Neutral Citation: [2012] IEHC 611

THE HIGH COURT

[2011 No. 1124 S.S.]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

HEALTH SERVICE EXECUTIVE

APPLICANT

AND

L.N. AND J.Q.

RESPONDENTS

AND

TIM VAUGHAN

GERALDINE KENNEDY

AND

MAURICE GUBBINS

NOTICE PARTIES/APPELLANTS

JUDGMENT of Mr. Justice Birmingham delivered the day 9th of October 2012

1. This matter comes before the Court by way of a case stated pursuant to s. 2 of the Summary Jurisdiction Act 1857 as amended by s. 51 of the Courts Supplemental Provisions Act 1861, Judge Con O'Leary of the District Court having signed a case stated on the 8th June, 2011.

2. Judge O'Leary stated this case in circumstances where on the 21st January, 2011, he had, of his own motion, directed the issue of summonses to Mr. Timothy Vaughan, editor of the *Irish Examiner*, Ms. Geraldine Kennedy, then editor of the *Irish Times* and Mr. Maurice Gubbins, editor of the *Evening Echo*, amongst others requiring those persons to attend before the District Court in Cork on the 26th January, 2011, to show cause why they should not be subject to process of execution including imprisonment for contempt of court in

> (a) publishing material tending to identify children the subject of proceedings under the Child Care Act 1991 as amended; and
>
> (b) publishing material tending to disclose the result of proceedings under the Child Care Act 1991 as amended.

3. Judge O'Leary heard evidence and received submissions over a number of days and thereafter delivered a written judgement on the 25th February, 2011. He found that Mr. Vaughan, Ms. Kennedy and Mr. Gubbins had shown cause why they should not be subject to process of execution for publishing material tending to identify children, the subject of proceedings under the Child Care Act. However, he found that the three editors had not shown cause why they should not be subject to process of execution for publishing material tending to disclose the results of proceedings under the Child Care Act 1991, as amended and were therefore in breach of the *in camera* rule governing such proceedings and were guilty of contempt of court. Having convicted the three newspaper editors of contempt of court, he imposed a fine €1,000 on each, allowing them three months to pay and made provision for five days imprisonment in default of payment.

4. In the case stated Judge O'Leary seeks the opinion of the High Court on the following questions:-

> (a) Whether he was correct in law in determining that *mens rea* (in the sense of a deliberate intention to publish in violation of the *in camera* rule or being recklessly indifferent as to whether such publication violated *the in camera* rule) was not required on the part of the notice parties/appellants before he found that a contempt of court had occurred as alleged?
>
> (b) Whether he was correct in law in determining that the provisions of the European Convention on Human Rights and the Irish legislation implementing it, did not require:
>
> > (i) that the notice parties/appellants be permitted to publish the reports complained of, and
> >
> > (ii) if they did so require, that he was required or entitled to over-rule existing rulings by the High Court in order to implement the provisions of the Convention or rulings by the European Court of Human Rights, or both?
>
> (c) Whether he was correct in law in determining that it constituted contempt of court to publish the fact of the making of an order in proceedings under the Child Care Act 1991 as amended where the publication in question did not identify or tend to identify the children who were the subject of those proceedings?

(d) If he was correct in law in determining that the notice parties/appellants were guilty of contempt of court as charged, was the sentence passed lawful in the circumstances?

5. It is necessary to provide some factual background to the request made to Judge O'Leary to state a case.

6. The Health Service Executive, the applicant in the District Court proceedings, applied to Judge O'Leary pursuant to s. 13 of the Child Care Act 1991, on the 17th January, 2011, in respect of two children. Section 13 makes provision for emergency care orders. Subsequently, on the 21st January, 2011, he made orders pursuant to s. 17 and then at a later stage made orders pursuant to s. 18. Section 17 is the section of the legislation that deals with interim care orders and s. 18 with care orders. The first respondent, L.N., is the mother of the two children in question and the second respondent, J.Q., is their father.

