SIR NICHOLAS WALL MEMORIAL LECTURE 2018

OPENNESS AND PRIVACY IN FAMILY PROCEEDINGS

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It is a great privilege to be delivering this, the first lecture in honour of the late, great Sir Nicholas Wall. I have been trying to think of an alternative ending to the famous clerihew which begins 'Sir Nicholas Wall was exceedingly tall' - so as to emphasise his crusading zeal to make the family justice system as good a place as it could possibly be but especially for the children that it is there to serve – but I haven't succeeded yet.

As an outsider joining the Family Division in January 1994, my first memory of Nicholas was at the judges' meeting at the start of term. This was pretty early in his career in the Division too, as he had only been appointed the previous year. On the agenda was a paper he had written with Dame Margaret Booth, who had just retired, arguing for the automatic publication of Family Division judgments. There was vehement opposition from almost everyone in the room. The arguments were familiar: the press were only interested in celebrities and salacious stories about their private lives; anonymisation would take time and trouble; far more judgments would have to be reserved. In the

end, he and I were only ones who voted for it. Nothing much happened for a long time.

But Nicholas never lost his interest in the subject. As President, in conjunction with the Society of Editors, he commissioned the helpful account of the law by Adam Wolanski and Kate Wilson.[1] Towards the end of his judicial career he delivered the 2012 Gray's Inn Reading at Gresham College, entitled *Privacy and Publicity in Family Law: Their Eternal Tension*. There had been much activity in preceding years, including the rule change in 2009 of which more anon, and culminating in the statutory scheme in Part 2 of the Children, Schools and Families Act 2010. But Nicholas had led a crusade against it and by the time of his lecture it was due to be repealed without ever having been brought into force. There has been a great deal of extra-legislative activity since then.

One of the disadvantages of leaving the Family Division is that one is no longer so familiar with what is going on on the ground, so you must forgive me if I get some of that activity wrong. And we have recently been reminded that we are living in a much-changed world, a world where social media mean that campaigns can be crowd-funded, and cases which in the past might have been heard and dealt with in private are now played out in the full glare of publicity,

[1] *The Family Courts: Media Access & Reporting*, July 2011.

with sometimes frightening results for those caught up in the events. (I am thinking, obviously, of cases such as Charlie Gard and Alfie Evans where the genie was well and truly out of the bottle so there was no point in trying to achieve either privacy or anonymity.)

On the other hand, one of the benefits of leaving the Family Division is that one gets to see other cases outside the family justice system which raise similar issues of privacy and publicity. To pick three at random which we have had recently in the Supreme Court, working backwards:

Reilly v Sandwell MBC[2] was an employment case – was the head teacher of a primary school unfairly dismissed for failing to reveal to the governors her close but platonic friendship with a man convicted of child pornography offences? The case had been anonymised in the Employment Appeal Tribunal and the Court of Appeal, so that she, her friend, the school and the local authority which had taken over the responsibilities of the governing body were not named. The case appeared in our lists as *A v B Local Authority.* Why? Not to protect the parties, but to protect the children and parents at the school (although it was not very clear from exactly what they were to be protected). We lifted the anonymity order in relation to the parties but did order that the

[2] [2018] UKSC 16.

school should not be identified. This was to protect children, who were only very indirectly involved in the court proceedings. I am still wondering about it.

Compare that with *Khuja v Times Newspapers Ltd* [3], a case thought so important that a panel of 7 Justices heard it and was divided 5 to 2. Mr Khuja is a prominent Oxford businessman and landlord who had been named in a high-profile criminal trial as someone who had been arrested and placed on police bail in connection with the Oxford child sexual exploitation case. Reporting restrictions were imposed during the criminal proceedings [4] to avoid prejudicing any eventual trial in which he was a defendant. Once the case was over, and it was clear that he would not be charged, the judge proposed lifting the order. Mr Khuja brought High Court proceedings for an injunction against newspapers who wanted to publish stories about him. He argued that not only himself but also his children and his family would suffer from the publicity. By a majority, we upheld the judge's refusal to grant the injunction. He had been named in open court. The issue was of very great public importance. And although this was not an invariable rule, the public could generally be expected to know that a person was innocent until proved guilty. Although the possibility of privacy interests outweighing the public interest could not be

[3] [2017] UKSC 49, [2017] 3 WLR 351.

