IN THE SUPREME COURT OF THE FALKLAND ISLANDS
AND IN THE MAGISTRATE'S COURT OF THE FALKLAND ISLANDS

Case No: SC/CIV/6/13
MC/32/12

BETWEEN

THE CROWN

and-

X and X and others(No.1 of 2012)

Re A and B (Reporting of Judgment)

This judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

JUDGMENT

1. On 12th August 2013 I delivered a judgment in a family case relating to care order applications brought in respect of two children (who for convenience sake and in order to preserve their anonymity) I shall refer to as A and B.

2. It is right to say that this judgment was critical of how the Crown had sought to comply with their duties and obligations relating to child protection and in particular, of the Social Services Department in the Islands. It is unnecessary to repeat the background to this case in this judgment save to say that at present the children are wards of court and are concurrently subject to a supervision order.

3. Following the delivery of my judgment I heard submissions as to whether that judgment should be published, that is, made available to the public. It was disappointing to observe that, despite the Court having given notice that this issue would be considered after delivery of the judgment, Counsel for the Crown stated that they were in not in a position to make proper submissions on the matter. Feeling somewhat constrained by the necessity for all counsel to return to the United Kingdom, and the need to deal with another pressing case in the short time left before they left the Islands, I formed the provisional view that it would be better if the question of publication of the judgment be deferred for a couple of months.

4. After an informal request by His Excellency the Governor, made on 14th August 2013 for sight of the judgment I invited the parties to make representations as to whether this was lawful and/or appropriate. The Guardian, objecting to disclosure of the judgment solely to the Governor, renewed her application for the judgment itself to be made public. In the light of that application, and particularly mindful of the haste in which the Court had to deal with matters on 12th August, I concluded that it was appropriate for me to consider this matter again and revisit my original decision. In order to do so, I invited written submissions from such parties as wished to make them on the matter.

5. I pause for a moment to make it clear that I am dealing with this application in the concurrent jurisdictions of the Supreme Court, as Acting Supreme Court Judge and in the Magistrate's Court, as Senior Magistrate.

The position of the parties

6. I will attempt to summarise the arguments put forward by the parties in this case in respect of the application made by the Guardian.

The Guardian's position

7. In support of her application for the making of the judgment public Ms Wiley, on behalf of the Guardian, has submitted written representations.

8. In them, she refers to what is undoubtedly a growing move towards the presumption that judgments in family cases should be made public, especially where the public interest so demands. She cites, in particular, the recent **Draft Practice Guidance** issued, albeit it for consultation, by the President of the Family Division, in which the view was clearly stated that there needed to be more transparency in family courts in order to improve understanding of the court process and confidence in the court system. Ms Wiley makes specific reference to the passage which reads *"a judgment should in any event be published whenever the court considers that publication is in the public interest, whether or not a request is made by a party or the media."* The Guardian submits that the public interest demands the publishing of the judgment.

9. In support of this she relies upon the fact that the Court has made a significant finding relating to the unfitness for purpose of the child protection systems in the Falkland Islands. She submits that the state of these services are such that they pose a risk to children in themselves. She says that the decision to ward the children in this case, whilst being wholly exceptional, was necessary because of the Court's view of the ability of social services to carry out their responsibilities.

10. She also refers to the fact that, despite these proceedings having already lasted for over a year to date, and despite the Crown having been fully appraised of the problems by the Court and (wholly exceptionally and with the approval of the Court) by some of the parties in the case themselves, the situation has not improved. Indeed she suggests that the situation has recently deteriorated further. She describes the failures as being *"wide reaching, endemic and are having and will have an impact on any child or family with whom social services are currently involved and trying to safeguard"* and makes reference to *"a clear duty of care owed by the court and the parties to the wider public including those children who currently require protection and assistance from social services and those children in the future who may require protection on the Falkland Islands".*

