IN THE HIGH COURT OF JUSTICE No.FD97P02101
FAMILY DIVISION – PRINCIPAL REGISTRY

IN THE MATTER OF AN ACTION TO PUNISH FOR CRIMINAL CONTEMPT

B E T W E E N:-

H.M. ATTORNEY-GENERAL Applicant

AND

DR.MICHAEL JOHN PELLING Respondent

BROUGHT IN EXISTING PROCEEDINGS:

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF FORHAD MATIN (A MINOR)(BORN 15 MARCH 1992)

B E T W E E N:-

ABDUL MATIN Applicant

AND

RUQIA ALI Respondent

SUMMONS (INTERLOCUTORY): FPR 1991 & RSC 1965

LET ALL PARTIES concerned attend the Judge in Chambers at the Royal Courts of Justice, Strand, London WC2A 2LL on day, the Day of 2004 at O'Clock, on the hearing of an Application on the part of the Respondent Dr Michael J.Pelling FOR THE FOLLOWING ORDERS:

0. That the Originating Summons issued by the Attorney-General herein on 12 December 2003 be struck out in part by the striking out of Count II(2) [publishing the Judgment of HHJ Goldstein 21 August 1996] as a nullity, the Court having no jurisdiction to hear this part of the Summons, and for other fatal irregularity.

1. That the said Summons be further struck out in part by the striking out of Count II(1) [publishing information relating to Children Act 1989 proceedings heard in private in *Matin v. Ali FD97P02101*] as disclosing no offence known to English law.

2. In regard to the preceding Order sought appropriate directions be given for the trial of the question of the existence of the offence as a Preliminary Issue, the directions to ensure in particular that the Issue be not tried by a Judge of the Family Division.

3. That the final trial of Count I [interfering with the administration of justice in regard to proceedings in *Matin v. Ali*] and of Count II(1) be stayed pending the determination of the Application for Leave to Appeal and of the Appeal if Leave be granted of Abdul

Matin [CA Ref.2003/1734] against the Declaration made by the President on 17 July 2003 in *Matin v. Ali* that the interests of the child Forhad Matin are not such as to preclude the institution of proceedings for contempt against Michael John Pelling.

4. That the application by Dr M.J.Pelling in *Matin v. Ali* issued 14 July 2003, which was adjourned generally by the President on 17 July 2003, be now heard.

5. That the Court grant the Respondent Dr M.J.Pelling Legal Facilities and Assistance and Representation, or otherwise give directions in relation to the obtaining of such Facilities and Assistance and Representation, to guarantee the Respondent his rights under Article 6(3)(b)(c) ECHR as now enacted by the Human Rights Act 1998.

6. That the Order of District Judge Angel herein made on 12 December 2003 be set aside as made without jurisdiction and a nullity.

7. That the Cause herein, that is to say Family Division Case *Matin v. Ali* FD97P02101, be transferred to the Queen's Bench Division.

8. That pursuant to RSC Order 32 Rule 13(1) this Interlocutory Summons be heard in Court or be adjourned into Court to be so heard.

AND THAT the Costs of the said Application be paid by the Attorney-General to the Respondent to be assessed summarily on an indemnity basis.

THE GROUNDS of this Application are as follows (numbering corresponding to above):

0. (a) Count II(2) alleges a criminal contempt of court in connection with proceedings in an inferior court, namely in the case *Pelling v. Bruce-Williams 94JS0001* in the Bow County Court in 1996. Accordingly Civil Procedure Rules 1998 Schedule 1 RSC Order 52 applies, specifically O.52 r.1(2)(a)(iii), so that by O.52 r.1(2) a Committal Order may only be made by a Divisional Court of the Queen's Bench Division, and further by O.52 r.2 Leave of the Court is required before the Committal application can be made. The Attorney-General has not obtained Leave and that part of his Summons is thus a nullity and the High Court has no jurisdiction to hear it.

