Neutral Citation Number: [2006] EWHC 2733 (Fam)

Case No: NR06C00371

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(In Public)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2006
Handed down in public 2 November 2006

Before :

MR JUSTICE MUNBY

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In the matter of BRANDON WEBSTER (a child, dob 29.5.2006)

Between :

NORFOLK COUNTY COUNCIL	**Applicant**
- and -	
(1) NICOLA WEBSTER	
(2) MARK WEBSTER	
(3) BRANDON WEBSTER (a child by his children's guardian)	
(4) BRITISH BROADCASTING CORPORATION	
(5) ASSOCIATED NEWSPAPERS LIMITED	
(6) ARCHANT GROUP	**Respondents**

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Ms Rachel Langdale (instructed by the Solicitor, Norfolk County Council) for the applicant
Mr Anthony Hudson (instructed by Harman & Harman) for the first and second respondents
Mr Jonathan Bennett (instructed by Tom Higgin) for the children's guardian
Mr Adam Wolanski (instructed by BBC Litigation Department) for the fourth respondent
Mr Mark Warby QC (instructed by Reynolds Porter Chamberlain LLP) for the fifth respondent
Mr Prashant Popat (instructed by Kennedys) for Norfolk Primary Care Trust
The sixth respondent was neither present nor represented

Hearing date: 26 October 2006

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Approved Judgment (corrected by the Judge)

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.

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MR JUSTICE MUNBY

Mr Justice Munby :

1. Parents who claim that they were the victims of a miscarriage of justice in previous care proceedings relating to their three older children, and who are now embroiled in care proceedings relating to their fourth child, seek, with the assistance of the media, to tell their story in public. They wish the media to be allowed to attend forthcoming hearings of the care proceedings. The question is whether they are entitled to do so.

2. The case raises important questions of principle about the right of access to and reporting of care proceedings in the Family Division and other family courts, which is why I am delivering this judgment in public. I have decided that the parents and the media are in substance, though with some amendments, entitled to the relief they seek.

The facts

3. I can take the background facts quite quickly. I have not seen, nor have the media seen, the papers either in the previous or in the current care proceedings, so I know little about the detail of either case. It does not matter. Subject only to one matter, which I deal with at the end of the judgment, I know enough to be able to decide the issues that are currently before me for determination.

4. The parents live in Norfolk. Their three older children, who I will refer to as A, B and C, were the subject of care proceedings under Part IV of the Children Act 1989 brought by the relevant local authority, Norfolk County Council ("NCC"). The case was heard in the County Court. Judgments were given by His Honour Judge Barham on 21 May 2004 and on 24 November 2004. Threshold was found established. Full care orders were made. Freeing orders were made. All three children were subsequently adopted. The outcome – permanent loss of all their three children – must have been devastating for both parents. Even those of us who spend our professional lives in the family courts can have, even with the assistance of the most vivid imagination and a superabundance of human empathy and fellow–feeling, but a dim awareness of what the parents must have gone through and must, indeed, still be going through.

5. As I understand it, the fundamental basis of the care proceedings was an allegation that one or more of the children had been physically abused by the parents. This is an allegation that they have always denied. They assert that the children were wrongly taken from them on the basis of flawed and incomplete medical and other evidence. A fracture suffered by one of the children, they say, had an innocent explanation, for what is commonly referred to as 'brittle bone disease' – osteogenesis imperfecta – runs, they say, in the mother's family. (That may be, but as NCC points out, recent DNA testing of the mother has apparently demonstrated that she is not a symptomless carrier of the disease. Furthermore, says NCC, this was never a 'single issue' case.)

6. Put shortly, the parents say that they and their three children were all the victims of a miscarriage of justice. Their cause has been taken up by both the print and the broadcast media – the BBC, the 'Times' and the 'Mail on Sunday' amongst others. Responsible journalists have suggested that a "terrible miscarriage of justice may have occurred."

7. The mother became pregnant in the latter part of 2005. Not surprisingly in the circumstances, NCC started child protection procedures before her new child was born. Brandon – for that is his name – was born on 29 May 2006 in Ireland, where the parents had fled shortly before his birth, fearful that care proceedings would be begun and that he too would be taken away from them. More or less voluntarily – in reality they probably had little choice – the parents returned to Norfolk with Brandon. Care proceedings followed. An interim care order was made on 10 June 2006 and the parents, with Brandon, were placed in a residential unit for the purposes of a detailed assessment.

8. By that stage there had been a very considerable amount of publicity about the case. Media coverage had started in about November 2005, before Brandon was born. Perhaps not surprisingly the parents' flight to and return from Ireland attracted very considerable media attention. The parents and Brandon were photographed and shown on television. Their first names were freely reported in the media, though the media chose to use the mother's maiden name rather than their true surname. The most recent broadcast was on 9 June 2006.

9. On 10 June 2006 His Honour Judge Curl, sitting as a Judge of the High Court, made an order imposing very drastic reporting restrictions. Addressed contra mundum (to the world at large), it prohibited, subject only to one minor exception, the publication of "any … information relating to" Brandon and the soliciting from the parents of "any information relating to [Brandon] or his parents". There was no 'public domain' proviso.

10. Prior to that, on 16 May 2006, Pauffley J had made an order designed to protect the identities of A, B, C and their adoptive parents.

11. On 17 August 2006 the BBC gave notice that it intended to apply to vary Judge Curl's order. On 18 October 2006 Associated Newspapers Limited, the publishers of the 'Mail on Sunday', made a similar application. Both applications came on for hearing before me on 26 October 2006. By then there was some degree of urgency, for the care proceedings were listed for a one–day hearing on 3 November 2006, the purpose of that hearing being to consider the interim placement arrangements for Brandon following the anticipated conclusion in the next few days of the residential assessment.

12. Associated Newspapers Limited, represented by Mr Mark Warby QC, the BBC, represented by Mr Adam Wolanski, and the parents, represented by Mr Anthony Hudson, made common cause. It is convenient to take their submissions together.

NCC, which had its own reasons for favouring at least some degree of relaxation of Judge Curl's order, was represented by Ms Rachel Langdale. Brandon's children's guardian, who opposed any relaxation of Judge Curl's order, was represented by Mr Jonathan Bennett. Norfolk Primary Care Trust, which was agnostic in relation to the main dispute between the parties but wished to ensure appropriate protection for its staff, was represented by Mr Prashant Popat. I am grateful to all counsel for their very considerable assistance in a difficult case. I only fear that I cannot do proper justice to the full subtlety and nuance of the very skilful arguments they have put before me.

13. At the end of the hearing I reserved judgment. I now (2 November 2006) hand down judgment in public, having previously handed it down in private on 1 November 2006.

The applications

14. The applicants emphasise that they do not seek to disturb in any way the order made by Pauffley J nor to do anything that might identify either A, B and C or their placements. In essence what they seek is:

i) that the media be permitted to attend the hearing on 3 November 2006;

ii) that the reporting restrictions imposed by section 97(2) of the Children Act 1989 be, for the most part, dispensed with so far as Brandon is concerned (but not in relation to A, B and C); and

iii) that the reporting restrictions imposed by Judge Curl's order be brought to an end – that Judge Curl's order be set aside – and that certain more limited restrictions be substituted, designed to ensure that Brandon's location is not published and that those currently caring for him (apart from his parents) are protected from solicitation of information.

15. The applicants also emphasise that this substitute regime is designed to last only until after judgment on the applications fixed for hearing on 3 November 2006, at which stage, they say, the regime should be reviewed in the light of the court's determination of the issues raised by those applications.

The applicants' submissions

16. The applicants assert that this case raises important points of high principle about open justice in the family courts and the role of the media in exploring and exposing possible miscarriages of justice. Understandably they put their case on the basis of what they say is fundamental principle, principle which, they say, entitles them to the

relief they seek. I agree with the applicants that high principle is indeed involved. And it is accordingly with that that I start.

Open justice

17. It is a fundamental and long-established principle of our legal system – and this principle is now underscored by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – that justice is administered in public. Legal proceedings should be conducted in public and should be fully and freely reported.

18. The classic statements of the principle are of course to be found in *Scott v Scott* [1913] AC 417. I can start with a famous passage in the speech of Lord Shaw of Dunfermline at page 477, a speech which, as Scarman LJ (as he then was) observed in *In re F (A Minor) (Publication of Information)* [1977] Fam 48 at page 93, "must surely rank as a classic declaration of common law principle." According to Lord Shaw:

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."
>
> I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary – and they appear to me still to demand of it – a constant and most watchful respect. There is no greater danger of usurpation than

> that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law"

19. Lord Atkinson in the same case observed at page 463:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

20. Moving to more recent times, in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 Lord Diplock said at page 449:

> "As a general rule the English system of administering justice does require that it be done in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

Lord Diplock went on at page 450 to recognise that:

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."

21. Two more citations will suffice for present purposes. The first is from the judgment of Lord Woolf MR in *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966 at page 977. Having referred to the observation of Sir Christopher Staughton in *Ex p P* (1998) Court of Appeal (Civil Division) Transcript No 431 of 1998 that "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant" – a warning which I would suggest has a particular resonance today in the context of family proceedings – Lord Woolf MR continued:

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.
>
> … Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

He continued with a reference to section 12 of the Administration of Justice Act 1960.