7. The background incident which led to the Health Service Executive launching proceedings under the Child Care Act 1991, received considerable media attention both in the newspapers the editors of which were subsequently convicted of contempt of court, but also in other sections of the media. It is necessary to trace some of that media coverage. I will do so, considering in turn the coverage in the three newspapers the editors of which have sought this case stated and then in relation to the balance of the media.

8. The *Evening Echo* carried reports on the 17th, 18th, 19th and 20th January, 2011. The report on the 17th January, which was a very short piece on the front page written by Anne Murphy stated that a garda investigation had been launched to establish how twin boys sustained head injuries. It reported that one boy was being treated in Cork University Hospital and that his brother had been transferred to Temple Street Hospital in Dublin where his condition was believed to be critical as he had bleeding in his brain. The report observes that the injuries were brought to the attention of gardaí who were trying to establish how the boys suffered their injuries. The report concludes by noting that the boys were born in October.

9. The report of the 18th January, 2011, also by Ms. Murphy, again appeared on the front page under the headline "Injured Cork Baby just Clinging to Life". Of note is that the report refers to the fact that the four month old twins had been in hospital since 9th January. It states that gardaí set up an investigation into the twins' injuries after the matter was brought to their attention by healthcare staff. It concluded by stating that the children's parents who are aged 19 and 20, were liaising with gardaí about the matter.

10. The report of the 19th January, 2011, appeared on p. 2, under the headline "Baby Taken off Ventilator". It states that one of the twin boys in hospital with head injuries had been taken off a ventilator. The four month old baby was in Temple Street Hospital since January 9th, while his brother was being treated in Cork University Hospital. Of particular significance in the context of the matters now before the court is that the report states that the two little boys are now in the care of the Health Service Executive as gardaí probed how the babies sustained their injuries.

11. The report of the 20th January also appeared on p. 2 of the newspaper. This time the headline was "Gardaí Investigate Twin Babies' Injuries". The report states that the twin babies who suffered head injuries two weeks earlier were still in hospital as gardaí continued to investigate how they sustained their injuries. Reference was made to the fact that one twin in Cork University Hospital was in a serious but stable condition while his four month old brother in Temple Street Hospital had been taken off a ventilator and was improving. It concluded by noting that no one had been formally interviewed but that a number of people had been spoken to by gardaí.

12. The first *Irish Examiner* report appeared on the 18th January, 2011, it appeared on p. 4 of the newspaper under the heading "DPP File on Twin Babies' Head Injuries" and was written by Catherine Shanahan. It stated that the gardaí were preparing a file for the DPP following the hospitalisation of twin baby boys with head injuries more than a week ago. The report continued that the three month old infants were admitted separately to Cork University Hospital on the 9th January and that one twin was transferred to Temple Street Hospital. An amount of detail in relation to the injuries that had been sustained was provided. The report concludes by recording that the children were living in the East Cork area with their parents and grandparents. One parent was a teenager and the other in their twenties. Finally it observes that it is understood the twins are the couple's only children.

13. The *Irish Examiner* report of the 19th January was a front page one under the headline "Twin Baby Stuns Doctors after Coming Off Ventilator". The Report refers to the twins as three months old, and refers also to Cork University Hospital and Temple Street Hospital. The report concludes by noting that detectives are liaising closely with the infants' parents who were understood to be aged 19 and 20 and to be from Cork. It was believed that they had not been interviewed yet.

14. The report of the 20th January, 2011, in the *Irish Examiner* appeared on p. 4 under the heading "Gardaí Talk to Parents of Injured Twin Babies". It is by Eoin English. The report contains references to Cork University Hospital and Temple Street Hospital, to the fact that the children were admitted to hospital on the 9th January, to the injuries sustained and to the condition of the children. The report commented that gardaí were still investigating how the babies who lived in Co. Cork with their parents aged 19 and 20 suffered the injuries. Significantly, in the current context, the article included the following paragraphs:-

> "The Health Service Executive has also secured interim care orders for the babies following separate District Court hearings in Cork and Dublin.
>
> The orders effectively make the HSE guardians of the twins. The HSE has declined to comment."

