PUMP COURT

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Withholding Disclosure of Material Filed in Care Proceedings

- or –

‘Do they have to know about that?’

Simon Johnson

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A Message to Professionals

- *RE B (DISCLOSURE TO OTHER PARTIES)* [2001] 2 FLR 1017: Per Munby J (as he then was) at paragraph [14]

'Lawyers and others who spend their professional lives dabbling in the stuff of other people's misery may not always appreciate as much as they should the embarrassment and worse – sometimes, understandably, the shame, humiliation and anger – that someone in the mother's position must feel as strangers pick over and dissect the most intimate aspects of private and family life.'

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Reconciling the Irreconcilable

In the Matter of A (A Child) [2012] UKSC 60, per Lady Hale –

‘1. We are asked in this case to reconcile the irreconcilable. On the one hand, there is the interest of a vulnerable young woman (X) who made an allegation in confidence to the authorities that while she was a child she had been seriously sexually abused by the father of a little girl (A) who is now aged 10. On the other hand we have the interests of that little girl, her mother (M) and her father (F), in having that allegation properly investigated and tested. These interests are not only private to the people involved. There are also public interests, on the one hand, in maintaining the confidentiality of this kind of communication, and, on the other, in the fair and open conduct of legal disputes. On both sides there is a public interest in protecting both children and vulnerable young adults from the risk of harm.’

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Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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Article 6

- Right to a fair trial

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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Article 6

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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The Concept of a, 'Fair Trial': a Criminal Law Perspective

Regina v A (No 2) [2001] UKHL 25, [2002] 1 AC 45, per Lord Steyn

'[38] It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. R v Forbes [2001] 1 AC 473, 487, para 24. The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play. The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the European Court of Justice and the European Court of Human Rights. It is not necessary for us to re-invent the wheel. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 Lord Clyde adopted a precise and concrete analysis of the criteria. In determining whether a limitation is arbitrary or excessive a court should ask itself:

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"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

‘The critical matter is the third criterion. Given the centrality of the right of a fair trial in the scheme of the Convention, and giving due weight to the important legislative goal of countering the twin myths, the question is whether section 41 [of the Youth Justice and Criminal Evidence Act 1999] makes an excessive inroad into the guarantee of a fair trial.’

(section 41 of the *Youth Justice and Criminal Evidence Act* 1999 imposed restriction on evidence or questions about the complainant’s sexual history at a criminal trial for a sexual offence.)

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Pre Human Rights Act 1998 Case Law

Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593 [1995] 4 All ER 385: per Lord Mustill (at p. 398)

'I tender the following propositions, with which I understand all of your Lordships are in accord.

'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.

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‘When deciding whether to direct that notwithstanding r 53(2) of the 1984 rules 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.

‘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.

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‘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.

‘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.’

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

'As he did in so many ways, Munby J, as he then was, has done service to the legal profession and the Family Judiciary by drawing together the jurisprudence on this matter and distilling it into clear propositions, and he did that primarily in his judgment in Re B *(Disclosure to Other Parties)* [2001] 2 FLR at p.1017.': per Sir Andrew McFarlane P in *London Borough of Barking & Dagenham v RM & Ors* [2023] EWHC 777 (Fam)(see below)

Per Munby J in Re B *(Disclosure to Other Parties)* -

'[63] So far as concerns the general point of principle ...

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‘[64] In the first place, although R is entitled under Art 6 to a fair trial, and although his right to a fair trial is absolute and cannot be qualified by either the mother's or the children's or, indeed, anyone else's rights under Art 8, that does not mean that he necessarily has an absolute and unqualified right to see all the documents. … . On this aspect of the matter I see nothing in subsequent Convention jurisprudence to cast any doubt on what the House of Lords said in Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593, sub nom Re D (Adoption Reports: Confidentiality) [1995] 2 FLR 687.