22. Finally in this context I turn to what Brooke LJ said when giving the judgment of the Court of Appeal in *Ex p Guardian Newspapers Ltd* [1999] 1 WLR 2130 at para [39], where the Court of Appeal adopted "as our own" the following proposition put forward (see at para [25]) by Mr Michael Tugendhat QC (as he then was):

> "Mr. Tugendhat submitted that the first of the reasons given in *Ex parte Kaim Todner* [1999] QB 966, 977 should be stated more broadly. Open justice promotes the rule of law. Citizens of all ranks in a democracy must be subject to transparent legal restraint, especially those holding judicial or executive offices. Publicity, whether in the courts, the press, or both, is a powerful deterrent to abuse of power and improper behaviour."

23. So much for the common law. Article 6(1) of the Convention provides, so far as material for present purposes, as follows:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial … where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

24. Article 6 is intended, amongst other things, to promote confidence in the judicial process. This is a point that has repeatedly been stressed by the Strasbourg court. In *Prager and Oberschlick v Austria* (1996) 21 EHRR 1 at para [34] the court said:

> "Regard must … be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties."

In *Diennet v France* (1995) 21 EHRR 554 at para [33] the court, reiterating what it had earlier said in *Axen v Germany* (1983) 5 EHRR 195 at para [25] and in *Pretto v Italy* (1983) 6 EHRR 182 at para [21], said:

> "The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society."

25. In this connection I remain of the view I expressed in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at paras [98], [103]:

> "[98] The need to maintain public confidence in the family justice system is particularly important at present when, as I have said, recent high-profile cases within the criminal justice system have given rise to a very anxious debate which is no longer confined to the possibility of further miscarriages of justice in the criminal justice system but extends also to the possibility of similar miscarriages of justice in the family justice system.

> [103] We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system. This is something that has to be addressed with honesty and candour if the family justice system is not to suffer further loss of public confidence."

Freedom of speech

26. The books are full of statements about the high value attributed to freedom of speech by our law and the vital role it plays in our democracy. A recent, authoritative and one of the most eloquent is to be found in the speech of Lord Steyn in *R v Secretary of State for the Home Department ex p Simms and Another* [2000] 2 AC 115 at page 126:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v United States* (1919) 250 US 616, 630, per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."

27. Freedom of speech is also, of course, guaranteed by Article 10 of the Convention:

> "1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

> information received in confidence, or for maintaining the authority and impartiality of the judiciary."

28. In *Bergens Tidende v Norway* (2001) 31 EHRR 16 at para [48], the Strasbourg court summarised its long-standing jurisprudence:

> "According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10(2), which must, however, be construed strictly. The need for any restrictions must be established convincingly."

The role of the media

29. The press and other media play a vital role in ensuring the proper functioning of our democracy, as also in furthering the rule of law and the administration of justice. The role of the court reporter is that of public watchdog over the administration of justice.

30. I can start with what Watkins LJ said in *R v Felixstowe Justices ex p Leigh* [1987] QB 582 at page 591. It is a powerful, indeed moving, passage which although long deserves citation in full:

> "The role of the journalist and his importance for the public interest in the administration of justice has been commented upon on many occasions. No one nowadays surely can doubt that his presence in court for the purpose of reporting proceedings conducted therein is indispensable. Without him, how is the public to be informed of how justice is being administered in our courts? The journalist has been engaged upon this task in much the same way as he performs it today for well over 150 years. In her work, Justice and Journalism (1974), p. 24, Marjorie Jones, making a study of the influence of newspaper reporting upon the administration of justice by magistrates, stated, having referred to a case decided in 1831:
>
> > "The same ruling that excluded the attorney admitted the newspaper reporter. The journalist entered, and has remained, in magistrates' courts as a member of the public taking notes. The constant presence of newspaper men in

> magistrates' courts provided not only a record of the proceedings but also a means of communication with the public. Through newspaper reports magistrates had access to a wider audience beyond the justice room or the police office. Communication is particularly important for deterrent sentencing, which requires that potential offenders shall be aware of the punishment they are likely to incur."

Later in her study, she recorded, at p. 26, that in Dickens' time journalists were the only impartial observers who sat regularly in magistrates' courts, day after day, week after week, month after month. In the provinces, particularly, the same reporter might often cover the local courts for year after year. These men regarded themselves as representing the absent public. And they were the first to concern themselves with the defence of the defenceless in the summary courts.

Lord Denning in The Road to Justice (1955) stated with regard to the free press, at p. 64:

> "A newspaper reporter is in every court. He sits through the dullest cases in the Court of Appeal and the most trivial cases before the magistrates. He says nothing but writes a lot. He notes all that goes on and makes a fair and accurate report of it. He supplies it for use either in the national press or in the local press according to the public interest it commands. He is, I verily believe, the watchdog of justice. If he is to do his work properly and effectively we must hold fast to the principle that every case must be heard and determined in open court. It must not take place behind locked doors. Every member of the public must be entitled to report in the public press all that he has seen and heard. The reason for this rule is the very salutary influence which publicity has for those who work in the light of it. The judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion."

Those observations suffice to emphasise to the mind of anyone the vital significance of the work of the journalist in reporting court proceedings and, within the bounds of impartiality and fairness, commenting upon the decisions of judges and justices and their behaviour in and conduct of the proceedings. If someone in the seat of justice misconducts himself or is worthy of praise, is the public disentitled at the whim of that person to know his identity?

> It must ever be borne in mind that save upon rare occasions when a court is entitled to sit in camera, it must sit in public. The principle of open justice has been well established for a very long time."

31. In a well-known passage in *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at page 183, Sir John Donaldson MR described the media as:

> "the eyes and ears of the general public. They act on behalf of the general public."

32. The crucial role of the media is also emphasised in recent authority at the highest level. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at page 200, Lord Nicholls of Birkenhead said:

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

That was cited by Lord Steyn and applied in the context of court reporting in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, at para [28]. In *McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd* [2001] 2 AC 277 at page 290 Lord Bingham of Cornhill said:

> "In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

33. The Strasbourg jurisprudence is to the same effect. In *Bergens Tidende v Norway* (2001) 31 EHRR 16 at para [49], the Strasbourg court summarised its jurisprudence (citations omitted):

> "The Court further recalls the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. In cases such as the present one, the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog" by imparting information of serious public concern."

Miscarriages of justice and the role of the media

34. Human justice is inevitably fallible. However hard we struggle to avoid them, and however rigorous the procedural and other safeguards we strive to erect against them, there will always be miscarriages of justice. In the investigation of possible miscarriages of justice and in righting judicially inflicted wrongs, campaigning and investigative journalists and the media in general have an absolutely vital role to play. As Lord Steyn said in *R v Secretary of State for the Home Department ex p Simms and Another* [2000] 2 AC 115 at page 126:

> "The applicants argue that in their cases the criminal justice system has failed, and that they have been wrongly convicted. They seek with the assistance of journalists, who have the resources to do the necessary investigations, to make public the wrongs which they allegedly suffered.
>
> The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons. But the free speech at stake in the present cases is qualitatively of a very different order. The prisoners are in prison because they are presumed to have been properly convicted. They wish to challenge the safety of their

> convictions. In principle it is not easy to conceive of a more important function which free speech might fulfil."

35. In *Prager and Oberschlick v Austria* (1996) 21 EHRR 1 at para [34] the Strasbourg court said:

> "The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law. Although it must not overstep certain bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart – in a way consistent with its duties and responsibilities – information and ideas on political questions and on other matters of public interest. This undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a matter that is in conformity with the aim which is the basis of the task entrusted to them."

36. I make no apologies for repeating here what I said in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at paras [101], [103]:

> " … We must be vigilant to guard against the risks. And we must have the humility to recognise – and to acknowledge – that public debate, and the jealous vigilance of an informed media, have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice … We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system … Open and public debate in the media is essential."

Family courts

37. So much for generalities and high principle. It is time to focus on the family justice system.

38. Here again, the starting point is *Scott v Scott* [1913] AC 417. This was itself, it is important to note, a case concerning the practice of the old Probate, Divorce and Admiralty Division, the ancestor of today's Family Division. The House held unanimously that so far as concerned its powers to sit in camera or in private, and this whether in nullity cases or in any other type of case before it, the Probate, Divorce and Admiralty Division stood in principle in no different position than the Queen's Bench and Chancery Divisions.

39. *Scott v Scott* established once and for all that there is in principle no difference for these purposes between the Family Division and the other two Divisions. It is impossible to argue that the Family Division as such has any greater powers to sit in secret or to enforce the confidentiality of its proceedings than any other part of the High Court. If it is to be argued that the Family Division has some such power, either generally or in some particular class or classes of case, that power is not to be derived from the fact that the Family Division is the Family Division or from any 'practice' of the Family Division however inveterate; it has to be founded in specific statutory authority or, since the coming into force of the Human Rights Act 1998, justified by reference to the Convention.