[4] Under s 4(2) CCA 1981.

ruled out, it would be rare indeed to prohibit publication of information revealed in a trial in open court.

Contrast these cases, which concerned court proceedings, with *PJS v News Group Newspapers*,[5] which did not. PJS applied for an interim injunction to protect his own privacy rights and those of his husband and their children. This was a straightforward clash between their privacy rights and the publication rights of the media. We held that there should be an interim injunction. There was zero public interest in the legal sense in salacious information about PJS and his extra-marital activities. I placed particular weight on the independent privacy interests of the children, who might well be harmed by wall to wall media interest if their parents were named.

I mention these cases because they were not family cases but they all involved protecting the interests of the family and in particular the interests of children. We strive for coherence and principle across the whole legal field. So we have to ask, first, what the general principles are, and second, whether the family justice system is different from any other part of the legal system, and if so why and how.

[5] [2016] UKSC 26, [2016] AC 1081.

There are three relevant general principles:

First, there is the common law principle of open justice. This was famously explained by Lord Atkinson in *Scott v Scott*:[6]

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'

However, everyone accepted that the High Court's *parens patriae* jurisdiction over children and persons of unsound mind was an exception. As the Lord Chancellor explained:[7]

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6 [1913] AC 417, at p 463.

7 At p 437.

> ‘In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic.’

Thus the two main themes to emerge from *Scott v Scott* have special resonance in family cases, but they point in opposite directions. The first is that open justice is there, not only to police the judges, and indeed the other participants in the story, such as health care professionals and social workers, to make sure that they are behaving properly, but also to engender public confidence that they are indeed doing so. Family courts have from time to time had a very bad press, from some politicians and some people in the media. But this is especially apparent in care cases, where the state is interfering in family life, often very drastically, to deprive parents of their children and children of their parents. We would not countenance sending someone to prison behind

closed doors – save in the most exceptional cases – so, it might be thought, why should we countenance putting children in care behind closed doors?

The second theme, on the other hand, is that children cases are different from ordinary civil or criminal proceedings. Their very object is to further the best interests of the child. Those best interests should not be put at risk by unnecessary public intrusion into their private and family lives.

Strong support for this can be found in Dr Julia Brophy's 2010 study for the Children's Commissioner of *The views of children and young people regarding media access to family courts*.[8] A large majority of the children studied were opposed to having reporters in court. They felt that the proceedings address issues that are private. They concern events which are 'painful, embarrassing and humiliating for children'. These are not the business of the media or of the general public. They feared bullying at school and in their communities. Nearly all of them said that if they knew that a reporter might be in court they would be less willing to speak openly to an expert about ill-treatment or disputes about their care or about their own wishes and feelings. This view was endorsed by the well-known child psychiatrist, Dr Danya Glaser.[9]

[8] 11 Million, March 2010.

[9] [2009] Fam Law 211.

Julia Brophy and her colleagues followed this up in 2014 with a study commissioned by the National Youth Advocacy Service and the Association of Lawyers for Children, *Safeguarding, Privacy and respect for Children and Young People and the Next Steps in Media Access to Family Courts*.[10] This showed children's continued suspicion of the media and opposition to their attendance at hearings in the family courts. Children were also really worried about 'jigsaw identification' – anonymization is not enough – and about how young people might feel on reading about their case in a newspaper. There were better ways of improving public knowledge about the family courts and other avenues in which to explore allegations of unfair treatment. The children's interests were not identical to their parents', who might want to exploit the media for their own purposes. Above all, the children wanted the courts to consult them and to ascertain the views, interests and long-term welfare implications for any child involved of allowing media access to the court.

In other words, they wanted their rights under article 12 of United Nations Convention on the Rights of the Child to be properly observed.[11] These are the

[10] NYAS, Association of Lawyers for Children, July 2014.