15. The reference to a District Court hearing in Dublin is inaccurate. There was no such hearing and the only court proceedings took place in the District Court in Cork. As we will see a similar inaccuracy also appears in the *Irish Times* reports.

16. In passing it may be noted that the story immediately below the one in the *Irish Examiner* with which we are concerned on that day is headed "HSE Care Order Of Baby In Assault Case" and reports that the HSE has obtained an interim care order at Ennis District Court in relation to an eleven month old baby who had sustained "very, very, serious injuries".

17. The *Irish Times* coverage of this issue consisted of a report by Barry Roche, Southern correspondent, which appeared on the 18th January, 2011, under the headline, "HSE Gets Care Orders For Injured Baby Twins". A sub-headline was "One Three- Month- Old Still Critical as Gardaí Investigate". The report opened with a statement that the HSE had obtained interim care orders for three month old twins brought to hospital last week. Later in the article, it is stated that the HSE obtained the orders at separate District Court hearing in Cork and Dublin which effectively made the Executive the guardian of the twins.

18. So far as the media not directly involved in the present case is concerned, an article appeared in the *Irish Independent* of the 18th January, 2011, by Ralph Riegel. The piece is quite an extensive one. The article refers to the parents of the twins as a couple, a

19 year old woman and her 20 year old partner coming from a large extended family in a rural part of Cork. It concludes by noting that the children had been living with their extended family in a house in an isolated part of Co. Cork. They had been together for the past two years and had just celebrated their first Christmas with their sons.

19. A piece in *The Star* newspaper on January 19th 2011, by Louise Roseingrave under the headline "Little Tot Breathing On His Own" with a sub headline "Brain Bleed Twin Off Ventilator" refers to the fact that a three month old twin from Cork, whose twin was hospitalised with similar injuries had been battling a life threatening bleed on the brain at Temple Street Children's Hospital. It notes that the children had been hospitalised ten days earlier when brought to Cork University Hospital. Reference is made to the fact that the twins lived with their 19 year old mother and 20 year old father in Cork and had been brought to hospital on the 9th January 2011. The piece refers to the role of the gardaí and to the extent that each twin had made progress.

20. The report in the *Irish Daily Mirror* of the 19th January, 2011, by Cathal McMahon provides the most specific detail on the identity of the twins. It refers to the fact that the three month old twins are members of a family, the name of which is given, and there is a reference to the family's cultural/ethnic background. Later in the article it is noted that the twins, referred to by their family name, were born last October to a 19 year old father and 18 year old mother and that the extended family were originally from Cork city but moved to a village in East Cork which is named, locating the village by reference to its distance from the nearest sizable town. The piece includes quotation from the twins' uncle referred to by both his first name and family name. The twins and their uncle share the same family name.

21. The story in relation to the twins and how it was developing was dealt with in the course of a "What it Says in the Papers" type broadcast on 96 FM on the 19th January, 2011. The piece refers to the coverage in the *Irish Independent*, *Irish Daily Mirror* and *The Star*. The report of the coverage in the *Mirror* refers to the twins by their family name and to the cultural/ethnic background of the family.

22. What emerges from this review of the media coverage is that a number of different approaches are evident. The three newspapers directly concerned with the present application did not identify the children who were the subject matter of the application to the District Court directly. However, quite an amount of background information relevant to the children was published, including the fact that the children were twins, were males, were born in October 2010, were brought to Cork University Hospital on the 9th January, 2011, that one twin was transferred to Temple Street Hospital, that the children's parents were 19 and 20, that the children had been living in the East Cork area and that the children were the only children their parents had.

23. As we have seen, not all this information appeared in each report or indeed in each newspaper. However, it seems to me that anyone knowing these children or indeed knowing of these children would have had the capacity to link them to the reports that the children had been taken into the care of the HSE.

24. Sections of the media that did not refer to the court proceedings and are not directly concerned with the present matters before the court went much further in identifying the children. Shockingly, the *Irish Daily Mirror* published material referring to the twins by their family name, pinpointing the village in which they lived and, lest readers did not know where the village was located, mapping it by reference to its proximity to the nearest town.

