Neutral Citation Number: [2023] EWHC 2446 (Fam)

Case No: FA-2023-000203

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

LOUISE TICKLE

Appellant

and

(1) FATHER
(2) MOTHER
(3) XX
(by their Children's Guardian)

Respondents

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Mr Chris Barnes (instructed by **Ms Louise Tickle**) for the **Appellant**
The First Respondent represented himself
Dr Charlotte Proudman (instructed by **Nelsons Solicitors**) for the **Second Respondent**
Ms Rehana Begum (instructed by **Butcher Barlow LLP**) for the **Third Respondent**

Hearing dates: **26 September 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MRS JUSTICE LIEVEN

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Lieven DBE :

1. This is an appeal against the decision of HHJ Haigh ("the Judge") to adjourn an application by the Appellant, Ms Tickle, to be allowed to report the proceedings. I granted permission to appeal on the papers.

2. Mr Barnes appeared on behalf of the Appellant, Ms Tickle, the Father represented himself, the Mother was represented by Dr Proudman and the child was represented by Ms Begum. I am very grateful to all counsel for their written and oral submissions and the speed with which they prepared the case.

3. The issue in this case is whether the Judge erred in law in his application of the balance between Ms Tickle's rights to report under Article 10 European Convention of Human Rights ("ECHR") and the child and family's right to privacy under Article 8 ECHR. Ms Tickle is a journalist who specialises in reporting from the Family Court.

The background

4. The background to the case is highly contentious private family law proceedings concerning a child under the age of 5, who I will call XX. For reasons that will become apparent below, the facts of the case and any personal information about the parties are irrelevant to Ms Tickle's application and this judgment, save in the broadest terms. The Father told me that there have been proceedings since 2019 and there are allegations of domestic abuse and "parental alienation" in the factual mix. A final order was made in, I believe, 2021 and the current proceedings concern an enforcement application by the Father. In brief overview therefore, it is a not unusual example of the kind of intractable dispute that takes place in the Family Court.

5. On 22 August 2023 Ms Tickle attended a hearing before the Judge sitting in the Family Court at Manchester. This was the second day of a hearing that had commenced on 21 August 2023. The hearing had been listed as a final hearing, with a 4-day time estimate, in private law proceedings concerning XX.

6. On the first day of the hearing another member of the accredited press, Ms Martin, had sought to attend the hearing and the Judge had refused, despite the provisions of Family Procedure Rules 2010 ("FPR") rule 27.11(3)(a)(i).

7. The proceedings concerning XX arise on the application of the Father with the Mother responding. XX themselves is a party to proceedings and represented through their Guardian, Jennifer Lomas ("the Guardian").

8. On 22 August 2023 the Judge:

    a. Initially heard argument in relation to Ms Tickle's attendance: this was opposed, unsuccessfully, by the Father and Guardian;

    b. Heard an application to adjourn the final hearing made on behalf of the Mother: this application was granted;

    c. Heard an application in respect of the Father's costs (framed as an application for 'wasted costs'): this application was granted and an

order for costs was made against the Mother summarily assessed in the sum of £7,000 plus VAT; and

d. Heard Ms Tickle's application for the relaxation of reporting restrictions to permit reporting of the hearing: this application was adjourned (a course supported by the Guardian and the Father).

9. The present appeal concerns only the Judge's adjournment of Ms Tickle's application, made orally to the court on the afternoon of 22 August 2023 (though notified by way of communication via the Teams chat function earlier in the day), to be permitted to report in respect of matters arising in the course of the hearing on 21 and 22 August 2023. The Judge adjourned Ms Tickle's application in the order of 22 August 2023 for reasons given orally. Ms Tickle sought permission to appeal from the Judge. This application was also refused, with further written reasons, by way of an order dated 25 August 2023

10. I have an agreed and approved note of the hearing on 22 August but not of the first day, 21 August 2023. This is because Ms Tickle was not present on the first day and it formed no part of her original Grounds of Appeal. However, Dr Proudman in her Skeleton Argument in support of the appeal made reference to various things that were said on the first day, which had been reported to her by her client. The Father disputed the accuracy of some of that report. I note that Dr Proudman was not present at that hearing. I took the view that it was not appropriate to consider any submissions which turned on what happened on 21 August without having a transcript approved by the Judge. I therefore told Mr Barnes that if he wished to pursue his Amended Grounds, I would have to adjourn the appeal, and that would necessarily involve adjourning it until after the substantive hearing in the case, which is listed for 4 days commencing on 17 October before a different Circuit Judge. In those circumstances Mr Barnes elected not to pursue his application to amend. I did however order a transcript to be produced of 21 August given the serious points that were raised by Dr Proudman's Skeleton Argument.

