



Neutral Citation Number: [2005] EWHC 1832 (Fam)

Case No: FD04C00433

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2005

Before:

THE PRESIDENT

Between:

A Local Authority

Applicant

- and -

P D

1st Respondent

G D

2nd

(By her Guardian Cathy Butcher)

Respondent

- and -

In the matter of an application by Times Newspapers Limited, News Group
Newspapers, Associated Newspapers Limited and Mirror Group Newspapers (“the Press
Applicants”).

Mr Bryan McGuire (instructed by the Local Authority) for the Applicant
Miss Michelle Corbett (instructed by Russell Cooke Solicitors) for the 1st Respondent
Mr Michael Simon (instructed by Ormerods Solicitors) for the Guardian
Mr Adam Wolanski (instructed by Times Newspapers Limited) for the Press Applicants

Hearing date: 19 July 2005

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE PRESIDENT

This judgment is being handed down in private on 10 August 2005. It consists of 12 pages
and has been signed and dated by the judge. The judge hereby gives leave for it to be
reported.

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 name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Sir Mark Potter, P :

1. This matter came before me on 19 July 2005 as an application by the proprietor companies of a number of newspapers in order to clarify the terms and effect of an injunction granted by H.H. Judge Pearlman sitting as a High Court Judge on 20 May 2005. The injunction was made in the course of care proceedings under *The Children Act 1989* relating to a six-year old child, G, described in the order as GD.
2. G's father, P D ("the father") is currently on trial charged with murdering his wife ("the mother") whose body was found on 8 June 2004 in a dismembered state in the freezer in her home where she had lived with the father and G.
3. On 7 June, G had been left in the care of her paternal grandmother ("the grandmother") by her father who seemed in an agitated state. Because of her concern the grandmother went round to the house the next day with her ex-husband, where they made their grim discovery. It subsequently emerged that the mother had probably been killed on 22 May, G living in her father's care for some two weeks thereafter.
4. On 8 June, the father was nowhere to be found. He disappeared abroad, but returned on 21 June, only to be arrested.
5. At the time of the father's disappearance, there was widespread press publicity identifying him and describing his domestic circumstances, including the fact that he had a six-year old daughter, of whom it was said she was thought now to be in care. This publicity was repeated at the time of the father's arrest.
6. Although in the immediate care of her grandmother and Mr D, the grandmother's partner of some seventeen years, the grandmother came under such severe stress, lacking, as she did, any knowledge of where and how her son was (the newspapers speculated that he had committed suicide), that G was placed in the care of a foster carer whom the grandmother knew and with whom she got on very well. Following the arrest of the father, in the knowledge that he was still alive, the grandmother became less stressed and, after assessment by social workers of her and Mr D, G (who was keen to be with her grandmother) was placed in their care in August 2004, where she has remained ever since under a series of interim care orders.
7. During this time, G, who is devoted to her father and displays very little grief over her mother's death, visited her father weekly in prison, an event to which she looks forward. She has thrived in the care of her grandmother and Mr D. Her position and progress as at 20 May 2004, as summed up in the report of her CAFCASS guardian dated 8 May 2005 is as follows.
8. In describing her progress at school, the report states at para 6.3 :

"Since G has been in the care of her grandmother and partner and attending school she has made considerable progress. Mrs W, the current head teacher described her to me as a "bouncy, bright, chatty child"... She was no longer on any special education measures and was described by her class teacher as a

bit above average in the class and had made great improvements in writing and spelling.”