(b) In any event that part of the Originating Summons is fatally flawed since: it applies to the Single Judge, not the QBD Divisional Court which is mandatory; it is made in the wrong Division of the High Court; it purports to be an application within a Family Division case known as *Matin v. Ali FD97P02101* which is impossible since P*elling v. Bruce-Williams 94JS0001 (Bow)* has nothing whatsoever to do with this

case; and the application is governed by the CPR 1998 and required to be made by Claim Form under Part 8 of the Civil Procedure Rules, not by RSC summons – indeed since no Claim Form has been issued the purported action fails *in limine*.

1. (a) The Respondent denies that there is any offence known to English law by way of criminal contempt in publishing information relating to proceedings before a court sitting in private where the proceedings are brought under the Children Act 1989. This challenge being raised, the burden of proof is upon the Attorney-General to establish the existence of the offence in English law.

(b) Section 12(1)(a)(ii) Administration of Justice Act 1960 neither creates nor declares the existence of such an offence: it merely declares that publication of the information *may* be a contempt. See the construction of s.12(1) by the Court of Appeal in *Re F (A Minor)(Publication of Information) [1977] Fam.58 CA, [1977] 1AER 114 CA*. That Court held that the Common Law prior to 1960 determined whether or not in fact a publication constituted contempt of court.

(c) There is no case reported prior to 1960 of contempt being found, *other than in wardship*, for the publication of information about proceedings heard in chambers under the statutory jurisdictions which preceded the Children Act 1989 – that is the Guardianship of Minors Act 1971, and prior to that Act, the Guardianship of Infants Acts 1886 & 1925. Prior to these Acts there were the Custody of Infants Act 1873, 36 Vict.c.12, and the Custody of Infants Act 1839, 2 & 3 Vict.c.54 (Talfourd's Act, the first). The Respondent accepts the well known categories of contempt in wardship: they do not apply in the statutory cases where the Court settles disputes between the parties like any other dispute and is not exercising the *parens patriae* jurisdiction.

(d) Criminal contempt is an offence and can also be prosecuted by information or indictment. The jurisdiction under the Custody of Infants Acts of 1839 and 1873, and the Guardianship of Infants Acts 1886 and 1925 was statutory. *"If Parliament seeks to create a new offence, it must do so in plain words"* - Lord Denning MR, *Re F supra* 86E/120c. Nothing in those Acts suggested a new offence, nor did the Master in Chancery Abolition Act 1852, ss.XI & XXVI, which first authorised proceedings under them to be held in chambers. Common Law Applications for Guardianship and Maintenance of Infants, wardship apart, could not be held in private prior to the 1852 Act but again there is nothing in that Act to remotely suggest a new criminal offence was being created if information about such Applications held in chambers *post* 1852 was published. The context of the 1852 changes was administrative convenience.

(e) Nor can Rules of Court alone make substantive changes to the law of contempt (see e.g. *Malgar Ltd v. R.E.Leach Engineering Ltd [2000] TLR 17/2/00 Ch.D*) so that if the effect of FPR 1991 r.4.16(7) is to make it a contempt to publish information about Children Act 1989 proceedings heard in chambers then the foundation of that criminal contempt and offence must be found elsewhere, and it cannot be found. It is not to be found in any statute, even going back to the 1852 Act which is the ultimate source of the power to make the Rule, and it is not to be found in the Common Law. There is and was no general power at Common Law to hear child cases in private, wardship apart, else the House of Lords in *Scott v. Scott [1913] AC 417, [1911-13] AERep 1 HL* would certainly have said so in their analysis of the open justice exceptions. Only wardship was included from the category of infants cases. The House did consider when publication of information would be a contempt if a Court had sat in private and the only instance in child cases was wardship: Viscount Haldane LC 439/440,10H-11A, Earl of Halsbury 442,12B, Earl Loreburn 447-449, 14I-15I, Lord Atkinson 449/450, 462, 15I-16B, 22I-23A, Lord Shaw 482-484, 33D-34G.

