Neutral Citation Number: [2023] EWCOP 4

Case No: 13884582

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2023

Before:

MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Between:

A Local Authority

Applicant

- and –

(1) H
(by her litigation friend, the Official Solicitor)

Respondent

- -
- -

Ms Rachel Baker for the **Applicant**
Ms Sophia Roper KC (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing dates: 25th-26th January 2023

- -

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.

....

THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE HAYDEN:

1. This application concerns H, a young adult, a natal male who now identifies as female. H prefers to be referred to by female pronouns. Though H has considered undergoing treatment for the purpose of modifying her sexual characteristics, she has recently indicated that she does not want to pursue this at present. H has, in her childhood, experienced very considerable trauma including parental neglect and severe abuse, at a very young age. In her mid-teens, in very distressing circumstances, she experienced the abrupt cessation of a long-term foster placement and subsequent loss and reduction of contact with key members of her foster family. The pain of this breakdown remains raw. Between 2019 and 2021, H experienced 5 changes of placement. She moved to her present home some time ago where she is, manifestly, settled and extremely well supported by the staff. Their professionalism and sensitivity have generated an atmosphere in which H has made a level of progress which has surprised and delighted everybody.

2. H faces very complex psychological and psychiatric challenges: global developmental delay; attention deficit hyperactivity disorder; executive dysfunction; developmental trauma disorder; possibly emotionally unstable personality disorder. Each of these is a consequence of H's traumatic and abusive childhood. H also has traits of autism spectrum condition, extremely disordered attachment and highly disrupted emotional regulation. At times when 'dysregulated', H's behaviour has been extreme and presents harm, both to herself and others.

3. H has expressed a sexual interest in pre-pubescent children. This too almost certainly arises in consequence of the nature of the abuse she experienced, which has distorted her sexual template. In the opinion of a highly experienced psychiatrist, instructed in these proceedings, H presents a real risk of sexual harm to children, both in contact with them and online. There has been some discussion concerning the nature and extent of this risk but it is sufficient to say that it is a risk which is plainly very serious and requires vigilant monitoring. There is an ongoing investigation by the police relating to H's possession of indecent images of minors on her laptop.

4. H's liberty is restricted, both within and outside the home where she now lives. Internal CCTV is installed, save for in the bathroom and bedroom. She is presently supervised on a 2:1 ratio. Until relatively recently, she had 3:1 supervision, although this proved unnecessary after a change to a placement more suited to her needs. H is only permitted access to the community with supervision. When in her bedroom, H is checked every hour. She is not allowed unsupervised access to the internet or electronic devices. She is also restricted from use of items which might be dangerous (e.g., knives). This level of supervision and restriction on her liberty has endured for over 3 years. Under this profoundly restrictive regime, H has progressed strikingly well. There has been a very significant reduction in the incidents of violent behaviour.

5. H has become remarkably compliant with a level of restriction that would be intolerable to most people. The psychiatrist was plainly concerned, as am I, that H has become so used to these arrangements that far from feeling them to be invasive of her privacy, she has come to regard them as integral to her safety and security. When the psychiatrist prepared her first report, H's circumstances were very different. There had been incidents of her striking out at others, destroying property, self-harming, threats of suicide. Physical restraint had been used where necessary.

6. One of the great advantages of H's living arrangements is that it is supported by a multi-disciplinary team. Dr S has repeatedly emphasised this and has been impressed by the therapeutic impact of a care setting which is *"stable, containing, consistent… where she knows and trusts staff and where she feels safe"*. Dr S identified *"meaningful activity"* which has developed a sense of purpose for H, *"crucial to her recovery and development"*. I record here that H has engaged with all the suggested activities both with great enthusiasm and obvious pleasure. In her oral evidence, Dr S wished to emphasise the fact that H is not yet 19 years of age. She is also, Dr S said, *"young for her age"* and still requires time and space *"to mature"*. Dr S considered that the

period between now and 25 years is an important one for H. Having emphasised H's achievements, it is also important that I highlight that a great many difficulties remain. By way of example, only a few weeks ago, H became dysregulated and aggressive which culminated in her assaulting a staff member. H has since pleaded guilty to a charge of assault.

7. In evidence, Dr S told me that in her traumatic life, H has identified women as more likely to support and be kind to her. Her carers are women. Dr S considered that H was far more wary of men. I note also that H has formed an obviously good relationship with her female solicitor, which has been very effective for her in these proceedings, and I suspect, more widely. H's solicitor has, in a very real way, managed to ensure that H's voice has been heard loudly and clearly. I record that at H's request, I met with her in chambers. Also present was H's solicitor and her two support workers. A note of that meeting was taken. I found H to be articulate, well-mannered and funny. I enjoyed meeting with her. With her solicitor's prompting questions, H covered a broad range of topics with, what I considered to be, a high level of candour.

