



Case No: B4/2018/2698 & 2698(A)

Neutral Citation Number: [2019] EWCA Civ 482
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PORTSMOUTH FAMILY COURT
(HIS HONOUR JUDGE LEVEY)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 15 February 2019

Before:
THE PRESIDENT OF THE FAMILY DIVISION
(LORD JUSTICE McFARLANE)
and
LADY JUSTICE KING

IN THE MATTER OF R (A CHILD)

Transcript of Epiq Europe Ltd 165 Fleet Street London EC4A 2DY
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Mr P Bowen QC and **Miss S Phillimore** (instructed by **Simons Muirhead & Burton**, LONDON W1T 3EY) appeared on behalf of the **First Appellant**

Mr A Wolanski (written submissions) (instructed by the Editorial Legal Group, LONDON W12 7TP) for the **Second Appellant**

Mr L Messling (instructed by **Boardman Hawkins & Osborne**, Ock St, ABINGDON OX14 5AL) appeared on behalf of the **Respondent Mother**

Miss S Earley (instructed by Southampton Council Legal, Civic Centre, SOUTHAMPTON, SO14 7LY) appeared on behalf of the **Respondent Legal Authority**

THE RESPONDENT CHILD BY HER GUARDIAN DID NOT APPEAR AND WAS NOT REPRESENTED

Judgment
(Approved)

THE PRESIDENT OF THE FAMILY DIVISION:

1. The court has before it an appeal against a reporting restrictions order made by His Honour Judge Levey, sitting in Portsmouth on 19 October 2018 at the conclusion of care proceedings in relation to a young child. The proceedings had had a history of substantial litigation in the family court and in the Court of Appeal. Originally, His Honour Judge Hess had made an order in June 2017, which refused mother's application to discharge existing care order and made an order authorising the local authority to place the child for adoption. That order was the subject of an application for permission to appeal, which was granted. The full court heard the appeal on 20 February 2018, giving a full judgment in public, which has been reported by publication on the BAILII website and subsequently in official law reports and elsewhere. As a result of the Court of Appeal judgment, the case had to be redetermined by a different judge.
2. It was that process that came before Judge Levey in the autumn of last year. By that time the case had attracted interest in the media, and three respected and experienced journalists appeared at court, as they are entitled to do under the Family Procedure Rules, to observe the hearing. Indeed, prior to the hearing, certain of the journalists had communicated directly with the court to alert the judge of their intention to attend, and their intention to apply, if they considered it was justified, for a variation of the ordinary restrictions in relation to reporting. The hearing took place. The journalists attended. They were not legally represented. They flagged up the applications that they intended to make, but as the transcript of the hearing makes plain, the issue was dealt with relatively swiftly, and the judge made an order which not only restricted reporting but also had the effect of restricting the reporting of information that was already in the public domain as a result of the publication of the Court of Appeal judgment.
3. One of the three journalists, Miss Louise Tickle, lodged an application for permission to appeal, which was granted by Jackson LJ. The appeal indeed is set down for full hearing for one day before this court in March. It has, however, come to pass that all of the parties involved, including representatives of the media, are now agreed as to a replacement reporting restriction order, which should stand in place of that imposed by

HHJ Levey. So, with respect to the appeal proceedings, there is no longer dispute as to what the order should be, and the appeal would, so far as the terms of the order itself are concerned, proceed by consent. Because this a reporting restriction order against all the world, it is not a matter that simply could be dealt with on paper and requires this court to consider and determine whether the replacement order, which is largely agreed between the parties, should be made. The court, therefore, established a short hearing this morning to take stock of the process and to consider whether a full appeal hearing was required. That is partly because of the background I have explained in terms of the need to make an order, but also because the appellant, Miss Tickle, and in addition those representing journalists at the BBC, wished to canvass wider issues of principle and practice which are generated by the facts of this case, and which go beyond the terms of the precise order which is to be made. The court is extremely grateful to Mr Paul Bowen QC, who leads Miss Sarah Phillimore, who previously drafted the Grounds of Appeal and skeleton argument, for the very full skeleton that has been prepared, which sets out the legal landscape in this somewhat complicated but very important area relating to transparency in the family courts and, in particular, for the elements that Mr Bowen has identified, which he submits would justify being encapsulated guidance.