25. These remarks are made by me, very much in passing but I make them to put in context the concerns that would seem to have been felt by Judge O'Leary at the nature and effect of media coverage. However, the case comes before me now as a case stated and my role is of course not to find facts. The facts relevant to the present hearing were all found by Judge O'Leary and have been set out by him in the course of the case stated. The facts as found by him were as follows:-

> (a) The notice parties/appellants being the editors of the *Irish Examiner*, the *Irish Times* and the *Evening Echo* respectively had caused or permitted the publication of the material contained in the reports in such publications, intending to refer to the proceedings actually had and clearly referable to the facts alleged in the proceedings;
>
> (b) Those reports published material tending to disclose the result of proceedings under the Child Care Act 1991 as amended;
>
> (c) The reports did not identify the names of the children concerned or the geographical location, save by reference to Cork University Hospital (*Evening Echo* and the *Irish Times*) or by reference to County Cork *(Irish Examiner)*;
>
> (d) The persons concerned had taken reasonable care in considering the permissibility of publishing the articles as they were published, in that they had each taken specific legal advice in relation to the actual reports published and had acted in good faith;
>
> (e) Those publications which had published the identity of the children concerned but not the fact of their involvement in proceedings under the Child Care Act had shown cause why they should not be subject to process of execution;
>
> (f) There was no collusion between those persons which published the identities of the children concerned but not the facts of the proceedings under the Child Care Act, and those persons which published the reference to the proceedings under the Child Care Act but not the identities of the children concerned.

Conclusions

26. The question posed by the judge of the District Court was whether he was correct in concluding that *mens rea* in the sense of an intention to breach the *in camera* rule or recklessness as to whether the *in camera* rule was breached was not a necessary requirement before he could proceed to convict. The District Court judge puts his question squarely in the context of a contempt committed by breach of the *in camera* rule. As Mr. Donal O'Donnell S.C., as he then was, pointed out in a presentation given to the Annual Conference of the High and Supreme Court Judges in 2002 (see (2002) 2 J.S.I.J. 88), criminal contempt of court can be divided into three categories, of which the first is contempt in the face of the Court, *i.e*. disruptive behaviour in or immediately outside the precincts of the court, the second is scandalising the court; *i.e*. the scurrilous abuse of courts or judges which can be said to be calculated to bring the administration of justice into disrepute and the third category of criminal contempt is constituted by words or conduct calculated to interfere with the administration of justice either by interference with a witness or judges or lawyers, by breach of the *in camera* rule, or by statements prejudicial to a fair trial. By reference to this exercise in categorisation by Mr. O'Donnell, it will be seen that the question posed relates to one of the three subspecies of criminal contempt, *i.e*. interfering with the administration of justice and to one of the three sub subspecies of it, *i.e*. breach of the *in camera* rule.

27. There is no doubt that a requirement for *mens rea* is the norm across the spectrum of the criminal law. However, it is equally clear that is not the universal position. There are of course many statutory exceptions, but of greater relevance is that there were also exceptions at common law. In that regard McAuley & McCutcheon in *Criminal Liability, A Grammar* at p. 315 observe as follows:-

> "Nevertheless, at common law strict liability was imposed in respect of a number of offences. These included certain contempts of court, criminal libels and public nuisances."

28. In the case of certain contempts of court the authors refer in the footnotes to the case of *Evening Standard Company Limited ex-parte Attorney General* [1954] 1 Q.B. 578, where what was at issue was the publication of inaccurate reports of evidence given at trial which was held to be contempt where jurors might have been influenced even though the publishers reasonably believed that the report was accurate.

29. Leaving to one side the precise nature of the publication required if contempt of court is to be established, it seems to me that there has to date been an underlying consensus that *mens rea* in the sense of an intention to breach the *in camera* rule or recklessness as to whether it was breached was not an essential element.

30. In the course of his judgment in the case of *E.H.B. v. Fitness to Practice Committee of the Medical Council* [1998] 3 I.R. 399, the leading case on whether the *in camera* rule was absolute or whether there were circumstances in which the court could permit disclosure, Barr J. commented without equivocation or qualification:-

> "It is a contempt of court for any person to disseminate information derived from proceedings held *in camera* without prior judicial authority."

