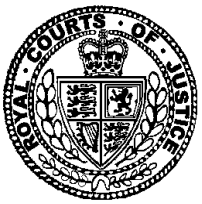

Neutral Citation Number: [2020] EWHC 2103 (Fam)

Case No: PO16C01149

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

MELANIE NEWMAN **Applicant**

- and -

SOUTHAMPTON CITY COUNCIL (1)

AB (2) **Respondents**

TR (3)

and

M (a child) (through her Children's Guardian) (4)

- -
- -

Anya Proops QC, Zac Sammour and **Kate Temple-Mabe** (instructed by **Howard Kennedy LLP**) for the Applicant
Heather Rogers QC and **Sarah Earley** (instructed by **Southampton City Council**) for the Local Authority
Deirdre Fottrell QC (instructed by **Goodman Ray**) for the Guardian

Hearing dates: 2nd and 3rd March 2020
Judgment released to counsel on 31 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice Roberts :

Introduction

1. This is an application by a professional journalist who seeks a disclosure order which, if granted, will enable her to see the court file and other materials relating to public law care proceedings which concluded in October 2018. The child at the centre of those proceedings is M who was born in November 2012. M is now 7½ years old. On the application of the local authority she was removed from her mother's care in June 2015 when she was 2 years old. With the mother's consent, a care order was made and M was placed in the care of her father. That placement subsequently broke down and M's mother made an application to discharge the care order on the basis that M would return to live with her rather than remain with foster carers.

2. In June 2016, after a hearing which lasted four days, His Honour Judge Hess sitting in the Family Court at Portsmouth rejected the mother's application to discharge the care order. Instead, he authorised the local authority to place the child for adoption. Had that order survived its subsequent journey to the Court of Appeal, the outcome for M and her mother would have resulted in the severing of all ongoing family ties between them.

3. The first hearing of this case in the Court of Appeal took place in January 2018. Lady Justice King delivered the court's judgment which is reported as *M (A Child)* [2018] EWCA Civ 240. The Court of Appeal set aside the placement order and remitted the matter for a rehearing. The mother was not eligible for legal aid and, for the purposes of bringing that appeal, she was obliged to fund the proceedings to the tune of about £20,000. It was money she could ill afford. The Court on that occasion declined to make an award of costs against the local authority because *"it is not possible to say that the local authority has been unreasonable in defending the judge's decision, it being a*

decision that was in line with all professional advice and was supported by the children's guardian" (paragraph 75).

4. Following the decision of the Court of Appeal in February 2018, the matter was relisted before the Designated Family Judge in Portsmouth, His Honour Judge Levey. By that stage the case had attracted wider media interest and there had been several reports about the case both locally and nationally. At the hearing on 19 October 2018 three respected and experienced journalists appeared at court to observe the hearing as they were entitled to do under the Family Procedure Rules. They had accorded the judge the courtesy of letting him know in advance that they would attend in order to make an application to vary the usual reporting restrictions. One of those journalists was Ms Newman. She was accompanied by fellow journalists, Ms Sanchia Berg and Ms Louise Tickle, who has been present in court, with my permission, throughout this hearing.

5. In terms of the development of the care proceedings at that point in time, the local authority had commissioned two expert assessments following the decision of the Court of Appeal. Those assessments were positive from the mother's perspective. She was by then working constructively with both the local authority and the experts. The plan for M changed to one based on rehabilitation within the family.

6. In the summer of 2018, M was returned to the full-time care of her mother where she has remained ever since. She was then nearly 6 years old and had spent over three years of her life in foster care. Those were three very important years in this child's life. Notwithstanding the conclusion of the proceedings and the absence of any further state intervention in M's family life, Ms Newman seeks access to the information and material which informed the earlier decision-making of the local authority and the court. She became interested in the case in 2018 following the decision in the Court of Appeal. She had by then begun a wider investigation into what she perceived to be an unusually high percentage of cases in this particular local authority's area which resulted in adoption orders and was keen to understand what might be driving that trend (if indeed such a trend existed).

7. Thus, by the time the matter was relisted before His Honour Judge Levey on 19 October 2018 after its first journey to the Court of Appeal, there was a clear consensus as to the way forward. The court was invited to discharge the care proceedings and substitute a six-month supervision order. All that remained for the judge to decide was the issue of the extent to which there should be a relaxation of the existing restrictions on reporting. Counsel who appeared for the mother on that occasion told the court that, whilst there was no criticism of the local authority's approach in terms of its willingness to change the plan for M, there was "a flaw in the system". Nevertheless, through her counsel, she was urging on the court a cautious approach to the issue of reporting which she said must be "very sensitive to her request that matters are kept as private as possible in terms of identification" which should include the potential for jigsaw identification.

8. His Honour Judge Levey permitted the reporting of the original judgment delivered by His Honour Judge Hess on an anonymised basis. He went on to approve a reporting restriction order which not only prevented further reporting: it also had the effect of restricting the reporting of information about the family which was already in the public domain as a result of the publication of the Court of Appeal judgment delivered in February 2018.

9. Ms Louise Tickle, one of Ms Newman's fellow journalists, lodged an appeal against that order. The BBC applied to be joined as a party to their appeal. By the time the case reached the Court of Appeal, there was a consensus amongst all parties, including the representatives of the media, in relation to the terms of a replacement reporting restriction order. In advance of the listed appeal hearing, a short hearing was convened on 15 February 2019 in order to take stock. The media representatives were anxious to preserve the full listing in order that they might canvass wider issues of principle and practice generated by the facts of this particular case. The President, Lord Justice McFarlane, sitting with Lady Justice King, declined on that occasion to take the opportunity to use the hearing date as an opportunity to issue wider guidance on "this somewhat complicated but very important area relating to

transparency in the family courts". His Lordship acknowledged the absence of any detailed guidance or road map to assist journalists on how such applications were to be determined and expressed his resolve as President to issue such guidance at the earliest opportunity after full consultation with all relevant stakeholders.

10. We shall see how that guidance emerged in due course.

11. Ms Newman has remained in touch with M's mother, the second respondent to this application, who does not oppose the application for disclosure. The application is opposed by the local authority and M's Guardian in terms of its reach and the nature and quantity of information and documents sought.

12. At the outset, it is important to note that this is *not* an application for permission to publish any of the material which may be released as a result of the disclosure order which Ms Newman seeks. She accepts that she would need to come back to the court and seek that permission on a separate occasion were her journalistic endeavours to lead to a story or an article which she wished to put before the public at large. Should she succeed in her present application, she accepts that she would continue to be bound by whatever restrictions the court considered appropriate and she has made it clear through her counsel from the outset that she would observe those restrictions to the letter. It is acknowledged by all parties to this application that Ms Newman is an experienced and responsible journalist who has a particular interest in this case.

The events which precipitated the original care proceedings

13. As is clear from that brief exposition of these proceedings to date, there are a number of reported judgments in the case, two from the Court of Appeal reported as *M (a Child)* [2018] EWCA 240 (24 January 2018) and *R (a child)* [2019] EWCA Civ 482 (15 February 2019). The original judgment delivered by His Honour Judge Hess in June 2017 has also been made available to Ms Newman and her legal team. Whilst each of these judgments has been anonymised to an extent, they contain a significant amount of material about

M's early life, her medical history and the events which led to her being removed from, and ultimately returned to, her mother's care. M's mother has since remarried and the family now includes M's new half-sibling.

14. The information which is already in the public domain can be summarised in this way.

15. M's mother came to live in England some twenty years ago where she trained as a nurse. She met M's father some ten years later. M was born in 2012 but her parents had by then separated. M had a number of developmental issues which were reflected in a delay in her functioning in speech and language. In addition she had a number of allergies which were characterised as 'severe'. Notwithstanding the challenges which M's early life presented to this mother as a single carer, there was nothing to suggest that the care she was providing was inadequate or concerning in any way until she presented at a local hospital with M on two occasions in October 2014 and May 2015. M was admitted as an emergency with respiratory problems on both occasions, the mother having administered medication to her daughter via the use of an EpiPen. Those admissions, together with a perception that she had been overprotective in her inappropriate use of the EpiPen, appear to have informed the local authority's concerns that M might be at risk of physical harm were she to remain in her mother's care. The mother was subsequently arrested by the police on suspicion of fraud and neglect. With no other family members available to care for M, she was taken into police protection and placed in local authority foster care. This started the local authority's formal involvement with this family. An interim care order was made on 19 June 2015 confirming M's placement with foster carers.

16. The matter returned to court at the end of March 2016 by which stage the care plan was for M to live with her father. No doubt fearful that the alternative might be a placement of M outside her family, the mother agreed to that plan and, having received legal advice, a final care order was made by a circuit judge in March 2016 reflecting that plan. All parties, including the mother, signed what is known as a threshold document confirming that the risk of significant harm to M in her mother's care in June 2015 was such that she

should now live with her father. That document recorded the agreed factual basis for the care order: it included that she was an overprotective parent who was not fully informed about the potential dangers of using an EpiPen in the context of M's several ongoing health concerns. Whilst the mother had always maintained that she did this in the honest but mistaken belief that her child was suffering a severe allergic reaction, she was prepared to accept that her own medical training as a nurse should have led to a more appropriate response.

17. The breakdown of those arrangements led to the mother's application to discharge the care order and the subsequent four-day hearing before His Honour Judge Hess. As is clear from the judgment delivered by Lady Justice King in February 2018, the Court of Appeal had identified a number of concerns about the reasoning and analysis which informed the judge's decision to place this child for adoption. First, there was no up to date picture of M or the extent of her developmental delay and speech difficulties both then and as anticipated in the future. Identifying what she regarded as "a significant gap in the judge's judgment", her Ladyship said this:

> "What cannot be seen from any of the statements and, therefore is not reflected in the judge's judgment, is an understanding of the challenges (if any) [M's] early life difficulties presented to the mother as a single carer but, more importantly for the purposes of an evaluation as to whether or not a placement order can be made, an up to date picture of [M], including her current state of allergies and most particularly the extent of her development delay and speech difficulties both now and anticipated in the future". (see paragraph 28)
>
> ……..
>
> "Pulling all these snippets of information together, it can be seen that the child in respect of which the local authority sought a placement order was a black Zimbabwean girl of five. She had issues which would make her, to some extent, challenging to care for in the form of severe allergies and speech and development delay, and some behavioural difficulties. In addition, she has attachment difficulties of sufficient severity so as to necessitate, it was said, long term carers requiring in-depth training in therapeutic parenting". (paragraph 33)

18. In addition, the Court of Appeal accepted that there was inadequate analysis behind the judge's "serious finding" that the mother represented a significant

risk of physical harm to M: his findings had been based "on the slimmest of evidence": see paragraph 55.

19. I do not intend within the confines of this judgment to set out the detail of the analysis conducted by Lady Justice King because the judgment is now available for all to read. I have included the references above simply to reinforce and explain the momentum of Ms Newman's case to this court that, as a responsible journalist with a particular interest in this area, there are aspects of the decision-making process on the part of the local authority and the courts which require more detailed investigation. She has had no access to any of the underlying material produced for the purposes of the care proceedings. Thus she says to me, in essence, that she cannot do her job and 'get underneath' the facts and processes engaged unless she has had the opportunity to read all the material which the case has generated.

The Law

20. Over the course of argument, I have been referred to a significant number of authorities in the context of the development of both English and Strasbourg jurisprudence. It is against that background that I have to consider the respective arguments of the parties in terms of what is often referred to as "the ultimate balancing act" in terms of the competing interests at play.

The statutory framework: the general rule

21. Section 12(1)(a) of the Administration of Justice Act 1960 ('AJA 1960') provides as follows:

> *(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be a 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) relate wholly or mainly to the … upbringing of a minor.

22. The disclosure of information or documents to a journalist is a form of publication for the purposes of s. 12(1) AJA 1960 even if the material disclosed is anonymised: see *Re B (A Child)* [2004] EWHC 411 Fam, [2004] 2 FLR 142. As to what information is captured within the statutory embargo, it will include:-

(a) documents prepared for the purpose of the proceedings; and

(b) information, even if not reduced to writing or electronic format, which has emerged during the course of the information or evidence gathering process for the purpose of proceedings which are already on foot: see *A v Ward* [2010] EWHC 16, [2010] 1 FLR 1497 at para [112] per Munby LJ.

23. The inherent confidentiality of documents concerning proceedings ongoing in a family context is further reinforced by the Family Procedure Rules 2010 ("FPR") r. 29.12(1) which sets out the general rule that no document, or copy of a document, which is filed or lodged with the court office may be inspected by any person, or issued to any person, without the specific permission of the court.

24. Notwithstanding the clear terms of the statutory embargo on the publication of information concerning proceedings relating to children as defined in section 12 AJA 1960, the court has an inherent jurisdiction to authorise the disclosure or publication of information or documents which would otherwise amount to a contempt. In the cases which have been cited in submissions by counsel, this jurisdiction has frequently been referred to as "the disclosure jurisdiction".

