Neutral Citation Number: [2016] EWCA Civ 798

Case No: B4/2016/2680

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE PAUFFLEY
FD12C00060

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2016

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE McFARLANE
and
LORD JUSTICE BURNETT

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C (A Child)

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- -

Jude Bunting (instructed by **Guardian News & Media Ltd & Others**) for the **Appellants**
Jacob Dean (instructed by **London Borough of Sutton**) for the **First Respondent**

Hearing date: 22/07/2016

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Judgment Approved**Master of the Rolls:**

Introduction

1. The central issue that arises on this appeal is whether the judgment given by Eleanor King J on 30 June 2014 ("the Judgment") in care proceedings in respect of a child to whom I shall refer as "C" and which were conducted in private and subject to reporting restrictions should be put in the public domain. C is the younger sibling of Ellie Butler. The parents of the two children are Mr Butler and Ms Gray. On 28 October 2013, Ellie died as a result of catastrophic head injuries at the family home.

2. Following her death, Mr Butler was arrested on suspicion of her murder. C was removed from the care of Ms Gray and placed into police protection and care. Public law care proceedings were commenced and thereafter orders were made from time to time prohibiting any publication that would enable C to be identified. The first of these was made by Hogg J on 30 October 2013.

3. In the Judgment, Eleanor King J found that (i) Mr Butler had caused Ellie's death; (ii) Ms Gray had failed to protect her from Mr Butler; and (iii) C had been the victim of physical and emotional abuse.

4. Following the handing down of the Judgment, Holman J made a further order for reporting restrictions on 11 July 2014. It included a prohibition on publishing or broadcasting any information as to the Judgment. Annexed to the order was an Explanatory Note which stated that a reporting restriction order was necessary (i) to prevent C from being identified and (ii) to ensure that there was a fair trial of Mr Butler and Ms Gray in the criminal proceedings. On 29 July 2014, Eleanor King J made a fresh reporting restriction order. On 14 June 2016, Bodey J discharged the orders of Holman J and Eleanor King J and made a yet further reporting restriction order which made elaborate provision as to which parts of the Judgment and the resulting Order dated 30 June 2014 were permitted to be reported. But the prohibition on reporting which might enable the identity of C to be established was continued.

5. Meanwhile, the criminal trial had been opened on 19 April 2016. On 21 June 2016, Mr Butler was convicted of murder and child cruelty and Ms Gray was convicted of attempting to pervert the course of justice and of child cruelty.

6. On 22 June 2016, seven media organisations applied to have the entirety of the Judgment put into the public domain. On the same day, Pauffley J dismissed the application essentially because of the possibility that disclosure of the contents of the Judgment would prejudice the right of Mr Butler to a fair trial. This right outweighed the public interest in open justice and the applicants' rights to freedom of expression under article 10 of the European Convention on Human Rights ("the Convention"). I shall consider Pauffley J's judgment in more detail later in this judgment.

7. At the time of the application, unsurprisingly neither Mr Butler nor Ms Gray had applied to the Court of Appeal Criminal Division ("CACD") for permission to appeal against their convictions, although Mr Butler had intimated that he intended to do so.

8. The applicants appeal against the decision of Pauffley J with the permission of Burnett LJ.

9. *The relevant law and legal principles*

10. The first question is whether Pauffley J had the power to make the order sought by the appellants. She recorded at para 25 of her judgment that Mr Bunting had submitted that she had no such power because there were no "active" proceedings within the meaning of Schedule 1 to the Contempt of Court Act 1981 ("CCA") for the purpose of the strict liability rule found in section 1. The judge did not rule on that submission. But there were no "active" proceedings, since the criminal proceedings had been concluded. If the power to postpone reporting were to be found in the CCA, it would be in section 4(2). That did not apply in this case because the potential retrial of Mr Butler was not "other proceedings" which were "pending or imminent"; and also because the power to postpone publication in section 4(2) applies to "legal proceedings held in public". The proceedings before Eleanor King J were not held in public.

