Neutral Citation Number: [2009] EWHC 1728 (Fam)

Case No: FD07P02269

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2009

Before :

THE PRESIDENT OF THE FAMILY DIVISION

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Re Child X (Residence and Contact – Rights of media attendance – FPR Rule 10.28(4))

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Richard Spearman QC, Deborah Eaton QC and Madeleine Reardon (instructed by **Schillings**) for the **Applicant**
Nicholas Cusworth QC (instructed by **Levison Meltzer Pigott**) for the **Respondent**
Gavin Millar QC and Guy Vassell-Adams (instructed by **Reynolds Porter Chamberlain**) for **the Media**
Adam Wolanski (instructed by) **CAFCASS Legal as Amicus Curiae**

Hearing dates: 29 June 2009 and 8 July 2009

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Approved Judgment

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

THE PRESIDENT

This judgment is being handed down in private on 15 July 2009. It consists of 15 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

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

Sir Mark Potter P:

Introduction

1. This matter comes before me in the course of ongoing proceedings concerning residence and contact in relation to X, the young daughter of the applicant father who is rightly described as a "celebrity" in that he is, and has for many years been, the subject of a high level of press attention and media interest by reason of his success the public arena. His life and activities are frequently the subject of report both here and abroad.

2. X lives with the respondent mother who is less well known in her own right but is herself the subject of considerable media interest by reason of her relationship with the father, as indeed is X.

3. So far as proceedings of this kind are concerned, the legal issues to be resolved are not unusual. The interest of the media in the proceedings lies in the celebrity of the parties and the curiosity and appetite of the public for "human interest" stories in relation to them.

4. The proceedings have hitherto been heard in private with the press and media excluded. The parties wish that position to continue. However, pursuant to a recent amendment to the Family Proceedings Rules 1991 ("FPR"), the media propose to attend future hearings in order to report and discuss the proceedings so far as the law permits.

The position to date

5. The residence and contact proceedings began in 2007 and have since been conducted continuously before a highly experienced County Court Judge, who has throughout been concerned, and rightly concerned, with the effects of publicity on X who is an intelligent and articulate child, well able to read about and follow references to her parents or herself as well as these proceedings in the press or on the internet. The Judge has, on two occasions in the course of the proceedings, warned the parties against any airing of their dispute in public or originating any leaks to the press and both are currently bound by undertakings to the Court not to disclose any information concerning these proceedings, save to their legal advisers. They have also agreed not give or permit interviews concerning the arrangements for X's upbringing. The parties are themselves genuinely motivated by concern for X, but the Judge was satisfied that the undertakings to which I have referred were essential if reference by the parents to their dispute, or indulgence in any kind of point-scoring in the course of press or other media interviews, was to be avoided.

6. Both parties have co-operated in supplying information to a CAFCASS officer for the purposes of ascertaining X's wishes and feelings, encouraging contact, and assessing the harm which X has or may have suffered or may be suffering as the result of the parties' estrangement and their attitude towards each other; second, they have also co-operated by resorting to the services of Dr C, a consultant child and adolescent psychiatrist. Towards the end of 2008, Dr C was jointly instructed to report on the question of X's welfare generally and, inter alia, (1) whether she

was suffering from emotional harm as a result of the current circumstances and the short and long term effects which the parental dispute might have upon her; (2) an assessment of each of the parents' understanding of the issues pertaining to X; (3) what, if any, work should be undertaken by the parents and/or X either separately, or with each other, or as a family.

7. On 7 December 2008, Dr C reported at length. The parties had given conflicting accounts as to various events which shaped their attitude towards each other, as well as a number of disputed incidents in the course of contact, in relation to which X had formed, or at any rate expressed, her own views and opinions which in turn shaped her attitude to each of her parents. Dr C made clear that he was not in a position to advise about the therapeutic work to be undertaken until there had been a fact finding hearing and the issues as to residence and contact established.

8. At a directions hearing in early December 2008, Dr C expressed concerns about X's emotional welfare and detailed directions were made in relation to the involvement of Dr C and the progressing of contact. More difficulties were encountered in the light of X's feelings and reactions, and further directions proved necessary shortly before the fact finding hearing. On 4 March 2009 Dr C also delivered an updating report for that hearing.

9. At the fact finding hearing the Judge heard evidence over a period of four days. The Judge heard evidence from both parties and from Dr C and Miss E the CAFCASS officer who, since March 2008 had been involved with X and the progression of contact. Miss E had made five reports concerning X over the year preceding the hearing. In the light of the intimate, emotional and sensitive nature of the issues explored and the information concerning X as reported by the CAFCASS officer and Dr C, and in the light of the manifest media interest outside the Court, the Judge, in anticipation of her judgment which she reserved, and in response to the joint urgent application of the parties, made a *contra mundum* order dated 13 March 2009 in relation to X until her 18th birthday or further order in the following terms:

> "**Restrictions**
>
> (3) This order prohibits the publishing in any newspaper or broadcasting in any sound or television broadcast or by means of any cable or satellite programme service or public computer network ('publishing') of;
>
> (a) the name or address of;
>
> (i) the child;
>
> (ii) any school or other establishment in which the child is residing or being educated or treated (an 'establishment'); or
>
> (iii) any natural person other than a parent of the child having the day-to-day care of the child (a 'carer'); or

(iv) the parents of the child ('the parents') being the persons whose names and addresses are set out in the second schedule;

(b) any picture being or including a picture of either (i) the child or (ii) either of the parents;

(c) any other matter.

(4) This order only prohibits publication in a manner which may lead to the identification:

(a) of the child either as being subject of proceedings before the Court;

(b) of an establishment as being an establishment in which the child is residing or being educated or treated;

(c) of any parent or any carer as being the carer of the child;

(d) of any arrangements for or details of or information relating to the child's care, residence, education, treatment or upbringing.

(5) Save for the service of this Order in accordance with para 8 below, no publication of the text or a summary of any part of this Order (or any other order made in the proceedings) may include any of the matters referred to in para 3 above.

(6) This Order prohibits soliciting any information relating to the child (other than information already in the public domain):

(a) from the child;

(b) from the staff or the pupils (or their parents) or residents or anyone connected with any establishment;

(c) from any carer;

(d) from the parents of either of them.

What is not restricted

(7) Nothing in this Order shall of itself prevent any person:

(a) publishing any particulars of or information relating to any part of the proceedings before any court other than a court sitting in private;

(b) publishing anything which at the date of publication by that person has previously been published (inside the jurisdiction of the court) in any newspaper or other publication or through the Internet or any other broadcast or electronic medium to such an

extent that the information is in the public domain (other than in a case where the only publication was made by that person);

(c) inquiring whether a person is protected by para 6 above;

(d) seeking information from any person who has previously approached that person with the purpose of volunteering information;

(e) soliciting information relating to the child while exercising any function authorised by statute or by any court of competent jurisdiction.

Service

(8) Copies of this order endorsed with a penal notice be served by the Applicant:

(a) on such newspaper and sound or television broadcasting or cable or satellite programme services as the Applicant may think fit in each case by fax or first class post addressed to the editor in the case of a newspaper or senior news editor in the case of a broadcasting or cable or satellite programme service; and

(b) on such other persons as the plaintiff may think fit in each case by personal service.