25. With further rules and Practice Directions governing the contents of court bundles in terms of relevance and materiality, it is difficult to imagine a scenario where the contents of a court bundle prepared for the purposes of care proceedings would not constitute 'information relating to the proceedings'.

26. Ms Newman has not yet seen any of the papers which predated her involvement in this case. However, from the various indices which have been disclosed to her, she has prepared a schedule of those documents in respect of

which she is seeking disclosure. As the Guardian observes, it amounts in effect to the entirety of the court files.

27. Not all of those documents were produced by the local authority. As is conventional in these types of cases, on each occasion when the case concerning M has been before the court, the relevant material which the court has been asked to consider has been divided into different sections. The first set of court bundles prepared for the purposes of the initial care order in March 2016 runs to almost 1,400 pages in five separate lever arch files. In addition to the case summaries, applications, orders and statements of evidence, the bundle includes a number of external reports from third party professionals, including detailed medical reports. There is also material which had been produced by different local authorities who had previously had an involvement in the case. In addition, there is a quantity of police disclosure, detailed medical records and foster care records.

28. The bundles for the hearing in June 2017 before His Honour Judge Hess (the mother's application to discharge the care order) ran to three further bundles. Whilst there was some duplication in respect of the earlier hearing in March 2016, for this contested hearing significantly more of the previously disclosed material was added including psychiatric reports, detailed medical records and records from Children's Services from another local authority unconnected with the current proceedings.

29. In terms of disclosure there is nothing controversial in the much smaller bundle of documents which was lodged for the purposes of the Court of Appeal hearing in January 2018 save for an additional statement from one of the local authority's social workers and some contact notes. However, the bundles containing the material for the rehearing before His Honour Judge Levey in October 2018 (the discharge of the care proceedings) ran to just under two thousand pages. The index to those bundles suggests that much of the material, whilst confidential, related to expert reports and assessments produced during 2016 and 2017. However, there was a significant quantity of updating material, including clinical psychology reports and an independent social worker's assessment of the mother and her husband.

30. The importance of preserving confidentiality in relation to the identity of any child or children involved in court proceedings is further reflected in section 97(2) of the Children Act 1989 which provides that:

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

31. That section of the 1989 Act is not engaged since the proceedings concerning M have now come to a conclusion. It is nevertheless a pointer in the direction of the importance which Parliament attached to the need to protect potentially vulnerable children from unwanted or harmful exposure to wider publicity whilst the courts consider the arrangements for their future care. The confidentiality which attaches to medical and social services records continues to apply to children throughout their minority and into adulthood.

Transparency in the Family Courts

32. In this context it is important to bear in mind that well-founded principles of confidentiality for these children and the professionals and others assisting the court should not be conflated with notions of 'secrecy'. In recent years there has been a welcome and progressive move towards open justice and transparency initiatives in the Family courts. In April 2009 the (then) President of the Family Division, Sir Mark Potter, issued guidance following the Government's announcement that members of the media could attend hearings in family proceedings: [2009] 2 FLR 167. That guidance established the important base line principle that, henceforth, "duly accredited representatives of news gathering and reporting organisations" would be permitted to be present at hearings of family proceedings save for those designed to achieve "judicially assisted conciliation or negotiation"'. Whilst a judge retained a residual discretion to exclude the media, the default position

from that point onwards was that, subject to statutory or judge-imposed restrictions on publishing material or reports of the proceedings, the doors of the Family Courts were open to journalists and other members of the media.

33. The 2009 guidance considered the extent to which media representatives should have access to documents to enable them to better understand the substance of the proceedings. It confirmed that in cases involving children, the court would still need to consider the proper application of existing statutory provisions restricting the identity of children and information, including section 12 AJA 1960. It recognised specifically that the ambit and reach of that protection might need to extend beyond the individual children involved in proceedings to include other parties, witnesses and others whose identities were likely to be known locally as people associated with the child and his/her family.

34. The basic structure and rationale underpinning the Government's mandate for admitting media representatives to attend family proceedings is reflected clearly in the 2009 guidance. It is recorded in paragraph 15 in these terms:

> *"…. the long standing policy of privacy in relation to children proceedings, while at the same time admitting the press, to avoid charges of 'secret justice' and to promote better understanding of the working of family courts. For these purposes, however, access to court documents is not generally necessary or desirable having regard to their confidential nature."*

35. Recognising that there will be high profile cases of particular interest to the media where access to statements and documents might assist a fuller understanding of the nature and progress of proceedings, the 2009 guidance sought to provide assistance. It anticipated how courts at all levels should respond to detailed legal argument relating to rival Convention[1] Rights, public and private interests, the welfare of children, and the construction of primary and secondary legislation: see paragraph 16.

[1] The European Convention on Human Rights as scheduled to the Human Rights Act 1998.

36. In the context of a request from a media representative to see such documents, the guidance envisaged that case summaries and position statements prepared by the parties' legal representatives were unlikely to cause too much difficulty subject to securing consent to their release. The justification for the release of this category of documents was extended to such "other documents as appear reasonably necessary to a broad understanding of the issues in the case": paragraph 20(ii).

37. The amendment to the FPR 2010, and in particular rule 27.11(2), provided the gateway for the implementation of the 2009 guidance and the admission of the press and other accredited media representatives to family courts subject to certain exceptions. It is clear from the grounds specified in rule 27.11(3)(a) and (b) that the media could properly be excluded by a judge if that course was necessary in the interests of any child concerned in, or connected with, the proceedings or for the protection of a party or witness in the proceedings or a party connected with such party or witness. Thus, the issue of confidentiality and the effects on a child and third parties of a breach of confidence was specifically preserved as a reason to exclude the media or to place restrictions on what could and could not be published about the proceedings. However, the default position regarding the attendance at family hearings of the media was preserved: a person wishing to exclude the media must satisfy the court of the necessity for exclusion.

38. Some two years later in July 2011, Sir Mark Potter's successor as President, Sir Nicholas Wall, together with Bob Satchwell, the director of the Society of News Editors, wrote a preface for the release of what he described as "a very important piece of work". That was a paper entitled *"The Family Courts: Media Access and Reporting"* written by Adam Wolanski and Kate Wilson. That paper considered media access to court documents. By this stage, the position was covered by FPR 2010 Part 12 and PD 12G. Nothing in the FPR 2010 permitted the communication to the public at large, or any section of the public, of any information relating to the proceedings and section 12 AJA 1960 continued to apply unless the court gave permission for publication. In this respect the position was different from the parallel provisions of the CPR

where there was a presumption that, in respect of hearings dealt with in an open court setting, certain documents which were relied on by the court in reaching its decision could be provided to third parties, albeit not the entire court file.

39. If a media representative wished to see documents referred to during family proceedings, the position remained that an application would have to be made to the judge for disclosure.

40. In the context of the disclosure jurisdiction, the Wolanski/Wilson paper captured several aspects of the development in the direction of travel towards more open justice in the family courts.

41. One such decision was that of Munby J (as he then was) in *Norfolk County Council v Webster* [2006] EWHC 2733, [2007] EMLR 7. The case concerned care proceedings initiated by a local authority during the course of which three children were removed from the care of their parents. When the mother became pregnant again, the local authority issued fresh proceedings with a view to removing the unborn child at birth. The basis of the earlier proceedings was an allegation that the parents had physically abused their children. The parents denied these allegations and claimed they had been the victim of a miscarriage of justice based on flawed and incomplete evidence. Their cause was taken up by both the print and broadcast media, including the BBC.

42. *Webster* is an important case in the context of the present application. With typical and robust clarity, Munby J expressed a number of fundamental principles which can be summarised in this way:-

    (i) The starting point is the fundamental and long-established principle that the English legal system is founded on its public administration.

    (ii) The possibility of miscarriages of justice in the family justice system (just as in the criminal justice system) engage the need to maintain public confidence in its workings.

(iii) Freedom of speech, as guaranteed by Article 10 of the European Convention on Human Rights, constitutes one of the essential foundations of a democratic society.

(iv) The press and media played a vital role in ensuring the proper functioning of democracy and in furthering the rule of law and the administration of justice. In this context, a court reporter fulfilled a vital role: he or she is, in effect, the "public watchdog" over the administration of justice. To this end, investigative journalists and the media in general have "an absolutely vital role" to play in "righting judicially-inflicted wrongs and highlighting miscarriages of justice".

(v) Where the court is exercising an essentially paternalistic or quasi-parental role in relation to a child, this remains an exception to the rule of publicity. The justification for the exception lies in the fact that the subject matter of such hearings usually concerns private affairs and the wish of those involved to maintain their confidentiality in those private affairs did not involve the consequence of placing in the public spotlight matters which are, and remain, essentially domestic affairs. The position may well be different in circumstances where the State is seeking to intrude into family life and remove children from their families.

(vi) Section 12 of the AJA 1960 does not prohibit the identification or publication of photographs of the child, the other parties or the witnesses, nor the identification of the party on whose behalf a witness has been giving evidence. However, notwithstanding the conclusion of court proceedings, s.12 and the limitation upon reporting on information relating to the proceedings themselves are not diluted or otherwise affected.

(vii) The court retains the ability to relax and increase these restrictions. The exercise of this power will involve the carrying out of a highly fact specific balancing exercise where conflicting rights under Arts 8 (right to respect for private and family life) and 10 (freedom of expression) will often be engaged. The need for "an intense focus" on the comparative importance of the competing rights engaged in any given individual case has to be considered. In particular, the court must focus on the justifications advanced for interfering with, or restricting, each right and the proportionality test must be applied to each.

43. It is this ultimate balancing exercise which lies at the heart of the case which is now before me. In 2004 the House of Lords had given important guidance as to how that exercise was to be undertaken. In *Re S (A Child) (Identification:*

Restrictions on Publication) [2004] UKHL 47, [2005] 1 AC 593, Lord Steyn said at paragraph 17:

> "The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

44. In *Webster*, Munby J undertook his own 'ultimate balancing exercise' on the particular facts of that case following the four principles outlined by Lord Steyn in *Re S*. Many of the views his Lordship expressed in *Webster* fall for consideration in the context of this case. He identified four particular factors which influenced his conclusion that the trial judge's restriction on publicity of any kind had been drawn too widely:-

(i) the case involved an allegation that there had been a miscarriage of justice. *("The fact that the parents may not be the martyrs they claim to be – something which I am in absolutely no position to assess and on which I express no views at all – [and] the fact that it may turn out that there was no miscarriage of justice, is not of itself any reason for denying the parents their voice.")* see paragraph 101;

(ii) the parents' own wish for publicity;

(iii) the very extensive publicity there has already been; and

(iv) the need in the circumstances for the full facts and the "truth" – whatever it may be – to emerge in a way which will command public confidence. *("In my judgment, the workings of the family justice system and, very importantly, the views about the system of the mothers and fathers caught up in it, are, as Balcombe L.J. put it in W (Wardship: Discharge: Publicity), Re* [1995] 2 FLR 466 at 474, *"matters of public interest which can and should be discussed publicly". Many of the issues litigated in the family justice system*

> *require open and public debate in the media. I repeat what I said in Harris v Harris; Attorney-General v Harris* [2001] 2 FLR 895 at [360] – [389] *about the importance in a free society of parents who feel aggrieved at their experiences of the family justice system being able to express their views publicly about what they conceive to be failings on the part of the individual judges or failings in the judicial system…) :* see paragraph 100.

45. The outcome in *Webster* at the end of the balancing exercise was a relaxation in part of the reporting restrictions imposed by the trial judge. Subject to some degree of necessary anonymisation, the publication of two earlier judgments was authorised.

46. In the context of cases involving an alleged miscarriage of justice, there is almost inevitably an assertion that there has been a failure of the *judicial* process. Whether that failure is the responsibility of the judge or failings on the part of the local authority in terms of a deficiency in the evidence which is put before the court, Munby J recognised that it was less than satisfactory that the only explanations to be given to the public are those which the judge thinks it appropriate to include either in a judgment or in a judicially approved press release: see paragraph [100] on p 237. For these reasons, his Lordship decided to go beyond the publication of the appropriately anonymised judgments which had already been delivered in the case. He allowed members of the media to attend at the forthcoming care proceedings and to report what transpired at the hearing subject to a more narrowly drawn reporting restriction order which, in terms, permitted further reporting of events already in the public domain (including photographs of the parents and one of the children), but restricted reporting of the identity (including names and addresses) of:

(a) those caring for the children on a day to day basis, including those having medical responsibility for a particular child;

(b) the identity / location of any residential assessment unit which had been involved in the proceedings;

(c) the identity/professional or other addresses of the social workers and the Guardian involved in the case and any other third party witness in the care

proceedings other than the parents who had waived their right to anonymity.

47. At the end of the day, as his Lordship stressed, the future conduct of the care proceedings which were to be attended by representatives of the media had to be left in the hands of the trial judge who would retain ultimate control so as to exclude the media from some particular part of the process (for example, whilst a particular witness was giving evidence) or to allow a category of witnesses, or a particular witness, to claim anonymity.

48. In 2014, as President of the Family Division, Sir James Munby issued further guidance on the publication on judgments in family cases which led to a significant increase in the number of judgments available on public platforms: see *Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230. This was later supplemented in December 2018 by further guidance on the anonymisation of such judgments[2].