40. Three short passages from the speeches of their Lordships will suffice for present purposes. Viscount Haldane LC at page 463 said:

> "As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B, in the case I have already referred to [*H (Falsely Called C) v C* (1859) 29 LJ (P&M) 29], which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts"

Earl Loreburn at page 447 said:

> "the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception."

Lord Shaw of Dunfermline at page 475 said:

> "these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever … The old private examination of witnesses is abolished; the new system is an open system."

41. In *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, at para [16], Dame Elizabeth Butler-Sloss P said, speaking of the Family Division:

> "The starting point must be the importance of the principle of open justice. This has been a thread to be discerned throughout the common law systems: "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards

> against improbity. It keeps the judge himself, while trying, under trial": see *Benthamiana*, or *Select Extracts from the Works of Jeremy Bentham* (1843), p 115. Consequently … the exclusion of the public from proceedings has objectively to be justified. It is not good enough for it to be said that we have always done it this way so it has to be right. That principle of open justice applies to all courts and in principle the family courts are not excluded from it, although for good reasons which I shall set out later, many family cases … require confidentiality."

Family courts – confidentiality in children proceedings

42. The principle of confidentiality in proceedings relating to children goes back a long way. Indeed, in *Scott v Scott* itself the House of Lords recognised that there were certain exceptions to the general rule. It suffices for this purpose to refer to what Lord Shaw of Dunfermline said at page 482:

> "Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves
>
> The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention – trade secrets – is of the essence of the cause. The first two of these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

As Viscount Haldane LC said in the same case at page 437, in such cases the court is not so much deciding contested questions as exercising what is best described as a paternalistic, parental, quasi-domestic and essentially administrative jurisdiction.

43. Now that may well be so of what we would now call private law cases, but it surely cannot be said of public law cases where, to make an obvious point, the State is seeking to intrude into family life and, indeed, very frequently is seeking to remove children from their families – sometimes, as in the present case, for ever. I shall return in due course to consider the implications of this.

44. Nonetheless, down the years, as we shall see, the limited exception recognised by the House of Lords has expanded very considerably. Statutory provisions have extended the principle of confidentiality to almost all proceedings in the Family Division involving children.

45. What are the principles which underlie this confidentiality? I sought to summarise them in *Re X (Disclosure of Information)* [2001] 2 FLR 440 at para [24]:

> "Wrapped up in this concept of confidentiality there are, as it seems to me, a number of different factors and interests which need to be borne in mind:
>
> (i) First, there is the interest of the particular child concerned in maintaining the confidentiality and privacy of the proceedings in which he has been involved, what … Balcombe LJ referred to as the "curtain of privacy".
>
> (ii) But there is also, secondly, the interest of litigants generally that those who, to use Lord Shaw of Dunfermline's famous words in *Scott v Scott* [1913] AC 417, 482, "appeal for the protection of the court in the case of [wards]" should not thereby suffer "the consequence of placing in the light of publicity their truly domestic affairs". It is very much in the interests of children generally that those who may wish to have recourse to the court in wardship or other proceedings relating to children are not deterred from doing so by the fear that their private affairs will be exposed to the public gaze – private affairs which often involve matters of the most intimate, personal, painful and potentially embarrassing nature. As Lord Shaw of Dunfermline said: "The affairs are truly private affairs; the transactions are transactions truly intra familiam".
>
> (iii) Thirdly, there is a public interest in encouraging frankness in children's cases, what Nicholls LJ referred to in *Brown v Matthews* [1990] Ch 662, 681C, as the frank and ready co-operation from people as diverse as doctors, school teachers, neighbours, the child in question, the parents themselves, and other close relations, including other children in the same family, on which the proper functioning of the system depends … it is very much in the interests of children generally that potential witnesses in such proceedings are not deterred from giving evidence by the fear that their private affairs or privately expressed views will be exposed to the public gaze.
>
> (iv) Fourthly, there is a particular public interest in encouraging frankness in children's cases on the part of perpetrators of child abuse of whatever kind …
>
> (v) Finally, there is a public interest in preserving faith with those who have given evidence to the family court in the

> belief that it would remain confidential. However, as both Ralph Gibson LJ in *Brown v Matthews* [1990] Ch 662, 672B … and Balcombe LJ in *In re Manda* [1993] Fam 183, 195H … make clear, whilst persons who give evidence in child proceedings can normally assume that their evidence will remain confidential, they are not entitled to assume that it will remain confidential in all circumstances …"

46. This confidentiality is now, of course, protected by Article 8 of the Convention. This provides:

> "1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Family courts – the statutory framework

47. I turn therefore to the relevant statutory provisions. It will be convenient to consider first the relevant statutory restrictions on reporting family proceedings or revealing what has gone on during the course of family proceedings before turning to consider the relevant statutory restrictions on access to family court hearings. I shall confine my observations to those restrictions which apply in 'children' cases. Different restrictions apply in 'money' cases.

Family courts – reporting restrictions

48. Section 12 of the Administration of Justice Act 1960, as amended, provides, so far as material for present purposes:

> "(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say – (a) where the proceedings – (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under the Children Act 1989; or (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor …
>
> (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an

> order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.
>
> (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from the section (and in particular where the publication is not so punishable by reason of being authorised by rules of court)."

49. There is no need on this occasion for any detailed exegesis of section 12. It suffices for present purposes to note that the effect of section 12 is to prohibit the publication of accounts of what has gone on in front of the judge sitting in private, as also the publication of documents (or extracts or quotations from documents) such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment. On the other hand, section 12 does not of itself prohibit publication of the fact that a child is the subject of proceedings under the Children Act 1989; of the dates, times and places of past or future hearings; of the nature of the dispute in the proceedings; of anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place; or of the text or summary of any order made in such proceedings. Importantly, it is also to be noted that section 12 does *not* prohibit the identification or publication of photographs of the child, the other parties or the witnesses, nor the identification of the party on whose behalf a witness is giving or has given evidence.

50. Section 12 also has to be read in conjunction with rule 10.20A of the Family Proceedings Rules 1991, SI 1991/1247, but as nothing turns for present purposes on its specific provisions I need say no more about it.

51. Section 97 of the Children Act 1989, as amended, provides in material part as follows:

> "(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –
>
> (a) any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or
>
> (b) an address or school as being that of a child being involved in any such proceedings.
>
> (4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it, and in the case of the Lord

> Chancellor, if the Lord Chief Justice agrees, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order."

52. The meaning and effect of section 97 has recently been considered by the Court of Appeal in *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 3 WLR 599, where it was held that the prohibition in section 97(2) comes to an end when the proceedings are concluded. The common belief (which I confess I shared) that the statutory prohibition outlasted the existence of the proceedings has now been exploded for what it always was – yet another of the many fallacies and misunderstandings which have tended to bedevil this particular area of the law. On the other hand, and as Sir Mark Potter P was at pains to point out (at para [53]), the fact that, following an end to the proceedings, the prohibition on identification under section 97 will cease to have effect does not of course mean that the provisions of section 12 of the Administration of Justice Act 1960 are diluted or otherwise affected. The limitation upon reporting information relating to the proceedings themselves under section 12 of the 1960 Act will remain.

53. So much for the automatic restraints which apply in cases of this kind. But it is clear that the court has power both to relax and to increase these restrictions. A judge can authorise disclosure of what would otherwise be prohibited. And a judge can impose additional restrictions. This involves the exercise of discretion – the carrying out of a balancing exercise – where a number of often conflicting rights and interests have to be balanced. How is this exercise to be performed?

54. The answer is provided by the speech of Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, at para [17]:

> "The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

55. In *A Local Authority v W* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1, at para [53], Sir Mark Potter P summarised the effects of the judgment in *In re S* in this way:

> "There is express approval of the methodology in *Campbell v MGN Ltd* [2004] 2 AC 457 in which it was made clear that each article propounds a fundamental right which there is a pressing social need to protect. Equally, each article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither article has precedence over or 'trumps' the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary before the ultimate balancing test in the terms of proportionality is carried out."

56. It is clear from *In re S* and *W* that in this context at least the interests of the child are *not* paramount. Nor is there anything novel in this. As I said in *Re X (Disclosure of Information)* [2001] 2 FLR 440 at para [23], summarising the relevant pre-Convention case-law:

> "The interests of the child (which … typically point against disclosure) are a "major factor" and "very important" … But … it is clear that the child's interests are not paramount."

57. In the present case counsel have raised an important question as to how section 97(4) is to be construed. The point arises because, as will be recalled, the power to dispense with section 97(2) is, on the face of it, confined by section 97(4) to those situations where "the welfare of the child requires it".

58. In my judgment section 97(4) cannot be construed in this restrictive way. In *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 3 WLR 599, the Court of Appeal held that the effect of section 3 of the Human Rights Act 1998 was to require section 97 to be read in a Convention-compliant way, because section 97 constitutes a specific restriction on the media's rights under Article 10. In the same way, section 97(4) must likewise be construed in a Convention-compliant way, not limiting the occasions on which section 97(2) is dispensed with to those where the welfare of the child requires it but extending it to every occasion when proper compliance with the Convention would so require. In other words, the statutory phrase "if … the welfare of the child requires it" should be read as a non-exhaustive expression of the terms on which the discretion can be exercised, so that the power is exercisable not merely if the welfare of the child requires it but wherever it is required to give effect, as required by the Convention, to the rights of others. This is a process of construction which in my judgment comfortably satisfies the criteria identified in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, and which is therefore required by section 3.