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Per Munby J in Re B *(Disclosure to Other Parties)*

‘[65] At this point it is important to note that, although decided before the Human Rights Act 1998 came into force, consideration had been given in Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593, sub nom Re D (Adoption Reports: Confidentiality) [1995] 2 FLR 687 to the possible impact of the Convention. Having referred to Hendriks v The Netherlands (1983) 5 EHRR 223, W v United Kingdom (1988) 10 EHRR 29 and McMichael v United Kingdom (1995) 20 EHRR 205, Lord Mustill continued at 613H and 699C respectively:

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'On the view which I have formed of the English law there is no need to engage the important general question which would have arisen if the conclusions impelled by the English legislation and decided cases had differed in important respects from the jurisprudence of the European tribunals. The language of the European Convention on Human Rights naturally causes the discussion to be couched in terms of rights, whilst I would prefer a different vocabulary, but in substance the principles to be derived from that jurisprudence are entirely consistent with those which I propose. In particular, the conflation in McMichael of the remedies under Arts 6 and 8 of the Convention shows that full disclosure will usually advance the interests both of a fair trial and of the parties to the parental relationship. On the other hand, there is nothing in these decisions to suggest that disclosure can never be properly withheld if the interests of the child so demand; and it is significant that in McMichael, a case where the reports were kept from the parents as a matter of general practice in Scotland, the court expressly referred in para 88 of its judgment to the fact that no special reasons for withholding them had been advanced.'

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Per Munby J in Re B *(Disclosure to Other Parties)*

- '[66] Secondly, however, I am satisfied that there is no longer, if there ever was, any warrant for saying that the only interests capable of denying a litigant access to the documents in a proper case are the interests of the child(ren) involved in the litigation. If the interests of a child are capable in a proper case of having this effect then so in principle, it seems to me, must the interests of anyone else who is involved, whether as victim, party or witness, and who can demonstrate that their Art 8 rights are sufficiently engaged. Whatever may have been the position in domestic law prior to the coming into force of the Human Rights Act 1998 and at the time when the House of Lords decided Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593, sub nom Re D (Adoption Reports: Confidentiality) [1995] 2 FLR 687 s 6(1) and 6(3)(a) of the Act forbid me, as a public authority, to act in a way which is incompatible with a Convention right. The Act accordingly, in my judgment, requires me to have regard in this context to the Art 8 rights of the mother and W as well as of the children. …. . There can be cases, in my judgment, where a litigant's right to see the documents may have to give way not merely in the interests of the child(ren) involved but also, or alternatively, to the Art 8 rights of one or more of the adults involved, whether as victim, party or witness. If and insofar as the House of Lords decided the contrary in Re D (and it is not at all certain that it did), then to that extent its decision, in my judgment, can no longer stand in the light of the Human Rights Act 1998. In my judgment, Re D can no longer stand as authority for the proposition that only the child(ren)'s interests can be taken into account.'

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Per Munby J in Re B *(Disclosure to Other Parties)*

‘[67] Applying the Convention case-law to which I have already referred the position can be summarised for present purposes as follows:

(1) R is entitled under Art 6 to a fair trial. So also, of course, are the mother, the children, W and G. The parties' rights to a fair trial are absolute. Their rights to a fair trial cannot be qualified by the mother's or the children's or anyone else's rights under Art 8.

(2) R's right to a fair trial means that he (like all the other parties) is entitled to be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests. He must be able to participate in such a way as will enable him not only to influence the outcome of the proceedings but also to assess his prospects of thereafter making an appeal to any relevant appellate court. He must have a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponents. He must have a reasonable opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other parties.

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(3) Prima facie this means that R is entitled to disclosure of all materials which may be taken into account by the court when reaching a decision adverse to him. If he is a party to the proceedings he is prima facie entitled to see all the documents that are available to the other parties.

(4) Nevertheless the decision-making process, although it must be fair to R (and to all the other parties), must also, so far as is compatible with that overriding requirement, be such as to afford due respect to the interests of the children, the other parties and the witnesses safeguarded by Art 8.'

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Per Munby J in Re B *(Disclosure to Other Parties)*

‘(5) So, a limited qualification of R's right to see the documents may be acceptable if it is reasonably directed towards a clear and proper objective – in other words, if directed to the pursuit of the legitimate aim of respecting some other person's rights under Art 8 – and if it represents no greater a qualification of R's rights than the situation calls for. There may accordingly be circumstances in which, balancing a party's prima facie Art 6 right to see all the relevant documents and the Art 8 rights of others, the balance can compatibly with the Convention be struck in such a way as to permit the withholding from a party of some at least of the documents. The balance is to be struck in a way which is fair and which achieves a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, having regard to the nature and seriousness of the interests at stake and the gravity of the interference with the various rights involved.

