Neutral Citation Number: [2005] EWHC 1564 (Fam)

Case No: NP 05 C 0017

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2005

Before:

THE PRESIDENT

- -

Between:	
A Local Authority	**Applicant**
- and -	
W	**First Respondent**
-and-	
L	**Second Respondent**
-and-	
W	**Third Respondent**
-and-	
T & R (By the Children's Guardian)	**Fourth Respondents**

- -
- -

Alison Ball QC (instructed) for the Applicant
Ian Peddie QC (instructed by The Guardian ad Litem) for the 3rd and 4th Respondents

Hearing date: 4 May 2005

- -

Approved Judgment

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

THE PRESIDENT
Approved Judgment

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THE PRESIDENT

This judgment is being handed down in open court on 14 July 2005. It consists of 27 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

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

Sir Mark Potter P. :

1. This is a reserved judgment following the hearing on 4 May 2005 of an application by a local authority ("the Council") to restrain publication of the identity of a defendant and her victim in a criminal trial in order to protect the privacy of children who are not involved in the trial but are the subject of care proceedings. This case raises, in substantially different circumstances, issues similar to those considered in the recent decision of the House of Lords in *Re: S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1FLR 591.

2. The Council is concerned with the care of two children, T (a girl) born on 6 March 2002, now aged 3, and R (a boy) born 31 December 2004, now aged 6 months. Both children are the subject of care proceedings. R is the subject of an interim care order. At the date of the 4 May hearing he was placed with foster parents while his father and his paternal family were being assessed as potential carers for him. T was living with her maternal grandmother under a supervision order and a time limited residence order. An application was due to be heard on 6 May 2005 in the County Court for the removal of T from her maternal grandmother's home to foster care.

3. The mother, who is the first respondent, suffers from the HIV virus and is awaiting sentence having pleaded guilty to a charge under s.20 of the Offences Against the Person Act, which alleges that she knowingly infected the second respondent, who is the father of R, with that virus. T is the child of a man with whom the mother had an earlier relationship. The applicant seeks the renewal of an injunction the effect of which is to prohibit until further order any newspaper, programme service or any media broadcast including publication by the internet from revealing the names and addresses or publishing any photographic images of the mother or father in connection with the criminal proceedings and the names, addresses or details of nursery placements, names of any carers, or any other particulars likely or calculated to lead to the identification of the children or any photographic image of either of them.

4. The procedural history to date is that, on 20 April 2005, the county court judge, sitting as a judge of the Family Division, in the local Registry, granted an injunction to the above effect. She did so during the currency of care proceedings. However, the application to her was a free standing one invoking the inherent jurisdiction of the court. On the next day i.e. 21 April the mother was due to attend a committal hearing in the local Magistrates' Court. The order was made with the consent of all parties, no notice having been given to the press in accordance with the President's Direction of 18 March 2005 "Applications for Reporting Restrictions Orders". The order on its face made no provision for service of the order upon anyone other than the parties although it provided that

> "Any person or organisation affected by this order shall have leave to apply or discharge or vary the same on two days notice."

It went on to provide for the filing of evidence, that all persons wishing to be heard on the injunction application should file a skeleton argument by 26 April, and that the matter would be further considered inter partes on 27 April 2005. The Council in fact served notice on the local newspaper. When the matter returned before the judge on 27

April 2005 the newspaper was not legally represented, although an editorial employee attended. However, the judge had before her and considered the written submissions of the Head of Legal Affairs of the owners, Newsquest, opposing the grant of the injunction. The judge renewed the injunction to 4pm on 28 April 2005, ordered service upon such newspapers and other organs of the media as the Council thought fit and transferred the matter to the High Court Family Division in London.

5. On 28 April 2005 the application was further adjourned by Singer J to 4 May 2005 so that further time could be given to those organs of the press, which had been served to respond to the application the injunction being continued by Singer J meanwhile. He also ordered service by the Council on the Press Association in accordance with paragraph 3 of the President's Direction dated 18 March 2005.

6. When the matter came before me on 4 May 2005 I was informed that a number of local newspapers in had been served, as well as the Press Association. No newspaper was present or represented. However, I had before me the written submissions of the Head of Legal Affairs of Newsquest which were before the judge and considered by her at the time of her renewal of the injunction on 27 April 2005.

7. The mother and father, as first and second respondents, were not present or represented. Nor was the third respondent, who is T's maternal grandmother. T and R were represented by the fourth respondent, their guardian, an officer of Cafcass. He is the author of a Children's Guardian Report, which was placed before me. I also considered the statement of Mr J, the Council's Service Manager for Children and Families in which he set out the position of the Council and the reasons for its application. I heard evidence from both the guardian and Mr J in elaboration of their statements. Finally, there was also a short statement from the mother.

8. That evidence established the following.

9. The mother is HIV positive. The court proceedings are likely to create considerable local (and possibly national) interest. A test upon T has established that she is not HIV positive. R, however, is too young to be reliably tested. Current medical advice indicates more than a possibility that R has been infected. However, he cannot be reliably tested at present or, probably, for up to a year.

10. The mother and children until recently lived on one of a small group of council estates, which are said together to form something of a self-contained community. What is local knowledge on one soon speeds to the others. The father lives on the same estate.

11. In December 2004, when it became known that the mother was HIV positive, she was forced to leave her council home due to abuse and harassment from neighbours in the form of name-calling and the throwing of missiles in her direction. The windows of her property were smashed. She has been moved to a neighbouring local authority some ten miles away from her community. For the purposes of contact with R, the mother has been transported to and fro at Council expense.

12. On 14 April 2005, T's maternal grandmother, with whom she was living, contacted T's guardian expressing concern that her own 12 year old daughter had been bullied at school and taunted with the word AIDS.

13. As at 4 May 2005, the position was as follows. T has been placed in a day nursery in another estate, well removed from the group to which I have referred, where there is no knowledge of her situation or the identity of the mother. She is happy there. There is a substantial level of ignorance locally about the nature, effect and communicability of the HIV virus and, according to the nursery staff, parents of children at the nursery (and in the community generally) are fiercely protective of their children and mistrustful of the local Social Services. It is the fear of the nursery staff, as well as the welfare officials of the council that, if publicity is given to the identity and HIV status of the mother or father and if (as is a likely consequence) knowledge that they are the parents of T or R spreads from the estate where they have lived to the wider community, it is also likely that such knowledge will be acquired and passed on by and between other parents of children at T's nursery. This will in turn give rise to a general assumption among the parents of HIV infection in the children and a general outcry at T's nursery.

