Neutral Citation Number: [2021] EWCA Civ 437

Case No: B4/2020/1357

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Mrs Justice Roberts
[2020] EWHC 2103 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2021

Before:

THE MASTER OF THE ROLLS
LADY JUSTICE MACUR
and
LADY JUSTICE KING

- -

Between:

MELANIE NEWMAN **Appellant**

- and –

SOUTHAMPTON CITY COUNCIL (1) **Respondents**

AB (2)

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 **Appellant**
Heather Rogers QC and Sarah Earley (instructed by **Southampton City Council**) for the **Respondent Local Authority**
Deirdre Fottrell QC and Tom Wilson (instructed by **Goodman Ray**) for the **Respondent Guardian**

Hearing dates: 4 March 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 25 March 2021.

Lady Justice King:

Introduction

1. This is an appeal against an order made by Roberts J on 28 August 2020. By her order, the judge refused to permit the Appellant, Melanie Newman ("Ms Newman"), to have access to documents held by the 1st Respondent Local Authority, Southampton City Council ("SCC"), that relate to care and placement proceedings in relation to a girl ("M") who is now 8 years of age.

2. It was common ground that the judge, under the inherent jurisdiction of the High Court, could have made an order in the terms sought. It was also common ground that the proper approach for the judge to take in reaching her determination was by conducting, against the backdrop of the open justice principle, a balancing exercise as between Article 8 of the European Convention on Human Rights ("ECHR") (privacy rights of the mother and M) and Ms Newman's Article 10 ECHR rights of freedom of expression.

3. It is further agreed between the parties, as confirmed by the Supreme Court in *PJS v News Group Newspapers Ltd* [2016] AC 1081 at [20] ("*PJS*") that:

> "20.The exercise of balancing article 8 and article 10 rights has been described as "analogous to the exercise of a discretion": *AAA v Associated Newspapers Ltd [2013] EWCA Civ 554* at [8]. While that is at best only an analogy, the exercise is certainly one which, if undertaken on a correct basis, will not readily attract appellate intervention."

4. The issue before this court is whether, on the facts of this case, the judge fell into error in the way in which she undertook the crucial balancing exercise.

Background

5. The background to the care proceedings in relation to M is set out in some detail in the judge's judgment at paras.[1] – [19] (*Newman v Southampton City Council* [2020] EWHC 2103 (Fam)). In brief, M's mother ("the mother") was a single parent to M who suffered from a number of developmental issues and severe allergies. On two occasions, the mother attended hospital by ambulance with M, the mother having unnecessarily administered medication to her by way of an EpiPen. This raised serious concerns for M's continued safety with her mother.

6. In June 2015, M was taken into police protection and placed with foster carers. On 31 March 2016, following a number of assessments, a care order was made with the consent of the mother, on the application of SCC. The mother agreed the s31 Children Act 1989 threshold criteria which recorded that M was at risk of significant harm in her mother's care. The factual basis supporting that conclusion included the inappropriate use of the EpiPen. The care plan was not for adoption, but for M to live with her father.

7. By June 2016, M's father had withdrawn from the rehabilitation plan and the local authority, therefore, reassessed the mother. Following the reassessment, SCC's revised care plan was for adoption and not for rehabilitation to the mother. Given that there was

a care order in place, in order to have M rehabilitated to her care, the mother's only recourse was to apply for the discharge of the care order. In June 2016, the mother's application was dismissed and HHJ Hess made a placement order, thereby facilitating SCC's plan for adoption.

8. The mother appealed. The Court of Appeal set aside the placement order and remitted the matter for a rehearing (*Re M (a child)* [2018] EWCA Civ 240). Fresh assessments were carried out and by May 2018 the plan was for rehabilitation and, after some three years in foster care, M now aged 6 years of age, was returned to her mother's care where she has remained ever since.

9. On 19 October 2018, final orders were made discharging the care order and a supervision order was made for six months. At the final hearing a number of respected journalists including Ms Newman were present. At the conclusion of the hearing the judge made a reporting restrictions order which, as everyone subsequently appreciated, was over zealous in its desire to protect M in that it prevented the media from reporting of information contained in the Court of Appeal judgment, which was not only in the public domain but had been handed down in open court and was readily accessible on Bailii.

10. On 15 February 2019, the matter was once again before the Court of Appeal; Ms Louise Tickle, one of the journalists who has been following the case, appealed the terms of the reporting restrictions order. The appeal was allowed by consent and the President of the Family Division Sir Andrew McFarlane ("the President") gave a brief judgment (*R (A Child)* [2019] EWCA Civ 482).