(f) Note also that for 75 years the County Courts held proceedings under the Guardianship of Infants Acts 1886 & 1925 *in open court* until the Rules of Court were amended in 1960 [County Court Amdt. Rules 1960, SI 1960/1275] to introduce CCR 1936 O.46 r.1(1): "All proceedings under the Guardianship of Infants Acts 1886 and 1925 shall be heard and determined in chambers unless the Court otherwise directs". It is absurd to hold that this new power of the County Court to sit in chambers *ipso facto* created a new criminal offence of publishing information about the proceedings.

(g) There are 2 non-wardship criminal contempt (for publication) reported cases *post* 1960, both Children Act 1989: *Official Solicitor v. News Group Newspapers [1994] 2FLR 174 FD* and *X v. Dempster [1999] 1FLR 894 FD*. However the point now argued was not taken in these cases, which were decided *per incuriam*. They are also High Court cases and thus not binding upon other High Court Judges or a Divisional Court.

(h) The truth is that the presumed criminal contempt is a myth created by the High Court Family Division *post* 1960 for the purpose of suppressing dissent and inquiry about the increasingly evil decisions made by that secrecy-obsessed Division in relation to the upbringing of children. What the High Court FD has done is unconstitutional, a deliberate destruction of our ancient liberties of open justice and freedom of speech. In *Scott v. Scott [1911-13] AERep 1 HL, [1913] AC 417* at p.30/p.477 Lord Shaw quoted with approval the philosopher Bentham and the historian Hallam:

"In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial". *(Bentham)*

"The civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and the fair construction of evidence; and the right of Parliament without let or interruption to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom where this condition is not found both in its judicial institution and in their constant exercise". *(Hallam)*

2. A *prima facie* case being made it is clearly right to try the question of the existence of the alleged offence as a Preliminary Issue and suitable directions should be given. The Attorney-General should plead a full case in writing and the Respondent should have liberty to file a full Defence on the Issue (the above being outline). The Issue should not be tried in the Family Division or by a Family Division Judge given the President's *dicta* to that effect in her Judgment of 17 July 2003 §4. Again, since the Respondent attacks the policy and motivation of the Family Division, trial in that Division would be unfair and prejudicial, there being real as well as apparent bias. That real bias of the High Court Family Division has been admitted in the Court of Appeal: *Re Geldof (Celebrities: Publicity) [1999] 1FLR 409 CA* at 418B.

3. Mr Matin's Appeal would be rendered nugatory if the trial of Counts I and II(1) took place before the final disposal of the Appeal proceedings. If the Appeal succeeds the Court of Appeal will declare that the interests of Forhad Matin do preclude the institution of contempt proceedings against Dr Pelling in relation to *Matin v. Ali* and the Attorney-General could not therefore in good conscience proceed with his case. Further, Mr Matin has himself applied in his Appellant's Notice for a Stay of the proposed contempt proceedings pending the conclusion of his Appeal, and the High Court ought not to render that application in the Court of Appeal nugatory. So there should be a stay of the trial pending disposal of the Court of Appeal proceedings. The Respondent does not object to the High Court proceeding with interlocutory matters nor with the trial of the Preliminary Issue identified *supra.*

4. As the Attorney-General has now commenced the contempt proceedings the Respondent is entitled to have the application issued 14 July 2003 heard as an interlocutory matter in the case, concerning inspection and disclosure. The request for an unedited transcript remains seeing as the A-G has provided one edited by Singer J.

5. (a) In this case I wish to exercise my rights under Article 6(3)(b)(c) ECHR to legal facilities assistance and representation, to such extent as I think fit. Unfortunately a problem has arisen in regard to the grant of Legal Aid (I use this term synonymously with the less informative term "public funding") which my chosen Solicitors Kingsley Napley have not been able to resolve at the date of issue of this Summons. It has not been possible to obtain conclusive guidance as to whether the Legal Aid should be Civil or Criminal, i.e. provided by the Community Legal or Criminal Defence Service.

(b) Having now looked into the matter I claim entitlement to Criminal Legal Aid by virtue of the Access to Justice Act 1999 Sections 4(3) & 12(1),12(2)(a),12(3). By virtue of Schedule 3 it is the Court that grants the right to representation. I claim the right to all facilities assistance and representation that I need and it is the duty of the Court and the State to secure to me the Article 6(3) rights, given s.6 HRA 1998.

