Neutral Citation Number: [2008] EWHC 1681 (Fam)

Case No: NME05C0016

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2008

Before :

THE PRESIDENT

- -

Between :

Medway Council	**Applicant**
- and -	
G and Others	**Respondents**

Stephen Bellamy QC and Graham Crosthwaite (instructed by **the Local Authority Legal Department**) **for the Local Authority**
Adam Wolanski (instructed by **Times Newspapers Legal Department**) **for Times Newspapers Ltd**
John Reddish (instructed by **Stephens & Sons**) **for the Mother**
Dylan Evans and Sara Hammond (instructed by **Stantons**) **for the Guardian of S**
Marcus Scott-Manderson QC (instructed by **Martin Tolhurst Partnership LLP**) attended on behalf of **M** but was not a party in the proceedings

Hearing dates: 12th and 13th June 2008

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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 18 July 2008 It consists of 22 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:

The Application

1. The application before me is an application by Times Newspapers Ltd (TNL) made for the purposes of clarifying the extent to which TNL are entitled to report and comment upon care proceedings brought by the applicant Local Authority ("The Council") in respect of S, now aged 8 years and 9 months who is presently living somewhere abroad with his mother ("the mother"). S is the child of the mother's former husband ("the father") from whom she is now divorced. On 23 July 2007 the mother was remarried to M at a time when S was living with foster parents, having been placed there following prolonged and difficult care proceedings taken by the local authority as a result of the stormy and embittered relationship between the mother and the father, the poor physical conditions in which S was living, and the extreme conflict between the mother and father prior to and following the time of the break-up of their marriage which had harmful effects upon S.

The Background

2. A history of the care proceedings is as follows. I set it out in some detail in the light of the criticisms of "Secret Justice" which have been raised in relation to the proceedings, which have been long drawn out and are not yet complete for reasons which will appear. The care proceedings had their origin in private law proceedings following the break-up of the marriage. In August 2004 the mother applied for non-molestation and occupation orders against the father pursuant to the Family Law Act 1996 and the father left the family home, S continuing to live with the mother. The mother applied for a residence order in respect of S under the Children Act 1989 and the father cross-applied for a contact order. A guardian for S was appointed. There were heavily disputed allegations made by the mother of domestic violence and physical and emotional abuse of herself and S by the father and an eight-day fact finding hearing resulted in a long and careful judgment of Her Honour Judge Cox dated 10 June 2005 at the end of which the Judge expressed considerable concern about the emotional harm which S had clearly suffered as a result of the conduct of *both* parents over the years, with the risk of continuing harm in the future unless the parents could forget their destructive histories and look to the future of S.

3. Judge Cox found that the mother had been exaggerating many of her allegations against the father and the social worker was found to be at fault for only taking the mother's point of view. However, it was found that the father on occasions acted irresponsibly and in an aggressive and intimidating manner, which had placed S at risk of harm. The mother was found to have a tendency to play the role of a victim and the conditions of the matrimonial home were unsuitable (i.e. it was like a building site). There was no doubt that S was suffering emotional harm due to the conflict between the parents and that the mother and maternal grandmother had been responsible for placing seeds of a real fear of the father in S's mind. The matter was adjourned to allow a psychologist to report on the matter.

4. Following a report obtained from a psychologist about the family situation and the effects on S, by which time a guardian had been appointed to represent S in the private law proceedings, the matter returned before HH Judge Cox who was satisfied that as a result of the then position, threshold criteria for the making of an interim care

order were established and an interim order was made with a direction for a Section 37 report to be prepared by the Council. Meanwhile it was ordered that S should be taken into foster care with an order for regular and equal contact for the mother and father.

5. The reasons for that course were again fully set out in a judgment of HH Judge Cox dated 5 October 2005.

6. In summary, the conflict between the parents had continued and the mother was further involving S in the conflict due to her entrenched position. S was still living in an atmosphere of fear and the judge had considerable worries about the mother's ability emotionally to separate from S sufficiently. S over-identified with the mother's point of view. The father was also unable to put S's needs first during contact and would cross-examine him and lose his temper at times. When S had contact with the father "it was as if the mother didn't exist". S had an equally insecure attachment to both parents. The psychologist thought S was in a "very bad place". S was therefore removed from the mother's care and placed in foster care. The local authority issued proceedings shortly thereafter.

7. The matter returned before HH Judge Cox on 26 April 2006 when the mother challenged the Council's application to renew the interim care order. The hearing took 5 days and was again the subject of a full and careful judgment.

8. Each parent was paying privately for therapeutic work with personal counsellors. The father had issues with his gender identity which were becoming more pronounced. The Judge found that the mother had not made sufficient progress to merit the return of S to her care at that stage and the Judge was troubled about S "keeping secrets" with his mother and her manipulative behaviour. The Judge also found that the mother had a habit of distorting the truth and a tendency to present herself as a wronged victim. The father had made progress and the Judge wished therapeutic work with S to deal with the father's gender issues to start as soon as practicable. It became clear that S's successful and happy foster placement was going to have to be changed because of the mother's attitude and behaviour towards the foster parents. That move took place on 30 May 2006.

9. There was a final hearing of the care proceedings in June/July 2006, judgment being delivered by HH Judge Cox on 13 July 2006.

10. It was clear by that stage that, despite the work being done with the parents by the professionals to address their issues, the parents had "expended their energies in continuing conflict". The mother wanted S returned to her care immediately, but on the second day of the hearing she indicated she would not be opposing a final care order on the basis that the Local Authority supported the rehabilitation of S to her care. The mother then changed her mind. She sacked her legal team and attended court with a new position which was the immediate return of S to her care under a residence order. The father sought a residence order and was disruptive throughout the entire hearing.

