Neutral Citation Number: [2006] EWCA Civ 878

Case No: B4/2005/2321 & 2322

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION
CARDIFF DISTRICT REGISTRY
Mr Justice Hedley
ZM04P00019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2006

Before:

THE PRESIDENT
LADY JUSTICE ARDEN DBE
and
LORD JUSTICE WALL

- -

Between:

Clayton
V
Clayton

- -
- -

Mr James Price QC and Mr Adam Wolanski (instructed by Lyons Davidson Solicitors) for the **Appellant**
Mr Brian Jubb (instructed by **CAFCASS Legal**) as **Advocate to the Court**

Hearing date: 28 February 2006

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Approved Judgment

Sir Mark Potter, P :

Introduction:

1. This is an appeal, brought by permission of Wall LJ, against orders of Hedley J made in the course of Children Act proceedings and dated 9 November 2004 and 11 August 2005. Those proceedings concerned the upbringing of C, the only daughter of the appellant father and the respondent mother who was born on 28 December 1998 and is now aged 7. The proceedings were concluded on agreed terms recorded in the order of 11 August 2005. The father's appeal relates to an injunction granted by Hedley J as part of that order, by which the judge continued an injunction (opposed by the father) earlier granted in the course of the proceedings on 9 November 2004 restraining the father from publishing various matters concerning C. The injunction was stated to be effective until C's eighteenth birthday in 2016.

Background:

2. The parties were married in 1997. They separated in spring 2000 and thereafter shared the care of C. In September 2002 the mother commenced proceedings for contact and residence orders in respect of C. During those proceedings, and before they could be resolved at a hearing, the father abducted C, removing her from the jurisdiction to Portugal without the knowledge or consent of the mother, travelling and living there in a camper van and concealing their whereabouts. The case attracted considerable publicity including regional and national television coverage when, on the advice of the police, the mother and the local police made a public appeal for information concerning the whereabouts of the father and C. After an absence of some 5½ weeks, the appellant was arrested and imprisoned in Portugal where he remained for some 2 months. On his return to England he was remanded in custody and sentenced to 9 months imprisonment on a plea of guilty to child abduction. He was released after serving 6 months of that sentence in December 2003. A half hour BBC documentary covering the events called "Simon says" was broadcast in January 2004.

3. Some 4 months after his release from prison, the father was able to resume contact with C by order of the court in the Children Act proceedings.

4. In November 1994 the mother received a copy of an e-mail sent by the father to a BBC reporter on 15 October 2004 indicating the intention of the father, (1) based on the experience of his own case and in the proceedings to date, to publicise and discuss delays in obtaining Legal Aid and the whole care proceedings process and criticisms of the services of CAFCASS; (2) to revisit Portugal in the near future to make a video diary retracing his steps with C during their time together in Portugal ending in his imprisonment, for which purpose he was requesting supply of a camera with a view to his supplying any " good footage" to the media.

5. At that time, the Children Act proceedings were standing adjourned part-heard from 6 October 2004, with the hearing due to resume on 10 November 2004 in the Merthyr Tydfil County Court. However, upon application by the mother for an injunction to restrain the father in terms which appear below, her application was directed to be heard before Hedley J then sitting at Chester.

6. The father did not attend the hearing, explaining by letter to the judge that he felt obliged to prepare for the resumed hearing of the Children Act proceedings on the next day. However, on the basis of the mother's counsel's submissions that the e-mail indicated that the father was contemplating publication of the details of his case and of information in respect of C's upbringing and care while the proceedings were still current, and that his likely disclosures would include matters live before the County Court in dealing with the residence and contact applications, Hedley J made an order restraining the father until C's 18th birthday or until further notice:

> "[2]… from discussing or otherwise communicating (otherwise than for ordinary domestic and social purposes) any matter relating to the education, maintenance, financial circumstances or family circumstances (including any proceedings before any court) of …. [C]… ("the child") other than with:
>
> (a) any legal adviser whom he may consult or instruct;
>
> (b) the other parties;
>
> (c) the medical and educational advisers of the child;
>
> (d) any person to whom information is communicated for the purpose of enabling the person to exercise any function in relation to the child which is authorised by Statute or by a court of competent jurisdiction; and
>
> (e) any other person the court may permit;"

7. The order went on to state:

> "[3] Nothing in this Order shall of itself prevent … [the father].. from:
>
> (a) discussing, communicating or publishing any matter relating to any part of the proceedings before any court other than a court sitting in private; and
>
> (b) discussing or communicating or publishing ("disclosing") anything which at the date of the disclosure by that person has been disclosed (whether inside or outside 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 the information is in the public domain (other than in a case where the only disclosure was made by that person)."

Liberty to apply on 48 hours' notice was granted to the parties or any person affected by the order.

8. The father did not take advantage of the liberty to apply expressly granted by the judge. However, in July 2005, after a contested hearing before the District Judge, the

proceedings were transferred for final disposition to the High Court, where it returned before Hedley J. The father was in person, the mother was represented by leading counsel Mr Anthony Kirk QC, and C was separately represented by counsel through NYAS, who acted as C's Guardian. Agreement was reached as to the disposal of the Children Act proceedings without the necessity for a hearing. After lengthy negotiations, in respect of which the father paid a warm and unsolicited tribute to Mr Kirk for the way in which such negotiations had been facilitated, both parents effectively consented to the discharge of all previous orders and the subsequent withdrawal of all applications for orders under the Children Act on the basis of the concept of a "shared care" arrangement which acknowledged the importance to the child of a number of matters set out in the second schedule to the order. Hedley J was approving of the approach adopted by the parents in the case to the extent that he adjourned the case into open court for judgment in anonymised form, so that publicity could be given to that approach and the terms of the "shared care" arrangements, in the hope that it might recommend itself to others as a basis for discussion and negotiation. For this purpose he incorporated into his judgment the shared care arrangements and the matters set out in the second schedule in anonymised form. So far as I am aware, Hedley J's judgment has not, to date, been reported.

9. However, the parties were not agreed on the question of the continuation or discharge of the injunction earlier granted in the terms set out above and, indeed, prior to the hearing, the father had given notice of application to discharge it. The father wanted the injunction lifted in its totality; C's guardian wanted it to continue in its totality, whilst the mother was agreeable to some publicity for the order provided that the child was not identified. Counsel for the NYAS Guardian considered that, in the light of the contrary arguments, the application to discharge the injunction should be adjourned on appropriate directions. The father indicated his disagreement. The judge made clear that he would hear the father and, if evidence were required, he would not deal with the matter that day. In the event he did not require further evidence.

The Judgment of Hedley J

10. Hedley J dealt with the matter succinctly in a written judgment dated 26 July 2005

> "7… [the father] essentially advanced two reasons for discharge: first, that he lived in a small community where this story was well-known and indeed it had received some national publicity and he wished to be able to say how it had ended; and secondly, that [the father] was also engaged on behalf of other fathers who wished to be able to show others the order and to commend the approach that had given rise to it.
>
> 8. The Guardian shared [the mother's] concern that the child should not be identified but advanced the view that in this case that could only be achieved by continuation of the injunction. In this case the rights of free speech under Article 10 and the rights to private life under Article 8 are all engaged and cannot each be wholly accommodated. I am particularly sympathetic to concerns that this order and the approach upon which it is based should be available widely and to concerns that this

> child's identity should be safeguarded so that the child can have peace. That peace should not be the price of A's freedom of speech. I was referred briefly to authority including *S (Identification: Restrictions on Publication)* [2005] IFLR 591 HL. In my view the relevant factors are adequately set out above so as to enable the court to strike a fair balance.
>
> 9. I am satisfied that the need to ensure that C has peace and freedom from publicity should outweigh A's right to freedom of speech. That approach broadly reflects the policy of section 97 of the Children Act 1989. However, I believe that I can give adequate expression to my sympathies to A's position by giving this judgment in open court provided the anonymisation is strictly adhered to. A is at liberty to use it as he wishes in that open court proceedings are exempted from the injunction itself – provided that is not used in such a way as which would reasonably lead to the child's identification."

11. Accordingly, the judge ordered that the terms of the injunction made on 9 November 2004 continue

> "until either [C] should attain the age of 18 years, or sooner order of the court".

12. Following the preamble, the order read as follows:

> "AND UPON the mother and father mutually undertaking not to remove (or seek to remove) C from the jurisdiction of England & Wales (whether by themselves or howsoever otherwise) without first having obtained:
>
> (i) the permission of the court; or
>
> (ii) the written consent of the other such consent not to be unreasonably withheld;
>
> And Upon the mother and the father mutually endorsing "Shared Parenting Plan for C" as set out in the First Schedule to this [order] and acknowledging the importance from C's point of view those matters set out in the Second Schedule to this order
>
> the court orders that
>
> 1. all previous orders made in respect of C under Section 8 of the Children Act 1989 both within these proceedings and proceedings in the Brecon Family Proceedings (distinctive title numbers FPC 032/2002/B and 1941058) are discharged;
>
> 2. the mother and father have permission to withdraw their respective applications for residence, contact and prohibited steps orders in respect of C, having reached the agreements set

out in the preamble to this order and as recorded in the First and Second Schedules annexed hereto;

3. the order by way of injunction made herein on the 9 November 2004 do continue until either C shall obtain the age of 18 years or sooner order of the court"

The preamble to the order was headed "By Consent". However, it is not in dispute that those words do not apply to paragraph 3 of the order, confirmation of the injunction having been objected to by the father.

Position of the Appellant Father:

13. As already indicated, the father now states that he wishes to be at liberty to discuss and publicise this case as exemplifying a number of limitations and defects which beset the family justice system. He submits that the restrictions on publicity and reporting on cases relating to children whether under statute or the inherent jurisdiction of the court are based upon the potential harm and embarrassment to the child which is likely to ensue from knowledge or discussion taking place outside the family circle in relation to disputes which are distressing to the parties and, above all, the child. However, it is of the utmost importance, that in cases where no substantial potential harm or embarrassment can be demonstrated, injunctions should not be granted which may inhibit discussion or publicity in relation to matters of general concern, including the processes surrounding the resolution of disputes in relation to children. Nor should they inhibit the ability of one of the parties who has received adverse attention in the media or been the subject of unsubstantiated rumour in the community from publicising his or her point of view by way of correction.

14. The father makes clear his position that he has three interests in securing the lifting of the injunction granted in this case. The first relates to his personal position. He states that he does not wish to say anything damaging or sensitive about C or to denigrate or criticise the mother, which he rightly does not think would be in C's interest. However, his story being well-known in the community in which he lives, he wishes to be free to say how matters have ended.

15. Secondly, he wishes to be at liberty to make a television film, relating his experience, and engaging C by taking her back to Portugal where she witnessed his arrest, and explaining things to her in that respect. He also wishes to write a story one day, for the purposes of illustrating the aspects of the system of which he is critical. He states that he has deep-rooted grievances about how his arrest and imprisonment in Portugal and the subsequent legal proceedings were handled.

16. His third interest is that of a spokesperson in relation to issues surrounding family justice as administered in this country. In doing so he is inhibited from referring to his own experiences. In particular, he is a protagonist for the principle that a child should spend time equally in the homes of both parents, in respect of which he can point to the shared parenting plan eventually agreed in his own case. He also wishes to campaign for equal sharing of tax credits and child and other benefits where there is shared parenting.

17. In short, the father's case is that the injunction prevents him from being as politically active as he would wish, since he believes that effective lobbying, comment or campaigning involves discussion of the human aspects of individual cases and specifically his own. He states that he regards his own case as illustrating both the negative aspects of delay and what he sees as a systemic tendency for parties to fight for court orders rather than drawing up their own solutions, as well as the positive, namely the outcome in his own case after sensitive negotiations too long delayed. He is also critical of the lack of resources and (as he asserts) expertise on the part of CAFCASS which organisation has the primary role in supplying support and advice and reporting to the court, based on the experience of his own case.

The Position of the Respondent Mother

18. The mother, who has for some time had a new partner with whom she lives and to whom she is shortly to be married, is not the beneficiary of Legal Aid and she has not been represented on this appeal. She has, however, made clear her position in a statement dated 23 February 2006 lodged with the court to which she has attached (i) a number of e-mails sent to her by the father in the course of the proceedings (ii) various copy letters sent by her to the father's solicitors (iii) an entry on the father's website (2005 update) and his blog site concerning his life with C, written in 2005 and accompanied by photographs. It is a matter for argument, with which we have not been concerned, whether certain of the contents of (iii) amounts to an infringement of the injunction.

