Re A (Disclosure) [2012] EWCA Civ 1204

[2013] 1 FLR 919

Court of Appeal

Thorpe, Hallett and McFarlane LJJ

21 September 2012

Disclosure — Serious sexual abuse allegations against the father — Contact with child suspended — Accuser suffered poor mental and physical health — Whether the balance fell in favour of disclosure

The married parents separated when the child was 6 months old and the father returned to his home country of Australia. As per the final order the child had contact with the father in England twice a year for 2 and 4 weeks respectively. When the child was 8 years old the local authority contacted the mother informing her that serious allegations of sexual abuse had been made against the father. The mother was not provided with details of the allegations or the identity of the young person, who wished to remain anonymous, but was advised that the allegations were credible and that she should not permit unsupervised contact between the child and the father. The mother, therefore, applied to vary the contact order so that contact was supervised and for shorter periods. The application had been ongoing for 2 years and the main issue for determination was whether the local authority, which was seeking to establish public interest immunity, should be required to disclose the identity of the young person and details of the allegations. The young person had suffered from unexplained but increasingly poor mental and physical health. In the opinion of the young person's treating consultant psychiatrist, disclosure and a requirement for her to give live evidence would be detrimental to her physical and mental health. When the matter was transferred to the High Court the judge had sight of all the material being considered and upheld the local authority's case dismissing the application for disclosure. He considered that the young person's wish not to speak further about the allegations and the risks to her mental and physical health were aspects of her private life within the scope of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). The guardian appealed. The mother and the guardian had inadvertently discovered the identity of the girl but the father had no information and denied any form of sexually inappropriate behaviour. Since the initial disclosure of the allegations, 3 years ago, the father had had no contact with the child.

Held – allowing the appeal; ordering disclosure of the young person's identity and the substance of the allegations to the mother, the father and the children's guardian –

(1) An outcome on the facts of this case whereby the key material had been read in full by the judge but was not disclosed to the parties, yet the same judge was going on to preside over the welfare determination was an untenable one in terms of justice being seen to be done. In failing both to consider this aspect of the case and in arriving at that outcome the judge was plainly wrong (see paras [37]–[39]).

(2) The judge had rightly identified that European Convention rights of Arts 3, 6 and 8 were in play. Article 3 was only engaged if (and then only probably so) the young person was required to give evidence. Article 3 was not engaged in relation to the simple disclosure of identity and the substance of the allegations. The judge had erred in conflating the issue of disclosure and the young person being required to give oral evidence. In concluding that compelling her to give evidence would be oppressive and wrong the judge allowed that conclusion to dominate his consideration of the disclosure issue. He failed to identify the freestanding value of disclosure which would

enable key adults to understand and give their own factual account of the circumstances within which the allegations of the abusive behaviour took place (see para [75]).

(3) The impact of disclosure on the young person was the only substantial factor against disclosure but it was a very significant factor in terms of its importance in principle and because of the serious consequences that may follow for her. However, the act of disclosure fell short of engaging Art 3 and did not amount to inhuman or degrading treatment (see paras [79], [80]).

(4) The court could not at this stage state that disclosure would achieve nothing of value (evidential or otherwise) for the child and her parents. It was premature to say that the air between the parents could only be cleared if the young person gave evidence. Given the nature of the allegations, disclosure was likely to achieve some further information from the parents which may either go to support or to erode what the young person had said. The court must bear in mind that if the allegations were not proved to the necessary standard, then the risks of harm to the child had to be evaluated on the basis that the father did not present a sexual risk and to that extent there would be ‘a solid foundation' for establishing the child's future welfare arrangements (see para [87]).

(5) Where the State had decided to breach the young person's Art 8 rights to such a degree, and where the fallout from that disclosure left the mother in the difficult position that she so clearly described, only very exceptional circumstances were likely to justify the court, also acting as an arm of the State, in refusing full disclosure of the material to the mother and in turn to the father and the child's representatives (see para [92]).

Statutory provisions considered top

Children Act 1989, ss 1(3)(e), 42

Human Rights Act 1998

Youth Justice and Criminal Evidence Act 1999, ss 23–29

Adoption Rules 1984 (SI 1984/265), r 53(2)

Civil Procedure Rules 1998 (SI 1998/3132), rr 39.2(3)(a), (g)

Family Procedure Rules 2010 (SI 2010/2955), r 16.4, PD 16A, Part 3

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 2, 3, 6, 8(2), 10

Cases referred to in judgment top

A Local Authority v A [2009] EWCA Civ 1057, [2010] 2 FLR 1757, CA

B, R and C (Children), Re [2002] EWCA Civ 1825 (unreported) 12 November 2002, CA

B (A Minor) (Disclosure of Evidence), Re [1993] Fam 142, [1993] 2 WLR 20, [1993] 1 FLR 191, [1993] 1 All ER 931, CA

B (Disclosure to Other Parties), Re [2001] 2 FLR 1017, FD

Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 WLR 1232, [2004] UKHRR 648, HL

D (Minors) (Adoption Reports: Confidentiality), Re [1996] AC 593, [1995] 3 WLR 483, [1995] 2 FLR 687, [1995] 4 All ER 385, HL

McMichael v United Kingdom (Application No 16424/90) (1995) 20 EHRR 205, ECHR

M and R (Minors) (Sexual Abuse: Expert Evidence), Re [1996] 2 FLR 195, [1996] 4 All ER 239, CA

S (Identification: Restrictions on Publication), Re [2004] UKHL 47, [2005] 1 AC 593, [2004] 3 WLR 1129, [2005] 1 FLR 591, [2005] UKHRR 129, [2004] 4 All ER 683, HL

Roger McCarthy QC and *Kate Purkiss* for Z County Council
Ms G appeared in person and was not represented
Mr J appeared in person via telephone link and was not represented
Paul Storey QC and *Camille Habboo* for the children's guardian
Sarah Morgan QC and *Andrew Bagchi* for X

Cur adv vult

MCFARLANE LJ:

Introduction

[1] A, who is now aged 10 years, is the daughter of Ms G and Mr J (the mother and father). Her parents married in 2000 but separated in December 2002, when A was only 6 months old. Following the separation, the father returned to his home country of Australia, but applied for an order for contact to A in a county court in August 2003. In all, some five separate contact orders were made during the ensuing 5 years culminating in a final order made in February 2009 providing for A to stay with her father for 2 weeks every February from 2010 onwards and for 4 weeks every summer.

[2] In March 2010 local authority social workers contacted the mother and informed her that a young person (X) had made serious allegations of sexual abuse against the father. The mother was not told any detail of the allegations and was told that the young person did not wish her identity to be revealed to any person. The social workers did, however, tell the mother that the local authority considered that the allegations were 'credible' and advised the mother that she should not allow A to have unsupervised contact with the father.

[3] On 28 May 2010 the mother applied to vary the February 2009 order so that future contact would be restricted to shorter, supervised periods. The only basis for the mother's application was the limited information given to her by the social workers. Despite the passage of over 2 years, the mother's application is still awaiting determination. The case became stalled at the preliminary stage of determining whether or not the local authority should be required to disclose the identity of X and/or the details of her allegations to the court, the parents and the children's guardian (who has been appointed to represent A's interests). It is of great concern to note that the case apparently languished in the county court for almost 12 months without any substantive activity occurring before it was transferred to the High Court in May 2011. Although an issue of public interest immunity does not of itself justify transfer to the High Court, the circumstances of the present case would seem to have merited an early transfer up from the county court.

[4] The issue of disclosure came before Peter Jackson J for the first substantive hearing on 27 September 2011. Prior to the hearing, as the result of an earlier direction, the judge had received from the local authority the documents in respect of which they sought to establish public interest immunity. In the event the September 2011 hearing was adjourned in order that X's position could be further clarified.

[5] At a hearing on 20 January 2012, Peter Jackson J heard submissions from or on behalf of both parents, the children's guardian appointed to represent A's interests under the Family Procedure Rules 2010 (FPR 2010), r 16.4, the local authority and X, who had been joined as an intervener. In a

reserved judgment handed down on 16 February 2012, the judge dismissed the parents' and A's application for disclosure and it is against that determination that A's children's guardian now appeals.

