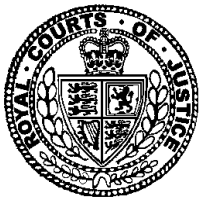

Neutral Citation Number: [2018] EWHC 3491 (Fam)

Case No: PO16C00605

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2018

Before :

SIR JAMES MUNBY
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

In the matter of A and B (Children)

- -
- -

Miss Nadia Tawfik (instructed by local authority solicitor) for the local authority
Miss Helen Khan (instructed by Footner & Ewing) for the children's mother
Ms Rosein Magee (instructed by Child Law Partnership) for the children's guardian
Miss Maureen Obi-Ezekpazu (instructed through the Direct Access Scheme) for Mr Stephen Green
The children's father was present in person.

Hearing date: 22 June 2017

- -

Judgment Approved

This judgment was handed down in open court

Sir James Munby, sitting as a judge of the High Court :

1. These are cross-applications by a local authority, Hampshire County Council ("HCC"), and a journalist, Stephen Green of Christian Voice ("Mr Green"), which arise out of care proceedings, PO16C00605, brought by HCC in relation to two children, A and B ("the children"), who were at the material time 13 and 6 years old. The care proceedings were in the Family Court at Portsmouth and were being heard by Her Honour Judge Black. On 1 June 2017 she made a care order in relation to B, the proceedings in relation to A having concluded with the making of a care order on 22 December 2016.

2. So far as concerns the matters before me, the story begins on 2 May 2017 when Mr Green attended a hearing in the care proceedings. His application to Judge Black for permission to report the proceedings was refused. Judge Black also ordered Mr Green to return to HCC by 2.30pm on 3 May 2017, all "court documents and any copies of those documents which he retains." He failed to do so. The order also "informed" Mr Green, although not in terms ordering him to do so, that "he should remove … from the internet within 24 hours" a particular article referred to in the order ("the Article"). He did not do so and in fact, *after* Judge Black had made her order, put up more material about the case on the internet ("the Second Article").

3. On 4 May 2017, applications were made by HCC under the inherent jurisdiction seeking injunctions against Mr Green prohibiting him from publishing "details relating to any proceedings concerning the children or information private to the children", requiring him "immediately" to remove the Article from the internet, requiring him to return to HCC "all papers he has received in relation to the proceedings concerning the children (and any copies thereof)", requiring him to inform the court as to "the identity of the person(s) who provided him with the information and papers relating to the proceedings concerning the children" and, finally, seeking permission to make a committal application against Mr Green "for publishing information relating to private proceedings under Children Act 1989."

4. Those applications came before Baker J, as he then was, on 8 May 2017. Mr Green appeared in person. Baker J's order recites that Mr Green agreed (i) by 11.59pm on 8 May 2017 to remove from the internet, which he duly did, both the Article and the Second Article, (ii) not to publish or broadcast "any information relating to the family proceedings in case No PO16C00605", and (iii) by 4pm on 10 May 2017 to return to HCC "all documents in his possession, and any copies thereof, which were prepared for the purpose of" those proceedings, including but not limited to "statements, court orders, reports, schedules and judgments." As refined in the skeleton argument filed on behalf of HCC, what is sought is an injunction:

> "to prevent Mr Green from publishing or broadcasting any details of the children or the proceedings, such order to last until the children's respective 18th birthdays."

The skeleton argument also indicated that HCC is not, at this stage, pursuing any application in relation to committal.

5. Since February 2016, Mr Green had been a member of the British Association of Journalists ("the BAJ"). On 9 May 2017, he was notified that he had been temporarily suspended for a period of 24 hours. On 10 May 2017, he was notified that he had been permanently disqualified from the BAJ for acting in a manner that was "detrimental to

the interests of the Association." According to Mr Green, this action was unlawful, solicitors on his behalf have written a letter before action to the BAJ and he intends to commence legal action against the BAJ. Whether he has done so, and if so with what outcome, I have not been told.

6. As contemplated by Baker J's order, on 25 May 2017 Mr Green applied for various orders, which I can summarise as follows:

   i) Orders permitting "information relating to the proceedings" to be provided and "disclosure of case papers" for the purpose of "writing a series of articles about the operation of the child protection care proceedings process."

   ii) An order "permitting … publication of a series of articles about the child protection care proceedings process."

   iii) An order "permitting any person with knowledge of the case or party to the case to share their knowledge and to pass on to me the papers detailed above."