14. It was the intention of the Council, if feasible, and following assessment, to place R with his father and the father's family if possible. The father presently enjoys anonymity in the criminal proceedings and it is the desire of the Council to preserve that position, if only for the sake of the children. If the father and his family were not assessed to be suitable carers, the Council considered that publicity as to the identity of the mother or the father in the absence of the order sought was likely to create difficulties in finding alternative carers. There was also grave concern on the part of the Council that potential foster carers, whose numbers are small, might themselves be put off taking a child who (whether accurately or otherwise) has the reputation of possible HIV status. Further, in the case of T, if (as might well be the case) she had to be moved from her grandparents, a similar problem might present itself in relation to finding a foster carer for her. It appears that, presently at least, a return to the care of the mother is unlikely in the case of either child.

15. In evidence before me, Mr J for the Council welfare services and the guardian were at one in their description of the position and their fears in respect of the children in the absence of an order of the kind sought. They were also hopeful that the making of the order would be likely to limit knowledge of the parents' identity to their own immediate estate or locality, and avoid the danger of the children being identified in the area where they are looked after. If, on the other hand the identity of the parents were to be published, broadcast or posted upon the internet, the news would be likely to spread and the connection made, with adverse effects upon the viability of the children's placement, whether within their extended family or outside. There would also be long-term adverse effects upon the reputation and happiness of the children resulting from what is misguidedly but widely regarded as the stigma of AIDS, which, if they remain within the area, they may never shake off.

16. In the statement of Mr J, it is summarised in this way:

> 12. If it became necessary to remove [T] from her current family placement and should [R] remain in his foster placement, information as to the status of their parents is likely to have an effect on the authority's ability to place the children. It may be that [R] would need to be moved from his current placement because his current foster carers are unwilling or unable to cope with the

> wider community having knowledge of his parents' health status. The pool of foster carers prepared to endure such stigma and isolation for themselves, their families and other foster children is likely to be small. It is likely that placements outside the immediate area would have to be sought. Placements outside the … area have a negative affect on the frequency of contact, which could be promoted between the children and their families, and perhaps between the siblings themselves while decisions were made about their future.
>
> "13. For both of these children if they are *permanently* placed outside their birth family, in view of their age, adoption may be a necessary eventual outcome, probably severing all direct contact with their birth family."

17. So far as attendance at nursery is concerned Mr J states:

> "14. … the local authority considers that other families using the nursery will not be able to put the potential risk to themselves and their children in the proper context. It is felt that they will either refuse to use the facilities or intimidate the family until they are prevented from attending themselves….
>
> 15. It is anticipated that this is not a short-term problem for these children. Once they are considered to be a risk by the wider community, it will be extremely difficult to remove that stigma. It will follow them throughout their childhood. It is likely that their schooling will be affected by families boycotting the school until the pupil is removed. Alternatively, the child in question will be socially isolated."

18. This position was supported by the children's guardian, who underlines the likelihood that publicity will impact, not only on the decision as to their placement, but on their lives generally. He also pointed to the substantial risk of long-term stigma within the community, regardless of the true position as to whether or not the children are themselves HIV positive (which in the case of T is already established not to be the case). He submitted that these matters plainly involve potential interference with the rights of the children to family life under Article 8 of the ECHR, quite apart from involving potential damage to their emotional and psychological health. His stance was set out in the Guardian's Position Statement as follows:

> "4. …the small children in this case will be harmed by those persons who impact upon the lives of these children knowing, not that the mother has faced criminal proceedings, but that she carries the HIV virus … [W]ithin the community in which the children live, the public will not stop to

> consider the likelihood of either child being affected, but will automatically assume so… [T]he elder child does not have the virus and the younger may not. Assumptions that they have will therefore be to the long-term detriment of these children.
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> 3. If the information about mother's status becomes public knowledge it is not difficult to see how this will impact [on] the children in the long-term in respect of:
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> - Placement and their right to be brought up within their family, if feasible;
> - Educational provision;
> - Social activities within the community; and
> - Their ability to make and sustain relationships.
>
> 4. It is the Guardian's strong view that the impact directly upon these is disproportionate to the right to the public's right to know NOT about the crime, but about the perpetrator and victim. The repercussions for these children will, to all intents and purposes, be permanent and they will [be] negatively affected if they remain within their community. This aspect distinguishes this case from that envisaged in Re: S (Identity: Restrictions on Publication) [2004] UKHL 47…"

19. At the hearing on 4 May, I also had before me a Position Statement from the mother supporting the application of the Council "not for her own ends, but because of the implications for the children as set out in the Local Authority's statement. She has experienced the stigma herself and does not believe that the children should have to."

20. In the written submissions of Newsquest, the statement of Mr J was criticised as 'only speculative suggestion' that the children might suffer hardship as a result of the identification of the mother as HIV Positive. It was said that 'no evidence is presented in support'. Reliance was placed upon the fact that T is not HIV Positive and R cannot be tested. It was said that there is no basis for the claim that there would be panic in the community leading to social isolation of the children and thus no "compelling circumstances' justifying the imposition of reporting restrictions to prevent the identification of the defendant and/or her children, as is stated to be required in *Re: S.*

21. I accept that the evidence to which I have referred is speculative. However, in a situation where, so far, no substantial publicity has occurred, the evidence is necessarily speculative in nature. In this case, it consists of the assessment of a local authority officer and a guardian, both with wide welfare experience and local knowledge as to local attitudes. I was told in evidence, that the assessment of the staff

of the nursery attended by T. is to similar effect. There are two pieces of factual evidence, which support the fears expressed by the Council, namely the reaction on the mother's local estate when her own condition became known and the complaint of bullying and taunting of the maternal grandmother's daughter at her school. In those circumstances, it was submitted that whether or not either child is in fact HIV Positive is unlikely to assuage the fears of the ignorant if the connection between the children and their parents becomes widely known.