‘(6) Bearing in mind the importance of the rights guaranteed by Art 6, and the fact that, as Sedley LJ pointed out in Douglas, Zeta-Jones, Northern and Shell plc v Hello! Ltd [2001] 1 FLR 982, para 141, Art 8 guarantees only 'respect' for and not inviolability of private and family life, any restriction of a party's right to see the documents in the case must, as it seems to me, be limited to what the situation imperatively demands. Non-disclosure can be justified only when the case for doing so is, to use Lord Mustill's word, 'compelling' or where it is, to use the Court's words in Campbell and Fell v United Kingdom (1984] 7 EHRR 165, 'strictly necessary'.

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‘(7) Moreover, to adopt Lord Mustill's word, the court must be 'rigorous' in its examination of the risk and gravity of the feared harm to the child or other person whose Art 8 rights are said to be engaged.

‘(8) Finally, any difficulties caused to a litigant by a limitation on his right to see all the documents must be sufficiently counterbalanced by procedures designed to ensure, in accordance with the principles in (2) above, that he receives a fair trial.

‘(9) At the end of the day the court must be satisfied that whatever procedures are adopted, and whatever limitations on a litigant's access to documents may be imposed, everyone involved in the proceedings receives a fair trial.’

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Per Munby J in Re B *(Disclosure to Other Parties)*

‘[68] Before leaving questions of principle there is one final matter that must not be forgotten. It is encapsulated in Lord Mustill's reference to 'the interest of the child in having the material properly tested'. As I have already observed, it is not only the individual litigant's right to a fair trial which may point in the direction of disclosure of the documents to him. The interests of the other litigants may well point in the same direction, for the children and other parties also have a right to a fair trial and, as part of their right to a fair trial, the right to have the forensic materials properly tested. It may well be that only if there is disclosure to all concerned can the children and other parties to the proceedings be confident that the materials have been properly tested. So it may often be that disclosure of the documents to the individual litigant is not merely for his benefit but also for the benefit of the others and the children in particular.’

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When are Article 6 Rights Engaged?

RE L (CARE: ASSESSMENT: FAIR TRIAL) [2002] 2 FLR 730 [2002] EWHC 1379 (Fam)

Family Division: Munby J

'[107] But *Mantovanelli* v France (1997) 24 EHRR 370 illustrates an important aspect of fairness for the purposes of Art 6 which has, as it seems to me, significant if thus far wholly unrecognised implications for procedure in family cases.

'[113] I derive from *Mantovanelli* two principles of particular importance for present purposes:

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(i) First, that the fair trial guaranteed by Art 6 is not confined to the 'purely judicial' part of the proceedings. Unfairness at any stage of the litigation process may involve breaches not merely of Art 8 but also of Art 6. This is potentially very important bearing in mind that, as I explained in Re B *(Disclosure to Other Parties)* [2001] 2 FLR 1017, at [56], [64], [67], whereas rights under Art 8 are inherently qualified and can be – and often have to be – balanced against other rights, including other rights under Art 8, a parent's right to a fair trial under Art 6 is absolute. It cannot be qualified by reference to, or balanced against, the child's or anyone else's rights under Art 8. The right to a fair trial under Art 6 cannot be compromised or watered down by reference to Art 8.

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(ii) Secondly, that where a jointly instructed or other sole expert's report, though not binding on the court is 'likely to have a preponderant influence on the assessment of the facts by [the] court' there may be a breach of Art 6 if a litigant is denied the opportunity – *before* the expert produces his report – (a) to examine and comment on the documents being considered by the expert and (b) to cross-examine witnesses interviewed by the expert and on whose evidence the report is based – in short to participate effectively in the process by which the report is produced.'

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Views from the Supreme Court, including the relevance of Article 3 rights

In the matter of A (A Child) [2012] UKSC 60

LADY HALE (with whom Lord Neuberger, Lord Clarke, Lord Wilson and Lord Reed agree)

The Human Rights Act

‘25. It is common ground that several Convention rights are, or may be, in play in this case. There are the article 6 rights of all three parties to the proceedings, A, M and F, to have a fair trial in the determination of their civil rights. The right to a fair trial is absolute but the question of what is fair may depend upon the circumstances of the case. There are the article 8 rights of A, M and F to respect for their private and family lives. There is also the article 8 right of X to respect for her private life. Article 8 rights are qualified and can be interfered with if it is necessary in a democratic society in order to protect the rights of others.

