives of the press to attend. Cases will no longer be conducted behind closed doors. Public concerns about miscarriages of justice going unnoticed should, in theory, be allayed.

But the proposals have another stated objective: to enhance the privacy of those who use the system. The paper argues that 'scrutinising the legal process is not the same as scrutinising private family lives'. The commitment to preserving the privacy of participants is underlined by the proposal to make the rules on reporting family cases more restrictive. In particular, the paper proposes to grant anonymity to all participants, not merely children (as is currently the case).

As far as the media is concerned, transparency therefore comes at a cost. There will be objections that proper reporting is being frustrated. Newspapers tend not to report cases where anonymity is mandatory. Anonymised reports are 'disembodied' and less likely to engage readers – something Lord Steyn acknowledged in *Re S* [2005].

Moreover, there will undoubtedly be cases – perhaps initially a large number of them – where all the parties ask the judge to exercise discretion to exclude the media, complaining that their privacy will be compromised by having the media present. What will judges do in such a situation? Will their instinct be to close the court doors to the press without adequately scrutinising the need to do so? Will they apply an 'intense focus' when balancing the privacy rights of the participants against the media's right to freedom of expression? Will the court insist on putting the media on notice when such applications are made? And if they do, will the media go to the trouble and expense of objecting to such applications when they do not know whether their efforts will ultimately yield a newsworthy story?

Similarly, what if experts object to their identification, or to their evidence being reported? Evidence about the increasing reluctance of medical practitioners to undertake child protection work was cited in the judgments in *Re B* and, more recently, in Sir Roy Meadow's successful application for judicial review of the GMC's decision to strike him off: *Meadow v General Medical Council* [2006]. Will judges grant applications for hearings to be in private where experts insist on privacy as a condition of giving evidence? Or will experts be told that there is no reason for their work to be subjected to less public scrutiny in the family courts than is the case in the criminal justice system?

The proposed changes will only answer concerns about transparency and accountability if accompanied by a willingness on the part of judges to reject applications for hearings to be in private, or for further reporting restrictions to be imposed, except where absolutely necessary. Otherwise, progress towards transparency will be, or seem, illusory. Attacks on the 'culture of secrecy' will continue.

There is another aspect to this: the most vigorous calls for transparency have often come from frustrated users of the system who complain of being unable to discuss their cases openly. Under the proposals, such individuals may feel that their position is little improved. An insistence on anonymity means that, without the permission of the court, parties will not be able to discuss their cases while they are ongoing unless they are prepared to have their identities masked, something campaigners find highly objectionable.

Will judges be prepared to relax the anonymity provisions where a participant expresses a wish to go to the press while the case is still being heard? The Court of Appeal in *Clayton* permitted the father to discuss his case after proceedings had ended. What would happen if a party made a similar application at the outset of a case? The refusal of such applications may lead to further protests about secret justice.

## Conclusion

The government states it is committed to answering calls for improved transparency in the family courts. The proposals will achieve this end only if accompanied by a change in the culture of the family courts, not just in high-profile cases in the Family Division (as is already beginning to happen) but at every level.

The courts will increasingly be required to conduct the difficult exercise of reconciling the privacy rights of participants with rights of freedom of expression. Their decisions will determine the continuing debate about the accountability of the family court system. ■

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*Re B*
[2004] EWHC 411 (Fam)

*B v United Kingdom*
[2001] 2 FLR 261

*BBC v Rochdale MBC*
[2005] EWHC 2862 (Fam);
[2006] EMLR 117

*Birmingham City Council v H*
[2005] EWHC 2885 (Fam)

*Clayton v Clayton*
[2006] EWCA 878

*Re H (Children)*
[2005] EWCA Civ 1325

*Meadow v General Medical Council*
[2006] EWHC 146 (Admin)

*An NHS Trust v MB and Mr and Mrs B (Re MB)*
[2006] EWHC 507 (Fam)

*Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs intervening)*
[2004] EWCA Civ 845; [2004] 2 FLR 823

*Portsmouth Hospitals NHS Trust v Wyatt and ors*
(Unreported, 30 September 2004)

*Re S*
[2005] 1 AC 593