

# 1KBW

## ***PUBLIC LAW MONTH***

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Session Four

Speakers: Frank Feehan KC and Tadhgh Barwell O'Connor

**THURSDAY 23 MAY 2024**

***Leading in family law***

## Topic: Publicity and Transparency in Public Law Cases



**Frank Feehan KC**

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Frank is a highly experienced, specialist family law practitioner with outstanding expertise covering all areas of the field from high-conflict and international private law children work, including child abduction, to the most serious public law cases. His work in this area is an even mix of private HNW clients and children's rights cases in the public law sphere.

[Click here to view Frank's full profile](#)

*"He blows you away with the way he approaches the case and his superb advocacy."*

- CHAMBERS AND PARTNERS, 2024

## Topic: When Abduction and Care meet: Local Authority exposure under s.5 of the Child Abduction and Custody Act 1985



**Tadhgh Barwell O'Connor**

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Tadhgh is a family law specialist accepting instructions in all areas of family law. He has experience representing clients from first to final hearing at all levels up to and including the High Court, including in complex, international multi-day trials. He is confident acting alone or as junior counsel.

[Click here to view Tadhgh's full profile](#)

*"He is a highly effective advocate, with great attention to detail in his preparation."*

- SOLICITOR, STOWE FAMILY LAW

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## TRANSPARENCY IN PUBLIC LAW CASES

Speaker: Frank Feehan KC

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## Scott v Scott [1913] AC 417:

‘Publicity is the very soul of justice, it is the keenest spur to exertion and the sure of all guards against improbity. It keeps the judge himself, while trying, under trial’ [p 477].”

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## What is already legal?

After Scott v Scott established the principle of open justice it left only “wards and lunatics” subject to reporting restrictions but legislation led to some tightening:

Judicial Proceedings (Regulation of Reports) Act 1926  
Administration of Justice Act 1960 s.12  
Children Act 1989 s.97(2)

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## AJA 1960 s.12

...has the effect of prohibiting the publication of:

‘(i) ‘information relating to proceedings before any court sitting in private ... where the proceedings

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under Children Act 1989; or (iii) otherwise relate wholly or mainly to the ... upbringing of a minor.’

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## ..but does not of itself prohibit:

- The fact that a child is a ward or subject to proceedings
- The name, address and photo of the child
- ..or of any of the parties
- ... or of any witness
- .... Anything heard in the corridor outside court
- .....etc!!

In Re B (A Child) (Disclosure) [2004] 2 FLR 142, FD, Munby J

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## CA 1989 S.97(2)

- 2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –
- a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or
  - b) an address or school as being that of a child involved in any such proceedings.

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## .... But:

- 4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it and, in the case of the Lord Chancellor, if the Lord Chief Justice agrees, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

(power delegated to the judge dealing with the case)

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## Relaxations of the rule

See: Griffiths v Tickle [2021] EWCA Civ 1882

Re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47, [2004] 4 All ER 683

.. A balance of all factors – child’s welfare not paramount

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## Transparency

Numerous half-hearted attempts:

- 1993 Lord Chancellors’ Department Review – all records now lost!
- 2005 Amendment to the Family Proceedings Rules 1991 to allow information to be shared with specified persons (other experts; police; non-participant lawyers etc)
- 2006; 2008; 2010 – “consultations” which led nowhere except for a change of the rules to allow media to attend with permission of the court (now r.27.11 and PD27B)
- 2014 “Transparency Guidance” – fizzled out.

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## Now – The Pilot Scheme

2009: FPR 2010 r27.11 – journalists may attend private hearings (expanded in 2023 to include “legal bloggers” to facilitate the pilot scheme)

2019 – 2021 President’s “Transparency Review”

November 2022:

<https://www.judiciary.uk/wp-content/uploads/2023/01/The-Reporting-Pilot-Guidance-26-1-23.pdf>

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## Now – The Pilot Scheme

- Any hearing except hearings which are conducted for the purpose of judicially assisted conciliation or negotiation. (FDHDRA/DRA in private law cases)
- CMHs, IRHs and Final Hearings are all open to attendance
- “Pilot Reporters” are either accredited UK press or legal bloggers (qualified lawyers with practicing certificates or attending on behalf of educational institutions or charities)
- Others may be admitted (eg foreign press)

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## But they already could under the rules, so what has changed?

- “16. The Court will consider whether to make a Transparency Order in any case where a pilot reporter attends a hearing (remotely or in person). The Court retains a discretion to direct that there should be no reporting of the case.”
- So consideration of a transparency order is mandatory and reporting of all issues is allowed subject to specific limitations
- Listing – to become more open and informative to allow reporters to understand issues

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## What Principles Apply?