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‘26. However, Miss Morgan on behalf of X has relied principally (as did the mother in *A Local Authority* v A) upon her article 3 right not to be subjected to inhuman or degrading treatment. Requiring X to give evidence in person would, she argues, amount to treatment for this purpose, but so too would the act of disclosure because of the effect that it would have upon X. Dr W was specifically asked to distinguish between the effect of disclosure and the effect of giving evidence (see para 6(vi) above). She replied that disclosure alone would potentially be detrimental to her health. She pointed out that her condition had deteriorated considerably recently, to such an extent as to be life-threatening. Disclosure would inevitably subject her to further stress. There was therefore a significant risk that exposure to further psychological stress would put her at risk of further episodes of illness. That, argues Miss Morgan, is sufficient to bring the effects of the treatment up to the high threshold of severity required by article 3. X has therefore an absolute right not to be subjected to it.

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In the matter of A *(A Child)* [2012] UKSC 60 Lady Hale

27. 'The other parties to these proceedings question whether mere disclosure can amount to treatment within the meaning of article 3. They also support the conclusion of the Court of Appeal that the effects of disclosure alone would not reach the minimum level of severity required to violate article 3. Indeed, Peter Jackson J, while concluding that requiring X to give evidence would probably reach that high threshold, did not hold that disclosure alone would do so. He did not say that it would not, but it is clear, not least from the questions he asked of Dr W, that he was fully alive to the distinction between the effects of disclosure and the effects of giving evidence.

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28.‘If her argument on article 3 is not accepted, Miss Morgan's secondary case on behalf of X is that the invasion of her private life which would result from disclosure of this material in these proceedings is so grave that it would be disproportionate to disclose it. The court should therefore contemplate some form of closed material procedure, which would enable the material to be put before the court and tested, without disclosing either her identity or the details to the other parties.’

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In the matter of A (A Child) [2012] UKSC 60 Lady Hale

Discussion

31. 'It is, of course, possible that the harm done to an informant by disclosing her identity and the details of her allegations may be so severe as to amount to inhuman or degrading treatment within the meaning of article 3. The evidence is that X suffers from a physical illness which is at times life-threatening and that her condition deteriorates in response to stress. The father does himself no credit by belittling this. There was some discussion about whether we were here concerned with the duty of the state to take positive steps to protect her from harm (under the principles explained in *Osman v United Kingdom* (1998) 29 EHRR 245) or with the duty of the state to refrain from subjecting her to harm. …. I have no doubt that we are here concerned with the primary, negative, duty of the state to avoid subjecting her to inhuman treatment.

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32.‘However, when considering what treatment is sufficiently severe to reach the high threshold required for a violation of article 3, the European Court of Human Rights has consistently said that this "depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim": see, for example, *Kudla v Poland* (2000) 35 EHRR 198, para 91. …. The context here is not only that the state is acting in support of some important public interests; it is also that X is currently under the specialist care of a consultant physician and a consultant psychiatrist, who will no doubt do their utmost to mitigate any further suffering which disclosure may cause her. I conclude therefore, in agreement with the Court of Appeal, that to disclose these records to the parties in this case will not violate her rights under article 3 of the Convention.’

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In the matter of A *(A Child)* [2012] UKSC 60 Lady Hale

33. ‘However, that may not be the end of the matter, for to order disclosure in this case would undoubtedly be an interference with X's right to respect for her private life. She revealed what, if true, would be some very private and sensitive information to the authorities in the expectation that it would not be revealed to others. She has acquiesced in its disclosure to her legal advisers and to the court in these proceedings, but that can scarcely amount to a waiver of her rights. She had no choice. Clearly, her rights are in conflict with the rights of every other party to these proceedings. Protecting their rights is a legitimate aim. But the means chosen have to be proportionate. Is there, therefore, some means, short of full disclosure, of protecting their rights?