4. In addition, the BBC have applied to be joined as a party to the appeal. That application is not contested. At the beginning of this hearing we granted that application and the court has also, therefore, received written submissions by Mr Adam Wolanski and heard oral submissions from him. Unfortunately, legal funding is not available for the child to be represented, but a letter has been submitted on behalf of the child. The court has, however, heard counsel, Miss Sarah Earley, for the local authority, and counsel, Mr Lawrence Messling, for the child's mother.
5. The issues that we have to determine this morning are narrow. One, however, is of general importance. It is whether the appeal hearing should be retained in the court's diary in order to determine what priority the welfare of a child is to have when a court is determining what, if any, relaxation of the automatic reporting restrictions is to be allowed or whether any additional reporting restriction order is to be imposed. Neither Mr Bowen nor Mr Wolanski forcefully press the idea of holding a hearing in this case solely on that topic. In our view, they are right not to do so. It is a matter that

undoubtedly justifies full consideration, but this case is now constituted so that no party to the proceedings wishes to argue against the propositions that the media would otherwise make. Mr Wolanski, in particular, submits that this may not be the right vehicle for that important process. My Lady and I agree, and we therefore decline the invitation to maintain the full hearing in March solely for that purpose. It follows that that hearing will now be vacated and the appeal will be determined as a result of the hearing today.

6. Before turning to a further issue, it is right that I therefore record the process that leads to the appeal being allowed. In short terms, the Grounds of Appeal assert that the judge gave no reasons for his failure to refer to the existing Court of Appeal judgment in this case. Secondly, it is asserted that he failed to consider the existing case-law in relation to transparency in the family court and the determination of issues which may or not restrict reporting. Finally, crucially, he failed to undertake the necessary balancing exercise between Article 8 and Article 10 of the European Convention on Human Rights, which is to be undertaken in any case such as this.
7. This court has sympathy for any judge at the current time faced with an application such as this. It also has sympathy for the journalists involved, often appearing without any legal representation, who make such applications. That sympathy arises from the fact that at present there is no detailed guidance or route map for how such applications are to be determine . It is, therefore, my resolve as President to issue such guidance at the earliest opportunity. There is no great controversy as to the elements of guidance that Mr Bowen, no doubt informed by instructions from Miss Tickle, has put forward. I therefore propose, outside these particular proceedings, to develop a draft set of guidance and then consult with the various interested parties and bodies upon that with a view to issuing it in due course.
8. A reading of the transcript, however, indicates that the basic grounds of appeal would be made out. The appeal is not contested, and therefore, if my Lady agrees, the proposal is that the appeal should be allowed on the basis that the order made by HHJ Levey on 19 October 2018 with respect to reporting restrictions was wrong and the reason that that was wrong arises from the procedural irregularities, which I have done no more than

highlight by referring to the Grounds of Appeal. The order, therefore, in relation to the appeal, in addition to recording that the BBC have been joined as a second appellant, will be that the appeal is allowed, and the order made by Judge Levey imposing reporting restrictions will be set aside and a fresh reporting restriction order is to be made in accordance with the terms of a draft, which will be further amended before being attached to the court order.

9. The element of controversy that remains with respect to the draft takes me now to the submissions made by Mr Messling. It is the case that the country of origin of the child's mother is stated plainly within the Court of Appeal judgment given in February 2018. There is common ground between all the parties before the court this morning that, if possible, there should be no reference to the mother's country of origin. The question is whether the new reporting restriction order should encapsulate that by imposing a restriction on any repetition of the country or origin in any reporting and, in particular, by in some way distancing any report from a direct reference to the case name and neutral citation of the Court of Appeal judgment or the link on BAILII.

10. My Lady and I have heard Mr Messling's clear submissions on this point and understand the importance that the mother places upon this particular piece of information. The court does not, however, have any detail as to what detrimental impact there would be upon the mother were matters to stand as they currently do, with the Court of Appeal judgment being available publicly and with journalists otherwise being freely able to connect it to the information which will now be put into the public domain as a result of the new reporting restriction order. The court has to approach this by balancing the Article 8 rights involved of the mother and the child against the freedom of publication encapsulated in Article 10. In my view, given that the information under consideration, namely the name of the country, is already out in the public domain in the Court of Appeal judgment, it would be wrong for this court now to take any step that prevents the ordinary linking and connection of that Court of Appeal judgment, with all that it contains, with the present process that is to be undertaken in terms of publishing this hearing and the earlier hearings in the lower court. I am not persuaded that the mother's or the child's Article 8 rights are compromised to a degree that would justify any other course and I would, therefore, refuse Mr Messling's application to amend the proposed

draft to achieve that which he and his client desire. I think that deals with all of the matters that are currently before the court. On that basis, the appeal is allowed, with the orders that I have described being made by this court in due course after any further drafting changes (which have to be approved by us) being undertaken by counsel.

Lady Justice King:

11. I agree.

Order: Appeal allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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