22. I have above set out the position as it existed on the evidence before me on 4 May 2005. That is because, since that date and prior to judgment, in response to an enquiry by my office, I have been informed by the Council that the position has changed in relation to the children to the extent that on 23 June 2005 further interim orders were made by the judge in the care proceedings to the following effect:

    a) An interim residence order in respect of R in favour of the father;

    b) An order of the court's own motion making T a ward of court, coupled with an order for care and control to a Mrs K under a supervision order.

Accordingly, I required the parties to return before me today to make any further submissions they thought appropriate in the light of these developments. Their submissions remain essentially the same against the following changing background. T has now been moved from the care of her maternal grandparents where her placement was not satisfactory to the care of Mrs K and her family who live on the estate next door to the father's. T still attends the nursery some way away where her provenance is unknown. The Ks are the subject of an incomplete assessment and are thus not suitable to be the subject of a placement under an Interim Care order. Thus a warding order has been made so as to allow T's placement to continue there under the court's inherent jurisdiction. The K's suitability is still uncertain. Furthermore, it now appears that T's paternal grandparents have made application for a residence order in respect of T. Their assessment, yet to be made, is also of uncertain outcome.

23. I have had placed before me today a recent report and assessment of the Cafcass guardian which makes clear that T is a disturbed little girl who has already had too many carers in her short life and has been emotionally damaged by the lack of consistency in her life. She has behavioural problems and she is in urgent need of a long-term placement in a loving household with as little disturbance as possible.

24. The law relating to the grant of injunctions restraining media identification of a parent who is a defendant in criminal proceedings, in order to protect the identification of his or her children, and the interplay of Article 8 and Article 10 in such circumstances, has recently been comprehensively reviewed by the decision of the House of Lords in *Re: S.* In that case, a mother was alleged to have murdered the brother of the child sought to be protected, in circumstances where the child was likely to suffer psychological harm if the mother's identity was publicised in the criminal trial. It was held that the approach to such cases is now governed by Human Rights principles; and that previous decisions concerned with the protective powers of the court under its inherent jurisdiction (see in particular *Re: Z (A Minor)(Identification: Restrictions on Publication)* [1996] 1FLR 191) are now of limited value, save in relation to the ultimate balancing exercise to be carried out under the provisions of the ECHR. Although the decision is contained in the single judgment of Lord Steyn, with whom

the remainder of their Lordships agreed, it is on analysis by no means easy to apply. That is because it makes clear on the one hand that, in performing the balancing exercise between the competing rights of freedom of the press under Article 10 and the rights of a child under Article 8, there is no presumption of priority as between those rights, while on the other hand it is stated that in European jurisprudence and domestic practice the ordinary rule that the press may report everything which takes place in a criminal court can only be displaced by "unusual or exceptional circumstances" (per Lord Steyn at paragraph [18]); see also the reference to a requirement for "most compelling circumstances" (at paragraph [20]).

25. Article 8(1) provides that:

> "Everyone has the right to respect for his private and family life…."

26. Under Article 8(2):

> "There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with law and is necessary in a democratic society… [for a variety of reasons, including]…. The prevention of disorder or crime…[and]…. The protection of the rights and freedoms of others".

27. In the context of this case, the observations of the European Court of Human Rights make clear that Article 8 protects not only privacy in the sense of private life lived behind closed doors and entitled to be kept secret or confidential.

> "Private life.. includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings." See: *Botta v Italy* (1998) 26 EHRR 241 at paragraph [32].

> "Private life is a broad term not susceptible to exhaustive definition … Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world." See: *Bensaid v United Kingdom* (2001) 33 EHRR 208 at paragraph [47].

For wider consideration, see the review of the relevant authorities by Munby J in *Re: Roddy (A Child)(Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2FLR 949 at [29]-[33].

28. There is no precise definition of "family life" in the European Case law. The existence or non-existence of family life is essentially a question of fact depending upon the existence in practice of close personal ties: see *K v United Kingdom* (1986) 50 DR 199, 207 E Comm HR. It plainly applies to the relationship between parents and children and their enjoyment of each other's company. It also applies to adoptive

parent-child relationships. Whereas, as it seems to me, the relationship of foster parent and child, at least on a long-term basis, is also apt to create a relationship the enjoyment of which amounts to family life, the Strasbourg court has not so far as I am aware yet dealt with that question. It is right to say that the Commission has held that such a relationship amounts to one of "private life" only: See *X v Switzerland* (1978) 13 DR 248. However, the distinction is not a significant one for the purposes of this case. If the position of the children and the possible effects of publicity upon them are as previously set out, it is plain that the Article 8 rights of the children are engaged in this case.

29. Article 10(1) provides that everyone has the right to freedom of expression. This includes

> "The freedom to hold opinions and to receive and impart information and ideas without interference by public authority".

30. Under Article 10(2), the exercise of these freedoms

> "May be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society… [for a variety of reasons including]… for the protection of the reputation or rights of others".

31. Section 12(4) of the *Human Rights Act 1998* provides that where a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression:

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

32. In referring to the relevant articles of the Convention, I have not set out the provisions of Article 6 relating to the right to a fair trial, which, by reason of the mother's position as set out at paragraph 20 above, is not engaged in this case. However, as made clear by Hale LJ in *Re: S* at [Paragraph 44]

> "The importance of Art 6 lies in the values which it is there to protect and the impact of those values from the exercise of the right to freedom of expression in Art 10. This was summed up

by the European Court of Human Rights in *Diennet v France* [1996] 21 EHRR 554, at Para 33:

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

The common law has long been in the same view: See *Scott v Scott* [1913] AC 417… The importance of press and media reports in safeguarding that public character and protection is reinforced by the privilege afforded to file an accurate reports of the proceedings."