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34. ‘It is in this context that it has been suggested that the court might adopt some form of closed material procedure, in which full disclosure was made to a special advocate appointed to protect the parents' interests, but not to the father himself. It faces two formidable difficulties. The first is that this Court has held that there is no power to adopt such a procedure in ordinary civil proceedings: *Al Rawi v Security Service (JUSTICE intervening)* [2011] UKSC 34, [2012] 1 AC 531. That case can be distinguished on the ground that it was the fair trial rights of the state that were in issue, and the state does not enjoy Convention rights. It is arguable that a greater latitude may be allowed in children cases where the child's welfare is the court's paramount concern. But the arguments against making such an inroad into the normal principles of a fair trial remain very powerful. The second difficulty lies in the deficiencies of any closed material procedure in a case such as this. …. In a case such as this, however, it is not possible effectively to challenge the allegations without knowing where, when and how the abuse is alleged to have taken place. From this information it is inevitable that X's identity will be revealed. Even if it were theoretically possible to devise some form of closed material procedure, therefore, it would not meet the minimum requirements of a fair hearing in this case.

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- 35. ‘The only possible conclusion is that the family life and fair trial rights of all three parties to these proceedings are a sufficient justification for the interference with the privacy rights of X. Put the other way round, X's privacy rights are not a sufficient justification for the grave compromise of the fair trial and family life rights of the parties which non-disclosure would entail.’

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In the matter of A (A Child) [2012] UKSC 60 Lady Hale

36. ‘It does not follow, however, that X will have to give evidence in person in these proceedings. Understandable though it was for Peter Jackson J to ask himself "where is all this leading us?", in a case such as this it is only proper and sensible to proceed one step at a time (as was done in *A Local Authority v A*) and to assess and reassess the competing rights as matters unfold. As the Court of Appeal said, disclosure may be enough to resolve matters either way. If, as Peter Jackson J thought, disclosure will not be enough there would be a number of options available to resolve matters. If any party wishes to call X to give oral evidence, up to date medical evidence can be obtained to discover whether she is fit to do so. There are many ways in which her evidence could be received without recourse to the normal method of courtroom confrontation. Family proceedings have long been more flexible than other proceedings in this respect. The court has power to receive and act upon hearsay evidence. It is commonplace for children to give their accounts in videotaped conversations with specially trained police officers or social workers. Such arrangements might be extended to other vulnerable witnesses such as X. These could include the facility to have specific questions put to the witness at the request of the parties. If she is too unwell to cope with oral questioning, the court may have to do its best with her recorded allegations, perhaps supplemented with written questions put to her in circumstances approved by Dr W. On the other hand, oral questioning could be arranged in ways which did not involve face to face confrontation. It is not a requirement that the father be able to see her face. It is, to say the least, unlikely that the court would ever allow direct questioning by the father, should he still (other than in this court) be acting in person. The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered.’

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Case Management of Disclosure Issues

London Borough of Barking and Dagenham v RM, LS, The Children: [2023] EWHC 777 (Fam): Sir Andrew McFarlane, President of the Family Division

‘9. I am not going to go through the full procedural history, but the matter came to be determined by Keehan J initially. He determined in October 2022 that the father should be informed, but that decision was challenged on appeal and the appeal was compromised by agreement between the parties, and so the issue has come back for rehearing before a different judge, and that is how it comes to me and that is the process that I have been embarked upon.

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‘10. Today’s hearing has been established with a degree of procedural flexibility available to the court. At the court’s direction, the father has attended the Royal Courts of Justice together with his counsel, Ms Moore, but they have been asked to wait in a different part of the building. They do not know anything of the procedural history relating to the mother’s HIV status that I have described. They are unaware that there was a decision by Keehan J and an appeal and further hearings before me on a previous date and today. They are at court in the event that the court needed to hear in some way from Ms Moore on behalf of the father or indeed from the father if matters proceeded in that direction. Indeed, before this morning, counsel representing the local authority, the mother and the guardian had contemplated that Ms Moore would indeed come before the court to make submissions on the issue of disclosure, notwithstanding that she might not be told what the substance of the factual background that was up for consideration might be.

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‘11. In the event, that strategy changed shortly before the hearing and I accepted that the right way forward was to hear the three parties before the court make their substantive submissions and then consider the court’s position at that stage, either moving on to engage Ms Moore or, if the court was clear that a decision could be made on the submissions that have been made, making that decision. That latter state of determination is the one that I have reached.’

