Neutral Citation Number: [2016] EWHC 2595 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2016

Before :

MR JUSTICE HAYDEN

- -

Between :

Re J (a minor)

- -
- -

Ms Flowers (instructed by **a Local Authority**)
Mr Baker (instructed by **Stephenson Solicitors**) for **M**
Mr Maddison (instructed by **King St Solicitors**) for **F**
Ms Kilvington (instructed by **CAFCASS**) for the **Child J**
Ms McMahon (instructed by in-house) for Associated Newspapers Limited

Hearing dates: 5th & 6th October 2016

- -

Judgment Approved

MR JUSTICE HAYDEN

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

Mr Justice Hayden :

1. A few weeks ago I circulated a draft judgment to the parties at the conclusion of public law care proceedings. This week I have been considering whether or to what extent that judgment should be placed in the public domain.

2. Having indicated that I would hand down judgment on the 5th October I impressed upon the Local Authority that if they were to apply for a Reporting Restriction Order (RRO) it was to be done in a timely and procedurally compliant manner. I regret to say that the application was both late and disorganised. However, I have been satisfied that the Press and broadcast media have notice of the application. Only Associated Newspapers Limited has chosen to make representations which they have done through their counsel Ms McMahon. Her arguments have been

broad ranging and ambitious, they have also been advanced forcefully and succinctly.

3. The Local Authority submit that the child subject to the proceedings, whom I have called J, 'should be afforded as much protection as possible to ensure that the child's identification is not revealed, including by 'jigsaw' identification using the judgment'. Ms Flowers reasons as follows in her position statement on behalf of the Local Authority:

> *"The issues in the case are extremely unusual, and it will be submitted that the Court should ensure anonymity for the child concerned to the fullest sense possible bearing in mind his young age and the detrimental effects upon him and his family should he be identified as the subject of this judgment, the potential for media interest in the issues arising in the case even from a fully anonymised judgment, and the potential impact and stress on the placement with his father in the wake of such media interest. It will be submitted on behalf of the Local Authority that there are "compelling reasons" to do so in this case."*

4. The Local Authority contend that in order to achieve its objectives there should be wide scale anonymisation to include: all the experts; the various CAFCASS officers involved in the case, both in the Care proceedings and the earlier Private Law proceedings; the social workers; the solicitors and barristers instructed in the case and the Circuit Judge who heard the majority of the Private Law proceedings.

5. The Local Authority associated itself with the even more wide ranging restrictions sought on behalf of the father (F) which contemplated the construction of a summary of the judgment, largely denuded of detail, which alone should be placed into the public domain (the full and detailed judgment to remain private). This idea had been drawn from a guidance document prepared by Dr. Julia Brophy entitled '*Anonymisation and Avoidance of the Identification of Children*'. When the concept was tested in practical terms during the course of exchanges with counsel it proved, in my judgement, impossible to undertake the exercise in a way which achieved any kind of satisfactory resolution. It is the core issue in the case here which raises the risk of identification, as is clear from Ms Flowers' own submission, set out above.

6. As Ms Flowers accepted during the course of her submissions, her support for the idea of a summary judgment indicated a recognition that the case contained matters which were in the public interest and thus fell within the ambit of the Practice Guidance issued by Sir James Munby (P) on the 16th January 2014: '**Transparency in the Family Courts; Publication of Judgments**'. At para 16 of that document it is stated:

> *"Permission to publish a judgment should always be given whenever the Judge concludes that publication would be in the public interest and whether or not a request has been made by a party or the media."*

7. Later, in the following paragraph the President observes:

> *"The starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the judgment should not be published"*

8. Thus it was with this in mind that Ms Flowers contended, again in the quotation that I have set out above, that the facts of this case established the 'compelling reasons' to depart from the Guidance.