31. The question of *mens rea* and contempt of court was considered in greater detail in the case of *P.S.S. v. J.A.S. & Independent Newspapers (Ireland) Ltd* (Unreported, High Court, Budd J., 22nd May 1995) a case from which the appellant editors draw some comfort. At the outset it may be said that a degree of caution is required when dealing with this case arising from the fact that the court was dealing with a situation where it was satisfied that the defendant was in contempt of court in breaching the *in camera* rule and also in scandalising the court by circulating a false, emotive and mischievous impression of a judgment given in a child abduction case which had been held *in camera*, with reckless disregard for the truth and with the intention of bringing the court in to public disrepute and odium. Budd J. engaged in a careful and extremely comprehensive analysis of all the authorities in the area summarising his research as follows at p. 29:-

> "Decisions in England, Australia, New Zealand and Canada however all dispense with a *mens rea* requirement as to the effect or likely effect of the publication on the administration of justice."

32. He felt that in Ireland judicial authorities seemed to be divided referring in that regard to the decision in *A.G. v. O'Kelly* [1928] I.R. 308, which he interpreted as indicating a willingness on the part of the majority to dispense with the requirement for *mens rea* while Meredith J., certainly on one interpretation, was applying such a test. The decision in question is a very interesting one, if only because of the prominence that the defendant, then editor of *The Nation* would later attain in Irish public life. However, reading the three judgments it does not seem to me that the members of the court were in reality divided on the question of *mens rea*. Rather, Meredith J. was determined to uphold the right to criticise and to criticise in clear and trenchant terms, even when the language chosen might appear in bad taste.

33. In the course of his judgment Budd J. referred to the decision of Gavan Duffy P. in *A.G. v. Connelly* [1947] I.R. 213, a case involving an article published in a publication known as *Resurgence* in relation to the pending trial of an individual who was charged with the murder of a Detective Garda. In that case the then President had observed that it was no defence in law for the defendant to say that he had intended nothing wrong, before going on to conclude that the article in question was unquestionably calculated to produce a public mischief and a grave one.

34. Having engaged in the very extensive review that he did Budd J. observed:

> "These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and in our opinion they dispose of the argument that *mens rea* must be present to constitute a contempt of which the court will take cognisance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know the matter was defamatory and had no intention to defame."

35. The conclusions reached by Budd J. accorded with the preponderance of the authority which he had reviewed. His approach was, for example, consistent with that taken as far back as 1907 in *R. v. Dolan* [1907] I.R. 260. Kenny J. in that case in the course of his judgment commented at p.267 that:-

> "In these circumstances, two questions present themselves, - the one, has the speech, as reported a tendency to prejudice and excite prejudice against the traversers? If, on the mere reading of it and without considering whether in the particular circumstances of the case it will really have that effect, the court be of opinion that it is *calculated* to produce it, a contempt of court, which may be either a trivial or a serious one is committed. If the court thinks there has been a contempt, the other question is, whether the contempt is of so serious a character as to call for the intervention of the court. On the first question, neither the law nor its application, in my opinion, presents any difficulty. To constitute a contempt, it is sufficient if the court arrives at the conclusion that the language used has a *tendency* to prejudice the trial. The *possible* effect of the language is all that the court looks to." [Emphasis in original]

36. In that case Kenny J. was of the view that the speech that was being considered was capable of giving rise to a certain amount of prejudice against the accused in a forthcoming trial and that being so the speech was capable of and did constitute a contempt, but took the view that the circumstances were not such as to require intervention by the court.

37. Palles C.B., who dissented on the question of whether it was situation requiring an intervention by the court commented at p. 284 as follows:-

> "As to the law applicable to the case, there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this Court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of court, if the court arrives at the conclusion which I have arrived at, that there is a real danger that

it will effect the trial, or that absence of intention is to excuse the party from punishment."

38. While it emerged from certain comments by Keane J. in *Kelly v. O'Neill and Brady* [2000] 1 I.R. 354 that the law in this regard might not have been regarded as completely free from doubt, the approach taken by Judge O'Leary in the District Court in the present case accorded with established and traditional jurisprudence.

