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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CAMBRIDGE COUNTY COURT
(HIS HONOUR JUDGE GREENE)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 24 March 2015

B E F O R E:

LORD JUSTICE SULLIVAN
LORD JUSTICE MCFARLANE
MR JUSTICE BLAKE

IN THE MATTER OF C (A CHILD)

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Official Shorthand Writers to the Court)

Mr Francis Wilkinson (instructed by Direct Access) appeared on behalf of the **Applicant Mother**

J U D G M E N T
(Approved)

1. **LORD JUSTICE MCFARLANE:** This appeal arises following the conclusion of extensive private law proceedings relating to a boy who is now some 12 years of age. At the conclusion of the proceedings on 17 March 2014, His Honour Judge Greene gave an extensive judgment which plainly from its terms he intended to be the final judgment at the conclusion of no less than nearly 10 years of litigation between the child's parents.

2. The outcome of the case was for the court to reverse the previous structure which had been in place to regulate the time that the boy spent with each of his two parents. At one stage that had been accomplished under a shared residence order which allowed for the child to spend roughly 50 per cent of his time in the father's home and 50 per cent of his time in the mother's home. However, by the time the matter came on for hearing before Judge Greene, the relationship between the parents was such that the boy was expressing the very clear view that he did not wish to spend any further time in the company of his father for the time being.

3. The judge's judgment explains that the court, and in particular the CAFCASS officer who had been appointed as the young boy's guardian, had spent a deal of thought and effort to try and achieve some warming of the relationship between the boy and his father so that at least some level of contact could be re established but that had effectively come to nought and the judge was faced with the position of a then 11 year old boy firmly indicating a reluctance to spend effectively any time with his father. The order made by the judge at the conclusion of the proceedings was to maintain the structure of a shared residence order but within that indicating only a minimal expectation of time spent with the father in the months or longer period to come.

4. I am deliberately vague about the details of the case because it is not the details of the case that bring this matter before this court today. The issue upon which this appeal turns is the subsequent decision of the judge in connection with the publication of the final judgment.

5. Following judgment being handed down the mother applied for permission for the judgment to be published in an anonymised form and indeed she and her legal advisers prepared a heavily anonymised version of the judgment. I say heavily anonymised because not only did those conducting the process change the names of the adults into initials, but they attributed initials to the adults which had no relevance to their actual names. They also changed the name of the town in which the mother lived, the nationality of the father and other matters of detail. They left the child's date of birth as it is in the judgment and kept the initial of his first name.

6. Despite the great deal of care that was taken by those conducting the anonymisation process, it is however of note that that process was not foolproof, in that at paragraph 9 of the judgment as currently anonymised the boy's first name appears in full.

7. Be that as it may, Judge Greene was asked to consider granting permission for the judgment to be published. The judge indicated that he would be prepared to contemplate publication if there was no opposition from the father but he went on to indicate that if the father did object, then the judge would consider the question of publication on its merits. He therefore set up a short process for submissions to be made.

8. Unbeknown to the mother, the father did submit short but firmly worded submissions strongly opposed to publication. The judge received no similar document from the mother and he therefore decided against publication and issued an order to that effect on 23 May 2014.

9. Receipt of that order gave news to the mother for the first time that the father had objected. She therefore instructed her counsel, Mr Francis Wilkinson, who appeared for her before and who appears now before this court, to set out short submissions in favour of publication. This Mr Wilkinson did in a very clear document dated 5 June 2014.

10. Judge Greene then considered the matter on the papers and issued an order which records his decision and a brief headline recitation of his reasons. The key parts of that document are as follows:

> "1. This is not a judgment which comes within paragraphs 16 or 18 of the President's Guidance dated 16 January 2014 and is therefore not a judgment in respect of which publication must ordinarily be allowed.