9. The framework of the law in this area is easy to state. Indeed, Lady Hale considers that it can properly be regarded as 'trite' see: **R (C) v The Secretary State for Justice [2016] UKSC 2; (citing Re S (a child) (identification: restrictions on publication [2005] 1 AC 593)**. The essence of the exercise is one of parallel analysis in which neither the Article 8 ECHR rights, which broadly protect individual privacy, nor Article 10 rights, which safeguard freedom of expression, has precedence. In **V v Associated Newspapers Limited [2016] EWCOP 21** Charles J described it as a clash of '*titanic proportions*' in which the public interest in the effective administration of justice plays a significant role. In **M v The Press Association [2016] EWCOP 34** I observed that whilst the framework of the law may be relatively easy to identify, its application, in what is always a highly fact sensitive arena, can be anything but. Certainly the application of the principles to the facts of this case is challenging.

10. It is also important to bear in mind that the analysis is not confined to the 'polar alternatives of openness and privacy' as Mostyn J put it in **DL v SL (Financial Remedy Proceedings: Privacy) [2016] 2 FLR 552.** Thus I must here consider the proportionality of each request for anonymisation or any wider restriction. In ***Re: J (Reporting Restriction: Internet: Video)*** **[2013] EWHC 2694 (Fam); [2014] 1 FLR 523** the President set out a succinct exegesis of the applicable case law which I adopt:

> *"[20] I can take this shortly, because most of this is now too well established to require either elaboration or extensive citation of authority.*
>
> *[21] What may be called the 'automatic restraints' on the publication of information relating to proceedings under the Children Act 1989 are to be found in s 97 of that Act and s 12 of the Administration of Justice Act 1960. Section 97 prohibits the publication of 'material which is intended, or likely, to identify' the child. But this prohibition comes to an end once the proceedings have been concluded: Clayton v Clayton [2006] EWCA Civ 878, [2006] Fam 83, [2006] 3 WLR 599, [2007] 1 FLR 11, [2007] UKHRR 264. Section 12 does not protect the identity of anyone involved in the proceedings, not even the child: see Re B (A Child) (Disclosure) [2004] EWHC 411 (Fam), [2004] 2 FLR 142, para [82], A v Ward [2010] EWHC 16, [2010] 1 FLR 1497, para [79], Re X and Others (Children) (Morgan and Others Intervening) [2011] EWHC 1157 (Fam), [2012] 1 WLR 182, sub nom Re X, Y and Z (Expert Witness) [2011] 2 FLR 1437, para [32]. So, just as in the case of experts, there is no statutory protection for the identity of either a local authority or its social workers.*

> *[22] The court has power both to relax and to add to the 'automatic restraints'. In exercising this jurisdiction the court must conduct the 'balancing exercise' described 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, and in A Local Authority v W, L, W, T and R (by the Children's Guardian) [2005] EWHC 1564 (Fam), [2006] 1 FLR 1. This necessitates what Lord Steyn in Re S (Identification: Restrictions on Publication), para [17], called 'an intense focus on the comparative importance of the specific rights being claimed in the individual case'. There are, typically, a number of competing interests engaged, protected by Arts 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). I incorporate in this judgment, without further elaboration or quotation, the analyses which I set out in Re B (A Child) (Disclosure) [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [93], and in Re Webster; Norfolk County Council v Webster and Others [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, [2007] EMLR 199, at para [80]. As Lord Steyn pointed out in Re S (Identification: Restrictions on Publication), para [25], it is 'necessary to measure the nature of the impact ... on the child' of what is in prospect. Indeed, the interests of the child, although not paramount, must be a primary consideration, that is, they must be considered first though they can, of course, be outweighed by the cumulative effect of other considerations: ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 WLR 148, [2011] 1 FLR 2170, para [33].”*

11. For completeness, the ‘automatic restraints’ on the publication of information relating to proceedings under the Children Act 1989 at s.97 provide:

> *“97 Privacy for children involved in certain proceedings ”*
>
> *...*
>
> *(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –*
> *(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or*
> *(b) an address or school as being that of a child involved in any such proceedings.*
>
> *(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.*
>
> *(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it and, in the case of the Lord Chancellor, if the Lord Chief Justice agrees, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.*
>
> *(5) For the purposes of this section – ‘publish’ includes –*

(a) include in a programme service (within the meaning of the Broadcasting Act 1990); or

(b) cause to be published; and
'material' includes any picture or representation.