The factual context

[6] The factual context is succinctly set out by Peter Jackson J in his judgment at paras [4]–[20]:

> 'The allegations
> [4] In May 2010, the mother applied to vary the most recent contact order. That application, long overdue for determination, arose in the following way.
> [5] In late 2009, a young person, known in these proceedings as X, alleged that she had been very seriously sexually abused by the father over a period of years, starting when she was a much younger child.
> [6] X, now no longer a child, has suffered from unexplained but increasingly poor physical and mental health for many years. Her account of abuse was first given to some known adults, who reported the matter to social services. When speaking to social workers, X insisted that she did not want any action to be taken on her complaint, or for her identity to be disclosed, even to her own parents. She refused to talk to the police, but in the end agreed that her parents had to be told. Her account has not always been consistent, but overall she has maintained it.
> [7] The local authority regarded the allegations as credible. Its first concern was for X, but it appreciated that the father would be coming to England for contact with A. Accordingly, in March 2010 it approached the mother and told her that a credible allegation of sexual abuse had been made against the father by an unidentified person. It told her that she should take action to protect A.
> The present proceedings
> [8] This placed the mother in an unenviable position. She had been ordered by the court to make A available for contact and was now being told by the local authority that this was not safe. She applied to vary the contact order to allow supervised contact only and the father was in turn faced in May 2010 with an application to stop contact on the basis of an unspecified allegation by an unidentified person. It could fairly be described as an impossible situation.
> [9] Not long after the proceedings began, the mother became aware of X's identity. She has since spoken to X and says that she believes her allegations.
> [10] There is no evidence of sexual harm having come to A. While the proceedings have continued, the father's occasional contact has been supervised by friends of the family.
> [11] There were a number of hearings at which little progress was made, with the parents seeking disclosure and the local authority resisting it. In May 2011, the matter was transferred to the High Court and at that point a Children's Guardian was appointed for A.
> [12] At hearings before me in September 2011, the parents (by that stage no longer legally represented) and the guardian sought disclosure

> of X's file. The local authority, mindful of its duties to both X and A, now took a neutral position. X, who is legally represented, sought permission to obtain a psychiatric report concerning the likely effect of disclosure upon her mental and physical health.
> [13] Having heard submissions and read the local authority's files, I have reached the conclusion that it would be impossible for the reliability of the allegations to be tested without a hearing at which both X and the father gave evidence.
> [14] Plainly, the preferable outcome was for X to agree to disclosure and to be able and willing to give evidence. I therefore deferred a decision until December 2011 to allow her to be encouraged to participate by her legal and psychiatric advisers. I directed that she should be told of the special measures that could be put in place to allow her to give evidence. I urged her to reflect not only on any harm that she may have suffered, but also upon her responsibilities, however unwelcome. I acknowledged that there might be good or even compelling reasons for her stance, but that it came at a high price for others.
> [15] In the event, the matter could not return for hearing until January 2012 because of a period of hospitalisation for X, the commitments of her consultant psychiatrist, Dr W, and listing difficulties around the Christmas period.
> Medical opinion

[16] Dr W has known X professionally since 2010. She has read the relevant documents, spoken to X's GP, and interviewed X in December 2011. She has now reported on the potential psychological/psychiatric implications for X of (1) disclosure of social services' records; or (2) being summoned to give evidence. She has produced two documents:

- A full report for the court reviewing X's medical and psychiatric records in detail, describing her interview, and giving her opinion and answers to the questions raised.

- A condensed version for disclosure to the parties, omitting identifying information, but setting out her opinion and answers in identical terms.

[17] In Dr W's opinion it would be detrimental to X's physical and mental health if information held by the local authority were to be disclosed and if X were required to give evidence in court.

[18] Her report reads as follows:

"X's allegations of abuse and events relating to her subsequent disclosure are relevant to my assessment of two reasons: (1) there appears to be a close temporal relationship between X's reported experiences of abuse and her presentation with episodes of medically unexplained symptoms; (2) X's experience of disclosure has left her feeling vulnerable and lacking in trust. In particular she feels that her confidentiality has not been respected and that she has been misled about the potential implications of disclosure.

Medically Unexplained Symptoms

X has a long history of repeated presentations with medically unexplained symptoms commencing in early childhood. Medically unexplained symptoms (ie, symptoms for which no physical cause can be found) are often a manifestation of underlying psychological distress although the person presenting might not recognise this. One psychological perspective is that presentation with medical symptoms provides an alternative route to care and respite when other more adaptive avenues of rescue are, for whatever reason, not open. Although concerns have been expressed over time about the frequent, often non-specific and sometimes dramatic presentations of X to medical services, it is with the benefit of time and with the availability of information brought together from a variety of sources (including social services), that a clear pattern can now be seen. Most recently, X has experienced episodes of physical illness which have at times been life-threatening. It is the opinion of a number of medical professionals caring for her (based on a variety of clinical observations) that stress/psychological factors are, at the very least, exacerbating her symptoms. As a result of her frequent presentations with exacerbations of this condition, X has received medical treatment which has had a number of damaging side-effects and there has been significant deterioration in her health.

X has been clear that the ongoing legal issues are a major source of stress and there does appear to be a pattern of worsening illness which coincides with the increasing pressures arising from these. In order to safeguard her health, an ongoing aim of management is to try and reduce her exposure to various stressors and to engage her in psychological therapy which might provide her with an adaptive outlet for expressing difficulties. However, this is likely to be a challenging and relatively long-term process.

Events around disclosure

X feels that her initial disclosure put in motion a chain of events which has left her feeling distrustful and lacking confidence in processes that should have been protective of her. In particular it is her perception that, despite reassurances about confidentiality, it has at times been breached which has had negative consequences for her. In addition, she feels that she was led to believe that she would never be required to speak of the allegations again and the current situation has therefore, once again, undermined her confidence in the system.

With regards the specific questions which I was asked to address:

(a) Psychological/psychiatric implications for or effects upon X regarding the disclosure of social services records to the parties

It is my opinion that disclosure of the social services records regarding X to other parties would be potentially detrimental to her health. As above, she appears to manifest psychological distress in physical terms both through medically unexplained symptoms and through the well recognised exacerbating effect of stress on a particular medical disorder. Her physical health has deteriorated considerably recently and, at times, has deteriorated to the point of being life-threatening. There is therefore a significant risk that

exposure to further psychological stress (such as that which would inevitably result from disclosure) would put her at risk of further episodes of illness. It would also be working against the current therapeutic strategy of trying to help minimise stress and engage with psychological therapy.

(b) The psychological/psychiatric implications for or effects upon X of being summoned to the court to give oral evidence about the allegations documented in the said records

My opinion on this is as above. Being summoned to court is one step further than disclosure and would inevitably be immensely stressful and therefore carry the same risk of deterioration in her physical (and mental) health.

(c) X's capacity with appropriate support to participate in the court proceedings including making a statement and attending court to give evidence

I believe that X has the capacity to participate in court proceedings. However, it should be noted that various professionals at different times have commented on the difficulty of interviewing her in relation to the alleged abuse. My own experience of exploring these issues with her is that many of my questions were met with silence; she was clearly very uncomfortable and distressed and seemed unable to respond. When I asked her about appearing in court she responded ‘I can't'.

(d) X's understanding of the measures which might be put in place to protect her as a vulnerable witness

When asked about her understanding of these, X told me that she understood that she could provide evidence via video link. However she said that this would be a traumatic prospect for her as she understood that the alleged abuser would be able to see her face and she could not cope with this. As above, I also think that her perception that processes so far have, to some extent, let her down means that she does not feel confident in any of the reassurances provided.”

> [19] Dr W's full report gives a more striking account of the pervasive nature of X's chronic difficulties and the serious effect that they are having on her daily life.
> [20] A report has also been produced by X's consultant physician, who says that she has ongoing severe physical symptoms, namely steroid-dependant difficult asthma and myopathy [muscular disease]. She has recently been admitted as an inpatient for an assessment that is not yet complete.'

The judge's decision

[7] Before Peter Jackson J the position of the parties was that:

(a) The father denied sexually abusing anybody. He had not been informed of X's identity and knew nothing of the substance of her allegations. He asserted that the mother had colluded with X to generate these allegations for the purpose of obstructing contact with his daughter. He argued that for the court not to

insist on testing the allegations would be fundamentally unjust and the situation would effectively encourage mothers to make outrageous allegations as a means of alienating fathers and children from each other. The interests of A must come first and there must be a trial attended by X.