59. This point was considered in *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 3 WLR 599, by Wall LJ, who set out (at paras [97]-[99]) the submission of Mr James Price QC to the effect that section 97(4) must be construed in such a way as to permit the court to lift the prohibition in section 97(2) where Convention rights required it. As I read Wall LJ's judgment (at paras [100]-[101]) he accepted Mr Price's submissions on this point, as more generally on section 97. Even if that is not so, and even if Wall LJ's observations on the point are purely obiter – and I do not accept either proposition – I am in no doubt that Mr Price's submission in relation to section 97(4) was correct. In my judgment, for the reasons given by Mr Price in his submissions in *Clayton v Clayton*, and repeated by Mr Warby, Mr Wolanski and Mr Hudson in their submissions before me, section 97(4) has to be read as permitting the court to dispense with the prohibition on publication in section 97(2) where the right of free expression under Article 10 or other Convention rights require it. To do otherwise would, as Mr Warby put it, place the child's interests on a pedestal in a way which is incompatible with the Convention. I agree.

60. That this is the true view is, in my judgment, supported by two additional considerations. In the first place, as Mr Wolanski points out, section 97(2) is not confined to cases heard in private. Unless section 97(4) can be 'read down' in this way, the power of the court to identify a child will be exercisable only in the rarest circumstances, even if the entirety of the proceedings has taken place in open court and in the glare of publicity. And it would also mean that the power of the Family Division to permit the identification of a child would be significantly more limited than the power of the Court of Appeal (to which, as *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs Intervening)* [2004] EWCA Civ 845, [2004] 2 FLR 823, shows, section 97(2) does not apply). Such undesirable anomalies would say little for a branch of the law already scarcely over-burdened with clarity and consistency.

61. Secondly, as he points out, a narrow reading of section 97(4) does not accord with the practice. Mr Wolanski and Mr Warby draw attention to Ryder J's judgment in *Blunkett v Quinn* [2004] EWHC 2816 (Fam), [2005]1 FLR 648. In the same vein I might draw attention to my own judgment in *Harris v Harris; Attorney-General v Harris* [2001] 2 FLR 895. In neither case is it easy to see how publication of the judgments in the form in which they were handed down could be justified on a narrow reading of section 97(4).

62. It follows, in my judgment, that section 97(4) must be construed in such a way as to permit the court to lift the prohibition in section 97(2) where Convention rights require it.

63. Before passing from this topic it is worth noting the views expressed in *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 3 WLR 599, both by the President and by Wall LJ as to the likely need for specific orders protecting a child's identity beyond the conclusion of the proceedings. Both were sceptical. The President at para [51] said this:

> "given the existence of section 12 of the Administration of Justice Act 1960 which is apt to prevent publication or reporting of the substance of, or the evidence or issues in, the proceedings (save in so far as permitted by the court or as revealed in any judgment delivered in open court), I do not think that, as a generality, it is right to assume that identification of a child as having been involved in proceedings will involve harm to his or her welfare interests or failure to respect the child's family or private life."

64. Wall LJ at para [145] said:

> "My impression is that there are unlikely to be many cases in which the continuation of that protection will be required."

Family courts – access restrictions

65. Rule 4.16(7) of the Family Proceedings Rules 1991 provides:

> "Unless the court otherwise directs, a hearing of, or directions appointment in, proceedings to which this Part [Part IV] applies shall be in chambers."

Rule 4.16(7) applies to care proceedings, as to other proceedings under the Children Act 1989. The effect of the rule is thus to secure privacy for care proceedings unless the court orders that the matter be heard in open court rather than chambers. As the President observed in *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 3 WLR 599, at para [26], such orders are rare.

66. In *B v United Kingdom* (2001) 34 EHRR 529, [2001] 2 FLR 261, the European Court of Human Rights held that the provisions of rule 4.16(7) were Convention compliant. So, subsequently, has the Court of Appeal: *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs Intervening)* [2004] EWCA Civ 845, [2004] 2 FLR 823.

67. The core of the Strasbourg court's decision is to be found in the following observation at para [38]:

> "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. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on

> highly personal issues without fear of public curiosity or comment."

68. But it is very important to note what the Court went on to say at paras [39]-[40] (citations omitted):

> "[39] The applicants submit that the presumption in favour of a private hearing in cases under the Children Act should be reversed. However, while the court agrees that article 6(1) states a general rule that civil proceedings, inter alia, should take place in public, it does not find it inconsistent with this provision for a state to designate an entire class of case as an exception to the general rule where considered necessary for the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties, although the need for such a measure must always be subject to the court's control. The English procedural law can therefore be seen as a specific reflection of the general exceptions provided for by article 6(1).
>
> [40] Furthermore, the English tribunals have a discretion to hold Children Act proceedings in public if merited by the special features of the case, and the judge must consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. Turning to the facts before it, the Court notes that … the judges at first instance and on appeal gave careful consideration and detailed explanations of their reasons for holding that the proceedings should continue in chambers."

69. This last point, as it seems to me, was crucial to the decision. As the United Kingdom judge, Judge Sir Nicholas Bratza, said in his concurring opinion:

> "As to the complaint concerning the holding of the proceedings in camera, I fully share the reasoning of the majority, the decisive point in my view being that in both cases the county court judge exercised his independent discretion to exclude the public from the substantive hearing in the interests of the children concerned."

70. In *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs Intervening)* [2004] EWCA Civ 845, [2004] 2 FLR 823, at para [49], Thorpe LJ said:

> "the time has come for the court to consider in each case whether a proper balance of competing rights requires the anonymisation of any report of the proceedings and judgment following a hearing that was conducted in public and, therefore, open to all who cared to attend."

71. He continued with these important observations at paras [54]-[55]:

> "[54] Clearly both the inherent jurisdiction and the statutory provision empower this court to impose restrictions in an individual case in the exercise of the court's discretion. But it is not so evident that either the inherent or the statutory jurisdiction justifies the imposition of an automatic restriction without the exercise of a specific discretion in the individual case …
>
> [55] … in reality, although the Family Proceedings Rules 1991 confer on the judge in any case the discretion to lift the veil of privacy, there is such a strong inherited convention of privacy that the judicial mind is almost never directed to the discretion, and, in rare cases where an application is made, a fair exercise may be prejudiced by the tradition or an unconscious preference for the atmosphere created by a hearing in chambers. Judges need to be aware of this and to be prepared to consider another course where appropriate."

72. Now these observations may have been directed specifically to practice in family cases in the Court of Appeal – hence the reference to hearings conducted in public – but consistently with the Strasbourg jurisprudence they seem to me to have a much wider resonance.

73. Very recently the Strasbourg court has returned to the issue in *Moser v Austria* [2006] 3 FCR 107. That was a case in which the applicant's son had been taken into public care. The court held that there had been a breach of Article 6, inter alia on the ground that the hearing had not been in public. The court's reasoning is to be found in paras [96]-[97] (citations omitted):

> "[96] The Court considers that there are a number of elements which distinguish the present case from *B v United Kingdom.* In that case, the Court attached weight to the fact that the courts had discretion under the Children Act to hold proceedings in public if merited by the special features of the case and a judge was obliged to consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. The Court noted that in both cases the domestic courts had given reasons for their refusal to hear the case in public and that their decision was moreover subject to appeal. The Court notes that the Austrian Non-Contentious Proceedings Act now in force gives the judge discretion to hold family-law and guardianship proceedings in public and contains criteria for the exercise of such discretion. However, no such safeguards were provided for in the 1854 Non-Contentious Proceedings Act. It is therefore not decisive that the applicant did not request a public hearing, since domestic

> law did not provide for such a possibility and the courts' practice was to hold hearings in camera.
>
> [97] Moreover, the case of *B v United Kingdom* concerned the parents' dispute over a child's residence, thus, a dispute between family members, ie individual parties. The present case concerns the transfer of custody of the first applicant's son to a public institution, namely the Youth Welfare Office, thus, opposing an individual to the State. The Court considers that in this sphere, the reasons for excluding a case from public scrutiny must be subject to careful examination. This was not the position in the present case, since the law was silent on the issue and the courts simply followed a long-established practice to hold hearings in camera without considering the special features of the case."

74. I draw attention to the important distinction here drawn by the Strasbourg court between (to use our terminology) private law cases and public law cases. There are two aspects of the latter which in the present context, as it seems to me, are of fundamental importance. The first I have already touched upon. In a public law case the State – public authority – is seeking to intrude into family life and, indeed, very frequently is seeking to remove children from their families. The second is the point I made in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [101]:

> "As I pointed out in *Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), [2002] 2 FLR 730, at para [150]:
>
> > '… it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to any parent – particularly, perhaps, to a mother – that he or she is to lose their child for ever.'
>
> When a family judge makes a freeing or an adoption order in relation to a 20-year-old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 years, and the baby for what may be upwards of 80 years. We must be vigilant to guard against the risks."