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

12. S.12 of the Administration of Justice Act 1960 prohibits the publication of material which is likely to identify the child as follows:

"12 Publication of information relating to proceedings in private

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –

(a) where the proceedings –

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002;
or

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

…

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the

> *publication is not so punishable by reason of being authorised by rules of court).”*

13. In many cases, when the Court comes to consider the ambit of reporting restrictions, the Judge and the parties are often involved in speculation as to the possibility of any media coverage. Here there has already been an approach to F by a freelance journalist instructed on behalf of a national newspaper. Unusually, at least in my experience, that approach involved (I am satisfied) a breach of s.6 of **The Editors' Code of Practice** which is, of course, enshrined in the contractual agreement between the Independent Press Standards Organisation (IPSO) and newspaper, magazine and electronic news publishers. F was offered remuneration if he was prepared to speak to the Press. I should say that I am confident that F would have declined a King's ransom. I have accepted the assurance of the journalist concerned that this was done in error and will not be repeated. In the circumstances it seems to me that Section 6 requires to be highlighted (the emphasis is mine):

> *“6. *Children*
>
> *i) All pupils should be free to complete their time at school without unnecessary intrusion.*
>
> *ii) They must not be approached or photographed at school without permission of the school authorities.*
>
> *iii) Children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.*
>
> ***iv) Children under 16 must not be paid for material involving their welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.***
>
> *v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.”*

14. The asterisk in the heading to paragraph 6 denotes that there may be exceptions where they can be demonstrated to be in the public interest. This is defined in the Code in these terms:

> *“The public interest includes, but is not confined to:*
>
> *Detecting or exposing crime, or the threat of crime, or serious impropriety.*
>
> *Protecting public health or safety.*
>
> *Protecting the public from being misled by an action or statement of an individual or organisation.*
>
> *Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.*

> *Disclosing a miscarriage of justice.*
>
> *Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.*
>
> *Disclosing concealment, or likely concealment, of any of the above.*
>
> *There is a public interest in freedom of expression itself.*
>
> *The regulator will consider the extent to which material is already in the public domain or will or will become so.*
>
> *Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.*
>
> *An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16."*

15. I propose to say nothing further about this incident other than I accept the submission on behalf of the Local Authority that a significant degree of press coverage is likely to arise in this case. Indeed a number of journalists have attended the hearings at various stages. In addition as Mr Baker, who appears on behalf of the mother, candidly states, the mother is highly motivated to speak to the press about this case. I have received a communication from the BBC informing me of a planned interview with the mother which it is intended will be "*silhouetted and anonymised*."

16. There is a consensus amongst all the parties that this case concerns matters which fall within the ambit of public interest. Not each party however has identified what that is. It is important to do so. Ms Kilvington has undertaken the exercise, she identifies the following, with which I agree:

> ● *"How agencies such as schools, anonymous referrers, health professionals and the police raised entirely appropriate concerns with the local authority, which were inadequately considered.*
>
> ● *How earlier professionals have however unwittingly colluded with or compounded the harm experienced by J through inept investigation and inadequate survey of the wide canvas of concerns.*
>
> ● *That whilst such professional ineptitude might be explained by the mother having provided a powerful narrative in an assertive fashion; this simply highlights the imperative on the part of professionals involved in this work to conduct an independent thorough investigation even in cases where at face value one parent's account might appear well-reasoned and articulate.*
>
> ● *How inadequate professional analysis has compounded the harm through engendering delay in the court investigative process."*

17. I would add that I considered the range of failings here to be so serious that I indicated, in the judgment, that I intend to invite the Director of Social Services to undertake a thorough review of the social work response to the case. I observed that 'professional deficiencies on this scale cannot go unchecked if confidence in this Local Authority's safeguarding structure is to be maintained'. It seems to me self evident that these are concerns in which the public has a legitimate interest.