11. Following the conclusion of the proceedings, Ms Newman has maintained contact with the mother and it is against the background of these protracted proceedings that Ms Newman, with the consent of the mother, now wishes to access the documents in the case in order to use the proceedings relating to M as a case study.

Jurisdiction

12. Cases concerning children continue to be held in private. The confidentiality of children caught up in proceedings is protected during the course of the proceedings by s97(2) Children Act 1989, and both before and after the proceedings have concluded by:

(i) s12 Administration of Justice Act 1960:

> "(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—
>
> (a) where the proceedings—
>
> (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or

> (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;"

(ii) The Family Procedure Rules 2010 r.29.12, provides that *no document or copy of a document filed or lodged in the court office* shall be open to inspection by any person without the permission of the court. The High Court has jurisdiction under its inherent jurisdiction to grant permission. Whether or not to do so will be a balancing exercise weighing factors in favour against those against (see *Re X (Disclosure of Information)* [2001] 2 FLR 440 para.[23]).

13. Duly accredited members of the press are permitted, pursuant to FPR r.27.11, to attend proceedings held in private. By FPR PD 27B.2.3, such attendance does not entitle a media representative to "receive or peruse court documents referred to in the course of evidence, submissions or judgment without the permission of the court" (other than in accordance with PD12G which permits disclosure to third parties in certain circumstances which do not apply in the present case).

14. In the *President's Guidance: Attendance of the Media* [2009] 2 FLR 167, issued to coincide with the change in the rules permitting press attendance at family hearings, the rationale for allowing the press to attend hearings was described at para.[15] as to "avoid charges of 'secret justice' and to promote better understanding of the working of the family courts". The guidance went on to say that access to court documents would not be "necessary or desirable" given their confidential nature.

15. Sir Mark Potter P emphasised this point, suggesting that:

> "Where a representative of the media in attendance at the proceedings applies to be shown court documents, the court should seek the consent of the parties to such representative being permitted (subject to appropriate conditions as to anonymity and restrictions upon onward disclosure) to see such summaries, position statements and other documents as appear reasonably necessary to a broad understanding of the issues in the case."

16. Since the publication of the 2009 guidance there has been a move towards greater transparency: in 2014, the then President of the Family Division Sir James Munby issued *Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230, which led to a significant increase in the number of judgments publicly available. This was later supplemented in December 2018 by further guidance on the anonymisation of such judgments.

17. With effect from October 2018, a pilot scheme has been in place which, under FPR PD 36J, permits "duly authorised lawyers attending for journalistic, research or public legal educational purposes" to attend. In other words, legal bloggers or reporters may now attend private hearings involving children.

18. In October 2019 the President issued guidance as to reporting in the family courts. The guidance sets out the approach to be taken to applications made by journalists who wish

to vary reporting restrictions to allow reporting of proceedings at, or following, a hearing. "Documents disclosed to reporters" continue to be subject to s12 AJA 1960 and s97 Children Act 1989 and remain confidential.

19. The 2019 Guidance at para.14 identifies the task of the court when faced with an application to relax reporting restrictions in a case before the Family Court or Family Division as being to "conduct the balancing exercise between privacy and transparency by balancing ECHR, Article 8 and Articles 6 and 10 and by having regard to the best interests of any child as a primary consideration."

20. In the present case, the court is concerned not with Article 6, but only with the qualified rights found in Article 8 and Article 10. The well-known provisions are as follows:

21. Article 8 provides:

> "Right to respect for private and family life
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

22. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. "

The documents

23. It can be seen that to date, the statutes, rules and guidance have referred variously to 'court documents', 'information relating to proceedings' and a 'document filed or

lodged in the court office' and not to any wider class of material in relation to a child who is, or has been, subject to proceedings.

24. The judge permitted Ms Newman to have access to a limited number of documents. The documents disclosed fell into two main categories:

    i) Court orders, which by the nature of case management orders in care proceeds contain a substantial amount of information extending far beyond the orders themselves. These orders include the identification of the key issues in the case as well as details of the parties' respective positions. The orders also contain clarification and directions in relation to evidence: for example in an order made on 9 February 2018 it was recorded within the recitals that it "is essential that there is a report from an independent social worker who can assess the mother and child in a culturally appropriate way";

    ii) Psychiatric and psychological assessments of M's mother ("the mother") and two independent social work assessments of the mother. These documents were redacted in order to protect the privacy of M.