(b) The mother described herself as being torn between the need to protect A and the reluctance to add to the pressure on X. She supported disclosure if it is the only means by which A can be protected, but is concerned about the consequences for X if disclosure takes place.

(c) X strongly resisted disclosure of her identity and of the substance of her allegations. She would oppose any attempt to summon her as a witness and would not be able to speak about her allegations if she were brought to court. She was acutely distressed by the effect of the proceedings on her already fragile state of health.

(d) A's guardian asserted that she was unable to represent A's interests in the proceedings without knowing the detail of the allegations and forming an assessment of them. She submitted that the issue of disclosure was a discrete issue and should be determined separately from any question of X being compelled to attend court to give evidence.

(e) The local authority took a neutral stance, but assisted the court by presenting arguments for and against disclosure.

[8] In analysing the competing factors, the judge referred to the following articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) as being relevant:

> ‘ARTICLE 3
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
> ARTICLE 6
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
> ARTICLE 8
> 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.'

[9] Having considered the decision of this court in *A Local Authority v A* [2009] EWCA Civ 1057, [2010] 2 FLR 1757, the judge concluded that the fundamental objective of the balancing exercise is to strike a fair balance

between the various rights and interests within the context of achieving a fair trial. In this context he held (at para [29]) the following European Convention Articles were engaged so far as the court and the local authority as public bodies are concerned:

- Article 6, entitling A and her parents to a fair hearing of X's allegations;
- Article 8, guaranteeing respect for the family life of A and her parents;
- Article 8, guaranteeing respect for the private life of X; and

- Article 3, prohibiting inhuman or degrading treatment of A and of X.

[10] Peter Jackson J concluded (para [34]) that X's wish not to speak further about her alleged experience of sexual abuse and the risks to her mental and physical health were each aspects of her 'private life' within Art 8.

[11] Within the Art 3 considerations fell not only the protection of vulnerable individuals such as A and X, in particular from sexual abuse, but also the protection of X from inhuman treatment by forcing her to give evidence about these matters in the context of her precarious state of health.

[12] In coming to his ultimate conclusion, Peter Jackson J began by rejecting the idea of attempting to resolve the issue by requiring X to come to court to be spoken to directly. He also rejected the father's accusation that the allegations were generated by a conspiracy between X and the mother.

[13] The judge rejected the guardian's contention that the issue of disclosure was a discrete and separate matter from the question of whether X should be compelled to attend court as a witness on the basis that the court should look at the likely consequences of disclosure and ask the question 'where is this going?'. He therefore turned first to the question of X attending as a witness and concluded that such a course would be 'oppressive and wrong'. At para [43] he said:

> 'It is likely to have a severe and possibly dangerous impact upon her health and well-being. There are also real practical difficulties in securing X's attendance and in her being cross-examined by the father. I have considered the various special measures of the kind set out in the Youth Justice and Criminal Evidence Act 1999 ss. 23–29, but none of these would in my view provide an adequate solution. The potential unfairness to other parties cannot outweigh these considerations.'

[14] The judge went on (para [44]) to conclude that the balance fell against general disclosure of X's personal and medical history, before forming his ultimate conclusion upon the issue of disclosure of X's identity and the substance of her allegations (paras [45]–[47]). These paragraphs are at the core of the judge's decision and justify quotation in full:

> '[47] That brings me to what is the most difficult aspect of the matter: disclosure of X's identity and allegations. I have carefully considered whether this can be achieved, and find the decision finely balanced. On the one hand, the prospect of a parent being denied normal contact with

> a child on the strength of undisclosed allegations from an anonymous source is deeply troubling and could only be entertained in compelling circumstances.
> [48] I have nevertheless concluded that in this highly unusual situation it is not possible for information about X's identity and allegations to be disclosed to the parties. My reasons are these:
>
> (1) I accept the medical evidence about the potentially serious effect of disclosure on X's health.
>
> (2) The information once disclosed, cannot be controlled. X could not be assured that her identity as an alleged victim of sexual abuse would remain confidential within the proceedings.
>
> (3) X's identity and her allegations are inextricably intertwined.
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> (4) For the court to order disclosure when it is not prepared to order X to give evidence would risk harming X without achieving anything valuable for A and her parents. The nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources. It is therefore unlikely that any outcome achieved in X's absence would clear the air between the parties or provide a solid foundation for future arrangements for A.

(5) The court must have regard to the nature of the interests being balanced, namely contact on one hand and physical and mental health on the other.

[49] I realise that the existence of this unresolved allegation creates real difficulties in relation to future contact between A and her father. Once the parties have considered this judgment, there will be a short hearing to identify the issues that now arise. For the present, I will only repeat the observation that I made during the Guardian's submissions, namely that this outcome will not automatically lead to the court making an order for unsupervised contact. That question must be resolved taking account of all factors bearing on A's welfare.'

The case on appeal

[15] Peter Jackson J dismissed the application for disclosure of further information about X and her allegations. By a notice of appeal filed on 11 May 2012, A's guardian seeks to overturn that decision. The grounds of appeal, in summary, are:

(i) The judge concluded that X's allegations would not be subject to a fact-finding process. As a result the court became disabled from adjudicating upon the potential dangers to A arising from contact with her father. The court thereby failed to accord paramount consideration to A's welfare and prevented itself from making an informed decision on the risk of harm to A in the Children Act 1989 (CA 1989), s 1(3)(e).

(ii) In determining that X's identity should remain confidential, the

judge gave too little weight to the fact that all save the father knew who X was and gave far too much weight to X's rights.

(iii) The judge erred in holding that disclosure of X's medical records would serve ‘no good purpose'.

(iv) The judge erred in conflating the question of X giving evidence with the question of disclosure.

(v) The judge was plainly wrong not to allow disclosure to the children's guardian in any event.

[16] Having considered the case on paper, on 26 June I granted permission to appeal on the basis that the highly unusual circumstances of the case, the importance of the issues and the pleaded grounds of appeal justified the matter being considered by the Court of Appeal.

[17] On 13 July the court (Thorpe and McFarlane LJJ) held a directions hearing to consider whether there was any objection to the Court of Appeal having access, prior to the appeal hearing, to the full file of confidential material seen by Peter Jackson J. In the event there was no objection and we are grateful to the local authority for furnishing us with this material together with a neutral chronological guide to it. At that hearing it was confirmed that Peter Jackson J, who has of course read all of the confidential material, retains the case and is intended to be the judge who is to determine the contact arrangements at a hearing that has been fixed in September. In response to a question from the court, the parties before the court (which did not include either parent) stated that it was their understanding that the judge intended to include an assessment of the validity of the undisclosed material and, therefore, form a view upon the probity of the sexual abuse allegations, as part of that welfare hearing. As will become apparent, this issue was further clarified during the appeal hearing so that the contrary now seems clear and Peter Jackson J is apparently not contemplating making any finding of fact in relation to the undisclosed material.

[18] As a preliminary issue, the local authority applied for this appeal hearing to be conducted in private on the basis that ‘the court considers this necessary in the interests of justice' and ‘publicity would defeat the object of the hearing' pursuant to the Civil Procedure Rules 1998 (CPR) rr

39.2(3)(a) and (g). Such a course had been adopted by this court in *A Local Authority v A*. Having considered short submissions on the point, we determined that the appeal could be conducted in public in a manner which neither compromised the interests of justice nor might defeat the purpose of the process. We held that the priority to be afforded to the Court of Appeal sitting in public determined that the application should be refused. Orders restricting publication and, specifically, preventing the identity of X as the fourth respondent being disclosed by any person, were continued.

[19] Before turning to the detailed arguments raised in this appeal, it is important to understand just how much knowledge each of the parties has as to X's identity and the substance of her allegations. The local authority has the most information and has passed to the court the material documents in which it is recorded. Those who represent X have seen that material and have also facilitated, and, therefore, seen the full medical report of Dr W. It is my understanding that the local authority has seen Dr W's full report. The position of the other parties is more complicated.