11. It is important to note that Ms Tickle was only seeking permission to report what had happened at the hearing and not the proceedings as a whole. There was no evidence heard at the hearing of 21 and 22 August 2023. Therefore, the focus of Ms Tickle's application was not the substantive issues (and evidence) in the case, but rather the procedural and systemic issues that had emerged from hearing.

12. Ms Tickle had applied at Court, via the Microsoft Teams Chat function in the following terms:

"[12.45] Louise Tickle (Guest)

I would like to make an application to report a) the submissions to and against media presence in court and the judge's decision and ruling plus permission to see the bundle, and b) the substantive matter from this hearing, ie, that the mother arrived at court as an LiP yesterday, discovered that the father was represented which I gather from what I have heard in court today she was not aware of, and this morning made an without notice application to adjourn the hearing. I would like to report the position of father and guardian, the judge's decision to permit the

adjournment, plus reasons. Re anonymity: as well as of course no names, schools, there is no need for me to mention anything in relation to the child including any indication of their sex or age, other than that this is a case relating to child contact post parental separation."

a. Ms Tickle was permitted, by the Judge, to pursue her application orally. In the course of those submissions Ms Tickle set out the significant issues of public interest upon which her application to report was based:

i. Continuing practical difficulties arising due to the lack of legal aid provision;

ii. The disruption caused to private law applications concerning children;

iii. Problems for the court system, and other families within the court system, of delays/adjournments where time has to be found for cases;

iv. Issues regarding transparency and media attendance, including the culture of the Family Justice System's interaction with/response to the media, especially in the context of the ongoing Transparency Pilot.

13. Ms Tickle reiterated that the scope of her application related to *"the entirety of the hearing*" (i.e. matters on 21 and 22 August 2023, including the matters she observed on 22 August 2023) and not the underlying substantive welfare application. She set out the restrictions which she considered would be appropriate, including not being able to identify anyone or give any identifying features, thereby ensuring the complete anonymity of the child and family. She also submitted that there was no prejudice *"to the rest of the hearing".* She told the Judge that she would not be available to attend the entirety of the then listed final hearing.

14. The Guardian, through counsel, opposed the application to report and proposed an adjournment of the application *"pending the final hearing".* The Guardian was reported to be *"concerned about how this may impact on the child and also these proceedings given that they have been adjourned and not finalised yet".* Counsel also appeared to indicate a wish to respond to the application in writing.

15. The Father, through counsel, simply adopted the Guardian's submissions.

16. The Mother supported Ms Tickle's application on the basis that *"the application was that this was for the purposes of picking up wider issues of legal and procedural things. There hasn't been any discussion of the child or anything sensitive at this point, and Ms Tickle has given assurances. I have no concerns".*

The Judge's Decision

17. The Judge gave reasons orally in the course of the hearing on 22 August 2023 and amplified his reasons in the order refusing Ms Tickle's application for permission to appeal.

18. The Judge identified three responses to the application to report: (i) grant permission to report, (ii) adjourn the application, or (iii) refuse the application wholesale.

19. The substance of the Judge's oral decision to adjourn the application to report to the final hearing was based on a single reason:

> *"The reason is this – it's context and it's understanding. Having a report of this case, limited to just the things that have happened over the last two days would be on any view incomplete. It would lack context and carry a significant risk of being misleading. We are, as Miss Tickle rightly says, looking at very, very important issues. We're looking at courts, the problems that people have with funding these cases. We are looking at how litigants in person cope with this challenging process.*
>
> *We're looking at how the courts are coping under the stress of this work. We're looking at the most complex of family circumstances where, as we know, this case involves two outcomes, including one possibility of finding parental alienation, which is a terrible place to find yourself with a family. Or alternatively, we're looking at the loss to a small little [child] of one important parental figure possibly for the whole of [their] childhood. And whilst I'm not going to foreshadow what ultimately my decision will be, together with I'm sure another application to report everything else that's happened.*
>
> *At the end of the proceedings, I'm going to say that I share the concerns of what has been spoken of. But at the end of the case everything can be put in context particularly from the perspective of the child. And that's my concern. So I am going to adjourn this application until the conclusion of the proceedings when I've heard the evidence and given judgement and we can renew it with any other applications that are made at that moment in time. I don't want anyone to think that this decision foreshadows what the outcome of that will be; it will be determined on its merits at the time. Okay."*