8. Dr S has speculated that H's self-identification as a woman may be deeply rooted in her trust of women and reflective of a wish to be close to and accepted by them. When I met H, she was entirely supported by women, relaxed and happy but also very respectful. I found Dr S's view on this point both thoughtful and persuasive, in the context of H's wider psychological landscape as it has been described to me, particularly, her difficulties in forging secure attachments. H engaged well with a specialist family service assessment which analysed her sexuality and behaviour.

9. The Court has been asked to consider H's capacity to take decisions in the following areas:

   i. Residence;
   ii. Care/support;
   iii. Contact with others (both adults and children);
   iv. Use of the internet and social media.

   Evaluating capacity is a very important aspect of the work of the Court of Protection. In effect, it is the gateway to this court process. Unless the presumption of capacity is rebutted, the Court has no jurisdiction. In very rare cases, resort may be had to the Inherent Jurisdictional powers of the High Court but the application of that jurisdiction is limited. It does not arise here. Ms Roper KC, acting on behalf of the Official Solicitor, has tested the evidence in relation to capacity in the spheres of residence/care/support. She tells me that H does not like to be perceived as incapacitous. This is an entirely natural reaction and I understand it. There is no doubt that H expresses views on these key issues of residence and support which are, superficially, consonant with an understanding of the issues involved. Certainly, as I have commented, H accepts this rigorous regime as linked to her welfare and acquiesces to it. However, Dr S remained very clear that H has not yet achieved capacity, although she considered that H was progressing towards it.

10. H stayed in Court (following the proceedings remotely) for the entire morning of the first day. The language surrounding capacity assessments has become increasingly complex, I suspect unnecessarily so, and inaccessible to lay people. Though it was clear to me that H was trying very hard to understand the exchanges in the morning, she did not join us in the afternoon. She gave oral evidence on the morning of the second day.

11. I propose to set out, in some detail, the applicable law in the relevant spheres of decision making, which fall to be considered. In doing so, I can, confidently, lean on the case law identified in Ms Roper's helpful skeleton argument. I think it would be helpful to have the relevant law, relating to issues which arise regularly in the Court of Protection, accessible in one judgment. Also, because I know that H's solicitors will take her through the judgment, I think it important that she sees the effort and care that has been taken for her, by all the professionals, to respect her autonomy as an individual.

12. The basic principles of the Mental Capacity Act 2005 (MCA) were conveniently and uncontroversially summarised by MacDonald J in *A Local Authority v RS (Capacity) [2020] EWCOP 29*:

> *"[30] From this statutory regime and the case law dealing with the statutory test the following principles can be drawn, as summarised in my decision in Kings College NHS Foundation Trust v C & V [2015] EWCOP 80 and the decision of Cobb J in WBC v Z and Anor [2016] EWCOP 4. Those principles are as follows:*
>
> > *i) An individual is presumed to have capacity pursuant to s 1(2) of the Mental Capacity Act 2005.*
> > *ii) The burden of proof lies with the person asserting a lack of capacity and the standard of proof is the balance of probabilities.*
> > *iii) The determination of the question capacity is always decision specific. All decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of ss 1 to 3 of the 2005 Act, which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the state to be embellished.*
> > *iv) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (Mental Capacity Act 2005 s 1(3).*
> > *v) A person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise.*
> > *vi) The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005.*
> > *vii) In determining the question of capacity, the court must apply the diagnostic and the functional elements of the capacity pursuant to ss 2 and 3 of the Mental Capacity Act 2005. Thus:*
> > *a) There must be an impairment of, or a disturbance in the functioning of the mind or brain (the diagnostic test); and*
> >
> > *b) The impairment of, or disturbance in the functioning of the mind or brain must cause an inability to understand the relevant information, retain the relevant information, use or weigh the relevant information as part of the process of making the decision in question or to communicate the decision made.*
> > *viii) For a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act.*
> > *ix) With respect to the diagnostic test, it does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary.*
> > *x) With respect to the functional test, the question for the court is not whether the person's ability to take the decision is impaired by the impairment of, or disturbance in the*

> *functioning of, the mind or brain but rather whether the person is rendered unable to make the decision by reason thereof.*
> *xi) An inability to undertake any one of the four aspects of the decision-making process set out in s 3(1) of the 2005 Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain. The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another."*