9. It was stated that, as the explanation of her mother’s death became better known, G had been referred for play therapy to a Ms P of the Grief Support Project for Children. A referral was also made to a Dr T of the Traumatic Stress Clinic with the intention of gaining professional advice about the way in which explanations should be given to G in order for her to make sense of the events in her life so far.
10. Having described G as having settled well, the report made clear her limited knowledge of the circumstances of her mother’s death (“she’s aware that her parents argued and that her mother fell down and her daddy is now helping the Police and must wait until a Judge has decided whether or not he can return home”), and that G is, for her age, an articulate child “well able to use therapy which I expect to continue when she is ready for more sessions”. The report continued as follows:
 - “7.4 The advice from Dr T included the need to offer G some life story work after the conclusion of the criminal proceedings to help her to feel more secure about what will happen to her and who will look after her. She will need to develop a secure sense of future and make sense of what has happened in the past. This work will need to include G’s carers and the father has also been made aware of this proposal and has offered to participate in this work in whatever way he can.
 - 7.5 There is significant concern among all the professional and family members in this case about the media coverage that is likely to occur when the criminal trial begins on 11 July this year. The father has made it clear in his statement that he has pleaded not guilty to the charge of murder, but guilty to the charge of preventing the burial of a body. It is the second event, which includes the purchase of a chest freezer and dismemberment of her mother’s body, which G has been shielded from so far but may become known to her through other sources in July unless great care is taken to protect her at this stage. It is necessary to ensure that sufficient well-qualified assistance is available to G should she become troubled by learning more about these events.”
11. So far as that aspect of matters was concerned, it was stated that in the arrangements which the grandmother and Mr D had made for looking after G:
 - “8.11 [The grandmother] and [Mr D] appear to be a mutually supportive couple who are enjoying the care of G and have seen her flourish since she has been with them. Unfortunately Mr D was made redundant at the

beginning of this year, but this has given him the opportunity to become more involved with the caring task and he takes G to school and collects her. [The grandmother] has preferred to keep a low profile in relation to the school and hasn't got to know other parents as an attempt to avoid recognition or confrontation should the media coverage of the trial enable other parents to identify her and G. Fortunately, G will be changing schools this summer as the junior school is on a separate site, but many of those families will also transfer and they live in a small community."

12. It was made clear that the plan of the Local Authority that G should be the subject of a Residence Order to her grandmother and a Supervision Order to ensure a high level of support by the Local Authority during the coming year was supported by the father, the guardian and all concerned with G's care.
13. Under a heading considering the harm which G had suffered or was at risk of suffering it was stated:

"G's care needs are being well taken care of and the main concern for her is that she does not suffer further emotional harm as a result of her family history and her mother's death. The explanations she has been given, coupled with the therapy and further planned work should ensure that any risk of harm is greatly reduced."
14. The report concluded:

"As G is likely to be living with her grandmother for some time, it appears to me to be necessary for [the grandmother] to have parental responsibility for her. As the family are likely to suffer further distress and anxiety during the criminal trial and may need protection from the media, it is also considered important that a Supervision Order should be made for at least 6 months or a year as the Local Authority have requested... I recommend that a Residence Order is made to [the grandmother] and a Supervision Order for G for 1 year."
15. When the matter came before H.H. Judge Pearlman on 20 May 2005 for an order in accordance with that recommendation, the parties were ad idem in supporting it. However, Judge Pearlman made clear that she was not willing to make a final Residence Order and Supervision Order at that stage as the criminal proceedings were in prospect and their outcome uncertain. It was not known what sentence the father would receive for his guilty plea, or what would happen if he were acquitted or convicted of murder or manslaughter. Furthermore, until the criminal proceedings were concluded, according to Dr T, life story work could not commence with G. The judge indicated that the Local Authority should make it clear to the grandmother why she was not making a final Residence Order; it was not because her ability to care for G was doubted in any way, but simply in order to ensure that G and the grandmother

should have as much help as was necessary once the criminal proceedings had finished. The judge accordingly simply made a renewed interim care order in favour of the Local Authority. She also directed that within 21 days of the conclusion of the criminal trial (then scheduled to start on 11 July 2005) the solicitors for the father should file and serve a memorandum of acquittal/conviction together with copies of the indictment, the basis of plea and the pre-sentence report. Also that the solicitor for the Guardian should by 30 September 2005 file an updating report from Dr T setting out her preliminary advice as to what G should be told about the circumstances of her mother's death, by whom she should be told and when she should be told. It was ordered that the final hearing should be listed for 18 October 2005.