*Tickle v Father* [2023] EWHC 2446 (Fam)

- Re S exercise (balancing art 8 and art 10 factors must be clear)
- Rarely but not never right to inquire into how the reporter heard about the case; although be wary about manipulation by a party
- “It is not for the court to consider the quality or fairness of the reporting” and no party has a right of veto
- It may be appropriate to adjourn reporting decision to final hearing but it is an interference with art 10 and should be carefully weighed
- Although a CMO, right of appeal is somewhat enhanced

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## Up-To-Date Position

### Essential Reading:

<https://www.judiciary.uk/courts-and-tribunals/family-law-courts/reporting-pilot/#:~:text=The%20reporting%20pilot%20is%20active,to%20strict%20rules%20of%20anonymity.>

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## Listing

- Local authority to be named
- Coding system to identify category of cases:
  - Case Category: A – Hearing that reporters are not entitled to attend B – Hearing that reporters are entitled to attend but is not within the pilot C – Reporting pilot case
  - Case Issues/Allegations: 1 – Alleged neglect 2 – Alleged physical harm 3 – Alleged sexual harm 4 – Alleged emotional harm 5 – Alleged Domestic abuse 6 – Alleged FGM 7 – Alleged trafficking 8 – Deprivation of Liberty/Secure Accommodation 9 – Contact issues/prolonged period of no contact 10 – Factitious or induced illness 11 – Schooling 12 – Medical treatment 13 – Relocation (in jurisdiction) 14 – Relocation (out of jurisdiction)

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## Transparency Order

➤ Anonymity

- No naming or images of parties or intervenors except for local authority
- No naming of social workers or Guardian
- No naming of foster carers
- No naming of schools or caring institutions
- No naming of treating doctors

BUT:

- Reporting can name the LA, Director of Children's Services and expert witnesses (including ISW if instructed under part 25)
- Reporters are entitled to copies of Case Summaries, Position Statements and Skeleton Arguments

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## Discussion with Reporter

“23. The Transparency Order will permit the parties to discuss the proceedings with a pilot reporter (see below) and subject to the terms of the Transparency Order, permit the reporter to quote parties in their reporting. It will not permit the parties to themselves publish information from the proceedings where this would be restricted by section 12 AJA1960 and/or the Rules of Court. This includes re-publishing any media articles or blogs written about the case under the pilot, where accompanied by comment that may identify the child concerned.” (Transparency Guidance)

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## Be Careful!!

Reporters do tend to report what they are told... (The Guardian, 7 March 2023):

“It is a wholly depressing scene just metres from Blackpool’s central pier, all housed in a worn out building that seems to match many of the cases that appear there. It’s 1960 crumbling concrete walls and sparse Government décor add to the sense that everything there has seen better days. “This is the worst court buildings in the country” a judge there quips, “the technical term is a shithole”

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## Example

Re BR (Transparency Order: Finding of Fact Hearing) [2023] EWFC 9; [2023] 1 WLR 2721

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When Abduction and Care Meet: Local  
Authority Exposure under S.5 of the Child  
Abduction and Custody Act 1985

Speaker: Tadhgh Barwell O'Connor

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## When Abduction and Care Meet

○Rare: Just 13 reported case in c.40 years.

- Bailli had all 13. National Case Law Archives had just 6.

○Court of Appeal:

- M (Children) (Rev 1) [2017] EWCA Civ 891
- Re A (child) [2016] EWCA Civ 572
- J (Children) [2012] EWCA Civ 1511
- Re A (Children) (Abduction: Interim Powers) sub nom EA v GA [2010] EWCA Civ 586
- Best v Hesketh [2005] EWCA Civ 1380

○High Court - Family Division:

- A v B & Anor [2023] EWHC 3041 (Fam)
- K (A Child) (Stay of Return Order: Asylum Application) (Contact to a Parent in Self-Isolation) [2020] EWHC 2394 (Fam)
- Re W (Children: Abduction: Implementation of Return Order) V [2019] EWHC 357 (Fam)
- E (Abduction: Article 13b Deferred Return Order) [2019] EWHC 256 (Fam)
- AH v CD & Ors [2018] EWHC 2322 (Fam)
- FK v ML (Child's Objections) [2016] EWHC 517 (Fam)
- Re Jones [2013] EWHC 88 (Fam)
- Re C (Abduction: Settlement) [2004] EWHC 1245 (Fam) & Re C (Hague Convention Application: Interim Powers) [2003] EWHC 3065 (Fam).

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## When Abduction and Care Meet

Awkward Convergence:

- International Child Law:  
The Hague Convention's summary jurisdiction.
- Private International Law:  
Two opposed parents & 'best interests' tests.
- Public Children Law:  
Engagement of a Local Authority & independence vs imposition on public body.