25. By her application and now by her appeal, Ms Newman seeks, in addition, access to many thousands of pages of documents relating to M and her family. The judge sensibly divided the documents into categories, each of which she considered separately in her judgment.

26. The broad categories of the documents to which Ms Newman sought access were distilled at para.[114] of the judge's judgment 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.

27. In order properly to consider the appeal and determine whether the judge fell into error in the conduct of the balancing exercise, it is important to understand both the purpose to which it is intended that the documents will be put and also the scope of the information found within the documents involved.

Purpose

28. The application before the judge was the first stage of what was intended to be a two-stage process. At this first stage Ms Newman sought 'access' to all the documents which, in her application dated 7 March 2019, were referred to as being "the documentation in the case concerning the child M". Ms Newman gave her reason for seeking access to the papers as follows:

> "I am a freelance journalist who has previously applied for reporting restrictions to be relaxed in this case….
>
> I was previously home editor at the Bureau of Investigative Journalism where I reported on the high rates of under-fives being put up for adoption in Southampton.
>
> I have an interest in fabricated illness on which I have 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 these factors.
>
> However the judgments alone do not provide sufficient insight into the case to allow this.
>
> M's mother has consented to let me see the court file so long as I have the permission of the court. I do not intend to report on or quote from these documents however I believe it is important I view them so that I have as full a picture as possible of what went on before I do any reporting."

29. Ms Newman went on to confirm that she would abide by any reporting restrictions orders and would not identify M or her family.

30. Ms Newman then sought access to the information and material which informed the decision making of the local authority. In particular the judge recorded, at para.[81], that Ms Newman wished 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'.

31. Ms Newman having made her application, M was, on 10 September 2019, joined as a party with Ms Young of Cafcass, who had been M's Guardian from 2015 to 19 October 2018, appointed to represent her.

Scope of the documents

32. Whilst the purpose to which the documents are to be put is simply stated, the scope of the application is less straightforward.

33. The documents with which the court was concerned had been identified by order of the court and were listed on indices. A Scott Schedule was then completed by the parties in which Ms Newman identified the reason why she wished to have access to various documents and, in the way of Scott Schedules, SCC and the Children's Guardian responded by agreeing or disagreeing to disclosure with brief reasons. By and large the reason given for wanting access was said to be: "Contains details relevant to LA decision making or is necessary to understand case." In response, SCC and the Children's Guardian's objections largely focused on the fact that the document in question: "contained private information about M and or her family".

34. In *A v Ward* [2010] EWHC 16 (Fam), [2010] 1 FLR 1497 ("*Ward*") Munby LJ (as he then was) considered an application made by treating physicians and social workers for injunctions designed to protect their anonymity together with an application by the parents that s12 AJA 1960 should be 'disapplied' so that they could speak publicly about their experiences of the child protection system. Munby LJ considered what information was protected by s12(1) AJA:

> "[112] Where, then, is the line to be drawn? The key is provided, of course, by the statutory principle, reproducing the common law principle to be found in *Martindale*, that what is protected, what cannot be published without committing a contempt of court, is "information relating to [the] proceedings". And from the various authorities I have been referred to one can, I think, draw the following further conclusions about what is and what is not included within the statutory prohibition:
>
> i) "Information relating to [the] proceedings" includes:
>
> a) documents prepared for the purpose of the proceedings; and
>
> b) information, even if not reduced to writing, which has emerged during the course of information gathering for the purpose of proceedings already on foot.
>
> ii) In contrast, "information relating to [the] proceedings" does *not* include:
>
> a) documents (or the information contained in documents) not prepared for the purpose of the proceedings, even if the documents are lodged with the court or referred to in or annexed to a witness statement or report; or
>
> b) information (even if contained in documents falling within paragraph (i)(a)) which does not fall within paragraph (i)(b);
>
> *unless* the document or information is published in such a way as to link it with the proceedings so that it can sensibly be said

> that what is published is "information relating to [the] proceedings".

35. Ms Rogers QC on behalf of SCC submits that the inherent jurisdiction goes wider than 'filed or lodged in court' (FPR r.29.12) and applies to all documents relating to court proceedings (undefined). In my judgment it is certainly arguable that many of the documents itemised on the indices and referred to on the Scott Schedule to which access is sought would fall within that category of document which were not, per Munby LJ at [112](ii), within 'information for the purposes of the proceedings' for the purposes of s12(12) AJA 1960.