11. The Judge found that there had been no improvement as far as the father was concerned. As far as the mother was concerned, the Judge followed the recommendation of the psychologist (supported by the Council and the guardian) that,

if the mother did not make sufficient improvements within 6 months of 6 July 2006, everything must be done to secure S's settlement with his current foster carers. S should only return to his mother if that return was going to be safe, secure and long term. A return to either parent followed by a period of conflict would cause S significant emotional harm and a further removal from either parent's care would inevitably be emotionally devastating and significantly emotionally damaging for S. The Judge found that S had lived his whole life in conflict until he was taken into foster care. "S deserved better than for history to repeat itself".

12. A final care order was made which provided for the preconditions to rehabilitation of S to the mother's care. These were:

    a) Mother to continue to have contact with S and would sign a contact agreement.

    b) Contact to be reviewed on a regular basis and would be dependent on mother's promotion of S's foster placement.

    c) Mother not to place S in a position of conflict upon separation.

    d) Mother not to mention or suggest to S the possibility of returning to her care unless agreed with social worker.

    e) Mother to have counselling once per week.

    f) Mother to co-operate with counselling with S concerning the father's gender identity issues.

    g) Mother to conclude her ancillary relief proceedings.

    h) Mother to obtain secure appropriate accommodation and the present former matrimonial home to be sold.

    i) Mother to maintain a settled lifestyle in her new home environment, free from conflict for a period of three months within the overall six month period.

13. If the mother achieved those objectives, her contact would be gradually increased, progressing through staying contact to rehabilitation of S to her care within 3 months of the increased contact.

14. There was a final hearing of the ancillary relief proceedings within the parents' divorce in September 2006. A sale of the former matrimonial home was ordered with an equal division of the proceeds.

15. In October 2006 the mother obtained alternative accommodation for herself. It appears that her relationship with M commenced at around this time, when he purchased the former matrimonial home (although the father had suspicions that it had been going on for much longer).

16. In December 2006, the Council issued an application for permission to refuse further contact with the father. The mother issued an application for discharge of the care

order and for a residence order to be made in her favour on the basis that she had complied with the conditions set out in the care plan, although the Council had not yet reached a decision on the matter. The father also issued an application to discharge the care order and for a residence application in his favour. The Council withdrew its application for permission to refuse contact with the father and, in February 2007, the Judge directed a psychiatric and psychological assessment to be carried out in respect of S by a hospital Child Care Assessment Team.

17. Subsequently an order was made transferring the case to the High Court so that the applications to discharge the care order could be heard by a High Court Judge, Mrs Justice Macur, with a time estimate of 7 days.

18. On 23 July 2007 the mother married M. At that time she was pregnant by him. At a hearing before the Judge on 26 July 2007 concerning contact between the parents and S, the mother did not reveal her pregnancy. The mother then became concerned about the likely outcome of her application to discharge the final care order.

19. In their summary assessment, which by now included M, the assessment team made the following findings and recommendations in response to issues raised in the letter of instruction.

    a) Overall S appears to be functioning well. He appears to be a remarkably resilient little boy who has adapted to his experience of emotional abuse, neglect and distortion of reality over a long period of time.

    b) We have one serious concern with regard to his emotional welfare. S can be emotionally guarded and is clearly sensitised to others' wishes and feelings.

    c) Although S clearly stated that he wished to live with his mother he was unable or unwilling to provide any positive descriptions of what his relationship with her was like beyond its 'nice' to be with her.

    d) Observation of the relationship between S and his mother suggested a disorganised attachment system. There was only a low level of reciprocity between S and his mother.

    e) The difficulty in the relationship between S and his father stems from the father's own emotional personality regulation difficulties. S still wishes that his parents will get back together but does not express a wish to live with his father.

    f) The assessment indicates that the mother is aware of some of S's needs and can list these as a need to socialise, have a routine, boundaries and a sense of belonging. However, her awareness seems concrete and sometimes relates back to her own needs. There is a strong sense that S's needs continue to be about her own needs.

    g) Overall there has been no significant improvement in mother's insight/approach to S since July 2006. Significant improvements are

not possible while the mother continues to be of the opinion that much of the previous judgments has been wrong or exaggerated. She does not accept the final judgment and she minimises and excuses and blames others. The mother did not accept that she needed to make changes to her parenting.

h) The mother's new husband, M, was an unknown quantity. He could be a negative or a positive influence. He presented as well meaning but blinkered. He was closely aligned with the mother's position.

i) The intended measures of change were insufficiently tightly described in the care plan and did not target S's emotional welfare or the neglected issues. The mother was given a number of targets to achieve and she has failed to do this on a consistent basis. S has a very high need for consistency.

j) It is in S's best interest for these proceedings, which have been long and drawn out, to be final.

k) The conflict between the parents is unlikely to change in any substantial way and, with either parent, S is likely to experience split loyalties, to be hyper vigilant, untrusting of adults and cautious not to upset anyone.

l) The father does not accept the need for change.

m) The father requires long term psychotherapy for his narcissistic and histrionic personality traits.

n) We do not consider it advisable to return S to the care of either parent.

o) Contact with father and mother should be supervised and should be suspended in the event that either parent is unable to contain feelings about foster carers, each other, social services or other professionals.

p) S needs stability, predictability, security and permanency as well as his emotional, educational and basic care needs being met. Adoption would give S the best possible opportunity for permanency.

q) Long term foster placement would not offer S the same chances of permanency as adoption, but would be an appropriate alternative. There is a risk of the (current foster) placement being undermined by the parents and the court process. There is a danger that this pattern would be repeated in any foster care placement unless the parents change significantly.