18. Ms Kilvington also contends that the following matters ought to be considered as relevant to the public interest:

> ● *"How J's emotional welfare has been harmed by a blinkered, confrontational and intransigent mother.*
>
> ● *How, as part of that harm, J has been denied a relationship with his father for a lengthy period of time.*
>
> ● *How, as part of that harm, J has been denied the opportunity to express himself in a manner contrary to the mother's expectations."*

19. I do not attribute the same weight to these factors. However, they highlight that this was a case involving emotional harm to a child and the alienation of a father. These are both matters in which there is undoubted advantage in wider public understanding and, in this way, I consider is legitimately a matter of public interest.

20. It is also common ground amongst the parties that there should be anonymisation of the child which should, in addition, broadly encompass factors which might lead to his identification. The central dispute therefore has crystallised in four areas:

    i) Should the experts instructed in the case be named in the judgment?

    ii) Should the Local Authority's social workers and various CAFCASS officers be named?

    iii) Should the Local Authority be specifically identified?

    iv) Should the mother be permitted to talk to the press about this case? Such suggestion being predicated on the preservation of the anonymity of mother and child.

Naming the experts

21. In **R (on the application of Guardian News and Media Ltd v City of Westminster Magistrates' Court ([2012] 3 WLR 1343; [2012] 3 All ER 551; [2012] EMLR 22)** Toulson LJ made a succinct and powerful assertion of the importance of transparency in the justice system:

> *"Open Justice. The words express a principle at the heart of our system of justice and vital to the rule of law"*

22. In **R (C) v the Secretary of State for Justice** (supra) Lady Hale also articulates the reasoning that underpins the principle of open justice thus:

> *"The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge. The rationale for the second rule is not quite the same as the rationale for the first, as we shall see. This case is about the second rule. There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property. The first issue before us is whether there should be a presumption of anonymity in civil proceedings, or certain kinds of civil proceedings, in the High Court relating to a patient detained in a psychiatric hospital, or otherwise subject to compulsory powers, under the Mental Health Act 1983 ("the 1983 Act"). The second issue is whether there should be an anonymity order on the facts of this particular case."*

23. In **M v The Press Association** (supra) I reminded myself of some of the key principles which require to be applied. They bear repetition here:

> *"i. Orders restricting reporting should be made only when they are necessary in the interests of the administration of justice – see Scott v Scott ([1913] AC 417);*
>
> *ii. The person or body applying for the reporting restriction bears the burden of justifying it – it is not for the media to justify its wish to report on a case;*
>
> *iii. Such an application must be supported by cogent and compelling evidence – see R v Jolleys, Ex Parte Press Association, ([2013] EWCA Crim 1135; [2014] 1 Cr App R 15; [2014] EMLR 16), R v Central Criminal Court ex parte W, B and C ([2001] 1 Cr App R 2) and, in civil cases, the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1033 and Derispaska v Cherney ([2012] EWCA Civ 1235, per Lewison LJ (at paragraph 14))."*

24. Applying these principles along with the President's Guidance, it seems to me to be beyond argument that those who offer expert evidence to any Court and to which the Family Court can be no exception, should do so realising that their conclusions and analysis will likely be held to public scrutiny. It is right that this should be the case in the Family Justice system, not least because those conclusions may (and I emphasise may) be relied on by Judges who are required to make some of the most draconian orders in any jurisdiction. These include the separation of families, temporarily or permanently and the revocation of parental rights and responsibilities. Not only is the probity of the process enhanced by scrutiny, so too is its efficacy. Transparency stimulates debate and in so doing provides fertile ground for the growth of knowledge and understanding.

25. These principles predominate in this case. I do not propose to set out and traverse the objections advanced on behalf of the Local Authority, though by no other party. To do so would be counter productive in the sense that mere repetition of the arguments has the potential to compromise J's privacy. I would only note that the experts in this case are all widely regarded both by the judiciary and practitioners in Courts nationally and at all levels. It is also important to record that none of the experts themselves has asked to be anonymised. Each of the experts should be named in this case.