Further applications about this order

(9) The parties and any person affected by any of the restrictions in paras 3-6 above are at liberty to apply on no less than 48 hours notice to the parties.

Third Parties

(10) The Applicant shall not be required to provide to any third party served with a copy of this order:

(a) a copy of any materials read to or by the Judge, including material prepared after the hearing at the direction of the Judge or in compliance with the order; and/or

(b) a note of the hearing."

10. On 13 March 2009 the Judge also made provision for the further instruction of Dr C and ordered that the matter return before the court for further consideration by the Court on 27 April 2009, in July 2009 and November 2009 when a final decision is contemplated.

11. In making the *contra mundum* order the Judge was in breach of the President's Direction dated 18 March 2005 [2005] 2 FLR 120 which, regrettably, appears not

to have been drawn to her attention by counsel in the case who (nor Mr Spearman QC) it appears, was unaware of it. Nor was it referred to in the skeleton argument prepared by the solicitors. Despite the fact that the order was headed with a reference to S.12 (1) of the *Administration of Justice Act 1960* ("AJA") and S.97 (2) of the Children Act 1989, the terms of the order, and in particular paragraph 6, went beyond the scope of those statutory provisions. As such the application required to be founded on Convention rights. This being so, it was subject to the provisions of Section 12 (2) of the *Human Rights Act 1998* ("HRA") which states that an injunction restricting the exercise of the right to freedom of expression must not be granted where the person against whom the application is made is neither present nor represented unless the Court is satisfied (a) that the applicant has taken all practical steps to notify the respondent or (b) that there are compelling reasons why the respondent should not be notified. In relation to this provision, paragraph 3 of the President's Direction makes clear that:

> "The Court retains the power to make without notice orders, but such cases will be exceptional, and an order will always give persons affected liberty to apply to vary or discharge at short notice."

12. More importantly, however, paragraph 2 of the President's Direction provides that such orders can only be made in the High Court and are normally dealt with by a Judge of the Family Division. If the need for an order arises in the existing proceedings in the County Court, Judges should either transfer the application to the High Court or consult their Family Division Liaison Judge. Where the matter is urgent, it can be heard by the Urgent Applications Judge of the Family Division. Paragraph 3 sets out provisions for service of the application on the National News Media via the Press Association's CopyDirect and Service. Paragraph 4 of the direction refers applicants for guidance to the joint Official Solicitor/CAFCASS Practice Note, also dated 18 March 2005 and states that such guidance should be followed.

13. The importance of observing the President's Direction in cases of high media interest has been judicially emphasised in *Local Authority v W* [2006] 1 FLR 1. It should be well known to practitioners in the field. The fact that a judge sitting in the County Court was unaware of it is much less surprising, because he or she may never have had occasion to refer to its terms, given that the practice direction requires such applications to be made in the High Court.

14. Nonetheless, following notice of the order being served upon the media, no application to discharge or vary the terms of the injunction was made prior to the Judge's order of 27 April 2009 when she referred the question of press access and reporting restrictions to the High Court. At the outset of the hearing before me, I indicated, without objection from the parties, that whatever the deficiencies in procedure, the terms of the injunction would continue in force pending my decision on the issues before me, to which I shall turn in more detail below.

15. The judgment of the Judge in the fact finding hearing was handed down in private early in April 2009. It is very long and thorough. It refers in length and detail to the evidence to which I have referred at paragraph 9 above. It makes clear that the

reason for this is the necessity to make findings to assess the contribution of each parent to the current predicament in relation to X's emotional state, her view of her parents and her attitude to contact. It also makes clear that its purpose is not limited to finding the facts necessary for the therapeutic purposes anticipated by Dr C, but extends to helping X make sense of the events in her life once she is an adult. It expresses the hope that she will never have to read the judgment. It contemplates a six-month adjournment of the final hearing in the light of the parents' consent to co-operate in the intervention of Dr C. It also makes provision for further hearings to progress the matter in the interim.

16. On the very day of the first further hearing, there came into force on 27 April 2009 *The Family Proceedings (Amendment No 2) Rules 2009* (2009 No 857 L8) which insert into the FPR a new Rule 10.28 which makes provision governing who may be present during a hearing in proceedings held in private ("in private" meaning when the general public have no right to be present). By the new Rule 10.28, duly accredited media representatives (previously excluded) are permitted to be present, subject to the power for the Court to direct their exclusion during all or part of the proceedings for one of a number of reasons specified in paragraph 4 of the new rule (see further below).

17. On 27 April 2009, the media were again in attendance outside the Judge's Court and sought admission, which was opposed by the parties. The Judge, having given certain further directions for the progress of contact and the involvement of Dr C with X, adjourned the hearing of the case until the issues concerning access by the media were determined, the *contra mundum* injunction remaining in place.

18. In adjourning for that purpose, the Judge was acting in accordance with the *President's Guidance in Relation to Applications Consequent Upon the Attendance of the Media in Family Proceedings* dated 22 April 2009 and issued in anticipation of Rule 10.28 coming into force. Under paragraph 20 of that Practice Direction, County Courts and Magistrates Courts were advised that, in the period of adjustment following the introduction of Rule 10.28, in order to avoid delaying decision-making on the substantive issues in family cases proceeding before them where the right of the media to attend was in issue, they should, in the absence of agreement between the parties, consider adjourning to the High Court the determination of any disclosure and/or reporting issues and/or applications by the media to lift restrictions already made during the currency of the case. They were also advised that if injunctive relief were sought restraining publication based on Convention rights rather than statutory provisions, the matter should in any event be transferred to the High Court to be dealt with under the President's Direction dated 18 March 2005 to which reference has already been made.

19. On 17 June 2009 on a joint application by the parties for ex-parte directions, I gave directions for a two-stage hearing before me. First, as to the principles to be applied in relation to media access and reporting in family cases concerning the children of "celebrities", second, for consideration and determination of the applications of the parties in the instant case. I also made a direction for the appointment by CAFCASS of an A*micus Curiae*. Mr Adam Wolanski was subsequently instructed in that role and I am grateful to him for the assistance I have derived from his submissions.

20. At this point it is necessary to make clear that, so far as the progress of the case is concerned, the hearing before me has been conducted upon the basis that, at the imminent hearing in July, Dr C will be questioned and asked to elaborate on the contents of his latest report. Since March 2009 two more experts in disciplines relating to children have been involved in assisting with the issues with which the Court is concerned and this evidence will be relayed in the evidence of Dr C. It is also envisaged that the CAFCASS officer will give evidence. The views of the experts and the CAFCASS officer will inform, and be inseparable from, all of the matters to be considered and determined at the hearing, including the child's state of health; the nature, timing and duration of any work to be undertaken with or involving the child and/or one or other of the parents; and the impact of these matters on the child's welfare and upbringing, including questions of contact residence and education. It is inevitable that detailed reference will be made in the course of the hearing to the Judge's judgment of 6 April 2009 and to previous evidence both written and oral of Dr C and the CAFCASS officer.

21. For the purposes of assisting the parties' Rule 10.28 application and the Court's consideration, Dr C and Miss E have supplied statements specifically directed to the question of the welfare of X and the damaging effect upon the progress and outcome of the processes in which she is currently participating, should the media be permitted to attend the proceedings. Dr C also addressed the question of his personal position and a variety of ethical considerations which arise in relation to the work of medical experts such as himself.