[20] The mother initially only knew what she was told by the social workers, namely that an unidentified individual had made serious allegations of sexual abuse against the father and that the local authority regarded those allegations as ‘credible'. Later, due to an oversight by the local authority, X was described in a document that was disclosed to the mother. The mother recognised X from the description, knew where to find X and immediately went round to see her. During the appeal hearing the mother confirmed to us that her conversation with X was short and consisted simply of the mother asking if ‘it was true' and X saying ‘yes'. She has subsequently not had any further discussion with X on this topic.

[21] In like manner to the mother, A's guardian knows X's identity having seen her name which was erroneously left in a document disclosed by the local authority. The children's guardian has not disclosed this information to anyone else and she knows nothing more of the confidential material.

[22] The father has not received any of the confidential material and has not been given X's name by any means. He denies any form of sexually inappropriate behaviour with any person and, therefore, claims to have no knowledge of who X might be.

[23] It is, therefore, the case before this court, as it was before Peter Jackson J, that each party, with the exception of the father, knows who X is and all, including the father, know of the general description of her mental and physical health contained in the report of Dr W that has been disclosed.

[24] The description of the state of knowledge of each party flags up, in particular, the exquisitely difficult position of the mother. In terms of the substance of the allegations, she has been given absolutely no information save that they are of serious sexual abuse. She knows that the local authority regard these allegations as credible. She knows X. She has been told by X that ‘it' is true and she believes X.

[25] The primary submission made by Mr Paul Storey QC for the appellant guardian is structural. The judge held that it was impossible to divorce the question of whether or not X could or would give oral evidence from the issues of disclosure of her identity and the substance of her allegations. Mr Storey submits that the judge was entirely wrong in adopting this structure which had the effect of determining all of the issues in the case by reference to the judge's primary conclusion that it would be oppressive and wrong to compel X to give evidence. By asking himself the question (para [42]) ‘where is this going?' and starting with the question of X giving evidence, it is said that the judge wrongly conflated all of the issues in the case. It is submitted that the correct approach is diametrically opposite to that adopted by the judge and that the sequence of issues should have started with disclosure of X's identity, followed by the substance of her allegations and only after disclosure has taken place should the question of X giving evidence be determined.

[26] In addition to his primary structural argument and the generally applicable points made in the first four grounds of appeal, Mr Storey submitted that the particular position of a children's guardian (whether in private or public law proceedings) justified disclosure in any event of material relevant to a risk to the child whose interests the guardian represents. In refusing disclosure, it is submitted the ability of the guardian to carry out her duties was significantly reduced.

[27] The father, despite the limits of a telephone link, was readily able to communicate his frustration to this court. He has not seen his daughter for 3 years. He has been accused of being a paedophile, yet not told by whom or what the allegations are. He has been given no chance to prove his innocence. He regards the whole process as a ‘farce'. He wants there to be full disclosure so that the full circumstances can be investigated.

[28] X strongly opposes the appeal. On her behalf the following principal submissions are made:

(a) It does not follow that if the allegations are true the father must know of X's identity as X does not know if she is alone in having been sexually abused by the father.

(b) The judge applied the correct legal approach by seeking to balance the competing European Convention rights of the interested parties, including X.

(c) The strength of Dr W's evidence was sufficient to justify the priority given to X's position in the balancing exercise.

(d) The judge was correct in holding that ‘it would be impossible for the reliability of the allegations to be tested without a hearing at which X and the father gave evidence' and that ‘the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources'. The inevitable consequence of those propositions is that the inability of X to attend and give evidence impacts on the decision whether or not X's identity and the substance of her allegations should be disclosed.

(e) This is a case where there are no easy answers and the judge's decision falls within the ambit of a broad discretion and the Court of Appeal should be slow to interfere.

[29] A's mother appeared in person but produced a position statement which, as counsel observed, would attract praise for its clarity and insight were it the product of a seasoned legal professional. Her principal position is as follows:

> ‘I believe the court has a responsibility to protect both A and X from any future harm, and I am seeking disclosure only if it will help to achieve this. I believe that, having read all the relevant documents, Jackson J has concluded that disclosure is unlikely to achieve anything positive for A, and it is likely to be significantly detrimental to X's health. As such, and with reluctance, I do not support the appeal.'

[30] That principal position is, however, qualified by the paragraph that immediately follows it:

> ‘I do agree with the children's guardian that it appears that more emphasis has been placed on the impact of disclosure on X than on the impact of non-disclosure on A. In his judgment, Peter Jackson J rules that even if the allegations made by X cannot be proved, this will not automatically lead to an order for unsupervised contact, and this is

> presumably why he did not feel compelled to address that issue alongside the question of disclosure. However in her appeal, the children's guardian asserts that unless the allegations can be proved, on the balance of probabilities, the judge will be unable to take into account the fact that they have been made, with the implication that the previous contact order, which

allowed for unsupervised contact, would be reinstated. The question of what will be the outcome for A if the allegations cannot be proved is one that I have been asking from the beginning when disclosure was first challenged, and in my opinion it should form the crux of the appeal court deliberations, because it is impossible to weigh up the competing rights of the parties without considering all the possible outcomes and following each through to its natural conclusion.'

[31] Based upon the observations of Peter Jackson J, the mother identifies the most likely consequence of disclosure as being one that does not lead to a definitive conclusion, one way or the other, as to the truth of X's allegations because the material does not meet the required standard of proof. She submits that that outcome is likely to be seriously detrimental to X's health, yet A will be no better off than she is if the judge's order remains unchanged.

[32] The mother supports Peter Jackson J's observation to the effect that, if the allegations cannot be proved, it does not automatically follow that unsupervised contact would be the outcome. She points to the following:

(a) It is an undisputed fact that the allegations have been made.

(b) As A's mother, it would place an impossible burden on her if, having been required by the local authority to protect A from unsupervised contact, she was then asked to hand her over to a man who she now believes sexually abused and raped X.

(c) If unsupervised contact were ordered, it is likely that the local authority would insist upon undertaking ‘keep safe' work with A. A is only 10 and very innocent; a situation which her mother is keen to preserve without the need for the child to learn about sexual risks.

(d) The local authority has previously told the mother that they would seek to take A into care if unsupervised contact occurs. The mother, obviously, sees this as being highly detrimental to A's wellbeing.

(e) The current circumstances have increased the risk of A's being abducted by her father and that risk would be increased if unsupervised contact takes place.

[33] On appeal, the local authority retains a neutral position as to the outcome, but does not agree with or support the appellant's criticisms of the judge's approach. In addition to general submissions which underline and endorse the judgment, the local authority argues strongly that any interpretation which suggests that the judge intended to withhold disclosure of the material but nevertheless rely upon that material to determine the contact issue cannot be sustained. It is the local authority's case that no experienced judge could have contemplated such a course. They submit that the judge

must have had in mind that if, as would inevitably follow non-disclosure, the court could not resolve the factual issue, then the mother would be left with her belief that the allegations are true and this would be a factor in any welfare determination.

[34] Insofar as the appellant seeks to make a special case for A's children's guardian to be given access to the confidential material in order for her to discharge her duties as guardian, the local authority point to the following reasons to the contrary:

(i) The record of what X has said is not part of the case records relating to A and, therefore, would not be material to which a children's guardian, even if appointed under CA 1989, s 42 in care proceedings, would have access as of right.

(ii) The distinction between private and public law child proceedings drawn by Parliament indicates that different rights and considerations apply. Thus, even if the material would be automatically disclosed to a guardian in care proceedings, it does not follow that the same applies in a private law case.

Non-disclosure: *the options open to the court for the substantive trial*

[35] Before turning to the issue of disclosure, it is necessary to consider the situation as it stands as a result of the judge's determination and his intention to proceed as the trial judge on the substantive issue of contact. Peter Jackson J observed (para [48](4)) that the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources. They were said to be unlikely to provide a solid foundation for future arrangements for A. Although these allegations are the only new material in the case that might justify a departure from the regime of unsupervised contact, the judge went on to say that non-disclosure of the material 'will not automatically lead to the court making an order for unsupervised contact' (para [49]).

[36] Having now had the benefit of looking at these potentially ambiguous passages with the assistance of counsel's submissions, I am fully satisfied that the judge has no intention of relying directly upon the undisclosed material to support some form of finding on the issue of sexual abuse. His latter comment about the outcome not automatically leading to unsupervised contact would seem simply to be a sensible and proper judicial indication that all substantive welfare options remain open and that all he has dealt with thus far is the application for disclosure.

