



Neutral Citation Number: 2011 EWHC 221(FAM)

Case No: FD 09 PO 1078

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th February 2011

Before :

MR JUSTICE McFARLANE

Re: Baby RB (Press Injunction)

**Mr A Wolanski of Counsel (instructed by Miss L Grace of the BBC Litigation Department
for the Applicant**

RB's father in person

RB's mother did not attend and was unrepresented.

Miss K Bhogal (Solicitor advocate for Weightmans) for the NHS Trust

Hearing date: 17th January 2011

Approved Judgment

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

.....
MR JUSTICE MCFARLANE

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

Mr Justice McFarlane. :

1. In November 2009 this court was the venue for proceedings in relating to the life of a young baby, RB, who had been born on 10th October 2008. The proceedings, which were conducted in the presence of the media and were fully reported, related to the long term treatment plan of RB who had from birth suffered from a profoundly disabling condition. After full investigation and much anxious thought those responsible for RB's treatment had concluded that life support should be withdrawn from him and he should be allowed to die. That course was accepted and supported by RB's mother, but was initially opposed by RB's father. In the event, after the first week of evidence, RB's father also concluded that the withdrawal of treatment was justified and matters thereafter proceeded by way of agreement. The plan was put into action soon after the conclusion of the court proceedings with the inevitable consequence that RB's life came to an end.
2. At the conclusion of the court hearing, and at a time when RB was obviously still alive, the court put in place a wide ranging injunction restraining the identification of RB, his parents, the health trust, the hospital treating RB and any of the responsible medical practitioners, nursing staff and care assistants or workers. That injunction, which was made on 11th November 2009, remains in force but is now the subject of an application brought by the BBC for some of its terms to be relaxed.
3. The basis of the BBC application is that RB's mother is willing to take part in an interview to be broadcast on BBC Radio Five Live and that she would wish to refer to the baby by name, rather than using the initials RB, and also that she would wish to be identified by her own name.
4. Since the oral hearing of this application, the BBC request is now supported by a single statement by RB's mother. In addition the court has received further written submissions from RB's father.
5. The initial court proceedings and their conclusion were the subject of very extensive media reporting to the extent that the story was effectively 'front page news' in most if not all of the national media at the time. In the days following the conclusion of the court process the mother gave two in-depth interviews which were published in the Mail on Sunday and the Sunday Mirror. Whilst these interviews contained a detailed account of the baby's life, the parents' relationship, the court process and all that followed from it, it was reported using false names and/or initials in such a way that no breach of the injunction occurred.
6. The only known subsequent publicity occurred in November 2010 when a short story was posted on the Daily Mail website reporting that the mother was once again pregnant. Again, no identifying details were given.
7. The BBC case is that these very tragic events continue to hold human interest. It is therefore planned that a sensitively handled radio interview will be undertaken. During preliminary discussions between the radio producer and the mother, the mother has expressed the wish to call her baby son by his real name. The mother also wishes to be identified only as being the child's mother. As a result the BBC has made the present application.

8. The extent of the BBC application is limited to relaxing the current injunction so as to permit the mother to be named in full, and to permit the use of baby RB's first name. All other elements of the injunction would remain in place. If, however, the injunction is altered to permit this level of identification, then the altered terms will apply to all elements of the media. In determining the application the court must therefore look at the matter in the round, and not be unduly swayed by the fact that what the BBC proposes is a sensitively handled interview by a respected journalist.
9. The BBC application is strenuously opposed by RB's father. Mr B, acting in person, makes the following points in opposition to there being any relaxation of the current order:
 - a. All of the details in relation to RB's life and the decision to terminate treatment, are already fully in the public domain and have been extensively reported in the media. There is, says Mr B, nothing to be gained by rehearsing these matters once more and no benefit to be had from using the baby's first name or from the mother declaring her own identity;
 - b. Naming the baby or the mother does not actually add anything to the details of the story which are already in the public domain;
 - c. The injunction was put in place to protect RB and those closely involved with him. The need for protection remains just as it was in 2009;
 - d. Mr B is worried that the relaxation, whilst not directly relating to his own identity, would nevertheless lead to him being identified;
 - e. Further reporting about the case would be detrimental to Mr B's own private life. He has formed a new relationship and seeks to move forward in his life, but he fears that renewed publicity will simply re-awaken his feelings of grief and bereavement in a manner which is entirely unwelcome and adverse to him;
 - f. Mr B does not welcome members of the public, perfect strangers to him, discussing his son and expressing their own views, one way or the other, as to what should have taken place. As far as he is concerned these matters are 'no one else's business';
 - g. Whilst his view is that there will be little public interest in this story, he retains the residual fear that if there is continued interest then the planned interview will simply open the floodgates and lead to the mother speaking openly about the case to journalists from other agencies and in other media;
 - h. He contends that, notwithstanding RB's death, his son continues to have rights and continues to deserve the protection of an injunction unless both of his parents agree to the contrary.
10. Having summarised the father's arguments, it is right to record that the emotional validity of each and every one of the points that he makes was plain to see. The ability of the court to understand and take on board what Mr B was saying was, in my view, enhanced by the fact that he was acting in person.