20. Following further submissions from Ms Tickle, the Judge added:

> *"… But I'm not restricting you in what you are entitled to report. What you report is what you will report. I will deal with the application, your application at this moment in time and any future ones at one moment in time. At one hearing, and this application is adjourned to that hearing, what you then decide to report, if I give you (permission to) report, if I lift reporting restrictions, is entirely up to you. You can report what happened today. You can report all of it. I will exercise no controls over that whatsoever. And for the sake of eight weeks, which is all we're talking about. That seems to me is the right thing to do.*

> *Because I think from my knowledge of the case, and you may when you've read the trial bundle in detail, perhaps come around to the same view, which is that there are many things in this case that are deserving of reporting And if that is the case, we need to look at it holistically, contextually and completely. And that is best at the conclusion of the case. But I emphasise what you choose to report in the light of any order that I make, assuming I make an order, is a matter entirely within your journalistic discretion."*

21. In writing, when dealing with Ms Tickle's application for permission to appeal the Judge expanded his reasons as follows:

> *"7. Ms Tickle's case in short is that I did not properly balance the article 8 and 10 rights of all concerned, balance the risk of harm to the child against the public interest in her publishing what she describes as matters of considerable public interest: the predicament those involves in private law childcare proceedings face following the withdrawal, many years ago, of legal aid and issues concerning press attendance.*
>
> *8. Ms Wilson for the guardian answers those points in her submissions which are detailed, and which I broadly agree with.*
>
> *9. A decision to adjourn an application is a case management decision. It is not a final decision. I made clear that it would be properly considered at the conclusion of the proceedings with what had been intimated by Ms Tickle was a further application to be made at that stage to report the final hearing.*
>
> *10. Case management decisions unlike decisions made at a final hearing carry a margin of discretion, particularly those in which an application is simply adjourned in contrast with ones in which the case management decision is a final on the issue. For an appeal to be successful an appellant must show that the decision made is outside the reasonable and wide bounds of a discretionary case management decision. I do not believe this decision was.*
>
> *11. I recall considering expressly (or by inference within the reasoning) and balancing the article 8 and article 10 rights of all parties including the child and in the case of article 10 the APR's.*
>
> *12. This is a terribly sad case in which a […] child faces either the loss of a relationship with a father who professes to love [them], probably for the whole of [their] childhood, or in the event of the evidence of parental alienation by mother the possibility of seeing a primary attachment with mother being severed. Each outcome carries with it the risk of emotional harm.*
>
> *13. I think I acknowledged that it was very likely at the conclusion of the final hearing a judgment would be published and that it may be appropriate for some form of relaxation of reporting restrictions. Much*

> *would turn on what emerged from the evidence, the courts conclusions, and full holistic evaluation of the engaged rights of all.*
>
> *14. I was clear that partial reporting in advance of the evidence being heard would likely be prejudicial to all the parties, the forensic process at the final hearing, and through that carry with it a significant risk to the welfare of the child. I felt it carried a significant risk of conveying a distorted and incomplete picture which would only be clear when all the evidence had been heard.*
>
> *15. I do not agree with the proposition that it is a matter for the media rather than the court when information concerning a private law children case is to be reported. That is inconsistent with the rules and statutory provisions. If reporting restrictions are relaxed however I agree it is then a matter for the press, subject to compliance with rules on anonymity, to decide what they wish to report. That is legitimate journalistic discretion.*
>
> *16. Concerning the two decisions initially to withdraw but then refuse to withdraw rights of attendance this is not a significant point. Between the two days the facts had changed. So the decision did: mother's position shifted from being neutral on press attendance to strongly supporting it. Day 2 was very different to day 1."*

The Law to be applied

22. The relevant law to be applied is familiar, and increasingly so in the Family Court. Proceedings concerning children in the Family Court are ordinarily heard in private, as the hearing before the Judge was. The publication and/or communication of information relating to the proceedings and/or the identification of the child concerned are restricted by virtue of s.12(1) of the Administration of Justice Act 1960 ("AJA"), and s.97(2) of the Children Act 1989 ("CA"). S.97(4) CA has been held to provide a basis for the relaxation of reporting restrictions, and information may be communicated *"where the court gives permission"* in accordance with r.12.73(1)(b) FPR.