[37] Despite accepting that the judge's indication is, within its own context, unremarkable, there is a need to step back to consider how a fair final hearing can be seen to take place if it is conducted by a judge who has read the detail of X's undisclosed allegations. This is not a topic that is addressed expressly in the judgment, yet to my mind it justifies careful consideration. From the perspective of an insider within the family justice system, I have no difficulty in accepting that any judge of the High Court Family Division would have the necessary intellectual and professional rigour to conduct the final hearing by putting the undisclosed material out of his or her contemplation when considering A's welfare. That, however, is not the test, or, at least, not the complete test. Justice not only has to be done, but it must manifestly and

undoubtedly be seen to be done. How is the final hearing to be viewed by the father if his contact to A is reduced from its pre-2010 level or terminated, when he knows that the judge who has determined the case has read details of serious, but untried and untested allegations against him? The father has already referred to 'a kangaroo court' and such a characterisation could only gain prominence in his mind were the case to proceed in the manner contemplated by the current orders.

[38] Often when public interest immunity (PII) is raised the matter to which the PII relates may not be directly relevant to the primary issue in the case and there can be a fair trial of the central issue notwithstanding the fact that material known to the judge remains undisclosed to some or all of the parties. Here the undisclosed information is at the core of the case and represents the entirety of the material relating to the only issue that has generated the mother's application to vary the contact regime. The father, or an impartial bystander, is entitled to question how there could be a fair trial of the contact issue when the judge is privy to this core material yet the father and those representing A are not. I stress again that I readily accept that if Peter Jackson J were the trial judge he would have approached the matters before him with intellectual and judicial rigour; my concern relates to how matters are, or may be, perceived by the parties and others.

[39] Drawing these observations together, in my view an outcome on the facts of this case whereby the key material has been read in full by the judge but is not to be disclosed to the parties, yet the same judge is going on to preside over the welfare determination is an untenable one in terms of justice being seen to be done. In failing both to consider this aspect of the case and in arriving at that outcome the judge was plainly wrong.

[40] In the light of the conclusion that I have just described, the option of non-disclosure but the case remaining with the judge was not one that was properly open to the court in this case. I repeat and stress that this conclusion is specific to the facts of this case where the PII material relates

entirely to the core issue in the case. It is not my intention to lay down a blanket approach to all cases, which will fall to be determined by the application of general principles to the individual facts that are in play.

[41] The judicial error that I have identified goes to the root of the PII exercise. In conducting the balancing exercise to decide whether or not disclosure should take place the court must have at the forefront of its mind the forensic options that flow one way or the other if disclosure does or does not take place. In basic terms the options were:

(a) disclosing the material and the contact issue being tried by Peter Jackson J;

(b) non-disclosure of the material and the contact issue being tried by Peter Jackson J;

(c) non-disclosure of the material and the contact issue being tried by a different judge who has not been exposed to the confidential material.

[42] The judge's conclusion indicates that he plainly had in mind both option (a) and option (b). It is not, however, clear that consideration was given to the more difficult option of non-disclosure and the trial being conducted by

a different judge who has not been exposed to the confidential material. Without consideration of option (c) it would not be possible for the court properly to contemplate the forensic consequences of an order for non-disclosure. It follows that the exercise conducted by Peter Jackson J was undertaken on an erroneous basis as the options that the judge had in focus included option (b), which I have held was not properly open to the court, but not option (c), which should have been the true alternative to option (a).

[43] It follows that there are two basic options available for the future conduct of the proceedings, either:

(a) the sensitive material (or a significant part of it) is disclosed to the parties and the case may continue in front of the judge who has dealt with the disclosure issue; or

(c) the sensitive material is not disclosed, in which case the welfare determination must be undertaken by a judge who is in a similar state of ignorance to that of the father.

[44] There is obviously room for the fine-tuning of option (c) with respect to the important detail of whether or not the judge is to be privy to X's identity.

[45] The two options set out above are necessarily stark. They describe the context within which the disclosure decision should have been undertaken in this case. In particular, option (c) readily bristles with potential difficulties both for the parties and for the trial judge. It also rightly brings into sharp relief the question of how A's welfare can be protected if the judge is not made privy to the information that has emanated from X. These are all matters which have to come into the balance when the issue of disclosure is determined.

Public interest immunity: the legal context

[46] Although the facts of this case render the task of judicial determination both difficult and sensitive, the legal context within which the decision falls to be taken is the same as that for any other PII issue falling for determination in the course of a child welfare case. The case-law in this area is now well settled and is equally well known. It follows that it is only necessary for me to describe it here by reference to the key authorities.

[47] The starting point is *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, [1995] 3 WLR 483, [1995] 2 FLR 687 in which Lord Mustill summarised (at 615, 496–497 and 700–701 respectively) the propositions upon which the House of Lords approached the issue of disclosure in that case:

‘1 It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party. This principle applies with particular force to proceedings designed to lead to an order for adoption, since the consequences of such an order are so lasting and far-reaching.
2 When deciding whether to direct that notwithstanding rule 53(2) of the Adoption Rules 1984 a party referred to in a confidential report

supplied by an adoption agency, a local authority, a reporting officer or a guardian ad litem shall not be entitled to inspect the part of the report which refers to him or her, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.
3 If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.
4 If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.
5 Non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling.'

[48] *Re D (Minors) (Adoption Reports: Confidentiality)* was determined prior to the enactment of the Human Rights Act 1998 (although their Lordships plainly had in mind European Convention authority, particularly that of *McMichael v United Kingdom* (Application No 16424/90) (1995) 20 EHRR 205). It was also considering a narrow point of disclosure of material in reports supplied for adoption proceedings. Notwithstanding those limitations, the *Re D (Minors) (Adoption Reports: Confidentiality)* principles have subsequently been applied more generally to other proceedings relating to children and are now accepted as encompassing the rights and interests of any person affected by the disclosure decision, and not just the child who is the subject of the proceedings. In addition, following the implementation of the Human Rights Act 1998 (HRA 1998), the balancing exercise must be conducted in a manner which takes account of and respects the various European Convention rights of each relevant person.

[49] In *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 Munby J, as he then was, performed the valuable task of drawing together and summarising the relevant case-law on the issue. In *Re B, R and C (Children)* [2002] EWCA Civ 1825 (unreported) 12 November 2002 this court (Butler-Sloss P, Thorpe and Scott-Baker LJJ) expressly endorsed Munby J's analysis and drew particular attention to his final paragraph which is in these emphatic terms:

‘Although, as I have acknowledged, the class of cases in which it may be appropriate to restrict a litigant's access to documents is somewhat wider than has hitherto been recognised, it remains the fact, in my judgment, that such cases will remain very much the exception and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to

demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the

needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary.'

[50] In endorsing the statement of the law of Munby J in *Re B (A Minor) (Disclosure of Evidence)*, the court in *Re B, R and C (Children)* also expressly upheld the approach taken by the Court of Appeal (Glidewell and Balcombe LJJ and Boreham J) in *Re B (A Minor) (Disclosure of Evidence)* [1993] Fam 142, [1993] 2 WLR 20, [1993] 1 FLR 191, notwithstanding that that authority preceded both *Re D (Minors) (Adoption Reports: Confidentiality)* in the House of Lords and the HRA 1998. The decision in *Re B (A Minor) (Disclosure of Evidence)* is of particular relevance to the present case as the factual context is not dissimilar. In *Re B (A Minor) (Disclosure of Evidence)* a stepsister of the subject child had informed a friend that she had been sexually abused by the subject child's father and expressed the fear that if he learned of her complaints he would kill her. She had attempted suicide since making the complaints and was staying temporarily in a children's home whilst receiving psychiatric therapy. The trial judge ordered disclosure of the material relating to the girl's complaints to the father. The Court of Appeal dismissed the mother's appeal against disclosure. In giving the leading judgment, Glidewell LJ observed that non-disclosure was sought mainly, if not entirely, for the protection of the complainant, yet it was the subject child's welfare which was the paramount consideration when considering whether or not contact should take place. He held that (at 156, 32 and 202–203 respectively):

> 'It is quite wrong that, for an indefinite period, the father should not know of [the allegations] and be given the opportunity to deny them if they are untrue or explain them if they are true in part. Balancing these factors, in my view the interests of justice to the father greatly outweighed any possible detriment to [the complainant]'.

