HOUSE OF LORDS SESSION 2003–04
[2004] UKHL 47

on appeal from: [2003] EWCA Civ 963

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re S (FC) (a child) (Appellant)

ON
THURSDAY 28 OCTOBER 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Carswell

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Steyn. I agree with it, and would make the order which he proposes.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD STEYN

My Lords,

3. On 19 February 2003 a judge in the Family Division of the High Court (Hedley J) dismissed an application for an injunction restraining the publication by newspapers of the identity of a defendant in a murder trial which had been intended to protect the privacy of her son who is not involved in the criminal proceedings: *Re S* [2003] EWHC 254

(Fam). By a majority (Lord Phillips of Worth Matravers MR and Latham LJ, with Hale LJ dissenting) the Court of Appeal dismissed an appeal against the order of Hedley J: [2004] Fam 43.

I. The death of a child and the criminal proceedings.

4. The child concerned is CS, who is now eight years old. On 20 August 2001, his older brother DS, then aged nine, died of acute salt poisoning in the renowned Great Ormond Street Hospital where he was a patient. Press reports about the death appeared soon afterwards, namely in the "Evening Standard" for 22 August, with headline "'Poison' theory over mystery death of boy, 9"; in "The Recorder" (a local paper) for 24 August, with headline "Police Probe into Boy's Death"; in the "Evening Standard" for 28 August, with headline "Boy's death from a mystery illness turns into murder inquiry"; in "The Independent" on 29 August, with headline "Poisoning suspected after heart attack kills boy aged nine"; in the local paper for 31 August with headline "'Poisoned' boy: Now it's murder"; and finally in the local paper for 5 October with headline "Boy's death: Man and woman arrested". All these reports named the dead child and where he lived. The local paper also named his parents, his younger brother and his school in their earlier reports. The "Evening Standard" did not name the dead child's parents or refer to his having a younger brother. "The Independent" named his parents but did not refer to a brother. In their final report, the local paper did not name the man and woman arrested or refer to the dead boy's family, but they did name the school he had attended.

5. Shortly after DS died, the London Borough of Havering brought care proceedings in relation to CS, to whom I will refer as the child. During the care proceedings the child was fostered. At a fact-finding hearing in July 2002, Hedley J found that the death was caused by salt poisoning administered by the mother. As a result of Hedley J's findings, the mother was charged with murder on 9 August 2002. She is due to be tried at the Central Criminal Court on 15 November 2004. Her trial is expected to last three months.

6. The parents have separated. The father has remained in the family home and the mother has moved out to live with her parents. At the final hearing in the care proceedings on 13 November 2002, Hedley J made a care order and approved a care plan to place the child with his father. The child has therefore returned to live in his home and

attend his old school. He has supervised contact with his mother and maternal grandparents. Contact is still in issue in the care proceedings and will probably remain so until after the criminal trial.

7. On 29 August 2002, in the criminal proceedings, Judge Moss QC made an order under section 39 of the Children and Young Persons Act 1933, prohibiting publication of information calculated to lead to the identification of the child. The judge stated that publication of the family's surname would be considered an act calculated to lead to such identification. On 11 October 2002, on the application of the local paper, Judge Focke QC discharged the order of 29 August 2002. He took the view, with which Hedley J later agreed, that section 39 was inapplicable to the case because the child was not a "child concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings were taken, or as being a witness therein".

II. The proceedings in the Family Division.

8. The guardian of the child made an application to Hedley J for an injunction under the inherent jurisdiction of the High Court. On 17 October 2002, the judge made an order based upon the standard form commonly used in the Family Division. The order prohibited publication (a) of the name or address of the child and his school; (b) of any picture of the child or either of his parents; and (c) of any other information which might lead to the child's identification. The order expressly prevented any person "publishing any particulars of or information relating to any part of the proceedings before any court which may or is calculated to lead to the identification of the said child". The order was clearly designed to prohibit publication of the name of the mother and the deceased child in any report of the impending criminal trial. It is common ground that the order also prevented publication of any photographs of the mother or deceased child.

9. The parties and any person affected were at liberty under the order to apply to vary the order. On 13 November 2002 the local paper, the Romford Recorder, applied ex parte for a modification of the order. Hedley J changed the order to include in paragraph 8 the proviso that "Nothing in this order shall of itself prevent any person (a) publishing any particulars of or information relating to any part of the proceedings before any court other than a court sitting in private . . ." However, paragraph 8 was stayed until 13 December 2002 so that the matter could be fully argued at an *inter partes* hearing.