13. In *A Local Authority v JB* [2021] UKSC 52, the Supreme Court considered the question of capacity, as defined in the MCA 2005, for the first time. The judgment clarifies the order in which the questions, identified above, are to be addressed. Lord Stephens stated at para 61 that the MCA 2005 applies a *"function"* or *"understanding"* approach to capacity which *"focuses upon the personal ability of the individual concerned to make a particular decision and the subjective processes followed by him in arriving at the decision."*

14. As Lord Stephens sets out (paras 66-79), an assessment of capacity requires the court to address two questions:

    > *"(a) first, whether the person is unable to make a decision in relation to a particular matter; and only if so*
    > *(b) second, whether that inability is caused by an impairment of or disturbance in the functioning of P's mind/brain*."

    In practice, the evaluation commences with diagnosis directed to establish that such an impairment/disturbance exists: this is a pragmatic approach, since if there is none, the assessment need go no further. Ms Roper submits, and I agree, that following the analysis in *Re JB,* which reflects the earlier case law, the question of causation should only be considered if the functional inability to make the decision has been established.

15. In considering the first, functional question, Lord Stephens emphasised the importance of identifying (1) the precise matter upon which the person's decision is required [68] and (2) the information relevant to that decision [69]. An assessor of capacity and the court must therefore ask as a preliminary matter, (1) *what is the decision to be made?* and (2) *what is the information relevant to that decision?*

16. The relevant information, defined in s3(4) MCA, which includes the reasonably foreseeable consequences of making or not making the decision, must be set within the specific factual context of the case [70]-[72], see: *PC v City of York Council [2014] 2 WLR 1*. The impact of this approach is that the assessment must be unique to P, and to P's specific circumstances. Thus, previous case law, suggesting that any particular type of decision must be assessed in a prescriptive way, must be approached with considerable caution.

17. Depending on the factual circumstances of the case, the reasonably foreseeable consequences within s3(4) may include the consequences not just for P but for other people [73].

18. The evidence of a psychiatrist is likely to be determinative of the issue of whether there is an impairment of the mind for the purposes of s2(1). However, the decision as to capacity is a judgment for the court to make: *Kings College Hospital NHS Foundation Trust v C* [2015] EWCOP 80 at [39], citing *Re SB* [2013] EWHC 1417 (COP) at [36]-[38]. In *PH v A Local Authority [2011] EWHC 1704 (COP)* Baker J helpfully identified the *"broad canvas approach"* to evaluating evidence of capacity at [16 (xiii)]:

> *"In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P.*
>
> *In Oldham MBC v GW and PW [2007] EWHC 136 (Fam), a case brought under Part IV of the Children Act 1989, Ryder J referred to a 'child protection imperative', meaning 'the need to protect a vulnerable child' that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person - including, of course, a judge in the Court of Protection - may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective".*

19. The danger of elevating the instinctive need to protect a vulnerable adult to such a degree that it corrupts the integrity of an objective assessment of capacity, is an ever-present danger in this sphere of work and requires vigorously to be guarded against. Paternalism has no place; protection of individual autonomy is the magnetic north of this court.

20. As is clear from *Re JB,* this demands a highly fact specific approach. The practice of applying identified tests rigidly and *'as if they had the force of statute'* was deprecated in *LB Tower Hamlets v NB & AU [2019] EWCOP 27 at [42]-[43],* approved by the Court of Appeal in *Re B [2019] EWCA Civ 913 at [44].*

21. Primary evaluation of capacity requires not only identification of the decision itself – which though often clear, is not ubiquitously so, but also, the relevant information which informs the decision. This will be both fact and person specific.

22. It is not necessary for a person to use and weigh every detail of the potentially relevant information, merely the salient factors, *CC v KK and STCC* [2012] EWHC 2136 (COP) at [69] and *Heart of England NHS Foundation Trust v. JB* [2014] EWHC 342 per Jackson LJ at [25]. Lord Stephens considered that whilst the gravity of the consequences is a relevant issue, pragmatically, there must be:

> *".. a practical limit on what needs to be envisaged as the "reasonably foreseeable consequences" of a decision, or of failing to make a decision, within section 3(4) of the MCA so that "the notional decision-making process attributed to the protected person with regard to consent to sexual relations should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity": see In re M (An Adult) (Capacity: Consent to Sexual Relations) at para 80. To require a potentially incapacitous person to be capable of envisaging more consequences than persons of full capacity would derogate from personal autonomy. [75]"*