11. She also submits that without the judgment being made public *"it is impossible for other parties involved in different Children's Ordinance proceedings and /or cases to be aware of the profound failures within the social services department identified only through this case and now contained in the judgment."* and contends that *"They are entitled to know about them".* She goes on to say that *"the difficulties identified are ones which impact on proper assessments taking place and adequate evidence being gathered by Social Services for court proceedings and general decision making relating to children. This raises the spectre of potential miscarriages of justice, delay for children on the Islands and risk to children".*

12. She submits that the judgment can be appropriately redacted to allow for publication without identifying the children and concludes that *"the children are unlikely to be adversely affected by a redacted judgment."*

The Crown's position

13. For the purposes of my judgment reference to Crown is meant to include the agencies of the Falkland Islands Government who deal with child protection, as a unitary authority. In written submissions submitted by Ms Grocott QC (who it seems has recently been instructed by the Crown but who did not appear at the hearing on 12th August) and Ms Bland, on behalf of the Crown, whilst accepting that there are problems in the area of child protection in the Islands, they submit that the judgment should not be made public. In support, they submit that *"the Court took the proper course by referring the issues of concern arising in the proceedings for good governance rather than issuing a public judgment".*

14. They go on to say that the Court is aware of proposed improvements and submit that publication of the judgment will not bring about changes any more quickly. They say that those involved in safeguarding children in the government can be made aware of the judgment without it having to be published and that the problems have already been brought to the attention of the stakeholders.

15. They also suggest that publishing the judgment runs the risk of defeating the object, that is securing improvements to services, that it is designed to achieve. They submit that *"repeated criticisms have already been levelled in these proceedings and have led to a crisis of confidence and a fear of becoming involved in the court process. Such a situation undermines the effective delivery of child protection services".* They say that criticism may create a further problem for recruitment of social workers to the Islands, they describe the social work department as being but *"fledgling",* they refer to the fact that few family cases are brought before the Court and they contend that *"the publication of the judgment may serve to erode the public confidence in the new systems which the Falkland Islands government is investing in".*

16. The Crown also maintain that they are *"not seeking to hide the problems revealed in the case and fully anticipates that the issues raised will be fully published at the end of September."*

17. They also submit that *"Of more prosaic concern is the fact that it is likely that publication of the Judgment will put further pressure on the current team who it is hoped will be providing continuity of services to families on the Islands for some time to come. The social work team must feel able to report matters and commence proceedings in the knowledge that it will receive the assistance and support of the court."*

18. The Crown also refer to risk that the publication of the judgment will bring further attention to the family at a sensitive time. They argue that the judgment will clearly identify the children and adults, however it might be redacted, and they suggest that this will lead to gossip in the small community of the Islands. They consider that a consequence of this might be that the family will disengage in the therapeutic process, as indeed might other families on the Islands.

The position of the First, Second and Third Respondents.

19. The position of the First, Second and Third Respondents (who, and without any disrespect and for the sake of convenience and anonymity only, I shall refer to as the parents) remains is as set out in a recent email from Mr Watson. It remains as it was at the hearing on 12th August, namely that they are entirely neutral on this issue.

The position of the Fourth and Fifth Respondent

20. Counsel for the Fourth and Fifth Respondent (who, and without any disrespect and for the sake of convenience and anonymity only, I shall refer to as the extended family) has not provided any written submissions so I approach their position as that which was stated on 12th August, namely that they ask the Court, in making its decision, to be particularly mindful of the effect that any such judgment might have on the children.

The legal framework

21. Whether a judgment is handed down in public or private is a matter for the discretion of the judge. It is clear that, where necessary, judgments that are published may be anonymised or redacted to protect sensitive information.

22. It is quite clear that a sea change began some years ago towards making family courts and their decisions more open and is moving at a pace in the United Kingdom. Of course the Falkland Islands are not the United Kingdom. The Islands have their own culture and, with that, their own positives and negatives in relation to society. However the Constitution of the Islands creates essentially the same rights as those imported into English Law by the European convention, much of Falklands Law is adopted or based on English Law and English jurisprudence still provides the primary source of assistance and precedent to the Falkland Islands Courts.