75. Just as I make no apology for repeating that observation, I make no apology for repeating what I said more recently in *Re X, London Borough of Barnet v Y and X* [2006] 2 FLR xxx. Referring at para [166] to public law care cases, I said:

> "Such cases, by definition, involve interference, intrusion, by the State, by local authorities, into family life. It might be

> thought that in this context at least the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling."

76. How then is the exercise required by *B v United Kingdom* (2001) 34 EHRR 529, [2001] 2 FLR 261, and by *Moser v Austria* [2006] 3 FCR 107 to be undertaken? By reference to what criteria is a judge to decide whether or not to accede to an application to disapply rule 4.16(7)? The answer can only be that the judge must apply the Convention, ensuring that his decision is Convention-compliant. Rule 4.16(7), after all, falls to be justified in accordance with the Article 6(1) tests of what is "required" or (as the case may be) what is "strictly necessary". And, as the decisions of the Strasbourg court in both *B v United Kingdom* (2001) 34 EHRR 529, [2001] 2 FLR 261, and *Moser v Austria* [2006] 3 FCR 107 make clear, such a blanket rule can be justified only if it remains "subject to the court's control" and only if the court exercises a proper discretion in the circumstances of the particular case. Moreover in a public law case, as *Moser v Austria* [2006] 3 FCR 107 makes clear, "the reasons for excluding a case from public scrutiny must be subject to careful examination" and the judge must "consider … the special features of the case."

77. In short the judge must, as it seems to me, adopt precisely the same 'parallel analysis' leading to the same 'ultimate balancing test', as described in *In re S* and *W*, which is applicable in deciding whether to relax or enhance reporting restrictions. I agree, therefore, with Mr Wolanski, when he submitted that rule 4.16(7) is properly to be regarded simply as a 'default provision' but not as a provision indicating some heavy presumption in favour of privacy. In my judgment, rule 4.16(7) must be read, construed and applied compatibly with the Convention. Once the point has been raised, the outcome must be determined in accordance with the Convention, 'balancing' all the various interests which are engaged and *not* giving any special pre-eminence to the claim to privacy. Moreover, and as Thorpe LJ pointed out, a judge must be alert to the dangers inherent in what he called the "strong inherited convention of privacy" and careful not to be "prejudiced by the tradition or an unconscious preference for the atmosphere created by a hearing in chambers."

78. In relation to this last point, it is perhaps worth pointing out that "representatives of newspapers or news agencies" have a statutory right under section 69(2)(c) of the Magistrates' Courts Act 1980 to attend hearings of the Family Proceedings Court except in the case of adoption proceedings or where the court has made an order either under section 69(4) (which permits the exclusion of the press if it is "necessary in the interest of the administration of justice or of public decency" to exclude them "during the taking of any indecent evidence") or under rule 16(7) of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI1991/1395 (which permits their exclusion "if the court considers it expedient in the interests of the child"). So if the present care proceedings were still before the Family Proceedings Court the press would have a statutory *right* to be present!

The balancing exercise

79. In the present case the balancing exercise, the 'parallel analysis' leading to the 'ultimate balancing test', involves consideration of Articles 6, 8 and 10 of the Convention.

80. In the nature of things the interests which are here in play are very similar to those which I had to consider in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [93]. Here, as there, what has to be struck, putting the point at its simplest, is the proper balance between publicity and privacy. But in fact in a case such as this the interplay of these various rights is quite complex. There are various rights and interests, both private and public, which have to be weighed and balanced. In the present case the analysis can perhaps be summarised as follows:

i) The parents seek to assert their rights under Articles 8 and 10 to impart information about the proceedings to the media and others, to tell their story to the world through the medium of the BBC, the 'Mail on Sunday' and other organs of the media. They also seek to assert their rights under Article 6 to a fair trial, rights which they say point in favour of publicity for the proceedings.

ii) Brandon, through his children's guardian, seeks to assert his rights under Article 8 to respect for his private and family life – his right to keep his private life private – rights which he seeks to vindicate by preserving the confidentiality of his personal data and the privacy of the proceedings. He also seeks to assert his rights under Article 6 to a fair trial, rights which he says point in favour of protecting his private life by maintaining the privacy of the proceedings.

iii) NCC may wish to assert its right under Article 10 (and it may be also under Article 8 – I need not pursue the latter point) to impart information about the proceedings to the media, so as to put its side of the story into the public domain.

iv) There are also the rights under Article 10 of the media and others to receive from the parents and from NCC the information about the proceedings they wish to impart and to publish or broadcast their stories.

v) There are the rights under Article 8 of the witnesses and others involved in the proceedings: see, for example, *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 applying *Doorson v The Netherlands* (1996) 22 EHRR 330 and *Z v Finland* (1998) 25 EHRR 371.

vi) There are wider public interests – the interests of the community as a whole – both in preserving freedom of expression and, as recognised in *Z v Finland*

(1998) 25 EHRR 371, in protecting the confidentiality of personal data and other information received in confidence.

vii) There is also the public interest – an interest of the community as a whole – in promoting the administration of justice, in maintaining the authority of the judiciary and in maintaining the confidence of the public at large in the courts. This crucially important public interest may pull in different directions:

a) The parents point to the vital importance, if the administration of justice is to be promoted and public confidence in the courts maintained, of justice being administered in public – or at least in a manner which enables its workings to be properly scrutinised – so that the judges and other participants in the process remain visible and amenable to comment and criticism.

b) Brandon, on the other hand (and it may be, also, the social workers and others, including witnesses who are involved in the proceedings), can, albeit from their different perspectives, point to the vital importance, if the administration of justice is to be promoted and public confidence in the Family Division maintained, of preserving the privacy of proceedings such as those with which I am concerned. There is an important public interest in preserving faith with those who have given evidence to the family court in the belief that their evidence would remain confidential and in encouraging co-operation from independent experts and other professionals.

The balancing exercise – the applicants' submissions

81. Mr Warby, Mr Wolanski and Mr Hudson make common cause in submitting that the parallel analysis leads to an ultimate balancing test where the balance comes down – they would say clearly and heavily – in favour of their clients.

82. In support of their arguments Mr Warby, Mr Wolanski and Mr Hudson focus in particular on the following factors:

i) First the fact that these are care proceedings, following earlier care proceedings in which the parents lost their three children forever. The potential outcome both for the parents and for Brandon could not be graver.

ii) Secondly, the fact that the first set of care proceedings culminated in what, according to the parents, was a miscarriage of justice – and a miscarriage of justice driven in part by the medical evidence and in part by failings (so it is said) on the part of NCC.

iii) Thirdly, the fact that this case accordingly fits into and properly forms part of a wider and very extensive ongoing public debate on a topic of great public importance.

iv) Fourthly, the fact that in this case there has already been very extensive publicity and debate in a variety of media.

v) Fifthly, the fact that both the media and the parents (and to some extent even NCC) support the opening up of the process to greater public scrutiny. Even if the reasons for this may vary as between the parties, the mere fact of this consensus is, so it is said, an important factor.

vi) Finally, Brandon's age – he is still only 5 months old – and the extreme unlikelihood, so it is said, that he will suffer any adverse consequences from what is proposed.

83. Developing their argument that the perpetuation of the existing restrictions will interfere disproportionately with their clients' rights, Mr Warby, Mr Wolanski and Mr Hudson elaborate their submissions as follows.

84. First, they say that, particularly in circumstances such as these, it is more than usually important that the parents should be able to exercise their rights to speak freely about the case, including about the evidence in the case. They cannot, it is said, do so properly without being able to refer in full to the evidence before the court. Nor can they do so effectively if their identities are obscured, for example by pixellation. To deny them their right of free speech in such circumstances is not merely to deprive them of an important and valuable right rooted in autonomy (see the analysis in *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949 at paras [35]–[36]) but also to hinder them in their attempts to establish that they have been the victims of a miscarriage of justice.

85. Secondly, there is likewise in these circumstances a pressing public interest in permitting the media to report the parents' experiences, past, present and future, and the matters under consideration by the court. The issues raised by the case and, it may be, the evidence adduced during the forthcoming hearing, are, it is said, of very considerable and legitimate public interest, concerning the role of the State in removing children from their parents on the basis of medical evidence. The absence in this case of any criminal prosecution, it is suggested, makes the family proceedings all the more particularly worthy of proper analysis and coverage.

86. Thirdly, permitting full reporting of the hearing will allow a full picture to emerge of the facts before the court. It is less likely in these circumstances that the evidence will be misrepresented by a partial or one–sided account provided by one or more of the parties, either while the case is underway or after it has concluded. The risk of one–sided or inaccurate reporting while the current restrictions remain is, if anything, a

reason for greater openness, not greater restriction. As Brandeis J said in *Whitney v California* (1927) 274 US 357 at page 77:

> "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

87. Fourthly, in a case where the parents allege that they are the victims if a miscarriage of justice, it is more than usually important that the truth – the full truth – should out. If, as the parents allege, they have lost three children and stand at risk of losing a fourth due to deficiencies in the system, then there is a pressing need for the true facts to be exposed. If, on the other hand, the parents are wrong, and the system has performed conscientiously, competently and correctly, then it is equally highly desirable that this should be known and publicised. Given all the publicity there has already been, the issue is in the public domain already. It is, therefore, important for public confidence in the system – public confidence in the court – that both the resolution of the issue, and the way in which it has been resolved, should be known. For that purpose, it is said, nothing short of access to the court along the lines proposed will suffice. On the contrary, to cut off the stream of information already provided to the public at the very point where the court is poised to take important decisions, would, it is said, be both artificial and potentially harmful to the public interest.