[11] Article 12 provides '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

right to express their views freely in all matters affecting them and in particular the right to be heard in any judicial proceedings affecting them. The UN Children's Rights Committee in *General Comment No 12* (2009) has stressed that children should be freely able to express a view without pressure, manipulation or undue influence, in conditions that take account of the child's individual and social situation, and in an environment where the child feels secure when expressing opinions. A child cannot be heard effectively where the environment is intimidating, hostile and insensitive. I have discussed elsewhere[12] how best to involve children in family proceedings about their futures and this is not the place to resume that discussion. But it is clear from the studies cited, and from the work of the Cafcass Young People's Board, that children want to be involved in an appropriate way. The fear is that even the risk of a journalist's presence, followed by insensitive reporting, will inhibit this.

The general rule is that proceedings to which the Family Procedure Rules apply will be held in private except where the rules themselves or any other

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2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

[12] Association of Lawyers for Children, Annual Conference 2015, 'Are We Nearly There Yet?'

enactment provide otherwise or where the court directs otherwise.[13] If proceedings are in private, only certain persons are allowed to be present. However, in the 2009 rule change referred to earlier, FPR rule 27(11) provides that, except in judicially assisted negotiation and conciliation, in proceedings related to adoption or for parental orders under the Human Fertilisation and Embryology Act, the people allowed to be present include 'duly accredited representatives of news gathering and reporting organisations'.[14] These can only be excluded in specified circumstances, which include where this is *necessary* in the interests of any child concerned in, or connected with, the proceedings.[15] The related Practice Direction states that the rule should be applied on the basis that media representatives have a right to attend throughout the case unless the court decides to exclude them from all or part of the proceedings on the defined grounds.[16] This is not a 'discretion' but a structured balancing exercise. As Baker J explained in *Re Al-Hilli (Reporting Restrictions)*,[17]

> 'It is a cardinal principle underpinning the provisions of rule 27.11 . . . that the duly accredited representatives of news gathering and

[13] FPR rule 27.10(1). Divorce and other matrimonial and civil partnership proceedings are generally in public, but may be in private in certain circumstances: FPR, rule 7.16.

[14] FPR rule 27.10.

[15] FPR rule 27.11(2)(f).

[16] PD27B, para 5.1.

[17] [2013] EWHC 2190 (Fam), [2014] 1 FLR 403.

reporting organisations are to be trusted not to abuse their right to attend by publishing information unlawfully.'

Clearly, this approach does not accord with the views of the children involved, who cannot be assured in advance that there will be no media representative present or that they will be asked for their views on any media application to attend.

Appeals to the Court of Appeal are held in public unless the court rules otherwise in specified circumstances: these include cases which involve confidential information, including information relating to personal financial matters, and where a private hearing is *necessary* to protect the interests of any child.[18] This is rarely, if ever, done. Appeals to the Supreme Court are also held in open court 'except where it is *necessary* in the interests of justice or in the public interest to sit in private for part of an appeal hearing'.[19] I know of only one case in which we have done so, and it involved a bank, not a child.[20]

This leads on to the second important principle, which flows from the principle of open justice. There is not much point in allowing the media into the court

[18] CPR, rule 39.2(1) and (3) (c), (d).
[19] SCR, rule 27(1).
[20] *Bank Mellat v HM Treasury* [2014] AC 700.

room if they cannot then report upon what they have seen and heard. Fair and accurate reporting is protected by the law of defamation for precisely that reason. As Lord Sumption said in *Khuja*,[21]

> 'It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so.'

He also pointed out that the conduct of the hearing falls within the court's power to control its own proceedings. Any restrictions there are more likely to engage the right to a fair hearing under article 6 of the European Convention on Human Rights than the right to freedom of expression under article 10. But reporting restrictions are different. 'This is direct press censorship' and raises issues under article 10. Article 10 guarantees the right to freedom of expression, but it is a qualified right, and may be subject to restrictions prescribed by law, provided that these are a proportionate means of achieving one of the listed legitimate aims, which include the protection of the

[21] Para 16.

reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

There are statutory restrictions on what may be reported about certain types of family case. But the most commonly applied restriction is to require anonymity for the parties or their children. Indeed, this is often seen as the *quid pro quo* for allowing media access to proceedings which would otherwise be heard completely in private. There is a general prohibition on identifying children 'involved' in proceedings under the Children Act 1989 or the Adoption and Children Act 2002[22] but this has been held to last only as long as the proceedings last.[23] There is also a general prohibition on the publication of information relating to proceedings heard in private under the inherent jurisdiction relating to children, or under the 1989 or 2002 Acts, or otherwise relating wholly or mainly to the maintenance or upbringing of children, as these are one of the exceptions to the general rule that publication of information relating to proceedings in private is not contempt of court.[24] A further exception to that rule is where the court (having power to do so) expressly prohibits the publication of information, but this begs the question of what other powers the court would have. Proceedings to which the media are

22 Children Act 1989, s 97(2).
23 *Clayton v Clayton* [2007] 1 FLR 11.
24 Administration of Justice Act 1960, s 12(1).

admitted under FPR rule 27.11 are still proceedings in private, so these restrictions would apply to them.