16. I have not seen a transcript of H.H. Judge Pearlman's judgment. However, I have had placed before me the full, though not yet finally agreed, note taken by the solicitor for the Local Authority. It bears handwritten amendments proposed by Counsel for the father. Nothing appears in that judgment in relation to publicity save that, in her opening remarks, the judge is noted as having said:

“When the matter came before me today it was on the basis of an agreed order relating to restricting publicity and an order that G should reside with the paternal grandmother with a Supervision Order to RBK for 1 year.”

The judge then went on to explain that, in the event, she did not propose to make the order proposed.

17. Counsel before me did not appear before H.H Judge Pearlman. However, it appears that there was no discussion of the terms of any order relating to publicity. The position was that, until that date, the question of publicity had been governed by an order of Bracewell J dated 11 June 2004, made pursuant to s. 100 of the Children Act 1989, restraining publication of G's name, address or school, the name, address of any foster parent, any picture of G or her foster parents, or any other information that might lead to her identification.
18. It appears that, following her judgment, H.H.Judge Pearlman had placed before her for her signature a form of anonymity order stated to be made in proceedings under the Children Act 1989, with the additional heading: “AND UPON leave being granted to the Local Authority to apply for the exercise of the court's inherent jurisdiction.” So far as is relevant to this application, the order provided as follows:

“THE COURT HEREBY DIRECTS THAT:

1. ANONYMITY:

- (a) Nothing should be published that shall identify... [there followed the full names of G, the father, the mother, the grandmother, Mr D, the father's father, and the foster carer.]
- (b) The above persons to be known as “GD, PD, THK, ED, PD, RD, and VRH”.

2. The injunctions and orders contained within this order of 20 May 2005 to continue until a determination of the criminal proceedings (Indictment no: 200474 78);
3. This order binds all persons (whether acting by themselves or by their servants or agents or any other way) and all companies (whether acting by their directors or officers, servants or agents or any other way) who know that this order has been made;
4. This order prohibits the publishing in any newspaper or broadcasting in any sound or television broadcast or by any means of any cable or satellite programme service or public computer network (“publishing”) of:
 - (a) The name and address of:
 - The child named in the First Schedule;
 - Any home or any school or other establishment in which the child resides or is educated (“an establishment”);
 - The parents and present carers of the child as named in the Second Schedule;
 - (b) Any picture or depiction, including a picture or depiction of the child;
5. This order only prohibits publication in a manner calculated to lead to the identification:
 - (a) Of the child either of being subject of proceedings before the Court or being the child named in Schedule 1;
 - (b) Of the home or establishment in which the child is residing or being educated or treated;
 - (c) Of any parent or any carer as being the parent or carer (as the case may be) of the child;
6. ...
7. ...
8. Nothing in this order shall of itself prevent any person:
 - (a) Publishing any particulars of or information relating to any part of the proceedings for

any court other than a court sitting in private;

- (b) Publishing anything which at the date of publication by that person has previously been published (whether inside or outside of the jurisdiction of the court); in any newspaper or any other publication or through the Internet or any other broadcast or electronic medium to such an extent that the information is in the public domain (other than in a case where the only publication was made by that person);

....”