2. In exercising the Court's discretion under paragraphs 15(ii) and 18 the strong opposition of the Applicant father has been taken into account together with the likelihood of identification despite anonymisation. There are no factors that would make publication in the public interest and the existence of numerous earlier judgments over a number of years that would not be published alongside this judgment may result in an incomplete and misleading impression."

The judge therefore renewed his previous order and ordered that permission for publication be refused.

11. The mother then sought permission to appeal that determination and again in short reasons set out in the form of an order dated 24 July 2014 the judge says this:

"Reasons

- Father's opposition was recited to make clear that the application was not by consent of the parties and that the grounds set out by father for his opposition had been taken into account along with the mother's reasons in favour.
- I consider that the exercise of my discretion in relation to the matters raised by each party were reasonable.
- I therefore consider that an appeal would not have a real chance of success."

The mother issued a notice of appeal to this court dated 31 July 2014 and permission to appeal was granted on the basis that the arguments raised had a reasonable prospect of success.

12. We have now heard the appeal. It is necessary, having recited the background, to explain in more general terms the context in which this appeal sits, coming on as it does in early 2015. That context is that, as is widely known, there is a move driven and led by Sir James Munby, President of the Family Division, for a greater degree of transparency in the Family Courts and to that end the President issued "Practice Guidance" on 16 January 2014, to which Judge Greene made reference in the order that I have just quoted.

13. I do not propose to quote extensively from that Guidance but the thrust plainly is for there to be a greater degree of knowledge in the public domain of the work of the Family Court and the reasons given by judges for making decisions about private family life and/or about the intervention of the State in a family's life than has hitherto been the case. Of importance is the clear direction of travel, as it would now be known, described by the President in that document. He makes it clear that he proposes to adopt "an incremental approach" and that the issuing of the January 2014 Guidance is an initial step.

14. The Guidance provides within its terms for two categories of decision: some which have a default position of publication unless some other factor is established and a second category into which this case plainly falls. The second category is described at paragraphs 18 and 19 of the Guidance in these terms:

"18. In all other cases, the starting point is that permission may be given for the judgment to be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that permission for the judgment to be published should be given.

19. In deciding whether and if so when to publish a judgment, the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings."

15. Since the issue of that Guidance the incremental process initiated by the President has moved on. A further document has gone out for consultation describing wider and different ways in which public access to knowledge about the Family Court may be obtained.

16. The second stage, the stage that is out for consultation, has caused a degree of discussion and concern amongst professionals involved in the family justice system. One consequence of the consultation process is that two organisations, the National Youth Advocacy Service ("NYAS") and the Association of Lawyers for Children, have commissioned research from a well known and highly respected academic, Dr Julia Brophy, who has published a report entitled "Safeguarding, Privacy and Respect for Children and Young People & The Next Steps in Media Access to Family Courts" ("the Brophy research"). That research was published on 31st July 2014.

17. NYAS were informed by the mother in these proceedings of her pending appeal and they approached the court for permission to intervene. I granted limited permission on the basis that NYAS would produce written submissions and I for one am extremely grateful to Mr Piers Pressdee QC, who, on a pro bono basis, has supplied the court with a very clear distillation of the key points in the report and submissions which range far more widely than this case but also encompass some of the factors which are in play in these proceedings.

18. NYAS, as is entirely appropriate, make no submissions as to the outcome of these proceedings, save that they observe that part of the thrust of the Brophy research is to underline the importance as perceived by young people of being involved in any decision as to publication, and NYAS submit that if this appeal is allowed in any degree, then this court should not move straight to make a re determination of the issue of publication but that steps should be taken to seek the views of the boy at the centre of the proceedings as to publication of the judgment.

19. I am bound to say that, for my part, hearing this appeal as we do effectively a year after the judge's decision and noting in particular that the judge stresses in paragraph 28 of his judgment that he "very strongly feels that there should be no further court proceedings in the foreseeable future", that it would be entirely inappropriate in this case now at this stage to seek to involve the boy in having his views canvassed for this purpose.