In Practice Guidance issued in January 2014,[25] the President of the Family Division laid down the circumstances in which permission to publish a judgement should be given; in summary, always when publication would be in the public interest, but, in particular, inter alia when finding facts where serious allegations have been made, or when making final orders in care proceedings, or when making placement or adoption orders. This applied, not only to the High Court, but also to any court exercising powers in relation to children. This resulted in far more judgments, not only in the Hight Court, but also in county courts where much more of the really useful stuff is being done, being made available on BAILII.

Research by Julie Doughty and others, *Transparency through publication of family court judgments* published in 2017[26] found wide variations in practice from court to court. Overall the cases available on BAILII represented judicial and professional decisions made in only some geographical areas. Analysis of the press coverage over the same period showed that allegations of secrecy in family cases had reduced, but there was still evidence of cherry picking facts

[25] *Transparency in the Family Courts: Publication of Judgments: Practice Guidance,* issued on 16 January 2014 by Sir James Munby, President of the Family Division.

[26] By Cardiff University.

and misleading headlines. They felt that the 2014 guidance should be reviewed so as to pilot a scheme requiring publication of a representative range of cases from every judge and every court, supported by adequate training and administrative assistance in safe anonymization, removal of identifying details and focusing on issues of genuine public interest.

In contrast, there is no general power to restrict the reporting of proceedings held in public.[27] There are various statutory powers to do so. These include the power, under section 39 of the Children and Young Persons Act 1933, to make an order prohibiting the identification of a child concerned in any civil or family proceedings, whether held in public or in private, but only if the child is the subject of or a witness in the proceedings. But it may be that if, in the course of controlling the proceedings in the interests of justice and a fair hearing, the court has ordered that a person should not be named, or has otherwise provided for anonymity during the proceedings, then there is no right to break that anonymity when reporting the proceedings. This would explain the difference between *Khuja*, where Mr Khuja was named during the trial, and *Reilly*, where Ms Reilly was not named during the proceedings in the Employment Appeal Tribunal and the Court of Appeal.

[27] *Independent Publishing Co Ltd v AG of Trinidad and Tobago* [2005] 1 AC 190.

However, there is a third principle at stake here, and that is the right to respect for private and family life, guaranteed by article 8 of the European Convention. As with article 10, this is not an absolute right. A public authority, including a court, can only interfere with the right if this is in accordance with the law and a proportionate means of achieving one of the legitimate aims set out in article 8(2). The most relevant of these for our purposes is the protection of the rights and freedoms of others, which include the best interests of children.

Obviously, family courts are interfering in people's private and family lives all the time. Publishing information about what they do is likewise interfering in people's private and family lives. So how is this to be reconciled with the media's right to freedom of expression under article 10? As Lord Hoffmann put it in *Campbell v MGN*:[28]

> 'Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right

[28] [2004] 2 AC 457, para 55.

> in order to protect the underlying value which is protected by the other.'

This was the approach adopted by Lord Steyn in the leading case of *Re S*:[29]

> '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.

We confirmed in *Khuja* that this was still the law. In *Re S*, as is well known, the child's guardian in family proceedings applied for an injunction to prohibit the identification of the child's mother who was being tried for the murder of his brother by poisoning him with salt while he was a patient in Great Ormond Street hospital. It was a strong case from the child's point of view, because there was psychiatric evidence that publicity surrounding the trial would be harmful to him. Nevertheless, the public interest in reporting the criminal trial was held to outweigh the indirect impact upon the child.

[29] [2005] 1 AC 593, para 17.