19. The terms of that order subsequently came to the attention of, among others, Mr Mike Dodd of the Press Association and Times Newspapers Limited. In the light of its terms, and in particular paragraphs 1 and 2 of the order on the one hand and paragraph 8(a) and (b) on the other, the view was taken that the order rendered uncertain whether the applicants were forbidden in connection with the criminal proceedings, (i) to name, (ii) to publish photographs of the father. Upon querying the matter with the Local Authority the applicants were informed of the Local Authority’s view that the order did indeed have that effect. Consequently, the applicants wrote a letter bringing the urgent attention of the applications judge to the terms of the order, in order to seek clarification. Baron J directed that the matter return before the court on Tuesday 19 July 2005 “for consideration of the interpretation and appropriateness of the current injunctive order”.
20. So far as the interpretation of the order is concerned, in accordance with any ordinary principles of interpretation, it is clear to me that paragraph 8 provides a clear exemption from the provisions of paragraphs 1 and 2. There can be no sensible explanation of, or purpose for, paragraph 8(a) other than the preservation of the liberty of the press to report the criminal proceedings shortly to be held at the time of the making of the order.
21. I have been told that, at the time the redrafted order was placed before H.H. Judge Pearlman, she was not referred to the House of Lords decision in *Re: S* [2004] UKHL 47, concerning the propriety of restricting the right of the press fully and freely to report criminal proceedings. Nor was she referred to the President’s Direction dated 18 March 2005, which applies to any application in the Family Division founded on Convention Rights, for an order restricting publication of information about children or incapacitated adults. So far as the intention of the judge is concerned, there is no reason to suppose from the terms of her judgment that she intended to muzzle the press reports of the criminal proceedings. Nor, on consideration of the evidence placed before her, was there any reason for her to suppose that the Local Authority were seeking such an order. Accordingly, there is no basis for considering whether the Slip Rule applies to the making of the order and it is clear to me, that, so far as H.H. Judge Pearlman’s order is concerned, the press are at liberty to report the name and publish a photograph of Mr D.

22. Faced with that position, Mr McGuire, rather than defending the earlier stance of the Local Authority, sought an original injunction based on G's Convention Rights to privacy and family life along lines advanced on behalf of the child in *Re: S* and further elaborated in *Re: W* [2005] EWHC 1564 (Fam).
23. I was not prepared to grant such an injunction because it did not seem to me that the evidence revealed circumstances of such an exceptional or compelling nature as would justify ordering anonymity in respect of the father. Having so stated, I indicated that I would hand down my reasons at a later date. They are as follows:
24. I do not propose to set out the law applicable in an application of this kind (i.e. to restrain publication of the identity of a defendant and his victim in a criminal trial in order to protect the privacy of a child or children not involved in the trial but the subject of care proceedings), because it is fully set out in the House of Lords decision in *Re: S*, as further considered in my own decision in *Re: W*. It requires the court to engage in a balancing exercise between the article 10 right of the press to freedom of expression (and, in particular, the ordinary rule that the press, as the watchdog of the public, may report everything that takes place in a criminal court) and the article 8 rights of the child to respect for his private and family life, each of which, by article 10 (2) and article 8 (2) respectively, permits a degree of interference with or restriction upon the right it protects, in order to protect the rights of others to the extent to which it is in accordance with law and necessary in a democratic society i.e. it must meet a pressing social need and be no greater than is proportionate to the legitimate aim pursued.
25. As stated in paragraph 17 of *Re: S*; first, "neither Article has *as such* precedence over the other. Secondly, where the values under the two Articles are in conflict, 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."
26. The second and third steps in the process, which may conveniently be called the process of parallel analysis, as well as the ultimate balancing test in which the test of proportionality is applied to each, requires the court to give great weight to the strong rule in European jurisprudence and domestic practice which permits unrestricted reporting of everything which takes place in a criminal court. The position is thus that the rule:

"can only be displaced by unusual or exceptional circumstances. It is however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule for reasons of rights under article 8."
(*Re: S* para 18)
27. Furthermore, the court is specifically enjoined under section 12 (4) of the Human Rights Act 1998 to:

"...have particular regard to the importance of the convention right to freedom of expression and, where the proceedings relate to material claims, or which appears to the court to be journalistic...material (or the conduct connected with such material), to:-

(a) The extent to which:-

(i) the material has, or is about to, become available to the public; or

(ii) it is, would be, in the public interest for the material to be published...”