39. It is of note that the area in respect of which Judge O'Leary was prepared to proceed without proof of *mens rea* and in respect of which he now poses a question for this Court is a narrow one. He was of the view that *mens rea* in the sense of an intention or a recklessness to breach the *in camera* rule was not required. There is no suggestion that the publications at issue were unintentional in the sense of accidental or as a result of some system breakdown. Nor is it the case that the material published was believed to be innocuous and unobjectionable, and because of information unknown to the authors or editors the material acquired a significance of which they were unaware. The incident that had occurred on the 9th January, 2011, was of interest to the media. The newspaper editors would and do argue that there is a public interest in disclosing that the authorities had intervened and that court orders had been obtained. The decision to publish was a considered and deliberate one. On the assumption, for the purpose of this exercise only, that the publication was wrongful, the contention that the editors lacked *mens rea* really amounts to a contention that they did not know that what they were doing was wrong or that they believed that they could publish what they did without transgressing. Despite the often repeated adage to the contrary, ignorance of the law can be a relevant factor in certain circumstances. In particular, it can be highly relevant to the question of penalty. However, ordinarily an intention to breach the law is not a necessary ingredient for a criminal offence as distinct from an intention to act in a particular way. It would usually be the case that an intention to do a particular act, or to bring about a particular set of circumstances will suffice and it will not be necessary to go further and establish that there was an appreciation that achieving the intended results would involve a breach of the law. If, in respect of the acts intended to achieve a result, there was a belief on the part of the actor that the act could be performed and the intention or objective achieved without breaking the law that would not serve to render the conduct otherwise unlawful lawful, but might be highly relevant to the question of whether a court would feel the necessity to intervene and would certainly be highly relevant to the question of penalty if that stage was ever reached.

40. It seems to me that these considerations which are of general application apply with greater force in the case of the subspecies of contempt of court constituted by breach of the *in camera* rule. Traditionally, when considering an offence that was one of strict liability, it was the practice to consider whether an offence was "truly criminal" or whether it was regulatory in nature or in the nature of a breach of administrative law. In that sense the offence of contempt of court by breach of the *in camera* rule can be said to be not "truly criminal". It seems to me that observation has a more obvious application to a breach of the *in camera* rule than would be the case in other forms of criminal contempt, such as improper contact with witnesses or scandalising the court.

41. Accordingly, in my view Judge O'Leary was correct to conclude that there was no requirement that it should be established that there was an actual intention to breach the *in camera* rule. His understanding of the law accorded with the long established and generally accepted view of what the law was and long has been.

42. The notice parties/appellants had placed considerable emphasis on the remarks of Keane J., as he then was, in *Kelly v. O'Neill & Brady* who had commented that there was room for doubt as to whether *mens rea* might, contrary to the generally accepted view in the past, in the future be regarded as a necessary constituent element. However, he was speaking in a situation where he felt that the trial judge would have been entitled to conclude that the article had been produced in good faith on a matter of public interest without any intention of influencing the court. The remarks of Keane J., which quite obviously must be afforded the greatest possible respect, were made in the context of publication of material post conviction in a high profile trial and do not seem to me to address directly the question of a breach of the *in camera* rule. The remarks do not to my mind serve to cast doubt on the correctness of the approach taken by Judge O'Leary in the District Court.

Question 2

43. Here, Judge O'Leary asks whether he was correct in law in determining that it constituted contempt of court to publish the facts of the making of an order in proceedings under the Child Care Act 1991, as amended, where the publication in question did not identify or tend to identify the children who were the subject of those proceedings.

44. I have already referred to the clear and unqualified observations of Barr J. in *E.H.B. v. Fitness to Practise Committee*. However, the notice party/appellants argued that this dictum to which I have referred is overbroad. The newspaper editors refer to the statement in Arlidge, Eady & Smith on *Contempt of Court* that:-

> "It is clear that the publication of purely formal details about proceedings being carried out in private is in itself unobjectionable, this was confirmed in *P. v. Liverpool Daily Post and Echo Newspapers Plc*."