88. Finally, they point to the fact that this is the kind of case where the local authority may itself wish to speak out, so as to correct what it apparently considers to be misleading accounts of the case and so redress the balance. NCC cannot do that if it is subject to the existing restrictions.

89. The factors Mr Warby, Mr Wolanski and Mr Hudson particularly rely upon in support of their submission that to strike the balance in this way will *not* constitute a disproportionate interference with Brandon's Article 8 and other rights are: (i) his age and (ii) the fact that there is already a significant amount of material about the case legitimately in the public domain as a result of coverage in both the print and broadcast media.

90. As Lord Steyn pointed out in *In re S* at para [25], it is "necessary to measure the nature of the impact … on the child" of what is in prospect. It is difficult, so it is said, to identify how a public hearing or public identification would be injurious to Brandon's welfare. He is far too young to be aware of the proceedings. It will be years before he learns of them or is able to understand their significance. If a child is "too young at this stage to be directly affected by anything in the media" the court must ask whether the child would be *indirectly* affected by the publicity which is in prospect, for instance by its having a grave impact on the child's carers: see the analysis in *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949 at para [71]. The prospect of Brandon suffering now or in the immediate future from publicity is, they submit, non–existent or negligible. In relation to any impact upon him when he is older, counsel pray in aid

the sceptical observations of the President and Wall LJ in *Clayton v Clayton* to which I referred in paragraphs [63]–[64] above. There is, they say, no real likelihood that publicity given now to this stage of the proceedings will affect him significantly or at all, either now or in years to come.

91. The fact that there is already a very significant amount of material about the case legitimately in the public domain as a result of coverage in both the print and broadcast media, can only go, so it is said, to minimise the risk of Brandon suffering any further or additional harm as a result of yet further publicity. As is pointed out, the material already in the public domain – and there is much of it, for, as I have said, there has already been much discussion of the case in the media – includes, in addition to the background to the adoption of A, B and C, the birth of Brandon and his parents' flight to Ireland, medical information which (so it is said) throws doubt upon the finding of abuse of child B, with particular reference to metaphyseal fractures, and the views of the parents about their experiences, Brandon's first name, photographs of Brandon as a baby, his parents' first names and photographs and film footage of the parents. The question therefore arises, it is said, whether and if so why the dissemination of further information would be harmful to Brandon.

92. Counsel submit that speculation is not sufficient. If, as here, pre–trial injunctive relief is being sought which would restrict freedom of expression, the applicant – and here, they say, the real applicant is NCC – must satisfy the test laid down by section 12(3) of the Human Rights Act 1998 and show convincingly, by evidence, that it is "likely" that such relief would be granted at a trial: compare *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949 at paras [73]–[76]. And "likely" in this context means more likely than not: *Cream Holdings Ltd v Bannerjee* [2004] UKHL 44, [2005] 1 AC 253.

The balancing exercise – submissions in opposition

93. NCC sees the one–sided reporting to date as being unhelpful to it in the administration of its wider tasks. Perceptions (however false they may be) of heavy handiness in the performance of its functions are obstructive in the path it pursues for the welfare of children in its area. From its own perspective, therefore, and in support of its broader functions, NCC would have no objection to the release, in appropriately anonymised form, of the two judgments given by Judge Barham, as also of all future judgments. That, however, will suffice, according to Ms Langdale to meet the key requirement of transparency and enable anyone who is interested to have a real understanding of the issues.

94. Release of anonymised judgments and judicially authorised press releases is, she says, appropriate in any event in order to correct current imbalances in the reporting, to correct perceptions of heavy handiness by NCC and to correct the perception that there has been a miscarriage of justice. But there is, she says, no justification for the media attending the hearing. It is, she asserts, an accepted fact that candour and frankness is much more likely in proceedings such as these where there is privacy

surrounding the giving of evidence. She suggests that what she calls the matter of actual reporting relevance is the court's determination and conclusions. Identification of individual social workers, of NCC's legal representatives and of expert witnesses is opposed as being "unnecessary, unhelpful in the pursuit of NCC's wider aims and tasks, and irrelevant to the issues".

95. The children's guardian opposes any further reporting or broadcasting of the proceedings which would identify either Brandon or his parents and seeks the continuation of the existing restrictions. She is sympathetic to the position in which NCC finds itself but rightly considers herself bound to have regard solely to Brandon's interests.

96. She points to the fact that the outcome of the forthcoming hearing may well be a continuation of Brandon's assessment with his parents, but at this stage in the community, without the round–the–clock monitoring and support they had whilst undergoing the residential assessment and potentially exposed to all the pressures of what may be an unforgiving and even hostile environment during what she says may be a particularly delicate and risky phase of the assessment. As Mr Bennett puts it, the guardian's view is that the parents' focus needs to be exclusively upon Brandon, to ensure his safety and wellbeing. "They should not be sidetracked by arguing old battles and anything which raises or increases the possibility of this is likely to have an adverse effect upon their availability for and care of Brandon and therefore upon Brandon himself." Mr Bennett expresses concern at the prospect of what he calls persistent approaches by members of the public in the streets whilst the parents and Brandon are going about their daily business and "media scrums". Further media attention, the guardian fears, will only escalate interest among the local community. That said, the guardian would have no objection, she tells me, to a suitably anonymised judicial press release.

The balancing exercise – discussion

97. Subject to one important point, I accept the general thrust of the submissions by Mr Warby, Mr Wolanski and Mr Hudson.

98. With all respect to Judge Curl, the extremely wide order he made is clearly too wide. Even if all the guardian's concerns were fully justified, that could not in my judgment justify the prohibition of publishing anything at all about the case: compare *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [144]. It does not permit even that degree of discussion normally allowed by section 12 of the Administration of Justice Act 1960.

99. Four factors in particular weigh heavily in my judgment in favour of the view that any greater degree of restraint than that which is being proposed by the applicants will indeed constitute a disproportionate – a significant and heavily disproportionate – interference with their rights: the claim that the case involves a miscarriage of justice, the parents' own wish for publicity, the very extensive publicity there has already

been, and the need, in the circumstances, for the full facts and the 'truth' – whatever it may be – to emerge, and, moreover, to emerge in a way which will command public confidence. Two of these factors require a little elaboration.

100. As I observed in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [99], parents – like the mother in that case and the parents in the present case – often want to speak out publicly. I repeat in this context the point I made in *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949 at para [83]. In my judgment, the workings of the family justice system and, very importantly, the views about the system of the mothers and fathers caught up in it, are, as Balcombe LJ put it in *Re W (Wardship: Discharge: Publicity)* [1995] 2 FLR 466 at page 474, "matters of public interest which can and should be discussed publicly". Many of the issues litigated in the family justice system require open and public debate in the media. I repeat what I said in *Harris v Harris; Attorney-General v Harris* [2001] 2 FLR 895 at paras [360]–[389] about the importance in a free society of parents who feel aggrieved at their experiences of the family justice system being able to express their views publicly about what they conceive to be failings on the part of individual judges or failings in the judicial system. And I repeat in this context what I said in the same case at para [368]:

> "The freedom to publish things which judges might think should not be published is all the more important where the subject of what is being said is the judges themselves. Any judicial power to punish such publications requires the most cogent justification. Even more cogent must be the justification for giving the judges a power of prior restraint."

101. The fact that the parents may not be the martyrs they claim to be – something which I am in absolutely no position to assess and on which I express no views at all –, the fact that it may turn out that there was no miscarriage of justice, is not of itself any reason for denying the parents their voice.

102. In the first place, and in the very nature of things, the initial 'official' response to any allegation that there has been a miscarriage of justice is likely to be one of scepticism or worse. But that, it might be thought, is all the more reason why there should *not* be restraint, why the media should not be hindered in their vital role. I repeat what Lord Steyn said in *Simms*: "In principle it is not easy to conceive of a more important function which free speech might fulfil."

103. Moreover, freedom of speech is not something to be awarded to those who are thought deserving and denied to those who are thought undeserving. As Lord Oliver of Aylmerton robustly observed in *Attorney-General v Guardian Newspapers Ltd and Others; Attorney-General v Observer Ltd and Others; Attorney-General v Times Newspapers Ltd and Another* [1987] 1 WLR 1248 at page 1320:

> "… the liberty of the press is essential to the nature of a free state. The price that we pay is that that liberty may be and

> sometimes is harnessed to the carriage of liars and charlatans, but that cannot be avoided if the liberty is to be preserved."

It is, after all, the underdog who is often most in need of the help afforded by a fearless, questioning and sceptical press.