20. On 11 September 2007, with the final hearing due to be heard before Macur J in October 2007, the mother, assisted by M, abducted S from his foster placement at 4am in the morning and they drove to France together. M returned to England on 13 September 2007 and was arrested by the police the next day. The mother and S did not return, and, since then, M has maintained that he does not know where they are. A

search for them and efforts to secure their return by the police and the authorities continue. It is known that the mother's child by M was born at the end of November at Carcassonne in France. Mother and child were discharged some two weeks later. The baby was briefly hospitalised again in Carcassonne at the beginning of January 2008, but a search for the Mother by the French authorities has so far been unsuccessful.

21. On 20 September 2007, having been notified of the imminent appearance of an article in the local paper, the Council made a without notice application to the High Court for an injunction prohibiting the publishing or broadcasting of information relating to S which might result in his identification. An order was granted by Macur J. Next day on 21 September 2007, Coleridge J ordered that such prohibition continue until 8 October 2007, with the addition of various amendments. In particular, paragraph 4 of Macur J's order was amended to prohibit the publication of S's personal circumstances and specifically that he was or should be living with foster carers. Paragraph 5 was added to forbid solicitation of information relating to S, his parents or any carer from S, the parents, M, the maternal grandmother, the mother's sister or any relative or carer. Paragraph 7 provided for various matters which were not prohibited including at 7(a) the usual "public domain" proviso, permitting publication of information relating to any part of a hearing in any court in England and Wales which was sitting in public and did not itself make an order restricting information.

22. At the beginning of October 2007, the local authority issued an application for a placement order and sought the return of S to the U.K. through the Central Authority. On 8 October 2007 the hearing of the parents' applications to discharge the care order previously fixed to be heard before Macur J was vacated and the order of Coleridge J dated 21 September 2007 continued until further order with liberty to any person affected by the restrictions to apply to a Judge of the High Court to vary or discharge it on 48 hours notice.

23. On 9 October 2007, on the application of M, Macur J authorised and ordered S's guardian to provide in edited form a copy of the guardian's report which had been prepared for the final hearing before Macur J, restricted to use by M's solicitors in preparing M's plea in mitigation in the criminal proceedings and to the Crown Prosecution Service for the assistance of the Judge who was due to pass sentence upon M at the Crown Court in relation to the child abduction charge. The order of Coleridge J was amended to allow for such communication.

24. The application of M to be joined as a party in the care proceedings was refused. On 11 October 2007 Macur J ordered that the parents' discharge applications and the council's placement order proceedings should be consolidated for final hearing on 10 March 2008 (with a time estimate of 10 days) for hearing by HH Judge Altman sitting as a High Court Judge at the Principal Registry Family Division.

25. In November 2007 M was sentenced in the Crown Court for the offence of child abduction, receiving a sentence of 16 months imprisonment and an order was made under Section 39 (1) of the Children and Young Persons Act 1933 preventing publication of S's name or the name of the village in which he lived in order to protect the anonymity of S. In the course of lengthy mitigation and the Judge's sentencing remarks, references were made to the guardian's report referred to at paragraph 23 above.

26. On 25 January 2008, at a directions hearing, the mother's solicitors indicated that the mother wished to return to the jurisdiction and an order was made giving permission to the Council to withdraw its application for a placement order in respect of S. The date for the hearing of the application to discharge the care order, then set for 10 March 2008, was vacated and it still awaits disposition. The mother has not returned.

27. M appealed against his sentence imposed at the Crown Court but, on 6 February 2008, his appeal was unsuccessful and was the subject of a judgment of the Court of Criminal Appeal in which the Court fully set out its reasons, as had the Crown Court Judge at the time of passing sentence.

28. In the light of the issues as they have been presented on this application it is appropriate to set out a short summary of the reasons for the length of the sentence imposed which is regarded by M and, by the authors of articles which have appeared in the *Daily Mail* and *The Times*, as excessive. Having referred to previous authorities of the Court to the effect that, save in quite exceptional circumstances, a person who abducts a child or aids and abets another to do so must expect a prison sentence, both for reasons of punishment and general deterrence, the Court of Appeal (Criminal Division) summarised it in this way:

> "12. The Sentencing Judge in the instant case considered that there were a number of aggravating factors. First, the Appellant knowingly took part in breaching a Court order with the result that the hearing in October was thwarted. Second, whatever the perception of the Appellant and of the mother was, the abduction was not in S's best interest, taken as he was from a foster home to a strange land. Third, the abduction as far as the Appellant was concerned was a planned offence at least in the short-term. The Judge found that once the three of them had left the village in which the mother lived and drove to Dover, the Appellant must have known what was on foot. Fourth, although he treated the abduction as one by parents, there were, the Judge said, some "stranger" elements; that is to say, the Appellant had never met S in any meaningful sense. The Judge refused to find that the mother must have told S who the Appellant was and of his role. Fifth, the mother and S are still on the run.
>
> 13. As to mitigating factors, the Judge rejected the submission that the Appellant was remorseful. He found that the Appellant could have helped to trace the mother and S, but had chosen not to do so. The Judge gave full credit for the Appellant's plea of guilty. Nevertheless, he regarded that as generous because the evidence, particularly the CCTV made a conviction inevitable. The Judge found that the Appellant had acted in good faith; that is to say, despite the fact that he was an outsider to the care proceedings, he could have no real picture of the case. The Judge accepted that the Appellant genuinely believed that he was doing the right thing. The Judge further accepted the Appellant's good character was "a very strong point" in the

> Appellant's favour. As to the effect on the Appellant's family and employees, he made some allowance for the latter.
>
> 14. Thus, the Judge refused to suspend the sentence of imprisonment. He found nothing exceptional which would allow him to pass a suspended sentence. He therefore concluded that an immediate sentence of imprisonment was inevitable and fixed the term, as we have said, at 16 months."