19. The mother makes the following points. First, she makes a number of complaints in relation to the father's conduct prior to, during, and after the abduction which were subject to publicity at the time and to which further reference is unnecessary for the purposes of resolving the issues before this court given the matters exempted from the purview of the injunction.

20. Second, the mother submits that the focus of the father's interest and activities is to achieve public recognition both as a virtuous father and a campaigner in respect of family justice rather than giving real consideration or any precedence to his daughter's welfare. In this respect, there is a degree of support to be obtained from the documents annexed to her statement. She also asserts that, when CAFCASS was involved in the earlier proceedings, the father was constantly concerned with media coverage and making money from writing books. In that respect we have not seen the reports of CAFCASS or the NYAS Guardian. However under the heading "CAMPAIGN" on his website, the father certainly states:

> "After I have sorted out legal matters my prime objective is to write a book to expose many wrongs done to us – some of them quite incredibly, and at the same time offer constructive criticism, so that the Family Justice system may be better reformed. I also want to tell many happy and fabulous tales of my wonderful daughter's life."

21. Third, the mother submits and the documents confirm that prior to the order of Hedley J, for the purpose of reaching agreement on the form of the injunction, requests made as to what precisely the father wished to write or criticise received no straight answer.

22. Finally, the mother expresses her view that C's friends at school have effectively forgotten about the original abduction and upset in C's life and she is treated as a "normal" child, whereas, if her father now publicises the case by participation in television programmes or authorship of a book, this will cause further and unwelcome disturbance in C's life.

Legal restraints upon access, publicity, and disclosure in Children Act proceedings.

23. Although this appeal is concerned with questions of publicity relating to Children Act Proceedings, rather than access by the public to the proceedings themselves, it is helpful to set out the overall legal framework in relation to restrictions on access, publicity, and disclosure in Children Act proceedings. Such restrictions constitute an exception to the general principle that justice is administered in open court, laid down in the seminal decision of *Scott v Scott* [1913] AC 417.

Access

24. So far as access is concerned, the position is, in broad terms, that set out by Dame Elizabeth Butler-Sloss P in *Clibbery v Allan* [2002] Fam 261, [2002] 1FLR 565 in which she summarised the effect of the current procedures in family proceedings as an exception to the general rule as follows at paragraph 43:

> "43… with the exception of Wardship and certain declarations in medical cases heard in the High Court, the jurisdiction of the High Court Family Division and of the County Courts and Family Court jurisdiction, whether public or private, remains based on Statute and regulated by the statutory framework. The hearing of cases is divided into those which are heard in open court and those heard in chambers. The way in which those cases are heard are regulated by Rules and not by custom. In all cases, except adoption which has its separate Adoption Rules 1984, the Family Proceedings Rules 1991 direct the court and the parties to the procedure to be adopted and the way in which the case is to be heard."

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

> "(7) Unless the court otherwise directs, a hearing of, or directions appointment in, proceedings to which this Part [Part IV] applies shall be in chambers."

26. The effect of Rule 4.16(7) is thus to secure privacy for proceedings under the Children Act unless the court orders that the matter be heard in open court rather than chambers. Such orders are rare.

27. The position was clearly summarised by Butler-Sloss LJ in *Re: PB (Hearings in Open Court)*[1996] 2FLR 765 at 769 V-H:

> "Despite the arguments advanced by Dr P, it is abundantly clear that the courts are bound by R 4.16(7) to hear child cases generally in private. That was obviously the intention of the

> Rules Committee and it follows the long-established practice in the hearing of child cases. Subrule (7) allows for all or part of the case to be heard in public. In the light of the long-established practice it is unlikely that the judges will, other than rarely, hear the evidence relating to the welfare of the child in public. The judgment is in a somewhat different position. It may be that the practice of giving judgment in private is partly due to the parties not asking for it to be heard in public and partly because in the County Court, where the vast majority of children cases are heard, it is less likely that there will be issues of public interest. Where issues of public interest do arise it would seem entirely appropriate to give judgment in open court providing, where desirable in the interests of the child, appropriate directions are given to avoid identification. If the case raises issues of principle or law, the judgments are increasingly provided to the law reporters and are published in the large number of law reports which report family cases. For the majority of cases are of no interest to anyone beyond the parties and their families."

28. The position is different in the Court of Appeal. As stated by Butler-Sloss LJ in *Re: PB* at 768 F-G:

> "Appeals in the Court of Appeal are almost invariably heard in public but oral evidence is almost never given and the appeal is conducted on the documents written and oral argument. The documents placed before the Court of Appeal include a transcript or agreed note of the judgment of the court appealed and frequently some or all of the transcript of the proceedings. It is the practice for the Court of Appeal to give a direction for non-identification of the child in child appeals, exercising the High Court's inherent jurisdiction to protect the child."

But see the further observations of Thorpe LJ in *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs Intervening)* [2004] EWCA Civ 845; [2004] 2FLR 823 as quoted below at paragraph 41.

29. The judgment of the Court of Appeal in *Re: PB* was considered by the European Court of Human Rights in *B v United Kingdom*: *P v United Kingdom* (2002) 34 EHRR 529; [2001] 2FLR 261 in which the ECtHR held that the provisions of Rule 4.16(7) were Convention compliant. It stated at paragraph [39]:

> "The applicants submit that the presumption in favour of a private hearing in cases under the Children Act 1989 should be reversed. However, while the court agrees that Art 6(1) states a general rule that civil proceedings, inter alia, should take place in public, it does not find it inconsistent with this provision for a state to designate an entire class of case as an exception to the general rule where considered necessary for the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of

> the parties (see *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, Paras 86-87), although the need for such a measure should always be subject to the court's control (see, for example, *Riepan v Austria* (Case 35115/97) (unreported) 14 November 2000). The English procedural law can therefore be seen as a specific reflection of the general exceptions provided for by Art 6(1).
>
> [40] Furthermore, the English Tribunals have a discretion to hold Children Act 1989 proceedings in public if merited by the special features of the case, and the judge must consider whether or not to exercise his or her discretion in this respect if requested by one of the parties."

Publicity and Disclosure

30. So far as publicity and disclosure are concerned s. 12(1) of the *Administration of Justice Act 1960* ["AJA"] as substituted by Section 108(5) of, and Schedule 13 paragraph 14.2, of the *Children Act 1989* treats children's cases as an exception to the general rule relating to the publication of court proceedings. Section 12 provides that:

> "(1) The publication of information relating to proceedings before any court sitting in private shall not in itself be contempt of court except in the following cases, that is to say:
>
> (a) where the proceedings –
>
> (i) relate to exercise of the inherent jurisdiction of the High Court in respect of minors;
>
> (ii) are brought under the Children Act 1989 or
>
> (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor…
>
> (2) Without prejudice to the foregoing subsection, the publication of the text or summary of the whole or part of an order made by a court sitting in private shall not in itself be contempt of court except where the court (having power to do so) expressly prohibits publication.
>
> (3) …
>
> (4) Nothing in this section shall be construed as implying with any publication is punishable as contempt of court which would not be so punishable apart from the section *and in particular where the publication is not so punishable by reason of being authorised by rules of court.*"

31. The words I have italicised in subsection (4) are those of an amendment made by s.62 of the *Children Act 2004*. The meaning of the word "publication" in s.12 (1) is effectively the same as that in the law of defamation, so that the statutory restrictions

apply to most forms of communication to individuals or wider dissemination through the media.

32. The recently published *Family Proceedings (Amendment No 4) Rules 2005* [S.I 1976 of 2005] which came into force on 31 October 2005 have introduced into Part X of the *Family Proceedings Rules 1991* a new Rule 10.20A which provides for limited exceptions to the blanket rule against disclosure. It reads as follows::

> "Communications of information relating to proceedings
>
> 10.20A
>
> (1) This rule applies to proceedings held in private to which these Rules apply where the proceedings –
>
> (a) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> (b) brought under the Act of 1989; or
>
> (c) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.
>
> (2) For the purposes of the law relating to contempt of court, information relating to the proceedings (whether or not contained in a document filed with the court) may be communicated –
>
> (a) where the court gives permission;
>
> (b) subject to any direction of the court, in accordance with paragraphs (3) or (4) of this rule; or
>
> (c) where the communication is to –
>
> (i) a party,
>
> (ii) the legal representative of the party,
>
> (iii) a professional legal adviser,
>
> (iv) an officer of the service or a Welsh Family Proceedings Officer,
>
> (v) the Welfare Officer,
>
> (vi) the Legal Services Commission,
>
> (vii) an expert whose instruction by a party has been authorised by the court, or
>
> (viii) a professional acting in furtherance of the protection of children.

> (3) A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column."

33. The table referred to is headed "Communication of information without permission of the court". It permits the following pertinent disclosures to be made by a party to, amongst other persons: a lay adviser or McKenzie Friend any information relating to the proceedings; the party's spouse, cohabitant or close family member for the purpose of confidential discussions enabling the party to receive support from his spouse or close family member; a health care professional or body providing counselling services for children or families to enable the party or any child of the party to obtain health care/ counselling; the Children's Commissioner or Children's Commissioner for Wales; a mediator; a person conducting an approved research project; a personal body responsible for investigating or determining complaints in relation to legal representatives or professional advisers; an elected representative or peer to enable them to give advice, investigate any complaint or raise any question of policy or procedure; the GMC for the purposes of making a complaint to the GMC; a police officer for the purposes of a criminal investigation; and a member of the CPS, to enable the CPS to discharge its functions under any enactment.

34. The table also provides that the recipient of the information from the party under its provisions may only communicate that information further for the purposes for which he or she received it or for professional development or training "*providing that any communication does not, or is not likely to, identify any person involved in the proceedings without that person's consent*". (emphasis added)

35. While s.12 AJA is comprehensive in relation to the matters which (with the exceptions mentioned) may be not be publicly disclosed, it does not extend to the naming of the child the subject of the proceedings. A useful practical guide to the ambit of s.12 AJA appears in the form of a working list set out by Munby J in his judgment in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam) [2004] 2 FLR 142 at para [82](v)-(vii); see also para [64]-[65].

Section 97 of the Children Act 1989

36. Section 97 of the *Children Act 1989*, as amended by section 72 of the *Access to Justice Act 1999* and section 62(1) of *Children Act 2004* provides as follows :

> "97. Privacy for children involved in certain proceedings:
>
> (1) Rules made under Section 144 of the Magistrates' 1980 may make provision for a Magistrates' Court to sit in private in proceedings in which any powers under this Act the Adoption and Children Act 2002 may be exercised by the court with respect to any child.
>
> (2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –

> (a) Any child as being involved in proceedings before the High Court, a County Court or a Magistrates' Court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or
>
> (b) An address or school as being that of a child being involved in any such proceedings.
>
> (3) In any proceedings for an offence under this section it shall be a defence for the accused person to prove that he did not know, and had no reason to suspect, the published material was intended, or likely, to identify the child.
>
> (4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.
>
> (5) For the purposes of this section –
>
> "publish" includes –
>
> (a) include in a programme service (within the meaning of the Broadcasting Act 1990); or
>
> (b) caused to be published; and "material" includes any picture or representation.
>
> (6) Any person who contravenes this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 of the standard scale."

37. There has been no detailed judicial consideration of section 97, though it has been referred to in passing in *Kelly v BBC* [2001] Fam 59 at 78f and *HM Attorney General v Pelling* [2005] EWHC 414 (Admin); [2006] 1 FLR 93 at para [28]. It was also briefly mentioned in the form in which the section was originally enacted in the *Children Act 1989* (i.e. as relating only to proceedings in the Magistrates' Court) in *Re: PB* at 768 G-H. Referring to the question of privacy for proceedings in the magistrates' courts, Butler-Sloss LJ said:

> "In the Magistrates' Courts the procedure has varied in the past according to whether the case is before 1991 or public or private cases. Family proceedings now heard in the Magistrates' Courts are bound by s.97 of the Children Act 1989 amending s.69 of the Magistrates' Courts Act 1980 and by r. 16 (7) of the Family Proceedings Courts (Children Act 1989) Rules 1991. In general the public is not admitted to family proceedings in the Magistrates' Court, but the press are often admitted."

38. The Court of Appeal has recently had occasion to consider section 97 in a limited respect in *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs intervening)* [2004] EWCA Civ 845; [2004] 2 FLR 823 at para 16, where, giving the judgment of the court, Thorpe LJ stated at paragraph [53] that section 97(2) of *Children Act 1989* did not extend to appellate proceedings in the Court of Appeal.