10. At the hearing before Hedley J in chambers on 12 and 13 December 2002 three national newspaper groups (the respondents) appeared on behalf of the press. The local newspaper withdrew to avoid the risk of being ordered to pay costs. The argument before Hedley J centred on whether the exception in paragraph 8(a) should remain in the order. The newspapers accepted that they should not refer to the child, but they wished to be able to publish the names and photographs of both parents and of the dead boy. At the hearing the court had before it a psychiatric report from a well-known child psychiatrist (Dr. Dora Black) who had already made reports on the child for the purpose of the care proceedings. When she had seen him in May 2002 he was apparently a well-functioning six-year-old who was attached to his parents. She said that he had coped well with the death of his brother and separation from his parents. She ascribed that to the good therapeutic programme put in place by the local authority. She understood that the child had now been told how his brother had died and that his mother was to stand trial for her alleged part in it. Dr. Black stated that the child was confused and his therapist and father were trying to help him. She said:

> "2.1 CS attends school and once the news of the charges against his mother becomes public, he will have to cope with the curiosity of his peers, and possible bullying and teasing. If the reporting was confined to the time of the trial and CS's name and the name of the family was not mentioned, and photos not published, it would be possible to plan for the minimum of adverse effects by removing CS from the country for a holiday during the trial itself and for sensitive work to be done with his peers by the school in his absence.
>
> 2.2. However if there is a long period of adverse named publicity, the effect on this vulnerable boy, who has already lost a brother by death and has been deprived of his mother's care (and it has to be said that there is no evidence that she was anything other than a good and caring parent to CS) would, in my opinion be significantly harmful. It would not be possible to protect him in the way I mention above. The effect of bereavement on a child of this age is to enhance the risk of developing a depressive disorder five-fold. CS therefore, whilst at present well-functioning carries this enhanced risk which may not manifest itself immediately. The risk continues into adult life. The addition of the stress of coping with the curiosity and possible teasing and bullying of his peers would be to significantly increase the possibility of his developing a psychiatric disorder."

The argument before Hedley J covered, among other things, the case law on the inherent jurisdiction of the High Court to restrain publication, the interplay between article 8 (Right to respect for private and family life), article 10 (Freedom of expression) of the European Convention on Human Rights as scheduled to the Human Rights Act 1998, and the balancing exercise required under the inherent jurisdiction and the ECHR.

11. On 19 February 2003 Hedley J delivered a carefully reasoned reserved judgment. He summarised his conclusions as follows (para 19):

> "First I recognise the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges and the inevitable price that that involves in incursions on the privacy of individuals. Secondly, I recognise that Parliament has in a number of statutes qualified that right to report and, in the context of this case, most notably in section 39 of the 1933 Act; where a set of circumstances arise not covered by those provisions the court should in my judgment be slow to extend the incursion into the right of free speech by the use of the inherent jurisdiction. Thirdly, I have to recognise that not even the restrictions contended for here offer real hope to CS of proper isolation from the fallout of publicity at this trial; it is inevitable that those who know him will identify him and thus frustrate the purpose of the restriction. Lastly, I am simply not convinced that, when everything is drawn together and weighed, it can be said that grounds under article 10(2) of the ECHR have been made out in terms of the balance of the effective preservation of CS's article 8 rights against the right to publish under article 10. I should add, although it is not strictly necessary to do so, that I think I would have come to the same conclusion even had I been persuaded that this was a case where CS's welfare was indeed my paramount consideration under section 1(1) of the 1989 Act."

The judge decided that the stay should be lifted and the exception in paragraph 8(a) should remain in the order. In other words, on the basis of his decision the newspapers were not prevented in reports of the criminal trial from publishing the identity of the defendant or her deceased son or photographs of them.

III. The proceedings in the Court of Appeal.

12. Through his guardian the child appealed to the Court of Appeal against the inclusion of paragraph 8(a). The mother supported the appeal. Although she was the dissenting member of the court the judgment of Hale LJ (now Baroness Hale of Richmond) appears first in the law reports because the other members of the court adopted her detailed analysis of the law. Lord Phillips of Worth Matravers MR and Latham LJ took the view that, although Hedley J had not performed the right balancing exercise, he had come to the correct conclusion. The majority dismissed the appeal. Referring to articles 8 and 10 of the ECHR. Hale LJ concluded (para 60):

> ". . . there is in my judgment no escape from the difficult balancing exercise which the Convention requires. Because the judge did not consider each article independently, and thus did not conduct that exercise, I consider that this appeal should be allowed."