23. By virtue of r.27.11(2)(f) FPR *"duly accredited representatives of news gathering and reporting organisations"* are permitted to be present at *"any hearing"* notwithstanding that the proceedings are *"held in private".*

24. A court may direct that a journalist, otherwise permitted to attend by virtue of r.27.11(2)(f), *"shall not attend the proceedings or any part of them"* where satisfied that this is *"necessary"* on the basis of one of the four conditions set out at r.27.11(3)(a) and (b).

25. In the context of directions for the instruction of an expert, the definition of necessary has been considered in *Re H-L (a child)* [2013] EWCA Civ 655:

> *"3. The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question*

considered, albeit in a rather different context, in Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125]. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." ..."

26. The use of the word 'necessary' adopts the language of the rights engaged under the ECHR given direct effect by s.1 of the Human Rights Act 1998 ("HRA"):

*"**Article 6 Right to a fair trial***

1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties 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.

...

Article 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the

> *protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

27. The issue of publication of a judgment, and consequential reporting, was considered by the Court of Appeal in *Griffiths v Tickle & Ors* [2021] EWCA Civ 1882, an unusual case concerning, amongst other matters, the publication of a judgment naming the parties to proceedings concerning a child. In summarising the law to be applied the Court of Appeal noted:

> *"27. The right to freedom of expression, protected by Article 10 of the Convention, encompasses a right to speak to others, including the public at large, about the events and experiences of one's private and family life. As Munby J (as he then was) pointed out in Re Angela Roddy [2003] EWHC 2927 (Fam), [2004] EMLR 8 [35-36] this is also a facet of the right to respect for private and family life:*
>
> > *"… amongst the rights protected by Article 8 … is the right, as a human being, to share with others – and, if one so chooses, with the world at large – one's own story…".*
>
> *28. Corresponding to the right of an individual to impart information about his or her private and family life, without interference by a public authority, is the fundamental right of others to receive such information, without such interference. That is a right enjoyed by the media parties here, as well as the general public.*
>
> *…*
>
> *34. Other considerations may come into play when information is disclosed or ascertained in the course of legal proceedings. The court is directly involved and in control of the process. It has the ability and the right to control the flow of information. As a public authority it has a duty to do so in a way that is compatible with the Convention rights - which in this context include the fair trial rights guaranteed by Article 6 as well as those protected by Articles 8 and 10. But the firmly established starting point in the domestic jurisprudence is the principle of open justice. The general rule is that proceedings are held in public and what is said, including the names of the parties and witnesses, can be observed and reported. In a case which involves the "determination" of criminal liability or civil rights and obligations, Article 6 confers on each party to litigation the right to a public hearing and a public judgment. Publicity for what goes on in court may be embarrassing and painful for those involved and third parties who are indirectly and incidentally affected but in general, "the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public": Khuja v Times Newspapers Ltd [2017] UKSC 49, [2019] AC [34(2)].*

35. The open justice principle and the related rights under Articles 6 and 10 are all subject to exceptions, but these are narrow and circumscribed and their application in an individual case requires strict justification. The category of exception that is relevant here is the need to protect private and family life rights, including in particular the rights of children. This was to the fore in Re S, where a mother was charged with the murder of one of her children. S, aged 5, was the brother of the deceased. The Guardian of S, concerned that reporting of the criminal trial would be seriously detrimental to S's welfare, sought an order for the mother and both children to be anonymised in any such reporting. The application was ultimately refused by the High Court, and appeals were dismissed by this Court and the House of Lords.