49. The move towards greater transparency in family courts was taken up with equal and vigorous commitment by Sir Andrew McFarlane, the current President of the Family Division. In October 2019, his Lordship published further guidance in relation to reporting in the Family Courts. That guidance flowed directly (in part) from the journey which this case had taken to the Court of Appeal the previous year when a challenge was launched to the reporting restriction order approved by His Honour Judge Levey. By that stage, FPR 2010 rule 27.11 had allowed the media and other reporting organisations to attend family hearings save in certain circumstances (referred to above) where the court could direct they may not attend (see r. 27.22(3)). With effect from October 2018 a pilot scheme under PD 36J had extended r. 27.11 to allow "duly authorised lawyers attending for journalistic, research or public legal educational purposes" (otherwise known as 'legal bloggers' or 'reporters') to attend such hearings.

50. This guidance alerted such reporters as to how they might make an application to vary or lift the automatic reporting restrictions which continued to apply as

[2] https:www.judiciary.uk/publications/practice-guidance-family-court-anonymisation-guidance/

a result of the operation of s. 12 of the AJA 1960 and/or s. 97 of the Children Act 1989. It made clear that these reporting restrictions remained in place notwithstanding the relaxation of the rules in relation to the attendance at, or presence of, such reporters at family hearings. In particular, any documents disclosed to reporters remained subject to the provisions of these two statutory provisions and *remained confidential*: (my emphasis) see para 8(e) of the Guidance. It provided judges with step by step guidance as to how they should deal with an application to lift reporting restrictions and the approach they must adopt to the balancing exercise between privacy and transparency when Articles 6, 8 and 10 are engaged "and by having regard to the best interests of any child as a primary consideration": see paragraph 14.

51. The importance of confidentiality in the context of the best interests of a child at the centre of proceedings had been addressed by the President some two years earlier. In 2016, and prior to his appointment as President in July 2018, McFarlane LJ sitting in the Court of Appeal with Macur and King LJJ, considered the issue of transparency and media reporting in the context of the high profile case of Poppi Worthington over which Peter Jackson J (as he then was) had presided: see *In re W (Children) (Care Proceedings: Publicity)* [2016] EWCA Civ 113, [2016] 4 WLR 39. Those proceedings involved a rehearing of an earlier fact-finding enquiry. They had been held in private pursuant to FPR r 27.10 and, since no part of the judgment had been released by the judge, the publication of any information relating to the hearing would have amounted to a contempt of court pursuant to s. 12 AJA 1960. Shortly before the rehearing was due to take place, the judge released an edited version of his judgment from the first hearing and allowed media representatives to attend the second hearing and to report on a daily basis what happened in court. The children who were the subject of the proceedings appealed through their Guardian arguing that the judge's order had placed too much emphasis on publication and openness to the detriment of their own interests.

52. In *Re W*, McFarlane LJ said this:

> "[36] Throughout her submissions, Ms Gallagher [counsel for the media organisations] repeatedly referred to the existence of a "presumption of open justice" which, it was submitted, should govern the court's decision in the present case. With respect to Ms Gallagher, whose submissions were otherwise argued from a cogent legal basis, any presumption or principle in favour of open justice which applies generally to court proceedings does not apply to proceedings that are held in private and which relate to children. The default position in such cases is to the contrary and is, as I have described, as a matter of statute and the rules, one which prohibits the publication of any information relating to the proceedings. That default position, which is designed to protect children, can, where appropriate, be modified by a judge upon the application of a party or the media. It has in any event been tempered by the President's transparency initiative, the purpose of which is to allow greater public access to, and understanding of, the work of the family courts.
>
> [37] In the present case, Peter Jackson J used the power available to him to move from the default position so as to allow a controlled degree of publicity. That was a matter for the judge's discretion. It was common ground before this court that the discretion must be exercised by conducting a balancing exercise between the rights to privacy and a private life which are encompassed within article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, on the one hand, and the right to freedom of expression reflected in article 10. The parties in this appeal each accepted that the exercise of judicial discretion whether to relax, or increase, the default restrictions upon publication of information from Children Act 1989 proceedings is not one in which paramount consideration must be afforded to the welfare of the child who is the subject of the proceedings…."

53. That last remark must be read in the context of paragraph 41 where, in the context of his reserved judgment, McFarlane LJ revisited the jointly argued approach on which the Court of Appeal had proceeded for the purposes of the oral hearing. That decision was based upon the child's welfare not being the paramount consideration. His Lordship then referred to key authorities which tended to point in a different direct: *In Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL; [2005] 1 AC 593 (cited above), *Clayton v Clayton* [2006] Fam 83, and *In re Webster* [2007] 1 FLR 1146. The issue was left unresolved in *Re W.*

54. As to outcome, McFarlane LJ concluded that, despite "a feeling of substantial unease at this degree of openness at the start of an unpredictable fact-finding exercise", it was not possible to hold that Peter Jackson J had been wrong in his analysis and conclusions. It was a compelling case of significant public and media interest. A very young child had died and the future of her five siblings was being considered. There had already been a substantial amount of press and media coverage of the case. The essential balance which the judge had struck involved looking at "the public interest in there being the greatest achievable openness in such a serious and worrying case" (the article 10 perspective) and "the public interest in the protection of vulnerable children who are innocent victims of the circumstances outside their control, and the legitimate interests of the adults concerned" (the article 8 side). The Court of Appeal decided that there was to be some protection for the children in terms of the confidentiality of the proceedings. That protection would be achieved by delaying the permitted reporting until after the court proceedings had concluded on any given day, thereby ensuring that the court had a proper opportunity to consider whether any additional directions were required. Stock could thereby be taken so as to identify any aspects of the evidence which should properly be subject to embargo in order to protect the children's confidentiality in the proceedings.

55. The decision in *Re W* and the remarks of McFarlane LJ which I have set out above need to be borne well in mind in the context of a decision of the Supreme Court to which I was taken during the course of legal argument. *Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)* [2019] UKSC 38, [2019] 3 WLR 429 concerned a civil case and the application of a non-party (the victim support group) to see the written material placed before the court in the main action. The material sought was voluminous and the core bundle alone amounted to over 5,000 pages in 17 lever arch files. That case turned largely on the meaning and construction of CPR r.5.4C(2) which concerned "the supply of documents to a non-party from court records". The Supreme Court determined that, for these purposes, "records of the court" referred to those documents and records which the court itself keeps for its own purposes.

It did not, and cannot, be construed as referring to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much of the material lodged at court happens still to be there when the request is made: see paragraph 23 per Baroness Hale of Richmond.

56. During the course of her Ladyship's analysis, the following principles were identified:

> "45. However, although the court has the power to allow access, the [non-party] applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so….. The court has to carry out a fact specific balancing act. On the one hand will be "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose".
>
> 46. On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, *the protection of the interests of children* or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality." [my emphasis]

57. Speaking of the practical difficulties and the costs which might be involved, her Ladyship concluded at paragraph 47 that,

> "… non-parties should not seek access [to documents] unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, *which may be stronger after the proceedings have come to an end*, and that granting the request will not be impracticable or disproportionate." [my emphasis]

58. In the context of this particular application, I was taken to another decision of Sir James Munby in his capacity as President of the Family Division. *In Re G (A Child) (Wider Family: Disclosure of Court File)* [2018] EWHC 1301

(Fam), [2018] 4 WLR 120, the court had before it an application by an older half-brother (B) who sought disclosure of particular documents on the court file relating to historic (private law) proceedings under the Children Act 1989 which concerned his younger sister (G) and his parents. At the conclusion of those earlier proceedings, the trial judge had made "some extremely unpleasant and grave findings" after considering evidence about the family's personal, intimate and distressing history. G was placed in the care of her father with very limited contact to her mother. Both parents gave undertakings not to speak to the media about the case. Subsequently, B made an application to see the documents on the court file so as to understand more about his family history. The father was adamantly opposed to G being made aware of the family's history at that stage and in that way. At the same time, G's mother applied to be released from her undertaking on the basis that she wished to share with the children and the media certain aspects of the evidence.

59. At a preliminary hearing, the court accepted that B had Convention rights under Article 8 to know the truth about his past and his parents. It permitted the release to him of both the judgment and three significant expert reports who had prepared reports for the original hearing. It restricted the release of those documents to B and his legal advisers on the basis there would be no further dissemination or publication. B then withdrew his application for permission to disseminate the documents but pursued his full application for access, for himself, to all the documents on the court file. He also sought access to *all* the files in the proceedings and also to certain files in the hands of third party agencies. If the court was not prepared to allow him unrestricted access, he sought specific disclosure of copies of the minutes flowing from various child protection case conferences; the reports of two further experts; the statements of his parents and four other non-family witnesses; his own medical records and those of two (now deceased) family members, and the medical records of all three children of the family, including G.

60. These were private law proceedings. There was no issue of State intervention into this family's life. The only person with parental responsibility for G was

the father. On behalf of B it was argued that since B was no longer seeking permission to disseminate the documents to others, his application (unlike his mother's) did not engage section 12 AJA 1960. He was not seeking disclosure from anyone else as a non-party. Having referred to an earlier case which concerned an application by the daughter of an adopted person (then deceased) to access the adoption file (*In re X (Adopted Child: Access to Court File)* [2014] EWFC 33, [2015] 1 FLR 375), Munby J adopted from that case the following propositions:

> "(i) the court has a discretion whether to disclose information contained in its own file to the applicant. (ii) In considering whether or not to exercise that discretion the court should have regard to all the circumstances of the case and should exercise its discretion justly. (iii) [In *Re* X, an adoption case], the public policy of maintaining public confidence in the confidentiality of adoption files is an important consideration. (iv) The duration of time that has elapsed since the order was made, and the question of whether any or all of the affected parties are deceased, are important considerations. (v) The nature of the connection between the applicant with the information sought from the court file is an important consideration. (vi) The potential impact of disclosure on any relevant third parties, and any safeguards that could be put in pace to mitigate this, is an important consideration.": see para 29.

Medical evidence

61. In terms of the confidentiality attaching to the medical evidence in *Re G*, his Lordship cited the fundamental and well known principle which had been acknowledged in both the domestic context and the Strasbourg jurisprudence: *Z v Finland* CE:ECHR:1997:0225JUD002200993 (1998); 25 EHRR 371 and *MS v Sweden* CE:ECHR:1997:0827JUD002083792 (1999); 28 EHRR 313:

> "… the protection of … medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general."

62. On behalf of the applicant in *Re G* it was argued that although the disclosure of the medical records engaged his siblings' article 8 rights and their rights to

medical confidentiality, it went largely to historic matters about which he knew much already. Since he was undertaking to keep the information confidential and was willing to undertake not to disclose it to third parties, it was difficult to see what the detriment to his siblings might be.

63. That argument was rejected. At the heart of the case was B's wish to understand the proceedings, the basis for the trial judge's findings, the methodology he had used in reaching his conclusions and a wish overall to understand his family's history. The President held that what had the most obvious and direct impact on B's life was the trial judge's *decision* and the consequences which flowed from it. To understand the basis of that decision B plainly needed access to the judgment which set out, by reference to the evidence he had heard and read, the judge's reasons for concluding as he did. Whilst a proper understanding of that judgment might require access to some of the centrally important documents referred to in the judgment, "this does not mean that B should be entitled to conduct an archaeological excavation through the entirety of the trial bundles so as to be enabled to come to his own conclusions about the quality of the evidence or the reliability of [the trial judge's] reasoning and conclusions, especially if, as here, much of the material he seeks to mine relates to the very personal and private aspects of the lives and histories of other family members, including their medical records": see paragraph 38.

64. B's application to see the entire court file was rejected. He was permitted to have copies of two further experts' reports and the statements of his mother and father on the basis that they were not to be disclosed to anyone other than his legal team.

65. The mother's application to be released from her undertaking was refused. She told the court she had wanted to ensure that her children in the future would have the chance to make up their own minds about her by reading the entire story. For these purposes she wished to show them to "a reputable broadcaster … to corroborate [her] assertions of a miscarriage of justice" (paragraph 46). She wanted to take her case "to the court of public opinion".

She believed that there were serious deficiencies in the expert evidence which had been put before the trial judge.

66. One of the central reasons for rejecting the mother's application for permission to publish aspects of the earlier case was the disproportionate risk to her children. There was no prospect of sufficiently anonymising the sensitive information within the papers to ensure complete confidentiality thereby exposing them to public discussion of some painful and distressing family history: paragraph 51. The fact that G was a minor made no difference to the outcome of this particular balancing act. It would be equally applicable once she attained her majority.

67. I have referred earlier in my judgment to the case of *A v Ward* (2010), a decision of Munby LJ sitting as a judge of the Family Division. The case concerned a very young child who had presented at hospital with various fractures. Although there was no other evidence of poor parenting, the local authority commenced care proceedings. Evidence was given by the treating clinicians, social workers and expert witnesses. The trial judge found in favour of the parents and dismissed the case against them. Those parents wished to tell their story through a television documentary. The issue was whether the professional witnesses were entitled to injunctive relief in order to preserve their anonymity. The parents sought to name them and applied for the disapplication of section 12 of AJA 1960 in order that they could speak publicly about their experience of the care system and various individuals within it.