36. It is not for this court to go behind the concession made by SCC. For my own part, however, I have significant doubts as to whether a number of the documents which appear on the Scott Schedule can be properly categorised as part of the court file, as court documents or even as information in relation to court proceedings. I note by way of example a number of documents are specifically recorded on the Scott Schedule as 'not prepared for court proceedings'. If that is the case the question would arise as to whether the inherent jurisdiction of the Family Division of the High Court properly extends to ordering SCC to disclose such documents after the conclusion of the proceedings to an unconnected third party.

37. In the event, the case at first instance and now on appeal has proceeded on the basis that the judge had the power under the inherent jurisdiction to make the orders sought and, not having heard argument to the contrary, it is on that basis that I approach this appeal.

Open Justice

38. SCC and the Children's Guardian accept both the importance of the principle of open justice and the right to freedom of expression as protected by Article 10 and that each apply to Ms Newman's application. The paradigm case on the principle of open justice is *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38 ("*Dring"*). In a judgment of the court, Baroness Hale at para.[2] identified the issue as being how much of the written material placed before the court in a civil action should be accessible to people who are not parties and how it should be accessible to them. It was, she said: "in short, about the extent and operation of the principle of open justice".

39. Baroness Hale highlighted two principal purposes of the open justice principle at para.[41]:

    i) To enable public scrutiny of the way in which courts decide cases – 'to hold the judges to account for the decisions they make and to have confidence that they are doing their job properly';

    ii) To enable the public to understand how the justice system works and why decisions are taken. Where much of the argument and evidence is reduced to writing it is difficult to know what is happening without access to the written material.

40. The Supreme Court at para. [38] approved the approach of the Court of Appeal in *GNM*:

> "*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." [*my emphasis*]

41. The Supreme Court held that the rules under CPR Part 5.4C (under which the application had been made) for permission to access documents 'from the court file' are not exhaustive and its inherent jurisdiction permits the court to order disclosure where a person shows a good cause to allow access outside the rules. The right approach was summarised by Baroness Hale as follows:

> "[45] However, although the court has the power to allow access, the 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. … the court has to carry out a fact-specific balancing exercise. 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*]

42. Ms Rogers QC, on behalf of SCC, drew the court's attention to the remitted hearing in *Dring* heard before Picken J ([2020] EWHC 1873 QB), when he summarised the position following the Supreme Court's decision, saying at para.[80] & [81] that the open justice principle is not the equivalent of 'open sesame' and that the court must carry out the balancing exercise giving appropriate weight to the relevant factors.

Transparency in the Family Courts

43. The judge set out in unimpeachable detail the steps which have been made by successive Presidents of the Family Division towards increased transparency in the family courts. It is, therefore, unnecessary for the purposes of this judgment to rehearse the position. What should be noted is that both in relation to open justice as identified in *Dring,* and in the steps that have been taken towards increased openness in the family courts, the aim has been to enable the public and/or the press to have a proper understanding of the court hearings themselves.

44. Ms Proops QC has helpfully taken the court to a number of authorities in support of her submission that Ms Newman's Article 10 rights weigh heavily in favour of disclosure of the broadest and fullest type, but it is helpful to look also at the outcome of those cases which, whilst recognising the need for increased transparency in the family courts, have not endorsed disclosure of the type and extent now sought by Ms Newman.

45. In *Re Norfolk County Council v Webster (a child)* [2006] EWHC 2733, [2007] 1 FLR 1146 (*Webster*) Munby J (as he then was) considered an application for the press to be permitted to attend a care case in the days before accredited journalists were permitted to do so by virtue of FPR 2010 27.11. In his judgment, Munby J emphasised at para.[29] the 'vital role' the press plays in furthering the rule of law and the administration of justice. He spoke of the court reporter as being 'the public watchdog over the administration of justice' and, at para.[100], in trenchant terms expressed his view of the importance, in a free society, of parents who feel aggrieved being able to express their views publicly. Munby J allowed the attendance of the press, but specifically did not permit the media to have access to the court bundle and only allowed them to see "such documents (referred to during such part or parts of the hearing) as the court permits to be made public".

46. More recently in *GNM*, Toulson LJ was concerned with an application in relation to extradition proceedings heard in open court. The media sought the release of certain documents referred to by counsel but not read out in detail. Toulson LJ in the passage approved by the Supreme Court in *Dring* and set out at para. [40] above, referred to the open justice principle requiring access to "documents [which] have been placed before a judge and referred to in the course of proceedings".