23. It is a fundamental principle underpinning the rule of the common law that, save in certain exceptional circumstances, court proceedings should be held in public and publicly reported: ***Scott v Scott* [1913] AC 417.** However, to that rule there are exceptions. In ***Scott v Scott***, the House of Lords recognised such exceptions in the case of what were then described as *"suits affecting wards"* and *"lunacy proceedings"* The rationale given was that "*The affairs are truly private affairs; the transactions are truly transactions intra familiam; and it has long been recognised that an appeal for the protection of the court in the cases of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.*"

24. Lord Diplock in ***AG v Leveller Magazine* [1979] AC 440** said: "*However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."*

25. The main statutory provisions in the United Kingdom dealing with confidentiality in family proceedings are s. 12(1) of the **Administration of Justice Act 1960** and s. 97 (2) of the **Children Act 1989.**

    Section 12 (1) of the **AOJA** states that:

    "*The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases that is to say*:
    (a)*where the proceedings*
        (i) *relate to the exercise of the inherent jurisdiction of the High Court with respect to minors*
        (ii) *are brought under the Children Act 1989 or the Adoption and Children Act 2002* or
        (iii) *otherwise relate wholly or mainly to the maintenance or upbringing of a minor…* "

    Section 97(2) of the **Children Act 1989** provides that:

    "*No person shall publish to the public at large or any section of the public any material which is intended, or is likely, to identify*
    (a) *any child as being involved in proceedings before the High Court, a county court or a magistrates court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the Court in respect of that or any other child or*

(b) *an address or school as being that of the child involved in any such proceedings.*"

26. Each of these statutory provisions has its limitations. According to the judgment in **Clayton v Clayton (2006) EXCA Civ 878** the prohibition in the **Children Act** comes to an end when the proceedings come to an end, and s.12 (1) of the **Administration of Justice Act**, whilst prohibiting the dissemination of details of a case, does not appear to prevent the naming of parties, the children or witnesses. However, in Children Act cases the provisions work together to effectively restrict publication of much if not all of the proceedings.

27. It is right to say that s.97(2) of the **Children Act 1989** is largely replicated by s.41 of the **Children Ordinance 1994** which is the provision applicable to the Falkland Islands. The affect of s.41 is to prevent the publication of anything that is likely to lead to the identification of a child involved in **Children Ordinance** proceedings. It does not, in fact, prevent publication of other matters so long as the restriction as to identification is not breached.

28. This, it appears to me, takes on a particular significance in the Falkland Islands for the following reason. It appears, from reference to the Laws of the Falkland Islands volumes and the disc of Falkland Islands Laws presently provided by the Attorney General's Chambers, that the **Administration of Justice Act 1960** has been dis-applied in the Islands. This, of course, needs to be treated with some caution because it is accepted that the discs provided are not necessarily correct and that there has been no Law Commissioner (and continues to be no Law Commissioner), contrary to the requirements of law, to certify the correctness of the volumes of Laws which are now significantly outdated.

29. I confess to being a little surprised to note the submission made in the recent Position Statement of the Crown to the effect that s.12(1) of the **Administration of Justice Act 1960** *"does not appear relevant to the issues (because section 12 deals with contempt of court rather than a decision to publish a judgment".*

30. To my mind the two go hand in hand. The importance of s.12 of the **AOJA** was recognised in the recent case of **Al-Hilli 2013 EWHC 2190 (Fam)** (which dealt with the reporting of the proceedings not just to publication of the judgment) where it was said that *"The prohibition on reporting private family proceedings is now derived primarily from section 12(1) of the Administration of Justice Act 1960".*

31. If s.12(1) does not apply it seems to me that there is nothing to automatically prevent anyone from informing anyone else of what has occurred in the proceedings so long as the provisions of the Children Ordinance are not breached. Any of the parties, the advocates, the professionals, or the witnesses involved could detail the matters at length to anyone as long as the identity of the children is preserved.