68. The majority of the judgment in *A v Ward* is focused on the issue of the anonymity of the professionals involved in the case. In terms of whether or not the parents should be allowed to publish information about their experience and that of their child, his Lordship held that, since they were the only persons holding parental responsibility for the child and there was no further State intervention or involvement with the family, any decision as to whether or not it was in their child's interest for any of this material to be put in the public domain was one for the parents. However, he explained that the balance in this particular case was not, as is so often the case, a balance

between differing and conflicting *private* interests; it was essentially a balance between the private interests of the Ward family and the various public interests they could pray in aid and, on the other side, the public interests in favour of preserving confidentiality for children who found themselves at the centre of proceedings. That confidentiality will often find traction in one or more of the factors identified in *Re X (Disclosure of Information)* [2001] 2 FLR 440. This was an earlier decision of the same judge. At paragraph [24] he identified those factors pointing towards confidentiality as including:

(i) the interest of the *particular* child in maintaining the privacy and confidentiality of the proceedings;

(ii) the interests of litigants generally who should not suffer the consequences of placing in the light of publicity their truly domestic affairs as a consequence of seeking the court's assistance and protection. All too often those domestic affairs might involve the most intimate, personal and painful issues which ought properly to be shielded from the public gaze;

(iii) the public interest in encouraging frankness in children's cases and securing the cooperation of doctors, school teachers, neighbours, the child in question and other close relatives who should not be deterred from giving evidence by fear that their private affairs or privately held views would be exposed to the public gaze;

(iv) encouraging frankness from the perpetrators of all forms of child abuse;

(v) preserving faith with those who have given evidence in the belief that the proceedings would remain confidential.

69. During the course of this hearing, Ms Louise Tickle, the other journalist who attended this hearing, handed up a short judgment delivered by Bodey J in a case in which she had been involved: *Louise Tickle v The Council of the Borough of North Tyneside & Others* [2015] EWHC 2991 (Fam). In that case, Ms Tickle had asked the court for permission to report certain care

proceedings in circumstances where the local authority was seeking a reporting restriction order. Ms Tickle's application was supported by the mother. She was working with Ms Tickle in relation to her experiences with her children in the care system. In that case, a compromise was reached in relation to reporting restrictions which appropriately balanced "(a) the public interest in the media being able to report care proceedings as against (b) the interests of the privacy of those whose lives are intimately involved": paragraph 5.

70. At paragraph 7 of his judgment, Bodey J made the following comments in relation to the practicalities of applications of this nature:

> "… However, what I will say is that this application demonstrates how time consuming and troublesome applications like this can be; not only for the media, but also for the court and for all parties. These are not easy applications. They require time, effort, research and expense on what is essentially a satellite issue. For these reasons it is important that if and when Local Authorities and the media (and/or the other parties) do come to realise there is an issue between them about how much should be reportable and on what terms, there should be sensible and responsible dialogue as soon as possible, with a view to finding an early *modus vivendi*. With the application of give-and-take, a measure of common-sense, and the engagement of the Children's Guardian, it should be possible in most cases to come up with a formula based on decided authority which steers a path between (a) the need for greater transparency in the public interest, and (b) the need to respect the privacy and sensitivities of those whose lives are involved."

71. In that case, and in terms of the disclosure of documents, the reporting restriction order was permissive rather than prescriptive in its effect. It provided that any party "may disclose to Louise Tickle documents produced for the purposes of the proceedings for the specific purpose of informing her journalism" but subject to the specific proviso that the documents themselves could not be published in full or further distributed by her.

72. The onward march of transparency in the Family Courts is further illustrated by the initiative advertised by the President, Sir Andrew McFarlane, in the *View from the President's Chambers* which he published in May 2019. In that document, his Lordship said this:

"*Transparency*

29. The issue of 'transparency', namely the degree to which the workings of the Family Court should be more open to the public, remains one that is regularly raised in the Press and in discussion by those who seek to persuade The President to one view or another. It is important that the Family Justice system is as open and transparent as is possible, whilst, at the same time, meeting the need to protect the confidentiality of the individual children and family members whose cases are before the court.

30. It is now some time since the issue was looked at on a root-and-branch basis. In the intervening time we have operated the current arrangements where journalists may attend any Family Court hearing, but not report the substance of the cases that they may observe. Following Presidential guidance, more cases are now regularly published on the BAILII website. In recent years full reporting has taken place of some important cases. In addition, the work of the Transparency Project, Dr Julia Brophy and others, together with the voices of young people who have [been] involved in the system, has produced a significant amount of further information and experience on the issue.

31. It is important that the issue of Transparency should be kept under active review. As previous consultations have demonstrated, it is an issue which divides opinion. The valuable process undertaken in 2006 by Lord Falconer when Lord Chancellor was entitled 'Confidence and Confidentiality', thereby neatly teeing up the twin, and competing, priorities of enhancing public confidence in the system and, at the same time, maintaining confidentiality for the individuals who come to the court. As that process, now more than a decade ago, found 'Transparency' may be a circle which is difficult to square.

32. I therefore intend to establish a 'Transparency Review', during which all available evidence and the full range of views on this important topic can be considered (including evidence of how this issue is addressed in other countries). The aim of the review will be to consider whether the current degree of openness should be extended, rather than reduced."

73. It is against that background that I turn now to the competing submissions of the parties in this case. I can distil them in this way.

The submissions

The applicant, Ms Newman

(i) Nature of the application

74. Through Ms Proops QC, Ms Newman contends that this case raises issues of legitimate and important debate concerning, as it does, a child who was taken into care *'on the slimmest of evidence'* by a local authority which has previously been reported in the wider news media for having the highest rate of adoption for under-5s in England[3]. Ms Proops QC maintains that the fact that M was subsequently returned to her mother after further judicial intervention, including that of the Court of Appeal, does not dilute the importance of informed public debate into the basis on which this particular local authority makes decisions. As a well-respected journalist with a long-standing interest in these proceedings, Ms Newman points to the fact that she has abided by the terms of the existing reporting restriction order and the court can have confidence in her ongoing compliance in terms of maintaining confidentiality in respect of the material she wishes to see. By gaining access to the court files she will have an opportunity to undertake an independent journalistic assessment as to whether or not they contain information which should be made available to the public at large. In that event, she accepts she will need to return to court to seek permission to publish at which stage the court will have an opportunity to conduct a further balancing exercise to test the extent to which the article 10 rights of the media should prevail over the article 8 rights of M and anyone else who may be affected by the resulting publicity if permission to publish is given.

(ii) Nature of the access risk

75. In these circumstances, Ms Proops QC submits that the focus in the present case must be the assessment of the risk of harm if all that is sought at this

[3] See 'Adoption and care rates high in some areas', 11 June 2018: https://www.bbc.co.uk/news/uk-44431585

stage is access rather than the ability to publish. In circumstances where Ms Newman has made it quite clear that she does not make her application in order to establish any wider principle of journalistic freedom to access and publish material put before the court in care proceedings, there is no harm to the child or anyone else in allowing her to have access to all the underlying material which has been generated in this case. When the risk to M is analysed in this context, it is "vanishingly small".

76. Further, she submits that Ms Newman would have been entitled as a member of the press to attend the earlier hearing before His Honour Judge Hess when the evidence was put before the court: FPR r. 27.11. In these circumstances, it is not enough for the local authority to rely on confidentiality per se. Whilst there is no guidance as yet in relation to the extent to which the court should exercise its disclosure jurisdiction since the introduction of r. 27.11, it is clear from the President's Guidance (Sir Mark Potter, 2009) that the media would be able to make applications to see the underlying court documents. Ms Newman was not in a position to make her application during the currency of the proceedings concerning M but that is no more than a reflection of the fact that journalists and the wider media do not have the resources to attend every family hearing.

77. Allied to that point is the fact that many family proceedings are resolved by agreement without the evidence being heard. In this way, the media has no opportunity to ask for access to documents and the operation of the family justice system and decisions made by local authorities are "effectively rendered entirely non-transparent".

(iii) Information already published

78. Ms Proops QC submits that there is already a great deal of information about M and her family in the public domain as a result of the judgments published by the Court of Appeal. This includes details of the family's ethnic origins, immigration history, religion and socio-economic status. Each of the judgments of His Honour Judge Hess and the Court of Appeal records some information about medical history including some specific diagnosed

conditions. On a proper analysis much of this information is no longer confidential and publicly available in any event.

79. In addition to its interest to the general public as a care / adoption matter, the proceedings have already been the subject of a report by the BBC following the rehearing[4].

80. Ms Proops QC urges me to scrutinise closely the wider public interest issues in permitting Ms Newman to embark on the investigative journalism she is proposing to undertake should she get access to the papers. These include:

(i) the open justice principle; and

(ii) the Article 10 rights of journalists to report on such proceedings and the corresponding rights of the public to receive such information. She submits that the particular circumstances of M's case justify wider media scrutiny and comment and this should be both enabled and sanctioned by the court.

81. As to the scope of the journalistic endeavour which Ms Newman proposes to undertake, she wishes to perform what is essentially a holistic evaluation of the entire case including an investigation into the decision-making processes of this particular local authority which is already the subject of press reporting into the disproportionately high levels of young children it is (allegedly) placing in the care system. Allowing her access to the entirety of the case material will ensure that she has access to the full truth thereby avoiding the risk of potentially inaccurate reporting. In particular she wishes to understand whether the local authority acted "unlawfully" in applying for a placement order and whether the placement order which was made amounted to a miscarriage of justice. In this she has the full support of the mother who has given consent on behalf of M to the disclosure exercise.

82. In this context, Ms Proops QC submits that published judgments will only ever tell part of the story. The purpose of allowing journalists access to

[4] 'The mother who lost her daughter over an EpiPen': 16 February 2019: https://www.bbc.co.uk/news/uk-47252605

Family Courts and the initiative behind r. 27.11 is "their ability to conduct an independent journalistic assessment of what is said and done in court". If the media are to discharge their function as the watchdog of the public in this context, they must be in a position to examine the pre-proceedings decisions of local authorities and the material on which these are based as well as the decisions of the courts. In this context their role is properly described as closer to that of a public 'bloodhound' than a watchdog[5]. This level of scrutiny is fundamental to the achievement of transparency and accountability within the care system.

The local authority

83. The local authority has identified some documents which it has agreed to provide to Ms Newman which do not undermine the private rights of this child. It maintains, following *Dring*, that it is for Ms Newman to show good reason why access to the documents sought would advance the open justice principle. The submissions advanced by Ms Rogers QC on behalf of the local authority boil down to six headline issues. I deal with each in turn.

(i) *It's only access ….*

84. Ms Rogers QC accepts that Ms Newman's professional credentials as a journalist are well established and she recognises that she has a legitimate interest in the matters she wishes to investigate. However, she reminds me that the breadth of the request for access is unprecedented and goes beyond any request for disclosure which has been made either in the Family jurisdiction or beyond. She points to the fact that what is sought represents a significant intrusion into matters which, by their nature, concern private rights. The law is such that, merely having access to a private document for the purposes of reading it, can represent an intrusion of that privacy: see *Imerman v Tchenguiz and Others* [2010] EWCA Civ 908, [2011] Fam 116. Whilst it is open to the court to authorise such an intrusion and render it lawful, the court must nevertheless look for a proper *justification*. She foresees a danger that if

[5] See, for example *Sanoma Uitgevers v Netherlands* [2011] EMLR 4 (Grand Chamber) at [50] and *Axel Springer v Germany* [2012] ECHR 227 (GC) at [79] and [91].

this access request is granted, it will open the way for many other journalists to seek access to court files.

(ii) *What is unusual or unprecedented about this case in particular ?*

85. Next, Ms Rogers QC submits that this is but one case amongst many. Ms Newman has failed to point to a feature which takes it out of the run of many similar cases dealt with daily in courts up and down the land. It did not develop into a case about fabricated or induced illness and it was never the subject of a forensic investigation on that basis. She points to the fact that all parties (including the mother) consented to the initial care order on the basis that threshold was crossed. Whilst the mother may have had regrets about her decision to agree that position, it was nevertheless a voluntary agreement between M's parents, approved by the court, which led to this child's original placement with her biological father.

86. In terms of the information which is already available to Ms Newman, Ms Rogers QC points to the fact that His Honour Judge Levey permitted the publication of the judgment delivered by His Honour Judge Hess in June 2017. Ms Newman has a copy of that judgment. As is clear from that judgment, His Honour Judge Hess acknowledged that, at face value, this was not a family in which the local authority's children's services department was likely to have been involved (para 49). Whilst the mother and her husband had made allegations against the local authority that there was an element of institutional racism driving its approach to the case, that had been specifically rejected by the judge and did not resurface as an allegation when the case went up to the Court of Appeal. The fact that Ms Newman, or any other journalist, *could* have attended that hearing and listened to the evidence (including the oral evidence from all the local authority's witnesses) does not mean she, or anyone else, would have been granted access to all the documents. On the contrary, Ms Rogers QC submits she would not have been granted that access although she might have made an application for permission to report some of what she had heard as the case progressed.