22. He raises an issue which may well not have been foreseen by government (it is certainly not mentioned), in its Response to the Consultation conducted prior to the Rule change (see further at paragraph 42 below). However, it lends considerable substance to the recognition by government in that Response of the need to safeguard and protect children and their families. Dr C explains that when a specialist such as himself interviews children for public or private law proceedings, they explain to them according to their age and understanding, the process in which they are involved and what is going to happen to what they say to the specialist. Hitherto specialists have explained that what the children say will be written down and put in a report which will be seen by the Judge, their parents and, according to circumstance, a CAFCASS or other social worker. Hitherto children have not been informed that the media will be given access to what they have said. That is the position in this case in relation to X who has spoken frankly and in confidence to Dr C and Mrs M, a colleague working closely with him, on the basis that matters would only be disclosed to the Judge the parties their legal advisors and the CAFCASS officer. Dr C considers, and has been so advised by the Medical Protection Society, that if he were to disclose to the Court in the presence of the media the information which he possesses concerning X it would be a clear breach of confidentiality. Furthermore, if he or Mrs M were to inform X now that the information they possessed were to be so disclosed it would undermine the trust which X has placed in Dr C and the work undertaken by him. She would also be highly likely to assume, regardless of explanations to the contrary, that their attendance was at the invitation and instigation of one of her parents. Dr C considers that, if the media are admitted to the hearings in this matter, X will not have sufficient trust in the ongoing process to be able to participate in it and the work initiated as a result of these proceedings will be

unable to continue. Dr C also makes clear that, quite apart from that unfortunate effect, he would himself be inhibited and in considerable difficulties in relation to giving evidence about X if the media were to be admitted to the hearings.

23. Miss E states that X is already aware of some of the reporting of her circumstances in the media and, in a recent conversation, told Miss E that reading about herself in the papers made her feel horrid and she became upset. She further asserts that the information and assessments contained in the Court documents (which will be the subject of evidence and submissions before the Judge) are of a highly sensitive nature and, if the media were present during the Court hearing she would have grave concerns that it would not be possible to maintain the level of anonymity required to safeguard X from emotional harm.

24. It is in those circumstances that, in relation to this hearing, and indeed all subsequent hearings, the parties seek an order excluding representatives of the media from attending under the provisions of Rule 10.28 and, in particular, sub-rule (4) (a) (i) and (4) (b).

The application of rule 10.28

25. Rule 10.28 provides as follows:

> "**Attendance at private hearings**
>
> 10.28.- (1) This rule applies when proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation.
>
> (2) For the purposes of these Rules, a reference to proceedings held "in private" means proceedings at which the general public have no right to be present.
>
> (3) When this rule applies no person shall be present during any hearing other than—
>
> (a) an officer of the court;
>
> (b) a party to the proceedings;
>
> (c) a litigation friend for any party, or legal representative instructed to act on that party's behalf;
>
> (d) an officer of the service or Welsh family proceedings officer;
>
> (e) a witness;
>
> (f) duly accredited representatives of news gathering and reporting organisations; and
>
> (g) any other person whom the court permits to be present.

> (4) At any stage of the proceedings the court may direct that persons within paragraph (3) (f) shall not attend the proceedings or any part of them, where satisfied that-
>
> (a) this is necessary-
>
> (i) in the interests of any child concerned in, or connected with, the proceedings;
>
> (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or
>
> (iii) for the orderly conduct of the proceedings; or
>
> (b) justice will otherwise be impeded or prejudiced.
>
> (5) The court may exercise the power in paragraph (4) of its own motion or pursuant to representations made by any of the persons listed in paragraph (6), and in either case having given to any person within paragraph (3)(f) who is in attendance an opportunity to make representations.
>
> (6) At any stage of the proceedings, the following persons may make representations to the court regarding restricting the attendance of persons within paragraph (3) (f) in accordance with paragraph (4)-
>
> (a) a party to the proceedings;
>
> (b) any witness in the proceedings;
>
> (c) where appointed, any children's guardian;
>
> (d) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings;
>
> (e) the child, if of sufficient age and understanding.
>
> (7) This rule does not affect any power of the court to direct that witnesses shall be excluded until they are called for examination.
>
> (8) In this rule "duly accredited" refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of this rule by the Lord Chancellor."

26. As already indicated, prior to the introduction of Rule 10.28 the press have been routinely excluded from private law proceedings in family courts concerning

children. Rule 4.16 (7) of the *Family Proceedings Rules 1991* ("FPR") provides that :

> "Unless the court otherwise directs, a hearing of, or directions appointment in, proceedings to which this part applies [i.e. proceedings under the Children Act 1989] shall be in chambers".

FPR Rule 4.23 (1), under the heading "Confidentiality of documents" provides:

> "Notwithstanding any rule of Court to the contrary, no document, other than a record of an order, held by the Court and relating to proceedings to which this Part applies shall be disclosed, other than to-
>
> (a) A party, (b) the legal representative of a party, (c) the guardian *ad litem*, (d) the Legal Aid Board, or (e) a welfare officer, without leave of the Judge or District Judge."

27. The situation was summarised by Dame Elizabeth Butler Sloss P in C*libbery v Allan* [2002] Fam 261 at para 47 as follows:

> "47. Part IV of the 1991 Rules deals with children applications under the Children Act 1989. There is no disagreement that children applications ought to be determined in private. Confidentiality in wardship cases was specifically recognised in *Scott v Scott* [1913] AC417 and section 12 (1) (a) of the Administration of Justice Act 1960, as substituted by section 108 (5) of, and schedule 13, paragraph 14 to the Children Act 1989, treated children cases as an exception to the general rule of publication of court proceeding: see below.
>
> The procedure in children cases is set out in careful detail in the 1991 rules and the confidentiality of all aspects of the proceedings, the evidence of the parties, the reports filed, and the documents disclosed is specifically provided for in Rule 4.23, headed " Confidentiality of documents" . Rule 4.16 deals with the hearing…
>
> 48. The public is almost always excluded from children proceedings which almost invariably remain confidential, subject to judgments, made suitably anonymous in cases of wider interest, being given in public or made available for publication."

28. So it has since remained. The privacy of proceedings under Rule 4.16 applies "unless the court otherwise directs". Courts have proceeded on the basis that private law children proceedings fall within the class of cases recognised in *Scott v Scott* as an exception to the 'open justice' rule, namely that, in exercising its wardship jurisdiction, the court was dealing with:

> "truly private affairs; the transactions are transactions truly *intra familial;* and it has long been recognised 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."

29. This rationale has been supported by the courts' view that the maintenance of privacy in cases concerning children brought under the *Children Act* 1989, is generally desirable as being in the overall welfare interests of the child which, pursuant to s. (1) of the Act are the Court's paramount consideration when determining any question with respect to the upbringing of a child. Upon this basis, the provisions and effect of FPR Rule 4.16 in relation to residence and contact proceedings have been held by the ECHR to be compliant with Article 6.1 of the Convention which provides that, in the determination of civil rights and obligations, everyone is entitled to a fair and *public* hearing, but also provides that:

> "The press and public may be excluded from all or part of the trial … where the interests of juveniles or the private life of the parties is so required or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice".