It must be said that the context of *P. v. Liverpool Daily Post* [1991] 2 A.C. 370 was quite different in that what was primarily in issue were provisions of the Mental Health Review Tribunal Rules 1993, in a situation where it was agreed that there was no prohibition on publishing the results of the review in terms of the fact that Mr. P was no longer detained under the Mental Health Act or that Mr. P continued to be detained.

45. In contrast it is clear beyond argument that it would be quite unacceptable to publish that the twins identified there by name, had been the subject of child care proceedings in the District Court and as a result of the outcome of the proceedings were now in the care of the HSE. Such publication would clearly breach s. 31 of the Child Care Act 1991, which prohibits the publication of any material likely to lead members of the public to identify a child who is or has been the subject of child care proceedings, and would also be a contempt of court. It seems to me quite unreal to regard publication of the fact that a child had been taken into care as the publication of a purely formal matter. Whether a child is or is not taken into care as a result of court proceedings is a matter of profound significance and cannot possibly be regarded as material that was purely formal.

46. The starting point for consideration of this topic has to be the statutory requirement under s. 29(1) of the Child Care Act 1991 that proceedings be held otherwise than in public. The appellants have argued that the publication of the mere fact of the making of an order without reference to the children cannot be a contempt of court. However, as I have indicated, it is to stretch matters to refer to what has occurred as a publication of the mere fact of the making of the order. A considerable amount of information was provided about the children and their background to the extent that a significant section of the general public learning the children had been taken into care would have had no difficulty in working out which children were being referred to. Indeed, it might be thought to border on the disingenuous to suggest that what occurred was the publication of the mere fact of the making of an order.

47. It may be noted that the requirement that child care proceedings be held other than in public is not some peculiarity of Irish law. It is mirrored in many other jurisdictions and, indeed, there are references in decisions of the European Court of Human Rights which

suggest that the holding of child care proceedings other than in public is the norm in a majority of the member states of the Council of Europe.

48. The fundamental reason for the requirement is that it serves the best interest of the children involved in proceedings that they should be protected from the harmful effects of publicity. It also recognises that the family and personal rights of parents and guardians are engaged and there is also a concern to protect the integrity of the child care system itself. All of theses objectives are jeopardised if, without reference to the court, material is published which informs a significant section of the public of the outcome of a specific distinguishable child care case.

Question 3

49. Just as the Irish Constitution requires that justice should be administered in public, so too, the European Convention on Human Rights envisages that the administration of justice will require public hearings. However, just as the Constitution permits exceptions to the general requirement that justice should be administered in public, so also the provisions in that regard of the European Convention on Human Rights are not absolute but permit certain exceptions. Article 6(1) provides as follows:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

50. Strikingly, therefore, the Convention itself expressly permits the exclusion of the press and public from all or part of a trial in the interests of juveniles or in the interests of the protection of the private life of the parties.

51. In the case of *HSE v. McAnaspie* (Unreported, High Court, Birmingham J., 15th December, 2011), I addressed the question of whether the *in camera* rule was absolute in all circumstances or whether there were circumstances where a judge could authorise disclosure. I concluded that the rule was not absolute. I took the view that providing for judicial discretion to modify the rigidity of the rule was consistent with earlier Irish and British authorities and also was consistent with and, indeed, might be mandated by the European Convention on Human Rights. Recognising the existence of a discretion to permit disclosure was consistent with the leading decision in the area, the decision of Barr J. in *E.H.B. v. Fitness to Practise Committee* [1998] 3 I.R. 399, which was the case where the issue was considered in greatest detail, but also consistent with decisions such as that in *E.H.B. v. E. (No.2)* [2000] I.R. 451. The background to that case was that the High Court had conducted an inquiry pursuant to Article 40 into the actions of a Pregnancy Counselling Agency which had taken an infant into care and custody. The judge who dealt with the Article 40 inquiry in the High Court (Laffoy J.) had permitted the publication of an edited version of her judgment. McGuinness J., when an application was made to her by sections of the media, authorised the naming of the agency involved but declined to authorise the naming of a barrister and a general practitioner who had played a role in the affair, taking the view that while there was a public interest in naming the agency, so as to offer protection to other pregnant women, that naming the barrister or general practitioner would merely satisfy public curiosity.