87. Ms Rogers QC further submits that King LJ gave a full judgment in the Court of Appeal and explained precisely why the trial judge was reversed and his placement order set aside. Thus, to the extent that there had been flaws in the judicial process in terms of the inadequacy of reasoning or analysis underpinning the original placement order, that potential injustice to M and her family had been exposed and made right by the higher court's reversal of the placement order. The Court of Appeal had thereby fulfilled its proper function as a check and balance on a potential miscarriage of justice. Furthermore, Ms Rogers QC argues that the mother's failure to qualify for legal aid to pursue her appeal was not reflected in a costs order on the basis that the Court of Appeal held that the local authority had not been acting unreasonably in supporting the judge's decision in the context of the appeal.

88. The local authority, through Ms Rogers QC, accepts that all judicial decisions are properly subject to media scrutiny but, here, the width and breadth of the disclosure which is sought takes the law into new and, as yet, unchartered territory. She makes a fundamental but compelling point that family proceedings involving children are held in private for a good reason. Apart from the privacy rights of the child, or children, and their family, others who provide documents or disclosure for such proceedings often do so in the legitimate expectation that the information will remain private.

89. She reminds me that both Articles 8 and 10 of the Convention are qualified rights. Article 10(2) provides for the imposition of restrictions on the basic right to freedom of expression where these are justified as necessary in a democratic society in the interests of certain specified matters which include the protection of the rights and reputations of others. Whilst the press and media are properly to be regarded as "the eyes and ears of the public" in court proceedings, the highest courts in England & Wales and elsewhere in Europe have nevertheless recognised the need for exceptions to the principle of open justice outside the family jurisdiction: see, for example, *Khuja v Times Newspapers Ltd* [2017] UKSC 49, at paragraph [15] where Lord Sumption acknowledged that the principle of open justice had never been absolute. Both

national security and individual rights to privacy under Article 8 had made material and legitimate inroads into the open justice rule.

(iii) What is open justice about ?

90. In essence the local authority submits that the purpose of open justice is to enable the public to understand and scrutinise the justice system. The media is allowed access to documents in order to inform a better understanding of the issues which fall to be decided. In the context of her third submission, Ms Rogers QC took me to the decision of the Court of Appeal in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court and Another (Article 19 intervening); Guardian News and Media Ltd v Government of the United States of America and another)* [2012] EWCA Civ 240, [2013] QB 618. That case concerned a judicial review of an extradition case in which a district judge sitting in a magistrates' court had refused an application by the media to inspect specified documents relied on by the parties and referred to in open court during the original hearing. The media sought to argue that they should be entitled to see and take copies of witness statements, written arguments and correspondence which were supplied to the judge for the purpose of the extradition hearings. At first instance the district judge determined that she had no power to grant the media's request. Having conducted a wide-ranging survey of both domestic and European jurisprudence, Toulson LJ explained the development of the court's power to determine what open justice requires. At paragraph 85, his Lordship said this:

> "[85] In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. ….. I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

91. Thus, we see a limited recognition of a default position whereby the media is entitled to court-generated documents subject to a fact-specific proportionality exercise.

(iv) Article 10: what it is not: rules, practice directions and the inherent jurisdiction

92. However, Ms Rogers QC submits that Article 10 is not a stand alone right of access nor does it *impose* on a court an obligation to impart information. I was taken to the decision of the Supreme Court in *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2014] UKSC 20, [2015] AC 455. That case concerned a request made by a journalist to the Charity Commission under the Freedom of Information Act 2000 for disclosure of certain information relating to enquiries which the Commission had made into a particular charity. In delivering the judgment of the court, Lord Mance JSC introduced the principle at the heart of the appeal in this way:

> "Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend on it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal."

93. Having conducted a survey of both European and domestic jurisprudence, Lord Mance concluded that, on its face, article 10 is concerned with the receipt, holding, expression or imparting of thoughts, opinions, information, ideas and beliefs. "It is concerned with freedom to receive information, freedom of thought and freedom of expression. It does not impose on anyone an obligation to express him- or itself or to impart information": see paragraph 58. Lord Toulson JSC expressed a similar view at paragraph 147:

> "… I cannot see the logic of using the existence of a duty of disclosure in domestic law as a platform on which to erect a duty under article 10, as

> distinct from article 6. As to the more radical suggestion that article 10 gives rise to a prima facie duty of disclosure of any information held by a public body which the applicant seeks in order to promote a public debate, this is flatly contradictory to the Grand Chamber decision in *Leander* 9 EHRR 433. As Lord Mance JSC has commented, it would amount to a European freedom of information law established on an undefined basis without the normal checks and balances to be expected in the case of freedom of information legislation introduced by a state after public consultation and debate."

94. Ms Rogers QC submits that, in terms of the breadth of this particular request, I must look at the purpose of the rule change which allowed journalists to sit in on otherwise private family hearings. She points to the President's guidance issued in April 2009[6]. It plainly anticipated that taking that step would inevitably open the door to requests by the attending journalists as to what they could report and what they could see in terms of the case material. As the guidance makes clear, court-imposed restrictions designed to protect the identities of vulnerable children, the parties, witnesses and others whose identities would be known locally as associated with the child or his family would often be necessary. As the guidance sets out at paragraph 15,

> "No doubt the basic opposing arguments in relation to the question of access to documents will be, on the one hand, that the Government has sought to retain the basic structure and rationale of the long standing policy of privacy in relation to children proceedings, while at the same time admitting the press, to avoid charges of 'secret justice' and to promote better understanding of the working of the family courts. For these purposes, however, access to court documents is not generally necessary or desirable having regard to their confidential nature."

95. Pending the development of further guidance from the High Court and appellate courts, it gave some detail of the sort of documents which a journalist attending a private hearing might wish to apply to see. These included "such summaries, position statements and other documents as appear reasonably necessary to a broad understanding of the issues in the case": see paragraph 20(ii). Even in respect of these categories of documents, consent, anonymity and restrictions upon onward disclosure were to be important

[6] [2009] 2 FLR 167 (see above)

considerations in the exercise of judicial discretion and case management. As Ms Rogers QC put it, the basic question which a judge had to ask him- or herself was, "What do you need as a journalist to follow the case ?".

96. On behalf of the local authority, she submits that the Family Procedure Rules 2010 continue to limit the extent to which parties are entitled to share information except in limited, defined circumstances. Rule 12.73 covers what information may be communicated in relation to proceedings held in private without exposing such communications to becoming the subject of contempt proceedings. R. 12.73(2) is clear: nothing in this chapter permits communication to the public at large, or any section of the public, of any information relating to the proceedings save where permission is granted by the court or in the limited circumstances set out in r.12.73(1). That contemplates communications between parties and their legal advisers, welfare officers, experts involved in the case and the like. Practice Direction 12G puts the flesh on the bones of what is and is not permitted in terms of disclosure, subject always to the overall discretion vested in the trial judge to enlarge the scope of any disclosure which may be necessary in any particular case.

97. I accept this as an accurate statement of the current law. In effect, a party can apply for permission to secure the release of confidential documents from the proceedings but has no automatic right to see them whether, in the case of a journalist or anybody else, they were permitted to attend the hearing in question. The court must then ask why that disclosure is being sought. It is accepted in this case that Ms Newman is a journalist with a serious purpose, but that fact alone does not provide a starting point: access is not the default position under the FPR 2010. It does, however, as we have seen, engage the ultimate balancing exercise anticipated in *Re S* (above).

98. I will deal with Ms Rogers QC's final point about the breadth of the request itself in due course when I have considered that balancing exercise.

99. Thus I turn finally to the submissions made on behalf of M's Guardian.

The Guardian on behalf of M

100. Ms Fottrell QC acknowledges that the decisions taken in this case by the Family Court have come under considerable and justifiable scrutiny. She recognises that the case raises issues about the removal of children from their parents as a result of medical evidence which has been subsequently been found not to justify removal. This, in turn, as she acknowledges, raises a broader concern about the exercise of the statutory powers under Part IV of the Children Act 1989. She makes the very valid point that *all* parties in this case have an interest in transparency and the efficient operation of the family justice system.

101. For the purposes of her submissions, the Guardian has confined her professional analysis to what she believes to be in the best interests of this particular child and has reached the conclusion that disclosure is not in M's best interests. She does not believe that M should be further burdened with any direct involvement with the court process now that it has come to an end. She has given significant weight in reaching her recommendation to M's valuable and important rights under article 8(1): disclosure of the full court file to a journalist, albeit a respected professional, would not coincide with the child's best interests. In taking this approach, the Guardian recognises that she departs from the view which M's parent has expressed.

102. In so doing, she asks me to undertake the balancing exercise from the foot of an acknowledgement that *all* parties in this case have been acting in good faith in adopting the positions they have taken. She stresses that this is not a case where any individual party is seeking to withhold information. She recognises that this is a decision for the court. She makes what is to my mind a valid point which is this. To some extent it is slightly artificial to adopt a bifurcated approach to Ms Newman's request for a disclosure order. She is seeking disclosure because she wishes to write about the case and publish what she writes with appropriate journalistic commentary. To look at the balancing act which is required on the basis that she will see the documents and there the matter will end does not reflect the reality of the situation. Thus, instead of asking, 'What is the harm in her seeing the documents if she has to return to seek the court's permission to publish', Ms Fottrell QC submits that the

correct approach is to ask, 'Where do this child's interests lie ? What weight should be attached to those interests in the light of the competing interests of the press under article 10 ?'

103. Ms Fottrell QC reminds me that there is a very strong public interest in maintaining the privacy afforded to proceedings which concern children. She points to published research[7] which demonstrates the extent to which children who are the subject of such proceedings invariably resist wider publication about their private family circumstances. They worry about general publicity and being the subject of speculation amongst their peers, friends, neighbours and classmates. The preservation of confidentiality (or privacy) in relation to the intimate details of their family lives is there to protect them as individual children as well as for purposes of protecting the public interest and nothing in the transparency initiative dilutes that principle.

104. The private rights of children are, she submits, no less important than those of an adult and the court should look for solid justification before invading the privacy of information contained in documents such as psychological reports and medical records. This principle achieves greater momentum in circumstances where the disclosure sought involves the release of these documents not to another family member or associated party but to a journalist who is a complete stranger to the child concerned. Ms Fottrell QC submits that children such as M are entitled to have their private information under the careful control of the court. She submits that whilst disclosure is often necessary when it is made to third parties involved in litigation which is designed to achieve an outcome based upon that child's best interests, we should only step over that line so far as is necessary. The mere fact that M's mother is prepared to consent to disclosure on behalf of her child is not a good reason to avoid the careful balancing exercise which has to be undertaken by the court which ultimately controls the process of disclosure.

[7] Dr Julia Brophy's study (with others) on "Safeguarding, Privacy and Respect for Children and Young People & The Next Steps in Media Access to Family Courts" (July 2014); "Openness and Privacy in Family Proceedings", Sir Nicholas Wall Memorial Lecture, 2018, by Lady Hale, Family Law [2018] 978.

105. Ms Fottrell QC maintains that the arguments advanced by Ms Proops QC on behalf of Ms Newman have conflated the position in relation to the difference between a child's best interests and the paramountcy principle. Here, she submits that the best interests of a child will always be the court's primary concern; the paramountcy principle goes merely to weight in any case where that principle is properly applied.

106. In this context, she relies on the observations of Baroness Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166. The decision in that case concerned the weight which should be given to the best interests of children who are affected by the decision to remove or deport one or more of their parents from the country. From paragraphs 21 to 28 of her judgment, Baroness Hale traced the development of the broad consensus which had emerged in both domestic and international jurisprudence that, in all decisions concerning children, Convention rights had to be interpreted on the basis that their best interests must be paramount. Her Ladyship pointed to article 3.1 of the United Nations Declaration on the Rights of the Child 1989 ("UNCRC") which provides as follows:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

107. This imperative is now reflected in section 11 of the Children Act 1989 which places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. In a separate judgment given in that case by Lord Kerr, he said this at paragraph 46:

> "It is a universal theme of the various international and domestic instruments to which Baroness Hale JSC has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child

> clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in the child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

108. Ms Fottrell QC submits on behalf of M's Guardian that, contrary to the assertion made on behalf of Ms Newman, this is not a particularly unusual case on its facts. It was the subject of a successful appeal and resulted in the reversal of the placement order made by His Honour Judge Hess. However, the material to which Ms Newman seeks access is typical of most of the information and records which are placed before the court in any public law care proceedings. The court's focus should therefore remain on the nature of the information to which access is being sought.

