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### Case Comment

#### Opening up the family courts in the name of public interest, but at what cost?

Zach Leggett

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**Keywords:** Children's rights; Contra mundum injunctions; Family proceedings; Freedom of expression; Public interest; Reporting restrictions; Right to respect for private and family life; Transparency

**Legislation:**

Children Act 1989 (c.41) s.97

**Case:**

J (A Child) (Reporting Restriction: Internet: Video), Re [2013] EWHC 2694 (Fam); [2014] E.M.L.R. 7 (Fam Div)

**\*J. Crim. L. 202** The father in this case had four children: L, C, W and J. L, C and W had previously been taken in to care by Staffordshire County Council under child protection orders and placed with new families. This case involved the parents' fourth child, J, who was born in April 2013 at home against medical advice.

The father of J had a history of posting information regarding his other children on social media sites. In February 2012 he posted images of L and C on Facebook with comments valuing both children as being worth £200,000 each to Social Services. In April 2012 the father posted an image of W with the comment 'snatched from the delivery suite by Staffordshire County Council'. The father also posted an image of the social worker describing her as a vampire-ish creature lurking in the corner, about to steal the child from the loving parents and that she was 'a wicked, wicked woman' who 'will suffer for this'.

On the day of J's birth, the father posted comments on Facebook stating 'SS banging on the door we're not answering' and 'SS gone to get EPO'. The father then secretly filmed social services removing the baby from the parents' care, and the video was broadcasted online by UK Column Live on 5 April 2013. UK Column Live also posted the video on YouTube. The video was subsequently shown on numerous other websites. On 12 April 2013, UK Column Live broadcasted an interview with J's father in which both parents, W and J were all identified by name. This video was subsequently withdrawn at the father's request.

Staffordshire County Council sought a *contra mundum* injunction to prevent the publication of any material which could disclose J's identity, including images or any information relating to: the newly born child, the parents, the carers, the county council and any other employees involved in the child protection process. Under s. 97(2) of the Children Act 1989, it is a criminal offence for a person to publish to the public any material which is intended, or likely, to identify a child involved in proceedings under either the Act or under the Adoption and Children Act 2002, or to publish the details of the child's address or the address of the child's school. It is a defence if the accused can show he did not know, and had no reason to suspect, that the published material would be likely to identify the child. Under s. 97(4), the court possesses the power to dispense with the requirements of s. 97(2) if the child's welfare requires it. A breach of s. 97 is triable summarily and punishable by a fine not exceeding level 4. Breach of a *contra mundum* order is punishable as a contempt of court.

**HELD, GRANTING THE APPLICATION**, a *contra mundum* injunction was justified, but in an amended form. The order should allow the publication **\*J. Crim. L. 203** of images of the child and information relating to all involved in the emergency protection process, including the carers and council workers. The names and addresses of the child and parents must not be published.

## COMMENTARY

An 18-year *contra mundum* order was already put in place in relation to child W by Hedley J on 14 June 2012. After posting images of W and the social workers on Facebook and referring to W by name during an online interview, the father admitted breaching this order. He was given concurrent six-week sentences for each breach, which were suspended on condition that he complied with the various orders and obligations imposed. Further violations in relation to J would have brought about further criminal sanctions under s. 97 of the Children Act 1989 as well as the risk of the suspended sentences being triggered.

In reaching his decision, Sir James Munby, President of the Family Division, placed substantial emphasis on the need for the family courts to be opened up to the public and to display more transparency in the child protection process. Transparency within the family courts has been a key item on Munby LJ's agenda. In his initial *View from the President's Chambers* [2013] Fam Law 548, his Lordship stated:

I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice.

This was followed by draft practice guidance indicating that the court must ordinarily publish judicial decisions unless there is a compelling reason not to do so in relation to cases brought by local authorities under the Children Act 1989 or the Adoption and Children Act 2002. A court may publish any other judgment where a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that the judgment may be published taking account of the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression). A judgment should in any event be published whenever the court considers that publication is in the public interest, whether or not a request is made by a party or the media.

In *Re J (A Child)*, Munby LJ placed emphasis on the severity of family orders:

I have said this many times in the past but it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. When a family judge makes a placement order or an adoption order in relation to a twenty-year old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years. We must be vigilant to guard against the risks. (at [28])

His Lordship emphasised the 'right of the public to know, the need for the public to be confronted with, what is being done in its name' in order to *\*J. Crim. L. 204* provide 'public scrutiny and public accountability'. His Lordship referred to the statement made by Lord Steyn in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 that 'freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate ... it facilitates the exposure of errors in the ... administration of justice of the country' (*Simms* at 126)

Munby LJ also referred to his previous comments in *A v Ward* [2010] EWHC 16 (Fam):

... the law has to have regard to current realities and one of those realities, unhappily, is a decreasing confidence in some quarters in the family justice system--something which although it is often linked to strident complaints about so-called 'secret justice' is too much of the time based upon ignorance, misunderstanding, misrepresentation or worse. (at [133])

In the present case it was argued that J's anonymity should be further protected by virtue of a *contra mundum* order as the publications made by the father were not only a breach of the child's right to privacy under Article 8 of the European Convention on Human Rights, but could also put the child at a risk of harm both in the present and future.