11. What is the legal context within which the decision falls to be made? Mr Adam Wolanski, counsel for the BBC, has helpfully taken the court through the three most relevant authorities. They are:

Re: S (FC) (A child) [2004] UKHL 47

Guardian News and Media and others v HM Treasury and others [2010] UKSC 1

Re: B; X Council v B [2008] EWHC 270 (Fam); [2008] 1 FLR 1460

12. The application is one which engages both Article 8 and Article 10 of the European Convention on Human Rights. These provide as follows:

Article 8

Right to respect for private and family life.

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

Article 10

Freedom of expression

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

13. In addition Human Rights Act 1998, section 12(4) provides that when considering whether to grant relief which, if granted, might affect the exercise of the Convention

right of freedom of expression, the court must have particular regard to the importance of that right.

14. In *Re S* (above) Lord Steyn, giving the leading speech, considered that four propositions emerged clearly from the earlier House of Lords decision in *Campbell v MGN Limited* [2004] 2 WLR 1232 concerning the interplay between Articles 8 and 10;

‘Neither Article has *as such* precedence over the other, secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.

Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.’

15. In the *Guardian News and Media v HM Treasury* case the Supreme Court was required, amongst other things, to focus upon the use of photographs in media reporting. Lord Rodger gave the unanimous judgment of the court. At paragraph 49, in the course of summarising the ECHR jurisprudence in the light of that court’s decision in *Von Hannover v Germany* (2005) 40 EHRR 1 by saying that ‘the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.’

16. Lord Rodger then goes on to draw attention to the observations to Lord Hoffmann given in the House of Lords decision of *Campbell v MGN Ltd* [2004] UKHL 22 a few weeks prior to the Von Hannover decision;

‘I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour in one rather than the other, the question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need’.

17. Later in his judgment at paragraph 63 Lord Rodger turns to a matter of particular relevance to the present application;

‘What’s in a name? ‘A lot’, the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people it is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed....Lord

Hoffmann observed in *Campbell v MGN Ltd* ‘judges are not newspaper editors’... This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.’

18. In the succeeding paragraphs Lord Rodger makes the point that anonymous reporting leads to a somewhat disembodied account, whereas if newspapers can identify the people concerned, then they may be able to give a more vivid and more compelling account with which to stimulate discussion about the relevant issues.
19. Finally in terms of the legal context, Mr Wolanski points to the case of *X Council v B* (above) in which Mr Justice Munby, as he then was, made it plain that, in a case where the state had no continuing interest in the wellbeing of a particular child, the question of whether or not it was wise for adults involved to identify themselves in public as the person being involved in the proceedings was not a matter for the court. The court’s role was simply to determine whether or not such identification was legally permissible.
20. It is now necessary to apply the legal context to the factors which are relevant in the present application.
21. The following ECHR rights are engaged:
 - a. Mr B’s Article 8 right to respect for his private life;
 - b. The mother’s Article 10 right to freedom of expression and, in particular, to identify herself as the mother of baby RB;
 - c. The right of the media, and in this case the BBC in particular, to freedom of expression under Article 10 and HRA 1998, s 12 (4).
22. Despite the father’s submissions to the contrary, which from a human point of view I understand, as a matter of law it is the case that, following his death, there are no continuing ECHR rights that attach to baby RB himself.
23. With the observations of Mr Justice Munby in *X Council v B* in mind, but in any event looking at the matter from first principles, the wisdom or otherwise of the mother seeking to identify herself publicly or the news worthiness, or lack of it, that the story may now have, are not matters which can play any part in the court’s determination. Thus, the submissions made by Mr B to the effect that there is nothing to be gained by further publicity, or that any public interest is now waning are not relevant matters.
24. At the core of the case are Mr B’s submissions about the impact on him from any renewed publicity. It has long been established that the ‘private life’ encompassed by Article 8 includes a person’s physical and psychological integrity, and their ability to