20. So far as the appeal is concerned, it was commenced, of course, in circumstances in which the father had strongly opposed publication in his communication with the judge. In the event, the appeal having been set down, the father communicated with the Court of Appeal in December 2014 indicating that he did not intend to contest the appeal and that he was content for publication to be ordered for the judgment in an anonymised form. In the light of there being therefore no opposition to the mother's appeal in any forensic sense, the court was invited by Mr Wilkinson to reconsider the time estimate for the appeal. The appeal, however, has been listed to be heard in full and for my part, as I would explain, I have concluded that the appeal should be dismissed.

21. In order to make sense of that conclusion, it is necessary to explain the grounds of appeal and the approach that should be taken to this matter, in my view. First of all, having set the context, it is right to draw from that that the move within the family justice system from circumstances in which it was unusual or exceptional for judgments to be published and for the public to know what occurred in family proceedings to a more open process there is a process of transition. The President is plain that what is sought to be achieved is a culture change. It is "work in progress". The Practice Guidance to which I have made reference is no more and no less than "Practice Guidance". It is not law, it is not even a Practice Direction and there is a danger, it seems to me, for this court to be invited by Mr Wilkinson to afford greater technical status to the Practice Guidance than it in fact currently has.

22. Secondly, it is important, in my view, to understand that those cases which fall into paragraph 18 territory within the Guidance are expressly left to the discretion of the judge. All the other cases fall into a category where the President through the Guidance expects that publication will take place. The discretionary nature of paragraph 18 material is one that this court should understand and respect. These are case management decisions given by judges, albeit at the end of the case, looking at whether or not the judgment should be published.

23. Again in this context, although Mr Wilkinson necessarily in order to present the appeal has tried to point to the areas of the note that we have of the judge's decision which are to a certain extent short or do not refer to particular matters, for my part I consider that it is important that this court should in no way encourage judges to deliver a full, detailed and compendious judgment on the issue of publication. It is a short point, it is an important point, it calls for a decision, the judge has to make that decision in a paragraph 18 case and it is incumbent on the judge to indicate basic reasons but beyond that this court should not expect more. This is particularly so where family judges, such as Judge Greene, operating, as I anticipate it to be, almost one hundred per cent within the family justice system, may be asked some months after a case has concluded to give a full judgment on the publication of judgment issue; such a request will inevitably take that judge's concentration and thoughts away from the case that he or she by then is engaged in trying.

24. The third observation I make is that the process that the President is currently engaged in is very much one which is organic and developing. It is not apt, in my view, for the Court of Appeal to intervene and to offer its own guidance, as we are invited to do by Mr Wilkinson, in the course of that process unless it is plain to this court that a judge in a particular case has fallen into an error of principle or is otherwise plainly wrong in the decision that has been given. I am therefore careful in the words that I use in this judgment to say nothing to enlarge upon or contradict the words that the President has carefully chosen to put into his guidance.

25. With those observations, what are the points that the mother seeks to make to further her appeal? There are effectively five grounds of appeal:

    "a. The Judge failed to consider, and balance, the parties' ECHR rights

    b. The Judge took into account irrelevant factors

    c. The Judge failed to consider the public interest in open justice

d. The Judge wrongly concluded that the judgment did not contain matters that could be of public interest

e. The judgment shows that the Guidance ... would benefit from appellate interpretation, which is a compelling reason why the appeal should be heard."

26. I propose to take each of these points in turn. Ground(a) relates to the ECHR rights and the submissions made by Mr Wilkinson with attractive clarity are that articles 6, 8, and 10 all apply to these decisions about publication of judgment and in his submission each of those three Articles when considered individually points in favour of publication. In that, to a fair degree, he is, of course, correct in terms of general principles. Article 6, right to a fair trial, normally includes openness. But, of course, it is a recognised exception that certain categories of case can be conducted, either partially or fully, in private and the whole purpose of the Guidance is to move away from an automatic default position of no publication.