[51] In the course of a short concurring judgment Balcombe LJ said (at 157, 33 and 203 respectively):

> 'In my judgment it was quite impossible that the father should be kept in indefinite ignorance of the allegations made against him, since those allegations were the basis of the mother's application that he be denied contact with his son.'

[52] Plainly if *Re B (A Minor) (Disclosure of Evidence)* were being determined in 2012 rather than, as it was, 1992 the court would have conducted a more widely based balancing exercise, taking account of each of

the European Convention rights that are engaged, including those of the complainant. The decision is nevertheless of continued relevance, endorsed as it was in 2002 in *Re B, R and C (Children*), as demonstrating the premium that attaches to disclosure of information similar to that in focus in the present case so that the allegations at the centre of the contact issue can be properly determined.

[53] The earlier cases, if couched in European Convention terms, are almost entirely limited to balancing Art 8 private and family life rights and those under Art 6 relating to fair trial. The present proceedings range more widely and also engage with rights under Art 3 relating to inhuman or degrading treatment. Peter Jackson J, therefore, rightly turned to the Court of Appeal decision in *A Local Authority v A* for guidance. In *A Local Authority v A* the parents of a child who was the subject of care proceedings originated from Pakistan. The sensitive information related to the fact that, during a holiday abroad with her sister, her aunt and the child, but without the child's father, the mother had had sex with three different men, on one occasion while the child was in the room, and that the sister and the aunt had encouraged her. The women, including the mother, expressed fear for their wellbeing and their lives if this information were made known to the father. An expert was instructed to undertake a paper exercise to assess the risks arising from disclosure. The expert subsequently advised the court that she could not advise upon the risks without interviewing the family, but she considered that she could do so without alerting those interviewed to the substance of the sensitive material. The judge refused to sanction a further adjournment to allow such interviews to take place and ordered the immediate disclosure of the

material to the father. The Court of Appeal (Wilson, Etherton and Sullivan LJJ) allowed the local authority's appeal, set aside the disclosure direction and substituted a direction that the expert be authorised to conduct interviews as appropriate.

[54] The primary judgment in *A Local Authority v A*, given by Wilson LJ, accepts that the foundation of the jurisprudence was laid by Lord Mustill in *Re D (Minors) (Adoption Reports: Confidentiality)* and then goes on to analyse the various factual issues in the case before concluding that the judge, having sanctioned the original instruction of the expert as necessary, was unable to justify his volte-face in failing to follow that process through to a conclusion and permitting the expert to meet the family as she advised.

[55] In a joint supporting judgment Etherton and Sullivan LJJ focus upon the fact that the case represented the first occasion upon which this court had had to consider European Convention Arts 2 and 3 in the context of non-disclosure of information in child proceedings. At para [39] their lordships describe the position in this manner:

> 'In the reported cases the conflict is usually between those who call for full disclosure of the information in order to achieve a fair trial under Art 6 and those who claim that disclosure will infringe their rights under Art 8, whether on the ground of privacy or confidentiality or some other reason. Unlike the right to a fair trial, which is absolute and unqualified, Art 8 rights are qualified rights. They are expressly subject, among other things, to protection of the rights and freedoms of others. This case concerns not only Art 8 rights, but also Art 2 and Art 3 rights, of

> the mother, sister and Aunt. Article 2 and Art 3 rights are not qualified rights, and that fact as well as their position in the list of rights and freedoms in the Convention highlight their importance.'

[56] Etherton and Sullivan LJJ held that the judge's approach was fundamentally flawed in that he had failed to identify precisely what were the possible consequences of disclosure for the female family members and came to his conclusion at a time when, because of the inchoate risk assessment, he lacked sufficient information upon which to carry out the balancing exercise.

[57] *A Local Authority v A*, which only dealt with an interim and time-limited order for non-disclosure whilst further assessment took place, is not an authority which is of great relevance on the facts to the present case. It is, however, a source of clear and useful guidance on the importance of Arts 2 and 3, if in play, in the overall balancing exercise.

[58] Finally two House of Lords authorities, which deal with the balancing exercise in a more general context, are of relevance to the question of whether automatic precedence attaches to any European Convention right as against any other. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 WLR 1232, [2004] UKHRR 648 the balance to be struck was between Art 8 rights to privacy against those in Art 10 relating to freedom of expression. At para [12] Lord Nicholls of Birkenhead held that 'both are vitally important rights. Neither has precedence over the other'. In *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, [2004] 3 WLR 1129, [2005] 1 FLR 591, [2005] UKHRR 129 again the balance was between Arts 8 and 10 and, at para [17], Lord Steyn drew the following 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.' (original emphasis)

[59] In the present appeal, Mr Storey submits that, on the basis of the precedence given in favour of disclosure in the 1992 case of *Re B(A Minor) (Disclosure of Evidence)*, which has been subsequently endorsed since the implementation of the HRA 1998, the right to disclosure should be afforded precedence over other rights. This submission is firmly opposed by Mr McCarthy QC who, by analogous reference to *Campbell v MGN Ltd* and *Re S(Identification: Restrictions on*

Publication), submits that no one right within the European Convention has automatic precedence over any other.

[60] On this point I unhesitatingly accept Mr McCarthy's general submission, but do so with the characterisation offered by Etherton and Sullivan LJJ in *A Local Authority v A* very much in focus. Whilst there is no automatic precedence for one right over another, rights under Arts 2 or 3, which are not qualified, have a highlighted importance which must be reflected in any balancing process.

Discussion

[61] It is common ground that Peter Jackson J correctly identified the European Convention rights under Arts 3, 6 and 8 that were in play in relation to the issue of disclosure.

[62] The judge rightly held that the rights of A and each of her parents are engaged under both Art 6 and Art 8. These rights all point towards disclosure of the sensitive material.

[63] In the opposite direction in relation to Art 8, the rights of X are engaged who is entitled to respect for her private life, subject to the potential for the court to interfere with that right where that is both proportionate and necessary.

[64] In relation to Art 3, Peter Jackson J held that:

> '(f) A's Art 3 rights are engaged in any situation that might avoidably expose her to sexual abuse (*Z and another v United Kingdom* (2001) 34 EHRR 3);
> (g) X's Art 3 right not to be exposed to inhuman treatment would probably be engaged in terms of the impact on her mental and physical health if she were required to give evidence.'

[65] It is of note from the judge's list of European Convention Articles that are engaged that, with respect to Art 3, that Article only enters the balance (and then only 'probably' so) in relation to X if she were required to give evidence. I agree that Art 3 is not engaged in relation to the simple disclosure of X's identity and of the substance of her allegations.

[66] It is not necessary, for the purpose of deciding the disclosure issue, to determine whether compelling a person to give evidence is or is not capable of amounting to inhuman treatment under Art 3. To so hold may have important implications both for the family justice and the criminal justice systems where it is far from uncommon for complainants to seek to avoid giving evidence by reference to the effect of the process upon their health.

[67] In addition with respect to Art 3, the need to avoid exposing A to sexual abuse would seem to play in favour of, rather than against, disclosure of X's allegations into the proceedings. That was no doubt the driving factor that led the State, in the form of the local authority, to breach X's Art 8 rights to privacy by disclosing the gist of her allegations to A's mother.

[68] Given the highlighted status of Art 3 rights, and given that these are only engaged in the balance against disclosure if X is required to give evidence, it is necessary at this stage to consider whether the judge was correct to hold that the aspects of disclosure and giving oral evidence could not be dealt with in isolation. Before us the guardian submits that the judge was in error on this point, whereas the local authority supports the judge's reasoning.

[69] Peter Jackson J (at para [42]) considered that it was not realistic to decide the application for disclosure without considering the consequences if the application were to succeed. The judge considered that it was inevitable that, once her identity is disclosed, a witness summons would be issued and the court would promptly be considering whether or not X should be compelled to give evidence. The court was, therefore, justified in looking beyond the immediate issue and should ask the question 'where is this going?'

[70] I readily accept the judicial prediction that as soon as X's identity is known, the father will seek to issue a witness summons; indeed he said as much to this court during the appeal hearing. The issue is not whether that is a consequence that will follow disclosure; it is whether that likely consequence should be a factor, or even the determining factor, in deciding the disclosure issue.