develop, without outside interference, their own personality in their relations with other human beings. Mr B states, and I accept, that any public reopening of these emotionally painful matters will have a negative effect on his own ability to move forward in his private life. He feels strongly that the issues raised in this case are nobody else's business and are private matters confined to those closely involved with baby RB.

25. The father's Article 8 rights are therefore engaged and the court must determine whether or not the relaxation of the injunction in the manner sought by the BBC is a necessary and proportionate step notwithstanding the impact that it may have on the father's Article 8 right to private life.
26. The justification relied upon by the BBC is that described by Lord Rodger in the *Guardian News* case. The BBC submission is that being able to name the mother, and for her to use the real first name of her baby, will give the story heightened human interest. That submission is fully supported by the judgment of the Supreme Court in the *Guardian News* case to which I have already drawn attention. The 2009 reporting of the plight of baby RB and the dilemma faced by his parents generated a great deal of public interest, debate and sympathy. The public interest was apparently genuine and the media reporting responsible. The reporting and the discussion were at the serious end of the spectrum, rather than being merely prurient or shallow. If the discussion of the case which took place a year ago was in the public interest, which I am satisfied it was, then Mr Wolanski submits, the naming of names at this stage, justified as it will be on the grounds described by Lord Rodger in the *Guardian News* case, must similarly be justified as adding to the journalistic value of any subsequent interview.
27. I accept that Mr Wolanski's submissions are a correct statement of the law and I accept that on that basis the naming of the mother and the identification of RB's first name are, when looked at alone, justified.
28. The question for the court therefore is, given that the naming of the mother and the use of baby RB's name would otherwise be justified, to what extent, if any, should that right to identification be limited in order to protect the father's right to respect for his private life? Secondly, if there is to be such a limitation on the mother's right, is that limitation proportionate?
29. In reaching a decision and deciding in what manner the balance should be struck in this case I take particular account of the fact that the application does not seek to lift the veil of anonymity which at present covers the father. The mother's surname is different from that of the father, and naming her will not of itself give rise to the identification of Mr B. Similarly, the use of RB's first name, without reference to the surname that both he and the father share, will also not lead to the father being identified. The father's case is not, therefore, that the relaxation of the injunction that is sought will lead to him being known to all the world as baby RB's father. The impact that he identifies is simply, but importantly, the effect that knowing that these issues are being resurrected in the media will have on his ability to move forward in his private life and continue the task of putting these events behind him.
30. Placing all of these matters into the balance, and without giving either side of argument any automatic priority, but nevertheless having particular regard to the

importance of the right of freedom of expression as set out in HRA 1998, s 12(4), I do not consider that the matters raised by the father are sufficient to justify restricting the right of the mother and the media to the degree of identification that is sought. Whilst I accept that the father is justified in describing the level of potential personal distress that he anticipates will follow, and whilst I accept that those circumstances represent an interference with his right to a private life, I consider that it would be a disproportionate and unnecessary step to restrict the mother's and the media's rights in order to give the father the level of continued protection that he seeks. Had there been a request to identify the father or to use RB's surname, then plainly the matter would have been more finely balanced and different considerations would have been in play.

31. On the case as it presented, however, I therefore consider that the relaxation of the injunction sought by the BBC is justified and in due course I will endorse an order to that effect.

[Judgment Ends]