But why, you might think, did that necessitate reporting the mother's name? Lord Steyn suggested that 'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial'.[30] Lord Rodger put it more vividly in *In re Guardian News and Media Ltd*,[31] another case where anonymity was sought in order to protect the family, this time of a person who had been blacklisted for suspected terrorist behaviour and subject to Treasury asset freezing orders:

> 'What's in a name? A lot, the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. . . . The judges [recognise] that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human

[30] Para 34.

[31] [2010] 2 AC 697. This was the first case heard in the new Supreme Court of the United Kingdom in October 2009. Complaint was made that our first term's lists 'looked like alphabet soup', as so many cases were anonymised.

> interest, could well mean that the report would not be read and the information would not be passed on.'

And, of course, there are some stories where the identity of the person is itself the story.

However, while thinking about the balance between privacy and publicity, we should not forget that article 8 is not the only privacy-protecting game in town. There is also the General Data Protection Regulation, with the accompanying Data Protection Bill, due to come into force on 25 May. The background is, of course, Article 8 of the Charter of Fundamental Rights of the European Union, which begins:

> '1. Everyone has the right to the protection of personal data concerning him or her.'

The foreground is the enhanced protection given to the processing of personal data under the Regulation. It applies to the processing of personal data by automatic means or by other means if the data are held in a filing system.[32] Personal data means any information relating to an identified or identifiable natural person.[33] Processing means any operation performed upon such data,

[32] Article 2.
[33] Article 4(1).

including their use, disclosure and dissemination.[34] Data have to be collected for specified, limited and legitimate purposes and processed lawfully, fairly and in a transparent manner.[35] Processing is only lawful if one of the conditions prescribed in article 6 applies. The most relevant to this discussion is where '(e) processing is *necessary* for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.' Special categories of data, including data concerning health or revealing racial origin or religious belief, cannot be processed at all except in defined circumstances, but these include whenever courts are acting in their judicial capacity.[36]

These rules might suggest that naming the persons involved in legal proceedings of any sort, but especially family proceedings, and revealing personal data from court documents will be lawful only if it is *'necessary'* for the performance of a public task. But then there is article 85:

> 'Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.'

[34] Article 4(2).
[35] Article 5(1) and (2).
[36] Article 9.

For this purpose Member States are not only empowered but positively required to provide exemptions or derogations, even from the fundamental principles, for processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

So the current Data Protection Bill, in paragraph 26 of schedule 2, provides that various provisions, including the lawfulness provisions, do not apply to extent that the data controller reasonably believes them to be incompatible with those purposes, if the processing is with a view to publication and the controller reasonably believes that publication would be in the public interest. In deciding this, the controller must take account of the special public interest in freedom of expression and information, and of relevant Codes of Practice.

So it looks as if this all boils down to whether, if a journalist or academic wants to publish the data, the controller – presumably the court – considers that publication would be in the public interest. A special steer is given in favour of freedom of expression and information, but it looks as if we are back to balancing open justice, the public's right to know what goes on in courts and the author's right to tell them, against the privacy interests of the data subject.

Those principles apply whether the proceedings are in private or in open court and whether in civil or family proceedings.[37]

So is simple anonymisation the answer? Julia Brophy's studies revealed that the children involved certainly do not think so. In these days of the internet and social media, it is particularly easy for tech-savvy young people to find out who is involved in a reported case, by joining up the dots. They were also really shocked and upset by the details given in the judgments published on BAILII. After several meetings between the NYAS Young People's Participation Group and the President, and with the help of an advisory group chaired by Lord Justice McFarlane, she was asked to draft some Judicial Guidance on *Anonymisation and Avoidance of the Identification of Children and The Treatment of Explicit Descriptions of the Sexual Abuse of Children in Judgments intended for the Public Arena*.[38] This was published in 2016 and contains a detailed list of do's and don'ts to avoid inadvertent and jigsaw identification. It also gives guidance on how to abridge judgments to avoid explicit descriptions of child sexual abuse being placed on the internet for all to see.

The moral of all of this is that the children have made the adults think again. Having read the guidance, I shall have to rethink one of my own pet ideas. I hate referring to children by initials – they can be so dehumanising and

[37] Criminal cases are outside the scope of the GDPR.

[38] Association of Lawyers for Children, funded by the Nuffield Organisation.

objectifying – almost as bad as referring to a child as 'it'. But the guidance says to avoid using pseudonyms because some children do not like them and they can present problems for some minority ethnic families. Perhaps the solution is, as so often, to consult the child?