47. Ms Proops argues that where a journalist has been able to attend a hearing, he or she will have been able to hear all manner of confidential information. The court, Ms Proops contends, should permit the substantial disclosure Ms Newman now seeks as she, as an investigative journalist, should be in no worse a position than if she had been aware of and able to attend the hearing. In my view in making that submission Ms Proops overlooks the fundamental point that whilst a journalist can attend, they are not permitted subsequently to report on the proceedings due to the constraints of s12 AJA 1960 and s 97 Children Act 1989. Ms Proops in reality seeks to put Ms Newman in a superior position to the attending journalist who would be most unlikely to be granted access to more than the skeleton arguments/position statements and such other documents as enable him or her to have a proper understanding of the proceedings.

48. In my judgment, what Ms Newman seeks is beyond anything that either the guidance or authorities have to date had in mind. Ms Newman seeks to embark upon what has been referred to as an "archaeological dig". She wishes to trawl through thousands of

highly confidential documents, many of which refer in detail to the most intimate medical and psychological details of this child's life, in order to see if something turns up. Almost certainly something would 'turn up' as it has long been acknowledged that things went wrong in this case to the significant prejudice to the mother, but mainly to the detriment of M. This is abundantly clear from the Court of Appeal judgment in the appeal against the making of the placement order.

49. Ms Newman is not seeking to push the boundaries of transparency in the family courts by way of a better understanding of the court process, or of the hearings which took place in respect of M, or even particularly to hold the judge or the family justice system to account. Ms Newman seeks to delve beyond the court proceedings themselves and to have access to documents such as social care and medical records in her capacity as an investigative journalist in order to track through the decision-making process which informed the decision to apply for a placement order. It should be understood that in saying this I do not in any way criticise Ms Newman's proper journalistic desire to hold the local authority to account. I am, however, seeking to establish the context in which the balancing exercise had to be conducted by the judge.

50. There is much common ground between the parties as to the proper approach: first, it is agreed that the balancing exercise to be undertaken by the court is that found in the seminal case of *Re S (A Child)* [2005] 1 AC 593 at [17] (Lord Steyn):

> "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."

It follows therefore that:

a) Neither article has precedence over, or "trumps", the other;
b) Where the values under the two articles are in conflict, 'an intense focus on the comparative importance of the specific rights being claimed' is necessary;
c) The justifications for interfering with or restricting each right must be taken into account;
d) Finally, 'the proportionality test must be applied to each' in what Lord Steyn described as 'the ultimate balancing test'.

51. Secondly, it is agreed between the parties that if the balancing exercise is undertaken correctly, the Court of Appeal will not readily intervene.

52. In the context of family proceedings, the approach was endorsed by Sir Mark Potter P in *A Local Authority v W* [2006] 1 FLR 1, in which case he emphasised that the analysis is not "a mechanical exercise to be decided upon the basis of rival generalities".

53. It is not suggested that Roberts J fell into the trap of deciding the case on the basis of 'rival generalities', on the contrary she considered each separate category of document individually and with meticulous care. The judge characterised her decision not as a determination of matters of general principle, but as 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'.

54. Ms Proops submits that, although the judge carried out a balancing exercise, that in itself is not enough. Ms Newman's case is that the judge adopted an impermissible and unlawful approach to the balancing exercise in two critical respects, namely:

    i) The judge failed to give adequate deference to the fact that the mother has parental responsibility and agrees to the proposed order for disclosure of the court files (Ground 1);

    ii) The judge failed to give sufficient weight to the fact that Ms Newman proposed a two stage process; stage 1 being the viewing and assessment of the material, and stage 2 being a further considered application for permission to make use of such material as she might determine from her view point as a highly skilled investigative journalist, to be relevant.

55. It is Ms Newman's case that these errors of law (but particularly in relation to the judge's approach to parental responsibility) infect the entirety of the judge's judgment. It is not therefore necessary, it is said, to consider individually the judge's conclusions in respect of each of the twelve categories of documents as they are each undermined by the same error in approach.

Parental Responsibility

56. It is submitted on behalf of Ms Newman that considerable deference must be given to the person who has unchallenged parental responsibility. It is not, she says, for the state to gainsay those decisions; even if they are bad decisions the court should step back and respect parental autonomy.

57. Ms Proops has somewhat modified her approach from that adopted before the judge and does not now say that the mother's consent should be determinative of the application. It is accepted that the court can depart from the views of a parent with parental responsibility. The court should however, she submits, be very slow to 'second guess' the views of a person with unchallenged parental responsibility and can do so only where there is powerful compelling evidence justifying such a departure.