109. In this context she highlights the sensitive personal information about M within the social service records and the medical information. The request in this case to inspect the entire file of material which has been collected in respect of M going back several years represents a significant quantum leap from any previous permission given by a family court in response to a request from a journalist. In urging caution, it is submitted on behalf of the Guardian that I should bear in mind the following contra-indicators:-

(i) the nature of the information contained in the documents and the highly private and sensitive matters on which it touches;

(ii) the fact that some information is already in the public domain is not a sufficient reason for disclosing further details which may well be detrimental to the child;

(iii) the interests of M and her mother may not always coincide;

(iv) in carrying out the balancing exercise the court must consider the impact of disclosure on M not simply now at this point in her life but throughout her adolescence and thereafter as she grows into a young woman

110. Ms Fottrell QC makes the point that this is not an application by M's mother for access to the information. It is an application by a journalist who supported her original application to the court with the following justification for her request:

> "I would like the Court to grant me permission to view the documentation in the case concerning the child in case No B4/2017/1863."
>
> "I have an interest in fabricated illness on which I have also previously reported, as well as in the circumstances in Southampton. I hope to write an in depth report on this case which sheds light on both of these factors. However the judgments alone do not provide sufficient insight into the case to allow this."

Discussion and analysis

111. In considering where the balance lies in this case, I start, first, with a survey of the nature of the material in respect of which disclosure is sought. This I take from the various indices to the trial bundles which have informed the breadth and reach of Ms Newman's current application. These documents and the information contained within them have not been made available to me for the purposes of this hearing. The merits of her application have been argued from the foot of existing law as it has developed through cases and statutory guidance. My core bundle was restricted in the main to the application and the statement in support, previous judgments and orders and such third party responses as had been received from the professionals to whom notice of this application had been given. In contrast I had three full bundles of authorities emanating from domestic and international courts at first instance and appellate level.

112. The first point to make is that I am dealing here with a particular application from a journalist who is interested in securing access to material from a particular case. It would be artificial, in my judgment, to proceed on any basis other than that this application has been launched with a view to the eventual exercise of Ms Newman's considerable journalistic talents and skills. She has a proper professional interest in matters which she believes this case might help her to expose to the wider public. She does not know the extent to which

her enquiries might reveal perceived deficiencies or shortcomings by any of the public bodies involved but she wants to conduct an overarching survey of all the material which the case has generated in order to reach her professional conclusions. At the end of that process, she will be very likely to come back to the court with the results of her endeavours and seek to justify afresh why particular information should be disseminated more widely to the public at large in order to inform future debate and stimulate discussion about issues which are, or should be, of concern to the general public. As she put it in her original notice of application, *"I hope to write an in-depth report on this case which sheds light on [the high rate of adoption in this local authority and the issue of fabricated illness]"*.

113. I do not have access to the content of all the information which Ms Newman wishes to see. However, informed as I am by the detailed judgments which I have read both from the first instance court which made the original placement order and the Court of Appeal which set it aside, I can anticipate the substance – if not the detail – of what is likely to be contained in the court files.

114. The broad categories of the documents sought can be distilled into the following list:-

(i) medical records (including health visitor notes);

(ii) records drawn up and maintained by M's foster carers and those who supervised contact sessions;

(iii) police disclosure;

(iv) Children's Social Care records;

(v) Child Protection conference and multi-agency minutes and reports;

(vi) letters, emails and records of phone calls between professionals;

(vii) experts' reports;

(viii) Children's Social Care assessments undertaken specifically in the context of these proceedings in respect of M;

(ix) care plans and interim care plans;

(x) written statements of evidence prepared by the parties;

(xi) position statements and case summaries;

(xii) orders made by the court at various stages of the proceedings.

115. It appears that the categories of documents from (i) to (vi) above were never the subject of orders requiring the material to be filed on the official court record. They appear in the indices as a result of a direction from the court requiring the local authority to secure such records from the third parties involved and to serve them on all parties to the care proceedings. In this way, quite properly, M's parents (and her mother and M's Guardian in particular) were provided with full and transparent details of the unredacted information which had informed the approach of both the local authority and the social workers and other professionals involved in the case. It was information which presumably informed the mother's legal advisers in their conduct on her behalf of the application to discharge the care order and her subsequent challenge to the placement order.

116. In this context, I remind myself that I am not in this instance dealing with an application by this mother for permission to release any court bundles she may have retained to Ms Newman. I am dealing with an application made by a professional journalist who enjoys the mother's confidence for permission to access source materials which would otherwise be confidential to the parties and the court.

117. Whilst a valid distinction to draw, it seems to me that the mother's wish to reopen these matters and to engage for these purposes the journalistic skills of Ms Newman provides a parallel platform in what is essentially their joint approach to this court. The absence of the mother as a represented party in this hearing has, I suspect, more to do with the financial cost to her of taking that position. She has given her full consent to the release of the information sought and has given that consent both on her own behalf and that of her child. Thus, the fact that the disclosure application is made in this instance by a journalist rather than a member of the family affected by any order may be of less weight in the exercise I have to conduct.

118. That said, I bear in mind that the essence of the application is a request by Ms Newman for the court's permission to immerse herself in the private detail of this family's domestic affairs (for these purposes with M at its centre) in a search to uncover material which may assist in exposing to public debate at least one of the questions she has formulated through her counsel: did this local authority act lawfully in commencing care proceedings in respect of this child ?

119. It seems to me that the answer to this particular question is one that can only be determined by the court in accordance with established legal principles. At the end of the day, it is not for journalists to determine the *lawfulness* of any particular decisions taken by judges or public bodies. That is the function of a judicial system which operates within State-mandated boundaries and judicial precedent. It is entirely appropriate and an important part of the media's function to hold up to public scrutiny and debate the reasons for the rules which bind us together as a democratic society. Equally, they must ensure that unintended consequences of legislation and miscarriages of justice in any individual case are subjected to the spotlight of intense public scrutiny and debate. In similar terms, any exercise of judicial discretion has to be undertaken (i) from the basis of established facts, and (ii) with a fully reasoned exposition or judgment which sets out a comprehensive and transparent basis for a particular decision. In this case, the important check and balance which exists as a function of the appellate process intervened to put right the potential injustice for this child which it agreed had occurred. The thorough and careful judgment which King LJ gave at the conclusion of the appeal explains precisely what mistakes had occurred, what questions had not been answered by the trial judge, and the defects in the process of his decision-making which had exposed M to the risk of being permanently separated from her birth family. There was no criticism of the local authority in *launching* the care proceedings as part of its statutory obligations to protect vulnerable children living within its area of responsibility. Indeed, there was no criticism of that authority for defending the mother's appeal. In finding that its actions had not been unreasonable so as to attract a costs sanction, the presumption has to be that the Court of Appeal found it to have been acting reasonably.

120. None of this minimises the important and vital work which the press and other media do to challenge injustice where and when they find it. Transparency of process requires a full understanding of not only how decisions are made but the basis of the facts and evidence-gathering which supports those decisions. The opportunity which journalists now have to sit in and observe the Family Courts in action gives them the opportunity, on behalf of the wider public, to see that process unfolding in real time and to observe the procedures which are put in place to ensure a fair and Article 6-compliant hearing for all the families involved. When such litigation concerns State intervention in family life, it is imperative that decision-making is subjected to particular scrutiny.

121. However, none of this adequately answers the legitimate questions which Ms Newman raises from her perspective as a journalist in relation to why this case ever came before the Family Court in the context of public law care proceedings. She seeks to understand how social workers and others make their decisions and the parameters within which issues and concerns for children are addressed. She wishes to explore, by reference to this particular case study, whether wider policy considerations influenced or determined decisions taken by the local authority at crucial points in that process. That in itself raises the issue of how far her Article 10 rights are engaged in the balancing exercise. I have determined that they plainly are engaged. Her request to *access* this information, if not to publish it without first securing the court's later permission, raises many if not all of the considerations which would fall to be examined at the next stage, i.e. the permission to publish.

122. In this context I respectfully align myself with the description which MacDonald J gave in relation to the nature of a family's Article 8 rights. In *H v A (No 2)* [2015] EWHC 2630 (Fam), he described the scope of Article 8 as

> "… a wide one, encompassing not only the narrow concept of personal freedom from intrusion but also psychological and physical integrity, personal development and the development of social relationships and physical and social identity".

123. In this case, M's mother has given her consent to the release of her own and M's personal information to Ms Newman. She has consented on behalf of them both to every last detail of this case being released to a journalist whose

objective ultimately is to "write an in depth report" which has the potential to expose the family, and the child in particular, to further press intrusion into, and exposure of, intimate details of their private family history.

124. On behalf of Ms Newman, Ms Proops QC has taken me to the email which the mother sent to the court before this hearing commenced. In that email she confirms that she has no financial interest in the outcome of any future publications about the case. She says she has not been subjected to duress or other pressure to agree to the disclosure request. She continues in this way:

> "It is my believe *[sic]* that issues in this case are now in the public interest. In regards, to maintaining the privacy of my daughter, [M], and her family, this is now unachievable. This is due to the fact that the Family Court Division has published documents currently available in the public domain that contains unique private information, leading to her identification. Hence the matter of protecting [M's] privacy and Human Rights is now beyond repair.
>
> The family is currently accessing privately funded counselling services to help [M] cope with the effects of the trauma she has experienced and the impact it has on her family, including that of future generations. The help that [M] and her family has received from the Local Authority and with the input of the Children's Guardian including play therapy, has been inadequate and obstructive throughout the reunification process of [M] returning back to her birth family.
>
> My hope now is that lessons can be learnt from the systematic failures of this case and spare others from the unimaginable trauma that [M] and her family has endured. I can confirm that this is also [M's] verbalised wish for her case to be utilised to benefit others. It gives [M] great comfort knowing that her suffering has not been in vain."

125. On the basis of this email, Ms Proops QC seeks to persuade me that because the mother holds parental responsibility for the child and has consented on her behalf to the waiving in their entirety of her child's Article 8 rights in connection with this material, the local authority is not entitled to put before the court a contrary view of what a responsible parent would do in this situation. She maintains that this email, and its contents, are a complete answer to the objections raised by both the Guardian and the local authority.

126. I do not accept that the situation is as simple as this.

127. Plainly, appropriate respect and weight must be accorded to the wishes and feelings of any individual who holds legal responsibility for a child as a result of being that child's parent. That concept is in itself central to the private family rights recognised and protected by Article 8 whenever those rights are engaged. However, *each* of M and her mother has rights to a private family life and those rights are engaged together, as a family unit, and separately as individual human beings. What the mother's email tells me about M is that I am dealing here with a child who has been severely traumatised by these proceedings. That trauma has been such that the child requires ongoing therapeutic intervention to mitigate its continuing effects. She is still only 7 years old. Her mother has clearly engaged her in discussion about these proceedings and I know not, and do not speculate, about the extent to which the mother's own views may have been projected onto her child in terms of [M's] "verbalised wishes".

128. I am not in this judgment expressing views of more general application. I am dealing with the balancing exercise I must conduct in respect of *this* particular child in *these* particular circumstances. I find it difficult to conclude that M could be treated as a *Gillick* competent child capable of expressing considered, informed and independent views about this issue. That is why she is independently represented by a children's court-appointed Guardian. None of the views I have expressed detract in any way from the important point which Ms Proops QC makes about the mother's parental responsibility for M but I do not agree with her that the exercise of it is conclusive in this case. It may well be that the mother believes her own and M's interests to coincide in relation to the issue of access / publication but my focus must be on M's interests not just now but in the years to come as she comes to terms with her own emerging identity as an individual in psychological, social and physical terms.

129. We are all crucially aware in this age of digital social and media platforms that once information is released, it remains available for all to see for all time. All too familiar is the process of jigsaw identification, an aspect of the case on which Ms Proops QC relies in her submissions pointing towards further

exposure of the case details. In terms she says to me, "It is already out there so what is the harm in releasing further detail to Ms Newman ?". In this context, I find myself unable to agree with the conclusions which this mother has reached in relation to the ongoing engagement of M's Article 8 rights. I do not accept that her child's anonymity is, as her mother expresses it, "beyond repair". The information contained in the various judgments which are now published and available for public consumption is indeed significant in terms of background detail and content. That, without more, does not necessarily justify giving further access to the child's private information to a journalist, albeit that she is an individual who is entitled to this court's respect for her professional endeavours.

130. Those are general, albeit highly relevant, points which I have to consider in my overall approach to this application. In terms of the balancing exercise which I must conduct, I turn now to consider the different categories of documents and information which are contained in the material to which Ms Newman seeks access. In my judgment, different considerations have to be weighed in the balance in respect of these broad categories.

Medical evidence and health records

131. With certain exceptions, the NHS trusts and individual doctors who have responded to the consultation process object to records into which they have had input being provided to a journalist. Given the period which is covered by these records, I accept that they cannot be seen entirely as documents which have been prepared for the purposes of litigation or court proceedings. Even where these records relate to a period where litigation was contemplated or ongoing, there cannot have been any legitimate expectation that they would subsequently be released for the purposes of journalistic scrutiny.