32. I come to this conclusion in the absence of any knowledge of any other provisions which, despite my researches, I have been unable to locate, and which might apply to the Falkland Islands. I am grateful to Ms Cheek who referred the Court to Hansard and the Lord Chancellor's speech on the introduction of the bill in 1960. It was hoped that this might assist with clarifying the position before 1960 so that consideration could be given as to whether some pre 1960 provisions might still apply in the Islands. However the Lord Chancellor then described the law of the point then as being *"obscure."* If there are any other provisions which deal with the matters covered by s.12 of the 1960 Act I would be most interested to consider them. As it is I must proceed on the basis that there is nothing which replicates s.12 in force in the Islands.

33. Although the **Family Procedure Rules 2010** set out a number of provisions for when details of cases can be communicated to other parties they are *"for the purposes of*

the law of contempt". If the contempt law as set out in s.12 is not in force then the rules are not applicable to that.

34. Although the publishing of a judgment is a matter for judicial discretion it has to be seen in the light of the relevant law regarding confidentiality that applies. In essence, why should a court restrain from publishing details of a case if anyone else can (subject to s.41 of the **Children Ordinance**) legitimately do so.

35. I should say at this point that I am of the view that the Court, in exercising its inherent jurisdiction to protect children, could impose restrictions to replicate in some way the provisions of s.12 (1) of the **AOJA** if this was appropriate. However, the natural caution which must be exercised in granting such injunctions would have to have particular regard to the fact that the Falkland Islands have specifically chosen not to apply the **AOJA**, and the automatic protection that this would have provided. Whether some form of injunction might be necessary or appropriate in this case is an issue to which I will return in a moment.

Discussion and Conclusions

36. Turning then to the question in this case as to whether the Court should publish its judgment.

37. In considering this matter I must and do have significant regard to the welfare of the children. However, when considering this issue it is clear that, whilst important this is not the decisive or paramount consideration (see **Re M and N (Minors)**. The Court also has to consider the various rights enshrined in the **Falkland Islands Constitution**, in particular sections 6, 9 and 13, as to rights to privacy and family life and as to rights of freedom of expression. I have also had regard to whether in this case the publication of the judgment will satisfy a genuine public interest rather than mere curiosity.

38. Balancing the competing interests is not an easy task. In **The Family Courts: Media Access and Reporting** issued by the then President of the Family Division, Lord Justice Wall and the Executive Director of the Society of Editors it was acknowledged that *"There is no more difficult issue in family justice than the reporting of cases. There is a tension between concerns about "secret justice" and legitimate expectations of confidentiality for the family. Both standpoints are valid, and the question is whether they are irreconcilable".* Of course there may be cases where a decision would be relatively easy. It would be a strong argument against publication if to do so would put a child at immediate risk or in significant danger or where publication might in some way prejudice ongoing police investigations. However, in most cases, the decision is likely not to be simple

39. Firstly, it seems to me I must assess whether there is any public interest, and if so what it is, in publishing the judgment.

40. The starting point must be the principle of open justice. This means a number of things. Firstly it means that the public at large should be given access to how the court system works, and in particular the family court system. There is a clear public interest in seeing how the Court deals with all matters before it so that the processes involved can be better understood and that any misunderstandings can be dispelled. The Court is entrusted with considerable powers and it is important that the exercise of this power should be subject to public scrutiny. Transparency in the process of the Court breads confidence in the administration of justice.

41. In addition, open justice also means that the actions and behaviour of the parties to a case are also open to scrutiny. This might be thought to be particularly important where a case involves the government, such as in public law proceedings where the executive, through its child protection agencies, seeks to interfere with private family life. There is a very strong argument that those who act in the name of the public,

and purportedly in the protection of the public, should be subject to the scrutiny of the public. This case is such a case. In it there has been considerable interference with a family. The Crown have moved children from their home and sought to act in a parental capacity in respect of them. That is, of course, the very nature of these kind of public law proceedings.