58. Ms Proops relied heavily on the observations of Munby LJ in *Ward:*

> "133.The starting point, in the particular circumstances of this case, is that the State is no longer involved with Mr and Mrs Ward and their family. The care proceedings came to an end without the making of any order. The local authority does not have parental responsibility for William and he is not a ward of court. The only persons with parental responsibility for him are Mr and Mrs Ward. Insofar as the disclosure of information about a child of William's age involves an exercise of parental

> responsibility then it is for Mr and Mrs Ward to exercise that responsibility, not the court or any other public authority. There are no grounds for any interference by the State – whether the state in the guise of the local authority or the state in the form of the High Court – with the exercise by Mr and Mrs Ward of their parental responsibility…...
>
> 134. Accordingly, in my judgment, so far as concerns any decision as to whether or not it is in William's interest for any of this material to be put into the public domain, and if so how and for what purpose, the decision is one for Mr and Mrs Ward. It is a matter for them. And it is for them, not the court, to assess the wisdom or otherwise of what they are proposing to do: *Re B; X Council v B (No 2)* [2008] EWHC 270 (Fam), [2008] 1 FLR 1460, at para [20(iv)]."

59. The judge, the Appellant says, failed to recognise that the only person with first hand evidence as to M's mental state and views was the mother. Whilst it was accepted that the Guardian had represented M between 2015 and 2018, she had not seen M with a view to ascertaining her wishes and feelings about the present application and had rather relied on academic papers about the views of children resistant to publication of their private information following care proceedings.

60. Ms Rogers deferred to Ms Fottrell QC, who represented the Children's Guardian, in respect of Ground 1. Ms Fottrell highlighted that the Guardian was intimately acquainted with the history of the case. Whilst she had not seen M in respect of this application, that had been a 'child focused' decision made because the Guardian took the view that M has been through enough trauma, both through her life events and the extensive proceedings, and that it would therefore be inappropriate to see her.

61. Ms Fottrell highlighted that the Guardian was appointed by consent to represent M's independent objective views. The child's own views, given that she was then only 7 years old, could hardly be regarded as informed. M has Article 8 ECHR private life rights which are separate from those of her mother notwithstanding that her mother has parental responsibility and, in this instance, Ms Fottrell submits those interests do not coincide.

Discussion on parental responsibility: Ground 1

62. The judge dealt with this central part of the case in some detail. Given that Ms Proops described this as the 'crux of the case', I set out the judge's analysis in full:

> "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."

63. In my judgment, detailed dissection of this careful evaluation is unnecessary to conclude that the judge made no error of law. Given, however, that this issue is central to Ms Newman's case, I will examine it a little further:

    i) The judge not only acknowledged the importance of weight and respect being given to the views of the mother as the holder of parental responsibility, but also acknowledged them to be central to Article 8 private and family life;

    ii) The judge rightly noted that M has her own individual rights and that she has a Guardian to protect those rights, she not being *Gillick* competent (*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402);

    iii) The judge rightly put into the balance not just the position as it is today, but M's "emerging identity in psychological, social and physical terms." To my mind this is a matter of considerable importance. Although the evidence of how M is currently coping was also (in my judgment) significant, M is a severely traumatised child in receipt of ongoing therapy to help her come to terms with

> all that has happened to her. It cannot be said that the judge was in error in suggesting that M may have been influenced (even unintentionally) by her mother, particularly if it is correct that she did indeed as her mother says, "verbalise her wishes that her case should be used to help others".

64. Ms Proops submits that Munby J's approach in *Ward* really provides the answer to this application. The judge, she says, failed to give sufficient deference to the mother's views and instead gave too much weight to the Guardian's academic approach. Further, she says, the judge gave insufficient weight to the level of intrusion M has already sustained. What, Ms Proops rhetorically asks, would be the degree of additional intrusion given what is already in the public domain?

65. In my judgment *Ward* is, as Ms Fottrell submits, a very different case. It is true that both relate to parents who had cause to feel they had been ill served by the child protection system, but in *Ward* the competing interests were as between the family unit and the local authority. In the present case the court and the parties have recognised, by the consensual appointment of a Children's Guardian, that the mother's and M's individual Article 8 private life rights may not coincide. Unlike *Ward*, therefore, the competing interests were not limited to the family on the one hand and Ms Newman's Article 10 rights on the other, but to the separate and individual rights of each of the mother, M and Ms Newman.

66. In *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541 Lord Dyson MR summarised the position in this way:

> "30. … in the case of a child too young to have a sufficient idea of privacy, the question whether a child in any particular circumstances has a reasonable expectation of privacy must be determined by the court taking an objective view of the matter including the reasonable expectation of the parents as to whether the child's life in a public place should remain private."