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The relevance of, 'Relevance': Care Planning and Credibility

London Borough of Barking and Dagenham v RM, LS, The Children: [2023] EWHC 777 (Fam): Sir Andrew McFarlane, President of the Family Division (continued 1)

'19. The starting point in this case must be that very substantial weight is to be attached to the mother's rights. If the material was not relevant to the care proceedings, then the mother's rights, to my mind, would undoubtedly trump the issue and determine it. That is effectively the purport of the two previously decided cases on this point: one, the case of London Borough of Brent v N & P [2005] EWHC 1676 (Fam), a decision by Sumner J; and the second, the case of Re P [2006] 2 FLR, a decision of Bodey J. In both those cases, for different reasons and different factual contexts, those two judges determined that the information that was to be withheld, which was HIV status in both cases, was simply not relevant to the court process and that was the end of the matter.

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‘20. So the application for disclosure, which is made by the local authority and supported by the guardian, only gets to the starting blocks, as it were, if relevance is established. But what is said about it? Well, a number of points are made. Firstly, it is submitted on behalf of the local authority that this is key information that is relevant for the planning for the future of these children in any event. They submit that it is information that the father should know so that:

(a) he can be aware of the need to ensure that the children’s HIV status is monitored and, if necessary, any needs are met in that regard; and

(b) he can be aware of the mother’s status and the need for her to look after her own health.

It is also said to be important for him to know rather than, at a later stage, coming across the information in an uncontrolled, unpredicted way, either through the children – who really cannot have any understanding of this material now at their age, but at a later age – disclosing it or, indeed, it seems to me, one or other of the mother’s wider family members telling him.

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- ‘23. The second element whereby it is said to be relevant to the proceedings is that unfortunately, in her attempts to hide the information, the mother has from time to time, it is said, either been dishonest in the way that she has dealt with the professionals or otherwise acted contrary to the best interests of the children. In the guardian’s position statement for this hearing, Ms Hendrick, counsel for the guardian, lists at para.20 some six ways in which it is said that the mother has been dishonest. …. Those points, which go further than simply honesty, go to the welfare of the children.’

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The relevance of, 'Relevance': What difference will disclosure make to the outcome?

London Borough of Barking and Dagenham v RM, LS, The Children: [2023] EWHC 777 (Fam): Sir Andrew McFarlane, President of the Family Division (continued 2)

'29. Approaching it in this way, I understand what is said about the bottom line, as it were, of the care plan, and it is difficult to see how a different plan would be put together for the children in terms of where they are going to live and who the people are who will have charge of their care, but that does not mean that this material is not relevant. I accept the submissions that have been made by the local authority and the children's guardian that it is relevant information, partly because it seems to me that it is essential that it is a known known for those who have parental responsibility for the children that they may, in future, turn out to be HIV positive and that there is a need for that question to be kept under regular monitoring and for the mother's health also to be protected by regular monitoring of her and regular taking of her medication. The father has parental responsibility for these children, and it seems to me that the judge dealing with the case needs to be satisfied about this element of the care plan just as he will need to be satisfied as all others. So, the judge needs to be across this issue, it needs to be a central part of the court's deliberations, and the father needs to know about it as well.'

PUMP COURT CHAMBERS

Practicalities of Non-Disclosure

London Borough of Barking and Dagenham v RM, LS, The Children: [2023] EWHC 777 (Fam): Sir Andrew McFarlane, President of the Family Division (continued 3)

'27. The submission was made – and it is one that was encouraged by me in questioning – that it is really not possible to contemplate how those matters could be litigated within the care proceedings without the father:

(a) becoming aware that something was being withheld from him; and

(b) actually having to go in and out of the hearing from time to time so that he was not present when the experts were questioned about this topic, but was present when they were questioned about others, and was not present when the mother was questioned about her honesty and other issues in relation to this matter, but was present when she was questioned about other matters.

The submission was made that that would simply be an unfair process and frankly untenable in any practical way.'

PUMP COURT
CHAMBERS

Managing Disclosure

London Borough of Barking and Dagenham v RM, LS, The Children: [2023] EWHC 777 (Fam): Sir Andrew McFarlane, President of the Family Division (continued 4)

37. 'Having looked at the factors as best I can, listing them as I have in this judgment, despite the weight that attaches to the need for the mother's rights to privacy to be protected, I consider that it is necessary for disclosure to take place. I consider that the submissions made by the local authority and the guardian point properly to matters that need to be considered fully in the care case, and that cannot be done without disclosing the information to the father. I consider that the father's reaction can be reduced, if it might be highly negative, by the way in which he is given the information, and by the professional support that he is given. I consider that if he is ever going to be told this information, then the optimum time to do so is now within a professionally supported context, namely the care proceedings being before the court, the local authority fully involved and with lawyers acting for him, rather than learning at some unpredictable, unplanned way in the future. It is also, it seems to me, for the reasons I have given, important that the father knows or has his eyes open to the fact that this is an issue in this family and knows that irrespective of the proceedings.