36. The House held that the jurisdiction to restrain publicity to protect a child's private and family life was now founded upon the Convention Rights. In a case where the child was not a party or witness and the interference with his Article 8 rights was indirect there was no justification for creating any new category of exception to the normal rule of open justice or otherwise interfering with free reporting of the trial. At [17], Lord Steyn famously identified four key propositions as to how the court should address a conflict between Articles 8 and 10. The passage is very familiar, but because it is so important to the present appeal we cite it:

> *"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."*

37. The "intense focus" must be brought to bear on the particular facts of the case. As Sir Mark Potter, P, memorably put it, the Re S approach "is not a mechanical exercise to be decided on the basis of rival generalities": A Local Authority v W [2005] EWHC 1564 (Fam), [2006] 1 FLR 1 [53].

38. The four propositions distilled by Lord Steyn in Re S were derived from the earlier decision of the House in Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457. There, the House explored the interplay between Articles 8 and 10 in the context of a complaint about press disclosure of the claimant's drug taking and rehabilitation. In the course of so doing, the House affirmed a principle of relevance to the present case. The claimant had falsely denied taking drugs. As Lord Hope put it at [82], "where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight". (See also, to similar effect, Lord Hoffmann at [58] and Baroness Hale at [151]: "The press must be free to expose the truth and put the record straight"). The reporters rely on this principle as providing

> *a public interest justification for the disclosure of at least parts of the judgment of HHJ Williscroft.*
>
> *39. Campbell is also important for what it says about the hierarchy of different kinds of speech. As Baroness Hale said at [148]:*
>
> > *"There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life."*
>
> *40. Another factor relevant to the assessment of the comparative importance or weight of the specific rights in play in a Re S balancing exercise is the extent to which the information, the disclosure of which is under consideration, has or is about to become available to the public. Section 12(4)(a)(i) of the Human Rights Act 1998 ("HRA") requires the court to have regard to this factor, when considering whether to make an order which affects the right to freedom of expression, in proceedings that relate to journalistic material. This will be a relevant factor in decisions about publication of a judgment, whether or not the statutory wording is strictly applicable. It is obvious that where disclosure of the same information has already taken place, or is imminent, the case for keeping the judgment private is weakened."*

28. The nature of the exercise to be undertaken, and the issue requiring 'intense focus' was summarised in the following terms:

> *"71. The critical question, therefore, is whether the best interests of the child, treated as a primary consideration, are weighty enough to justify maintaining that fetter, during the course of the proceedings under s 97(2) Children Act, and indefinitely as a consequence of s 12 AJA. Put another way, do the child's best interests make it necessary and proportionate to impose those restrictions on the Article 8 and 10 rights relied on by the applicants and the mother? …"*

29. It should also be noted that the Court of Appeal was, having circulated a draft judgment to the parties, invited to consider a stay pending a potential appeal to the Supreme Court. In refusing that application the Court noted:

> *"81. … The application for permission is therefore totally without merit. It is in these highly unusual circumstances that we have addressed the application for a stay. A stay would be a further interference with Article 8 and 10 rights, requiring justification. We consider it wholly unarguable that such an interference could be justified."*

Guidance

30. Mr Barnes also relies on Guidance produced by the President of the Family Division, issued on 3 October 2019, *'Guidance as to Reporting in the Family Courts'*. This highlights the summary of the balancing exercise required as described in *Re J (A Child)* [2013] EWHC 2694 (Fam) at [22]:

> *"The court has power both to relax and to add to the 'automatic restraints.' In exercising this jurisdiction the court must conduct the 'balancing exercise' described in In re S (Identification: Restrictions on Publication) [2004] UKHL 47, [2005] 1 AC 593, [2005] 1 FLR 591, and in A Local Authority v W, L, W, T and R (by the Children's Guardian) [2005] EWHC 1564 (Fam), [2006] 1 FLR 1. This necessitates what Lord Steyn in Re S, para [17], called "an intense focus on the comparative importance of the specific rights being claimed in the individual case". There are, typically, a number of competing interests engaged, protected by Articles 6, 8 and 10 of the Convention. I incorporate in this judgment, without further elaboration or quotation, the analyses which I set out in Re B (A Child) (Disclosure) [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [93], and in Re Webster; Norfolk County Council v Webster and Others [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, at para [80]. As Lord Steyn pointed out in Re S, para [25], it is "necessary to measure the nature of the impact ... on the child" of what is in prospect. Indeed, the interests of the child, although not paramount, must be a primary consideration, that is, they must be considered first though they can, of course, be outweighed by the cumulative effect of other considerations: ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 AC 166, para [33]."*