67. In my judgment the court must, therefore, take into account not only the mother's view that access to the court files is in the best interests of M but also, in taking an objective view of the matter, the following matters in relation to the child in question:

i) Children have independent privacy rights of their own: *PJS* para.[72];

ii) Whilst M's interests are a primary consideration, they are not paramount;

iii) Rights of privacy are not confined to preventing the publication or reporting of information. To give a third party access to information by allowing them to see it, is in itself an incursion into the right of privacy for which there must be a proper justification: see *Imerman v Tchenguiz* [2011] Fam 116 CA at paras.[69], [72] & [149];

iv) Even "the repetition of known facts about an individual may amount to unjustified interference with the private lives not only of that person, but also of those who are involved with him": *JIH v News Group Newspapers Ltd* [2011] EMLR 9, para. [59], per Tugendhat J;

v) Repetition of disclosure or publication on further occasions is capable of constituting a further invasion of privacy, even in relation to persons to whom disclosure or publication was previously made—especially if it occurs in a different medium. It follows that the court must give due weight to the qualitative difference in intrusiveness and distress likely to be involved in what is now proposed: *PJS*: para. [32.(iii)] and para.[35].

68. Munby J put it in this way in *Re X, Y* [2004] EMLR 607, para.[57]:

> "In considering the proportionality of the proposed interference with the right of [the child] to respect for his private and family life, the judge must again consider the magnitude of the interference proposed. He must consider among other things ….. the extent to which this additional intrusion would add to the interference which has already taken place and is bound to take place in the future…"

69. The information sought by Ms Newman is as an investigative journalist. Her request for access to the documents has been put in a number of different ways but is aimed at obtaining access to the source material which informed the decision-making process that led to the events which culminated in the making of a placement order. That 'source material' contains the most sensitive and personal material in relation to a child who suffered a number of developmental and other difficulties even before the trauma of her removal from her mother's care for three years. The judge, in considering that aspect of the application which was in relation to M's medical records, properly said:

> "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".

70. In my judgment the judge was entitled to conclude at para.[129] that the information now available through the various judgments is significant in terms of background detail and content, but that that is the case does not, without more, 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'.

71. The Guardian submits that if the application were allowed, Ms Newman would have access to substantially more documents than would have been permitted had she attended the hearings. Such an outcome would, she submits, be wholly inappropriate and would allow access to information substantially beyond that which is anticipated by the rules and authorities to date; I agree.

72. It was against that backdrop that the judge, having the mother's views well in mind, considered each individual category separately before concluding that in the main, the balancing exercise militated against substantial disclosure.

73. In my judgment the judge gave every appropriate respect to the fact that the mother has parental responsibility unimpeded by state interference, which respect was reflected in the careful and detailed analysis in her judgment set out above. There is no basis for this court to interfere with the balancing exercise which in my view was carried out correctly.

Grounds 2 and 3

74. Although Ms Proops submitted that the alleged failure properly to weigh the Article 8 rights in play lay at the heart of the appeal and on its own should result in the appeal being allowed, she further argued that the judge fell into error in relation to her approach to the countervailing Article 10 rights (Grounds 2 and 3).

75. In her submission, the judge was wrong in law in failing to recognise the cardinal importance of the media being permitted to discharge its investigative role, in this case by way of independently scrutinising the facts of the case and the local authority's decision making. The judge made a fundamental error in failing to understand the importance of Ms Newman's Article 10 rights, with the consequence that Ms Newman is denied access to the underlying material; this Ms Proops says, is an 'open justice deficit'.

76. Ground 2, therefore, focuses on the judge's alleged failure to give adequate weight to Ms Newman's free expression rights and in particular to the significant public interest in enabling effective investigative journalism.

77. Ms Proops reminded the court of the canine analogy frequently referred to in disclosure cases and taken from the judgment of Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at p205, namely that the court should 'above all' have particular regard to the importance of freedom of expression: "The press discharges vital functions as a bloodhound as well as a watchdog". Ms Newman seeks, as she is undoubtedly entitled, to be in the present case not a 'watchdog' but a 'bloodhound'.

78. The judge was, I am satisfied, conscious of the importance of the role of the media. At para.[120] she said:

> "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".

79. In my judgment there is no merit in this ground depending as it does on an assertion that the judge gave inadequate weight to Ms Newman's freedom of expression rights.

As the Master of the Rolls put to Ms Proops in oral argument, the challenge raised amounts to this: Ms Newman does not agree with the outcome of the balancing exercise conducted by the judge.