39. The ambit of s.97 of the *Children Act 1989* is the subject of detailed submissions by the appellant in this case and I shall turn to them shortly hereafter.

Section 39 of the Children and Young Persons Act 1933

40. For the purposes of completeness, I refer to section 39 of the *Children & Young Persons Act 1933* which provides:

> "(1) 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 the 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 newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court."

41. So far as the hearing of appeals is concerned, in *Pelling v Bruce-Williams* (see above) the appellant took objection to a notice to the public regarding reporting restrictions posted outside the court. The Court of Appeal held that the court had jurisdiction to impose such restrictions under the inherent jurisdiction of the court in relation to children, and under section 39 of the 1933 Act, at the court's discretion. Having so stated at paragraph [54], Thorpe LJ went on:

> "But it is not so evident that either the inherent or statutory jurisdiction justifies the imposition of an automatic restriction without the exercise of a specific discretion in the individual case. Indeed in his subsequent written submissions, Mr Cobb suggests that the future the court should, both at the outset and the conclusion of each appeal concerning children, exercise its specific discretion either to impose or refuse prohibition on the identification of the parties to the appeal. It would, therefore, seem to us to be desirable for the Master of the Rolls and the President to review the standard practice of this court to reflect developments since the decision pronounced in *Re: R (Minor) (Court of Appeal: Order against Identification)*[1999] 2 FLR 145 in 1998. This reconsideration should perhaps extend to applications to permission to appeal listed for oral hearing. In

relation to such hearings, Mr Cobb submits that the need for caution is all the greater given that:

(a) permission to appeal is ordinarily sought in the first instance court where statutory protection applies;

(b) applications for permission to the Court of Appeal are ordinarily considered by a single Lord Justice on paper which would have the protection of confidentiality under R 52.3(3)-(4)

(c) oral hearings for permission are often listed without notice which the respondent is not present to argue against publicity."

42. Having earlier emphasised at paragraph [50] that questions relating to the publicity to be accorded to Children Act proceedings are essentially policy questions, Thorpe LJ stated at paragraph [55]:

> "Policy questions do have to be addressed against this background: in reality, although the Family Proceedings Rules 1991 confer on the judge in any case the discretion to lift the veil of privacy, there is such a strong inherited convention of privacy that the judicial mind is almost never directed to the discretion and, in rare cases where an application is made, a fair exercise may be prejudiced by the tradition or an unconscious preference for the atmosphere created by a hearing in chambers. Judges need to be aware of this and to be prepared to consider another course where appropriate."

43. It is right to note that the review called for by Thorpe LJ in paragraph [54] of his judgment has not yet taken place. However, there is at the time of this judgment a Governmental Review in progress which is examining the whole question of openness (or "greater transparency" as it is often called) in relation to proceedings involving children for the purpose of issuing a Consultation Paper with a view to making decisions on the matters of policy involved.

The Grounds of Appeal.

44. In the passage from his judgment quoted at paragraph 10 above, Hedley J referred briefly to the balancing act to be performed as between the right of free speech under Article 10 of the ECHR and the right to private life under Article 8. He stated that his decision that the need to ensure that C had peace and freedom from publicity outweighed the father's right to freedom of speech broadly reflected the policy of s. 97 of the 1989 Act. It is this statement which founds the first ground of appeal. Mr Price for the father submits that the judges' observation stems from misconstruction of the Act, because the prohibition on publication likely to identify a child contained in s.97 (2) lasts only until the conclusion of the proceedings in question, such conclusion being reached in this case on the making of the order of 11 August 2005.

45. Alternatively, Mr Price submits that, if the prohibition on publication under s.97 (2) does not cease at the conclusion of the proceedings, then s.3 of the *Human Rights Act 1998* requires that s.97 (4) of the 1989 Act be read and given effect so as to permit and require the court to lift the prohibition on publication in all cases in which the right of free expression under Article 10 of the ECHR outweighs any Article 8 right of the child. And, in his submission, this is clearly such a case.

46. Thirdly, Mr Price submits that the judge was wrong to hold that any Article 8 right of C was engaged by discussion or communication of either: (a) the classes of information covered by the injunction, namely matters relating to the education, maintenance, financial circumstances (including proceedings before any court) of the child, or (b) such information as it appeared to the judge the appellant was threatening or intending to discuss or communicate.

47. Fourth, and in any event, Mr Price submits that the judge failed to identify in specific terms the manner in which, or the extent to which, C's rights would be interfered with by the publication which the appellant wished to be free to make, or by the publication prohibited by the injunction, and, in particular, the judge failed to identify whether or to what extent C would be harmed by such publication. Mr Price submits that the judge should have required those matters to have been established by evidence, which they were not. Finally, it is said that the judge failed to recognise the harshness and importance of the restriction on the father's Article 10 right to free expression, or to give it proper weight; on a proper analysis, such a restriction by injunction was not necessary in a democratic society, did not meet a pressing social need, and was not proportionate to any proved necessity for C's privacy to be protected by the injunction.

Discussion

Section 97 of the Children Act 1989

48. Mr Brian Jubb, who has appeared as Advocate to the Court instructed by CAFCASS Legal, supports the position of the appellant that, whereas the prohibition on publication contained in s.97 of the 1989 Act prevents identification of children involved in Children Act proceedings while the proceedings continue, such prohibition ends when the proceedings are concluded. My initial reaction to his position was one of surprise because, as I understand it, the family courts have proceeded hitherto upon the assumption that the statutory prohibition outlasted the existence of the proceedings, so that any identification of a child as *having been* involved in Children Act proceedings which have ended would equally amount to a breach of s.97. However, having heard the arguments, I consider that Mr Jubb was right to adopt the position that he did.

49. First, the language of sub-section (2) which prohibits publication of any material "intended or likely to identify…. any child *as being involved* in any proceedings before the High Court" is on the face of it language which relates to proceedings which are current. Its form is explicable as a provision designed to prevent harassment of children while the proceedings continue. Second, sub-section (2) is a penal provision (see sub-section (6)) and as such falls to be construed restrictively.

50. Third, the prohibition in s.97 (2) constitutes a specific restriction on the media's right of free expression under Article 10 of the Convention. In this respect, s.3(1) of the Human Rights Act 1998 requires that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights."

51. It is plainly open to be argued in relation to s.97 that, headed as it is "Privacy for Children Involved in Certain Proceedings", the focus should be on Article 8 considerations and thus a Convention compatible construction should lead to an interpretation in accordance with previous judicial assumption that the wording, though inapt, should be read as extending to prevent publication of any material likely to identify the child as *having been* involved in the proceedings once complete. However, given the existence of s.12 AJA which is apt to prevent publication or reporting of the substance of, or the evidence or issues in, the proceedings (save in so far as permitted by the court or as revealed in any judgment delivered in open court), I do not think that, as a generality, it is right to assume that identification of a child as having been involved in proceedings will involve harm to his or her welfare interests or failure to respect the child's family or private life.

52. There is a further point which arises under the Convention jurisprudence, and it is this. The terms of Article 10(2), which provides that the exercise of that freedom proclaimed in Article 10(1) may be subject to such restrictions or penalties as are prescribed by law, give rise to a requirement of legal certainty, not least as to the length or period of the prohibition. I have already expressed the view that, on a straightforward reading, the words themselves are to be read as limited to the duration of the proceedings; but, even if this were not so, the terms of s.3 of the 1998 Act require that the legislation be so construed

53. That does not of course mean that the provisions of s.12 AJA are diluted or otherwise affected. So that whilst, following an end to the proceedings, the prohibition on identification under s.97 will cease to have effect, the limitation upon reporting information relating to the proceedings themselves under s.12 AJA will remain.

54. Nor does it mean that, in the course of Children Act proceedings conducted within the High Court, the judge may not, in the welfare interest of the child and in order to protect his or her privacy under Article 8, make an injunction or order which prohibits the identification of the child not simply to the extent set out in s.97 (2) of the 1989 Act, but for a period beyond the end of the proceedings (e.g. until the age of 18). However, in deciding to make a long-term injunction aimed at restricting the reporting and publication of proceedings involving children, the court is obliged in the face of challenge to conduct a balancing exercise between the Article 8 rights of the child and the Article 10 rights of the parent asserting such right, and/ or, where press or media interest is involved, the Article 10 right to report and discuss the circumstances surrounding, as well as the issues arising out of, a case of public interest. In the instant appeal, of course, the focus is not upon the past, i.e. in relation to the original kidnapping and recovery of C, all of which received high publicity at the time and are expressly exempted from the purview of the injunction, but upon future public discussion of the Children Act proceedings.

55. In relation to the exercise of the inherent jurisdiction of the High Court to make orders for the protection of children, the law has developed and been clarified in recent years, in particular by the House of Lords decision in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 [2005] 1 AC 593 in which Lord Steyn gave the leading judgment, with which the rest of their Lordships expressed agreement. In that case, Lord Steyn shortly referred to a plethora of previous authority upon the nature and extent of the inherent jurisdiction of the High Court to make orders restricting the discussion and reporting of cases concerning children (see paragraph [22] of his judgment). Lord Steyn made clear that, so far as the existence and scope of the jurisdiction was concerned, such authorities no longer require to be considered, because the foundation of the jurisdiction to restrain publicity in such cases is now derived from Convention rights under the ECHR. At the same time, Lord Steyn also made clear that the authorities referred to might remain of some interest in regard to the ultimate balancing exercise to be carried out as between the competing Convention rights.

56. This approach has the beneficial effect that, with the substitution of the Convention for the inherent jurisdiction of the High Court as the source of the power to grant anti-publicity injunctions in such cases, it is clear that the power to grant such an injunction on welfare grounds in Children Act proceedings now applies equally to proceedings in the County Court as in the High Court, whatever the precise ambit of s.97 of the 1989 Act.

57. In *Re S*, the conflict was between the child's Article 8 rights to privacy on the one hand and the Article 10 rights of the media to report *criminal* proceedings on the other. As stated by Lord Steyn at para [17] neither Article as such has precedence over the other and, 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 cases is necessary. The justification for interfering with or restricting each right must be taken into account and, finally, the proportionality test must be applied to each.

58. In *Re W* [2005] EWHC 1564 (Fam), I summarised the effects of the judgment in *Re S* in this way:

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

59. Both *Re S* and *Re W* were concerned with orders made *contra mundum*, the effect of which would be to prevent the media exercising their right otherwise uninhibited by statute, fully to report and comment upon criminal proceedings in order to protect a child who was *not* a party, victim or witness in those proceedings. In such an extreme case, both authorities make clear that the grant of any such injunction would and should be rare indeed. However, neither decision was concerned with an order directed to a parent in Children Act proceedings in order to prevent public discussion by the parent of arrangements made, proposed, or ordered in relation to his child, when such discussion would be harmful to the welfare of that child. In such a case, as it seems to me, the observation of Lord Steyn that earlier case law on the inherent jurisdiction of the High Court may be relevant in regard to the balancing exercise to be carried out under the ECHR provisions, applies, because the injunction is sought and granted as part of the court's consideration of a question regarding the upbringing of the child concerned: see s.1 (1) of the 1989 Act. In such a case, the child's welfare, which of course includes respect for his or her privacy free from damaging publicity, is the court's paramount consideration see *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1 per Ward LJ at 23C-E, 23H-24A, 28B-D, 29D-E and per Sir Thomas Bingham MR at 33B-D. Nonetheless, it does not exclude the necessity for the court to consider (a) the right of the child under Article 8 to privacy, both in relation to the proceedings and the confidentiality of his or her personal data, (b) the right of the parent under Article 10 to tell his or her story to the world and, (c) in the case of an application by media interests, their wish to publish or broadcast the story and/ or to comment on the issues involved.