33. It is pertinent to add that, in relation to the values which Article 6 is there to protect, Article 6(1) recognises the need to circumscribe the right to a public hearing in the case of a person charged with a criminal offence by permitting the exclusion of press and public "where the interests of juveniles… so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

34. Although there have been a number of judicial observations in the past which have accepted the presumptive primacy of Article 10 (see for instance Butler-Sloss LJ in *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 at 921 and 931), that proposition was rejected by Sedley LJ in *Douglas v Hello! Ltd* (No.1) [2001] QB 967, 1003 and the majority of the Court of Appeal in *Cream Holdings v Bannerjee* [2003] EWCA Civ 103, [2003] 2 All ER 318 at para 41. The position was made clear beyond doubt by the House of Lords in *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2WLR 1232 in which Lord Hope stated at para 111:

> "Section 12(4) of the Human Rights Act 1998 provides:
>
> > "The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material claims, or which appears to the court, to be journalistic, literary or artistic material (or the conduct connected with such material), to –
> >
> > (a) the extent to which –
> >
> > (i) the material has, or is about to, become available to the public; or

> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

But, as Sedley LJ said in *Douglas v Hello! Limited* [2001] QB 967, 1003, Para 133, "you cannot have particular regard to Article 10 without having particular regard at the very least to Article 8": see also *In Re: S (A Child) (Identification: Restrictions on Publication)* [2004] Fam 43, 72, Para 52 where Hale LJ (as she then was) said that Section 12(4) does not give either article pre-eminence other the other. These observations seem to me to be entirely consistent with the jurisprudence of the European Court, as is the following passage in Sedley LJ's opinion in *Douglas*, at p1005, Para 137:

> "The case being one that affects the Convention right of freedom of expression, Section 12 of the Human Rights Act 1998 requires the court to have regard to Article 10 (as, in its absence, with Section 6). This, however, cannot, consistently with Section 3 and Article 17, give the Article 10(1) right of free expression a presumptive priority over other rights. What it does is require the courts to consider Article 10(2) along with Article 10(1), and by doing so it will bring into the frame the conflicting right to respect for privacy. This right, contained in Article 8 and reflected in English Law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which so far evidently has to be the same under both Articles, is determined principally by considerations of proportionality." "

35. In *Campbell*, Baroness Hale, having stated with approval the agreement of the parties that neither right takes precedence over the other, said as follows:

> "139. Each right has the same structure. Article 8(1) states that "everyone has the right to respect for his private and family life, his home and his correspondence". Article 10(1) states that "everyone has the right to freedom of expression. This right should include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…" Unlike the Article 8 right, however, it is accepted in Article 10(2) that the exercise of this right "carries with it duties and responsibilities". Both rights are qualified. They may respectively be interfered with or restricted provided that three conditions are fulfilled. (a) The interference or restrictions must be "in accordance with the law"; it must have a basis in national law which conforms to

> the Convention standards of legality. (b) it must pursue one of the legitimate aims set out in each Article. Article 8(2) provides for "the protection of the rights and freedoms of others". Article 10(2) provides for "the protection of the reputation or rights of others" and "preventing the disclosure of information received in confidence". The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights. (c) Above all, the interference or restriction must be "necessary in a democratic society": it must meet "a pressing social need" and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both "relevant" and "sufficient" for this purpose.
>
> 140. The application of the proportionality test is more straightforward when only one Convention right is in play; the question then is whether the private right claimed offers sufficient justification for the degree of interference from the fundamental. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it. The Convention jurisprudence offers us little help with this ….
>
> 141. Both parties accepted the basic approach of the Court of Appeal in *Re: S* [2004] Fam 43, 72-73, Paras 54-60. This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each."

36. The approach of the Court of Appeal in *Re: S* is best to be found in the analysis by Hale LJ in the following passages in paras 52-54 and 60 in which she stated:

> "52. … the court, in deciding whether to exercise its jurisdiction to restrain publication, whether under the inherent jurisdiction or under S.39 or any others statutory provision, has to consider both Art 8 and Art 10 as independent elements… as Sedley LJ said in *Douglas and Others v Hello! Limited* [2001] QB 967, sub nom *Douglas, Zeta-Jones, Northern & Shell PLC v Hello! Limited* [2001] 1FLR 982 at 1005and 1019 respectively:
>
> > Neither element is a trump card. They will be articulated by the principles of legality and

> proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights. It will be remembered that in the jurisprudence of the Convention proportionality is tested by, among other things, the standard of what is necessary in a democratic society."

53. in *A v B PLC and Another* [2002] EWCA Civ 337, [2002] 3 WLR 542, Lord Woolf CJ observed at Para [6]:

> "There is a tension between the two Articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights which both Articles are designed to protect. Each Article is qualified expressly in a way which allows the interests under the other articles to be taken into account."

54. This is the approach that should have been followed in this case. The concept of proportionality means that the proposed interference or restriction must be supported by relevant and sufficient grounds; it must respond to a pressing social need; and it must be no greater than necessary to meet the legitimate aims pursued.

55. In considering the proportionality of the proposed interference with freedom of expression, the court must not only consider the importance of press freedom in principle: as Lord Woolf CJ also said in *A v B PLC and Another* [2002] EWCA Civ 337, [2002] 3 WLR 542, at Para [11] (iv) "the existence of free press is in itself desirable and so any interference with it has to be justified". It must also consider those features which enhance its importance in the particular case.

….

60. It would be so much easier if there were a trump card or governing principle, whether it be press freedom or rights of the child. But there is, in my judgment, no escape from the difficult balancing exercise which the Convention requires… The judge did not consider each Article independently, and thus did not conduct that exercise…"

37. Lord Philips of Worth Matravers MR (at para[110]) and Latham LJ (at para [64]) agreed with the judgment of Hale LJ as to the legal principles and the approach to the balancing exercise to be followed in a case of this kind. They merely differed as to whether or not the judge had followed that approach and / or was right in the conclusion to which he came. Latham LJ put the matter in this way:

> "75. Whatever the theoretical limits of the jurisdiction [to protect a child from the consequences of trial or conviction of a parent] may be, the [Pre-Human Rights Act] authorities suggest that the courts should not even consider exercising that jurisdiction in cases where publicity is not directed at the child or the child's carers unless it could have an adverse affect on the court's ability to deal properly with the care proceedings in question… It seems, to me, however, that the limitations so far imposed on its exercise will have to be reconsidered in the light of the Human Rights Act 1998. As there is a proper foundation for the court to exercise jurisdiction, the child's rights under Art 8 must be taken into account by the court if it is to comply with its obligations under s.6 of the Human Rights Act 1998. It follows that the court is at least entitled to consider the grounds of an injunction in cases such as this even if publicity is not directed at the child or his carers and could not be shown to have an adverse effect on the care proceedings, although that would undoubtedly be a significant factor in deciding whether or not an injunction should ultimately be granted. This conclusion has the added benefit of enabling the family court to make an order in an appropriate case if it is clear that the criminal court would have made an order under s.39 of the *Children and Young Persons Act 1933* but for the fact that, for what may be wholly fortuitous reasons, the child in question is not a witness or does not happen to be a victim identified in the indictment.
>
> 76. It follows that in considering whether or not to make an order such as the order applied for in the present case, the court has to carry out the exercise which was identified at the beginning of this judgment. [i.e. 'identifying the extent to which refusing to grant the relevant terms of the injunction asked for would be a proportionate interference with the private life of the child on one hand and their grant would be a proportionate interference with the rights of the press under Art. 10 on the other hand.': Para[64]] In doing so, the court will have to bear in mind, on the one hand, the effect the publicity will have on the child, and the extent to which it will affect the ability of the