30. As stated by the European Court of Human Rights (ECHR) in *B v United Kingdom* (2001) 34 EHRR 529 at para [38], residence and contact 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/ or the parties and to avoid prejudicing the interests of justice. At paragraph [38] it is stated that:

> "To enable the deciding Judge to gain as full and accurate a picture as possible of the advantages and disadvantages of various residences 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."

The Court further stated at paragraph [39] that, while Article 6(1) states a general rule that civil proceedings should take place in public, the Court:

> "… 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 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)."

31. See also the lengthy review of the position per Bennett J in *P v BW (Children Cases: Hearing in Public)* [2004] 1 FLR 171.

32. In recent years, the privacy of family law proceedings in this country has given rise to concerns, not only on the part of the media and certain pressure groups, but also of government, that a procedure designed to protect the privacy of the parties and the welfare interests of the children has given rise to a system perceived as one of "secret justice", in which the workings of the courts and the decisions of judges are not available to public (in reality media) scrutiny. This is a view which has principally been propounded in relation to public law care proceedings on the basis that public scrutiny is of high importance in cases where the state (albeit in the interests of safeguarding children) intervenes from outside in family life and seeks to remove a child from his or her family or to supervise or limit parental rights (see *Moser v Austria* [2006] 3 FCR 107 at [97] and *per* Munby J in *Re X, London Borough of Barnet v X & Y* [2006] 2 FLR 998 at [166]. However, the cause of "open justice" has also been taken up and promoted in relation to *intra-familial* disputes in private law children proceedings, principally by fathers who have regarded the courts as too inclined to favour mothers when resolving residence and contact disputes, particularly in relation to the enforcement of contact orders in the face of non-compliance.

33. Judicial concerns have also been expressed over the need to maintain public confidence in the family justice system in the light of these matters, acknowledging that many of the issues litigated in the family justice system require open and public debate in the media, not least to avoid the charges of secret justice advanced by those who have reason to be discontented with the outcome of cases with which they have been concerned.

34. These matters provide the immediate background to the change introduced by Rule 10.28, which confers upon the media in the form of "duly accredited representatives of news gathering and reporting organisations" an effective right to be present at private hearings of children proceedings, subject to a direction of the court that they may not attend the proceedings, or part of the proceedings, on grounds set out in 10.28 (4) (a) and (b). However, what the rules do not do is to effect any substantial change in the right of the press, once having been admitted to the proceedings with the opportunity to observe them in progress, thereafter to report the detail of such proceedings to the public (who have no such right to be present).

35. What goes on in the proceedings remains subject to he terms of s.12 (1) of the AJA, the effect of which is to forbid disclosure of the details of proceedings concerning children, save to the limited extent set out by Munby J in "a working list" in his judgment in *Re B (A Child) (Disclosure)* [2004] 2 FLR 142, accompanied by the threat of proceedings for contempt of court in respect of organs of the media who transgress its terms.

36. While the provisions of s.12 of the AJA are not apt to prevent disclosure of the name of the parties or the identity of any child the subject of the proceedings, that is achieved by s.97 (2) of the 1989 Act (as amended by s,72 of the *Access to Justice Act 1999* and s.62 (1) of the *Children Act 2004*) which provides that:

> "No person shall publish to the public at large or any section of the public any material which is intended, or is likely, to identify -
>
> (a) Any child as being involved in proceedings before the High Court, a County Court or a Magistrate's Court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the Court in respect of that or any other child or
>
> (b) An address or school as being that of the child being involved in any such proceedings."

37. Further, s.39 (1) of the *Children and Young Persons Act 1933* provides that:

> "In relation to any proceedings in any Court … the Court may direct that –
>
> (a) No newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in proceedings, either as being the person by or against or in respect of whom proceedings are taken, or being a witness therein;"
>
> (b) no picture shall be published in any newspapers being or including a picture of any child or young person so concerned in the proceedings as aforesaid;
>
> (c) except in so far (if at all) as may be permitted by the direction of the Court"

38. The net result of all this is that, while the press are entitled to report on the nature of the dispute in the proceedings, and to identify the issues in the case and the identity of the participating witnesses (save those whose published identity would reveal the identity of the child in the case), they are not entitled to set out the content of the evidence or the details of matters investigated by the Court. Thus the position has been created that, whereas the media are now enabled to exercise a role of "watchdog" on the part of the public at large and to observe family justice at work for the purpose of informed comment upon its workings and the behaviour of its judges, they are unable to report in their newspapers or programmes the identity of the parties or the details of the evidence which are likely to catch the eye and engage the interest of the average reader or viewer.

39. It is of course in the context of disputes over children between "celebrities" in private law proceedings such as these that the media find the current statutory limitations most irksome. The line drawn is nonetheless one recognised as valid when balancing Article 8 and Article 10 considerations as between the privacy rights of individuals and the watchdog role of the press: see *Von Hannover v Germany* [2005] 40 EHRR 1 at para 63:

> "A fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society reacting to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "imparting information and ideas on matters of public interest" it does not do so in the latter case."

40. In stating its conclusion in that case, the ECHR stated at paragraph 76 that:

> "It considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of private life."

See also paras [63]-[66] of the judgment.

41. In introducing Rule 10.28 without amendment to the statutes to which I have referred, it is clear that the distinction drawn in the *Von Hannover* case was recognised by the government, at least in relation to the privacy rights of children as an aspect of their welfare interests: see sub –paragraph (4) (a) (i).

42. In Response to Consultation (CPR) 10/007, December 2008 "Family Justice In View" the government stated the rationale which informs the rule change:

> "We propose to change the law to allow access to the courts so that family justice can be seen. The family justice system is not secret, it has nothing to hide, but it does need to be private to safeguard and protect children and their families.
>
> The media have a role to play. Their reporting must be responsible and honest, providing information about the system without endangering the identities or welfare of children. We believe that there could be a positive influence in increasing the understanding of the work of the courts.
>
> We can understand that journalists want to run human-interest stories where the parties and children are identified. Journalists have said that want to provide the full detail "human" story with photos. But the rules limiting reporting are there for the good of children experiencing very difficult situations. While the media **will not** be able to identify parties or the child subject to proceedings, they will certainly be able to discuss in a more informed way how the system works.

> Journalists who have attended family proceedings courts have been able to report sufficient outlines of several cases that allow the reader to understand the gist of proceedings but without identifying those involved. The challenge for the media is to report fairly, openly and without any risk to the identities and welfare of those involved." (p31)
>
> "Since we have decided to open up family proceedings to the media, we consider it essential to bring forward legislation that provides the necessary protection for children and families by preventing certain information from being published without the permission of the Court. Children and families need to be confident that their privacy will be protected. We will revise law on reporting restrictions as soon as Parliamentary time allows." (p33)
>
> "**2.** To protect the interests of children and vulnerable adults
>
> We will change the law so that:
>
> - The Court may exclude the media in the interests of children or for the safety and protection of parties or witnesses;
>
> - There will be a consistent set of reporting restrictions to ensure children and families are protected; and that certain information cannot be published without the permission of the Court; …" (p39)

43. With those passages available as an appropriate guide to the intent and interpretation of Rule 10.28, it seems to me that, albeit I have received from the parties lengthy submissions on the background of European and Convention jurisprudence in relation to the balancing of Article 8 and Article 10 rights, they need little recitation or elaboration in this judgment, at least in relation to the application which is made by the parties that the media be excluded from the proceedings.