60. Before leaving the topic of the proper construction of s.97 of the 1989 Act, I should add that I am conscious that the arguments for the restrictive reading which I consider to be appropriate may also be applicable to the broadly similar wording of s.39 of the *Children and Young Persons Act 1933* (see para 40 above) which is of course a provision applying to *any* proceedings in *any* court and is in wide use in the criminal courts in respect of child victims and witnesses. I do not so hold, as the matter does not arise directly in this appeal and has not been argued before us. Quite apart from any differences in wording, there is in relation to criminal trials no similar restraint upon reporting the detail of the trial to that embodied in s.12 (1) AJA. Thus the effect of permitting a newspaper to report the identity of a child or young person in a case embodying lurid detail as to which there is no restraint on reporting, may have a far more devastating effect on the Article 8 rights of the child concerned. And, even if the imperative of restrictive construction applies to s.39 of the 1933 Act, judges in criminal proceedings will enjoy a power deriving from the child's Convention rights to make orders similar to those made hitherto, provided that the court has considered the question with care in the course of undertaking the requisite balancing exercise between the effect upon the Article 8 rights of the child concerned and the Article 10 rights of the media: see *Re S* at paras 23 and 26-7.

The Original Injunction (November 2004)

61. At the outset of the appeal, Mr Price submitted for the father that the judge was in error in granting the original injunction in the form that he did, because it went wider than was necessary to prevent any threatened prejudicial action on the part of the father. At the same time, he made clear that his criticism was principally directed to the continuation of the injunction in August 2005.

62. Although the form of the injunction as originally granted by Hedley J in November 2004 was continued by him in similar form in 2005, the immediate circumstances were very different. In November 2004, the matter came before the judge as a matter of emergency in the course of part-heard residence and contact proceedings in which the behaviour and attitudes of the father in relation to his responsibilities in respect of C were highly material to the issues before the court (see paragraph 6 above). The matter was placed before the judge on the basis that the e-mail of 10 October 2004 showed that there had been a direct publication of information concerning the care and upbringing of C; that there was likely to be publication of details of the case in the future; and that there was likely to be publication of matters concerning C's upbringing and care then under consideration in the proceedings. In this respect the mother relied on the fact that the e-mail was headed "ongoing"; that it contained the following phrase "*I could tell you something in person also about the way in which CAFCASS are handling matters that is bad for A as well that I cannot write"*; and that it pronounced an intention to "*write that story up one day"*. Finally, the e-mail revealed on the part of the father a determination to return with C to Portugal to retrace and re-examine the steps and incidents which occurred during his abduction of her and, in this connection, himself to go the following week to Portugal to make a video diary record of his period in Portugal with C for the purpose of supplying "any good footage" to a television company".

63. The terms of the draft injunction placed before the judge for his signature were taken from the judgment of Munby J in *Harris v Harris; Attorney General v H*arris [2001] 2 FLR 895 at 950 Those terms were very general (see paragraph 6 above), However, the father was not present and had supplied no statement to give an account of what he did or did not propose to do. In those circumstances, in the light of the authorisation given to the father to discuss matters with the persons set out at paragraph 2 (a) – (e) of the order, and on the basis of the liberty to apply which was granted to enable him to return to court if he required modification of its terms, I do not consider that the form of the order was unduly wide as a matter of interlocutory relief.

The continuation of the injunction (August 2005)

64. When the terms of the injunction were next considered by the judge, however, the position had changed. It was upon the father's application for discharge in a situation where the matters of substantive dispute between the parties i.e. residence and contact, had been resolved by agreement, and it was agreed that all previous orders made in respect of the Children Act proceedings were to be discharged and the respective applications of the parties withdrawn. Thus the argument for continuation of the injunction depended not upon any element of prejudice in relation to Children Act proceedings yet to be resolved, but upon the court's jurisdiction in respect of the father's future rights to discuss and seek to publicise the proceedings beyond the scope of the statutory protection provided in any event by s.12 (1) AJA. This invoked the need for a careful consideration of the human rights issues involved if the injunction were to be renewed in the form originally granted. As made clear in *Re S* and *Re W* above, such applications fall to be decided not on the basis of rival generalities but by focussing on the specifics of the rights and interests to be balanced in the individual case.

65. Unfortunately, it is not clear that the judge adopted such an approach. The terms of the judgment, as well as the transcript of the proceedings, reveal that the matter before

him was essentially dealt with on the basis of an adjudication between the polarised position of the parties (i.e. injunction or no injunction) rather than refashioning its scope to meet the concerns of the father who was applying for its discharge, while protecting against any substantial threats to the welfare of the child.

66. As the judge made clear in his short judgment, the principal matters relied on by the father in support of a discharge of the injunction were that its effect was (1) to prevent him conveying to people in his local community, who were aware of what happened in the past, what had in fact been the outcome of the case; (2) to prevent him from making clear, whether voluntarily or in response to enquiries, how the case had ended and that a shared parenting plan of the type which he advocated had in fact been effective in his case. However, the judge did not address the father's assertion that it would unduly inhibit him in his work as a campaigning member for Fathers Need Fathers and as a McKenzie Friend to other fathers in that it was both artificial and unnecessary for him, when advising other fathers to put forward similar shared parenting plans, to be obliged to conceal that the reported case on such plans which commended there utility was that negotiated in his own case.

67. The father made clear that he wished to do all these things. He complained that, as he understood the injunction, he could speak generally about matters in his and C's life prior to November 2004, but he could not do so since. He submitted that the case was one where there was no need for absolute anonymity. The judge then observed:

> "That is an issue for Parliament, because Parliament has passed section 97(2) of the [Children] Act. I am not aware of any power that I have to subvert that provision."

68. At this point the father made clear that he was aware that there were arguments to be put under the Human Rights Act. At the same time he made clear that, in that respect, he was not able to put the arguments himself, having hoped to be accompanied by Mr McKay (a well-known, helpful, and responsible McKenzie Friend now, sadly, deceased) who had to be elsewhere. The judge observed that no doubt the father was thinking of Articles 8 and 12 of the Convention and section 3 of the *Human Rights Act* 1998. He then turned to Mr Kirk for the mother who observed that, if the judge looked at section 97(4) there was provision and power there for him in an appropriate case, to dis-apply subsection (2) so as to turn into something lawful what would otherwise be a criminal contempt. The judge acknowledged that, observing that s.97 (2) was the subsection used by the courts to achieve publicity in abduction cases. Mr Kirk went on to make clear that the wife had no objections to the dissemination of the document or the making public of the order made in the case provided that anonymity was preserved for C. His submission was that the husband should be allowed to publish materials so long as he did not contravene s.12 AJA or s.97 (2) of the 1989 Act.

69. The position of counsel for the Guardian was to oppose publication of the judgment altogether, on the basis that, if it were published and the father permitted to refer to it publicly, then it would in effect lead to the identifying of C. Counsel put it in this way:

> "The concern is that we are in effect just taking the names out, but if the document is presented by the father then that would in

> effect would lead to the identity of C and potentially involve her in further media coverage."

She referred to the father's proposal that there be a press release, to which the mother did not in principle object provided that it was a brief release by both parents on the basis that the judgment concluded a one-off episode. However, she objected to this, stating that it would heighten the historical wrongness of what had happened in the past and put it back into the forefront of people's minds, again identifying C in that regard. She accepted that an order of the court would be a public document but submitted that the way the father would be likely to use it would, as she put it, "track back to defeat the anonymity the court is seeking to preserve". She observed that the purpose of the day's proceedings had been to attempt to give C stability and an end to any history or any continuing dispute between the parents. The judge observed that the "history" to which counsel referred was exempted from non-publicity. Counsel stated that she understood it to be the position that C knew nothing about the circumstances of what had happened when the father was arrested and that such knowledge would prove quite traumatic if she were informed.

70. In reply, the father disputed that C was unaware of what had happened, stating that he knew her friends had already spoken to her about it. At this stage the judge observed that such debate was a red herring because what had appeared in the press was not restricted from being talked about. He observed to the father:

> "… there is nothing to prevent you from reiterating matters that have been in the public domain. Whether it is wise or not is a matter for judgment of those who hold parental responsibility. The injunction manifestly exempts anything that has been in the public domain, unless the person the subject of the injunction has wrongfully disclosed it. Broadly speaking, anything that has got itself in the past into the public domain is not covered by the injunction anyway..."

71. The judge then informed the parties that he would put a judgment in writing and give it in open court both to enable free access to a report which publicised the kind of order agreed and to deal with the question of the injunction. He observed:

> "I want to give some thought to the way of expressing myself that will pay close regard to everyone's legitimate interests in this whilst keeping C's need for as peaceful life as she can decently have to the fore of my thinking."

In the event he continued the injunction in the terms originally granted.

72. I think that the judge was wrong to do so. In my view, bearing in mind the position of the father as an active campaigner for improvement in the processes and outcomes of the family justice system and his role as an advisor to others in that connection, as well as his views and interests concerning shared parenting arrangements, the terms of the injunction were far too wide in their effect, preventing the father as they did from referring to his own case as one satisfactorily resolved by the particular shared parenting agreement approved by the judge. As an annex to the skeleton argument in this case, the terms of which are fully set out at paragraphs 106 to 108 of the judgment

of Lord Justice Wall, the father itemises at paragraphs 1-8 a list of those matters which he wishes to be free to discuss or communicate, to which I have already referred in summarised form at paragraph 66 above. Like Lord Justice Wall, with one exception, I consider that those wishes are legitimate and, as I would judge, none relates to the upbringing of C or substantially engages her welfare interests in that respect.

73. The exception appears at paragraph 8(iii) of that list and involves the father's continued interest and concern to take C back to Portugal and to re-trace the journey which they made following her abduction together with the events at that time including his arrest and treatment in Portugal. This is stated by the father to be for the purpose of explaining his position to C, but it is apparent both from the material before the court and the submissions of Mr Price that it is in reality intended as a self-exculpatory publicity exercise for the purposes of supplying a film of the journey to any television company interested in broadcasting it.

74. I am quite satisfied that the prospective making of any such film and the taking of C to Portugal for that purpose is a matter relating to the upbringing of C, engages her welfare interests and infringes her Article 8 rights. It is noteworthy that, at the time the matter was before Hedley J upon the father's application to discharge the injunction, he made no reference to his continuing intention to involve his daughter in the making of such a film, or to involve her in any other way in his campaigning or media activities. Had he done so, I have no doubt that the judge would have regarded any such involvement as contrary to the welfare interests of C and exposing her to unsuitable and undesirable publicity at a tender age. That is certainly my view. It is one thing for the father to discuss with C as he may (but which I hope he will avoid) past events relating to her abduction. It is quite another to revive the events in her mind and seek her participation in their repetition for the purposes of publishing his sense of deep-rooted grievance about his arrest and imprisonment in Portugal and the resulting legal proceedings. Such an exercise would not fall within the proviso contained in paragraph [3] of the injunction, but would amount to exploitation of C and the father's parental powers and influence over her in his interests, and not hers. As such, it would amount to a failure to respect her Article 8 rights wholly disproportionate to any Article 10 rights of his own.

Conclusion

75. I would allow the appeal and discharge the injunction. In its place I would make a Prohibited Steps Order pursuant to s.8 and s.10(1)(b) of the 1989 Act restraining the father until further order from revisiting Portugal with C (he has the rest of Europe in which to take her on holiday if he so wishes) and further restraining him from involving C in any way with the publication of any information relating to his abduction of her. I would add that in my judgment, the father would be wise not to write about it, but ultimately that is a matter for him. That, after all, is what freedom of speech is about. If the father thinks that an exculpatory account to the world of his discreditable behaviour in abducting C will serve any purpose, he must be free to write it. What he is not free to do is to involve C in that process.

76. I would therefore request Mr. Price, and Mr. Jubb to draft an order which gives effect to the court's intention, and to make it available when this judgment is handed down. If, for any reason, it remains contentious, we should be notified of the fact in writing

in advance, and we will endeavour to deal with the matter on paper, and impose an order of our own.

77. The practical consequence which flows from this judgment is that henceforth it will be appropriate for every tribunal, when making what it believes to be a final order in proceedings under the 1989 Act, to consider whether or not there is an outstanding welfare issue which needs to be addressed by a continuing order for anonymity. This will, I think, be a useful discipline for parties, judges, and family practitioners alike. If there is no outstanding welfare issue, then it is likely that the penal consequences of s.97 of the 1989 Act will cease to have any effect, and the parties will be able to put into the public domain any matter relating to themselves and their children which they wish to publish, provided that the publication does not offend against s.12 AJA 1960.

78. Our judgments in this case are likely to have an impact, and must not be misunderstood. The fact that the provisions of s.97(2) of the 1989 Act, cease to operate after the conclusion of the proceedings does not mean that parents are free at that point to draw their children into an ongoing public debate about their welfare or other wider issues. The court, after the conclusion of the proceedings, retains its welfare jurisdiction and will be able to intervene where a child's welfare is put at risk by inappropriate parental identification for publicity purposes. Quite where the line is to be drawn between CA 1989, section 1, and ECHR, Articles 8 and 10, in this context remains to be seen, although I venture to think that in practice most parents will recognise it. But let those parents who do not be in no doubt that the court's powers under the ss 1 and 8 of the 1989 Act remain, as do its powers to grant injunctions.