It was Mr Alistair MacDonald QC's submission, on behalf of the County Council, that the published material would be potentially embarrassing to the child and the material could be used in future for bullying campaigns which could create an adverse effect on J, both emotionally and in regards to J's future development. In addition, by allowing material to be published, there was an intrusion into J's privacy contrary to Article 8 whereby J's life story will be played out within the 'uncontrolled

insensitivities' of the internet (at [76]).

Munby LJ acknowledged the validity of arguments in favour of J's Article 8 rights. However, his Lordship suggested that he would not be prepared to grant an injunction based on 'the manner or style in which the material is being presented on the internet, nor to spare the blushes of those being attacked, however abusive and unjustified those attacks may be' (at [80]). His Lordship further identified that it was not part of the Family Division's jurisdiction to prevent the dissemination of material on the grounds of it being defamatory or in violation of criminal law:

If what is published is defamatory, the remedy is an action for defamation, not an application in the Family Division for an injunction. If a criminal offence has been committed, the appropriate course is the commencement of criminal proceedings. If it is suggested that publication should be restrained as involving a criminal offence, that is a matter for the Law Officers. (at [39])

Munby LJ highlighted a difference between restricting the publication of a one-day-old baby's name and restraining the publication of his or her image. He suggested that 'although anyone can identify a baby by its name it is almost impossible, unless you are the parent, to distinguish between photographs of children of that age who have the same general appearance' (at [81]). He suggested that without knowledge of the child's name, an internet search would be rendered impossible. His Lordship argued that the public interest in the publication of material which would allow scrutiny and awareness of the workings of the care system outweighed the *\*J. Crim. L. 205* interest in restricting the publication of the child's image, and an injunction preventing the images being published would be disproportionate. He suggested that the restriction on publishing the child's name was sufficient and 'public debate is enabled to continue with the public having access to the footage albeit not knowing who the anonymous child is whose image is on view' (at [82])

Although Munby LJ may be commended for attempting to open up the family courts in order to increase public confidence in them--contrary to the fact that the decision was celebrated as a landmark case in some quarters of the media (see, for example, Steve Doughty, 'Top judge's war on secret courts: family hearings must be exposed to glare of publicity', *Daily Mail*, 5 September 2013)--this decision gives rise to some concerns. Munby LJ's suggestion that the child is unrecognisable at such an early age and that most one-day-old babies are indistinguishable from one another may well be valid. However, it is likely that children will recognise themselves at a later date as the subject of a video depicting their removal from the care of their parents. On viewing this footage, a child may well find this embarrassing, disturbing or harmful. The argument that others will not be able to recognise the child, thereby removing the risk of the footage being used for the purpose of bullying, still does not remove the issue that exposure to the footage, regardless of the source, would create a risk of harming the child. It is submitted that the child does have Article 8 rights not to have such an important event in his or her life at such a young age broadcast across the internet without his or her consent. Perhaps the decision to allow images to be published in the public interest of creating transparency is a disproportionate interference with the rights of the child.

The decision also raises questions regarding at what age a child is deemed to be distinguishable from his or her peers and, therefore, entitled to have the publication of his or her image restricted. The answer will most likely be that this must be decided on a case-by-case basis. However, this is not helpful for those who publish an image believing the child to be too young to be identified, only to discover at a later date that they have inadvertently fallen foul of the law in the event that a judge disagrees and deems the image to be likely to identify the child. The lack of clarity created is of concern and the decision in *Re J* should be regarded with caution.

Secondly, there is a question over the protection of those who work within social services. Social workers have a difficult role when intervening in child protection cases, and the removal of a child can be a stressful and confrontational experience. The nature of the social worker's role means that such workers are not always popular in the eyes of sections of the public. The popularity of social networking sites provides a platform for those who wish to expose social workers and to coordinate hate campaigns. Hate sites such as UK Social Workers Exposed have allowed users to post names, images and addresses of social workers and depicted social workers as Nazis. Munby LJ's decision to allow the images of social workers to be posted exposes those working in the child protection system to greater risks of being identified as they carry out their duties. The Protection from Harassment Act 1997 and the Malicious Communications Act 1988 may *\*J. Crim. L. 206* offer some protection to social workers in more extreme cases, but the decision in the present case limits what little protection social workers currently have in place. Furthermore, it is submitted that criminal proceedings under the two Acts could potentially increase as a consequence of this decision as those

harmful by invasive or abusive behaviour online must rely on the reactionary criminal law response, rather than the more preferred proactive protection afforded by a *contra mundum* order. Users of social media sites are now free to post images of social workers carrying out their duties and they are free to name those within the images. It has been argued by the British Association for Social Workers that social workers require greater protection when carrying out their duties and that Munby LJ's decision is a backward step (see Nushra Mansuri, 'Social workers may be targeted online following Munby video footage ruling', *Guardian Professional*, 24 September 2013).

Munby LJ is clearly following an agenda to open up the family courts in response to criticisms that the Family Court is a 'secret court', using his position as the President of the Family Division of the Court of Appeal to shape the law in this area. The concern is that in following this approach his Lordship has given insufficient weight to the rights of the child and the professionals involved in the process while also creating unnecessary uncertainty within the law. It is disturbing that a process which has the protection of children as its overarching principle quickly trivialises the rights of the child in favour of the rights of the parents and the media in the name of transparency.

*Zach Leggett*

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