7. He identified the papers sought as follows:

   i) Copy sealed copy of the application for a public law order.

   ii) Interim and final threshold document containing findings sought by HCC against the parents.

   iii) Initial and final social work statements.

   iv) Expert assessments including ISW assessments.

   v) Initial and final analysis and recommendations of the children's guardian.

   vi) Copy sealed application for a placement order (if applicable).

   vii) Statements of facts.

   viii) Redacted annex b report.

   ix) Guardian report.

   x) Transcribed judgment.

   It will be noted that this list embraces, to all intents and purposes, almost all the key documents in the case, other than those emanating from the parents; that, except for (viii), there is no suggestion that any of the documents should be redacted in any way; and that no limitations of any kind are suggested on the use or publication of any of the documents, whether in whole or in part, nor are any protective safeguards proposed.

8. On 31 May 2017, Judge Black refused, pursuant to FPR Rule 27.11(2)(g), an oral application by Mr Green to observe the final hearing of the care proceedings.

9. The hearing before me was on 22 June 2017. HCC was represented by Miss Nadia Tawfik, Mr Green by Miss Maureen Obi-Ezekpazu, the mother by Miss Helen Khan, and the children's guardian by Ms Rosein Magee. The father was present in person. Broadly speaking, the mother and the children's guardian supported HCC; the father supported Mr Green. In a statement dated 12 June 2017 he said: "I and my family have suffered grave injustice in these proceeding. I fully support the application of Mr Green for documentation and to report on this case."

10. Given its contents, it would be wholly inappropriate, and indeed counter-productive, for me to set out or even summarise the Article. For present purposes it suffices to make three observations:

    i) First, it is perfectly obvious that the Article contains much information and material culled from the care proceedings. Indeed, it explicitly refers to "documents we have seen", quotes at length from a judgment given by Judge Black, the publication of which had not been authorised by the judge (it does not appear, for example, on the BAILI website) and also quotes from "a report prepared by" an HCC social worker.

    ii) Secondly, it refers – inaccurately according to HCC – to certain of A's behaviours and actions in a way that A would undoubtedly find distressing. In relation to this (the impact on the children) there is much concerning material in a witness statement filed on behalf of HCC which it would not be appropriate even to summarise in a public judgment,

    iii) Thirdly, although none of the family is identified, it refers to other distinctive and unusual aspects of A's life in a way which would very significantly increase the likelihood of readers being able to identify precisely who A is.

11. It is perfectly obvious that, on the face of it, the publication of the Article on the internet was a contempt of court. The effect of section 12(1)(a)(ii) of the Administration of Justice Act 1960 is that, unless a judge has *previously* give permission, it is a contempt of court (see *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, para 58) to publish:

> "'information relating to proceedings before any court sitting in private … where the proceedings … are brought under the Children Act 1989."

As set out in *Re B*, para 82(vi):

> "Section 12 prohibits the publication of:
>
> (a) accounts of what has gone on in front of the judge sitting in private;
>
> (b) documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment (this list is not necessarily exhaustive);

(c) extracts or quotations from such documents;

(d) summaries of such documents.

These prohibitions apply whether or not the information or the document being published has been anonymised."

12. Mr Green's prima facie contempt of court is aggravated by his posting *after* the hearing before Judge Black on 2 May 2017 of the Second Article, itself breaching section 12, though less flagrantly.

13. I add that Mr Green's lengthy final witness statement dated 25 May 2017 (which is expressly stated to supersede his earlier statement) contains much detail about his involvement in the reporting of *other* family court proceedings but has surprisingly little to say about *this* case. He complains that "the freedom of the Press has been severely, unreasonably limited by the court by its order of 8th May 2017." He makes various legal submissions, saying that "In my mind there is a clear tension between section 12 … and the Family Procedure Rules on the one hand, and Article 10 … and the Human Rights Act 1998 on the other." He cites my judgment in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, as implying "that parents should be able to share their story with the media and the media to receive documents." He invites me "to consider that the media … should have the ability, in its own right, to receive and publish information within family proceedings without the need to apply for permission." He asserts that he has "acted in a responsible and bona fide way throughout faithfully discharging the duty of the media to hold those in power to account and to raise questions of public importance." He says nothing whatever as to his compliance with the orders of 2 May 2017 and 8 May 2017.

14. There is one other matter I should deal with before addressing the opposing submissions. The linked questions of Mr Green's status (or not) as a duly accredited journalist (see FPR Rule 27.11(7)) and of his ability to attend hearings of the family court are *not* before me, being raised neither in his application nor in HCC's applications. Those were matters, as we have seen, dealt with by Judge Black previously. If Mr Green disagreed with her rulings, his remedy was to appeal. Although the written submissions before me address the issue, I do not propose to do so. The point is not before me and, in such circumstances, it is better that I say nothing.