[71] It is of note that the previous case-law appears to be entirely silent on this point. The cases deal with the issue of disclosure per se and in isolation. In taking the pragmatic course that he took, Peter Jackson J did not refer to authority and in defending that position Mr McCarthy does not refer to any in his submissions. That this is so is important. Disclosure to a party, and knowledge of relevant information by a party, are free-standing matters, albeit that they may in some cases form part of a continuum which may in due course include consideration of a witness being called to give oral evidence.

[72] Rather than there simply being an absence of reference in the case-law to a need to consider how the disclosed material can be proved by oral evidence or otherwise when determining the disclosure issue, a premium is put upon disclosure as a free-standing matter. So much is plain from each of the authorities to which I have made reference, but it is plainly in the forefront of the reasoning in the judgments of Glidewell and Balcombe LJJ in the 1992 case of *Re B(A Minor) (Disclosure of Evidence)* where it is said to be 'quite impossible that the father should be kept in indefinite ignorance of the allegations made against him, since those allegations were the basis of the mother's application that he be denied contact with his son'. Disclosure was (per Glidewell LJ) for the purpose of giving the father the opportunity of explaining or denying them. The complainant in *Re B(A Minor) (Disclosure of Evidence)* was herself in a vulnerable state not unlike that of X, yet no link was contemplated between the question of disclosure and the question of whether or not she could give oral evidence in due course.

[73] It follows that the course taken by Peter Jackson J in linking consideration of whether or not X could ever give oral evidence with the issue of disclosure is not only unsupported by previous authority but also appears to be contrary to the earlier case-law.

[74] Moving from legal principle to the circumstances of this case, whilst the judge's characterisation of the probative value of X's allegations as being unlikely to lead to a resolution of the issue that they raise may be correct on our present state of knowledge, that state of knowledge is based entirely on what X is reported to have said. Because of X's stipulation that no person is to be told of her allegations, the local authority has not undertaken any investigation of them whatsoever. Insofar as X may give a factual context which places X and the father together and within which the alleged abusive behaviour took place, it has not been possible to ask any of the adults who were then responsible for X's care whether or not that factual context has validity. A's mother knows only of the label attached to the alleged behaviour, she too may readily be able to validate or challenge what is said about the factual context and the father's opportunity to interact abusively with X as X alleges. Plainly the father too will be able to give his own account of matters if disclosure takes place. I do not, therefore, accept Peter Jackson J's assertion that 'the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources';

the position is that, unless or until the relevant adults are told of the allegations, it is simply too early to come to a conclusion on that issue. There is merit in the disclosure of this core material, so that it may properly be evaluated by A's mother, A's father and A's professional representatives: that merit is free-standing and has value irrespective of whether or not in due course X could be called to give oral evidence.

[75] For the reasons I have given, I conclude that the judge was in error in conflating the issues of disclosure and X being required to give oral evidence in due course. In turning to the latter issue first, and concluding that compelling X to give evidence would be oppressive and wrong, the judge unfortunately allowed that conclusion to dominate his consideration of the disclosure question in a manner which is unsupported by authority. The judge was further in error in failing

to identify the free-standing value of disclosure which would enable the key adults to understand and give their own factual account of the circumstances within which X alleges that the abusive behaviour took place.

[76] It follows from the adverse conclusions that I have felt driven to make concerning the approach adopted by Peter Jackson J that this court must now determine the disclosure issue itself. In the earlier parts of this judgment I have laid the ground by summarising the relevant case-law and the need to undertake a balancing exercise of the relevant European Convention rights, without attributing automatic precedence to any, but by giving highlighted weight to Art 3 if it is engaged, but also to the importance of disclosure in a case such as the present. The balance falls to be undertaken in the shadow of the choice of forensic options, which is between disclosure with the case remaining before Peter Jackson J or non-disclosure and the case being heard by a judge who does not have knowledge of the confidential material.

[77] Before turning to balance itself, it is necessary to consider the impact upon X of disclosure to the mother, father and A's professional representatives of (i) X's identity; and (ii) the recording of what she has said in relation to the father's abusive behaviour. In addition to taking full account of the description of the likely effects of disclosure given by Dr W in her abbreviated report, I have considered the more detailed explanation that is given in her full report. It is plain that X's current state of physical health is severely compromised and has at times been life threatening. Part of the underlying causation for these symptoms seems likely to arise from damaging side effects from her medication, but stress/psychological factors are, to use Dr W's words, ‘at the very least exacerbating her symptoms'. Dr W concludes that disclosure would be potentially detrimental to X's health. Given the already compromised and vulnerable state of her physical health, Dr W advises that there is a significant risk that exposure to further psychological stress, such as would inevitably result from disclosure, would put her at risk of further episodes of illness and would cut across the current therapeutic strategy of attempting to minimise stress.

[78] The only expert evidence relating to X's psychological condition comes from Dr W, who, as X's treating clinician, is not in the same position of professional independence as would be the case if a forensic expert had been appointed. Dr W was not called by any party and the court proceeded on the basis of her written reports. That said, this court must accept, as did Peter Jackson J, the medical evidence as to the potentially serious effect that

disclosure would have on X's health. There has hitherto only been a very limited and generalised disclosure of X's identity and the subject matter of her allegations to A's mother. Dr W identifies the ongoing legal issues as a major source of stress and this coincides with a pattern of worsening illness. Disclosure of the details of her allegations and, obviously, disclosure of her identity to A's father are inevitably going to exacerbate her experience of stress which supports Dr W's negative opinion as to the consequential psychological and physical fallout.

[79] The impact of disclosure on X is the only substantial factor against disclosure in this case. It is, however, a very significant factor both in terms of its importance in principle but also because of the serious consequences that may follow disclosure for X's wellbeing.

[80] In terms of characterisation of the impact upon X in terms of the European Convention, I agree with Peter Jackson J that the act of disclosure falls short of engaging Art 3 and does not amount to inhuman or degrading treatment. X's right to a private life, which includes not only confidentiality of information relating to her life but also her ability to live that life as she would wish, is, however, plainly engaged. The State, in this context that is the court, may only act in breach of those rights in a manner which is compatible with Art 8(2), that is because it is necessary to do so and that what is proposed is proportionate to the identified need.

[81] When considering necessity and proportionality it is important to do so in the light of the degree of disclosure that has already taken place. To employ an oft-used phrase in family proceedings, ‘we are where we are'. Currently that is that:

(a) X herself has disclosed these allegations to professionals;

(b) the State, through the social services, has decided to breach X's Art 8 rights by disclosing to A's mother that an unidentified young person has accused A's father of serious sexual abuse;

(c) the State, albeit inadvertently, has disclosed X's identity to A's mother and to A's children's guardian;

(d) upon being contacted by A's mother, X has simply confirmed that 'it' is true.

[82] In addition to listing or measuring the degree of disclosure that has thus far occurred, when looking at where 'we are' it is necessary to take account of the effect of that disclosure upon A's family and, in particular, upon the mother. When disclosing the information to A's mother, the local authority chose to tell her that they regarded X's allegations as 'credible'. In submissions it was explained that this simply indicated that the social workers regarded the material as 'capable of being believed'. It is, however, and this was confirmed by the mother, entirely likely that a lay person would interpret the word 'credible' as indicating that the social worker considered that the allegations were true. On the basis of that professional endorsement and following her brief conversation with X, the mother is now in the position of believing that the father is guilty of having seriously sexually assaulted X, but she holds that belief without any hint of detail as to what form that assault took, when it occurred, whether or not it was a one-off incident or indeed any other relevant information. In the course of her submissions the mother very

eloquently described a situation, generated by what X has said and how the social services have dealt with it, which is exquisitely difficult. She wants to protect her daughter, but, equally, does not want to exclude A from having a relationship with her father if there is in fact no cause for such an extreme course. Given that it is the mother who has the principal responsibility for caring for A as the parent with primary care, and given that the State through the local authority has effectively compelled her to make the current application, there is a strong argument for holding that it is both proportionate and necessary for that parent to be given full details of the allegations that have given rise, in the social workers' view, to a need to protect her daughter.