28. In this case, Mr McGuire for the Local Authority submits, as indeed Mr Wolanski for the Newspapers acknowledges that, if the name of the father is published together with a photograph, this is likely to lead to an interference with (a) private life of G, in respect of her “physical and psychological integrity” (see *Botta - v - Italy*(1998)26 EHRR241) and (b) her family life, to the extent that it disturbs to a greater degree than has already occurred her quiet settled and happy life with her maternal grandmother as a result of the ensuing publicity.
29. In making his submission, Mr McGuire has sought to build upon this acknowledgement, by casting the onus upon the media to explain the degree to which their effective reporting of the case would be inhibited. His submission, at a point when the trial was incomplete, was based largely on a series of questions; has the public in fact been less able or inclined to follow the trial? What damage has been caused to the public interest? Has the story been given less prominence in the press by reason of its ability only to use initials, as provided for in the order of the judge? What difference would identification of the father now make?
30. In my view that approach is erroneous. The burden of proving the case for grant of an injunction always lies upon the applicant. In the special case of an injunction *contra mundum*, and in particular one which restrains the press from exercising its right unrestrainedly to report criminal proceedings, the burden is a heavy one. The necessity is to show unusual and exceptional circumstances. The entire tenor of the judgment in *Re: S* demonstrates the difficulties facing the applicant in a case of this kind.
31. In the case of *Re: W*, there were a variety of features which rendered the circumstances justifying the ground of an injunction both exceptional and compelling. First, it was a case where, on the evidence, there had been no, or minimal, previous publicity in respect of the case concerned (c.f. section 12(4) (a)(i) of the Human Rights Act 1998). Second, it was a case where the identification of the defendant was potentially likely to have a seriously prejudicial effect upon the placement of the children in the care proceedings to which they were subject. Third, the harm from which the children were sought to be protected was the likelihood of their short and long term stigmatisation as suffering from AIDS when such was not the case.
32. By way of contrast, the evidence relied on in this case in respect of the potential harm to G is no more than that set out in the extracts from the guardian’s report I have quoted at paragraphs 8-14 above. It is said that identifying the father is liable to result in the child being identified within the locality almost immediately, with adverse

- consequences on the ability of the Local Authority to provide her with effective counselling.
33. In addition, concerns are expressed as to the impact of identifying the father or the ability of the grandparents to meet the needs of the child. It appears that the grandmother is already herself nervous of taking the child to school, which she leaves to her partner.
 34. I do not consider that these considerations are sufficient to entitle the Local Authority to succeed. While every case must be examined according to its particular facts in order to carry out the balancing exercise involved, it is difficult to see any exceptional or compelling circumstances in this case which call for treatment different from the result in *Re: S*.
 35. The need to counsel the child in relation to her “life story” and the position of her father is a process which will be necessary quite apart from the question of publicity for the proceedings. It is something which the Local Authority planned to carry out in any event and was only seeking to defer until the result of the trial was known. There is no intention to conceal the sad fact that the mother met her end at the hands of the father in the somewhat gruesome circumstances which existed regardless of the level of criminal responsibility for which he may be sentenced. It may well be that the task will be more difficult if publicity is given to the identity of the father. However, that eventuality appears to have been anticipated and is not said to present an insuperable obstacle to the proper handling of G’s emotional and psychological care.
 36. Nor is it suggested, and certainly not established, that there will be undue harassment or mockery of G as the result of the publicity. She is fortunate to be being cared for and educated in a reasonably affluent and well-informed milieu where, whatever the level of curiosity she may experience, sympathy rather than hostility may be expected. Further, as in the case of *Re: S* (though unlike the case of *Re: W*) there has already been widespread publicity in relation to the identity of the father, the circumstances of the mother’s death and the existence of a child (see paragraph 5 above). Thus the granting of the injunction sought will to a considerable extent be an attempt to close the door of the stable after the horse has bolted.
 37. So far as the impact upon the grandmother and Mr D is concerned, it is plain that publicity during the course of the trial will make their position more difficult in shielding themselves and G from curiosity and inquiry. However, it is not suggested, let alone established as a probability, that the effect will be such that they may refuse or feel unable to care for G, or that she may otherwise be deprived of a home in which the judge has already indicated it is appropriate for her to be (c.f the position in *Re: W*)
 38. Thus, unusual and sensational as the *facts* of this case may be, the proposed identification of the defendant in connection with the criminal proceedings cannot be shown either to cause or create serious, let alone irremediable, damage to G in the enjoyment of her private or family life. It is certainly far from sufficient to outweigh the plain and substantial interference with the right of the press to identify the father and otherwise to report the criminal proceedings in which she is being tried.