15. Miss Tawfik's submissions on behalf of HCC are brisk and uncompromising. Mr Green, she says, "has shown flagrant disregard for the children, the parents, the law and indeed the court." The court, she says, "can have no confidence that [he] will behave in a responsible and reasonable way with any information gleaned … [he] has proved himself unable to report on the proceedings in an appropriate manner." For these reasons, she submits, I should refuse Mr Green's application but, conversely, grant HCC the injunction it seeks.

16. More specifically, her submissions proceed in stages:

i) First, and in each case correctly,

a) she submits that Mr Green cannot do what he wishes without first obtaining the permission of the court: see section 12 of the 1960 Act and Rules 12.73 and 12.75 of the Family Procedure Rules 2010, also PD12G to which Miss Obi-Ezekpazu helpfully drew attention;[1]

b) she accepts that, in principle, the court can, if appropriate, grant Mr Green the relief he seeks: cf, *Practice Guidance: Transparency in the Family Courts: Publication of Judgments*, para 13, and, for a recent example, *Tickle v Council of the Borough of North Tyneside & ors* [2015] EWHC 2991 (Fam);

c) she submits that the matter is to be determined by reference to the well-known principles to be found in such cases as *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, and *H v A (No 2)* [2015] EWHC 2630 (Fam), [2016] 2 FLR 723.

ii) Next, she submits that the impact on the children, A in particular, of permitting Mr Green to proceed as he would wish is, as HCC's evidence powerfully demonstrates, she says, likely to be so significantly harmful that their rights under Article 8 counter-balance Mr Green's rights under Articles 6 and 10. The material to which Mr Green seeks access and wishes to publish contains, as she says, extremely personal information about the family and what she calls their somewhat challenging past. Moreover, the Article contained, as I have mentioned, material about A's behaviours and actions that A, an intelligent though vulnerable child, would undoubtedly find distressing, particularly if, as he fears, and with reason, people might link it with him, even if he is not named. Miss Tawfik elaborates the point in submissions which it would be wholly inappropriate, because potentially damaging to A and B, even to summarise in this judgment.

iii) Next, she draws attention to the extreme width of the disclosure being sought – no meaningful limitation being suggested by Mr Green – and to the absence of any proposed protective safeguards.

iv) Next, she submits that I can, and should, have regard to Mr Green's status – he is not a duly accredited journalist but merely, she says, a member of the public who has no connection with the proceedings – and, more especially, to his previous conduct, in particular:

a) in publishing the Article in flagrant breach of section 12 of the 1960 Act, notwithstanding that, on his own evidence, this was far from being Mr Green's first experience as a commentator on the family justice system;

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[1] Miss Obi-Ezekpazu agrees with this analysis but uses it as the springboard for an argument, which I merely record without comment, that the Rules should be amended to include "the media" in the list of authorised receivers and users of information – which she says would be only "a tiny step in the right direction to transparency."

b) being so dilatory in response to the order made by Her Honour Judge Black on 2 May 2017;

c) in publishing the Second Article *after* that hearing; and

d) in publishing these articles which are, like other articles he has previously published about other cases, not merely very negative about HCC, individual social workers and the court but are in this case, she says, highly selective and misleading.

v) Furthermore, she questions Mr Green's professed motives, as set out above, given the content of the Article.

17. Both the mother and the children's guardian, as I have said, align themselves with HCC.

18. Miss Khan on behalf of the mother points to Mr Green's "flagrant disregard" for the children, the parents and the court; she submits that his behaviour demonstrates that he is incapable of reporting in an appropriate manner and that the court can therefore have no confidence that he will behave in a responsible and reasonable way with any information he may have; and she says that the balancing exercise has to be conducted having regard to the cumulative effect of everything that has happened.

19. Ms Magee on behalf of the children's guardian makes similar points. The guardian, she says, is "extremely concerned" that Mr Green, in pursuit of his agenda in exposing perceived injustices within local authority children's services and the family court system, has in this instance unlawfully published information in breach of section 12 of the 1960 Act, has distorted the facts and provided information that could readily identify the children. Ms Magee records the guardian as being "deeply concerned" about the impact on the children, A in particular, of what Mr Green has written and records A's own view, as reported by the guardian: A "is very clear that he does not wish to have his family circumstances published. Having endured an unhappy start to his childhood he is trying to re-build his life and move on." Ms Magee submits that the children's Article 8 rights outweigh Mr Green's rights under Article 10.