42. It does not appear that the Crown seek to go behind the findings of the Court and they now accept that there are considerable problems in the provision of social services and child protection in the Islands. Their submissions, as to whether the judgment should be made public, are primarily based on their submission that the public interest will not be served by informing the public of the identified problems in child protections services at this time. I think it is important at this point to deal with those submissions in a little more detail.

43. The Crown submit that the right way forward in this case is to do as the Court did earlier in the life of the case, and has done for many months and that is informing the executive of its concerns rather than publishing its judgment. It is entirely right to say that the Court did notify senior members of government many months ago of its very real concerns. Three directors of social services have been in Court at various times and have heard some of the problems. Social workers and government lawyers have been party to the concerns of the court and the parties in the case. Some of the parties, including the Guardian, were so concerned that they too took the exceptional course of directly writing to those at the highest level.

44. The issue as to what has happened in the intervening months since these problems were highlighted to the government, to address the problems and concerns was considered during the recent hearing in August this year as a fundamental issue as to how to move forward in the case.

45. The Crown say that the Court "is aware of proposed improvements." After a year of hearings and on the evidence before the Court heard and considered, although there have been discussions and meetings and committees and working parties and action plans and reports no actual improvements of any significance seem to have been made. Indeed, although the social work manager gave evidence that he would be pushing his action plan he has since left the Islands, the new Director, with whom this court has some sympathy having been thrown in at the proverbial deep end, although accepting the need for something to be done did not appear to the Court to be entirely enthusiastic of at least some of the reforms suggested or optimistic as to the speed at which any reforms might occur.

46. In any event the course taken by informing those in government of the concerns, as the case progressed, is an entirely separate issue as to whether to publish the judgment. It was borne out of necessity and very real and immediate concern for the welfare of children in these Islands.

47. The Crown submit that the problems have been brought to the attention of the *"stakeholders charged with the provision of child protection services on the Islands."* Of course the issue here for the Court to consider is whether the problems should be brought to the attention of the main stakeholders who use the child protection services, the public, by the publication of the judgment. In addition, and in relation to another submission made by the Crown, whether the publishing of the judgment speeds up reforms is not a matter for the Court. Whilst it is hoped that this will be a result it is not for the Court in these proceedings to dictate to the Executive as to what they should do. This is not a matter, which in my judgment, has much, if any, relevance to the issue in hand, that of whether the judgment should be published.

48. Let me deal with the submissions made by the Crown that *"repeated criticisms have already been levelled in these proceedings and have led to a crisis of confidence and a fear of becoming involved in the court process. Such a situation undermines the effective delivery of child protection services".* As I have said above they go on to say

that criticism may create a further problem for recruitment of social workers to the Islands, they describe the social work department as being but fledgling, they refer to the fact that few family cases are brought before the Court and they contend that *"the publication of the judgment may serve to erode the public confidence in the new systems which the Falkland Islands government is investing in".*

49. To my mind this is a singularly unconvincing argument. The Crown have accepted in these proceedings that the criticisms of the Court have largely been justified and have served to highlight many problems in the provision of child protection services in the Islands. It seems to me that the way to raise confidence in a public body is for the public body to act properly and for underlying problems to be resolved, not for its deficiencies to be hidden from the public. The way to retain staff is perhaps to create a system worth working in, to reward staff for their efforts, to train them properly, or to let those who come from abroad know of the reality of the situation and the challenges that they face, rather than hide deficiencies from potential new recruits, as the Crown's submission seems to suggest.

50. The idea that the public and indeed off island recruits should be sheltered from the truth is one which is now outdated as being unduly paternalistic and patronising. If the public know the truth they can debate the issues, form their own opinions, and act accordingly. A glance at the recent NHS scandals in the United Kingdom demonstrates that the idea that the public are better off not knowing for fear they may loose confidence in the system is not one which seems to find favour any longer in political circles. It is not an argument which finds favour in this Court. As Munby J said in relation to freedom of expression in **Re B, X Council v B and Others (2008) 1 FLR 482** *"How can such errors be exposed, how can public authorities be held accountable, if allowed to shelter behind judicially sanctioned anonymity".* It is not the role of the Court to be party to an attempt to protect the Crown and its agencies from exposure if the public interest requires the same.