80. By Ground 3 it is said that the judge wrongly 'collapsed' together the two-stage process, that is: access first and publication second. It was not for the court, Ms Proops submitted, to anticipate what Ms Newman might identify within the documents she wished to be disclosed, or for the court to assume, without having seen the documents, that Ms Newman would not be able to justify publication of an article drawing on some of that material.

81. Ms Proops points to the judge's finding at para.[158] of her judgment:

> "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."

82. The entirety of the judge's analysis was, says Ms Proops, tainted by what she submitted was the court's premature indication that it would refuse future publication.

83. It should be borne in mind that the judge made the observation that she was "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" in that section of her judgment in which she was specifically dealing with the social care assessments undertaken and witness statements prepared for the proceedings. Ms Proops says that, whilst that may be so, the reality is that the comment applied equally to all categories of document and reflected the judge's approach over all.

84. In my judgment, the judge was entitled to have an eye to the likelihood of a future application to publish/draw upon substantial extracts from the personal information relating to M. Such a consideration would properly form part of the proportionality exercise given the very considerable cost in terms of money and time in providing and

redacting the thousands of documents to which Ms Newman sought access. It may be that the judge went too far in her reliance on a likely refusal to permit future publication in relation to this category of documents but, even if that is the case, in my judgment the court should stand back and look at the totality of this judgment and in particular at the careful and detailed analysis of each individual category found between paras.[131] and [161]. Such a review discloses no error in the conduct of the balancing exercise and on the contrary displays punctilious care at every stage.

The ultimate balancing test

85. The judge rightly approached the case as a:

> "[162]… targeted and fact-specific exercise which has involved a careful balancing exercise of all the competing rights as between the individual parties to this case… 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."

86. The judge correctly identified the task before her as she recognised also in the following paragraph, observing that "The principle of transparency and openness is of crucial importance in a democratic society". The judge further properly recognised that: "There have been significant developments towards greater transparency in the Family Courts". That does not, as the law presently stands, alter the balancing exercise which had to be conducted in this case which is as the judge recognised at para.[119]: "one that can only be determined by the court in accordance with established legal principles".

Practicality

87. Ms Proops submits that the importance of Article 10 is such that it should be the main focus of the courts and that it would be a serious concern if issues of resource stood in the way of Article 10 rights; I disagree. A number of authorities refer to the importance of having in mind the practicalities of the request as part of the proportionality test which forms the final part of the *Re S* exercise. I need go no further however than *Dring* at para. [47]:

> "47. Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day to day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become

> much harder, or more time-consuming, to discharge. On the other hand, increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access 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."

88. The judge was entitled at para. [164] to be conscious of the costs which SCC had already incurred in participating in proceedings in circumstances "where it has no ongoing responsibilities for the child" and accordingly to reserve the issue of costs, including the costs in relation to the redaction and copying of those documents to which Ms Newman was granted access. The judge, however, notwithstanding her inability at that stage to assess the extent of the administrative burden to SCC in undertaking the redaction exercise, held at para. [162] that it was nevertheless an exercise that SCC had to undertake as to do so was "necessary and proportionate" given the importance which the judge attached to aspects of Ms Newman's Article 10 rights. Such an approach cannot in my view be faulted.

Conclusion

89. This appeal is concerned only with the 'targeted and fact specific' balancing exercise undertaken by the judge. In my judgment there is no basis for this court to interfere with the judge's approach to the ultimate balancing test which was conducted with meticulous care and which demonstrated no error of law.

Accordingly, if the Master of the Rolls and My Lady agree, I would dismiss this appeal.

Postscript

90. This case has served to emphasise the need for the development of guidance in the form of court rules in order to assist courts in dealing with these difficult issues. Although "about the importance and universality of the principles of open justice there can be no doubt" and the *Re S* test provides the ultimate balancing exercise as between the Article 8 and Article 10 rights, there are many issues of both practice and principle which are, as Baroness Hale said at para. [51] in *Dring*, "more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case".

91. Just such a process was launched by the President of the Family Division in May 2019 following the appeal against the reporting restrictions order in this case ([2019] EWCA Civ 482). The President's review is now well under way. The call for evidence is complete with more than 100 submissions having been received from both individuals and agencies. The first of three oral evidence sessions has been held. The final session will take place in May 2021 with the final publication of the *Family Division's Transparency Review* expected in the summer of this year.

92. In my judgment the issues raised in this case serve to underline the need for the Transparency Review.

Lady Justice Macur:

93. I agree

The Master of the Rolls:

94. I also agree