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## When Abduction and Care Meet

### Child Abduction and Custody Act 1985

#### Section 5: Interim Powers

Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

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## When Abduction and Care Meet

### 1. Where an application has been made to a court in the United Kingdom under the Convention

- There must be a valid application made under the Hague Convention:
  - child removed from one contracting state to another contracting state or retained in another contracting state;
  - the date of removal / retention is after both states became signatories (not application date); and
  - application must be made by someone exercising rights of custody.
- It bites in all four nations / 3 jurisdictions of the UK:
  - England & Wales;
  - Scotland; and
  - Northern Ireland.

### 2) the court may

- Permissive power. Discretionary.

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## When Abduction and Care Meet

### 3) at any time before the application is determined

- From the moment an application is first made.
- 'Determined' has been interpreted to mean the overall or final determination.
- Includes period of mounting an appeal or seeking permission to appeal.
- Includes period until effect of a return order (if made) bites, such as waiting for flight to 'home' state days/weeks after judgment handed down/order sealed.

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## When Abduction and Care Meet

### 4. give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

- Interim: cannot pre-determine final outcomes.
- Summary jurisdiction so presumed short time span.

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## When Abduction and Care Meet

### 4a) 'Securing the welfare of the child'

- Incredibly wide ranging.
  - Care provision.
  - Accommodation.
  - Schooling.
  - Transport.
  - Clothing.
  - Food.
  - Healthcare.
  - Other activities?

### Is there a limit?

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## When Abduction and Care Meet

### 4b) '*preventing changes in the circumstances relevant to the determination of the application*'

- Maintaining the interim status quo i.e. keeping the child in this jurisdiction and in a known location.
  - If adequately housed, less likely to be forced to move again.
  - If in school, harder to relocate.
- Preventing further abduction or unilateral relocation (which complicates matters and slows down the process).
- Perez-Vera Report [§91]: “*the provisional measures envisaged are designed in particular to avoid another removal of the child*”.

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## When Abduction and Care Meet

### **Re C (Hague Convention Application: Interim Powers) [2003] EWHC 3065 (Fam)**

- Believed to be the first case.
- The court has the power to direct a Local Authority to make arrangements for a child's placement and to secure retention in this jurisdiction.
- The scope of Section 5 CACA is "very broad indeed" [§15].
- Section 5 is the only effective means to regulate a child's welfare during the pendency of a Hague Convention application.
  - Accommodation of a child provided.
  - Electric tagging of the 'abductor' to ensure she remained in this jurisdiction.

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## When Abduction and Care Meet

### **Re A (child) [2016] EWCA Civ 572**

- Very complex case concerning interplay with Brussels II.
- Protection against the 'ultra-summary' dispensation of proceedings. Time therefore needed and the question how the child/ren's welfare will be met in that period is raised.
- Steps can be taken to secure the child's welfare and prevent changes in their circumstances without having to order a return to the 'home' state without following due process.

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## When Abduction and Care Meet

**Re A (Children) (Abduction: Interim Powers) sub nom EA v GA [2010] EWCA Civ 586**

- Parents, Westminster City Council, & Salford City Council.
- There is jurisdiction to order a Local Authority to provide accommodation under Section 5 of CACA 1985. Section 5 should be construed widely.
- A child's vulnerability is likely magnified by the effects of abduction.
- Such accommodation aided this child's welfare due to specific needs.
- Time permitted to enable a party to appeal.
- Applications for such provision should be made on notice and supported by evidence.
- The burden falls to the LA where the 'abducting party' is present when the order is made. (Disputes between LAs were discouraged. If disputed, then decided upon welfare grounds within the Convention proceedings.)

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## When Abduction and Care Meet

**A v B & Anor [2023] EWHC 3041 (Fam)**

- Complex case – not to be taken as precedent.
- Bristol City Council: attempt to defend against Section 5 application (parents both agreed on an interim basis necessary).
- Council put forward public policy concerns: residents already housed inadequately in hotels, severely limited budgets, etc..
- Various reasons issue did not reach Court of Appeal.
- Public Policy or simply inability to fund provisions directed under Section 5 remain undecided points.

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## When Abduction and Care Meet

### **E (Abduction: Article 13b Deferred Return Order) [2019] EWHC 256 (Fam)**

- Warning to ensure habitual residence prior to ICO being sought/granted.
- Very easy to miss in the fast-paced nature of urgent care proceedings.
- The ICO had to be converted to Section 5 CACA order.

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## When Abduction and Care Meet

### **Best v Hesketh [2005] EWCA Civ 1380**

- Quite extraordinary case of Spanish re-abduction.
- Can also be used to prevent the ‘left behind’ party from re-abducting or seeking ‘self-help’ remedies.

### **K (A Child) (Stay of Return Order: Asylum Application) (Contact to a Parent in Self-Isolation) [2020] EWHC 2394 (Fam)**

- Section 5 can be run for novel points.
- Pierce Covid-19 isolation regulations to permit contact during the 14 day period of self-isolation (unsuccessfully).

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