51. As for social services being a 'fledgling' department it is of note that a social welfare officer was appointed in the Falkland Islands in 1984 and that Mr Muhl, who held the post of Interim Director during at least some of this case had previously been appointed as Director in 1998, and that a "Social Worker" was appointed in 1999. Whilst the definition of fledgling may be open to debate, it would be a struggle to describe a service which is at least 15 years old in such terms. Even if this were a 'fledgling' department it is no argument to say that deficiencies and concerns should be ignored because of this. This seems to me not to be a valid argument against publicity.

52. In any event it is important to observe that the judgment delivered on 12th August 2013 itself specifically makes it clear that the Court does not seek to blame those who work at the grass routes level of the relevant departments. If anything, the judgment clarifies the position of the Court, as it specifically makes mention of the admiration the Court has for those at the coal face of social services provision. Consequently, rather than being a further blow to the confidence of those working in the agencies involved in child protection, as the Crown suggest, publishing the judgment would serve to correct an impression that seems to be erroneously held and a criticism which it seems may have has been incorrectly reported.

53. The Crown also maintain that they are *"not seeking to hide the problems revealed in the case and fully anticipates that the issues raised will be fully published at the end of September".* Presumably the intention to publish *"the problems revealed in the case"* derives from the fact that the Crown themselves consider that they should be published for the sake of transparency and in the public interest. If this is correct it does seem to go a long way to defeat most of the other arguments advanced as set out above. It is difficult to understand why the Crown suggest that there is no public interest in the Court publishing a judgment when the Crown apparently intend to publish essentially the same matters themselves. The Crown go on to say *"If, contrary to the belief of the Crown, the published material does not articulate the*

problems experienced by the department contained within the Judgment then the Crown accept that there would be less ground to resist publication." To my mind it is not a valid argument to say that a Court should wait to see what the Crown will do before publishing a judgment.

54. The Court and the Crown (as the government) are separate institutions of state. If the Crown want to tell the people of the position, in whatever manner they consider appropriate, so long as no issues arise as to confidentiality in specific court cases, they are, of course, perfectly entitled to do so.

55. Finally in respect of what might be termed their public interest submissions they say *"Of more prosaic concern is the fact that it is likely that publication of the Judgment will put further pressure on the current team who it is hoped will be providing continuity of services to families on the Islands for some time to come. The social work team must feel able to report matters and commence proceedings in the knowledge that it will receive the assistance and support of the court".*

56. Let me emphasise this, the Court will always support any person who is legitimately, lawfully and appropriately taking action for the protection of a child. In addition, as I have said above, and as I have said on a number of occasions before, I recognise the problems encountered by those at the coal face of child protection. However the above submission seems to presuppose that social services will always be right and that action taken by them will always be appropriate. That is precisely what the Court is there to decide.

57. Regrettably it seems necessary for me to reiterate what I have had to say far too many times in this jurisdiction. The Court is independent. It is there to consider the interests and rights of all, to listen to the views and submissions of all, and then to make a decision. The Court may agree with the action of social services, or it may disagree. If the Crown does something wrong or unlawful a judgment to that effect will be made. If a parent does something wrong, again an appropriate judgment will follow. It is not for the Court to automatically legitimise poor or deficient practice. The Court is not there, as the submission rather worryingly seems to suggest, to rubber stamp all actions of those in government who are involved in child protection.

58. The fact that this submission is even made by the Crown in the terms that it is seems to me to suggest that an erroneous view as to what the role of the Court is might pervade much deeper in society and, in my view, makes it even more important that judgments are, when appropriate, published, so as to dispel such a view and so that the public can have confidence that all who attend before it will be heard and treated fairly, without a presumption that the position of, for example social services, will automatically be adopted.