> courts to carry out its obligations to the child in the exercise of its care jurisdiction on the other hand, and the effect the order will have on the ability of the press to provide the public with a full and fair report of the proceedings bearing in mind the interest which the public has in knowing the identity of a defendant, which is one of the important and usually inevitable consequences of a public trial."

38. There is no criticism in the unanimous judgment of the House of Lords of Latham LJ's helpful enunciation of the balancing process involved, or indeed of the passages I have quoted from the judgment of Hale LJ. The only criticism or qualification of her detailed analysis of that process appears at paragraph [30] of Lord Steyn's judgment in relation to paragraph [56] of Hale LJ's judgment, which I have omitted.

39. In the House of Lords, having set out the relevant European Convention provisions and referred to the "general and strong rule in favour of unrestricted publicity of any proceedings in a criminal trial both at common law and under decisions of the European Court of Human Rights in relation to the European Convention, Lord Steyn adopted the approach articulated in the House of Lords in *Campbell v MGN*. He stated:

> "17. The interplay between Arts 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN*… for present purposes the decisions of the House on the facts of *Campbell v MGN Limited* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither Article has *as such* precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test. This is how I will approach the present case."

40. By framing his first proposition as he did, Lord Steyn affirmed the rejection in *Campbell v MGN Limited* of a "presumptive priority" for Article 10 over Article 8. At the same time he nuanced that rejection by use of the words 'as such', thus signalling the subsequent burden of his judgment, which was that, in cases involving limitations upon press freedom to report everything that takes place in a criminal court, the ultimate balancing test in relation to proportionality is generally likely be resolved in favour of Article 10. Under the heading "The general rule" Lord Steyn stated:

> "18. In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the

> public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule for reasons of rights under Art 8."

41. Lord Steyn went on to set out the relevant Statute law relating to reporting restrictions, in order to underline that, though there are numerous statutory provisions which require or permit reporting restrictions in various situations, none covers the situation in a case of this kind. In particular, s.39 of the *Children and Young Persons Act 1933* limits the ambit of the reporting restrictions which the court may impose 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 as being a witness therein'. Lord Steyn observed that his reason for referring to those provisions was

> "the reflection that, in regard to children not concerned in a criminal trial, there has been legislative choice not to extend the right to restrain publicity to them. This is a factor which cannot be ignored."

42. Lord Steyn then referred briefly to the plethora of earlier authority on the nature and extent of the court's inherent jurisdiction to restrain publicity and made clear the unanimous view of the House of Lords:

> 23. "…that since the Human Rights Act 1998 came into force in October 2000, the earlier case-law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction for restrained publicity in the case such as the present is now derived from convention rights under the European Convention. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case-law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the European Convention provisions… it will in future be necessary, if earlier case-law is cited, to bear in mind the new methodology required by the European Convention as explained in *Campbell v MGN Limited*…".

43. Moving to consider Articles 8 and 10 in turn, Lord Steyn readily accepted that, in the circumstances under consideration, Article 8 was engaged and that publicity surrounding the trial would involve 'dreadfully painful times for the child'. However he went on to observe:

> "25. But it is necessary to measure the nature of the impact of the trial on the child. He will not be involved in the trial as a witness or otherwise. It will not be necessary to refer to him. No photograph of him will be published. There will be no references to his private life or upbringing. Unavoidably, his mother must be tried for murder and that must be a deeply hurtful experience for the child. The impact upon him is, however, essentially indirect."

44. Lord Steyn went on to observe that, not only had no such injunction previously been granted by an English court under the inherent jurisdiction or under the provisions of the European Convention; there was also no decision of the Strasbourg court granting injunctive relief to non-parties, juvenile or adult, in respect of publication of criminal proceedings. Nor did the United Nations Convention on the Rights of the Child 1989 make provision to protect the privacy of children in that respect. He continued:

> "27. The interference with Art 8 Rights, however distressing to the child, is not of the same order when compared with cases of juveniles who are directly involved in criminal trials. And, saying this, I have not overlooked the fact that the mother, the defendant in the criminal trial, has waived her right to a completely public trial, and supports the appeal of the child. In a case such as the present her stance could only be of limited weight."

45. Turning to Article 10, Lord Steyn quoted the judgment of Lord Woolf MR in *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966 at 977 where he emphasised the need to contain erosion of the principle of the freedom of the press to report criminal trials and for exceptions to grow by accretion when applied by analogy in subsequent cases. Lord Steyn observed:

> "These are valuable observations. It is, however, still necessary to assess the importance of unrestricted reporting in specifics relating to this case."

46. He nevertheless reiterated at paragraph [30] the general observation that:

> "The criminal trial is a public event. The principle of open justice puts, as it has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials and progress promotes public confidence in the administration of justice. It promotes the values of the rule of law."

47. Lord Steyn then proceeded under the heading "Consequences of the grant of the proposed injunction" to consider those consequences broadly in terms of Article 10

and the erosive effect which grant of an injunction of the type proposed might have upon the right to report criminal proceedings generally. He expressed concern (Paragraph [32]) that the jurisdiction under the European Convention might equally be invoked by an adult non-party faced with possible damaging publicity as a result of a trial of a parent, child or spouse.

> "This would confront newspapers with an ever wider spectrum of potentially costly proceedings and would seriously inhibit the freedom of the press to report criminal trials."

48. Second, if such an injunction were to be granted, it could not be assumed that relief would only be sought in future in respect of the name and a photograph of the defendant and victim.