23. Even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision: *Re SB* [2013] EWHC 1417 (COP).

24. *King's College Hospital NHS Foundation Trust v C & V* [2015] EWCOP 80 at [37]-[38]:

> *"Within the context of s 3(1)(c) it is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors (see CC v KK and STCC [2012] EWHC 2136 (COP) at [69]). Even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision (see Re SB [2013] EWHC 1417 (COP)).*
>
> *It is important to note that s 3(1)(c) is engaged where a person is unable to use and weigh the relevant information as part of the process of making the decision. What is required is that the person is able to employ the relevant information in the decision-making process and determine what weight to give it relative to other information required to make the decision. Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision-making process is a matter for the decision maker. Thus, where a person is able to use and weigh the relevant information but chooses to give that information no weight when reaching the decision in question, the element of the functional test comprised by s 3(1)(c) will not be satisfied. Within this context, a person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision-making process."*

25. It is also important not to conflate what might be regarded as important to the professionals with, what is or may be, important to P. In the instant case, H is 18; she has had, for all the reasons I have set out, a troubled life. Nonetheless, as Ms Roper astutely recognises, H's life has been *"a varied one"*. This leads Ms Roper to the following observation:

> *"Matters such as potential police involvement may hold less weight for [H] than they would for a professional, who brings a different experience to the process of weighing up information."*

Confronted with this intensely vulnerable young person, who is still only 18 years of age, it is also very easy for the judge to drift towards a paternalistic approach and inadvertently substitute his or her values for those of the protected party (P). Ultimately, this would be to fail H.

26. It is very clear from the evidence, that when she is dysregulated, H is unable to take capacitous decisions. As I understand it, there is no dispute about this nor, to my mind, could there be. Inevitably, this has led to consideration of *"fluctuating capacity"*, which always presents a challenge to general assessment of capacity. In *Re JB*, Lord Stephens said at [64]:

> *"Capacity may fluctuate over time, so that a person may have capacity at one time but not at another. The "material time" within section 2(1)*

> *is decision-specific (see para 67 below). The question is whether P has capacity to make a specific decision at the time when it needs to be made. Ordinarily, as in this case, this will involve a general forward looking assessment made at the date of the hearing. However, if there is evidence of fluctuating capacity then that will be an appropriate qualification to the assessment."*

27. In relation to her sexual thoughts and fantasies, H experiences a very strong sense of self-loathing. Following the family service assessment, H has been able to speak more openly about this. This honesty is regarded as a positive indicator for progress and change. H's commitment to the various activities arranged, some with therapeutic objectives, is also reflective of her resolve to achieve a more stable life for herself. H tries to apply the techniques and strategies that she was guided towards in the assessment. She states that she has learned to *"put a barrier or brick wall up at times"* to prevent her from thinking in sexual terms about underage children. Dr S pays tribute to H's determination and effort but again, emphasises that H is still only 18 and has years left in which she will have to continue to work through her sexual thoughts and the impact of sexual abuse on children. As I understand Dr S's evidence, to some degree the 'barrier' that H erects sometimes requires to be taken down in order that the reality of the potential risk of harm that she represents is confronted more critically by her and better understood. In August 2022, the psychiatrist has assessed H as presenting *"an extremely high risk of sexual offending against children. If she is not continuously supervised, it is almost inevitable that she will commit sexual offences against children, and there is a substantial risk that this could be contact offences".* Ms Roper has, in testing the evidence, sought to dislodge that evaluation of risk and, in particular, the conclusion of the psychiatrist.

28. In relation to H's own account of her inappropriate touching of prepubescent children, whilst in care, Ms Roper suggests that *"there is a level of doubt as to how much of this happened"*. She also speculated that H's accounts might, in some way, be a false memory, perhaps based in her own experiences. This, with respect to Ms Roper, strayed beyond the boundaries of constructive testing of evidence and into the terrain of the entirely speculative. The countervailing analysis of the available evidence points to it revealing a high level of peripheral detail, and a pattern of behaviour which would be identified by experts as 'grooming' (unlikely to be understood or appreciated by H). Moreover, the allegations H makes against herself led inevitably to the collapse of a placement in which she had plainly been happy. Further, the allegations have never been retracted. Additionally, they cannot be looked at in isolation. H has downloaded indecent images of children and, at one point, made direct contact with a 12-year-old boy. Whilst I would not go so far as Dr S and say that the evidence suggests that *"it is almost inevitable that [H] will commit sexual offences against children"*, I do consider the risk to be ongoing and high. In her oral evidence, Dr S was prepared to contemplate that the progress H has made might render her earlier identification of risk to be overly pessimistic. This led her to say that *"the risk is possibly, probably lower".*