11. Before this court, Mr Bunting submits that Pauffley J had jurisdiction to make the order sought under FPR 12.73(1)(b) which provides that, for the purposes of the law relating to contempt of court, information relating to proceedings held in private may be communicated "where the court gives permission". But as Mr Dean points out, rule 12.73(2) provides that "nothing in this Chapter permits the communication to the public at large, or any section of the public, of any information relating to the proceedings". It seems to me, therefore, that the power to make the order sought cannot derive from rule 12.73(1).

12. In the alternative, Mr Bunting relies on what MacDonald J said in *H v A (No 2)* [2015] EWHC 2630 (Fam) at para 20:

> "The Court of Appeal made clear in *Re C (A Child)* [2015] EWCA Civ 500 at [23] that the decision whether or not to publish the judgment constitutes a case management decision. In my judgment it is open to the court to remove the judgment from the public domain or otherwise make orders restricting its use in light of new evidence or changed circumstances as part of the courts' case management powers regarding disclosure and the wide powers under FPR 2010 r 4.1(3)(o) to further the overriding objective of ensuring the case is dealt with justly."

13. I doubt whether the court's case management powers are a sufficient basis for holding that the power exists. But I am in no doubt that the court does have the power to order the disclosure of part or all of what takes place in private proceedings (including any judgment made by the court during the course of or at end of the proceedings). In my view the court has that power under its inherent jurisdiction. It had that power before the incorporation of the Convention by the Human Rights Act 1998: see *Kent County Council v The Mother, The Father, B* [2004] EWHC 411 (Fam) at paras 83 to 86 where Munby J summarised the relevant jurisprudence. The court continues to have that jurisdiction following the incorporation of the Convention. The domestic and Strasbourg jurisprudence is reflected in the *Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230 ("the Practice Guidance") issued by Sir James Munby P in relation to the publication of judgments in family courts and the Court of Protection. See also per McFarlane LJ in *In Re W (Children) (Care Proceedings: Publicity)* [2016] 4 WLR 39 at paras 32 to 40.

14. *The exercise of the power*

15. The Practice Guidance gives helpful guidance as to how the power should be exercised. Para 16 states that permission to publish a judgment should always be given whenever the judge concludes that publication would be in the public interest. Para 17 states where a written judgment relates inter alia to the making or refusal of a final care order:

> "the starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the judgment should not be published."

16. Para 19 states that, in deciding whether and if so when to publish a judgment, the judge should have regard to all the circumstances, including any relevant provision of the Convention such as article 6 (right to a fair trial), article 8 (respect for private and family life) and article 10 (freedom of expression) and the effect of publication on any current or potential proceedings.

17. Mr Bunting submits that article 6 has no application in a case (such as the present) where the criminal proceedings have been concluded. He says that it is irrelevant that the convicted person intends to apply for permission to appeal against his conviction or even that he has been given permission to appeal or that his appeal has been allowed or that a retrial has been ordered. Once the original criminal proceedings have been concluded, article 6 considerations have no part to play in the decision whether to permit publication of any part of the private proceedings until and unless fresh criminal proceedings are commenced.

18. I do not accept that this uncompromising stand is a correct statement of the law. It is inconsistent with the carefully calibrated guidance given in the Practice Guidance which states in terms that the judge should have regard to all the circumstances. It will be a question of fact and degree how serious a risk publication will be in any particular case to the fairness of potential future criminal proceedings.

19. In my view, the more uncertain the prospect of future criminal proceedings, the less weight should be given to the article 6 rights of an individual who may be affected by the publication. And the converse applies too. Thus in a case where a person convicted of a criminal offence has appealed and his appeal has succeeded and a retrial has been ordered, it is of little significance that the formal steps necessary to start the fresh trial have not yet been taken. On the other hand, in a case such as the present where the convicted person has not been given permission to appeal and a retrial is no more than a speculative possibility, the court should usually give little weight to the article 6 rights of a person seeking to oppose the publication of private proceedings. The positon may be different if the court is able to make an assessment of the prospects of permission to appeal being granted and the prospects of a successful appeal. But that has not been possible in the present case. Neither Pauffley J nor this court was provided with any material to enable such an assessment to be made.