31. The President's Guidance is intended to simplify, and reduce costs associated with, the process of varying or lifting the ordinary restrictions which apply to private proceedings concerning a child. To that extent it is consistent with the later conclusion of the President *"that there needs to be a major shift in culture and process to increase the transparency of the system in a number of respects".*

32. In particular, the President's Guidance indicates that:

    a. Where a reporter has attended a hearing pursuant to FPR r.27.11 an application to vary the automatic statutory reporting restrictions *"can be made orally, whether or not notice has been given in advance to the court that is hearing the case. Although such notice is encouraged it can, for example, be given by way of an email to the court office or the judge's clerk, which has been copied to the parties"* [8(b)];

    b. Court should *"be astute to assist reporters seeking to attend a hearing, or to relax reporting restrictions, and should provide them with relevant contact details of the court office, the judge's clerk and the parties where requested (unless there is good reason not to do so)"* [8(d)]; and

> c. Where agreement cannot be reached on varying reporting restrictions *"the reporter should be invited to make oral submissions. The court, and any advocate appearing for parties to the proceedings, should provide assistance in terms of the relevant law and procedure to be followed. Any party opposing the application may then make submissions. The reporter should then be given an opportunity to reply"* [10]

33. Mr Barnes also places some reliance on the report produced by the President, *Confidence and Confidentiality: Transparency in the Family Courts* (20 October 2021) in which he says, *"that there needs to be a major shift in culture and process to increase the transparency of the system in a number of respects".* This is, of course, merely a report. But it does support Mr Barnes' submission about the strong public interest in increasing transparency in the family justice system, and in the media being able to report on issues that arise within that system.

34. The importance of open justice has recently been strongly endorsed by the (former) Lord Chief Justice, Lord Burnett, in his speech to the Commonwealth Judges and Magistrates Conference 2023 on 10 September 2023, where at the end of his speech he said:

> *"Now, Louis Brandeis, US Supreme Court Justice, famously noted over a century ago now that 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' This is usually shortened to the pithier 'sunlight is the greatest disinfectant'. Where court proceedings are concerned, he was without doubt correct. Open justice may not often be thought of as one of the most important principles that underpins fair trials and the proper administration of justice. The focus is on the right to due notice, to an adversarial process, and equality of arms. It is on the right to submit and test evidence and to participate effectively in proceedings. But the ultimate guarantee of all these principles is open justice. Without it they would not last long as meaningful principles. Nor would our courts and judiciaries maintain public confidence and legitimacy. Open justice is a necessary foundation of the rule of law. That is why we should all give very careful thought in the years to come, as technology continues to reshape our justice systems, to maintaining and, more importantly, enhancing how we give effect to open justice."*

Submissions

35. Mr Barnes advances four Grounds of Appeal, but to a significant degree they blend into each other. The Judge failed to apply the "intense focus" referred to in ***Griffiths*** to Ms Tickle's application. In particular, he failed to engage with the fact that she was not seeking to report the underlying facts of the case, or on any evidence, but rather on the procedural and systemic problems that arose in this type of case. He failed to recognise that reporting would have no impact, or at least no material impact, on the final hearing. The nature of the reporting sought would not prejudge the evidential issues which were yet to be aired. He failed to have regard to the fact that adjourning the application was itself an interference with Article 10, particularly as Ms Tickle had attended as a freelance journalist. He did not engage with the fact that the alleged harm to the child

was wholly generalised and on the facts of the case did not stand up to any scrutiny. He failed to balance the strong public interest in reporting the general issues about the family justice system.

36. Dr Proudman supported the appeal. In her Skeleton Argument she raised concerns about what had occurred on the first day of the hearing but, as I have explained above, that did not form part of the issues before me in the appeal. In her oral submissions she pointed to the fact that the Mother had not had the benefit of any participation directions, and this was an issue which there was a real public interest in being widely known and aired.

37. The Father did not support the appeal. He appeared in person and made clear that he supported the principle of greater transparency in the Family Court. He raised, somewhat tangentially but in my view relevantly, that he had many concerns about the way the Family Court operated and how it had dealt with the case. However, he felt that there was potential prejudice to the final hearing and to the child if reporting was allowed at this stage.