44. Prior to the rule change, the presumption, at any rate in the High Court and County Court was that the media were excluded and this presumption was observed in practice, save in unusual circumstances. However, as Mr Gavin Millar QC submits for the media, the change in the rules creates a presumption that duly accredited media representatives can attend such hearings and provides that they can only be excluded if one of the reasons set out in the rule is clearly demonstrated.

45. Put in terms of the Convention, the position seems to me to be as follows. The restrictions i.e. the grounds for exclusion under Rule 10.28 (4) are in broad terms Article 6 compliant. Paragraph (a) (i) is within the legitimate aim of protecting the interests of juveniles and grounds (a) (ii) (iii) and (b) are legitimised under the heading of "special circumstances where publicity would prejudice the interests of justice". It is to be noted in passing that nothing is included in the Rule to provide

for exclusion of the press where the Article 8 interests of the parties (as opposed to those of the child) so require. However, one can envisage a situation where a ground for exclusion, at least for part of the proceedings, might be required to protect the Article 8 interests of the parties which could properly justify exclusion of the media under ground (b) to prevent the press from hearing and/or reporting allegations of an outrageous or intimate nature before the Court's decision as to whether or not they were established. This might well constitute a serious and irredeemable invasion of the privacy and/or family life of an adult party if the press were not excluded.

46. The task faced by the Court in deciding whether or not to exclude the press in the welfare or privacy interests of a party or third party is to conduct the balancing exercise and process of parallel analysis first considered by the House of Lords in *Campbell v MGN Limited* [2004] 2 AC 457 and further elaborated in *Re S (A Child)* [2005] 1 AC 593 in respect of the interplay between Articles 8 and 10 of the Convention. At paragraph [17], Lord Steyn observed that four propositions emerged clearly from the decision in *Campbell*:

> "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."

47. The structure of Articles 8 and 10 are both the same; accordingly, the same considerations apply to the rights protected by each and to the grounds for restricting those rights. In relation to the interference with either right it is necessary to consider whether the interference complained of corresponds to a pressing social need, whether it is proportionate to the legitimate aim pursued, and whether the reasons given by the National Authority to justify it are relevant and sufficient. All cases are, to an extent, fact specific and, in relation to press freedom, the question to be asked is that articulated by Lord Hoffman in the *Campbell* case at para [56]:

> "When press freedom comes into conflict with another interest protected by the law, the question is whether there is sufficient public interest in *that particular publication* to justify curtailment of the conflicting rights." (emphasis added)

In that respect, the positive obligations which are imposed on the state under Article 8 are to respect, and therefore to protect the interests of private and family life which embrace right of autonomy, dignity, respect, self esteem, to control the dissemination of private and confidential information and to establish and develop relationships with other people. In relation to the question of confidentiality, as Lord Phillips CJ stated in *HRH The Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222 at para [68]:

> "The test to be applied in considering whether it is necessary to restrict freedom of expression in order to prevent the disclosure of information received in confidence is not simply whether the information is a matter for public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The Court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

48. While the task for the Court to perform in relation to Rule 10.28 (4) is to apply the same process as the House of Lords in *Re S*, the outcome in terms of the hegemony accorded to the Article 10 rights of the press over the Article 8 rights of the child is by no means necessarily the same. In *Re S*, the Court was concerned with an application to restrain the right of the press freely to report criminal proceedings and, in particular, to report the identity of the adult defendant in those proceedings in order to protect the identity and privacy of the defendant's child who was not involved in the proceedings in any way. The dispositive feature in the decision of the House of Lords was (a) the emphasis it placed upon the importance of the public and media interest in enjoying the uninhibited right both to attend and report on all criminal proceedings; (b) the fact that the child who was sought to be protected was not the subject of or involved in the proceedings in any way; (c) the fact that the provisions of S.39 of the *Children and Young Persons Act 1933* directed to the question of child protection in relation to criminal proceedings limited the Court's powers to any child or young person concerned in the proceedings as a party or a witness; thus, the right not to be identified which the child was asserting was contemplated but not recognised by domestic legislation. None of those considerations applies to the issues in this case. Whilst the principle of open justice is important in civil proceedings concerning children, the need for the protection of children from publicity in the course of proceedings which concern them, was long ago recognised at common law in *Scott v Scott*, and is provided for in the statutory provisions as to identification to which I have referred at paragraphs 29-31 above.

49. Nonetheless, it is important to keep one's eye on the ball of the parties' application, which is not to limit the media's reporting rights, but to exclude the media altogether from their presumptive right under Rule 10.28 to be present for the purpose of exercising a watchdog role, albeit with limited reporting rights under the terms of the AJA.

50. I therefore now turn at once to the application of the parties to exclude the press. I will then deal with the question of the *contra mundum* relief earlier granted and currently in force, and then with certain procedural issues which have arisen and upon which the media seek guidance under the new regime.

The application to exclude

51. By way of general observation it is important to make the following matters clear. First, private law family cases concerning the children of celebrities are no

different in principle from those involving the children of anyone else. An application by a celebrity who happens also to be a parent who is unable to agree with a former spouse or partner over the appropriate arrangements for their child(ren) is not governed by any principle or assumption more favourable to the privacy of the celebrity than that applied to any other parent caught up in the court process. In this respect, and in very different circumstances concerning the publication of the identity of a barrister who had been convicted of criminal offences, (*Crawford v CPS* [2008] EWHC 854 (Admin)), Thomas LJ rejected the submission that, in conducting the *Re S* balancing exercise there involved the Court should have regard to the public profile of the appellant:

> "[34] That is because it is fundamental that all persons are equal before the law of England and Wales, as embodied in our common law, our legislation and the Conventions to which this party (*sic*) has subscribed.
>
> [35] No person in this country can enjoy a different status because he holds a public position. It is important to stress that."

52. However, in considering whether or not to exclude the press under Rule 10.28 (4) (a) (i), the focus is upon the interests of the child and not the parents. It is almost axiomatic that the press interest in and surrounding the case will be more intense in the case of children of celebrities; and the need for protection of the child from intrusion or publicity, and the danger of leakage of information to the public will similarly be the more intense.

53. Second, Rule 10.28 provides that, in order to exclude the press on any of the grounds stated, the Court must be satified that it is *necessary* to do so. That is wording which picks up and reflects the provisions of the Convention relevant to the balancing act which the Court has to perform as set out in Articles 6 (1), 8 (2) and 10 (2) of the Convention. We are here concerned with a restriction on the freedom of expression of the media under Article 10 (1), (namely the right to receive and impart information and ideas without interference) for the purpose of the protection of the rights of the child to respect for her private and family life.

54. So far as necessity is concerned, as stated in *R v Shayler* [2003] 1 AC 247, 268, *per* Lord Bingham at para [23]:

> "Necessary" has been strongly interpreted; it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handiside v United Kingdom* (1976) 1 EHR 734, 754 para 48. One must consider whether the interference complained of corresponds to a pressing social need, whether it is proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under Article 10 (2): *The Sunday Times v United Kingdom* (1979) 2 HER 245, 277-278 para 62."