20. *The judge's approach*

21. The judge noted (para 3) that the application was made on the basis that there is a "profound public interest in reporting the story of Ellie's death, including, in particular, the history of the care proceedings relating to Ellie's younger sibling". She accepted that these care proceedings place the Family Court "under a particular spotlight and cry out for public exploration" (para 13). She made the point that, if she acceded to the application, there would be "the most widespread and extensive reporting of the content of [the Judgment]" (para 31). She said: "if there is any potential for a retrial", the Judgment should not be released into the public domain for the same reasons as "underpinned the decision of Eleanor King J not to release [it] in 2014" (para 32). At para 34 she said:

> "There is the potential for prejudice to, even the derailing of, the criminal process. That, to my mind, is manifest. The risk may be, as Mr Bunting suggests, small but the consequences for the criminal process could be incalculable."

22. Finally, at para 36 she said:

> "The arguments in favour of the release of King J's judgment are powerful and strong. They will remain so. I fully expect that so soon as the criminal appeals' process is at and end a full, suitably redacted version of the 30th June 2014 Judgment will be published."

23. *Discussion*

24. Mr Butler and Ms Gray have not appeared in person nor have they been represented on the appeal. The court has received a letter from Messrs Bindmans LLP dated 15 July 2016 which asserts that the findings set out in the Judgment have been seriously undermined by evidence heard at the criminal trial. The letter concludes:

> "If Mr Butler is successful in his appeal against conviction and a retrial is ordered, the prejudice caused by disclosure of the extensive ruling of Mrs Justice Eleanor King cannot be overcome and Mr Butler will be deprived of a fair trial."

25. The London Borough of Sutton ("LBS") has appeared and has been represented by Mr Dean. C's Guardian has submitted a skeleton argument. Both LBS and the Guardian are neutral on the issue raised by the appeal. Both are concerned to ensure that, if the appeal is allowed, the interests of C are protected by ensuring that the publication of the Judgment does not enable C to be identified.

26. The judge rightly recognised at para 10 of her judgment that open justice is at the heart of our system of justice and vital to the rule of law. As she said, it promotes the rule of law by letting in the light and allowing the public to scrutinise the workings of the law. There is a particular need for the media to act as a public watchdog in care proceedings in the Family Court "because of the intrusion or potential intrusion into family lives of those concerned and what could be a serious interference by the state in family life".

27. She rightly also recognised that this was a powerful argument in favour of publication. As the Practice Guidance makes clear, permission for the publication should have been given unless there were compelling reasons why not to do so. The Practice Guidance accurately reflects the law.

28. In what follows, like the judge I shall only refer to Mr Butler. So far as I am aware, Ms Gray has not indicated that she is intending to seek leave to appeal. The letter from Bindmans was written on behalf of Mr Butler. In balancing the article 6 rights of Mr Butler against the public interest in open justice and the article 10 rights of the applicants, I am in no doubt that the judge reached the wrong conclusion. If she had made a proper assessment of the risk that there would be a violation of Mr Butler's right to a fair trial, she would have been bound to conclude that the risk was minimal and was plainly outweighed by the countervailing considerations to which I have referred.

29. First, she made no assessment of the likelihood of a retrial. This was not the judge's fault. It is a striking feature of this case that no attempt was made on behalf of Mr Butler to demonstrate that he had real prospects of being granted permission to appeal, still less that any appeal would be likely to succeed. In these circumstances, the judge should have approached the article 6 issue on the basis that there was at best a speculative possibility that there would be a retrial.

30. But the second and decisive reason why the judge reached the wrong conclusion is that, even if there is a retrial, there is no real possibility that the publication of the Judgment will prejudice the rights of Mr Butler to a fair trial. This is clearly demonstrated by both our domestic jurisprudence and the jurisprudence of the ECtHR which are entirely harmonious with each other on this point.