59. I regret that I am not convinced by any of these arguments put forward by the Crown that the judgment should not be published. In essence I agree with the submission of Ms Wiley for the Guardian who suggests that the arguments put forward by the Crown in this regard essentially amount to please don't publish because the Crown *"will sort it out".*

60. The Crown are, of course, are at liberty to *"sort it out",* indeed are to be urged to *"sort it out"* but what they do and how they do it is a matter for them. It is not for the Court to interfere or direct the Crown in how they deal with what they themselves accept are very considerable problems.

61. However, neither is it for the Courts to refrain from making perfectly legitimate comments, or making public properly made findings in a case before it, because the Crown say that they have done something or are going to do something. In respect of this case, there has been considerable judicial criticism of the Crown by the Court. Where there has been such criticism, arising from accepted and found facts made by the Court after a full and detailed hearing, it seems to me that the presumption

towards open justice and the disclosure of any deficiencies through publication is all the stronger.

62. In addition I have had particular regard to the submission made by Ms Wiley that other parties in other cases, which might be ongoing or which might be taken in the future, have a right to know about these matters so that they can consider the issues when considering what advice to give, what action to take or what submissions to put forward, and consider it to be highly persuasive. For instance a party in a different case may seek to argue that the Crown should not be given parental responsibility, or may seek independent assessments, or suggest alternative ways of protecting children. This will not be possible if they are not aware of previous judgments.

63. In my judgment this is undoubtedly a case which raises fundamental issues as to the capability of the Crown to deal with social welfare matters and matters of child protection. In exercising their not inconsiderable powers, and in the preparation and presentation of their case those involved in child protection agencies have been subject to considerable judicial criticism. The Court has found that such is the state of the social services department who deal with child protection, and in particular the social services department that parental responsibility has had to now be removed from the Crown, and given to the Court through wardship, in order to ensure that the welfare of the children is best served. There is a clear public interest in highlighting where a system is failing and to highlight where, in the considered view of the Court, that the operation of the system, as it is here, is itself currently posing a risk to children. There is a clear public interest in showing how the Court exercises its powers in an independent way. In this case the judgment also raises some interesting legal and practical issues as to how the Court might deal with a situation such as this.

64. The issue as to publication relates to the public being aware of the position and not just those in government. The state of child protection is a matter which can, and should, be discussed openly and properly. Having considered this matter with care I find that there is a very strong and compelling public interest argument for the publishing of the judgment in this case.

65. However, the Crown also refer to risk that the publication of the judgment will bring further attention to the family at a sensitive time. They argue that the judgment will clearly identify the children and adults, however it might be redacted, and they suggest that this will lead to speculation and gossip in the small community of the Islands. They consider that the family might thereafter disengage in the therapeutic process (as might other families on the Islands). I find the submissions based on these considerations much more attractive and I acknowledge that these are undoubtedly valid concerns.

66. The Crown, of course, refer to s.41 of the Children Ordinance which prohibits any material which has the intention of, or is likely to reveal the identity of children involved in proceedings being published. There is a discretion given to the Court and to the Governor to publish details where the welfare of the child requires it. I make it clear that I do not consider that it is in the children's interest to allow publication of anything that is intended to or likely to lead to the identification of the children. I have no intention, certainly at this stage of exercising my discretion to allow this to happen. It would be a contempt to break this provision.

67. The Guardian submits that the fact that the Falkland Islands is a small and isolated community and that many of the population are or may become aware of the present case is not a sufficient reason to prevent publication of the judgment.

68. Regrettably it has been a stark and unfortunate reality in this case that rumours have been rife in the community up to date in any event. Concerns about this have been referred to in previous hearings. I acknowledge that in reporting any case there is always going to be some risk that a child will be identified from it, and that there is a

risk that the children will be adversely affected by this. I have also had regard to the fact that this is a sensitive time in the lives of the children and in the proceedings. I have had regard to the concerns of the extended family as to preserving the welfare of the children, but also to the neutral stance taken by the parents. I also take into account the constitutional rights as to privacy and family life, the rights as to freedom of expression and bear in mind that this judgment is an interim judgment and not a final one.