Naming the social workers and CAFCASS officers

26. It is said that the social workers and CAFCASS officers, because they work predominately in one particular city will, if named, reveal by the 'jigsaw effect' the area in which the child lived. Though no evidence has been submitted on this point, I am prepared to accept it as an obvious contemporary reality. Ms Flowers robustly, but erroneously in my view, submits that if I name this particular category of individuals, her argument for not naming the Local Authority directly becomes otiose (or at least, she says, very nearly so). Ms McMahon counters that this is too tenuous a link to J himself and further that it can hardly be described as the 'cogent and compelling' evidence required.

27. The real question is not whether there is a risk that those who are highly motivated to discover which area of the UK J lives in, might be able to do so but rather what consequences might arise in such a situation. It certainly 'tightens the net' to use the phrase coined in submissions, but I am not persuaded that it will therefore lead to the identification of the child whose details and location cannot be published in any event. Moreover, there is a very considerable difference between permitting information to be included in a judgment that runs the risk of identifying the child's geographical location and effectively stating it in terms in the judgment itself by naming the Local Authority. For the avoidance of doubt the Reporting Restriction Order incorporates the publication of information leading to the identity of the child, including material gleaned by way of the 'jigsaw effect'. To avoid any ambiguity the order should specifically prohibit the publication of the region of the country in which J lives.

28. Thus analysing risk of identification and proportionality of restriction in this way I come to the clear conclusion that both the CAFCASS officers and the social workers should be named. Again, I think it important to note that none of these witnesses has actively sought anonymity.

Naming the Local Authority

29. In respect of naming the Local Authority itself the balancing exercise between the competing rights and interests in play is more subtle. There is an obvious tension in Ms Flowers' position. She seeks the anonymisation of her Local Authority in order to protect the Article 8 rights of the subject child. Of course, were she to succeed it would have the collateral attraction of keeping the name of a Local Authority out of the public domain in a case where they have been subject to trenchant criticism. Whilst I have been critical of this Local Authority I must say that I am entirely convinced of their integrity in this argument. I am satisfied that they advance their argument on this point entirely and exclusively in J's interest.

30. Those reading my judgment in the public law proceedings will quickly identify two particular features of it. Firstly, the factual background is striking and remarkable. Secondly, the impact of his experiences on J is likely to be profound and potentially long lasting. It is important to keep these issues at the centre of this exercise. If I were here exercising a welfare jurisdiction, that is to say one in which J's interests were the paramount consideration, then I should wish to construct an impregnable fortress around him to guarantee the peace and privacy which he undoubtedly requires to recover from his extraordinary experiences. I do not operate here in that jurisdiction, as is clear from the framework of the law set out above. I am required to balance rights and freedoms of 'titanic proportions' in an exercise which requires me to evaluate principles which are conceptually different.

31. Ms Kilvington submitted that though the balance is a delicate one, the facts of the case are indeed so striking that the identification of the geographical area in which the child lived would, far more readily in this case than in others, risk his identification becoming known. I agree both with Ms Kilvington's ultimate conclusion and with her identification of the delicacy of the balancing exercise. I would add that an important factor in coming to this conclusion is my earlier decision to require a thorough investigation of this case at the most senior level in the Authority. This I believe addresses, to an important degree, the public interest in the professionalism of child protection within this Authority's department. I should also say that whilst I am satisfied that the balance here falls in favour of J's Article 8 rights, that balance may potentially shift at some point in the future.

Should the mother be permitted to give interviews to the press and broadcast media concerning J?

32. Mr Baker has informed me that the mother has entirely rejected the views of the experts, set out in my judgment, as well as my own reasoning and conclusions. In her last contact session with J she said this to him *'I know you are a girl and you feel like a girl and want to be a girl'*. I accepted the evidence that this had caused him significant distress. During a voluble interjection in the course of Ms Flowers' submissions, M said that she did not maintain that J is a girl but rather that he is 'gender dysphoric'. M has been ambivalent throughout on this point. For the purposes of this application the distinction does not matter. From any perspective, M has a different view concerning J's gender identification and emotional needs to everybody else. This has been properly identified as a significant challenge in promoting the mother and son relationship in the future.