79. So far as this father is concerned, he would do well to reflect on his conduct. His incapacity to recognise the dangerous folly of his abduction of his daughter may in some measure be due to the mother's willingness to co-operate in his wishes to obtain a shared residence order in respect of C. The statement which she put in, however, demonstrated a more jaundiced (and possibly more realistic) view of the father. She appears to have accepted shared residence with reluctance, recognising that the welfare of her child in that respect was a separate matter from the question whether (as the mother plainly believed and believes) the father's concerns to publicise his daughter's identity are focused on his own interests and the interests of fathers generally rather than upon those of C. C's own interests are plainly best promoted by leaving the past behind and avoiding, rather than receiving, publicity in connection with family proceedings. It appears to be the father's intention to publicise the fact that he was involved in proceedings in relation to his own daughter C which ended in the shared parenting agreement publicised by Hedley J in his judgment and that the child is happy and stable as a result. By reason of s.12 AJA he will not be at liberty to re-canvass the issues explored in the Children Act proceedings and, on that basis, I am not prepared to infer that the nature of any such publication will be damaging to C. Nor do I consider it necessary to refer the matter back to the judge for consideration of that issue. However, if the father continues to fail to recognise his former parental shortcomings and persists in his attempts to involve C in his attempts at self-exculpation, I fear that further proceedings will ensue. I hope that he will take heed of that warning.

Lady Justice Arden:

80. I agree.

Lord Justice Wall

81. I entirely agree with the President's judgment, which I have had the advantage of reading in draft. I also agree with the result which he proposes. I add a judgment of my own for two principal reasons. Firstly, as the President has recorded, I was the single Lord Justice who, on 8 December 2005, granted permission to appeal in this case on the papers. I regarded the case then, and continue to regard it, as raising issues of considerable general importance in the developing practice of Family Law. It was for this reason that I invited CAFCASS Legal to appoint an advocate to the court to assist us, and I am extremely grateful to Mr. Brian Jubb for his clear, cogent, and sensible submissions. I had hoped that it would prove possible to combine this appeal with others raising similar issues, so that our overview could be undertaken in the context of a series of different cases. Unfortunately, this has not proved possible; although Mr. Jubb's wide-ranging analysis has gone a long way towards rectifying that deficiency.

82. In my short judgment granting permission to appeal I stated: -

> This case, it seems to me, raises in acute form the purpose and function of long-term injunctions in Children Act proceedings, and the circumstances in which a litigant finds him or herself when restrained by such an injunction, namely precisely what they can and what they cannot say, and to whom – and also, of course, what function the injunction itself actually is to fulfil.

83. Secondly, this case seems to me a good example of a major dilemma which often faces judges when administering Family Law, namely the need for the court in proceedings relating to children under the Children Act 1989 (hereafter CA 1989) to impose the restrictions permitted by CA 1989 on certain aspects of parental behaviour, including parents' freedom of expression, whilst at the same time seeking to ensure; (1) that such freedom of expression is not unnecessarily or inappropriately restricted; and (2) that the important issues raised by individual cases both enjoy the widest possible dissemination and are the subject of fully informed public debate.

84. Before I develop these points, I need to emphasise, as has the President that this case is ***not*** about the important policy issue relating to whether or not family proceedings should be heard in private or in open court. That is an issue on which the Government is shortly to undertake a public consultation. What this appeal ***is*** about is the extent to which the parties to proceedings are entitled to put into the public domain information about themselves and their children which has derived from the disputes between them, and which has been the subject of proceedings under CA 1989 held in private.

85. However, before engaging with the issues raised by the appeal, I need to declare an interest, and to make clear the direction from which I approach the issues in this appeal. I have reminded myself that as long ago as 1994, I gave a paper to a conference in Oxford, entitled ***Publicity in Children Cases – a Personal View***, which was subsequently published at [1995] 25 Fam Law 136 and in which I advanced what

I perceived to be the three most compelling reasons for promoting open justice in the family jurisdiction. These were: -

(1) to enable informed and proper public scrutiny of the administration of (family) justice;

(2) to facilitate informed public knowledge, understanding and discussion of the important social, medical and ethical issues which are litigated in the family justice system;

(3) …… to facilitate the dissemination of information useful to other professions and organisations in the multi-disciplinary working of family law.

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

87. More recently, in the unreported case of ***Re H (Children)*** [2005] EWCA Civ 1325, the Press had published a highly tendentious, and illicitly obtained account of care proceeding and the subsequent application to free the children concerned for adoption. The message from the newspaper was that local authorities, aided and abetted by the judiciary, were implementing a covert policy of social engineering by removing children from the care of their parents on the grounds that the parents concerned were not sufficiently intelligent to care for them. Nothing, of course, could be further from the truth, as an objective and fair minded reading of the judicial judgments in question made clear. Thorpe LJ, who gave the leading judgment in the case (to the effect that press misreporting did not provide grounds for permission to appeal and that the parents had not made out a case for permission) expressed his agreement with me when I said: -

> 26. ….. this case provides a strong argument for those who. like myself, take the view that the decisions of circuit and Family Division judges hearing care and adoption proceedings should, as a matter of routine, be given in an anonymised form and in open court. No fair minded outsider reading the judgments of HHJ Hayward-Smith QC and Pauffley J could possibly conclude that either decision represented a miscarriage of justice ……
>
> 27. This case is not about social engineering or about the State intervening in an improper and heavy-handed fashion in normal family life to remove children from honest and law-abiding parents whom it deems insufficiently intelligent to care for them. Like all care cases, it is about children suffering, or being likely to suffer, significant harm due to the care or lack of it given to them by their parents…..

Having reviewed the decisions in the courts below, I commented: -

> 31. Cases involving children are currently heard in private in order to protect the anonymity of the children concerned. However, the

> exclusion of the public from family courts and the lack of knowledge about what happens in them, easily lead to the accusation of "secret justice". Moreover, judges communicate in carefully reasoned judgments, not sound-bites. Thus, even when a judgment is published, it is likely to be read in its entirety only by lawyers……

88. Having suggested that in appropriate cases, judges should also prepare short, anonymised summaries of their reasons for public distribution, I said:

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

89. I apologise for the length of these citations. I hope, however, if nothing else, that they demonstrate a consistency of thought on my part over the last twelve years. They also mean, I think, that I approach aspects of the instant appeal with considerable sympathy for the arguments advance on behalf of the Appellant which are, to a substantial extent, supported by Mr. Jubb. I therefore welcome this appeal as a means of giving careful consideration to the true effects of CA 1989, section 97 and section 12 of the Administration of Justice Act 1960 (henceforth AJA 1960).

90. It is, in my judgment, unacceptable that conscientious judges and magistrates up and down the country, doing their best, with inadequate resources and under heavy pressure of work to make difficult decisions in the best interests of children, should be accused of administering "secret" justice. Let it always be remembered that it was Parliament, not the courts, which imposed the restrictions contained in CA 1989, section 97 and AJA 1960 section 12. The judicial task is to interpret and apply those statutes. Thus, although this case is not about whether family cases being heard in open court or in private, I nonetheless regard it as a welcome opportunity for this court; (1) to review the terms of CA 1989, section 97 and AJA 1960, section 12; and (2) to take a further small step towards transparency.

91. Before this court, the Appellant has had the great advantage of representation by Mr. James Price QC. It is, I think, unfortunate that C's mother was not represented. However, like Mr. Jubb, I give considerable weight to the material which she has placed before the court, and whilst (as this judgment will make clear) I accept the argument advanced by both Mr. Price QC for the Appellant and Mr. Jubb in relation to CA 1989, section 97, I part company strongly from Mr. Price – as did Mr. Jubb – when the former sought to argue that the ECHR Article 8 rights of C (the child who is the subject of the proceedings) were not engaged in the Appellant's wish to involve her participation in the preparation and publication of a film designed to vindicate (or at the very lowest to provide an apologia for) his criminal conduct in abducting her to Portugal in 2001.

CA 1989, section 97: the arguments for the appellant

92. I gratefully adopted the President's recital of the facts. He has also already set out the terms of CA 1989, section 97, and I do not need to repeat them. This is, so far as I am aware, the first time that the terms of this section have been fully considered in this court, and certainly the first time, that the restrictive interpretation advocated by counsel has been advanced in proceedings.

93. In his skeleton argument, Mr. Price raised two important questions, namely:

    (1) whether the prohibition on publication imposed by the section was limited to the currency of the CA 1989 proceedings, or continued after the proceedings had concluded (and if so, for how long);

    (2) whether CA 1989, section 97(4) can be construed, in compliance with section 3 of the Human Rights Act 1998 (hereafter HRA 1988) so as to permit the court to dispense with the prohibition on publication where the ECHR right to free expression under Article 10 requires it.

94. Mr. Price was unable to discover any authority which directly engaged either proposition, although he cited an article by Mr. Timothy Scott QC printed at [2003] Fam Law 594, entitled ***Automatic prohibitions on disclosure*** in which Mr. Scott discussed a case, in the event resolved by consent, in which a woman who had been exonerated in care proceedings under CA 1989, Part IV from abusing her infant twins was, nonetheless, vilified in her local community. Her two elder children were also ostracised. She wished, with the help of a journalist, to write a story to set the record straight. Plainly, for the exculpation to be effective, the mother and the children had to be named.

95. The question for the court in that case was whether the article setting the record straight fell foul of CA 1989, section 97 and AJA 1960, section 12. In the event, an agreement was reached, presumably approved by the judge (Coleridge J), that the article could be published subject to certain agreed restrictions. Mr. Scott advanced the argument that, whatever the outcome of public law proceedings, the provisions of CA 1989, section 97(2) ceased to have effect when a final order was made. In private law proceedings, Mr. Scott acknowledged that the situation could be more blurred, in that it was sometimes difficult to discern when particular proceedings (for example a contact dispute) had come to an end. That, however, he argued, should not affect the principle that there will always come a time when it is clear that a particular set of proceedings had been concluded.

96. As to AJA 1960, section 12, Mr. Scott argued in his article that since the decision of this court in ***Re F (Orse A) (A Minor) (Publication of Information)*** [1977] Fam 58, it was clear that the scope of the section was narrow, and that its primary purpose was to safeguard the integrity of the court process itself. A further object of the section was to protect evidence which had been given in confidence. Mr Scott cited from the decision of Munby J in ***Kelly v BBC*** [2001] 1 FLR 197 (***Kelly***) to which I will return later in this judgment.

97. In the instant case, Mr. Price advanced six arguments in support of his submission that CA 1989, section 97(2) must be construed as prohibiting the identification of children

involved in proceedings under CA 1989 while the proceedings continued, but not after they were concluded. Those arguments, as set out in his skeleton argument, were the following: -

(1) CA 1989, section 97 is a penal enactment, and so must be construed strictly. It is a principle of legal policy that a person should not be penalised except under a clear law. Thus, if the legislator's intention is doubtful, the doubt must be resolved against the imposition of a penalty. Reference was made to the 4th edition of ***Bennion on Statutory Interpretation*** at pp.705-6.

(2) In the present case, that principle is reinforced by rights arising under ECHR. Obviously, CA 1989, section 97 is a restriction on the right of free expression under ECHR Article 10. It follows that any restriction must be formulated with precision. This requirement of legal certainty is inherent in the provision, in Article 10 (2), that the exercise of the freedom may be subject to such restrictions or penalties as are 'prescribed by law'.

(3) CA 1989, section 97 (2) prohibits publication of material likely to identify 'any child ***as being involved*** in any proceedings' (emphasis added). It is difficult to see how this can include material identifying a child as ***having been involved*** in proceedings. Moreover, the proceedings are defined as 'proceedings … in which any power under this Act ***may be exercised*** by the court', which appears clearly to contemplate a future exercise of the power. The language does not appear to be capable of covering the historical exercise of powers under the Act in concluded proceedings, in which therefore there is no further question that powers 'may be exercised'.