29. Following the appeal a number of articles appeared in the press. On 1 February 2008 the *Medway Messenger* carried an article "Step-dad who helped kidnap son from foster care loses sentence appeal". It was of a factual nature and contained no substantial comment.

30. On 7 February 2008 an article appeared in the *Daily Mail* "Jailed, man who helped flee as social workers threatened to take baby." It referred to matters raised in mitigation by counsel for M in the criminal case in the following terms:

> "The businessman's wife was heavily pregnant with their first child – and was terrified the baby would be taken at birth by social workers – when he drove his family to Dover, and then on to Paris.
>
> She had a second reason for fleeing – she believed her 8-year old son from a previous marriage was to be adopted against her wishes."

The article stated that the plight of the mother raised disturbing questions about the "secret family courts which only last week were in the spotlight when social workers illegally snatched a new born baby from its mother." The article was strongly sympathetic to M, quoting a friend who observed that the case wasn't justice and that putting M in prison for protecting his family had made the law look an ass.

31. On 9 February 2008 a further article in the *Daily Mail* headed "My life as a fugitive" quoted the mother, who had obviously been in contact with the newspaper, either directly or indirectly, explaining at length her refusal to return home because of fears that S would be adopted and her baby daughter taken into care. It gave a lengthy self-exculpatory account of her reasons for acting as she did and her belief that S was unhappy in foster care.

32. On 10 February 2008 an article appeared in the *Mail on Sunday* headed "How do you judge a court held in secret?", with the by-line "Justice cannot be done behind closed doors. For most of us the businessman who risked prison to protect his wife and children is the hero". The article was critical of the fact that while the case and the appearance of M at the criminal court, raised a host of questions about the care proceedings and the role of the social services, those questions could not be properly judged in the light of the fact that what had passed in the care proceedings was not available to the public.

33. On 15 February 2008, at a directions hearing in the County Court, the date for the hearing of the application for discharge of the care order was vacated and the

injunction previously granted by Coleridge J, as varied by Macur J, was extended to 9 May 2008 and an order made that its terms be served on the Press Association.

34. On 21 February 2008 an article appeared in *The Times* by Camilla Cavendish headed "A decent family ruined. That's justice?" It gave a brief and partisan account of what was said to be the course of the proceedings and the conduct of the social workers which was heavily criticised (it is not clear from whom the account had come). It was also highly critical of the length of sentence imposed upon M. It presented a strong plea for the opening up of the Family Courts and spoke of the "need to tear down the wall of secrecy that has forced a decent woman to live as a fugitive, to save her little boy from a life with strangers, used like a pawn in a game of vengeance".

35. On 13 March 2008 a further article appeared in *The Times* by Camilla Cavendish under the title "Its child ruination, not child protection".

36. Again it pursued a theme strongly sympathetic to the mother and M, critical of the effect M's sentence in the criminal proceedings was having upon him, and critical of the secrecy of family proceedings. It linked M's case with another case in which an elderly man had been sentenced to prison for 20 months for breach of a court order in a family case and criticised the fact that the secrecy of the proceedings prevented them from talking about their position and the details of the situation which had led to it.

37. On 21 April 2008 there was a hearing before HH Judge Cryan at which TNL applied for an amendment to be made by way of proviso to the injunction then in force.

38. It is convenient to set out the relevant parts of the current form of order made by Coleridge J with the wording of the proviso sought by TNL in italics.

> "3. This order binds all persons and all companies (whether acting by their directors, employees or agents or in any other way) who know that the order has been made.
>
> 4. This order prohibits the publishing or broadcasting in any newspaper, magazine public computer network, internet website, sound or television broadcast or cable or satellite programme service or any other form of electronic technology of
>
> a. The names and address of, or information otherwise identifying, the Respondent child [S];
>
> b. Any information relating to the following people which may result in the deliberate or accidental revelation of the identity of the child:
>
> 1. The Child [S]
>
> 2. [M]
>
> 3. [The mother]

4. [The paternal grandmother]

5. [The mother's sister]

6. [Any relative of the child]

ii Any picture being or including a picture of the Respondent child.

c. Any other particulars or information relating to the child or his personal circumstances and specifically that he is or should be living with foster carers.

5. This order prohibits any person from seeking any information relating to the child or the parents or a carer from any of the following;

a. The child,

b. The parents,

c. [M]

d. [The mother]

e. [The maternal grandmother]

f. Any relative of the child,

g. A carer

Save that TNL may seek information from [M], and [M] may provide information, concerning (i) matters relating to any part of a hearing in Court in England and Wales in which the Court was sitting in public; (ii) [M]'s current emotional state; [M's] experience in prison; (iv) the support [M] has received from friends and family.

6. No publication of the text or summary of this order (except for service of the order under paragraph below) shall include any of the matters referred to paragraph 4 and 5 above.

7. Nothing on this order shall prevent any person from:-

a. Publishing information relating to any part of a hearing in England and Wales (including a coroners' court) in which the Court was sitting in public and did not itself make any order restricting information.

b. Seeking or publishing information which is not restricted by paragraph 4 and 5 above.