27. In my view, the Article 6 point is plainly in play in the Guidance and represents part of the impetus behind the move to greater openness. It does not assist in clarifying for the judge, or indeed for this court, how the discretionary decision should be taken in a particular case, it simply establishes the context.

28. With regard to Article 8, I disagree with Mr Wilkinson to this degree: the father was facing publication of details about his private life, albeit anonymised, in the judgment and he objected to it. Even though a reader might not be able to identify the father from the anonymised version, the father would know that his personal information was out there and to that extent Article 8 does not lead as night follows day to a decision as to publication. Article 8 has at its core in every respect the need to consider necessity and proportionality and that is very much at the centre of any decision to be taken under paragraph 18 of the Guidance.

29. Article 10, freedom of expression, obviously points towards openness as its core value. But in terms of the submission that Mr Wilkinson makes to the effect that the judge failed to take proper, or any, account of these matters I am afraid I simply am not persuaded. Although the judge does not refer at all in express terms to the ECHR, the approach he took to publication when first asked to consider the issue was to say, "I may be inclined to grant permission if the request has the consent of [the father] or his solicitors. If he does not consent then I will have to decide on the merits". That indicates to me that the judge was contemplating publication, all other things being equal, in circumstances where both of the parents of this boy, each of whom had parental responsibility, each of whom was named in a shared residence order, were in agreement. If not, the judge would decide. This judge refers expressly to the President's Guidance in the two paragraphs of the short reasons that he gave. He obviously was aware of the Guidance and the thrust within it towards greater openness. He had but 2 weeks before writing his reasons received Mr Wilkinson's clear submissions as to the points under the ECHR that the mother wished to make. It is to my mind fanciful to suggest that the judge did not have the ECHR Articles at 6, 8 and 10 in mind when expressing his conclusions on this point.

30. The second ground of appeal is to the effect that the judge took into account irrelevant matters. The first point that Mr Wilkinson makes is that the bare fact that the father opposed publication should not of itself have any weight in the equation. I have been helped during Mr Wilkinson's oral submissions today to understand the point he makes here is that simply for the father to (to use my word) vote against publication but offer no reasons should carry no weight any more than the mother voting in favour of publication without reasons should carry weight. I agree with him. But here the father had given reasons for opposing the publication and, as the judge says in his further document dealing with the application for permission to appeal, he took account of "the grounds set out by father for his opposition" just as he had taken into account the mother's for granting permission. So to my mind that point goes no further.

31. The second point that Mr Wilkinson submits is irrelevant is the judge's reference to "the likelihood of identification despite anonymisation". Mr Wilkinson submits that there is no indication from the anonymised judgment itself, save perhaps for the inadvertent use of the boy's full name, that any identification could take place. This was "anonymisation plus" in the sense that not only had the relevant details been rendered into initial form but the very location of the family and the nationality of the father had been changed.

32. In this regard I have some need to refer to Dr Brophy's research to the extent that those young people that her team consulted for the purposes of their project indicated concern as to "jigsaw identification", namely the use by those who wish to try to trace the individuals behind an anonymised judgment using other bits of information to put together a picture which leads to the identification of those involved.

33. This may well be the point that the judge had in mind when looking at the likelihood of identification despite anonymisation. No system is entirely watertight and it seems to me that the judge was entitled to have regard to that factor. It was not irrelevant. Indeed, as Dr Brophy's report shows, there is a constituency, namely the group of young people to whom her project team turned to for information, who consider that this is a real concern even where anonymisation has been put in place.

34. The mother's case in relation to these factors moves further by saying that the judge was wrong to say in his fourth point that "the existence of numerous earlier judgments over a number of years that would not be published alongside this judgment may result in an incomplete and misleading impression." Mr Wilkinson submits that that is simply not right, that there have been four substantive judgments in the case over as many years but they have been freestanding, they have dealt with the picture of the child at the age at the time and that this is a final judgment which, albeit in short terms, seeks to draw together by express reference the factors that were prominent in those earlier years and there is no need for the publication of earlier judgments.