104. The other element of great importance, as it seems to me, in the present case, is what I have referred to as the public interest in maintaining the confidence of the public at large in the courts and, specifically, in the family justice system. This is not merely a point of general application. It has, at it seems to me, a particular resonance in this particular case. Rightly or wrongly, correctly or otherwise – and for present purposes it matters not which – the media have suggested that the parents and their children A, B and C have been, and that the parents and Brandon are at risk of being, the victims of a miscarriage of justice. In these circumstances there is a pressing need for public confidence to be restored – either by the public and convincing demonstration that there has *not* been a miscarriage of justice or, as the case may be, by public acknowledgement that there has been. That is not, of course, the purpose of the current proceedings, and it is very possible that the outcome of the judicial process, whatever it may be, will not be a clarity and certainty that all will accept. But as few obstacles as possible should be placed in the way of the media doing their job. For in the proper exercise by the media of their investigative and other functions there exists perhaps the best chance of the truth, whatever it may be, emerging at the end of the day. And that, at least in the circumstances of this case, points to the media having access not merely to more information than Judge Curl's order would permit them but access also to the forthcoming hearing.

105. As a number of judges have pointed out, there is another important aspect of the problem that has to be taken into account: the unfortunate fact that the rule of confidentiality facilitates the dissemination of false and tendentious accounts of proceedings in family courts, which in turn tends further to undermine public confidence in the system.

106. In *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at paras [133]-[134], I commented that:

> "[133] One of the disadvantages of the 'curtain of privacy' to which Balcombe LJ referred – what some campaigners would prefer to characterise as the cloak of secrecy surrounding the family courts – has become apparent. Those who without justification attack the family justice 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: see *Harris v Harris; Attorney-General v Harris* [2001] 2 FLR 895 at para [386].

> [134] I make the point for two reasons. In the first place it suggests that too relentless an enforcement of the privacy of family court proceedings may be counter-productive and that the courts should perhaps in future be more willing than they have been in the past to exercise the disclosure jurisdiction so as to permit matters such as these to be put into the public domain. Secondly, if disclosure is to be permitted, the person seeking disclosure – here the mother – may have to be prepared to take the rough with the smooth. The mother is not necessarily entitled to set the media agenda. If she wants to put some parts of the case into the public domain, then she may have to accept that other less appealing parts of the case are also put into the public domain."

107. In *Blunkett v Quinn* [2004] EWHC 2816 (Fam), [2005]1 FLR 648, at para [22], Ryder J said:

> "In considering the competing rights [under Articles 6, 8 and 10], I have come to the clear conclusion that having regard to the quantity of material that is in the public domain, some of it even in the most responsible commentaries wholly inaccurate, it is right to give this judgment in public. The ability to correct false impressions and misconceived facts will go further to help secure the Art 6 and Art 8 rights of all involved than would the court's silence which in this case will only promote further speculation and adverse comment that will damage both the interests of those involved and the family justice system itself."

108. In *Re H (Freeing Orders: Publicity)* [2005] EWCA Civ 1325, [2006] 1 FLR 815, at paras [31], [33], Wall LJ said:

> "[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' …
>
> [33] What is manifestly unacceptable is the unauthorised and selective leakage of one party's case or selective, inaccurate and tendentious reporting in breach of the rules relating to the confidentiality of the proceedings. This, in my experience, invariably leads to unbalanced misreporting of the difficult and sensitive issues with which the courts have to grapple. In my judgment, therefore, the best way to tackle that problem is by greater openness in the decision-making process."

He indicated what he had in mind at para [26]:

> "In my judgment, this case provides a strong argument for those who, like myself, take the view that the judgments of circuit and Family Division judges hearing care and adoption proceedings should, as a matter of routine, be given in an anonymised form and in open court."

He returned to the same theme in *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 3 WLR 599, at paras [85]-[89].

109. In *Re X, London Borough of Barnet v Y and X* [2006] 2 FLR xxx, at paras [166]-[167] I said:

> "[166] … In my view the public generally, and not just the professional readers of law reports or similar publications, have a legitimate – indeed a compelling – interest in knowing how the family courts exercise their care jurisdiction. Moreover, if leave is confined in practice to those cases which are, for some reason, thought to be worthy of reporting in a law report, the sample of cases which will ever come to public attention is not merely very small but also very unrepresentative.
>
> [167] My own view, and I make no bones about this, is that, subject of course to appropriate anonymisation, the presumption ought to be that leave should be given to publish any judgment in any care case, irrespective of whether the judgment has any particular interest for law reporters, lawyers or other professionals. It should not be necessary to show that there is some particular reason to justify why leave should be given in the particular case, let alone any need to justify leave on the basis that the judgment deals with some supposedly interesting point of law, practice or principle. For my own part, I should have thought that the proper approach ought to the other way round. It is not so much for those who seek leave to publish an anonymised judgment to justify their request; surely it is for those who resist such leave to demonstrate some good reason why the judgment should not be published even in a suitably anonymised form."

110. In the present case there are, I think, overwhelmingly strong reasons for authorising the disclosure – perhaps subject to some degree of necessary anonymisation – of Judge Barham's two judgments. And in many cases adoption of the practice recommended by Wall LJ will be sufficient to meet the needs of transparency and to facilitate appropriate public debate. But cases of alleged miscarriage of justice seem to me to stand on a somewhat different footing. After all, what is being alleged in such cases – what is being asserted in this case – is that there has been a failure of the *judicial* process. Sometimes it may be said that that is the fault, the responsibility, of the judge. Here, as it happens, responsibility seems to be attached more to deficiencies in the evidence and what are said to have been failings on the part of the local

authority. But on either basis, if what is being said is that there has been a failing in the *judicial* process, it might be thought – and certainly will be thought by some – to be less than satisfactory that the only accounts of what has happened, the only explanations to be given to the public, are those which a judge thinks it appropriate to include either in a judgment or in a judicially approved press release. After all, the complaint may be that the judge has misunderstood the evidence, overlooked some vital piece of evidence or gone against the weight of the evidence – and how can that case be made if the only material available to the public is the very judgment whose alleged deficiencies are under challenge? How can the media properly assess things if denied access to the hearing?

111. In the present case it is not enough that there should be publication of the judgments, whether or not supplemented by judicially authorised press releases. To confine the parents and the media to that extent is, in my judgment, to interfere disproportionately with their rights under Articles 6, 8 and 10.

112. I have of course considered very carefully all the points made both by NCC and by Brandon's guardian. I do not doubt the strength of the guardian's views, and in particular the concerns she has as to the possible effect on Brandon if the applicants achieve what they desire. But after anxious consideration I have come to two conclusions which, in the final analysis, are determinative of the ultimate balancing test.

113. The first is that the risks to Brandon are in significant measure speculative and in any event not as large as the guardian would have it. Given all the publicity there has already been – and it is not said that it has been in any way damaging to Brandon – one has to ask, taking a realistic view, what additional risks he is likely to run if exposed to further publicity. Moreover, one has to bear in mind that even if Judge Curl's order were to remain in place, there can be no assurance that there will not be continuing publicity, and continuing publicity which, however much anonymised, those 'in the know', including, it may well be, many in the local community, will readily appreciate is about Brandon and his parents. The media, after all, are adept at working their way – quite lawfully, I might add – around even the most drastic restraints.

114. My second conclusion is that the restraints being sought by the guardian go further – much further – than is required to protect Brandon's rights, whilst at the same time involving, as I have said, a quite disproportionate interference with the applicants' rights. In the particular circumstances of this particular case, an intense focus on the comparative importance of all the various rights which are in play leads in the final analysis to an ultimate balancing which satisfies me that, subject to one important qualification, the outcome contended for by the applicants involves no disproportionate interference with Brandon's rights, whilst any greater degree of restraint would indeed involve a disproportionate interference with the applicants' rights.

115. I appreciate that the effect of the order I am proposing to make is that the family's true name – Webster – will for the first time be publicly known. But it seems to me

that this alone will have little if any discernible impact upon Brandon. His first name and his photograph are already in the public domain, and those 'in the know' and, I suspect, many in his local community are well aware that Mr and Mrs Hardingham (as they have hitherto been referred to) are in fact Mr and Mrs Webster. There is, in my judgment, no disproportionate interference with Brandon's rights in permitting him and his parents to be identified by their true name. On the other hand, and in the particular circumstances of this case, it would, in my judgment, be a disproportionate interference with the parents' rights to deny them what they want, the right not merely to argue their case in public but to do so under their true name and not under a pseudonym.

116. The qualification I have mentioned arises out of the fact that the applicants' submissions have paid small attention to, and their analysis has attached what I believe is insufficient weight to, the various rights and interests which I referred to in paragraph [80], sub-paragraphs (v), (vi) and (vii) above. This is a matter which, as will be appreciated, troubles NCC. It also troubles me.

117. This is not, in my judgment, any reason to refuse the media all access to the proceedings, let alone any reason sufficient to justify Judge Curl's order. But there are important public interests involved here – see the analysis in paragraph [45] above – just as there are the important interests of the social workers, of Brandon's children's guardian and of the other witnesses to be borne in mind. And these interests require to be carefully considered and appropriately protected. (I do not agree with Ms Langdale that the same goes for NCC's legal team.)

