

Neutral Citation Number: [2016] EWHC 2414 (Fam)

Case No. FD16P00388

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 September 2016

Before :

ALEX VERDAN QC
(Siting as a High Court Judge)

RE: ALCOTT (2)

Approved Judgment **ALEX VERDAN QC:**

Introduction

1. In this case I am concerned with one child: a boy born on 10.10.13 and so aged almost 3. For the purposes of this judgment I will identify him as D.
2. His mother is Katy Ashworth. His father is Ben Alcott.
3. The substantive application is the father's dated 21.07.16 is for the summary return of D to Australia, pursuant to the Hague Convention 1980.
4. I have determined that application and given a separate judgment. This judgment needs to be read in conjunction with that one.
5. The case was listed for final hearing on 21-22 September 2016.

Media involvement

6. The case attracted a significant interest in the media. Before the hearing commenced articles appeared in this jurisdiction in The Times, Daily Mail and The Sun. In these the parties' identities were not revealed. However an article also appeared in the Daily Telegraph of Sydney, together with an accompanying photograph, in which the parties and D were named. It is difficult to understand how that newspaper obtained the details for that story, which is written very much from the father's perspective and obtained the photograph without the father's cooperation and Miss Renton on his behalf was unable to provide the court with any clarity on this point. I was told that the details of the case, by link to the

Australian article, are available by using Google UK but only with a search of the names of both the father and mother.

7. Various journalists therefore attended the morning of the first day of the hearing. I heard in particular from Mr Famer from the Press Association. I confirmed that the press were able to report the fact that the proceedings were being heard and repeat the details that had already appeared in the media in this jurisdiction but should not identify the parties and D.
8. Mr Callus (counsel) attended on the afternoon of day one representing News Group Newspapers Ltd (“NGN”) to:
 - a. Clarify that there was no automatic statutory reporting restriction preventing the identification of the father and mother as parties to the proceedings;
 - b. Seek (on behalf of NGN but not the Times) to lift the prohibition on reporting the evidence given at a private hearing which would otherwise engage section 12 of the Administration of Justice Act 1960 (“AJA”); and
 - c. Apply for the publication of the any judgment in these proceedings.
9. I adjourned these applications to the following morning as I wished to conclude the oral evidence of the parties on day one. I took the media to have agreed not to report the identities of the parties until that hearing had taken place and I am grateful to them for their cooperation.

Parties’ positions

10. The parties and Mr Callus subsequently lodged skeleton arguments to deal with the media applications, which I have read. By this point Mr Callus also represented Times Newspapers Limited (“the Times”).
11. I was concerned that D’s interests were not properly represented by his parents, each of whom had their own respective positions which did not necessarily focus on D and so on the morning of day two I invited Cafcass Legal to attend court to advocate on D’s behalf. I am very grateful to Mr Ford who was able to do this at 2pm when I heard submissions from all the parties.
12. Mr Callus submitted that the public interest in these proceedings amply justifies that his clients should be allowed to report beyond the information already in the public domain, including on behalf of NGN the evidence heard in private and on behalf of NGN and The Times that the judgment should be made public and the parties identified. He relies on the following factors which he submits distinguishes this case from others:
 - a. The mother is an actress and television celebrity and a public figure in this country;
 - b. The mother has given numerous interviews about her professional role and

motherhood in which D has been named;

- c. D is part of M's brand;
 - d. D is frequently named on the mother's Twitter account;
 - e. The allegation of wrongful removal from Australia is a serious one;
 - f. There is a high public interest in reporting such legal proceedings;
 - g. Justice should be administered in the open;
 - h. D is very young and unlikely to be distressed by short term media attention and also can be easily insulated by his parents from media coverage;
 - i. The more reasonable media outlets will respect D's privacy;
 - j. Much material is already in the public domain albeit written mainly from the perspective of one party and so lacking balance.
13. The father through Miss Renton opposed any reporting of the evidence. Miss Renton makes the point that presence of the Australian article does not justify wider reporting of the evidence as the evidence goes much further in terms of the details about the parties' private lives than what has been reported to date. In addition, she states that the Australian article is relatively difficult to find as it requires a Google search of both the parties names at the same time and so the story is relatively buried online. In her oral submissions Miss Renton clarified that the father does not seek orders to prevent the publication of the parents' identities or oppose in principle the publication of the judgment.
14. The mother through Mr Devereux submitted that she would prefer no publicity given the case concerns matters which are deeply private but given the reporting to date and the current misinformation and lack of balance, she did not seek a reporting restriction order and accepts that the parties' own identities will be revealed in any judgment. However the mother opposes any reporting of the parties' evidence. Mr Devereux submits that the balancing exercise in this respect comes down in favour of Article 8 given the very personal nature of the evidence which focused on the private lives of the parties and the limited public interest in knowing these details as opposed to knowing the outcome of the case.
15. The parties' advocates wished to see my judgment in respect of the father's application before making any final submissions in respect of the media's applications and they were given that opportunity.
16. For the purposes of this application and with the agreement of all parties, I joined D to these proceedings. Mr Ford's position was that it is likely to be contrary to D's best interests and harmful to his emotional welfare if in a few years time he is able to find online references to these very personal matters relating to his parents' private lives. He therefore opposed any reporting of the evidence. However he did not seek on D's behalf any privacy

injunction.

17. At the end of the hearing I indicated I would reserve judgment but hoped to deliver it within one week. In order to prevent identification of the parties and D pending my judgment and so to avoid a substantial risk of prejudice to the administration of justice in these proceedings I made an order pursuant to section 4(2) of the Contempt of Court Act 1981 postponing publication of a report of these proceedings (including information likely to identify the parties) until handing down of this judgment or further order; save for allowing publication of the fact of the hearing; the details already published in this jurisdiction; the decision itself and the names of the legal representatives.