> c. Inquiring whether a person or place falls within paragraphs 4 and 5 above.
>
> d. Seeking information relating to the child while acting in a manner authorised by statute or by any court in England and Wales.
>
> e. Seeking information from the responsible solicitor acting for any of the parties or any appointed press officer for the local authority.
>
> f. Seeking or receiving information from anyone who before the making of this order had previously approached that person with the purpose of volunteering information (but this will not make lawful the provision or receipt of private information which would otherwise be unlawful).
>
> g. Publishing information which before the service on that person of this Order was already in the public domain in England and Wales as a result of publication by another person in a newspaper, magazine, sound or television broadcast or cable or satellite programme service or on the internet website of a media organisation operating within England and Wales (save that there should be no future published references to the child's placement in foster care).
>
> Save that it is made clear that nothing in this order shall be interpreted to in any way prohibit or impede the appropriate and necessary investigation, interviewing of witnesses and preparation of any parties case whether in Criminal or other proceedings.
>
> 8. …"

39. The application to Judge Cryan on 21 April 2008 was supported by a statement from Miss Cavendish who explained that the proviso was sought to be included on the basis that TNL wished "to follow the story in so far as is permissible within the limitations of the orders (and statutory restrictions) in place". She went on to state:

> "I do not wish [M] to disclose evidence from the on-going Family Division proceedings and therefore do not seek the Court's permission to be able to do so. I do not wish to discuss child S with [M]. The essential reason that I wish to interview [M] is to understand his reaction to his experiences of the criminal justice system and to find out about his emotional state. The order TNL seeks would enable me to ask [M] about these matters without putting him [and myself] at risk of being in contempt of court."

The skeleton argument of counsel stated that the subject matter of the interview was not to be "directly related to the child, his carers or his upbringing … it wishes to

publish the fruits of an interview with [M] and impart information about what he says to its readers". Finally:

> "It is difficult to see how child S's Article 8 rights would be engaged at all by the giving and publication of the information set out in the proviso. The interview will not cover private matters concerning child S. It will not delve into the matters arising in the Family Division proceedings."

40. At the hearing, the Council raised no objection to the insertion of the proviso in paragraph 5. However, the guardian was not present or represented and the proviso was therefore ordered subject to the guardian's indication of consent.

41. In the event, the guardian did not consent and the matter returned for hearing before H H Judge Cryan sitting as a Deputy High Court Judge on 9 May 2008 when, at the Judge's suggestion, there was added to the proviso the unexceptionable words at the end of (iv) of the proviso:

> "*(Although for the avoidance of doubt the saving provision does not in any way affect the prohibition upon identification of individuals as set out in paragraph 4 of the publicity order)*"

42. However, at that stage, TNL's position in relation to the care proceedings changed. An application was also made for:

> "*Release into the public domain of the judgments handed down in the proceedings to date, suitably anonymised*."

43. In the light of the issues raised by that application, the Judge gave directions for the matter to proceed and to be listed for hearing before myself here in London with a time estimate of a day and that all the documents filed in the case be lodged with the Clerk of the Rules at the Royal Courts of Justice.

44. Subject to what I shall say shortly about the position of M, who has appeared before me represented by Mr Scott-Manderson, largely in relation to collateral matters, the issues which have been argued before me related to the question (1) of the proviso (2) whether or not there should be publication of the previous judgments of HH Judge Cox in the care proceedings in anonymised form. In the event the issues under (2) have been largely resolved by an agreement between the parties which I have been content to endorse.

The Proviso

45. There has been an issue between the parties as to whether the proviso is in fact necessary. Before me, the guardian has conceded that, provided TNL does indeed limit itself to the matters itemised in (i)-(iv) then that information would in any event not fall foul of the remainder of the terms of the injunction. That is because item (i) of the proviso relates to criminal proceedings which fall within the exemption from the effects of the order at paragraph 7(a) on the assumption (as TNL concede) that nothing should be published which has or might have the effect of identifying S. That being so, the guardian has been suspicious that the incorporation of the proviso

expressly permitting TNL to interview M may be used (or misused) to justify the giving or obtaining of information by or from M which in fact transgresses the limitations imposed by S.12(1) of the *Administration of Justice Act 1960*. Mr Wolanski for TNL disclaims any such intention. He has made clear that it is not the intention of Miss Cavendish or TNL to seek, and that they recognise that they are prohibited from seeking, from M any information relating to matters dealt with in the care proceedings, to which of course M was never a party and could only have acquired any knowledge subsequently and at second hand through the (self-serving) account of the mother. They are, however, concerned to seek an account from M of what happened in the criminal proceedings which themselves related to his involvement with S and in particular S's abduction. That being so, Mr Wolanski submits that TNL would be prohibited by the general words of the non-solicitation provision in paragraph 5 of the order, in the absence of the proviso sought. In my view, Mr Wolanski is correct and it is appropriate that sub-paragraph (i) of the proviso be inserted in the order. As to sub-paragraphs (ii), (iii), and (iv), there can be no valid objection to their being included. Provided that great care is taken by TNL in relation to the question of direct or indirect identification when dealing with the subject matter of sub-paragraph (iv), a "human interest" article dealing with such matters is plainly a permissible journalistic enterprise.

The release of the judgments in the care proceedings

46. By applying for release of the judgments in the care proceedings, TNL have belatedly changed tack from their original position which was essentially one which recognised the privacy of the care proceedings, no doubt upon the basis that those proceedings are proceedings brought under Part IV of the Children Act 1989, which proceedings have not yet been finally dealt with but are still in the course of resolution. Such resolution has of course only been prevented or obstructed by the unlawful removal of S abroad by the mother and M.