118. These are issues which I considered in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 and, with particular reference to expert witnesses, in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142. The position of social workers is the subject of consideration by the Court of Appeal in *Re W (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626, [2003] 1 FLR 329, and more recently by Ryder J in *British Broadcasting Corporation v Rochdale Metropolitan Borough Council* [2005] EWHC 2862 (Fam) – authorities to which I was not referred and on which I have accordingly heard no argument.

119. I cannot resolve these issues today, but I must put appropriate interim protective measures in place:

i) In the first place, the trial judge must have the ultimate right to control access by the media to any hearing. It may be that even though the media should, in principle, be able to attend the hearing, there will be some particular part of it during which it would be right to exclude them, perhaps, for example, while a particular witness is giving evidence.

ii) There may be questions as to whether some category of witnesses, or a particular witness, should be entitled to anonymity. That is not a matter I can resolve today.

It is for these reasons that I have included in the draft order prepared by the applicants the provisions in paragraphs 1(b) and 8(c).

120. There are two final matters I should mention. In the first place, if the media are to be permitted access to the forthcoming hearing that access cannot properly be confined to the particular organs of the media who are before me. It is not for a judge to licence the media, preferring one over another. If the media are to be permitted to attend, then all the media must be given the same rights of access. Hence the additional words I have inserted in paragraph 1.

121. The other relates to the effect of my order permitting media access to the forthcoming hearing. The general public will not be able to attend the hearing. But since the media will be entitled to be present, the hearing will not, as it seems to me, be "in private" within the meaning of section 12 of the Administration of Justice Act 1960. Section 12 will therefore not apply in relation to that hearing. But this does *not* mean that section 12 ceases to apply altogether to the care proceedings. Save in relation to any particular hearing which has been opened to the media, section 12 will continue to apply. Hence paragraph 10 of the order. Moreover, the effect of the order I am proposing to make is *not* to permit the dissemination of the entire contents of the court bundle prepared for a particular hearing merely because that hearing is not "in private", *nor* to permit the publication of any or every part of a document merely because passing reference has been made to it during the course of the hearing. In principle, section 12 will continue to apply to everything in such a bundle save insofar as either (a) particular parts of documents in the bundle have actually been read out or summarised during the course of the hearing (in which case, absent the imposition of further restrictions, the media will be able to report what has actually been said during the hearing) or (b) the judge authorises further disclosure.

Concluding observations

122. As is well known, many of the topics I have canvassed in this judgment are the subject of a vigorous on-going debate about 'transparency' in the family justice system. A number of judges, myself and Wall LJ included, have given evidence to a House of Commons Select Committee. A number of judges, myself and Wall LJ included, have written and spoken about these matters extra-judicially. A public lecture I gave in October 2005 was subsequently published as 'Access to and Reporting of Family Proceedings' [2005] Fam Law 945. Wall LJ's more recent Hershman-Levy lecture, delivered in June 2006, has now been published (in part) as 'Opening Up the Family Courts: a Personal View' [2006] Fam Law 747. The Government is at present embarked upon a public consultation exercise.

123. Reference to some of these matters was made during the course of submissions in the present case. I have made no reference to any of these materials, or indeed to any of the submissions based upon them, for the applications before me have to be determined, as I have conscientiously sought to determine them, by reference to the law as it is, not the law as some might think it ought to be.

124. The other matter is this. The applications in the present case were for access to the forthcoming hearing *by the media*. There was no suggestion that access should be afforded to the public generally. I say nothing about how such an application, had it been made, would have been decided. I merely observe that, as a number of commentators have suggested, different issues may arise if it is to be suggested that the general public and not merely the media should have access.

Order

125. Accordingly on 1 November 2006 I made the following order:

> "EXPLANATION
>
> A. Applications to the court ('the Care Applications') are due to be heard on 3 November 2006, being applications made in the proceedings ("the Care Proceedings") which are pending in relation to Child F.
>
> B. On 26 October 2006 the Court heard applications by the Fourth and Fifth Respondents for orders permitting them to attend and report the hearing of the Care Applications, and for the variation of the reporting and other restrictions imposed by the Order of HH Judge Curl dated 10 June 2006.
>
> C. The following parties were represented before the court: the Fifth Respondent, by Mark Warby QC; the Fourth Respondent, by Adam Wolanski of Counsel; the First and Second Respondents, by Anthony Hudson of Counsel; the Third Respondent, by Jonathan Bennett of Counsel; the Claimant, by Miss Rachel Langdale of Counsel; and Norfolk Primary Care Trust, by Prashant Popat of Counsel. The Fifth Defendant did not appear and was not represented.
>
> D. The court read the following documents: the witness statements of Sian James (1st), Dave Stanford (1st) and Kirsty Howarth (1st), and the exhibits to those statements; the Position Statement of Child F's Children's Guardian dated 25th October 2006; and the undated affidavit of Sharon Joy Clark, sworn in June 2006.
>
> E. Details of the children referred to in the Order are given in Schedule 1 to this Order.
>
> F. The court directed that the attached Explanatory Note be made available to any person served with this Order.
>
> ORDER
>
> Permission to attend and report

1. Representatives of the Fourth and Fifth Respondents and of other newspapers broadcasters or news agencies may attend and report the hearing of the Care Applications subject only to

(a) the restrictions set out or referred to in paragraphs 5 to 11 below;

(b) any directions the judge hearing the Care Applications may make requiring such representatives to absent themselves during any particular part or parts of the hearing.

Reporting and other restrictions dispensed with

2. In relation to Child F, section 97(2) of the Children Act 1989 is dispensed with, except for the restrictions set out in paragraphs 8(a) and (b) below.

3. The Reporting Restriction Order of HH Judge Curl dated 10 June 2006 ('the Second Reporting Restriction Order') shall cease to have effect.

4. Accordingly, and for the avoidance of doubt, the following information may be published:

(a) the names and photographs of the First and Second Respondents and the nature of their interest in these proceedings;

(b) the name and photographs of Child F;

(c) subject to paragraph 8(b) below, the address or whereabouts of the First and Second Respondents and Child F;

(d) the identity of the Applicant.

Reporting and other Restrictions continuing

Children A, B and C

5. The following reporting restrictions in relation to Children A, B and C continue:

(a) The Reporting Restriction Order made by the Hon Mrs Justice Pauffley on 17 May 2006 in relation to Children A, B and C ('the First Reporting Restriction Order'), which is unaffected by this Order and shall continue to apply to the persons and for the period provided for in that order.

(b) Section 97(2) of the Children Act 1989, which is not dispensed with in relation to Child A, B or C.

Child F

Duration

6. Subject to any different order made in the meantime the restrictions in paragraphs 8, 9 and 11 below shall have effect until after judgment on the Care Applications.

Who is bound

7. The restrictions in paragraphs 8, 9 and 11 below bind 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.

Publishing restrictions

8. This paragraph prohibits the publication or broadcast in any newspaper, magazine, public computer network, internet website, sound or television broadcast or cable or satellite programme service of any of the following in connection with the Care Proceedings:

(a) the name and address of any individual having day-to-day care of or medical responsibility for Child F whose details are set out in Schedule 3 to this Order ('a carer');

(b) the name, address or whereabouts of any residential assessment unit, residential home or other establishment at which the First and/or Second Respondent and child F are resident at the time of publication ('an establishment');

(c) the name and address of any social worker involved in the Care Proceedings, the Childrens Guardian of Child F, and any person (other than the First and Second Respondents) who is a witness in the Care Proceedings.

9. No material the publication of which would offend against the restrictions set out or referred to at 5 and 8 above shall be included in

(a) any publication of the text or a summary of this order (except for service of the order under paragraphs 13 and 14 below);

(b) any report permitted under paragraph 1 above.

10. Save in respect of

(a) such part or parts of the hearing of the Care Applications as representatives of the Fourth and Fifth Respondents and of other newspapers broadcasters or news

agencies are permitted to attend and report in accordance with paragraph 1 above; and

(b) such documents (referred to during such parts or parts of the hearing) as the court permits to be made public,

the restrictions in respect of the Care Proceedings arising by virtue of section 12 of the Administration of Justice Act 1960 are unaffected and continue to apply as if this order had not been made.

Restrictions on seeking information

11. This paragraph prohibits any person from seeking any information relating to Child F from

(a) a carer or

(b) a resident (other than the First or Second Respondents) or member of staff of an establishment.

What is not restricted by this Order

12. Nothing in his order shall prevent any person from

(a) Seeking or publishing information which is not the subject of the restrictions set out or referred to in paragraphs 5 to 11 above;

(b) Inquiring whether a person or place falls within the scope of paragraphs 8 or 11 above or the First Reporting Restriction Order;

(c) Seeking or publishing information relating to Children A, B, C or F while acting in a manner authorised by statute or by any court in England and Wales;

(d) Seeking information from the responsible solicitor acting for any of the parties or any appointed press officer, whose details are set out in Schedule 2 to this Order;

(e) 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 in any 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."