> "It is easy to visualise circumstances in which attempts would be made to enjoin publicity of, for example, the gruesome circumstances of a crime. The process of finding exception upon exception to the principle of open justice would be encouraged and would gain in momentum."

49. Third, from the point of view of a newspaper, a report of a sensational trial without revealing the identity of the defendant will be a very much 'disembodied trial'.

> "If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

50. Fourth, not only is it costly for newspapers to contest applications for injunctions but:

> "time constraints of an impending trial may not always permit such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting."

51. Fifth, Lord Steyn placed emphasis on the position from the point of view of local, as much as national, newspapers. He stated:

> "For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now is under consideration, it is likely that they will often be silenced… The impact of such a new development on the regional and local press in the UK strongly militates against its adoption. If permitted, it will seriously impoverish public discussion of criminal justice."

52. I have set out the reasoning of Lord Steyn at some length, because it has been suggested by at least one commentator that, given the overall tenor of the judgment, the House of Lords, whilst on the one hand acknowledging and accepting the new

methodology required by the European Convention as explained in *Campbell* (see Paragraphs 7and 23 of the judgment as quoted at Paras 30-31 above), has, on the other hand effectively restored the presumptive priority of Article 10 which in *Campbell* they were at pains to reject.

53. I do not read Lord Steyn's judgment in that way. Paragraphs 17 and 23 of the judgment are clear as to the approach to be followed in a case of this kind. 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 upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out. Having so stated, Lord Steyn strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test and stated that, at first instance, the judge had rightly so treated it. However, nowhere did he indicate that the weight to be accorded to the right freely to report criminal proceedings would invariably be determinative of the outcome. Indeed, he acknowledged that although it was the "ordinary" rule that the press, as public watchdog, may report everything that takes place in a criminal court, that rule might nonetheless be displaced in unusual or exceptional circumstances.

54. It is of course the submission of the Council and the Guardian that such unusual and exceptional circumstances have been demonstrated in this case.

55. Before stating my conclusions in that respect, it is pertinent to make clear certain important differences between the facts of this case and the background to the application in *Re: S*, the first of which is not obvious from the report of the House of Lords decision, although clearly influential upon the decision of Hedley J at first instance. In *Re: S*, the court was concerned with an application similar to that sought in this case for the protection of a child who was the nine year old brother of the victim of a murder for which his mother was soon to be tried. There was psychiatric evidence before the court that, if the child was subjected to bullying and teasing in school as a result of press publicity once his mother's identity became known, he would suffer increased trauma and risk of mental illness. It was a feature of the case that, at the time of the application there had already been widespread press reports naming the dead older brother and where he lived, the parents, the child and the child's school. Hedley J based his decision on what he called "the primacy in a democratic society of the open reporting of public proceedings of grave criminal charges and the inevitable price that involves in incursions on the privacy of individuals". However, as an element in that decision he stated:

> "Thirdly, I have to recognise that not even the restrictions contended for here offer a real hope to CS for proper isolation from the fall out of publicity for this trial; it is inevitable that

> those who know him will identify him and thus frustrate the purpose of the restriction. Lastly, I am simply not convinced that, when everything is drawn together and weighed, it can be said that grounds under Art 10(2) of the European Convention have been made out in terms of the balance of the effective preservation of CS's Art 8 rights against the right to publish under Art 10.": (see Para [17] of the decision in the Court of Appeal at [2003] 2 FLR 1257.)

56. By way of contrast, this case is presented on the basis that, given the absence of previous publicity, if the injunction against publicity is granted there is a good prospect that these children, too young to be aware of the existence or significance of the trial, may indeed in large measure be isolated from its fall out.

57. A point of further distinction is that the application in *Re: S* was made at the final hearing in care proceedings, the judge having made a care order placing the child with the father who had separated from the mother and remained in the family home. There was no question or suggestion that refusal to grant the injunction would have any adverse or inhibiting effect upon the court's proper placement of the child i.e. upon the very process by which his future in a secure and happy family life was to be protected and assured. By way of contrast in this case, the Council and Guardian argue that, in a still shifting and unresolved situation, refusal of the injunction may place real difficulties in the way of the Council and of the court in locating and/or providing a suitable placement for the children in the family best suited to provide such security and happiness.

58. As a final ground of distinction, this case is not put on the basis of the damage likely to be caused to the children by knowledge that their mother is or may be a criminal. Many children, themselves innocent, regrettably have to bear the burden of that experience. In this case the danger against which protection is sought is attachment of the personal attribution of HIV infection, falsely in the case of T and uncertainly in the case of R, with the consequences for them already described.

59. Clarification of those distinctions between the position in *Re: S* and the position in this case brings out vividly the factors which, if sufficiently established by the evidence, would militate in favour of recognising and supporting the Article 8 rights of T and R by grant of the injunction sought. Neither of the considerations upon which the Council and the Guardian place heavy reliance in this case, namely the prejudice to future placement and the long-term effects of the attribution of Aids, were present in the case of *Re: S.* Since it is clear that, on an application of this kind, it is the task of the court to maintain an intense focus on the comparative importance of the specific rights being claimed in the individual case, it is also necessary to examine the impact upon the rights asserted of the general considerations which Lord Steyn identified as militating against the making of inroads into the general principle of unrestricted reporting.

60. At paragraph 27 of his judgment, Lord Steyn stated that interference with the Article 8 rights of a child not a party to or involved in criminal proceedings, however distressing to the child, was not of the same order when compared with the cases of those directly involved in criminal trials. That is of course correct (a) in the general sense that, ex hypothesi, the interference is in one case a direct effect of the court

proceedings, whereas in the other it is an indirect effect; (b) in the particular sense that a child directly involved in a trial is likely to undergo trauma from that very fact, whereas the damage to a child who is not involved is limited to stress arising from knowledge of the trial and the criminality of the child's parent if found guilty. If, however, it is clear from the evidence that real and substantial damage to the child's Article 8 rights is likely to result if the injunction is not granted which would not otherwise occur, it does not seem to me that the distinction adverted to by Lord Steyn goes to the core of the balancing exercise as articulated by Latham LJ in *Re: S* at paragraph 76, (as quoted at para 37 above).