47. The position in law is that such proceedings, brought under Part IV of the *Children Act* 1989, are subject to Rule 4.16(7) of the *Family Proceedings Rules 1991* which has the effect of securing the privacy of such proceedings unless the Court orders that the matter be heard in open court rather than chambers. No such order was made in this case. The privacy provided for under Rule 4.16(7) is reinforced by S.97(2) of the *Children Act 1989* which makes it a criminal offence to:

> "Publish any material which is intended, or likely, to identify … any child as being involved in any proceedings before [the Family Court] in which any power under [the 1989] Act may be exercised by the Court with respect to that or any other child."

Save that under S. 97(4):

> "The Court …. may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such an extent as may be specified in the order."

Furthermore, so far as publicity and disclosure are concerned the proceedings and judgment therein are subject to s.12(1)(a) of the *Administration of Justice Act 1960* which renders it a contempt of court to publish information relating to Children Act proceedings before the court sitting in private.

48. The documents filed in these lengthy proceedings, particularly the experts' reports and the detailed judgments delivered, will be very important parts of the evidence in the discharge proceedings which currently stand adjourned but which will no doubt be resumed once the mother and S have returned to the jurisdiction. The information contained in those documents touches in detail upon some of the most intimate aspects of the mother's, father's, and S's lives, and goes to the heart of the welfare interests of S, which are the paramount consideration for the Court under s.1 of the 1989 Act. This information is not within the public domain and will remain confidential to the court and the parties unless and to the extent that the Court makes an exception.

49. When the argument commenced before me, it was, and has since remained, the position of the Council and of the guardian that there is every reason why the "usual" position should prevail in this case, broadly for the reasons set out in paragraph 48 above. That had plainly been the view of HH Judge Cox; indeed the parties never applied that it should be otherwise. It was also the view of Macur and Coleridge JJ in making their orders to date. Nor had it been otherwise suggested by TNL in its original application which, as I have made clear, simply related to its right to interview M about his prison sentence and his reactions and feelings surrounding it.

50. The basis upon which TNL have now sought to go wider and to secure publication of the judgments (subject to anonymisation) is that the articles written by Miss Cavendish upon the topic, in ignorance of the detail of the care proceedings have created huge reader and public interest in the reasoning of the Court when making the care orders in the first place; it is submitted that such reasoning has become a matter of genuine and intense public interest upon which media comment should be permitted even though the court proceedings are still in being, provided the anonymity of S is preserved

51. In this respect, TNL relies strongly upon the increasing number of observations by the senior judiciary in encouraging the publication of judgments in care cases, subject to preservation of the anonymity of the child where such anonymity is desirable in his or her welfare interests. As long ago as 1996 Butler Sloss LJ stated in *Re: PB (Hearings in Open Court)* [1996] 2 FLR 765 at 769:

> "It may be that the practice of giving judgment in private is partly due to the parties not asking for it to be heard in public and partly because in the County Court, where the vast majority of children cases are heard, it is less likely that there will be issues of public interest. Where issues of public interest do arise it would seem entirely appropriate to give judgment in open court providing, where desirable in the interests of the child, appropriate directions are given to avoid identification."

52. In her President's memorandum of administrative directions, issued on 28 January 2004 following the judgment of the Court of Appeal in *Re Cannings* [2004] EWCA Crim 01, she observed under the heading "Public Judgments":

> "Where applications for the variation, discharge or revocation of final orders are made, Judges should consider issuing in public at the conclusion of the case suitably anonymised judgments …
>
> It is also worth giving consideration to increasing the frequency with which anonymised Family Court judgments in general are made public. According to current convention, judgments are usually made public where they involve some important principle of law which in the opinion of the Judge makes the case of interest to law reporters. In view of the current climate and increasing complaints of "secrecy" in the Family Justice system, a broader approach to making judgments public may be desirable."

Besides gaining the emphatic endorsement of Munby J in *Kent County Council v (1) the Mother (2)the Father(3) B (By Her Children's Guardian)* [2004] EWHC 411 Fam, the desirability of promoting open justice by this means was strongly urged by Wall LJ in *Clayton v Clayton* [2006] EWCA Civ 878 [2006] FLR 2 405 in order

> "(1) to enable informed and proper public scrutiny of the administration of (Family) justice;
>
> (2) to facilitate informed public knowledge, understanding and discussion of the important social, medical and ethical issues which are litigated in the Family Justice system;
>
> (3) … to facilitate the dissemination of information useful to other professions and organisations in a multi-disciplinary working of Family Law. (Paragraph 85)"

He added at paragraph 86:

> "In 1994, I saw "no difficulty in promulgating a rule" that the evidence in family proceedings could continue to be heard in private, whilst the judgment or decision of the Court should always be given in public unless the Judge, for reasons to be explained in public, decided otherwise."

53. Wall LJ also repeated his observations in *Re H (Children)* [2005] EWCA Civ 1325 to the effect that:

> "31. 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, a Judge is

> communicating carefully reasoned judgments, not sound-bites. Even when a judgment is published, it is likely to be read in its entirety only by lawyers …
>
> 33. What is manifestly unacceptable is the unauthorised selective leakage of one parties' case or selective and tendentious reporting in breach of the rules relating to the confidentiality of the proceedings. This, in my experience, inevitably leads to unbalanced mis-reporting of the difficult and sensitive issues with which the Courts have to grapple. In my judgment, therefore, the best way to tackle the problem is by greater openness in the decision-making process along the lines that I have described."