6. (a) DJ Angel ordered, *"This application be transferred for hearing to the Queen's Bench Division and be listed initially for directions before the Senior Master"*. This appears to be an order in good faith to give effect to the President's *dicta* in Para.4 of her Judgment 17 July 2003. They are nothing more than *dicta*, and do not constitute an order by the President, because she herself expressly said her directions should not be put in the Order made on 17 July 2003 and in any event the proceedings not in fact having at that time been issued the Court was not seized with jurisdiction to make any orders at all in regard to the Attorney-General's criminal contempt action.

(b) The Learned District Judge had no jurisdiction to make the Order because any such jurisdiction is expressly denied to him by virtue of s.19(3)(b) Supreme Court Act 1981 and RSC Order 32 Rule 11(1)(a)(b) – exclusion of matters relating to criminal proceedings and matters relating to the liberty of the subject.

(c) DJ Angel's Order did not purport or intend to transfer the whole Cause: hence by virtue of s.64(2) Supreme Court Act 1981 all interlocutory steps must be taken in the Family Division and the QBD Senior Master has no jurisdiction in the matter. This view is fortified by RSC Order 4 Rule 8 which makes provision for the exercise of a master's or registrar's jurisdiction by another but only within the same Division.

(d) Nor can a Family Division order transfer *simpliciter* the Attorney-General's action for hearing to the Queen's Bench Division because RSC Order 4 Rule 7(1) requires both the consent of the Queen's Bench Division Judge who will hear and dispose of the action *and* the direction of the Lord Chancellor for such hearing and disposal.

7. Bearing in mind, (i) the President's *dicta*, which deserve respect, (ii) the fact that the substantive proceedings in *Matin v. Ali* concluded on 30 April 2003 by a Residence Order being made in favour of Mr Abdul Matin in respect of Forhad Matin, (iii) the desirability of interlocutory steps proceeding in the same Division as the final hearing, (iv) the desirability of consolidating or hearing consecutively the instant action on Counts I and II(1) with the action the Attorney-General must bring in the Queen's Bench Division if he is to proceed with Count II(2), which requires by RSC O.4 r.9 that the causes be in the same Division, and (v) the impossibility in any event of having the contempt action tried by a Judge of the Queen's Bench Division so long as the *Matin v. Ali* Cause remains assigned to the Family Division, because of the mandatory requirement of RSC Order 52 Rule 1(3) in these circumstances that the committal *"order may be made only by a single judge of that ..Division"* – it is therefore better to transfer the Cause to the Queen's Bench Division under RSC Order 4 Rule 3.

8. (a) This is an action for Committal and the liberty of the subject is at stake.

(b) The proceedings in this action do not fall within s.12(1) Administration of Justice Act 1960 and the proceedings on this Interlocutory Summons should be open to the public: *Hodgson v. Imperial Tobacco Ltd [1998] 1WLR 1056 CA*.

(c) Since even the President admits the possibility of apparent bias in this case in the Family Division, and the interlocutory stages here being of considerable importance to a fair trial, it is necessary that the proceedings be in open court to ensure that there is public scrutiny and public confidence maintained in the administration of justice.

(d) Article 6(1) ECHR applies by virtue of the HRA 1998 to the determination of the criminal charges against the Respondent, which determination includes interlocutory stages, and therefore there is entitlement to fair and public hearing.

(e) This case is arousing considerable public interest; the issues are of importance.

(f) Since the Respondent has no confidence in even interlocutory justice being done in this case in a secret court in the Family Division he will decline to take part if the public are excluded and will immediately proceed to the Court of Appeal.

DATED this 6th Day of January 2004. THIS SUMMONS was taken out by the RESPONDENT DR M.J.PELLING of 3 Avenue Road, Forest Gate, London E7 0LA.

TO H.M. ATTORNEY-GENERAL by the Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS (Ref.LT31338G/CPW/D1), Tel.020 7210 3282;

AND TO THE COURT.