38. 'So, for those reasons that I have now given, I come to the view that it is necessary and proportionate for the information to be disclosed, notwithstanding the weight that I have given to the mother's Art.8 rights.'

PUMP COURT
CHAMBERS

A Recent Review by the Court of Appeal: Core Principles

Re T (Children: Non-Disclosure), [2024] EWCA Civ 241 (Judgment 18 March 2024)

Lord Justice Peter Jackson:

‘20. The approach to an application for relevant evidence to be withheld from a party to proceedings is well-established. … . [In Re D *(Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, [1995] 2 FLR 687*, Re B (Disclosure to other Parties) [2001] 2 FLR 1017 and Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60, [2013] 1 FLR 948 cited with approval.]

‘22. A court that is asked to authorise non-disclosure in the interests of a child should therefore ask itself these questions:

(1) Is the material relevant to the issues, or can it be excluded as being irrelevant or insufficiently relevant to them?

(2) Would disclosure of the material involve a real possibility of significant harm to the child and, if so, of what nature and degree of probability?

(3) Can the feared harm be addressed by measures to reduce its probability or likely impact?

(4) Taking account of the importance of the material to the issues in the case, what are the overall welfare advantages and disadvantages to the child from disclosure or non-disclosure?

(5) Where the child's interests point towards non-disclosure, do those interests so compellingly outweigh the rights of the party deprived of disclosure that any non-disclosure is strictly necessary, giving proper weight to the consequences for that party in the particular circumstances?

(6) Finally, if non-disclosure is appropriate, can it be limited in scope or duration so that the interference with the rights of others and the effect on the administration of justice is not disproportionate to the feared harm?

The Guardian, who supports the appeal, also argues that the hearing was not fair. Her counsel had drawn the judge's attention to the decision of the President in *London Borough of Barking and Dagenham v RM & LS* [2023] EWHC 777 (Fam).'

PUMP COURT
CHAMBERS

A Worked Example of Decision Making about Disclosure (or at least how not to do it)

Re T (Children: Non-Disclosure), [2024] EWCA Civ 241 (Judgment 18 March 2024)

Lord Justice Peter Jackson (Continued):

‘24. …. The first thing that the court therefore had to assess was the nature and probability of the harm that might result from the father receiving this further material. On the basis of Judge Roberts’ findings, he could not be relied upon to react sensitively, and serious harm could undoubtedly result from him blundering in. Francis J was entitled to be concerned about that risk. However, he then needed to consider what might be done to counteract it.

It was not right to regard either the child or the mental health professional as having a veto on disclosure, and the judge did not approach the matter in that way, but he did not identify the nature and probability of the risk to the children or the measures that might be taken to reduce it.

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‘25. Nor was there an evaluation of the overall advantages and disadvantages to Tom of disclosure taking place. No consideration was given to the difficulties for the child of continued secrecy, or the difficulties for the court in reaching a workable outcome if information continued to be withheld. The judge accepted that there would be some disadvantages to the father in taking part in the psychological assessment without disclosure, but he did not think that it would be impossible for him to do so. With respect, that was unrealistic. It would require the expert to be instructed in terms that were partly withheld from the father, and to be required to assess the father on the basis of information that could not be shared. That would heavily compromise an assessment designed to pave the way to a better future, even if the father agreed to take part in it, which was doubtful. The Guardian was making clear recommendations which the judge was bound to engage with if he was going to depart from them.

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‘26. Rights under Articles 6 and 8 exist equally for the protection of the deserving and the less deserving. In making his decision, the judge referred to the father’s rights, but he does not appear to have given them any weight. He was struck by Judge Roberts’s findings about the father’s self-centeredness in relation to two episodes predating the earlier proceedings, but these fell far short of providing a foundation for depriving a parent of information about his child in the midst of a crisis, particularly as it was being said that he had significantly brought it about.’