Hale LJ concluded her judgment as follows:

> "62. In my view there is a good case for remitting the case to Hedley J, who has considerable experience of both criminal and family cases. However, at the end of his judgment, he stated that he would have reached the same conclusion even if the child's welfare had been the paramount consideration. With the greatest of respect to him, I cannot understand this. If the child's welfare is the paramount consideration, then when everything else has been taken into account and weighed, it rules on or determines the issue before the court. *It* is the trump card. It might therefore be preferable for the matter to be reconsidered by the judge who is to try the criminal case, provided that he is authorised to exercise the inherent jurisdiction and has the benefit of the relevant material from the family proceedings.
>
> 63. However, it is not necessary for me to resolve that dilemma. I understand that Lord Phillips of Worth Matravers MR and Latham LJ, although agreeing with my analysis of the law, consider that Hedley J was entitled to reach the conclusion he did in this case and that his

> decision should not be disturbed. I, for the reasons given, would have allowed this appeal."

The Court of Appeal refused leave to appeal. The Appeal Committee of the House of Lords granted leave to appeal.

IV. The Appeal.

13. Through his guardian the child now challenges the decision of the majority of the Court of Appeal. Counsel for the child submitted that the majority misapplied the principle of proportionality in a case of competing rights under the ECHR and in so doing exposed a vulnerable child to interference with his private and family rights. In outline her submissions were as follows. The child had a right to respect for his private and family life in that he was entitled to expect the state to provide, by way of his access to the court, protection against harmful publicity concerning his family. The child has a right to protection from publicity which could damage his health and well-being and risk emotional and psychiatric harm. Recognising that the subject matter of the trial is a matter of public interest counsel for the child submitted that a proportionate response would be to permit only newspaper reports which do not refer to the family name or incorporate photographs of family members or the deceased.

14. In order to assess the merits of these arguments it will be necessary to set out the legal framework in some detail.

V. The relevant ECHR provisions.

15. In the present case there is no suggestion of a possible breach of article 6, which provides that in the determination of any criminal charge against him "everyone is entitled to a fair and public hearing". Article 6 is, however, relevant so far as it provides that "the press and public may be excluded from all or part of the trial" for a variety of reasons including "where the interests of juveniles" so require. The purpose of a public hearing is to guard against an administration of justice in secret and with no public scrutiny and to maintain public confidence: *Axen v Germany* (1983) 6 EHRR 195, para 25. Article 6 recognises a *prima facie* rule in favour of open justice in criminal trials. In the Court of Appeal Hale LJ drew attention to the decision of the

European Court of Human Rights in *Diennet v France* (1995) 21 EHRR 554, at para 33:

> "The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ."

This statement reiterates the consistent earlier jurisprudence of the ECtHR: *Pretto v Italy* (1983) 6 EHRR 182, para 21; *Axen v Germany* (1983) 6 EHRR 195, para 25. Since *Diennet* this principle has been reaffirmed by the ECtHR: see *Werner v Austria* (1998) 26 EHRR 310; *Riepan v Austria* ECtHR, 14 November 2000; *Machous v The Czech Republic* ECtHR, 12 July 2001; *Bakova v Slovakia,* ECtHR, 12 November 2002. These statements by the ECtHR reveal that under the ECHR there is a general and strong rule in favour of unrestricted publicity of any proceedings in a criminal trial. Hale LJ rightly observed that the common law has long adopted a similar approach: see *Scott v Scott* [1913] AC 417 and *Attorney-General v Leveller Magazine Limited* [1979] AC 440, at 450 A-B, per Lord Diplock.

16. It is, however, the interaction between articles 8 and 10 which lies at the heart of this appeal. They provide as follows:

> "*Article 8*
>
> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

protection of health or morals, or for the protection of the rights and freedoms of others."

"*Article 10*

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

By section 12(4) of the Human Rights Act 1998 Parliament made special provision regarding freedom of expression. It provides that when considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression the court must have particular regard to the importance of the right.

17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. 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. This is how I will approach the present case.

VI. The general rule.

18. In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8.

VII. Statute law.

19. Parliament has created numerous statutory exceptions to the ordinary rule of open court proceedings in the interests of justice. It is not necessary to refer to all the statutory provisions. The CPR rule 39.2 shows the nature of the exceptions. It provides:

> "(1) The general rule is that a hearing is to be in public.
>
> (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.
>
> (3) A hearing, or any part of it, may be in private if - (a) publicity would defeat the object of the hearing; (b) it involves matters relating to national security; (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; (d) a private hearing is necessary to protect the interests of any child or patient; (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or (g) the court considers this to be necessary, in the interests of justice.
>
> (4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

Clearly paragraph 3(d) envisages a hearing involving the child or patient in some way. It is not engaged in the present case.