20. Putting on one side those parts of her submissions which in reality invite change in the law, a topic I return to below, Miss Obi-Ezekpazu's submissions can be summarised as follows:

i) First, and entirely appropriately, she emphasises the important need for transparency in the family justice system and the vitally important role which is played by questioning and critical commentators, whether journalists or not, not merely to counter ignorance but to improve understanding. That is clear and unchallenged, being underpinned by numerous authorities which there is no need to refer to, though *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, is a recent and obvious point of entry into the debate.

ii) Secondly, she submits that what Mr Green seeks to be able to do – obtaining access to documents and information with a view to publication – accords with

that important public policy and will, indeed, further the process of transparency in the family justice system. Publication of a judgment, without the underlying documentation, is not enough if there is to be full insight into what the court is doing and a proper understanding of the whole process, including the interlocutory hearings, leading up to the judgment.

iii) Thirdly, she suggests that concern about how Mr Green might use this material could be overcome by incorporating appropriate safeguards and restrictions in any order I make so as to safeguard the Article 8 rights of those concerned. What those safeguards might be was never really explained, let alone in appropriate detail, and no draft of a possible order including such safeguards and restrictions was ever provided.

iv) Fourthly, she asserts that Mr Green "has a clear understanding about the need to protect the Article 8 rights of the children."

v) Fifthly, she submits that a careful balancing of all the competing rights in play under Article 6, Article 8 and Article 10 tips in favour of Mr Green and Article 10.

vi) Finally, and in relation to what the children's guardian reports of the children, she submits that both have little understanding of what the application is about and that therefore their wishes and feelings must have limited if any weight.

21. The father, as I have said, aligns himself with Mr Green. His stance appears plainly enough from the statement I have already quoted. Although in his oral submissions he said that the case was not to do with his family but with transparency, other things he said suggested that he was not averse to Judge Black's findings being challenged.

22. Before proceeding any further, I need to deal with two of the points made by Mr Green in his witness statement and picked up by Miss Obi-Ezekpazu in her submissions, namely his contention that "there is a clear tension between section 12 … and the Family Procedure Rules on the one hand, and Article 10 … and the Human Rights Act 1998 on the other" and his invitation to me "to consider that the media … should have the ability, in its own right, to receive and publish information within family proceedings without the need to apply for permission." Miss Obi-Ezekpazu submits that it should not be necessary for a journalist to have to seek the permission of the court to publish; that where information has come to light about the family justice system which should be placed in the public domain the media should have the freedom to publish the information without threat of sanction; and that the current regime – a system which requires a journalist to apply to the court, which in turn requires him to pay a fee – infringes Article 10. "Having to negotiate a freedom is not a freedom at all." She submits that only Guidance or a change in legislation will meet the requirements of Article 10.

23. In relation to Mr Green's first point, there is simply no basis at all for the suggestion that there is any "tension" between, let alone any incompatibility of, the 1960 Act (and the FPR) with the Human Rights Act 1998. Ample authority, which there is no need for me to cite, both in the Strasbourg court and in our domestic courts, is absolutely clear on the point. In relation to the second point, I can only agree with Miss Tawfik's pithy submission that it is "both wildly ambitious and wholly

unjustified", given the by now well-established jurisprudence. I am, with all respect to her, quite unable to accept Miss Obi-Ezekpazu's submissions, except that if there is to be any change in the law of the kind she postulates that can, in my judgment, be achieved only by primary legislation.

24. There is no dispute as to the principles I have to apply; they are by now so well established as to require neither great elaboration nor the citation of authority. I have to have regard to all the interests in play, whether public or private, and whether protected by Article 6, Article 8 or Article 10. None of these interests is intrinsically of any greater weight than any other; in particular, public interests do not take precedence as such over private interests. All these interests have to be evaluated and balanced before the final balance is struck. What weight is to be attached to any particular interest will depend upon an intense scrutiny of the circumstances of the particular case, as will the final determination as to how, at the end of the day, the balance is to be struck. An important aspect of the exercise is an evaluation of the impact on the children of what is proposed: *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, para 25. I make clear that in this, as in every, case my duty is faithfully to apply the law as it is and not as some, like Miss Obi-Ezekpazu, might think it ought to be, and that is what I have sought to do.