Law

18. The parties agree the applicable law and I have been referred to the relevant Convention, statutes and authorities including:
- a. Articles 8 and 10 of the European Convention of Human Rights 1950 (ECHR);
 - b. AJA 1960 section 12;
 - c. Section 12 (4) of the Human Rights Act 1998;
 - d. Children and Young Persons Act 1933 Section 39 (CYPA);
 - e. Re B [2004] 2 FLR 142;
 - f. Re J [2014] 1 FLR 523;
 - g. Re S [2004] UKHL 47;
 - h. Ciccone v Ritchie v Ritchie (No 2) [2016] EWHC 616;
 - i. Birmingham CC v Riaz [2014] EWHC 4247;
 - j. OPO v MLA [2014] EWCA Civ 1277; and
 - k. The President's Practice Direction Guidance dated 16.01.14: Transparency in the Family Courts: Publication of Judgments.
19. On the facts of this case Articles 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms 1950 are engaged.

Article 8

Right to respect for private and family life

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.

Article 10

Freedom of expression

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.

20. I take into account section 12 (4) of the Human Rights Act 1998 provides that:

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appear to the court, to be journalistic, literary or artistic material (or to conduct connected with such material) to (a) the extent to which (i) the material has, or is about to, become available to the public, or (ii) it is, or would be, in the public interest for the material to be published, [and] (b) any relevant privacy code.

21. Miss Renton questioned whether section 12 of the AJA 1960 applied to Hague Convention proceedings given that it does not specifically refer to them. All counsel agreed that there was no case-law expressly considering this point.

22. However all the parties in effect accepted that the court could invoke the inherent jurisdiction so as to trigger subsection (1)(a)(i), which is what I will do. There is no need for a formal application to be issued for me to do that.

23. All the parties also agree that as these are not Children Act 1989 proceedings, the provisions of section 97 of that statute, which provides for privacy for children involved in such proceedings, do not apply.

24. In determining the applications the parties agree that the court must apply the so called 'ultimate balancing exercise' between the competing Articles, weighing up the Article 8 right

of a party to private and family life against the Article 10 right of the media and their readership to freedom of expression.

25. Mr Callus reminded the court of Lord Steyn's four propositions to be taken into account when carrying out the balancing exercise, referred to *Re S* [2004] UKHL 47 at paragraph 17, namely:
- i. neither article has *as such* precedence over the other;
 - ii. 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;
 - iii. the justifications for interfering with or restricting each right must be taken into account;
 - iv. the proportionality test must be applied to each.
26. In addition, I take into account that within this balancing exercise that D's best interest are not a paramount consideration but are a primary one. They must be considered first but can be outweighed.
27. Finally, section 39 CYPA 1933 as amended allows the court to prohibit the publication of a child's name in relation to any proceedings; such publication to include by the traditional paper press and by online media. All the parties agree that the court is able to make such an order and all save the media submit that such an order should be made. Mr Callus however does not oppose such an order.

Discussion

28. I have reached the clear conclusion that the restriction imposed by section 12 should not be lifted to allow for the reporting of the parties' evidence. This was a highly unusual part of the application and none of the advocates were able to provide me with any authority where the restriction has previously been lifted. Mr Callus also accepted that if my judgment was published which identified the parties and provided sufficient detail to explain the outcome and satisfy the legitimate public interest, the corresponding public interest in seeing a report of the evidence was much diminished. He accepted the two applications were linked. Moreover, on the facts of this case, I am completely satisfied that there is no legitimate public interest in a report of the evidence which would be a significant interference with the parties right to respect for private and family life and pose a risk of harm to D's welfare if it was reported given that the evidence included full details about his parents' private lives, in

particular the allegations of the father's infidelities. The real public interest in knowing about the detail of these matters is minimal; on the contrary the interest would be inappropriately inquisitive, prying, prurient and voyeuristic. My judgment comes down firmly in favour of Article 8 and so I refuse the application to report the evidence.

29. As for publishing a judgment and identifying the parties within it I am persuaded, on the unusual and specific facts of this case, by Mr Callus' arguments as summarized at paragraph 12 above. I accept that once the proceedings are over there is no bar on the parties being named in the absence of the court making a reporting restriction order and in this case none of the parties applies for such an order.
30. I appreciate that naming the parties in my judgment leads indirectly to the further identification of D. I accept that currently, given his young age, he can be protected by his parents from exposure to any such publicity. I accept that in years to come he may, as a result of the press reporting this case and his parents being named, learn more about the history of the case and some personal details of his parents' private lives and he may suffer harm as a result. However there is also a chance, despite the digital footprint left by this news that in years to come such details will be less accessible. The court has to look at the likelihood of this harm and evaluate how serious the risk is but these are not the only factor to take into account and do not take precedence and in my judgment on the facts of this case are outweighed. My assessment is that the likelihood of harm and risks are relatively low given the contents of my judgment, which is carefully crafted to avoid the sensationalist detail. The reality also is that identification of D is already possible given the press reports today in particular the Australian article and the resulting Google searches and although this is not a determinative factor it is an important one.
31. In the above circumstances the judgment I have given in respect of the father's application will name the parents but will not name D.
32. I will also make a section 39 order prohibiting the publication of D's name during his minority which will provide him with some protection. As already stated all the parties agree to this save for the media who do not oppose it.

AVQC

29.09.16