33. It follows, to my mind, that were M to talk about her son in the media, advancing what Mr Baker has referred to as her 'alternative view of the case', there is the real risk that, contrary to my findings and in a way which is inimical to J's best interest, M will misrepresent his 'gender identity' to the world. That after all is what M's 'alternative view' of the case is. The expression of that view, therefore, not only risks J's privacy but his emotional wellbeing. As will be clear from my extensive judgment, given space and independence, J has moved from presenting as a girl to asserting his male identity. This process has been gradual and public. It has been witnessed by his peers and teachers. His school has been tremendously supportive. This is the landscape in which J's Article 8 rights, asserted on his behalf by his father and Guardian, fall to be considered. There is, in my evaluation of the competing rights and interests here in play, a high and wholly unacceptable risk that

the mother will either unknowingly or otherwise, broadcast some detail of her and J's life together which will identify J to those who know him and who hear or read such information. Again, the highly unusual facts of this case render that, self evidently, far more likely than would be the case in many other circumstances. The potential consequences incorporate not only the violation of J's privacy but the inestimable harm to him caused by hearing, or hearing of, his mother asserting, in the public domain, her wholly unjustified conviction that her son is gender dysphoric or identifies as a girl. Moreover, it is difficult to see how by advancing her views in the public domain M can fail to damage the fabric of her relationship with her son. That relationship as I have said in the substantive judgment is, above all else, J's right.

34. The mother's competing right is that of freedom of expression, protected by Article 10 ECHR. Mr Baker tells me that M is also interested in speaking publicly about the issues presented by those experiencing gender dysphoria. She has the inviolable right to do so. Her right to speak about her son however, has to be balanced against J's own rights. This for me is not a delicate balance, the predominance of J's right is both pressing and clear. I am accordingly prepared to grant the restrictive order sought by the parties, save the mother and Associated Newspapers Limited, preventing her from speaking about any aspect of 'gender dysphoria or gender identification' in so far as these relate to J. For the avoidance of doubt the restriction extends, as seen from the wider terms of the order, to prohibiting the mother from broadcasting or publishing any detail of J's life which might identify him as the child subject to these proceedings.

35. By way of completeness I would add that Ms McMahon tells me that she does not abandon the request for various transcripts made by her client concerning aspects of the evidence. However, she has advanced no argument on the point recognising its futility 'at least at this stage'.

36. Finally, at para 5 above, I indicated that the highly restrictive proposals advanced by Mr Maddison and enthusiastically adopted by Ms Flowers had their roots in Dr Brophy's research paper. I formed the clear impression that counsel in this case and indeed in another case that I heard recently, had overestimated the reach and scope of Dr Brophy's research. The confusion, it seems to me, lies in the title: 'Judicial Guidance'. I think the legal profession may interpret that as signalling an authority which this research does not have. The position has been clarified by the President of the Family Division's own guidance which was issued on the 18th October 2016. **TRANSPARENCY IN THE FAMILY COURTS: GUIDANCE BY THE PRESIDENT OF THE FAMILY DIVISION.**

> *"There appears to be uncertainty about the status of ANONYMISATION AND AVOIDANCE OF THE IDENTIFICATION OF CHILDREN & THE TREATMENT OF EXPLICIT DESCRIPTIONS OF THE SEXUAL ABUSE OF CHILDREN IN JUDGMENTS INTENDED FOR THE PUBLIC ARENA: JUDICIAL GUIDANCE published in August 2016 by the Association of Lawyers for Children and Dr Julia Brophy.*
>
> *This is a valuable piece of academic research and analysis, funded by the Nuffield Foundation, whose publication and wide dissemination I fully supported. However, it is important to*