61. Turning to Lord Steyn's further five points of concern, (see paras 47 to 51 above), so far as the first is concerned it does not seem to me that the grant of an injunction on the grounds advanced in this case would or should afford comfort to any subsequent application by an *adult* non-party faced with possible damaging publicity as a result of a criminal trial, in that the principal element which underpins grant of an injunction in vindication of the Article 8 rights of T and R is the potential interference with their care and placement under the court's care jurisdiction. That is a situation, which simply would not arise in the case of an adult non-party.

62. As to the second point of concern, the aim of the relief sought here is to prevent the identity of the children from being linked with that of either parent. It can and should give rise to no precedent in respect of any future application designed to suppress the details or circumstances of the crime itself.

63. As to the third point of concern, it must be acknowledged that, the reporting of the trial without revealing the identity of the defendant would be a "disembodied" trial. However, Newsquest's principal submission in that respect is that the case concerns a grave and unusual charge that raises controversial questions of law and policy about the handling of charges against persons accused of using HIV infection as a weapon; consequently the questions should properly be aired in public and made open to discussion. That cannot be gainsaid; but I do not consider that granting the injunction is in fact likely to inhibit the press from reporting the case, nor should well-informed debate be significantly impaired simply because of the non-identification of the defendant or victim. It is said that the editor's principal wish is to be free to identify and publish a picture of the defendant *so as to report and convey an adequate understanding to the public*. I do not think the former is essential to the latter, albeit grant of the injunction would unquestionably be an interference with the freedom of the media to identify and picture the defendant.

64. As to the fourth concern, this is not a case where time constraints have denied opportunity to the press to contest the proceedings.

65. As to the fifth concern, that expressed particularly in relation to *local* newspapers, it was stated on behalf of Newsquest in a letter faxed to Judge Case, (a copy of which is before me,) that the Newsquest Group lacked the necessary resources to attend an oral hearing rather than submitting representations in the form of its letter dated 26 April 2005. I find that somewhat surprising but, accepting it to be so, I have nonetheless had the opportunity to consider the written submissions of Newsquest to which I have already referred.

66. In addition to emphasising the various points of principle propounded in *Re: S* and criticising the speculative nature of the evidence, Newsquest make the point that the children in this case are very young, namely 4 (now 6) months old and 3 years old and that, at such a young age, they are unlikely to be aware of or affected by publicity. Again that is true. However, that does not seem to me to meet the burden of the Council's concern that the effect of connecting the children with their mother may adversely affect their placement or, in the case of T, might disrupt T's attendance at the nursery in which she is now happily placed.

67. Thus, considered in terms of S.12 (4)(a) of the Human Rights Act 1998, (1) this does not appear to be a case where the identity of the mother or any link with the children has yet become available to the public at large, at any rate beyond the confines of the estate on which the mother lived and the father still lives. Whether that will remain so even if the injunction is granted is more problematic: (2) it is in the public interest for the identity of the mother to be published, given the general rule that unfettered freedom to report criminal proceedings and give publicity to the identity of the defendant is in the public interest. However, knowledge of that identity is not essential in order to give the public an adequate account or understanding of the trial or issues involved for the purposes of "open justice" or informed debate. Nor, as already observed, is any breach of Article 6 rights involved.

68. I move now to the balancing exercise in relation to the specifics of the Convention rights raised and the degree of interference involved in relation to those rights. I approach that exercise first by considering the case for publication as set out by Newsquest. That is because of the injunction of Lord Steyn that, without according presumptive authority to the Article 10 rights of the media, it is nonetheless necessary to recognise the weight traditionally given to the public interest in the open reporting of criminal proceedings and the general undesirability of creating exceptions to that principle beyond those provided for by statute.

69. The case for unrestricted reporting is as follows

    a) First, the criminal proceedings are of high public interest and are likely to raise controversial issues as to law and policy in relation to the prosecution of charges of the kind involved. That high interest will not be properly reflected by a requirement for the trial to be reported in "disembodied" form. The public should be entitled to put a face to the name of the defendant in any such proceedings.

    b) Second, the proposed publication of the identity and photograph of the mother is not directed at the children, who are not involved in the criminal proceedings as victims or witnesses. Indeed there is no certainty that the children will be mentioned in the course of the criminal proceedings.

    c) Third, the children are of an age where they will be themselves unconscious of the nature of the proceedings or their implications. There is therefore no immediate threat to their health or wellbeing as a result of these proceedings.

d) The evidence before the court is speculative in nature in two respects. First, as to the likelihood of widespread recognition of the children beyond the confines of the estate and the immediate area in which the mother formerly lived. The second, as to the effects which it is suggested such recognition will have, namely abuse or harassment of the children or the families in which they find themselves, and recognition and ostracism at the nursery attended by T. These are fears expressed rather than real probabilities demonstrated.

70. The case for the applicant is as follows.

a) First, it is acknowledged that there is high public interest in the proceedings. However reporting of the proceedings and discussion of the issues raised will not be seriously inhibited by an order permitting publication of the identity or address of the parents.

b) Second, there will be serious short-term and long-term prejudice to the children if an injunction is not granted.

c) Third, in the short-term, the care proceedings will be inhibited and the placement of the children with foster parents will be prejudiced for the reasons given in paragraphs 13-18 of this judgment.

d) In the long-term, the children will be affected by the lasting stigma of AIDS and will continue likely to face teasing, bullying and ostracism at school and in the community as a result.

71. I have found it by no means easy to come to a conclusion in this case, primarily because of the inevitably speculative evidence in the case so far as the adverse effects an the children and their placements are concerned. There are here two powerful and emotive competing interests, each protected by the Convention. On the one hand, the freedom of the press in relation to the open reporting of criminal proceedings, coupled with what Munby J has described as the "clear and compelling interest" of the media and the public in the publication of the photograph of a person convicted of a serious crime so as to "put a face on the man" (see *F v Newsquest Limited and others* [2004] EWHC 762 (Fam), [2004] EMLR 607 at para 98); on the other hand the need to protect the privacy of the children caught up in a situation over which they have no control and where they are in a delicate and vulnerable state and the subject of care proceedings of uncertain outcome. As to the former, the interference with the Convention right is certain and clear cut. As to the latter, it is more problematic in two respects. First, what is the likelihood of interference if the injunction is withheld? Second, if the injunction is granted how effective will it be to prevent or reduce the interference against which protection is sought? In these respects, when having regard to proportionality, it is necessary to consider not only the extent of harm which has already occurred, but the likelihood that the harm sought to be avoided will occur in any event.