69. However, I am mindful of the clearly expressed view of the Guardian, charged with advising the Court as to the welfare of the children, which positively supports the reporting of the judgment and her conclusion that *"the children are unlikely to be adversely affected by a redacted judgment"* and that *"the publication of it is in fact the safest way of ensuring there is urgent and immediate reform in social services which should allow for a far safer rehabilitation process than that which the court has determined is so wanting that the safest course for the children at this juncture is to make them wards of court".*

70. Indeed, if the fact that the Falkland Islands are a small society were to be a trump card to prevent publication even where the public interest requires it, nothing much would ever go into the public arena and the Courts would operate in considerable, and what might be regarded as wholly unacceptable, secrecy.

71. I am also of the view that any media use of what is contained in the judgment is likely to focus on the failings of the authorities, the state of the system and the operation of the Court, which, it seems to me to be where the public interest lies, and not the specific details of the case itself.

72. In addition the judgment would also contain the usual rubric:

    "This judgment was given in private. The Judge hereby gives leave for it to be reported, and
    The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved."

73. Whilst I very much bear in mind the concerns that there are in respect of the risk of identifying the children I consider that these concerns can be dealt with in a proportionate and appropriate fashion by proper editing and redaction.

74. In addition from my considerable dealing with the various parties in this case throughout the last year I find it highly unlikely that anything would distract any the parties from what I have found to be their committed and continuing engagement with the therapeutic process that is ongoing.

75. Taking all these matters into account and balancing the various interests and rights, as I must do, I conclude that the judgment in the case should be made public in an appropriately redacted form. To that end I have seen the proposed redaction by the Guardian for which I am grateful. I have made further amendments so as to further anonymise the judgment.

76. I therefore authorise the publication of the judgment made on 12th August 2013 in this redacted and anonymised form. This version seeks to balance the need for some detail, so as to make sure that the context of the judgment is properly understood, with the removal of sensitive details of the case that I consider should not be in the public domain.

77. I also authorise the publication of this judgment.

78. Bearing in mind the ruling in this case it has not been necessary for me to consider whether His Excellency the Governor is entitled to seek a copy of any ruling, even those handed down in private and not made public. I am a little concerned with the submission by the Crown contained in their Position Statement which seems to suggest that not only is the Governor entitled to all private judgments as he is "the sCrown" but that this would extend to "all subordinate committees and officers" of the government. This is clearly an issue that urgently needs some clarity but it is for another day. I will ensure that a copy of both judgments are forwarded to His Excellency today. Copies of the judgment and that which has been the subject of these proceedings will be available on request from the Court Office from later this afternoon.

79. Before I leave this case there is another issue which needs consideration. I am concerned about the possibility that the lack of the application of the **AOJA** to the Falkland Islands would potentially allow for details of what has happened in the proceedings to be made widely available as long as the identification of the children as prevented by the Children Ordinance is not breached. In **Harris v Harris (2001) 2 FLR 895** Munby J held that the Court should only exercise its powers under the inherent jurisdiction to restrain publicity if and only if the interests of the child could not be adequately protected by the automatic restraints or by an order under the **Children Act**.

80. As there is no **AOJA** I am minded at this stage to make an injunction within the inherent jurisdiction of the Court and on the Courts own motion to prevent the publication of any details or information relating to the proceedings before the Court save for that which has been specifically authorised for release or publication. I am conscious that I will not have received any submissions as to this point. It does of course mirror s.12 (1) of the **AOJA**, which all parties seem to have understood to apply. I will reconsider this injunction on the application of any party or any other person on short notice if necessary.

81. I will invite counsel for the Guardian, whose application this is, to draw up the Orders and circulate them accordingly.

Carl Gumsley

Acting Supreme Court Judge and
Senior Magistrate

28th August 2013