25. Before proceeding any further, I need to clear the ground by disposing at the outset of some of Miss Tawfik's less convincing submissions.

    i) Her argument based on the fact (if fact it be) that Mr Green is not a duly accredited journalist but merely a member of the public in my judgment takes her nowhere. Mr Green is as much entitled to invoke his arguments under Article 6 and Article 10 as anyone else. Duly accredited journalists have a privileged position in relation to attendance at family courts, but that is all.

    ii) Her argument based on the negative slant of Mr Green's articles takes her into very debateable, indeed dangerous, territory. It is one thing to complain, as she also does, about the misleading nature of what he has to say – but even if there is factual error the appropriate remedy, if there is one, is proceedings for defamation rather than an injunction of the kind that HCC seeks (see, for example, *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, para 39) – but it is vitally important to remember that the court is not a censor, that the court does not licence views and opinions with which it agrees while suppressing those with which it does not agree, that freedom of speech is not to be denied even to the unprincipled charlatan (I speak generally and not, I emphasise, of Mr Green), and that "It is not the role of the judge to seek to exercise any kind of editorial control over the manner in which the media reports information which it is entitled to publish": see, on all this, *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, paras 36-40.

    iii) Similarly, the argument that Mr Green's motives may be suspect, even if the premise is made out, is not a secure basis for granting relief of the kind sought by HCC.

iv) While Miss Tawfik correctly says, citing *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, para 32, that "there is a clear and obvious public interest in maintaining the confidence of the public at large in the courts", this is of itself no basis for restricting what may be published merely because it might be thought critical, even violently and unfairly critical, of the court. On the contrary, "the remedy to be applied is more speech, not enforced silence": *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, paras 34-35, citing Brandeis J in *Whitney v California* (1927) 274 US 357.

26. As will by now be apparent, the balance at the end of the day lies within quite a narrow compass.

27. I deal first with Mr Green's application. For reasons I have already explained, a number of the factors identified by Miss Tawfik and Miss Obi-Ezekpazu carry, in my judgment, either no or very little weight. Focusing on what, at the end of the day and looking at matters in the round, seems to me to be the essence of the matter, four factors are, in my judgment, of magnetic importance:

i) First, the very great extent of the documents and information to which Mr Green seeks access and the nature of the information – extremely personal information – contained in them.

ii) Secondly, the absence of any limitations or safeguards in relation to Mr Green's use of the documents and information: cf in relation to both of these matters *Re C (A Child) (Application by Dr X and Y)* [2015] EWFC 79, [2017] 1 FLR 82. Here, as in that case, the effect of his claim is that Mr Green should be enabled to make disclosure out of this great mass of material of what he selects, to whom he selects, at a time he selects and without the intervention of either the court or the parties.

iii) Mr Green's previous behaviour – his publication of the Article and the Second Article in flagrant breach of section 12 of the 1960 Act – gives one no confidence at all that he can be relied upon to act responsibly and not to misuse all this material if entrusted with it. Given his proven track record, not least his responses to the order Judge Black made on 2 May 2017, his protestation that he has throughout acted responsibly and bona fide rings hollow, as does the assertion that he "has a clear understanding about the need to protect the Article 8 rights of the children."

iv) There is compelling material describing the impact on the children – A in particular – of what has already been published, of the likely impact on them if there is further publication, and of A's own wishes and feelings, matters which, entirely understandably as it seems to me, are of great concern both to HCC and to the children's guardian. I attach great weight to their views. On the other hand, I can attach little if any weight to Miss Obi-Ezekpazu's submission that the children have little understanding of what the application is about. No doubt the finer, legal, points elude them, but there is no basis for doubting, given the guardian's reported views, that A is acutely aware of the essence and reality of the matter and of the situation.

28. In these circumstances, in my judgment, the balance comes down clearly and decisively *against* granting Mr Green the relief he seeks. Recognising, as I do, the importance of all the public interest arguments that Miss Obi-Ezekpazu has appropriately deployed on his behalf, they do not, in my judgment, begin to counter-balance the combined effect of the four magnetic factors I have just identified.

29. I turn to the relief sought by HCC. I have, of course, considered Miss Tawfik's submissions very carefully, but have nonetheless concluded that I should not make the order sought. My reasons are two-fold:

    i) First, an order is not necessary to prevent Mr Green doing what section 12 of the 1960 Act would in any event prohibit.

    ii) Secondly, it is important for Mr Green, and others like him, to appreciate that what he has been doing hitherto is prohibited by section 12 and that if he breaches section 12 he is guilty of contempt of court and can and will be punished for that contempt – the punishment being up to two years imprisonment or an unlimited fine – *whether or not there was any express injunction in place*. In that sense, to make an order may be to send an unhelpful message.

30. There is one final point. I would not in any event have been prepared to grant an injunction in the very wide form proposed by HCC: "any details of the children." It is wrong in principle in this kind of case to prevent the publication of information about a child which is neither confidential nor linked in any way, explicitly or implicitly or by way of a 'jigsaw', with the family court proceedings or with the matters which were the subject of those proceedings: see *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, para 71 (to which Miss Tawfik very properly directed my attention). Otherwise, for example, the person injuncted would be prevented from publishing, in a 'stand-alone' story, wholly innocuous, and indeed entirely positive, information about the child.