132. The justification for disclosure advanced by Ms Proops QC rests primarily on the absence of any harm to M or anyone else involved in the proceedings in a disclosure order. She also refers to the analysis of the local authority as resting on an anachronistic interpretation of the rules governing such family proceedings. In circumstances where accredited members of the media are

permitted to sit in on family cases, why, she asks, should they not have access to whatever material they wish to see subject to specific reporting restrictions imposed by a judge ? That may be an interesting policy debate for the future but it does not represent the current state of the law. Journalists are entitled to be in court but they have no *automatic* right to court papers and documents.

133. Ms Proops QC's submission necessarily requires an assumption that, in terms of wider public policy, we have moved on from the position as it was in 2009 when the media were first entitled to attend family hearings. At that point in time, and after much careful thought and debate surrounding the change to the Family Procedure Rules, it was decided that the press should be entitled to see whatever was reasonably necessary for a broad understanding of the case. The interests of a child or third party in the confidentiality of their personal information extended beyond the mere provision of limited information to journalists: it was a specific reason for excluding them from all or part of the proceedings.

134. In terms of the medical evidence in this case, it relates to both the mother and M. The mother wishes to open the way to an open debate in the media about whether or not there has been a miscarriage of justice in this case. She supports the release of information to Ms Newman for these purposes even where that information touches and concerns the most personal and private details of her own medical history. It seems to me that she is entitled to make that waiver on her own behalf if and insofar as it is not contrary to the best interests of her child. In this context it is important to bear well in mind that M is now reunited with her mother and living in a household where she will continue to live probably for the next decade and more. These will be challenging years for a child who has evidently been severely traumatised by the litigation in which she has already been involved and the publicity which has surrounded the appeal in that litigation. I accept that the original proceedings have now concluded but Ms Newman's application has already provoked a further round of litigation and anticipates yet more litigation should her current application succeed. There is thus the potential that this child will be drawn back into the forensic spotlight of further court scrutiny.

In this context it seems to me that the concept of any potential "harm" to this child has to be seen in a wider context outside the question posed by Ms Proops QC: 'Where is the immediate evidence of harm to M by the disclosure of this material to Ms Newman ?'.

135. In terms of Ms Newman's Article 10 rights, I have to balance the fact that the medical records, taken as part of the overall picture, may disclose some important piece of information about M or her mother which is not already in the public domain and which she would wish to publish. Not having seen the medical records, and knowing only what I read in the published information which is available from the published judgments, I cannot imagine what that information might be. However, Ms Newman has the mother's consent. She would need to come back before publication and thus there is a protective brake on further dissemination.

136. In considering where the balance lies, it seems to me that the overarching factor which I have to weigh in the balance is whether it is in M's overall best interests to release to a journalist the most intimate details of her own and her mother's medical records even if the dissemination goes no further than that. Such a step would represent a clear court-directed intrusion of this child's most basic and fundamental rights to a private family life. If those rights are to be the subject of court-sanctioned interference, there has to be a proper justification. I appreciate that Ms Newman cannot justify that interference on any specific basis because she has not yet seen the medical and other records. She wants to read them in order to see what they contain. Having reflected carefully, and because of the intimately personal and sensitive nature of this material, I do not consider the mother's consent to its release on her own or M's behalf to be sufficient to displace the overwhelming need to ensure that such information remains confidential from public scrutiny and I would include Ms Newman within this embargo. In the context of this application, I am satisfied that she has sufficient material about the medical history of both M and her mother. It is either already in the public domain and recorded in the judgments to which I have referred or it is likely on the balance of probabilities to be irrelevant to any decisions which were made in those

proceedings. To the extent that those judgments have not recorded the full detail of the medical evidence available in the bundles, I am satisfied that such confidence will have been preserved for a very good reason.

137. Thus in terms of access to the underlying medical records, I am in no doubt that the balance comes down firmly in favour of preserving confidentiality in respect of this information. Ms Newman is, of course, entitled to draw upon the information which is already in the public domain from the reported judgments in this case but I am not prepared to authorise the release of the detailed medical records of M, the mother or any other family members. I shall deal separately with the experts' reports shortly. However, the primary material in the form of the medical records must remain confidential.

Foster carer records

138. This category of documents in no longer in issue as Ms Newman conceded at an earlier hearing in February 2020 that she would not pursue access to the daily records maintained by the foster carer.

Contact records

139. These records appear to provide a running narrative in relation to the contact which M had with her parents, her stepfather and her half-sibling between 2016 and 2018 whilst she was living in foster care. If they are typical of the contact records which are regularly produced in care proceedings, they will no doubt contain details about the dates and frequency / duration of such periods of contact. They are more often than not a useful source of reference for observations about interactions between a child and his or her family members. They can demonstrate the extent to which a parent has insight into a child's needs, how he or she is able to hold a child's attention with appropriate activities and child-centred play. Whilst I have not seen the contact records in this case, I know that they have been referred to and, to some extent, relied on in the social work undertaken and the Guardian's analysis of the relationship between M and her family members. The judgment produced by His Honour Judge Hess sets out an overview of contact for a period of nearly a year between 2016 and 2017. There is reference in his

judgment to certain aspects of concern which arose from those contact records. We know that ultimately, following the reversal of the placement order by the Court of Appeal, the contact records were sufficiently positive for both the local authority and the Guardian to recommend the return of M into the care of her family.

140. Whilst these are essentially private records of family contact, the arguments for restricting disclosure appear to me to be less compelling than those relating to medical records when looked at in the context of the balancing exercise. However, it appears from the schedule with which I have been provided that objection is taken because of the multiple references in these notes to private information relating to M and her family. Given this factor, I accept that a release of these records to Ms Newman could be seen as a significant interference with the child's Article 8 rights to a private family life. It appears from the indices in Section F of the core bundle that there are hundreds of pages of contact notes and I cannot see how it would be proportionate or necessary to require the local authority to conduct an extensive redaction exercise in circumstances where there is within the published judgments a summary of the progress of contact. M is now back with her family and that fact alone speaks to the success of those contact arrangements and their development in the context of the family's rehabilitation.

Police disclosure

141. I accept that not all the police records were documents which were prepared for the purposes of the earlier court proceedings. In response to the consultation process, the police have confirmed that they are not in a position to consent to disclosure. This remains a matter for the court as part of its balancing exercise. I accept that the mother is entitled to share details of her criminal record with Ms Newman if that is what she chooses to do. What she cannot do is waive the rights of any other individuals who are referred to in, or are the subject of, the police disclosure. This constitutes private information and, whilst perhaps not always on a par with the sensitivities of medical evidence, the police records may nevertheless reveal intensely personal and sensitive information which has the potential to influence matters such as

reputation, employment prospects and the formation of future social and personal relationships. In this case, the judgment of His Honour Judge Hess makes clear reference to the mother's involvement with the police. That information is already in the public domain. In these circumstances I cannot, for example, protect M from the consequences of it being public knowledge that her mother was arrested. This mother will no doubt be able to provide Ms Newman with a full narrative account of the circumstances of her own arrest and criminal record. I cannot see what a formal disclosure of the underlying police records will add to her forthcoming journalistic enquiries over and above what she already knows about the case both from the public judgments and from her discussions about the case with M's mother.

142. In my judgment, in this context as in other categories of documents, it is not enough for Ms Newman to say that she cannot articulate specific arguments to weigh in the balance because she does not know what she might find in this material until she sees it. It is clear from the observations of Sir James Munby P in *Re G* that the court will not permit an 'archaeological excavation' through material in the trial bundles so as to be enable a family member to come to independent conclusions about the quality of the evidence or the reliability of the trial judge's reasoning and conclusions. Adopting his Lordship's analogy, it seems to me that much of the material which Ms Newman seeks to 'mine' relates to the very personal and private aspects of the lives and histories not only of M and her mother but of other family members. If that did not weigh sufficiently in the balance of a family member's Article 10 rights in *Webster*, it is difficult to see what change she can point to in terms of public policy in relation to child protection issues which might warrant wholesale disclosure to a journalist who has no direct family connection.

Previous records maintained by Children's Social Care

143. M's family moved around England during her early years and social care records were maintained by two different local authorities before there was any involvement by this local authority. One of those authorities has specifically objected to disclosure of its records on the basis that they are confidential to M. Ms Newman has not advanced any specific justification for

disclosure and she has made it clear that her focus and interest lies in the dealings with this family by the local authority which is the first respondent to these proceedings.

Child Protection Conference and multi-agency minutes and reports

144. In relation to this category of documents and the last, it is important to weigh in the balance the reasons for the confidentiality which attaches to this type of record. Their entire focus is on steps and actions being taken or considered in order to safeguard vulnerable children who are potentially at risk of harm. They come into existence at various stages during the risk assessment process both before and after the commencement of formal court proceedings. They are conducted at a time when perceived risks may not be substantiated by a solid body of reliable evidence such as would be required by a court charged with reaching what are often exquisitely difficult decisions about whether to separate children from their birth families. Because the overriding objective of such meetings is the immediate safety of children, they are of necessity a forum for free discussion of views and opinions expressed by professionals coming together from a number of different backgrounds. These meetings are conducted on a confidential basis and the expectations of all those who attend is that they are free to express views and concerns in confidence with that objective. The written reports or minutes of such meetings attract a high level of confidence for obvious reasons. Save in cases of exceptional risk or emergency, parents are invariably permitted to attend these meetings (including the regular reviews which are held) and will thus be privy to the views which are expressed.

145. It is argued on Ms Newman's behalf that all of these records should be released to her for the purposes of her review of the local authority's policy and approach to child protection issues. To adopt Munby J's metaphor, she does not know how rich this particular seam might be until the material is released. Again, the argument deployed on her behalf is the engagement of her Article 10 rights and the absence of any harm to M because of her inability to publish without coming back to court. Balanced against that proposition is the fact that it is essential that those charged with protecting children should

not feel constrained in their efforts by concerns in relation to the confidentiality of their investigations. In this context it is important to remember that confidentiality in this context should not be equated with secrecy. A local authority which evaluates the risk to a child as being substantial and crossing threshold in any given case will always be required to subject those concerns to the scrutiny of the court. Ms Newman would no doubt argue that judicial scrutiny and challenge through the forensic court process is not always sufficient protection against potential miscarriages of justice. She is right to make that point. But child protection case conferences are deliberations which evolve as investigations and enquiries proceed. They involve professional assessments of risk and for good reasons of public policy the courts have afforded a high level of confidentiality to records informing these ongoing risk assessments. I can see nothing in this particular case which would justify any departure from that established principle. The local authority recognises that the mother is entitled to share with Ms Newman those expert assessments which relate to her. It supports the objections raised by the Guardian on behalf of M in relation to expert reports relating to the child.

Experts reports and professional communications

146. Various experts were instructed to prepare reports during the currency of the care proceedings concerning M. The indices refer to psychiatric and other reports in respect of both the mother and M's father which were prepared in October 2015. These reports were before His Honour Judge Hess for the purpose of the hearing in June 2017. There were further assessments and psychological reports carried out in 2018 in respect of the mother and her new husband when the local authority's plans for M changed to rehabilitation within the family. An independent social worker carried out an assessment of both M's mother and stepfather in May 2018 in the context of the proposed reunification of the family.

147. It appears that the earlier reports were agreed for the purposes of the hearing before His Honour Judge Hess in June 2017. Whilst he heard from a number of witnesses, it does not appear from the summary in paragraph 7 of his

judgment that the authors of these reports were required to give oral evidence. It is nevertheless true that, subject to any reporting restrictions put in place by the judge, those experts would have expected that they might be required to attend for cross-examination on the content and conclusions of their reports in the presence of any press members attending. That by itself would not have given such journalists access to copies of the full reports.

148. In *X, Y, Z (Morgan v A Local Authority)* [2011] EWHC 1157 (Fam), Sir Nicholas Wall (then President) encouraged a move to greater transparency by stating that he would wish to see the development of a practice whereby experts' reports were routinely disclosed to media representatives. The basis of such disclosure, he suggested, was that journalists should be able to comment upon the reports and the use to which they were put in the proceedings so long as this did not undermine the child's anonymity.

149. As matters currently stand, without specific permission, publication of any such report or the information contained within it would constitute a breach of FPR 2010 r. 12.73. Whilst r.12.75(1)(c) permits a party or his legal representative to communicate information relating to the proceedings to any person where it is necessary to make or pursue a complaint against a body or person involved in the proceedings, that onward communication is only possible where the consent of the person who initiated the original communication consents.

150. As far the underlying communications between the experts is concerned, if indeed there has been discussion between the experts in this particular case, I am wholly persuaded that these should remain confidential. The rationale for such communication, in whatever form it takes, is designed to encourage experts to agree or at least to narrow issues. If experts believed that their deliberations were to be opened to the scrutiny of parties and their legal advisers, they would doubtless be reluctant to make concessions and accept the validity of different opinions. They can, of course, be challenged in cross-examination about the reasons underlying their conclusions and opinions but this is different from requiring them to publish or open to scrutiny the professional discussions which informed those conclusions.