55. Third, since the ECHR has already held FDR Rule 4.16 (7) to be Convention-compliant in a form which effectively excluded the press from admission, the introduction of a provision which gives the media the clear *prima facie* right to be present during the proceedings, subject only to exclusion on limited grounds is plainly Convention compliant from the point of view of the media's Article 10 rights. In the light of the wording of Rule 10.28 (4) and the Convention jurisprudence, the question of necessity in respect of the derogations from those rights must be approached on the basis set out by Lord Bingham above, in the context of the particular facts of the case, and with an eye to the question whether any information received in confidence is involved and therefore at risk by reason of press attendance, as to which see the observations of Lord Phillips CJ quated at paragraph 47 above.

56. Fourth, so far as the Practice Direction of 20 April 2009 is concerned, its reference to the exercise of the Court's *discretion* to exclude media representatives from all or part of the proceedings is, strictly speaking, not accurate. In *Interbrew SA v Financial Times* [2002] EWCA Civ 274 [2002] 2 Lloyd's Rep 229 at para [58] Sedley LJ made clear that where the Court has a duty to apply a test of necessity in relation to a series of questions as to legitimacy and proportionality the duty of the Court is to proceed though the balancing exercise making a value judgment as to the conflicts which arise rather than to regard the matter simply as an exercise of discretion as between two equally legitimate courses. Thus references to the Court's discretion in paragraph 3.1 and in the heading to paragraph 5 in the Practice Direction dated 20 April 2009 are a misnomer. Nonetheless, the balancing act involved in the weighing of the conflicting but interlocking rights and restraints embodied in Article 10 and Article 8 of the Convention are highly fact sensitive from case to case. Thus, in performing the necessary balancing act, and in particular the ultimate test of proportionality, it is the Judge dealing with the case who is the person best placed to make the necessary decision.

57. Fifth, the burden of satisfying the Court of the grounds set out in Rule 10.28 (4) is upon the party or parties who seek exclusion, or the Court itself in a case where it takes steps of its own motion, to exclude the press. This will be an easier burden to satisfy in the case of temporary exclusion in the course of the proceedings, in order to meet concerns arising from the evidence of the particular witness or witnesses.

58. Sixth, in deciding whether or not the grounds advanced for exclusion are sufficient to override the presumptive right of the press to be present and in particular whether or not an order for total exclusion is proportionate, it will be relevant to have regard to the nature and sensitivities of the evidence and the degree to which the watchdog function of the media may be engaged, or whether its apparent interests lie in observing, and reporting on matters relating to the child which may well be the object of interest, in the sense of curiosity, on the part of the public but which are confidential and private and do not themselves involve matters of public interest properly so called. However, while this may be a relevant consideration, it in no sense creates or places any burden of proof or justification upon the media. The burden lies upon the applicant to demonstrate that the matter cannot be appropriately dealt with by allowing the press to attend,

subject as they are to the statutory safeguards in respect of identity and under the provisions of s.12 of the 1960 Act.

59. Moving to the question of the balancing exercise in this case, I have no doubt that, so far as the imminent hearing is concerned, a direction should be made that the media should be excluded from attending the proceedings, or any part of them, on the basis that such exercise is necessary in the interests of X as the child concerned in the proceedings: Rule 10.28 (4) (a) (i). Also upon the basis that justice will otherwise be impeded: Rule 10.28 (4) (b).

60. My reasons are essentially based upon the course of the proceedings leading to the grant of the *contra mundum* injunction by the Judge (see paras 7-9 above) the nature, context and purpose of the judgment following the fact finding hearing (see para 15 above); the description of the matters which it is clear will be dealt with at the imminent hearing (see para 20 above); and the statements of Dr C and Miss E to which I have referred at para 21-23 above.

61. These matters all relate to the interests and welfare of X and constitute a strong case of necessity for the press to be excluded in protection of X's Article 8 rights. Albeit X has received considerable attention from the press in the past the child of famous parents are as a result of press interviews granted by one or other of her parents in the past, there is no suggestion that any of the matters involved in the next hearing regarding her present progress and state of mind are in the public domain or known to any one other than the parents, the CAFCASS officer and Dr C. Nor has it been disputed that X's welfare interests dictate that there should be no derailing of these processes which are crucial to the protection and development of her family life.

62. There is a further matter of concern. While there are no transitional provisions in Rule 10.28, and it makes no distinction between the right of the media to attend in respect of proceedings commenced and underway prior to the Rule coming into force and those commenced thereafter, the fact is that matters have to date proceeded on the basis of the privacy of the proceedings and the confidentiality of X's exchanges and interactions with Dr C and Miss E, as to which X has received assurances too late to be qualified or withdrawn if she is to remain engaged in Dr C's work (see para 22 above).

63. The matter last mentioned also raises concerns and inhibitions on the part of Dr C and Mrs E of the type anticipated in para 5.4 of the Practice Direction which gives by way of an example of circumstances justifying exclusion that a witness (other than a party) states for credible reasons that he or she will not give evidence in front of media representatives, or where there appears to the Court to be a significant risk that a witness will not give full or frank evidence in the presence of media representatives.

64. I note that Munby J in his recent decision in *Spencer v Spencer* No. FD06D04962, 23 June 2009, (an ancillary relief case not involving the welfare or interests of children), observed that, if a proper case for excluding the media is demonstrated on such a ground, the appropriate form of order is, in principle, an order requiring the media to remove themselves while that particular evidence is being given,

rather than an order excluding them altogether. Whilst I would agree in general with that observation, I would not accept its universal application. This case is a very good example of a situation where, in the circumstances already explained, the evidence of such witnesses is likely to be the only "live" evidence before the Court at the next hearing and the matters to be dealt with are all matters of high sensitivity and importance to the welfare of X.

65. While it is true that an exclusion order will deprive the media of their strong *prima facie* to attend the proceedings, they will not thereby be deprived of attending a case in which the issues raised matters of public interest or of particular importance from the point of view of the watchdog role of the press. It has been argued by Mr Millar QC for the media that the interests of X can be sufficiently catered for by the protections as to identity and on reporting imposed by the current statutory regime. I do not consider that is so for a number of reasons. The first is that which I have already articulated, namely that the intrusion of the press into the proceedings in relation to this particular child and the particular matters investigated in Court would constitute a betrayal of the trust already built up between X and Dr C and Mrs E and would present a grave danger to a successful outcome for the welfare and family issues on the case.

66. Finally, this case is one in which there is a very high degree of interest on the part of the English media and an even greater interest in the media of a particular country who have already been active in approaching the parties for comment on the proceedings, on one occasion by the press, and on another by the presence of a foreign television crew outside the Court. The reason for the Judge's granting of the *contra mundum* order was the presence of press photographers outside the Court throughout the hearing. Shortly after the grant of the injunction, a foreign magazine published an article identifying the parents and speculating upon the outcome of the proceedings. Upon the day the matter was transferred to me by the Judge, a member of the press of that country was taking photographs in the Court corridors and of the door of the Court. Upon appearing before the Judge, she said that she was intending to publish the pictures to illustrate a report of the proceedings in a foreign magazine.