72. Finally, it may be pertinent to add in relation to the balance to be struck that, in the absence of Article 6 considerations, the predicament of the defendant in the criminal proceedings is irrelevant. Different types of crime, albeit serious, give rise to different reactions in society and (depending upon the circumstances of the case) there

may well be cases, which engage pity as much as condemnation for the defendant. That is, however, irrelevant to a balancing exercise as between the inroad into press freedom and the public interest on the one hand and incursion into the child's right to privacy and family life on the other. *Re: S* has made clear that the court must be prepared to take a hard-headed and, what may appear in this jurisdiction a hard-hearted, approach.

73. After carefully consideration I have decided nonetheless to grant the injunction sought.

74. So far as Article 10 is concerned, I accept the high media and public interest in the case, and still that suppression of the identity of the parents by name, address or photograph will result to that extent in a disembodied trial. However, the case rightly made by Newsquest is that it is the novelty and issues involved in the charge to which the mother is pleading guilty which render it of high interest and I do not consider that reporting or discussion of those issues will be significantly inhibited. In so far as relief is sought against the naming of others who are or may be responsible for the care, education or welfare of the children, I do not consider that any significant inroad would be made into the right to report the criminal proceedings.

75. I accept entirely that the principal interest of the press, namely that to publish the identity and photograph of the mother is not *directed* at the children; however I consider that it is bound to have an adverse affect upon them in a manner which engages, and is likely to inflict, substantial damage on their Article 8 rights.

76. I also accept that the children are of an age where they will NOT themselves BE conscious of the nature of the proceedings. However I do not accept there is no immediate threat to their health or well-being if the injunction is not granted. I am persuaded by the evidence before me that if the "naming and shaming" which is proposed (and by use of that convenient phrase I do not seek to suggest that it would not be justified) then there is likely to be a focus of attention, pressure and harassment upon the children and the families concerned and potentially concerned with their care of a far higher profile and more intense degree than would be the case if the injunction is not granted (see further below).

77. As to the likelihood of future events, it does seem to me that, so far as R is concerned, at his tender age, the likely damage is far less acute than in the case of T. If R stays with his father's family, their predicament will be known on the estate, regardless of whether wide spread publicity occurs. However, it is not yet settled where R's future placement will be. Further, if the matter is the subject of high publicity, not only is it likely to encourage a higher level and a more widespread curiosity and adverse attention in the short-term, but, memory and gossip being what they are, chances of attracting harassment, bullying and teasing in the future over a medical condition which R probably does not have, and certainly does not deserve, are high, and in my view probable. If, in the event, the outcome of the care proceedings is ultimately that the Council seek to place R with other foster parents, again I consider it likely that unnecessary difficulty may be encountered in placing him.

78. So far as T is concerned, similar considerations apply, but to a more serious and positive extent in that she is already of an age to be vulnerable and sensitive to teasing, ostracism or bullying should that occur as a result of wide publicity being

given to the identity of her mother and father. I have already referred to T's very vulnerable position by reason of the disturbance that she has already suffered. I accept that there is likely to be serious short-term and long-term prejudice to the children if the injunction is not granted, for the reasons given by the Council. It may well be that, even without it, there will be a level of gossip and harassment. However, in my view it is sufficiently established that what may otherwise die down as a nine-day wonder will be elevated into a widespread and far longer-lasting inroad into the privacy and family life to which these children are entitled and of which they are in such need. In my view it is both necessary and proportionate to protect the children against what I consider is established as a likelihood of harm which will be avoided, or at any rate diminished, if the injunction is granted.

79. Accordingly, I propose to grant an injunction, the final terms of which remain to be discussed.

FOOTNOTE:

80. As a footnote to this judgment, I wish to take the opportunity of emphasising the existence of the President's Direction dated 18 March 2005 to which I have earlier referred and to remind those concerned with applications of this kind of its provisions, as well as the helpful further advice afforded by the Practice Note of the same date issued by the Official Solicitor in conjunction with the Deputy Director of Legal Services Cafcass. The Direction applies to any application in the Family Division founded on Convention Rights for an order restricting publication of information about children or incapacitated adults. However, it is of particular importance in a case where, despite the strong reminder in *Re: S* to respect the freedom of the media fully to report criminal proceedings and in particular to identify the defendant, it is thought appropriate to make an application for the protection of a child on the grounds that the circumstances are exceptional and compelling. Such cases raise sensitive issues and, almost by definition, arise in cases of serious crime where there is high press and public interest in the criminal proceedings. That is why the Direction provides that, if the need for such an order arises in existing proceedings in the County Court, judges should either transfer the application to the High Court or consult the Family Division Liaison Judge and, where the matter is urgent, it can be heard by the Urgent Applications Judge of the Family Division.

81. The Direction is specifically designed to ensure compliance with s. 12(2) of the *Human Rights Act* 1998, the effect of which is that an injunction restricting the exercise of the right to freedom of expression must not be granted where the person against whom the application is made is neither present nor represented unless the court is satisfied (a) that the applicant has taken all practicable steps to notify the respondent, or (b) that there are compelling reasons why the respondent should not be notified. In cases of this kind the respondent, in the sense of the person or persons against whom the injunction is sought, is the press and media at large.

82. For that reason, whereas it will almost invariably be practicable and appropriate to give notice, however short, to the local press in a case of high public interest, the

Direction draws attention to the same ability to notify the national news media by service of notice of such applications via the Press Association's CopyDirect service, to which national newspapers and broadcasters subscribe as a means of receiving notice of such application. The Direction provides that service of applications via the CopyDirect service should henceforth be the norm.

83. It is necessary to emphasise, as the Direction provides, that, whereas the court retains the power to make without notice orders, such cases should be exceptional. In this connection, Local Authorities and others concerned with an application of the instant kind should be astute to plan in advance for such an application to be heard and so to avoid placing the judge to whom the application is made in a position of urgency whereby the judge may feel obliged to make an order which, if fully argued on notice, might not have been made.

84. Finally, it should be noted, that, while the CopyDirect service is there for the purpose of receiving notices of application and forwarding them to its subscribing media outlets, it is not a medium for service of an injunction once made. The responsibility for service of such orders upon particular organs or news organisations remains that of the successful applicant.