151. I have considered carefully the extent to which the balance in this case falls on the side of disclosure in terms of reports and assessments of the mother herself. Reports such as these are an important aspect of the forensic evaluation process which a court must undertake because they are often an expert distillation of a significant quantity of underlying material. I start from the proposition that Ms Newman has every right to pursue her journalistic enquiries in circumstances where she believes that something may have gone wrong in this case, whether or not there has been a miscarriage of justice. I have already expressed my view that any potential miscarriage of justice for this family was averted by the decision of the Court of Appeal to set aside the original placement order. The judgment of King LJ is the clearest evidence of the judicial process at an appellate level working as a proper check and balance in respect of a flawed decision made by a lower court. As she has explained to me, Ms Newman's investigations extend beyond the court process itself. As I understand it, she wishes to understand the process and evolution of the local authority's decision-making in terms of the original institution of care proceedings and its subsequent decision to rehabilitate M with her family.

152. I accept that in this context expert reports and assessments made in respect of the mother and her ability to care properly and safely for her child will have been relevant to decision-making. There is no detailed analysis of these reports in any of the published judgments. The mother has expressly waived her Article 8 rights in respects of these documents and has consented to their release to Ms Newman. As I have said, she cannot waive the Article 8 rights of other parties to the litigation such as M's biological father. I have not read this material and no one has suggested that I should do. I was told by Ms Rogers QC that the author of the clinical psychology report prepared in relation to the mother and the independent social worker who assessed the mother and her husband have no objections to Ms Newman being shown copies of their reports.

153. One of the difficulties which confronts this court is that I do not know the extent to which it may be possible to redact these reports and assessments so as to preserve the confidentiality of the child and third parties.

154. As Lord Steyn pointed out in *Re S* at paragraph 25, I have to measure the nature of the impact of the proposed disclosure on the child and, in the case of a young child, that includes a consideration of whether he or she might be *indirectly* affected. Were I now to be considering the issue of publication of information by Ms Newman into the public domain, I would undoubtedly have to ask myself the question: is there a real likelihood that publicity given now will affect M significantly or at all, either now or in years to come. We are not at that stage. Ms Newman, for present purposes, seeks only to understand from information which was put before the court by the local authority why decisions were taken both by its officers and social workers and ultimately by the court. For these purposes she wants access to everything in the court files. I have explained why that request is far too wide and, in certain respects, inimical to M's interests.

155. However it seems to me that a different approach is justified in terms of the reports and assessments which relate to the mother herself (and, where relevant, to her husband) both in relation to the original decision to remove M and in relation to her rehabilitation into the family. Taking into account the important role which journalists have as a result of the engagement of their Article 10 rights, I have reached the conclusion that, in relation to the reports which relate to the mother herself, the balance falls in favour of allowing Ms Newman to see these. I appreciate that there may be reference in those expert reports to her underlying medical records in respect of which, as a category of documents, I have not authorised release. To the extent that there is specific reference to the child's medical history which is not already in the public domain through the judgments, the reports in relation to the mother will need to be redacted to preserve M's confidentiality in respect of her own medical history. The same principle applies to any reference in the reports on the mother to M's biological father and his medical history. In the event that M's stepfather gives his consent, I can see no reason why the reports prepared by

the clinical psychologist and the independent social worker in April and May 2018 in relation to the mother and stepfather cannot be released with the same caveat. To the extent that the authors of those reports have not given consent for their identities to be published beyond the confines of the court bundles, they should be entitled to anonymity for the present purposes both in relation to their names, professional addresses and their places of work.

156. The content of those reports and assessments on the mother (and stepfather, if he consents) should provide Ms Newman with a better informed understanding of why the removal of M from her home was considered necessary at the time and why rehabilitation was later considered to be a viable option. The information will, of course, remain subject to the current reporting restrictions order and the parallel undertaking which Ms Newman has given to this court that she will preserve the confidentiality of this information. I have no reason at all to doubt her personal or professional integrity in this respect.

Children's Social Care assessments undertaken for the proceedings and witness statements

157. In the light of what I have said above in paragraph 144 in relation to child protection case conferences and minutes, and given the nature of these particular assessments, I do not see how the social care records could be suitably redacted to protect the Article 8 rights of this child and other family members. I have already explained why I do not consider the wholesale waiver of those rights which M's mother is prepared to give is conclusive and/or in the best interests of this 7 year old child. These assessments will cover a very broad range of sensitive and private information relating to the backgrounds and early lives of each of M's parents, as well as M's own early circumstances. To redact large sections of these assessments would inevitably lead to an unintelligible document. This runs the very risk of uninformed reporting which Ms Newman wishes to avoid.

158. I take a similar view in terms of the witness statements which were put before the court in 2017 and 2018. These statements will have informed the narrative

of this family's life as it was put before the court. The later statements set out the new narrative which underpinned the family's situation following the mother's marriage to M's stepfather. Insofar as these details were relevant to decision-making, they have been referred to in the published judgments. Weighing these matters carefully in the balance, I cannot see any justification for prioritising Ms Newman's wish to conduct a trawl through this material over and above this child's expectation of privacy for the intimate details of her family life. In circumstances where I would be unlikely to permit the publication of this information in any media article which Ms Newman might wish to write for consumption by the general public, I can see no principled reason to elevate her wish to read the material over the importance I attach to M's Article 8 right to confidentiality in respect of that information. Unlike the specific reports and assessments which relate to the mother, who has given her consent to their release, these statements have been provided by third parties. They are likely to cover much ground which touches and concerns the private family life of M and other family members.

159. To the extent that Ms Newman requires a broad overview to contexualise the information which is already available together with that which I have decided she should be permitted to see, I accept the principle that she should have access to position statements and case summaries. The local authority does not oppose Ms Newman having access to case summaries and some of the filed position statements. Given that these documents would have been made available to her had she attended, albeit in an appropriately redacted form approved by the judge, I can see no basis for withholding these documents. However, I accept that there may be reference in those documents which touches on sensitive material and content which I have protected within the confines and reach of M's Article 8 rights. The local authority has identified which of the position statements and case summaries require redaction and these are referred to in the lengthy schedule which is in the core bundle from [A:26-53] ("the mainframe schedule").

160. In order to assist the parties in terms of the implementation of the disclosure process, I propose to annotate an electronic version of the mainframe schedule

so as to make it clear which documents can be disclosed to Ms Newman, in an appropriately redacted form where necessary. In the main, and as a category, I have permitted the disclosure of court orders relating to the case management of the two earlier substantive hearings since I anticipate these will assist Ms Newman to understand how the case developed without infringing any private Article 8 rights of the child and others. She would have been aware of these case management decisions had she been sitting in court to observe these hearings and, redacted where appropriate, I can see no basis for depriving her of this information subject to the embargo on publication. Indeed, the local authority does not oppose this course subject to the removal of private third party details.

Disclosure: practicalities and cost

161. In terms of any necessary redaction, it will inevitably fall to the local authority in consultation with the Guardian to undertake the process of redaction in accordance with the guidance I have set out in my judgment. Given that redaction is likely to be a limited exercise in the light of the extent of disclosure which I have permitted, I would hope this exercise can be contained. At this point, I accept that it is not possible for me to assess the administrative burden which this will place on the local authority but it is an exercise which I consider both necessary and proportionate given the importance which I have attached to aspects of Ms Newman's Article 10 rights. In essence her rights at this stage concern her entitlement to receive information (rather than her ability to publish) as an aspect of the freedom of expression which is guaranteed by Article 10.

162. As I have made clear at several stages of this judgment, I am not deciding matters of general principle. This is a targeted and fact-specific exercise which has involved a careful balancing exercise of all the competing rights involved as between the individual parties to this particular case. I have rejected Ms Newman's application for wholesale disclosure of the court file but I have agreed that she should be entitled to see limited aspects of the material it contains. To the extent that I have interfered with either the mother's or M's Article 8 rights and/or Ms Newman's Article 10 rights, I have

done so in what I judge to be an entirely proportionate manner. An important factor in my decision has been the mother's consent to disclosure but this does not mean that in every case where an aggrieved parent supports media access to material generated in children's proceedings, journalists should be encouraged to make applications.

163. The principle of transparency and openness is of crucial importance in a democratic society. There have been significant developments towards greater transparency in the Family Courts but any wholesale departure from the principled and well-recognised protection afforded to the interests of children is one which will need to be informed by a careful evidence-based review. Just such a process is ongoing at the present time. As advertised in his 2019 *View from the President's Chambers* to which I have referred in paragraph 72, Sir Andrew McFarlane, as President of the Family Division, has assembled a panel who will assist him in the important task of considering whether the line which is currently drawn between, one the one hand, the need for confidentiality for the parties and children whose personal information is the subject of proceedings, and, on the other, the need for the public to have confidence in the work done in these courts on behalf of the State and society is the right one. The consultation process is ongoing as I conclude this judgment.

Costs

164. I am conscious of the costs which this local authority has already incurred in participating in these proceedings in circumstances where it has no ongoing responsibilities for this child. The financial and other demands on all local authorities at the present time are heavy and the current Covid-19 crisis will undoubtedly have increased those demands. To this end, I propose to reserve the issue of costs generally (including the financial burden of the redaction/copying exercise) until I am better informed in relation to the position. I did not hear any submissions in relation to costs generally and I would hope that there may be some agreement in principle between the parties once they have had an opportunity to digest the content of my judgment. If it

proves possible to resolve any outstanding aspects in relation to costs on paper, I will certainly consider that course.

Postscript: subsequent developments

165. Shortly before I heard this case, the President of the Family Division published an open judgment in a case which has attracted a considerable amount of media attention both nationally and internationally: see *Re Al M (Publication)* [2020] EWHC 122 (Fam). The case concerned private law proceedings concerning the children of His Highness Sheikh Mohammed bin Rashid Al Maktoum and Her Royal Highness Princess Haya bint Al Hussein. The case was unsuccessfully appealed by the children's father. The Court of Appeal's judgment is reported at [2020] EWCA Civ 283 and was handed down on 28 February 2020 after I had reserved judgment in this case.

166. On 12 March 2020, I received emails from counsel for Ms Newman, the local authority and the Guardian in relation to that judgment.

167. The potential relevance of the appeal judgment lies in the reference in paragraph 80 of the judgment to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC, [2011] 2 AC in the context of whether the interests of a child in Convention terms is 'paramount' or 'primary'. I have already referred to this issue in paragraph 106 of my judgment. Without deciding the point, the Court of Appeal in *Re Al M* has acknowledged the potential importance of the distinction in the context of private law proceedings brought under the Children Act 1989 where, pursuant to section 1(1), the paramountcy principle applies. Underhill LJ did not determine the issue because the court had not heard full argument and considered in any event that the point should be determined with the benefit of a reasoned first instance judgment.

168. I note that since the Court of Appeal's judgment, Hayden J has also made reference to the distinction in his recent judgment in *PA Media Group v London Borough of Haringey* [2020] EWHC 1282 (Fam). In that case he referred to an earlier decision of Sir James Munby P in *Re J (A Child)* [2013] EWHC 2694 (Fam) at paragraph 22 as an example of the court's approach to the balancing exercise which is required.

169. Neither Ms Rogers QC nor Ms Fottrell QC sought to make any further submissions on behalf of the local authority or the Guardian as a result of the judgment handed down by the Court of Appeal in *Re Al M*. However, on behalf of Ms Newman, Ms Proops QC relies on the fact that, in his own

judgment, reported at [2019] EWHC 3415 (Fam), the President saw fit to permit the reporting of what journalists attending the hearing had observed as well as the reporting of his judgment. She contends that this is powerful support for her submission on behalf of Ms Newman that journalists need to be able to scrutinise and then (with the permission of the court) report on underlying evidence in the case. She also relies on the support of the children's mother in that case to wide publication on behalf of herself and her two children (then aged 12 and 8) as a factor which weighed heavily with the President. From that proposition she develops a further submission that the mother's consent in this case "*must* be treated as determinative given that, in contrast with Maktoum, there is no other responsible parent purporting to speak out against Ms Newman's application" [my emphasis].

170. I have dealt with her original submission in relation to the mother's consent in paragraphs 126 to 128 above. I do not agree that her consent on behalf of M is determinative in this case. As the President made clear in paragraph 74 of his 'Publication' judgment reported at [2020] EWHC 122 (Fam), the *Maktoum* case was wholly unusual on its facts. The father had placed in the public domain a number of matters about the case which the mother contended were untrue. Having found them to be so, the President went on to say,

> "… I consider that widespread media publicity with the aim of presenting the facts as found by a judge in a court of law is a necessary step in order to meet the private and family life needs of the mother and the children. The purpose of publication is to correct the false narrative that has been generated and currently surrounds their ability to have any form of family, private or social life outside the immediate confines of their home."

Having found the Article 8 argument to be by far the most powerful in the balance, he went on to say that, whilst the children's wishes were important, they "cannot hold a position of greater prominence or, otherwise, be determinative".

171. Thus, I do not consider Ms Proops QC is correct to say that M's wishes, as expressed through her mother, must determine the issue of disclosure. Other than to point to the balancing exercise I have already carried out in this respect, I do not propose to say any more about the *Maktoum* judgments as I do not consider anything said in them affects the fact-specific balancing conclusions I have reached in this case.

Order accordingly