29. In respect of H's capacity to take decisions about her residence, Dr S emphasised that such decisions are best categorised as longitudinal rather than single issue. It is not just a question of whether H wants to be at the home or not, it requires a balance of the options. H can do this in a capacitous fashion when calm and engaged but is unable to achieve this at times of emotional dysregulation. This is as Lord Stephens indicated in *Re JB* (supra), *"an important qualification to capacity"*. Additionally, H is identified as presenting with *"all the traits of development trauma disorder (DTD)"* which has a considerable overlap, Dr S tells me, with the symptomology associated with emotionally unstable personality disorder (EUPD). A feature of DTD is *"executive dysfunction"* caused by cognitive impairment and/or emotional instability. The executive dysfunction is *"characterised as difficulties with the higher order cognitive functions affecting impulse and behavioural control, planning, abstract thinking, flexibility and disruptions in task-oriented behaviour. Executive functioning is often impaired at times of distress or heightened emotion".*

30. In each of the spheres of capacity that have been analysed i.e., residence, care/support, contact with others (both adults and children), use of the internet and social media, I agree with the psychiatrist that the presumption of H's capacity is rebutted by cogent evidence. I also agree that H plainly has some insights into her behaviour but that it remains incomplete. Her co-operation with the plans for her care is one of a number of factors, which I have referred to above, which gives rise for optimism for the future. It is important that H hears me say this and that she recognises the tribute to her resolve and hard work. The philosophy of the care plan, which is being amended in light of the evidence, is to focus upon developing H's sense of agency, to use the psychiatrist's words. In other words, the plan is geared to enabling H to develop her own autonomy.

31. This hearing was conducted as a hybrid hearing i.e., some witnesses and Counsel appeared before me in the courtroom, others attended by video-conferencing platform. Also, a number of members of the public attended (remotely). Throughout the pandemic and in periods of 'lockdown', a great many members of the public attended this court remotely. Understandably, and rightly, the public have come to expect that they will be admitted. It is important that the difficult decisions this court is required to take are subject to public scrutiny. Occasionally, however, the compelling arguments for transparency are required to yield to the equally compelling need to protect the most vulnerable. At every hearing and in every case, Counsel and the Judge, when considering Reporting Restriction Orders (RRO), protecting the identity of P, are evaluating the competing rights and interests that fall to be assessed.

32. It is important to identify, albeit in outline only, the applicable legal framework. Toulson LJ articulated the established principle of open justice in *R (oao Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420 at [1]:

> *"...In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse..."*

33. The framework of the applicable law is now well settled, it requires a balance to be struck on the facts of each individual case, having regard to the relevant competing interests in focus. The exercise was identified with rigorous clarity by Lord Steyn in *Re S (a child)* [2005] 1 AC at [17]:

> *"The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN limited [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 ..."*

34. Thus, the competing rights are balanced, predicated on a parallel analysis in which neither is afforded greater weight. Where a restriction on either right is contemplated, the proportionality of that restriction falls to be considered in what Lord Steyn calls *"the ultimate balancing test"*.

35. H's vulnerability is evident from all that is said above and requires no further comment. It is equally obvious that a carapace of privacy needs to be constructed around her to enable her, at this most important point of her life, to address the considerable challenges she faces, linked to her abusive childhood. The background facts of this case may generate a high level of public interest. Issues surrounding transgender rights have recently achieved a very high profile, for reasons that I need not burden this judgment with. Of particular sensitivity is that of the natal male, who self-identifies as female but who has not embarked upon treatment for the purpose of modifying her sexual characteristics. H plainly falls within that category and as is clear from the evidence, presents a sexual risk to children. It is not difficult to imagine that not only H's privacy but her safety might be compromised were her identity to be in the public domain.

36. In this case, the analysis of competing rights and interests fell decidedly in favour of H's Article 8 rights. I permitted only accredited journalists and legal bloggers to remain in Court. I also prevented any reporting in the case until the conclusion of the hearing. I did not want to risk evidence seeping into the public domain that might, indirectly (i.e., by jigsaw), identify H. I have delivered this judgment in order that the parties can understand my reasoning and to establish an identified baseline to the future progress of the case. I recognise the legitimate public interest in these highly sensitive issues and have endeavoured to put them into the public domain in a way which is carefully designed to protect H's identity becoming known. It is for this reason, by way of example, that I have referred to the expert instructed as 'Dr S' and pared away any detail of H's life that might reveal who she is. In this way, I have sought to achieve proportionality in *"the ultimate balancing test"*.