35. So far as this court is concerned, we have not seen the earlier judgments and we have no way of assessing in detail the validity of that point in the circumstances of this case. But I am struck by the fact that Judge Greene was obviously fully aware of the details of those three earlier judgments. Whilst I have been keen not to read any part of Judge Greene's judgment into this judgment given my decision to uphold the judge's decision not to publish, it is plain from a reading of His Honour Judge Greene's judgment that he was fully steeped in the detail of this case and the detailed history. It was a very concerning case on its facts given the length of the parental dispute over the course of 10 years and the sad outcome, which was for a child to indicate a desire not to spend

anything other than a minimal amount of time with his father. The judge necessarily had to go back through the detail and be fully seized of that in his mind and that judge is the judge who says in terms that the existence of the other judgments that would not be published "may result in an incomplete and misleading impression". To my mind, it is not for this court to go behind that observation by the judge and the reasons that the judge gives for his decision. That seems to be the primary one and one which cannot be gainsaid by this court in these circumstances.

36. Moving forward with the grounds of appeal, Mr Wilkinson takes the next two together, namely a failure to consider the public interest in open justice and secondly the conclusion by the judge that the judgment did not contain matters that could be of public interest.

37. Again, with respect to Mr Wilkinson, who very adeptly has sought to argue the mother's case, it is not possible to say that the judge ignored the importance of the public interest in open justice. As I have indicated, the judge was fully aware of the President's Practice Guidance and quoted from it. In headline terms within that Guidance is the need for greater openness in the family justice system and the judge accepted that there was a category of cases into which this case did not fall that would result in publication of judgment. He was therefore at the second stage of evaluating whether or not publication should take place in this case and when the judge says "there are no factors that would make publication in the public interest" that can only mean "there are no *additional* factors". The judge was looking to see whether there was something that would tip the balance further in favour of the publication or the other way and he found no additional factors in favour of publication. Again, the judge did not consider there were any factors that might make this otherwise a case that should be reported.

38. In this regard, the mother's submissions to this court are to the contrary. She says that this is an example of a "failure" by the court to achieve contact in the case of a young boy. With respect to her, and again without going into the detail of the judgment, if there is a failure described in the sad history of these proceedings, it is not a "failure" on the part of the court, it is a total failure on the part of these two parents, each of whom are said by the judge to "detest" each other, to be adult enough to put their own relationship to one side so that their much loved boy can experience a happy, ordinary and straightforward relationship with each of them. It is not, in my view, an example of any failure on the part of the family justice system.

39. That is my view but it is off the point. We are sitting in the Court of Appeal to evaluate whether the judge was "plainly wrong" in deciding not to give permission for publication of this judgment and in my view it is simply not possible to say that publication was so merited because of the judgment's internal interest that the judge was "plainly wrong".

40. Finally, as I have indicated, the final ground of appeal is an invitation to this court to give further guidance as to the implementation of the President's Practice Guidance. For the reasons I have already given, I am deliberately not taking up the invitation that Mr Wilkinson attractively makes in that ground.

41. So for all of those reasons, I am afraid I regard this appeal as having absolutely no merit at all. We are being asked to evaluate the discretion of a senior circuit judge who was thoroughly steeped in this case whether or not to sanction publication of a judgment that falls into the discretionary paragraph 18 category. He did so in an efficient manner, taking on board, once they were available, the submissions from both sides and giving

short reasons in the documents that he published. It is simply not possible to identify an error of principle and certainly not possible to hold that he was plainly wrong in deciding that publication should not take place in this case.

42. I would therefore dismiss the appeal.

43. **MR JUSTICE BLAKE:** I agree.

44. **LORD JUSTICE SULLIVAN:** I also agree. So the appeal is dismissed