67. In these circumstances, and with this level of curiosity, as it seems to me, if the press are admitted to the proceedings at this stage at least, there is inevitably a danger of details of the case as explored and discussed in Court leading to a wider audience and, in the case of the foreign media, being published in a country beyond the reach of this Court so far as proceedings for contempt of court are concerned. If this happens, there is an obvious danger that the contents of the article may come to the attention of X via her own access to the internet or via her friends.

68. In all the circumstances, I am satisfied it is necessary to exclude the media from the imminent hearing before the Judge on the grounds set out in paras 4 (a) (i) and 4 (b) of Rule 10.28.

69. As already indicated, the application of the parties for exclusion of the media is not limited to the next hearing but extends to the final hearing fixed for November. I am not prepared to make such an order at this stage because it seems

to me that it is possible (though unlikely) that circumstances change as between the parties and/or in respect of the position of X so as to bring into play wider issues than at present, which might call for a reconsideration of the question of press attendance.

70. I can, however, indicate my clear view that, absent any unexpected change in circumstances, and on the assumption that the final hearing will not involve substantially different issues, but will simply involve further consideration of the progress of the work undertaken with X and the development of her relationship with her parents, then the exclusion of the press will continue to be appropriate for the reasons already given. However, the Judge should reconsider the matter prior to the final hearing, whether upon her own motion or on the basis of written representations from the parties and/or the media to be forwarded to the Court not less than five days before the hearing. At that stage, it may well be that the Judge will consider it appropriate to hear further argument on the basis that she will deliver an anonymised judgment following the final hearing, in terms appropriate to enable the media to comment in an informed manner upon the process and outcome of the proceedings.

The *Contra Mundum* Injunction

71. It is the submission of the media, that there should be no restrictions in this case which go beyond the extensive reporting restrictions already provided by s.12 of the 1960 Act and s.97 (2) of the Children Act. I propose to deal with that question quite shortly because, subject to certain prior comments upon the form of the injunction, I am satisfied that it remains necessary for the protection of X, at least so long as these proceedings last, given the matters spoken to by Dr C and Mrs E.

72. In broad terms, paragraphs [3] and [4] of the injunction are in a well known form in terms which, in combination, do no more than put into effect the provisions of s.97(2) of the *Children Act* which prohibits publication of any material "intended, *or likely*, to identify … any child as being involved" in the proceedings. It is a provision designed to prevent the harassment of children while the proceedings continue: see *Clayton v Clayton* [2007] 1 FLR 11 at para [49]. So far as paragraphs [3] and [4] of the injunction are concerned, they appear to me no more than an itemisation of the measures necessary to procure the anonymity of X under s.97(2), save that they potentially extend beyond the end of the proceedings. (i.e. "until [X's] 18th birthday or further order"). This can readily be cured by a change "until the end of the proceedings or further order".

73. The paragraph which plainly does depend upon an assertion of the Article 8 rights of the child rather than upon any statutory protection available is paragraph [6] prohibiting the solicitation of information from X, her school staff, fellow pupils etc, from any carer or from her parents. This is similarly designed to prevent harassment of the child by representatives of the media seeking to acquire, with a view to publication information about X not already in the public domain. In the light of the evidence of Dr C and Mrs E, such approaches and/or publication of such information would plainly cause distress to the child, be corrosive of her current regime and would be likely to cause her to perceive herself as having been placed in the limelight by one or other of her parents in an unwelcome manner.

74. In the course of argument before me, Mr Millar QC at no stage felt able to suggest that paragraph [6] of the injunction imposed a fetter upon the media in respect of any purpose which they might legitimately wish to pursue. Indeed, Mr Millar recited and relied upon the terms of the Press Complaints Commission Editor's Code of Practice which variously provides that "editors must not use the fame, notoriety or position of a parent or guardian as the sole justification for publishing details of a child's private life"; "Pupils must not be approached or photographed at school without the permission of the school authorities"; and "In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of the child". That being so, I do not regard the provisions of paragraph [6] of the injunction as constituting an oppressive or unjustified fetter upon the Article 10 rights of the media, whereas I do regard its provisions as an essential part of the protection to be afforded within the circumstances of this particular child in the course of these particular proceedings.

75. The second issue raised by the media for consideration in relation to the granting of the injunction is the significance and consequences of the parties' and/or the Judge's failure to comply with the provisions of the President's Direction dated 18 March 2005. Mr Millar also complains that there was a failure to respect the provisions of s.12 (2) of the *Human Rights Act*. So far as the Practice Direction is concerned, there is now available to the media and the Court a copy of the skeleton argument presented to the Judge in support of the application for the judgment and extracts from the transcript of the proceedings on that day which show that the Judge retired to read the skeleton argument and came back into Court confirming that she was satisfied as to the correctness of its contents.

76. Unfortunately, while the Judge was fully and properly referred to the terms of s.12 (3) of the HRA ("No such relief is to be granted so as to restrain publication before trial unless the Court is satisfied that the applicant is likely to establish that publication shall not be allowed") and s.12 (4) which requires the Court to have particular regard to the importance of the Convention right to freedom of expression, she was not referred to paragraph 12 (2) which states that, if the person against whom the application for relief is made is neither present or represented, no relief shall be granted unless the Court is satisfied that the applicant has taken all practical steps to notify such person or that there are compelling reasons why such person should not be notified.

77. Surprisingly, as I have already pointed out at paragraphs 11 to 13 above, the Judge was not referred to the President's Direction of 18 March 2005 of which the Judge also was apparently unaware. Accordingly, while it appears that there was a full consideration by the Judge of the substantive matters to be taken into account, of the importance attached to the Convention right to freedom of expression by the HRA and of the requirement that the Judge should be satisfied that the applicant is likely to establish that publication should not be allowed, the Judge did not have drawn to her attention the need for the appellant to establish either that all practicable steps had been taken to notify the media (which was plainly not the case) or that there were compelling reasons why the respondent should not be notified. The reasons advanced were that the information in the proceedings had not been the subject to any publicity and that there was nothing about it in the

public domain, it not yet having been mentioned in the media. It was therefore feared by the parties that notification in the case would only serve to draw the media's attention to it. That can scarcely constitute a compelling reason in this context. For similar reasons it was requested of the Judge that it should be sufficient to serve a copy of the order made upon the media rather than any other documents accompanying the application including the skeleton argument. It was simply stated that once the draft order was served, any party wishing to vary its terms could do so at any time by giving 48 hours notice and that anyone genuinely wishing to vary or discharge the injunction (as opposed to being curious about what was being said within the proceedings) would be provided with appropriate material. The Judge having acceded to this reasoning, the media were thus deprived of an opportunity which is plainly contemplated by s.12 (2) of the *Human Rights Act 1998* and by the President's Direction of 18 March 2005, to argue against the grant of the injunction before it was made.

78. It seems to me highly likely, that had application been made to the Urgent Applications Judge of the Family Division, a without notice order with liberty to apply might well have been made in view of the general press presence and interest outside the Court to which I have already referred. However, if the matter had been dealt with ex parte and on an expedited basis, without the benefit of an explanatory witness statement, the Court would have been likely to require the parties to file a statement at the earliest opportunity setting out the information placed orally before the Court: see the Official Solicitor/CAFCASS Practice Note dated 18 March 2005 which the President's Direction states should be followed.