54. Finally, the Government's most recent Consultation Paper "Confidence and Confidentiality: Openness in family Courts – A New Approach (CP10/07) proposes that there should be published and made available on line for public scrutiny (subject to protection of the identity of the child concerned) the transcript of the judge's judgment (alternatively a "Decision Summary") in any case where a final order is made in Children Act Public Law cases. Information as to the position of the Government following the responses to that Consultation Paper is currently awaited and it has been stated in Parliament that the Government will make an announcement to the House of Commons after the 2008 Summer recess.

55. It is right to observe, however, that the observations to which I have referred do not anticipate publication of judgments before final orders have been made and the welfare interests of the child finally adjudicated. The rival arguments of both sides in this case, if fully deployed, would have involved a detailed weighing, in that context, of the mother's, father's, and S's Article 8 rights under the European Convention on Human Rights, the welfare interests of S and the Article 10 rights of M and TNL, against the background that Rule 4.16(7) of the Family Proceedings Rules has been held to be Convention compliant (see *B v United Kingdom: P v United Kingdom* (2002) 34 EHRR 529; [2001] 2 FLR 261). However a practical solution to the problem in this unusual case was proposed by the parties. Mr Bellamy QC for the Council produced a "Summary of the facts in the Children Act proceedings" in a form which was considered sufficient and satisfactory by TNL for the purposes of publication and comment without resort to the detailed judgments in the care proceedings, in the light of which TNL was prepared to withdraw its application for publication of those judgments. The other parties to the care proceedings also indicated that they were content with the form of the summary. In those circumstances, and following my indication that I considered this an appropriate solution, subject to final approval of the detailed terms of the order, the parties indicated that they were in a position to agree an order which would recite the terms of their agreement in relation to the use of the Summary of Facts and would incorporate the proviso originally sought by TNL. I shall elaborate my reasons for approving the suggested solution below.

56. Since the hearing, the parties have agreed a form of order, subject to certain matters of disagreement which remain and which have been supplied to me in the form of a draft order containing certain suggested additions and/or amendments to the order of Coleridge J. The draft has been annotated to indicate the matters in relation to which

differences remain or clarification is required and I have received rival submissions from the Council and TNL in writing in relation to those differences. The position is as follows.

57. Apart from certain additions to bring the matter up to date, two points arise on the preamble to the order. It appears from footnote 1 that M is concerned to have included a passage referring to the documents read by the Court in these proceedings, whilst making no admissions as to the matters contained therein. I see no objection to the inclusion of such a passage.

58. It appears from footnote 2 that the Council wish to have an undertaking by TNL not to interview M until after the handing down of this judgment and TNL consents to that course, which I approve.

59. The subject of footnote 3 is a small and unobjectionable inclusion.

60. Footnote 4 indicates that the guardian objects to the order being described as "by consent" and, in the light of the differences which still exist between the parties (albeit as to matters of detail), it is plain that those words should be omitted.

61. The subject of footnote 5 is the desire of the Council to have included in the prohibition on publishing or broadcasting information contained in paragraph (4) of the previous order, the fact that the Council is and has been the local authority with care of S. This is on the ground that such identification raises the risk that S will be identifiable within his local community on his return. TNL oppose the inclusion of any such provision noting that it was not a matter raised before the Court in argument or, indeed, before the hearing. I have received and considered a belated statement from the Council's Assistant Director of Children's Care and a letter from the Council's solicitor in that respect as well as the submissions of counsel.

62. It is to be noted that publication of the name of the Council as a party to the proceedings and a statement as to the nature of the proceedings is not a matter prohibited by S.12 of the 1960 Act. As Munby J observed in *Kent CC v B* [2004] EWHC Fam 411 at paragraph [125], where a local authority wishes to obtain an order preventing its identification:

> "It is for the local authority to establish a convincing case for an injunction to restrain the media publishing something which is prohibited neither by the general law nor by Section 12 [of the *Administration of Justice Act 1960]*. It cannot establish such a case merely by demonstrating – even assuming that it can – that there is no public interest in the identity of the local authority."

Munby J went on to state at paragraph [126] that the fact that identification of a local authority may make it easier for those in the know, or for those who are part of the child's close family, domestic or social circle, to realise that something is being published about that particular child, is not in itself a sufficient reason to keep the identity of the local authority a secret. Thus it is the position that, when considering the likelihood of identification of S simply by reason of publishing the identity of the Council, the Court must concentrate on the position of those who do not already know

who the child is. In this case it is clear that the mother and M live in a small village community in which they are well known. However, although Medway is a geographically small area, there are over 300 "looked after" children within its area, and I do not consider that the evidence placed before me establishes the likelihood of any widespread identification of S or knowledge of his involvement in proceedings by the general population outside that village (who are already well aware of it) as a result of the provision sought.

63. More specifically, however, it is clear that such a provision would be at odds with the overall structure of the order as it currently exists, in that paragraph (7) of the order expressly preserves the right of TNL to interview M and publish matter in relation to the criminal proceedings in any respect in which the criminal courts did not themselves make an order restricting information. In the course of the criminal proceedings (perhaps not surprisingly because the Council were not represented), there was no suggestion advanced, let alone any order made, on the basis that identification of the Council might directly or indirectly lead to the identification of S as the child concerned. Further, in the judgment of the Court of Appeal Criminal Division of 6 February 2008, sitting in open court, as the transcript of the judgment shows, the Court identified the Council as the instigator of the proceedings for care and the recipient of a care order in its favour on 14 July 2006. No order for restrictions on publicity appears to have been made on that occasion. The identity of the Council in those respects is thus fairly and squarely within the public domain at least in relation to any interview concerning the criminal proceedings.