52. Similar approaches were evident in the case of *Martin v. The Legal Aid Board* [2007] 2 I.R. 759, a decision of Laffoy J., and in the case of *Miggin (a Minor) v. HSE & Gannon* [2010] IEHC 169, a decision of Hanna J.

53. The decision of the European Court of Human Rights in the case of *B. & P. v. the UK* (2002) 34 E.H.R.R. 529. judgment of the 24th April, 2001 is of particular significance in the current context. In that case the ECHR rejected a challenge objecting to the presumption in English legislation that proceedings would be held in private. The objecting parties believed that the presumption should have gone the other way with a presumption in favour of public hearings. The court felt that it was not inconsistent with Article 6(1) of the European Convention on Human Rights for a state to designate an entire class of cases as an exception to the general rule that judicial proceedings should be held in public, but significantly went on to observe that the need for such a measure should always be subject to court control.

54. That was a case where each applicant was anxious that court proceedings to determine the place of residence of their son following the parents' divorce should have been in public. At para. 38 of the judgment, the court commented as follows:-

> "The proceedings which the present applicants wish to take place in public, concerned the residence of each man's son following the parents' divorce or separation. The court considers that such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment."

55. In my view there is no basis for suggesting that the European Convention on Human Rights required that the newspaper editors be permitted to publish the articles complained of. Any suggestion of a conflict between established Irish law and the Convention just does not arise.

56. In this case, what was objectionable was that the editors took the decision to publish the material complained of without reference to the court. It was open to them to raise the question of publishing certain material with the court. In that situation, they would no doubt have urged that in a situation where an incident as alarming as the one at issue had occurred that there was then a public interest in reporting that there had been an intervention by the statutory authorities. Had that happened the Judge in the District Court might or might not have been prepared to contemplate some form of publication, perhaps subject to conditions. However, that did not happen and instead the editors decided to proceed with publication without reference to the court or to the parties to the proceedings whose rights were affected.

57. The appellants have argued that if the *in camera* rule is not absolute and if the District Court had jurisdiction to modify it or dispense with its full rigours, that the District Court must retain a discretion to deem a publication not to have breached the *in camera* rule. The District Court of course has a discretion to exercise as to whether to take any action on foot of a particular publication, but it is a complete *non sequiter* to suggest that because a court would have the discretion to authorise disclosure that creates an entitlement to disclose in the absence of authorisation by the court.

Question 4

58. I think it is fair to say that this is the aspect of the case stated that has received least attention. The respondent L.N. specifically declined to make submissions on this aspect, while the respondent J.Q. indicated that he had no interest in the question of penalty. In general terms since the court was satisfied that a contempt of court was established, the question of the selection of penalty was a matter for the court. It is of course the case that at the penalty stage the intention and indeed motive of the publishing party is a relevant consideration. In that context the observations of Keane J. in relation to penalty in the case of *Kelly v O'Neill and Brady* [2000] 1 I.R. 354 come to mind. In that case Keane J. having pointed out that it was possible that the respondents would be found innocent of any contempt went on to say that in any view the circumstances of the case would clearly have called for the imposition of no more than a modest penalty. Indeed, it is a feature of many of the reported cases that the courts have dealt very leniently with contempt. It is not infrequently the situation that if an apology is forthcoming along with an assurance that there would be no repetition and an acceptance that an error was made that a court would not find it necessary to take any further action. However, that of course, was not the position here as the editors maintained, as indeed they still maintain that they were entitled to publish the articles complained of. It seems to me that in these circumstances, the penalties selected fell within the range of options open to the District Court. The penalty imposed was, in the circumstances a perfectly lawful one.

59. In the circumstances I will answer the question posed in the case stated as follows:-

(a) the judge was correct;

(b) the judge was correct;

(c) the judge was correct; and

(d) the sentence passed was lawful in the circumstances.