31. Our domestic law is heavily influenced by section 4(2) of the CCA which provides that an order postponing the publication of a report of proceedings can only be made "where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice". Such an order should only be made as a "last resort": *R (Press Association) v Cambridge Crown Court* [2013] 1 WLR 1979 per Lord Judge CJ at para 13.

32. In assessing whether there is a "substantial risk of prejudice", it is necessary for the court to have regard to three matters in particular. First, juries "have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial": *Re B* [2007] EMLR 5 at para 31. The importance of trusting a criminal jury to comply with directions made by the trial judge has been underlined repeatedly. For a recent example, I refer to *Taylor* [2013] UKPC 8 at para 25. Criminal Practice Direction 26G.3 identifies what judges should cover in their opening instructions to jurors. This includes that the jury should try the case only on the evidence and no other material. In particular, juries are directed to make no internet searches relating to the trial and to avoid discussing the case with anyone outside their number, including on social media.

33. Secondly, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice: *Re B* at para 25.

34. Thirdly, the "fade factor" that applies in news cases. The "staying power of news reports is very limited": Judicial College Guidance on *Reporting Restrictions in the Criminal Courts,* revised in May 2016 at p 29. The significance of this factor may have reduced a little in view of the staying power of the internet. But in my view, it remains a highly relevant factor.

35. It is clear from the Strasbourg jurisprudence that, even if there were a retrial of Mr Butler, his article 6 rights would not outweigh the article 10 rights of the applicants.

36. In *Beggs v United Kingdom* (app. No. 15499/10), the ECtHR adopted an approach which is entirely consonant with that adopted in our domestic jurisprudence: see paras 122 to 129. It noted, in particular, in cases concerning the fairness of criminal trials, the importance of directions given to juries. In that case, there had been a "virulent and prejudicial press and media campaign" against the applicant before his criminal trial took place. The complaint that the impugned publications had influenced the jury was declared inadmissible for a number of reasons. These included that in his directions the judge had warned the jury to disregard the prejudicial material and that it was reasonable to assume that the jury would follow the directions given.

37. *Abdulla Ali v United Kingdom* (App. no. 30971/12) was a similar case. There was what was described as "an avalanche of objectionable material" in prominent position in both broadsheet and tabloid newspapers. The court said at para 89 that a direction to the jury to disregard extraneous material "will usually be adequate to ensure the fairness of the trial, even if there has been a highly prejudicial campaign….". At para 91, the court said that "it will be rare that prejudicial pre-trial publicity will make a fair trial at some future date impossible." The applicant had not pointed to a single case where the ECtHR had found a violation of article 6 on account of adverse publicity affecting the fairness of the trial itself.

38. The judge acknowledged that, in the event of a retrial, the risk of prejudice to its fairness occasioned by the publication of the Judgment was "small". In my view, it was so negligible that it should have been given little or no weight in the balancing exercise. The judge failed to take into account (i) the fact that the jury would be directed to ignore anything they read or heard outside the trial and that it should and would be trusted to follow the directions given by the trial judge; (ii) the fact that broadcasting and newspaper editors should be trusted to behave responsibly; and (iii) the fade factor (it would be many months and possibly more than a year before a retrial would take place). If she had properly taken these factors into account, she would have been bound to conclude that the Judgment should be put into the public domain. Mr Bunting makes the further valid point that it is difficult to see how the publication of the Judgment could create a separate substantial risk of prejudice given that much of what appears in it is already in the public domain. But I do not need to examine this point in detail since the Judgment should be put into the public domain for the reasons that I have already given, subject to the redactions necessary to protect the interests of C. These redactions have been the subject of further submissions and the Court has made an Order determining the way in which the Judgment should be redacted.

39. *Conclusion*

40. For all these reasons, I would allow this appeal and permit the Judgment to be published with the approved redactions.

41. **Lord Justice McFarlane:**

42. I agree.

43. **Lord Justice Burnett:**

44. I also agree.

45.