64. Footnote 6 to the draft order relates to the wish of the Council to include in paragraph (6) of the order a reference to paragraph (5) as containing matters to be excluded from the text or summary of this order as published. TNL does not object to such inclusion. However, it is opposed by M. It is not apparent to me what logic grounds that opposition and, in my view, the reference to paragraph (5) should be included, together with the reference which echoes it in paragraph (7) (b) of the draft.

65. Finally, the Council seeks to retain, and TNL to exclude, that part of the order granted by Coleridge J comprising the words in brackets at the end of paragraph (7)(g) which provide that there should be no future published references to S's placement in foster care, despite the fact that such information may already have been previously placed in the public domain as a result of publication by some other media source or on the internet website of a media organisation. If and in so far as the reference is simply a reference to S having been in foster care without more, and on the basis that it does not permit publication of any details in relation to the identity or location of S's then (or any future) foster carer, then it is at odds with the effect of paragraph (7)(a) which provides in effect that nothing should prevent any person (including TNL) from publishing information relating to any part of the criminal proceedings. That is because, as I have already indicated, there was considerable reference in the criminal proceedings to the fact that S was in foster care; indeed the very charge upon which M was convicted was based upon the removal of S without lawful authority or reasonable excuse from foster care. In my view therefore it is not in principle appropriate to include the words in brackets unless it is very clear that the welfare interests of S so require (see: *re S Identification; restrictions on publication) [2004] 1 UKHL 47 [2005] 1 FLR 591* at [para. 37]). I do not consider that they do. My reasons are shortly as follows.

66. I consider that the level of interest created in this case by the imposition of a prison sentence upon M, the resultant publicity, and the suggestions made that the actions of M were in some way heroic and those of the Council were "child ruination not child protection", make a very strong case for the background to be made more widely known. That background has been fairly set out in agreed and abbreviated form in the Summary of Facts, the substance of which I have set out in paragraphs 1-22 of this judgment.

67. Such publication will enable the public to form its own view whether the actions of the Council or the decisions of the Court to date have been fairly characterised. Article 10 considerations are therefore very strong in this case, despite the fact that the proceedings are not yet concluded. They are in a state of prolonged hiatus, with no date for their completion in view. I do not consider that comment upon the proceedings as set out in the Summary of Facts will invade the Article 8 rights of S to an extent substantially greater than the position which already exists as a result of the publicity to date, provided his anonymity is protected as required under the terms of the order. The agreed Summary of Facts is recognised by TNL as sufficient for its purposes under Article 10, and the restricted content of the summary means that the considerable and extensive references to intimate family matters and S's welfare contained in the previous judgments of H H Judge Cox will remain largely, and in my view sufficiently, protected.

68. In that respect, the Council (and I have not been separately addressed upon this matter by the guardian) are fearful that, having agreed to the Summary of Facts as an appropriate form of publication in relation to the content of care proceedings for the purposes of any comment by TNL, the identification of the Council as the Local Authority involved will concentrate attention upon Medway and its relatively small pool of looked after children (see paragraph 62 above) in a manner which may lead to identification of S to an audience hitherto ignorant of his position as the subject of care proceedings, thus rendering him vulnerable to curiosity and embarrassment. However, having considered the evidence available to me upon this matter, I am not persuaded of significant risk to S in this respect.

69. I am therefore prepared to sanction a departure from the provisions of S.12 (1) of the *Administration of Justice Act 1960* (and, for the avoidance of doubt, s.97(2) of the *Children Act 1989*) so as to permit publication and disclosure of the course and content of the previous proceedings to the limited extent set out in the Summary of Facts referred to in the draft order. Subject to any further submissions of counsel, I propose to authorise publication of this judgment.

The position of M

70. Despite the fact that M is not a party to the care proceedings, Mr Scott Manderson made an application on his behalf, which I granted, to be heard not only on TNL's application, but on various matters extraneous to it which were the principal subject of his submissions.

71. In a statement dated 10 June 2008 and placed before me, M not only sets out various events in the history of the proceedings and makes comments critical of the Council; he also expresses a wish to "intervene" in the proceedings to assist in resolving the

question of securing the return of the mother to England with S and the restoration of their family life with him.

72. Mr Scott Manderson did not formally apply for M to be made a party to the care proceedings, an application refused by Macur J on a previous occasion. Nor, in the event, did he pursue any request for me to make an order permitting his continued intervention short of joinder. In this connection, following disposition of this application, the conduct of the care proceedings, including any reconsideration of the extent of M's participation, will be re-assigned to Macur J, and the question of any future directions in the care proceedings will be dealt with by her. She will be available in London to deal with any application for directions prior to the end of term.

73. However, Mr Scott Manderson emphasised to me the desire of M to secure the return to the jurisdiction of the mother and S together with his own child, born to the mother in Carcassonne. I have no reason to doubt M's sincerity in this respect and it is plainly both the interest and duty of this Court to encourage that result. However, it appears that the prison license conditions of M contain a provision that he is not to contact or associate with the mother or S either directly or indirectly without the prior approval of his supervising officer. It appears that such approval has so far not been forthcoming. Whether or not that approval is given is of course a question for that supervising officer based no doubt upon his or her view of the likelihood that, rather than assisting the course of justice and, in particular, a return to the jurisdiction by the mother with S and her six months old child, M might seek to obstruct such return. Nonetheless, I was invited by Mr Scott Manderson to express the attitude of this Court on the question, for report to the supervising officer. In this respect, I am able to say that, in the light of the information before the Court, I consider that permitting M to contact the mother, to the limited extent of allowing him to communicate with her, either himself or through others, with a view to securing her return, would be a helpful development so far as this Court is concerned.