38. The Guardian also did not support the appeal, Ms Begum submitted that the decision to adjourn was a case management direction and therefore the Judge had a wide discretion and the court should be slow to intervene. In making the decision to adjourn he balanced Articles 6, 8 and 10 and was governed by Article 6 and the need for a fair hearing at the substantive hearing. The parents were engaged in stressful litigation which could have enormous consequences for the family, and that was a factor the Judge appropriately took into account.

39. She accepted the Judge took a "cautious approach" but submitted that was quite appropriate in order not to inflame emotions between the parents. Partial reporting of the proceedings could lead to a distorted picture of the case.

40. She pointed to the fact that the Father did not support there being reporting. Therefore, the Judge was correct to adjourn the issue until the end of the proceedings so that both parties could be as comfortable as possible with the position.

41. Ms Begum suggested it would be helpful for the Court to give some guidance on how to approach applications such as Ms Tickle's, particularly given the increasing support for greater transparency in the family justice system.

Conclusions

42. I will start by setting out some of the relevant principles when approaching an application for reporting of a Family Court hearing.

43. Firstly, although Family Court proceedings are normally held in private the press and legal bloggers are entitled to attend under FPR27.11(2)(f).

44. Secondly, such a person can be excluded, but only where it is "necessary" in the interests of the child, the safety or protection of parties or others, or the orderly conduct of proceedings, FPR27.11(3).

45. Thirdly, I agree that in approaching the test of "necessity", what was said in ***Re H-L (a child)***, albeit in a different legal context, is a useful guide.

46. Fourthly, it will rarely, but not never, be appropriate for the Court to inquire as to why the journalist is seeking to report, or how s/he became aware of the hearing. In general, as Mr Barnes submits, this will be a matter for the journalist who would not be expected to reveal a "source". However, if the Judge becomes concerned that one party is seeking to use reporting as a litigation strategy, particularly in the context of issues around coercive control, the Judge may wish to inquire into the background to the application to report. This can only be considered on a case specific basis.

47. Fifthly, in determining whether a reporter can report on what they see and hear in a Family Court, the Judge will have to apply a balance between Article 8 and Article 10. The approach to such a balancing exercise was considered in detail by the Court of Appeal in ***Griffiths v Tickle*** [2021] EWCA Civ 1882 at [27]-[40]. The Court will have to apply an *"intense focus"* on the *"comparative importance of the specific rights being claimed in the individual case …",* see ***Griffiths*** [37] and Lord Steyn in the House of Lords in ***Re S*** at [17].

48. Sixthly, the child's best interest will be critical, ***Griffiths*** at [71], although they will still have to be balanced against the other rights asserted. In practice, in most cases in the Family Court, it will be of great importance to preserve the anonymity of the child, so far as is reasonably practicable. I note this caveat because there will be cases, such as ***Griffiths*** itself or cases concerning a high profile criminal case, where anonymity can only be preserved in reality to a certain degree. There may be an important distinction between cases such as the present, where the reporter is seeking to report wholly generic and systemic matters, and where the reporting is of the facts and evidence in the case, where the risk of identification of the child is much greater. The experience of the Transparency Pilot currently under way is that anonymity of the child can be effectively preserved by the use of a detailed Transparency Order.

49. Seventhly, there is a public interest in the reporting of cases in the Family Courts. This is made clear in the report of the President of the Family Division (Sir Andrew McFarlane) in his report *Confidence and Confidentiality: Transparency in the Family Courts* (21 October 2021). At paragraph 22 the President said:

> *"The level of legitimate media and public concern about the workings of the Family Court is now such that it is necessary for the court to regard openness as the new norm. I have, therefore, reached the clear conclusion that there needs to be a major shift in culture and process to increase the transparency of the system in a number of respects. In short, the reasons for this conclusion are as follows: …"*

50. The Report goes on to refer to the genuine and legitimate public interest in the Family Justice System for the purposes of gaining public confidence in the system, and greater knowledge and understanding of issues such as domestic abuse, see [30]. In my view it is relevant that because most Family Court cases are held in private and with no reporting, there is less knowledge or understanding of the challenges facing the Family Justice System than those facing the Criminal Justice System. There is a very real public interest in there being greater understanding of the work done by the Family Courts.