20. There are numerous automatic statutory reporting restrictions, e.g. in favour of victims of sexual offences: see, for example, section 1 of the Sexual Offences (Amendment) Act 1992. There are also numerous statutory provisions, which provide for discretionary reporting restrictions: see, for example, section 8(4) of the Official Secrets Act 1920. Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice.

21. Section 39 of the Children and Young Persons Act 1933 is of particular relevance. It provides:

> "(1) In relation to any proceedings in any court … the court may direct that - (a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, *of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein*; (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court."
>
> [Emphasis supplied]

This provision will be replaced by section 45 of the Youth Justice and Criminal Evidence Act 1999, which is not yet in force: see also section 46(3) of the same Act which came into force on 7 October 2004. For present purposes section 45 is in material respects the same as the extant section 39(1): see section 45(3). As the words, which I have italicised, make clear section 39(1) is not engaged in the present case. My reason for referring to it is, however, the reflection that, in regard to children not concerned in a criminal trial, there has been a legislative choice not to extend the right to restrain publicity to them. This is a factor which cannot be ignored.

VIII. The Inherent Jurisdiction.

22. At all stages in this litigation the provisions of the ECHR have been carefully taken into account. But at first instance, and in the Court of Appeal, much of the debate centred on the inherent jurisdiction of the High Court to restrain publicity. Hedley J and the Court of Appeal were asked to exercise this inherent jurisdiction. Hale LJ (with the agreement of the other members of the court) observed (para 40):

> "Now that the Human Rights Act 1998 is in force, the relevance of the jurisdiction may simply be to provide the vehicle which enables the court to conduct the necessary balancing exercise between the competing rights of the child under Article 8 and the media under Article 10."

In their printed cases, and in oral argument, both counsel adopted this approach. This is the context in which in oral argument the House was taken on a tour of the following decisions on the inherent jurisdiction: *In re X (A Minor) (Wardship: Jurisdiction)* [1975] Fam 47; *In re C (A Minor) (Wardship: Medical Treatment) (No. 2)* [1990] Fam 39; *In re M and N (Minors) (Wardship: Publication of Information)* [1990] Fam 211; *In re W (A Minor) (Wardship: Restrictions on Publication)* [1992] 1 WLR 100; *In re H (Minors) (Injunction: Public Interest)* [1994] 1 FLR 519; *R v Central Independent Television PLC* [1994] Fam 192; *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254; *In re Z (A Minor) (Identification: Restrictions on Publications)* [1997] Fam 1. The question arises whether such an exercise, in a case such as the present, is still necessary or useful.

23. The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the ECHR. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the ECHR provisions. My noble and learned friend Lord Bingham of Cornhill invited the response of counsel to this approach. Both expressed agreement with it. I would affirm this approach. Before passing on I

would observe on a historical note that a study of the case law revealed that the approach adopted in the past under the inherent jurisdiction was remarkably similar to that to be adopted under the ECHR. Indeed the ECHR provisions were often cited even before it became part of our law in October 2000. Nevertheless, it will in future be necessary, if earlier case law is cited, to bear in mind the new methodology required by the ECHR as explained in *Campbell.*

IX. Article 8.

24. On the evidence it can readily be accepted that article 8 is engaged. Hedley J observed (para 18) "that these will be dreadfully painful times for the child". Everybody will sympathise with that observation.

25. But it is necessary to measure the nature of the impact of the trial on the child. He will not be involved in the trial as a witness or otherwise. It will not be necessary to refer to him. No photograph of him will be published. There will be no reference to his private life or upbringing. Unavoidably, his mother must be tried for murder and that must be a deeply hurtful experience for the child. The impact upon him is, however, essentially indirect.

26. While article 8.1 is engaged, and none of the factors in article 8.2 justifies the interference, it is necessary to assess realistically the nature of the relief sought. This is an application for an injunction beyond the scope of section 39, the remedy provided by Parliament to protect juveniles directly affected by criminal proceedings. No such injunction has in the past been granted under the inherent jurisdiction or under the provisions of the ECHR. There is no decision of the Strasbourg court granting injunctive relief to non-parties, juvenile or adult, in respect of publication of criminal proceedings. Moreover, the Convention on the Rights of the Child, which entered into force on 2 September 1990, protects the privacy of children directly involved in criminal proceedings, but does not protect the privacy of children if they are only indirectly affected by criminal trials: articles 17 and 40.2(vii); see also Geraldine Van Bueren, *The International Law on the Rights of the Child,* 1994, 141 and 182. The verdict of experience appears to be that such a development is a step too far.