(4) A construction in which the prohibition ends with the proceedings puts a definite date on the ending of the prohibition. If the subsection is construed as prohibiting identification of children involved in concluded proceedings, the position is uncertain and lacking in definition: when does the prohibition end? Such a construction contravenes the principles referred to in (1) and (2) above. The only alternative construction is that the prohibition ends with the child's minority, but that, as in the present case, may be a very long time off. If the draftsman had intended that, he would surely have provided for prohibition on publication during the child's minority. Moreover, it is extremely doubtful whether such a long prohibition could be justified under ECHR Article 10, which requires that restrictions and penalties on the exercise of freedom of expression should respond to a pressing social need, and be no more than proportionate to the legitimate aim which the prohibition is designed to achieve.

(5) This point is reinforced by consideration of CA 1989, section 97 (4), which permits the court to lift the prohibition 'if satisfied that the welfare of the child requires it'. This subsection must be construed as permitting the court to lift the prohibition where ECHR Article 10 requires it. Nevertheless, it is difficult to see that the draftsman would have omitted to include express reference to wider considerations than the interests of the

child, if the prohibition on publication goes beyond the currency of the proceedings.

(6) CA 1989, section 97 (2) makes no reference to whether the Children Act proceedings are held in private, or in open court. It applies equally to both. It is inherent in ***B & P v United Kingdom*** [2001] 2 FLR 261 that on occasions, Children Act proceedings will be heard in open court. This is a remarkable omission from s.97 (2), if the prohibition on identification continues after the proceedings have been heard and decided. On the other hand, if the prohibition affects only pending proceedings, the omission is to be expected, because the question whether to hold the proceedings in private or in open court will be as yet undecided.

98. Mr. Price then referred to HRA 1998, section 3(1), which the President has set out in paragraph 50 of his judgment, and which requires both primary and subordinate domestic legislation to be given effect in a manner which is compatible with ECHR rights. Mr. Price argued that this was a far-reaching provision, as explained by the House of Lords in ***Ghaidan v Godin-Mendoza*** [2004] 2 AC 557. He submitted that section 3(1) may require a court to depart from the unambiguous meaning the legislation would otherwise bear, and to read in words which change the meaning of the enacted legislation so as to make it ECHR compliant, provided that the court did not adopt a meaning inconsistent with a fundamental feature of the legislation.

99. Mr. Price submitted that it was clearly possible to contemplate circumstances in which the welfare of the child could not be said to require that the CA 1989, section 97 prohibition on publication should be lifted, but in which the prohibition on publications likely to identify the child encroached on article 10 rights of freedom of expression to an extent greater than is proportionate to the child's real need for privacy. In some cases (of which he submitted that the present was one) there was no reason to think that identifying the child would cause any harm to the child or her privacy. In such cases, he submitted that there was no difficulty in construing CA 1989, section 97 (2) in conformity with ECHR. Indeed, the sub-section should, he argued, be given an extended meaning which allowed the court to dispense with the prohibition on publication where Convention rights required it.

CA 1989, section 97: the argument for the friend to the court

100. Mr. Jubb, in his skeleton argument, conducted a careful analysis of all the cases in which CA 1989, section 97 has been mentioned. He agreed that there had been no detailed judicial consideration or construction of the section. It does little justice to Mr. Jubb's erudition and careful analysis to cite only his conclusion. However, that conclusion was that Mr. Price is correct in his submission that the prohibition referred to in CA 1989, section 97 ends when the proceedings are concluded; alternatively, if that is not the correct construction, the section should be construed, in compliance with HRA 1998, section 3 so as to permit the court to dispense with the prohibition on publication where the right of free expression under ECHR Article 10 requires it. The purpose of CA 1989, section 97 is to protect the privacy of the child in question during the proceedings. Once the proceedings have been determined, and the court is no longer engaged, the section ceases to have any effect.

101. However, Mr. Jubb went on to argue that limited protection of the privacy of the child was still maintained through AJA 1960 section 12, breach of which could result in proceedings for contempt of court: - see ***Her Majesty's Attorney General v. Pelling*** [2006[1 FLR 93.

Conclusion on CA 1989, section 97

102. Like the President, I accept the joint submissions of Mr. Price and Mr. Jubb. I am, of course, conscious that we have not heard the alternative viewpoint argued. However, apart from the natural meaning of the words used in the section, I am, I think, particularly influenced by three factors. The first is the fact that the section creates a criminal offence (CA 1989, section 97(6)) and therefore needs to be construed strictly. The second is that the use of the phrase "as being involved in any proceedings" in CA 1989, section 97(2)(a) connotes the identification of a period when those proceedings are pending and not concluded. The third is that the thrust of the authorities - to which I will refer later in this judgment - is that there is no special privilege accorded to children who are the subject matter of proceeding save as is strictly necessary for their protection in the context of the proceedings themselves: see ***R v Central Independent Television PLC*** [1994] Fam 192 at 207 per Waite LJ.

103. I am conscious that I must beware of what Lord Templeman in ***Re M (A Minor)(Care Orders: threshold conditions)*** [1994] 2 AC 424 at 438 memorably called "the tyranny of language", and I am equally conscious that, in that case, the phrase used to identify the moment at which the threshold criteria for the making of care orders under CA 1989 section 31(2) kicked in , namely that the child in question "is suffering significant harm" was construed by the House of Lords to mean, in effect, that he or she ***was*** suffering significant harm at the time the local authority instituted proceedings or took measures to protect the child, even if, by the time the care order came to be made, he or she was no longer so suffering. Thus it could, I suppose, be argued that, viewed retrospectively and in the light of a subsequent publication of information, the information so published related to a child who had been involved in proceedings.

104. However, I am satisfied that I must read the words in their proper context, and in the context of CA 1989, section 97 I do not think that the natural meaning of the words "as being involved" relates to the past. I also take comfort from Lord Templeman's robust conclusion, in ***Re M*** that the use of the continuous present in that case would defeat the whole object of the statute; see [1994] 2 AC 424 at 440A.

The consequences of the agreed construction of CA 1989, section 97

105. I am therefore satisfied that Mr. Price's and Mr. Jubb's construction of CA 1989, section 97 is correct. However, I do not think that his construction has all the consequences for which Mr. Price argued. In order to examine its effect on the activities which the Appellant wishes to pursue, and before considering the impact (if any) of AJA 1960 section 12, it is necessary to examine those activities. I therefore propose to set out ***in extenso*** the helpful document which Mr. Price prepared as an annexe to his skeleton argument, in which those activities were identified.

106. The first seven paragraphs of the document set out the following activities: -

What the appellant wants to discuss or communicate

1. He wants to publicise the agreement about shared parenting and its benefits, and to encourage others to go down the same route, something which, in my judgment given on 8 December 2005 I described as 'an entirely laudable goal'. He has been asked to assist journalists making useful programmes about mediating solutions.

2. He wants to communicate to the community in which he lives, in which the story is well-known, how matters have ended. He is prevented from explaining to people what has been the outcome.

3. He is regularly contacted by the media as a moderate and well-informed spokesperson on the family justice debate; he is unable to explain how matters concluded, and worries, given the background, that there is whispering that something new and discreditable has happened, meriting a blanket injunction.

4. He campaigns for better, and more open, family justice and for several organisations hoping to bring about change to the family law. He cannot refer to his own experiences in the family justice system. For example, he would wish to take vigorous issue with the President's opinion published in the *Times* of 31st January 2006 that a 50-50 contact regime for a child is 'simply not practicable', and can only cogently do so by reference to his own experience.

5. In particular he campaigns for equal sharing of tax credits and child benefit (and other benefits) where there is shared parenting. The media are rightly interested in this; it is an issue which, according to HM Revenue and Customs, generates a greater workload than any other. Basic tax credit and working tax credit and child care allowances can be a very significant proportion of the total income of people on lower incomes. He is a potentially excellent spokesperson for this, because he has a particularly clear cut case for a share in these credits, having a fully shared care solution sanctioned by the High Court.

6. In short, the injunction prevents him being as politically active as he would wish, because he believes that the most effective lobbying, comments, or campaigning involve discussion of the human aspects of individual cases, specifically his own, both positive (the outcome) and negative (the delay, and what he sees as a systemic tendency for parties to fight for court orders, instead of drawing up their own solutions).

7. He uses the internet a lot, putting holiday snaps and so forth on the net, and E-mailing people about C.

107. So far, I have to say, I have little difficulty in agreeing with Mr. Price that these activities are all perfectly legitimate, and are not caught by CA 1989, section 97, now that the substantive proceedings between himself and C's mother have concluded. I can therefore see no harm to C in being able publicly to identify himself and C as being the beneficiaries of items 1 to 3. I can equally see little mischief in the Appellant identifying himself in his campaigning role (items 4 to 6). Item 7 is no less than many parents do as part of normal family life. None of these items, therefore,

seems to me to fall foul of CA 1989, section 97 as construed by Mr. Price and Mr. Jubb.

108. Thus, if Mr. Price's shopping list ended with item 7, I would have little quarrel with it. But it does not. It continues: -

> 8. Points raised in the E-mail to the BBC reporter which triggered the injunction application:
>
> (i) Severe delays in dealing with even a simple case.
>
> (ii) CAFCASS's lack of resources and expertise, yet having a primary role as the only supplier of support and advice, and of reports to the court. The Appellant made several complaints about CAFCASS to the judge, and will want to speak of concrete complaints. There is a passage in the e mail, relied on in the skeleton argument in support of the grant of the injunction, for the November 2004 hearing:
>
> "I could tell you something in person also about the way CAFCASS are handling matters that is bad for A as well that I cannot write."
>
> The appellant can no longer recall what he had in mind in this passage.
>
> ***(iii) A matter that may possibly be newsworthy, and might be the subject of a television film: taking C back to Portugal, where she witnessed the appellant's arrest, and gradually over the years explain things to her. The appellant wishes to write that story one day, not to be negative about the mother, but about the system. The appellant has deep-rooted grievances about how his arrest, imprisonment in Portugal, and legal proceedings were handled. He also wishes to write a book about his travels with C: there were 6 other trips including to North Africa.*** (emphasis mine)

What the appellant does not want to discuss or communicate

> 9. He does not wish to say anything damaging or sensitive about C. He deals with the media only occasionally and responsibly. He has been careful not to publicise aspects of the proceedings in private, or to denigrate or criticise C's mother, which he does not think is in C's interests. He simply wishes to debate the shortcomings of the family justice system. Between December 2003 and the grant of the injunction, he gave at least 15 interviews to broadcast media about issues very high in public awareness, as a result of the activities of Fathers 4 Justice; he said nothing contentious or in breach of any confidence. See also the draft press release which he suggested for distribution at the conclusion of the case, which appears entirely unobjectionable.
>
> 10. In a recent E-mail to C's mother, he suggested, unprompted, the following addition to the 1st schedule to the 11th August 2005 order:
>
> "We both agree to place trust in each other, rather than a court order, to behave with appropriate parental responsibility, and in accordance with

> the Welfare Checklist, in respect of any mention there may be of [C] in any public domain. We both agree that we shall endeavour, if ever speaking publicly, to act in a way to minimise interest in her, respect her privacy, and not speak negatively of either party in terms of past actions or behaviour, as that may be hurtful for [C]. We shall endeavour, wherever possible, by discussion and negotiation, to present a united front in any public matters as that is in [C's] best interests."

109. The reference in paragraph 8(iii) of the extract to one of the points raised in the E-mail to the BBC reporter which triggered the application is, in my judgment, highly significant. This document is produced by C's mother in her bundle. It is dated 15 October 2004, and contains the following passage, which relates to the Appellant's abduction of his daughter, and which I reproduce as it is set out in the original: -

> Portugal. Portugal affected (C). We had a fab 5 1/2 weeks – she was 100% HAPPY SAFE AND AS USUAL WELL MOTIVATED AND NURTURED She loves travel and meeting new people. The end was dramatic and unnecessarily unpleasant for her. Anyway, what do I want to do about it: first, (C) has to go back – her memory is "interrupted" but she has an extremely good memory. She won't ever forget. The best way forward is to take her back and then gradually over the years explain things to her. To do otherwise is denial that will likely have adverse psychological consequences for her. Ditto myself. I went back to Portugal in December but didn't have enough time to go see the jail and Cid chaps there which I did want to do. And I slightly bottled out. I need to do it and am going to.
>
> Best thing for all is if I went back and (Mrs C) came down with (C). See people again who we encountered. Let (C) see that no-one was inherently unpleasant or hurt. Get it out in the open for her (and the Portuguese are very good people very family focused and were very pleasant to me under the circumstances and would welcome us back to allow the episode to come to a proper conclusion).
>
> Anyway I'm going to go to Portugal myself over the next few weeks.
>
> I am DEFINITELY writing that story up one day (not negative about (Mrs C) but about the system) and also doing a book on my travels with C – there were six other trips including to N Africa – it was always my plan to do so as travelling with an infant is magical. The latter is likely to be a big hit I have excellent material and of course a good spin at the end.
>
> I have always planned to do a video diary record of things – going back to Portugal, meeting the jailers in Portugal, etc especially one really scary looking jail I popped into which has apparently been turned into a museum – it is so scary looking from the outside.
>
> Can't really afford a good camera. Carlton would lend me one if they had any – but they don't they are so underfunded these days they don't even get lunch on the company. They have said they want any good footage. Any chance of borrowing a handy-cam type thing from anyone at your end.