79. The upshot of all this was that the media were also deprived of the opportunity to see any informative material upon which to base any decision they might take to seek an application to vary or discharge the order. This is not a position which should occur again. Practice Directions issued for the purpose of giving important procedural protections to the media should be observed. Where injunctions founded upon Convention rights are contemplated, applicants must bear in mind the provisions of section 12(2) which the procedure provided for in the President's direction is designed to support. If (as does not appear to have been the case here) it is not possible to draft explanatory documentation in the time available before the hearing, the Court should require the applicant to file it at the earliest opportunity and to make it available on request to any person who is affected by the order: see para 3 of the Official Solicitor's Practice Note.

80. Despite these deficiencies in the procedure, however, on the basis of the material now before me, I am satisfied that the terms of the order should continue to govern the position until the end of the proceedings subject to any observations of the parties on its final form. At that stage the Judge should consider the case for a continuation of the injunction on Convention grounds, given that the provisions s.97 (2) of the *Children Act* will then becoming ineffective to give protection in relation to identification: see *Clayton v Clayton* at paras [54] and [78].

Procedural Issues

81. The important procedural question which these proceedings have highlighted and upon which guidance is also sought by the media is the question by what

machinery may the media, for the purposes of their submissions as to their proposed exclusion, be apprised of the materials upon which an applicant bases his application to exclude, when the protection of the confidentiality and/or sensitivity of the details contained within those materials constitutes the very reason for the application to exclude.

82. In the course of their submissions, Mr Millar QC for the media and Mr Wolanski as *amicus curiae* pointed out that the machinery is available in the methodology and procedure set out in the President's Direction of 18 March 2005 relating to Reporting Restrictions, coupled with the further guidance in the Official Solicitor/ CAFCASS Procedural Note of the same date. Its terms are readily applicable to the case where an applicant intends at the outset of the proceedings to seek from the Judge an order excluding the press altogether (see para 2 of the Practice Note).

83. Following completion of the parties' submissions, I have received a communication from the Press Association Injunction Alert Service confirming that the Press Association is willing for its CopyDirect service to be used for the purposes of notification to the media on the basis that such notification is supported by the same documentation as is provided for in the Practice Note of 18 March 2005. This seems to me to be a welcome development which I propose to adopt.

84. As previously noted, the Practice Note provides for service of a witness statement justifying the need for an order which may be, and frequently is, a statement by the parties' solicitor. This may or may not exhibit documents or opinions referred to in the statement which support the grounds of justification advanced. Where, as here, the grounds are based upon the confidentiality and sensitivity of material contained in medical and social work reports which will be deployed and referred to in the course of the proceedings from which it is sought to exclude the media, it would obviously defeat the object of the application for those reports to be supplied or that detailed contents be revealed in advance. In those circumstances it is sufficient for the justifying statement, without revealing the *detail* of the sensitive or confidential matter, to outline and make clear the *nature* of the matters and issues covered in such reports in a manner sufficient to enable the media to make an informed decision as to whether they wish to attend the hearing of the application and/or the proceedings to which it relates (cf paragraph 4 of the Practice Note). I would add that where the reports or other documents containing sensitive matters are already in the possession of the applicant's solicitors, they should be brought to the hearing of the application in a convenient bundle to enable the Judge to refer to such documents as seem to him necessary for the purposes of his decision. Such a procedure is fully in accordance with the principles discussed and applied by Lord Mustill in *Re D (Minors) Adoption Reports: Confidentiality)* [1996] AC 593 and it is a procedure sufficient to make disclosure to the media of the case they have to meet where application is made to exclude them from the proceedings altogether.

85. This procedure is not one required by the Practice Direction of 20 April 2009 made by me and approved on behalf of the Lord Chancellor in conjunction with the Rule change. Paragraph 6 of the Practice Direction contemplates and provides for a system whereby applications to exclude media representatives should be

dealt with as and when the occasion arises in the course of the proceedings by way of oral representations. It does not require prior notification to media interests unless the Court so directs (see para 6.4). All that is required of a party who intends to apply for the exclusion of the media is that, where practicable, advanced notice should be given to the Court and the other parties, including any childrens' guardian (para 6.3), and that, when an application has been made to the Court and is "pending" the applicant must where possible notify the relevant media organisations (para 6.4)

86. The terms of the Practice Direction are conditioned by the anticipation that, up and down the country and at all levels of Court, applications under the provisions of Rule 10.28 (4) may arise in cases being heard daily and should in their ordinary way simply be dealt with on the spot, subject to the provisions of para 6.4 in respect of pending applications. A general mandatory requirement to go through the processes provided for in the President's Direction and CAFCASS Practice Note of 18 March 2005 would introduce unacceptable interruption and delays into court processes already hard pressed by the rising volume of work nationwide.

87. In the light of the media interest to be anticipated in cases involving the children of "celebrities", whether national or local, I do not consider the provisions of paragraph 6.4 to be an adequate provision to protect the interests of the press and I am of the view that it requires to be reconsidered. Meanwhile, although the Practice Direction does not expressly so provide, I consider that it is incumbent upon an applicant who wishes to exclude the media from a substantive hearing *ab initio* to raise the matter with the Court prior to the hearing for consideration of the need to notify the media in advance of the proposed application and that, if this is done, the Court should require the applicant to notify the media via the CopyDirect service in accordance with the procedure provided for in the CAFCASS Practice Note. The Court should at the same time make directions for the hearing of the application whether by way of special appointment or consideration at the outset of the next substantive hearing. It is of course not necessary for the matter to be dealt with by a High Court Judge and it should, wherever possible, be dealt with by the trial judge. In the light of the view I have expressed, I consider that para 6.4 of the Practice Direction of 20 April 2009 should be read as if there were added at the end of the final sentence in that paragraph the words "and should do so by means of the Press Association CopyDirect service, following the procedure set out in the Official Solicitor/CAFCASS Practice Note dated 18 March 2005".

88. It has been suggested on behalf of the media that a similar procedure is necessary or appropriate even in respect of cases where, although the parties do not challenge the right of the media to attend the proceedings from the outset, they seek during the course of the proceedings the temporary exclusion of the media in relation to the evidence of a particular witness or witnesses. I do not think that is either practical or necessary. There are likely to be frequent occasions when, either on the application of a party or of its own motion the Court considers it necessary, on one of the grounds set out in Rule 10.28 (4) to direct that accredited media representatives temporarily withdraw while certain evidence is given. To require the parties or the Court to institute the processes provided for in the

President's Direction and CAFCASS Practice Note would create undesirable interruptions and produce unacceptable delays in the administration of justice.

89. The decision as to the necessity to require the withdrawal of such representatives from the courtroom on a temporary basis will call for careful but robust decision making by the Judge who has the task of hearing the proceedings and completing them so far as practicable in the limited time available for the hearing of the case. Whilst the Judge is required to engage in a balancing exercise as between the Article 10 rights of the press and the Article 8 rights of the child, and the jurisprudence describes the exercise to be performed in fairly elaborate terms, the factors to be weighed in the balance as applied to the particular circumstances of the case will be well in the trial Judge's mind. It will not be a difficult task for the Judge to articulate them shortly to any media representative present, inviting him/her to comment and/or make representations before the Judge gives brief reasons for his/her decision (see para 5.5 of the Practice Direction of 20 April 2009).