> *appreciate that it is only that. It has no official status. It has not been approved or issued as Guidance by me or the judges. It is therefore not judicial guidance in the sense in which many would understand that phrase.*
>
> *As has been made clear, see September [2016] Family Law 1067 and October [2016] Fam Law 1266, I am currently considering Dr Brophy's work with a view to deciding the form any Guidance which I may issue should take. My intention is to consult on my proposals before I issue any formal Guidance."*

37. In her prefacing paragraphs Dr Brophy observes:

> *"**(a) Personal and geographical indicators in judgments***
>
> *It [the Guidance] builds on a stream of work regarding issues of 'transparency' in family proceedings and the privacy, welfare and safeguarding needs of children and young people subject to proceedings. It results from a review of children judgments on BAILII and findings regarding geographical/personal identifiers and jigsaw identification of children, and the treatment of sexually explicit details of the abuse of children (see Appendix 1). Anonymisation is not confined to concealing names but extends to the avoidance of any materials liable to lead to the identification of the child.* ***It aims to help judges strike a better balance between the policy that more judgments should be published, and the concerns expressed by and on behalf of young people about the implications for them of placing personal details and information in the public domain, in particular in relation to inadvertent and jigsaw identification."*** *(my emphasis)*

There is no doubt that Dr Brophy's research is, as one would expect, very child focused. I am concerned however that in expressing her aim to be striking '*a better balance between the policy that more judgments should be published' and the concerns of 'young people*' about '*deeply distressing*' information *'in the public arena'*, Dr Brophy has lost sight of the legal framework that requires to be applied in any decision concerning publication. We are not concerned merely with a 'policy', to publish more judgments, rather we are applying the obligations imposed by Article 10 and Article 8 ECHR. This has been established law since the decision in **Clayton v Clayton [2006] EWCA Civ 878; [2007] 1 FLR**. Sir Mark Potter (P) observed:

> ***[54]*** *Nor does it mean that, in the course of Children Act proceedings conducted within the High Court, the judge may not, in the welfare interest of the child and in order to protect his or her privacy under Art 8, make an injunction or order which prohibits the identification of the child not simply to the extent set out in s 97(2) of the 1989 Act, but for a period beyond the end of the proceedings (eg until the age of 18). However, in deciding to make a long-term injunction aimed at restricting the reporting and publication of proceedings involving children, the court is obliged in the face of challenge to conduct a balancing exercise between the Art 8 rights of the child and the Art 10 rights of the parent asserting such right, and/ or, where press or media interest is involved, the Art 10 right to report and discuss the*

> *circumstances surrounding, as well as the issues arising out of, a case of public interest...*
>
> ***"[58]** In **A Local Authority v W, L, W, T & R; (By the Children's Guardian)[2005] EWHC 1564 (Fam), [2006] 1 FLR 1**, I summarised the effects of the judgment in Re S in this way: 'There is express approval of the methodology in Campbell v MGN Ltd in which it was made clear that each Article propounds a fundamental right which there is a pressing social need to protect. **Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary, and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or trumps the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided on the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary before the ultimate balancing test in the terms of proportionality is carried out.**'"*

38. I have highlighted the above passage because it represents, to my mind, the clearest and most concise expression of the analysis that is required. Thus it follows that whilst Dr Brophy's detailed suggestions are helpful when addressing the proportionality of intervention in a particular case, they must not be regarded as constructing a paternalistic presumption of privacy for every child in every case. I am sure she did not intend that her work be construed in this way. In a mature family justice system the weight afforded to the right to freedom of expression must be recognised and engaged with.

Post script

During the course of submissions Mr Brian Farmer (Press Association) informed me of a recent case in which Keehan J had deferred the handing down of a judgment until a child's half term holiday, in order that any distress to the child consequent upon publication could be managed most effectively. That seems to me to be a very sensible course and when F was approached with the idea he was very enthusiastic about it. Accordingly I intend to hand down the judgment in the Care Proceedings at 10.30am on 21st October 2016. In the light of the content of this judgment I do not propose to publish it until 21st October 2016, following handing down of the substantive judgment.