> It's half term soon. I really think a little trip for everyone to Portugal would go a long way to allowing us to put all this crap behind us. If the parents agree to stop disputing things then the court ***ends*** – the parents RULE the proceedings if in unison. (Mrs. C) fails to understand this. Only losers have to go through all this court stuff.
>
> If there were any poss of a loaner handicam I'm really in a hurry cos might go next week.

110. This document was placed before the judge and, plainly, was highly influential in his decision to grant an injunction. What is puzzling, to my mind, is that the injunction he granted and then continued does not appear specifically to address the mischief which needed to be prevented. I will return to this point in a moment. What is of the greatest significance, in my judgment, is that it became perfectly clear during the course of Mr. Price's submissions that far from abandoning the idea of making a film about the abduction, it remains at the forefront of the Appellant's priorities. In Mr. Price's otherwise immaculate skeleton argument, there was a telling minimisation of the abduction. It was said that the Appellant "needed a holiday and took C with him to Portugal in his camper van"; and that "since he had not obtained the consent of her mother, his action in taking C out of the country was ***treated as*** child abduction" (my emphasis). I shall return to this point later.

111. In my judgment, the Appellant's wish to engage C in a film about his abduction of her in 2003 moves the case out of CA 1989, section 97 into a straightforward issue relating to C's welfare which is justiciable under CA 1989 Article 8, and represents conduct which is manifestly preventable by injunction or prohibited steps order.

112. Mr. Price sought to meet the point by submitting that C's ECHR Article 8 right to respect for her private and family life was not engaged, and even if it was, it was subordinate to the Appellant's ECHR Article 10 right to freedom of expression. Mr. Jubb did not agree; nor do I. In my judgment, C's Article 8 rights are manifestly engaged; but that is not how I see the point. I see the point as a welfare issue relating to C's upbringing in which her interests are paramount. The question of her participation in an exculpatory film about the Appellant's abduction of her is self-evidently a justiciable issue whether by way of prohibited steps order under CA 1989 section 8, and / or by way of injunction. The judge was plainly entitled to make an order to prevent it.

113. In deciding the question of the Appellant being prevented from involving C in the process of making a film about his abduction of her, the Appellant's Article 10 ECHR rights plainly fall to be considered and balanced; but they fall to be considered in the context of CA 1989, section 1.

Health warning

114. I should, however, make it clear that in giving the Appellant (and other parents in his position) liberty to identify themselves and their children in post proceedings communications of the kind identified in paragraph 106 above, the court is emphatically not authorising a free for all in which the rights of children cease to be respected. The court retains its powers (to which I allude in more detail later in this judgment) post proceedings to intervene to protect the paramount best interests of

children if parental conduct crosses the line which divides legitimate parental freedom of expression on the one hand, and children's welfare and respect for their article 8 rights on the other.

115. I anticipate that it may take some time for the full implications of our decision in this case to bed down. No doubt the courts may need, on future occasions, to examine individual instances to see whether the line identified in paragraph 114 above has been crossed. It is for this reason, amongst others, that I wholeheartedly endorse what the President says in paragraphs 77 to 79 of his judgment. In particular, the discipline of considering, at the end of what is anticipated as being the "final" hearing in any proceedings under CA 1989 needs to take into account; (1) whether there is going to be any need for continuing anonymity; (2) whether the children concerned are likely to be identified in the future for any particular purpose; and (3) if so what activities would be appropriate. This discipline will, I think, focus parental minds on the future best interests of their children and ensure that questions of future identification, in so far as they can be, are sensibly addressed.

116. There is, moreover, a second, non-legal point. In the post proceedings period, parents would also be wise to reflect that, certainly in my experience, the relationship between themselves and their children is rarely enhanced by parents talking about their children in public or identifying them as the unwilling participants in family disputes. Children are entitled to their privacy, and even if the law now allows parents, after the conclusion of proceedings, to engage sensibly in activities such as those identified in paragraph 106 of this judgment, and to identify their children in the process, they would, in my judgment, be wise to think several times before doing so. It is not perhaps well enough understood that one of the primary purposes of hearing children's cases in private is to protect the privacy to which children are entitled. Parents who breach that privacy may well pay a price in terms of their relationships with their children.

The injunction made by Hedley J

117. The puzzle, as I indicated earlier, is that the injunction which the judge made on 9 November 2004 and continued on 11 August 2005 does not address the identified issue, save in the broadest of terms. It is, in the trite phrase, a large hammer being used to crush a small, but highly significant, nut. Whilst I agree with the President that, as a matter of urgent, interlocutory relief such a hammer may properly be wielded, it became inappropriate in August 2005 to wield it, for all the reasons the President gives. The injunction granted on 11 August 2005 is, accordingly, in my judgment, defective and needs to be reconsidered. At the end of this judgment I will discuss how this should be done.

Is AJA 1960 section 12 in play?

118. I agree with Mr. Jubb that AJA 1960 section 12 is to be narrowly construed. For my part, I do not think anything which the Appellant wishes to do in section 1-7 of the document which I have set out in paragraph 106 above offends against it. The agreement which he wishes to promote seems to me to fall within the exemption provided by AJA section 12(2), and the other matters do not seem to me to comprise "information relating to any court sitting in private". In my judgment, accordingly, AJA 1960 section 12 is not in play.

The authorities

119. In the particular circumstances of this case, and for reasons which I hope are already apparent, I do not propose to examine any of the cases which address the desirability or otherwise of hearing children's cases in open court as opposed to hearing them in private. This is the debate upon which the Department of Constitutional Affairs is to consult, and it would be neither seemly nor appropriate to attempt to hi-jack that debate with a judgment in a case in which that particular issue is not directly raised by the appeal. Accordingly, although we were referred to cases such as ***Re PB (Hearings in Open Court)*** [1996] 2 FLR 765, and ***B v United Kingdom; P v United Kingdom*** [2001] 2 FLR 261, such cases, in my judgment, are of only tangential relevance to the issues raised by this case.

120. Cases such as ***Cibbery v Allan and Another*** [2002] Fam 261 are relevant in so far as they relate to the publication of information conveyed in the course of proceedings heard in chambers. ***Cibbery v. Allan***, however, was not a child case, and CA 1989, section 97 was not engaged. Nonetheless, I extract from it an observation of Dame Elizabeth Butler-Sloss P at [2002] Fam 261, 288 that: -

> It will …. require the parties and the court to consider in each case whether the proper working of the administration of justice requires there to be continuing confidentiality after the end of the proceedings. That is, in my view, no bad thing.

I respectfully agree, and will return to what I see as the significance of this observation at the end of this judgment.

121. A case such as ***Re B (A child) (Disclosure)*** [2004] 2 FLR 142 is plainly relevant, not least because it highlighted the breadth of the term "publication" in AJA 1960, section 12, and led both to the enactment of section 62 of the Children Act 2004 and the amendments to the Family Proceedings Rules which the President has set out. However, it does not address CA 1989, section 97(2), and I will leave for another occasion Munby J's concern that in ***Re M (Disclosure: Children and Family Reporter)*** [2003] Fam 26, Thorpe LJ and I "did not speak with one voice" when addressing the meaning of the word "publication" in AJA 1960, section 12: - see [2004] 2 FLR 142, at 167-8.

122. The decision of the Divisional Court in ***Her Majesty's Attorney-General v Pelling*** [2006] 1 FLR 93 is also plainly relevant, although in my judgment equally plainly distinguishable from the facts of the instant case. In that case, the contempt with which Dr. Pelling was charged was the deliberate publication of a judgment which had been (equally deliberately) delivered in private. Dr Pelling's argument that the common law, combined with ECHR entitled him to publish the judgment has been concluded against him both by this court and by the European Court of Human Rights – see ***Re PB (Hearings in Open Court)*** [1996] 2 FLR 765 and ***B v United Kingdom; P v United Kingdom*** [2001] 2 FLR 261. It was not accordingly open to Dr Pelling to reopen the question. The Divisional Court, unsurprisingly in my view, concluded that in proceedings under CA 1989, the protection of the interests of the child concerned was a function of the administration of justice, and that the publication of a judgment, which the court had determined should be kept private,

was an interference with the course of justice. In my judgment that is plainly correct, but it is equally not determinative of the issues in the present case.

123. The President has, in his judgment, considered further the decision of the House of Lords in ***Re S (A Child) (Identification: Restrictions on Publication)*** [2005] 1 AC 593, (***Re*** S) and his own decision in ***A Local Authority v W, L, W, T and R (by the Children's Guardian)*** [2006] 1 FLR 1. Whilst ***Re S*** is plainly a decision of considerable significance in its emphasis on the balance to be struck between Article 8 and Article 10 rights, it does not address either of the issues which, in my judgment are at the heart of this case, namely (1) the construction of CA 1989, section 97(2); and (2) the circumstances in which the court is properly seized of an issue in proceedings under CA 1989; in which the child's welfare requires the court to take action to prevent the child's exposure by one of her parents to a particular form of publicity which, in the view of the court, is inimical to her welfare. In my judgment, the principles applied in the case of ***Re Z (A minor) (Freedom of Publication*** [1997] Fam 1 (***Re Z***) which I examine below continue to apply in such a case.

124. ***Re S*** concerned the court's power to restrain the identification of a child in the context of criminal proceedings for murder brought against his mother in relation to his sibling. Both this court and the House of Lords upheld the judge's refusal to exercise of the Family Division's inherent jurisdiction to prevent identification of the child's mother and his deceased sibling.

125. As aptly summarised in the headnote, the House of Lords decided:

> (1) that the foundation of the jurisdiction to restrain publicity to protect a child's private and family life was now derived from Convention rights rather than the inherent jurisdiction of the High Court;
>
> (2) that where the right to private and family life under article 8 of the Convention was in conflict with another's right to freedom of expression under article 10 of the Convention, neither article as such had precedence over the other, the correct approach being to focus on the comparative importance of the specific rights claimed in the individual case, with the justifications for interfering or restricting each right being taken into account and the proportionality test applied to each;
>
> (3) that although the ordinary rule was that the press could report everything that took place in a criminal court, it was the duty of the court to examine with care each application for a departure from the rule by reason of article 8, but in so doing the court was not, given the number of statutory exceptions to open court reporting, to create further exceptions by a process of analogy save in the most compelling circumstances;
>
> (4) that, on an application of those principles, the interference with the child's article 8 rights, albeit distressing, was indirect and not of the same order when compared with cases of juveniles directly involved in criminal trials; that, by contrast, the article 10 rights at issue concerned the freedom of the press, subject to statutory restrictions, to report

proceedings at criminal trials, which was a valuable check on the criminal process and promoted public confidence in the administration of justice; and

(5) that the consequence of granting the relief sought, which could thereafter equally be invoked by adult non-parties faced with damaging publicity as a result of a criminal trial, would be the inhibiting of the press to report criminal trials, at the expense of informed debate about criminal justice; and, that, accordingly, there would be no injunction in respect of publication of the identity of the defendant or of photographs of the defendant or her deceased son.

126. In ***Re W, L, W, T and R*** the President granted an injunction restraining the identification of the parents of children whose mother was the subject of criminal proceedings for (and had pleaded guilty to) having knowingly infected the father of one of the children with HIV. He held that the balance between the Article 8 rights of the children and the Article 10 right to freedom of expression fell in favour of the children's Article 8 rights. He did so for the reasons set out in the judgment, which I need not repeat.

127. In my judgment, ***Re S*** is in no sense determinative of the issue in the present case, which relates to the power of the court under CA 1989 to protect the child who is the subject of the CA 1989 Act proceedings. Moreover, even if it were permissible for it to do so (which it is not) nothing in this judgment is designed to affect the nature or extent of the court's exercise in criminal proceedings of its jurisdiction under section 39 of the Children and Young Persons Act 1933, which the President has set out at paragraph 40 of his judgment.