51. Eighthly, there may well be cases where it is appropriate to adjourn a decision about whether a case can be reported on until the final hearing. However, whether that is justified must be considered on the facts of the individual case. Adjourning the decision is itself an interference with the reporter's Article 10 rights, and as such is different from a more normal case management decision. The Court must bear in mind that the resources of media outlets and reporters are finite, and a reporter may not be able to return on a future occasion.

52. Ninthly, in deciding whether to allow reporting, the views of the parties, including the child, are of great significance. However, they are not determinative, so no party holds a veto against reporting. As in ***Griffiths*** there will be cases where one party wants to be allowed to "tell their story", and to prevent them doing so will be an interference, albeit potentially justified, in their Article 8 rights. There may therefore be cases where there are competing Article 8 rights which need to be considered.

53. Applying those principles to the facts of this case I conclude that the Judge erred in law. The decision to adjourn the reporting application was a case management decision and as such the Court should ordinarily be very slow to intervene, ***Re TG (Care Proceedings Case Management Expert Evidence)*** [2013] 1 FLR 1250 at [24] to [38]. However, a decision on reporting is rather different from most case management decisions because it interferes with an Article 10 right and in practice may prevent that journalist from reporting at all. It therefore appears to me that the full rigour of the principles in ***Re TG*** do not fully apply.

54. In my view, the Judge here did not apply the Article 8/10 balance in a legally appropriate manner. On the Article 8 side of the balance he did not address his mind to the fact that given the restrictions that Ms Tickle proposed, there was no possibility of the child or parents being identified. She did not seek to report any of the evidence and any of the factual matrix beyond the greatest of generalities. As such, it put the case well outside the norm of what is sought to be reported. The Judge in his consideration simply did not engage with the scope of the limitations Ms Tickle was proposing. As such, "confidentiality" or "anonymity" did not arise in any meaningful way on the facts of the case.

55. The Judge's justification for adjourning the application was the concern that reporting might jeopardise the fairness of the substantive hearing and therefore impact on the parties', in particular the Father's, Article 6 rights. However, this approach does not stand up to scrutiny. Again, Ms Tickle was not seeking to report about the factual or evidential matrix of the case. Therefore the concern that her reporting might not give a fair view of the case misunderstood what she wished to report. In any event it is of the greatest importance to understand that it is not for the Court to consider the quality or fairness of the reporting. The Court is not an arbiter of the editorial content of reporting.

56. To the degree the Judge was concerned that the parents, or in particular the Father, might be upset or antagonised by reporting and that would impact on a fair trial, that approach comes very close to giving parents a veto over reporting, which plainly would not meet the ***Re S*** requirement for an intense focus on the competing rights. In any event, there was minimal or no evidence to support such a position. The nature of the reporting would make it impossible to identify anyone and was not going to comment on the evidence. It is possible that Ms Tickle will refer to issues of parental alienation

and domestic abuse, and the Father, who will know that the report concerns this case, may not agree with that. But that is hardly a ground to refuse to allow reporting.

57. On the Article 10 side of the balance, the Judge did not consider the strong public interest, as explained by the President of the Family Division and set out above, in the public being informed about the working of the Family Justice System and the problems that are faced on a daily basis with private family law cases. Again the Judge simply did not grapple with this part of the overall balance.

58. For these reasons I conclude that the Judge did not properly direct himself with regard to the Article 8/10 balance, essentially for the reasons set out in Mr Barnes' Grounds of Appeal.

59. I then have to decide whether to remit the matter back to the Judge, or to the Judge who is not to hear the substantive matter, or to decide Ms Tickle's application myself. In my view the most appropriate and proportionate approach is for this Court to determine the application. I have had all the material presented to me, and this is not a decision that either turns on primary evidence nor on a detailed knowledge of the underlying facts of the case. Further, it is important to deal with press applications in a proportionate manner, and that militates in favour of not having another hearing to decide the application.

60. For the reasons that I have set out above, I take the view that this is a case where the Article 8/10 balance, and taking into account any impacts on Article 6 rights, points clearly in favour of allowing report. In very brief summary, there is effectively no risk of the child being identified. There is a strong public interest in allowing Ms Tickle to report the generic concerns about the Family Justice System which arise. There is no interference in any parties' Article 6 rights. I will therefore allow the appeal and allow the application.