27. The interference with article 8 rights, however distressing for the child, is not of the same order when compared with cases of juveniles, who are directly involved in criminal trials. In saying this I have not overlooked the fact that the mother, the defendant in the criminal trial, has waived her right to a completely public trial, and supports the appeal of the child. In a case such as the present her stance can only be of limited weight.

X. Article 10.

28. Article 10 is also engaged. This case is concerned with the freedom of the press, subject to limited statutory restrictions, to report the proceedings at a criminal trial without restriction. It is necessary to assess the importance of this freedom. I start with a general proposition. In *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 Lord Nicholls of Birkenhead described the position as follows (200G-H):

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

These observations apply with equal force to the freedom of the press to report criminal trials in progress and after verdict.

29. The importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms. In *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966, Lord Woolf MR explained (at 977):

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because

> the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely . . . Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

These are valuable observations. It is, however, still necessary to assess the importance of unrestricted reporting in specifics relating to this case.

30. Dealing with the relative importance of the freedom of the press to report the proceedings in a criminal trial Hale LJ drew a distinction. She observed (at para 56):

> "The court must consider what restriction, if any, is needed to meet the legitimate aim of protecting the rights of CS. If prohibiting publication of the family name and photographs is needed, the court must consider how great an impact that will in fact have upon the freedom protected by Article 10. It is relevant here that restrictions on the identification of defendants before conviction are by no means unprecedented. The situation may well change if and when the mother is convicted. There is a much greater public interest in knowing the names of persons convicted of serious crime than of those who are merely suspected or charged. These considerations are also relevant to the extent of the interference with CS's rights."

I cannot accept these observations without substantial qualification. A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal

process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.

31. For these reasons I would, therefore, attribute greater importance to the freedom of the press to report the progress of a criminal trial without any restraint than Hale LJ did.

XI. Consequences of the grant of the proposed injunction.

32. There are a number of specific consequences of the grant of an injunction as asked for in this case to be considered. First, while counsel for the child wanted to confine a ruling to the grant of an injunction restraining publication *to protect a child*, that will not do. The jurisdiction under the ECHR could equally be invoked by an adult non-party faced with possible damaging publicity as a result of a trial of a parent, child or spouse. Adult non-parties to a criminal trial must therefore be added to the prospective pool of applicants who could apply for such injunctions. This would confront newspapers with an ever wider spectrum of potentially costly proceedings and would seriously inhibit the freedom of the press to report criminal trials.

33. Secondly, if such an injunction were to be granted in this case, it cannot be assumed that relief will only be sought in future in respect of the name of a defendant and a photograph of the defendant and the victim. It is easy to visualise circumstances in which attempts will be made to enjoin publicity of, for example, the gruesome circumstances of a crime. The process of piling exception upon exception to the principle of open justice would be encouraged and would gain in momentum.

34. Thirdly, it is important to bear in mind 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. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.

35. Fourthly, it is true that newspapers can always contest an application for an injunction. Even for national newspapers that is, however, a costly matter which may involve proceedings at different judicial levels. Moreover, time constraints of an impending trial may not always permit such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting.

36. Fifthly, it is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85% of all British adults read a regional or local newspaper compared to 70% who read a national newspaper. Very often a sensational or serious criminal trial will be of great interest in the community where it took place. A regional or local newspaper is likely to give prominence to it. That happens every day up and down the country. For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now under consideration it is likely that they will often be silenced. Prudently, the Romford Recorder, which has some 116,000 readers a week, chose not to contest these proceedings. The impact of such a new development on the regional and local press in the United Kingdom strongly militates against its adoption. If permitted, it would seriously impoverish public discussion of criminal justice.

XII. The decision of Hedley J.

37. In agreement with Hale LJ the majority of the Court of Appeal took the view that Hedley J had not analysed the case correctly in accordance with the provisions of the ECHR. I do not agree. In my view the judge analysed the case correctly under the ECHR. Given the weight traditionally given to the importance of open reporting of criminal proceedings it was in my view appropriate for him, in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it. He went too far in saying that he would have come to the same conclusion even if he had been persuaded that this was a case where the child's welfare was indeed the paramount consideration under section 1(1) of the Children Act 1989. But that was not the shape of the case before him.

XIII. The Disposal.

38. I would dismiss the appeal. The effect of the opinions delivered in the House today is that there is no injunction in respect of publication of the identity of the defendant or of photographs of the defendant or her deceased son.

LORD HOFFMANN

My Lords,

39. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD CARSWELL

My Lords,

40. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Steyn, and for the reasons which he has given I would dismiss the appeal.