Re Z (A minor) (Freedom of Publication) [1997] Fam 1

128. The case which I have found of greatest assistance in considering the issues raised by this appeal is the decision of this court in ***Re Z***. In that case, the mother of a disabled child (Z) obtained an injunction against the world, the effect of which was to restrain the media from revealing Z's identity; or the identity of any school or other establishment in or at which she was residing or being educated or treated; or from publishing any information calculated to lead to the identification Z or such establishment.

129. Z's mother subsequently took part in a live television broadcast and made a number of remarks which breached the order. As a result, an injunction was made against her, restraining her from discussing or otherwise communicating (except for ordinary social domestic purposes) any matter relating (inter alia) to Z's education.

130. Z subsequently began to receive treatment at a specialised foreign institute which offered a unique and apparently highly successful method of treating problems of the kind that confronted her. A television production company wished to make a documentary about the work of the institute and to that end to identify and film Z and her treatment. The mother wished to permit the filming and to be interviewed in the programme in order to publicise the valuable work of the institution and thereby to enhance Z's welfare and self-esteem. Accordingly she applied to court for the injunctions to be discharged or varied in order to permit the production and broadcast

of the programme. Cazalet J refused the application as not being in the best interests of the child. Z's mother appealed, contending that the court should never override the reasonable decision of a responsible parent and that freedom of publication should prevail.

131. This court (Sir Thomas Bingham MR, Auld, and Ward LJJ) dismissed her appeal. This court's reasoning is aptly summarised in the headnote, namely:

> (1) that, where the court was not exercising a supervisory role over an aspect of a child's care and upbringing, it should not, in the absence of statutory warrant to restrain publicity and of any threat to the integrity of its proceedings, restrain publications which were not directed at the child, his carers or his upbringing and which only peripherally related to him; but that where the court was required to determine any question with respect to the upbringing of the child, the welfare of the child was, by virtue of section 1(1) of the Children Act 1989, its paramount consideration; that such a question arose where the central issue for determination related to the manner in which the child was being reared; and that, accordingly, since the issue for determination, namely whether Z should be identified and participate in a film about her, was such a question, the court's paramount consideration was her welfare to which the public interest in freedom of publication was subordinated.
>
> (2) That, although the decision of a devoted and responsible parent was not to be disregarded or lightly set aside, the court's duty was to exercise an independent and objective judgment of where the child's welfare lay, and where it differed from that of the parent, to give effect to its own judgment; that since the judge, treating Z's welfare as paramount, had concluded that the proposed publicity would be harmful to her, he had rightly refused to discharge or vary the injunctions; and that, accordingly, his decision could not be impugned.

132. ***Re Z*** was followed by Munby J in ***Kelly v British Broadcasting Corporation*** [2001] Fam. 59. K was a boy of 16 who lived with his grandmother. He left home to join a religious group and his whereabouts were unknown. K was made a ward of court by his grandmother and a "seek and find" order was made in relation to him. The court enlisted the help of the media and gave the Official Solicitor permission to give the matter publicity in order to help trace K.

133. The BBC obtained an interview by telephone with K which it wished to broadcast on a radio programme. Singer J made a temporary order restraining the publication of the detail of any report, interview, or communication from the ward or members of the religious group. The BBC applied to set aside the injunction, and Munby J did so. He held that in the absence of any breach of such statutory restraints as were imposed by AJA 1960, section 12 and CA 1989 section 97(2)(a) in relation to the identification of a child subject to the court's wardship or *parens patriae* jurisdiction, no contempt would be committed by the media interviewing K or publishing or broadcasting such an interview.

134. Munby J held, accordingly;

(1) that since K's participation in the BBC interview did not raise any question with regard to his upbringing his welfare was not the paramount consideration;

(2) that there was a clear public interest in broadcasting the interview, the suppression of which would involve a derogation from the right to freedom of expression, including the right to impart and receive information, guaranteed by article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(3) that no "clear and identifiable harm" had been established to justify its suppression; and

(4) that since, in the unusual circumstances, further publicity was in the best interests of the child no case had been made out that it was necessary to restrain the broadcast of the interview.

135. In reaching his conclusion, which in my view was plainly correct, Munby J followed the categorisation of cases involving restraints on publication identified by Ward LJ in ***Re Z***. At [2001] Fam 59 at 74, Munby J said: -

> As is well known, the authorities in this field draw a distinction between the court's jurisdiction to grant so-called "in personam" injunctions and its jurisdiction to grant so-called "in rem" injunctions or "injunctions contra mundum". The court has power, exercising normal equitable principles, to grant an injunction restraining a child's parents or other carers from misusing information which is properly confidential to the child: see ***In re C (No 2)*** [1990] Fam 39 and ***In re Z*** [1997] Fam 1. But quite apart from this equitable jurisdiction, the court, as Thorpe LJ put it ***In re G (Celebrities: Publicity)*** [1999] 1 FLR 409, 414-415, "has jurisdiction in personam to restrain any act by a parent that if unrestrained would or might adversely affect the welfare of the child the subject of the proceedings". This jurisdiction can be exercised and a parent can be restrained either by an in personam injunction or, where appropriate, as explained by Ward LJ ***In re Z*** [1997] Fam 1, by a prohibited steps order under section 8 of the Children Act 1989. Well known examples of the exercise of this jurisdiction are to be found ***In re Z*** [1997] Fam 1; ***In re G*** [1999] 1 FLR 409 and ***A v M (Family Proceedings: Publicity)*** [2000] 1 FLR 562. I say no more about this branch of the court's jurisdiction since it is common ground that I am concerned exclusively with an injunction contra mundum.
>
> As is also well known, the result of the analysis ***In re Z*** [1997] Fam 1 is that in relation to the media the exercise of the court's inherent parens patriae or wardship jurisdiction is divided into three parts: the first part, in which the jurisdiction is not exercisable at all and the child is left to whatever remedies against the media the law would give an adult in comparable circumstances; a second part in which the jurisdiction is exercisable, but in circumstances where, because the court is exercising only its "protective" jurisdiction, the child's interests are *not* paramount and where a so-called balancing exercise

> has to be performed; and the third part, in which, because the court is exercising its "custodial" jurisdiction, the child's interests *are* paramount. Well known examples of cases falling into the first category, where no injunction can be granted, are ***In re X (A Minor) (Wardship: Jurisdiction)*** [1975] Fam 47; ***R v Central Television plc*** [1994] Fam 192 and ***M v British Broadcasting Corporation*** [1997] 1 FLR 51. Familiar examples of cases falling into the second category, where there is a so-called balancing exercise, are ***In re M and N (Minors) (Wardship: Publication of Information)*** [1990] Fam 211 and ***In re W (A Minor) (Wardship: Restrictions on Publication)*** [1992] 1 WLR 100. So far as I am aware, and none of the counsel appearing before me was able to identify any other example, ***In re Z*** [1997] Fam 1 is the only reported case falling within the third category.

136. In my judgment, it is unnecessary for present purposes to examine the cases identified in this extract. It is, I think, sufficient to say that in my judgment the instant case is manifestly in the third, ***Re Z*** category.

Conclusions

137. In my judgment, the principles identified in ***Re Z*** are apt to apply here. There is, I think, little mischief, and possibly some benefit, in the Appellant being able to tell the world – or any part of it that is prepared to listen – that he and his former wife have reached an amicable arrangement over C's care, and that such arrangements are preferable to achieving less satisfactory results by litigation. Equally, items 2 to 7 on the shopping list presented by Mr. Price seem to me unexceptionable. If, for example, the Appellant wishes to put photographs of himself and C on his website, in order to impart the information that they have had a very happy holiday together, this, to my mind, is not different in substance from the activities of many families which operate a "blog" and exchange information and news about the progress of themselves and their children on a web-site. Against such activities there seems to me to be little point in having a blanket injunction which then exempts social and domestic purposes.

138. However, the Appellant's involvement of C in a self-serving film designed to exculpate him in relation to his criminal activity in abducting C in 2001 seems to me to be in a wholly different category. In my judgment, despite the skill with which Mr. Price sought to introduce it, this aspect of the Appellant's behaviour is properly justiciable under CA 1989, section 8, alternatively by way of a ***Re Z*** injunction.

139. I do not accept the argument that the involvement of C in a film is unobjectionable on the grounds that it is not about the case, or C's mother, but about the system. It may well be that a book about the abduction (the essential facts of which are in the public domain) would not engage CA 1989, section 1, would, in any event, fall on what I might call the "freedom of expression" side of the line, and would not thus become the subject matter of an injunction: - see, for example, ***Re X (A minor)(Wardship: Jurisdiction)*** [1975] Fam. 47. But involving C in a film about the abduction; and "taking C back to Portugal" for that purpose seem to me matters which plainly relate to C's upbringing. They are equally plainly matters within both the court's protective and its statutory jurisdiction. C's welfare is plainly engaged and is paramount; the Appellant's ECHR Article 10 rights are manifestly outweighed, and the judge was fully entitled to grant relief to C's mother to prevent it happening.

140. That the desire to involve C in such a film is a principal driving force behind the Appellant's anxiety to discharge the injunction is manifest from the fact that he has had the best part of three years to see sense about it. The Email to the BBC journalist which prompted the application is in our papers, and I have cited fully from it. On this appeal, the Appellant could easily have disavowed any intention to do anything of the sort. But plainly, it not only forms a crucial plank in the Appellant's thinking, but, as I have already indicated, his attitude to the episode even infected Mr. Price's otherwise immaculate submissions.

141. I have already highlighted Mr. Price's phrase "treated as child abduction" (see paragraph 110 above). It ***was*** child abduction. The Appellant demonstrates a continuing failure (despite his guilty plea and his prison sentence) to understand that the abduction was not only criminal behaviour and an act of either unthinking or deliberate cruelty to C's mother; it was also highly deficient parenting. It is not something in which C needs to be further involved. It is something for which the Appellant needs to apologise, both to C and to her mother. His involvement of her in an exculpatory film, in my judgment, not only engages her Article 8 rights, which need to be protected, but raises a welfare issue in which C's welfare is paramount. In my judgment, as I have already stated, C's welfare in this context, and the court's duty to protect her ECHR Article 8 rights, heavily outweigh the Appellant's right to freedom of speech and expression.

142. What needs always to be remembered in cases under CA 1989 is that the ECHR rights of children need to be protected. The court normally looks to the child's parents to implement that objective, and in weighing the respective ECHR rights of parents and children, it is trite law that the balance which the court seeks to achieve is an outcome which best promotes the welfare of the child. But equally there are occasions (and this seems to me to be one of them) when the child's ECHR rights need to be protected against disproportionate interference with them by inappropriate parental action.

143. C, at her age, is not ***Gillick*** competent. She is unable to make a properly reasoned decision about whether or not she participates in the type of film the Appellant envisages. The likelihood is that she would do what the Appellant told her. Effectively, she would have no choice. She would be unable to exercise her Article 8 rights. Since her father, in this particular instance, is minded to override them in a misguided (and it must be said arrogant) belief that his abduction of C was unexceptionable, the court must, in her best interests, intervene to protect her rights. It does so either by way of a prohibited steps order or by way of injunction. The ultimate form does not, I think, matter. What matters is the substance.

Outcome

144. I would, accordingly, allow the appeal and discharge the injunction made by Hedley J. I have considered whether or not we should remit the matter to the judge for him to reconsider the terms of the injunction but, like the President, consider that we have sufficient material before us on which to exercise our own discretion. I would, therefore, respectfully adopt the course which the President proposes in paragraphs 75 and 76 of his judgment.

Footnote

145. I would also like specifically to repeat and re-emphasise my endorsement of what the President says in paragraphs 77 of his judgment. I have already stated my view that it may take time for the implications of our judgments in this case to filter through, and there may be some initial debate in individual cases in relation to the application of our judgments to the facts of those cases. In these circumstances, it would plainly be sensible for every court, at what it perceives to be the conclusion of proceedings under CA 1989 to take a few moments to consider whether there are any outstanding welfare issues which require a continuation of the protection afforded during the pendency of the proceedings by CA 1989, section 97. My impression is that there are unlikely to be many cases in which the continuation of that protection will be required: such considerations are, however, in my view best addressed at the time when the parties and their advisers are still before the court at the final hearing.