[83] The father's position is more simply described but nonetheless equally as difficult. It is the position contemplated by this court in the 1992 case of *Re B(A Minor) (Disclosure of Evidence)* and was described by Balcombe LJ as 'quite impossible'. The normal position adopted in proceedings of this nature is that it is not only in the interests of the alleged abuser but also the interests of the child to have serious allegations properly investigated and evaluated within the court process.

[84] A's children's guardian is in a different position. In private law proceedings a children's guardian is appointed under Family Procedure Rules 2010 (FPR 2010), r 16.4. A r 16.4 guardian who is a Cafcass officer has the same duties as a guardian appointed in public law proceedings (FPR 2010, PD16A para 7.7). Those duties are set out in FPR 2010, PD16A Part 3 and include (para 6.8(a)) advising the court upon the interests of the child. The argument put on behalf of the guardian, which I accept, is that the guardian's ability to advise upon A's interests is severely hampered if she is not privy to the detail of X's allegations.

[85] A's Art 3 rights are only engaged insofar as the court must not act in a manner which would avoidably expose her to sexual abuse. If there is no disclosure, and in the absence of any other evidence, then it will simply not be possible for a court to make a positive finding that the father did indeed sexually abuse X. The court will then have to proceed in evaluating risk and determining the contact arrangements for A on the basis that the father did not sexually abuse X. In my view A's Art 3 rights impact upon the present issue of disclosure is marginal, but such weight, as it has, points in favour of disclosure for the reasons that I have already given to the

effect that it is premature to hold that disclosure will not produce further information from the parents and others as to the veracity or otherwise of X's allegations.

[86] At para [46] of the judgment the judge gives five reasons for concluding there were compelling reasons justifying not disclosing information about X's identity and allegations into the proceedings. I agree with the judge that the first two reasons (X's health and inability to assure X of confidentiality beyond the proceedings) are validly in the balancing exercise and support non-disclosure. The third reason (X's identity and allegations are inextricably intertwined) whilst true does not seem to weigh one way or the other in the overall balance.

[87] Where I would part company from the judge is in relation to his fourth and fifth reasons. The fourth is:

> 'For the court to order disclosure when it is not prepared to order X to give evidence would risk harming X without achieving anything

> valuable for A and her parents. The nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources. It is therefore unlikely that any outcome achieved in X's absence would clear the air between the parties or provide a solid foundation for future arrangements for A.'

In short, for the reasons that I have already given, I do not accept that the court can state at this stage that disclosure will achieve nothing of value (evidential or otherwise) for A and her parents. It is premature to say that the air between the parents could only be cleared if X gives evidence. Given the nature of what X alleges, disclosure is likely to achieve some further information from A's parents which may either go to support or to erode what X has said. Furthermore, the court must bear in mind that if X's allegations are not proved to the necessary standard, then the risks of harm to A must be evaluated on the basis that the father does not present a sexual risk and to that extent there would be 'a solid foundation' for establishing A's future welfare arrangements (*Re M and R (Minors) (Sexual Abuse: Expert Evidence)* [1996] 2 FLR 195).

[88] The fifth reason given in para [46] is that 'the court must have regard to the nature of the interests being balanced namely contact on the one hand and physical and mental health on the other'. The implication is that the latter significantly outweighs the former. If that is the implication then, I am afraid, once again I differ from the judge in his evaluation. In this regard Mr McCarthy sought to support the judge's decision by submitting that where the health and welfare of a third party are at risk, it can never be right to say that the interests of conducting a fair trial should prevail over those of the third party.

[89] What is under consideration in these proceedings amounts to much more than that which is encompassed in the one word 'contact' or the conduct of a 'fair trial' as an isolated concept. There is a choice to be made here between the previous liberal contact regime, limited only by the impact of geographical distance, and a severely restricted level of contact or even a total fracture in the relationship between A and her father. Overlaying the issue of contact is the fact that allegations of serious child sexual abuse have been made and A's mother has been encouraged to believe that the father had indeed perpetrated serious abuse, without having any idea of what is alleged. The father is entitled to fear that his daughter, and the wider family, will henceforth approach life on the basis that he is a 'paedophile'. In *Re D (Minors) (Adoption Reports: Confidentiality)* the House of Lords held that the principle of fairness to a party, and hence disclosure, applies with particular force in adoption proceedings. The issues in the present proceedings, although falling short of adoption, in my view justify the application of a similar degree of force to this principle. As to the balance struck in the judge's fifth reason, after allowing full weight, as I do, to the impact on the physical and mental health of X, I consider that the weight to be attached to the nature of the interests in play here, whilst they are very different in character, is not such that one automatically outweighs the other.

[90] The final factor that falls for consideration is the stark choice of forensic options ((a) or (c) as set out in para [41]). The second option, namely a trial being undertaken where neither the parties nor the judge know the

detail of the allegations and the father does not know the identity of his accuser, is one that will present a range of difficulties for the parties and the court and is only to be contemplated as last resort. Such a process runs entirely contrary to the ordinary position in which the judge in the family court is privy to every material detail that may impact upon the sensitive decision that he or she is called upon to make. The court would have to grapple with the fallout from the fact that X has made allegations and with the factors that the mother has identified (para [31] above) but will have to make the contact determination without itself having any knowledge of what X has actually said and on the basis that there is no established risk of sexual abuse to A from having ordinary contact with her father.

[91] Drawing matters together, the balance that has to be struck must accord due respect to X's Art 8 rights on the one hand and the Art 6 and 8 rights of A and her parents, and the marginal impact of A's Art 3 rights, on the other. In conducting the balance no one right attracts automatic precedence over another: however Art 8 rights are qualified whereas those under Art 6 are not qualified. The presence of A's Art 3 rights is to be highlighted; they are of marginal impact on this issue, but their presence flags up the importance of the issue (serious sexual abuse) to which the disclosure relates. The evaluation of necessity and proportionality is to be conducted on the basis of the current situation, taking account of the fact that the State has already seen fit to breach X's Art 8 rights by making the disclosure that has taken place to the mother and the State has effectively required the mother to commence these proceedings with a view to achieving orders that protect A from a risk that the local authority has described as credible. In terms of A's interests and those of her parents, the undisclosed material is absolutely central to the issue of contact that has been brought before the court.

[92] For the purposes of this evaluation it must be assumed that the local authority was justified in acting as it did in relation to A's mother. Where the State has decided to breach X's Art 8 rights to that degree, and where the fallout from that disclosure leaves the mother in the difficult position that she so clearly describes, only very exceptional circumstances are likely to justify the court, also acting as an arm of the State, in refusing full disclosure of the material to the mother and in turn to the father and A's representatives.

[93] Adopting the words of Munby J in *Re B (Disclosure to Other Parties)*, which were endorsed by this court in *Re B, R and C (Children)*, the case for non-disclosure must be ‘convincingly and compellingly demonstrated' and will only be sanctioned where ‘the situation imperatively demands it'.

[94] This is a hard and difficult decision. It is made so by the fact that the stakes are high on both sides of the equation. The description of X's mental and physical health difficulties are towards the top end of the spectrum. The issues for A and her family arising from what X has said are similarly of great magnitude.

[95] In answer to the questions posed within structure established by Lord Mustill in *Re D (Minors) (Adoption Reports: Confidentiality)*:

(a) There is a real possibility that disclosure will cause significant harm to X's mental and physical health.

(b) The interests of X would benefit from non-disclosure, but the interests of A favour disclosure. It is in A's interests that the

material is known to her parents and is properly tested. There is a balance to be struck between the adverse impact on X's interest and the benefit to be gained by A.

(c) If that balance favoured non-disclosure, I would in any event evaluate the importance of the undisclosed material as being central to the whole issue of contact and the lifelong structure of the relationships within A's family. In fact, X's allegations represent the entirety of the ‘issue' in the family proceedings. There is, therefore, a high priority to be put upon both parents having the opportunity to see and respond to this material.

[96] For the reasons that I have given, and approaching the matter in the way that I have described, I am clear that the balance of rights comes down in favour of the disclosure of X's identity and of the records of the substance of her sexual abuse allegations to the mother, the father and A's children's guardian.

HALLETT LJ:

[97] I agree.

THORPE LJ:

[98] I also agree.

Order accordingly.

Solicitors:*A local authority solicitor*

Blackfords llp for the children's guardian

Russell Cooke for X

SAMANTHA BANGHAM

Law Reporter