So what's the message?

The law and practice need to be simple, clear, coherent and accessible and they are not.

First, we need to be clear about what the powers of the courts are. Is it right that the general rule is that civil courts sit in public unless . . ., while family courts sit in private unless . . .? Should the Family Procedure Rules be more specific about the principles governing the decision to sit in public, just as the Civil Procedure Rules are specific about the circumstances in which the court can sit in private?

Second, we need to be clear about the source of any power to impose reporting restrictions in both civil and family proceedings and whether the court is sitting in public or in private. Is there a distinction to be drawn between what goes on in the court and tribunal involved and what can be reported about it?

Third, we need to be clear about the rules relating to access to court documents. Sitting in the Supreme Court, one is only too well aware that our much-vaunted transparency is not much use unless those with a real interest in the case can see the parties' written submissions and even some of the supporting documents. We would like to put these up on our website. But to what extent are we inhibited by data protection or other privacy concerns?

Fourth, we need to be clear about when and how cases can be anonymised, whether to protect the adults or the children. Why are we going to such lengths to protect children directly involved in court proceedings, but rarely protect those who are only indirectly involved, however severely they may be affected by the washing of their family's dirty linen in public? We have just refused a father permission to appeal against the Court of Appeal's decision to lift an anonymity order made in financial remedy proceedings at least partially to protect the parties' children, in *Rotenburg v Times Newspapers*.[39]

Fifth, to what extent is acceptable to leave these decisions – about sitting in private, about disclosure of documents, about publication of information - to the court hearing the case? It sounds the obvious thing to do, but if one of the objects is public confidence, can the public be confident if the judge is judge in what might be seen as his or her own cause?

[39] [2017] EWCA Civ 1588, [2018] 1 FLR 1035.

Sixth, are these things better achieved through the law – as I tend to think – or – as Nicholas tended to think – through a voluntary agreement between the courts and the press: that in return for access to hearings and to documents, the press would report cases fully, accurately and fairly?

Finally, once we are clear what the powers are, we need to be clear about the applicable principles. I don't see this as a tension. It's a balancing act and that should not be a problem – these days, the courts do a good deal of balancing and we have the tools available to help us to do it.

But there are several interests that need balancing and we could do with clarifying them:

First, there is the public interest in open justice, in the public knowing how the coercive power of the state is being exercised in their name. This will be stronger in some cases than in others, but I would suggest that it is particularly strong when the state is compulsorily interfering in family life.

Second, there is a more general interest in freedom of expression. This too will be stronger is some cases than in others. Knowing what goes on in courts is one thing. Knowing what goes on in a person's private life is quite another.

Third, there is the interest which we all have in keeping private information private. The GDPR assumes that all our information is private until we have put

in into the public domain and then makes exceptions to that assumption. Our own law tends to distinguish between situations in which there is a reasonable expectation of privacy, such as visiting narcotics anonymous, and situations in which there is not, including legal proceedings in open court. If proceedings are held in private, there may be a reasonable expectation that the information revealed will be kept private. But there is 'a strong divergence of opinion' in the Family Division as to whether financial remedy proceedings should be heard in public.[40]

Fourth, there is a separate interest in the protection of family life, by which I mean the safeguarding of family relationships, particularly between parent and child but also between adult family members.

Fifth, often related to that but in principle separate, there are the best interests of any child involved. Article 3.1 of the UNCRC is comprehensive:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

[40] See *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523, per Eleanor King LJ at para 91; cf *Luckwell v Limata (No 2)* [2014] 2 FLR 168, para 3, per Holman J, and *L v L* [2016] 1 WLR 1259, per Mostyn J This has not yet been resolved.

Unlike article 8 of the ECHR, this has only partially been adopted in UK law, but there would be nothing to prevent a new code of privacy and publicity in court proceedings adopting it. It has the great advantage of focussing specifically upon the child – asking the child question – without making the child's interests paramount – a 'primary consideration' should be enough to make a difference. And those interests can be relevant, though not necessarily determinative, whatever the child's link with the proceedings – this direct and indirect distinction makes little sense in the real world of children's lives.

Our children are our future and, as Nicholas was always the first to say, we need to treat them right.