Neutral Citation Number: [2021] EWCA Civ 1882

Case No: CA-2021-000713

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mrs Justice Lieven
Case No. DE19P00318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2021

Before :

DAME VICTORIA SHARP
(President of the Queen's Bench Division)
LADY JUSTICE KING
and
LORD JUSTICE WARBY

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Between :

ANDREW JAMES GRIFFITHS	**Appellant**
-and-	
(1) LOUISE TICKLE **(2) BRIAN FARMER** **(3) KATE ELIZABETH GRIFFITHS** **(4) 'G' (A CHILD) THROUGH THEIR GUARDIAN**	**Respondents**
-and-	
(1) RIGHTS OF WOMEN **(2) ASSOCIATION OF LAWYERS FOR CHILDREN**	**Interveners**

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Richard Clayton QC, Victoria Edmonds and Kate O'Raghallaigh (instructed by **Griffins Law**) for the **Appellant**
Lucy Reed (instructed by **direct access**) for the **First Respondent**
The Second Respondent in person
Dr Charlotte Proudman (instructed by **Nelsons**) for the **Third Respondent**
Deirdre Fottrell QC and Timothy Bowe (instructed by **Moseleys Solicitors**) for the **Fourth Respondent**
Caoilfhionn Gallagher QC, Chris Barnes and Charlotte Baker (instructed by **Rights of Women)** for the **First Intervener**
Denise Gilling QC, Victoria Roberts and Lucy Maxwell (instructed by **TV Edwards LLP**) for the **Second Intervener**

Hearing date: 4 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on Friday 10 December 2021.

DAME VICTORIA SHARP, P:

1. This is an appeal against a decision of the High Court that a fact-finding judgment in proceedings under the Children Act 1989 ("the Children Act") should be published with the names of the father and the mother included, and only relatively modest redactions, primarily aimed at mitigating the impact of publication on the couple's infant child. The appellant is the father, against whom findings were made. He accepts that the judgment can be published but contends that the interests of the child make it necessary that he, the mother, and the child should all be anonymised and that there should be additional redaction of some details.

2. This is the judgment of the court.

The proceedings so far: an outline

3. The judgment at issue was delivered by HHJ Williscroft on 26 November 2020, in the Family Court at Derby, in the course of proceedings initiated by the father. He was seeking orders under s 8 of the Children Act to allow him to spend time with the child. His application was resisted by the mother. The Judge held a fact-finding hearing at which she considered evidence in the form of documents, photographs and a video recording, and heard the mother and father give oral evidence. In the judgment, which runs to some 10,000 words, the Judge made findings of domestic abuse against the father which we will summarise later. The father has not sought to appeal against those findings. The hearing and the judgment were in private, but open to accredited media representatives, as is the norm for proceedings of this kind under Rule 27.11(2)(f) of the Family Procedure Rules ("FPR").

4. No media representative did attend, but in February 2021 two reporters, Louise Tickle and Brian Farmer, each applied for an order authorising the publication of the judgment. The applications were heard in the High Court by Lieven J, on 13 and 14 July 2021. They were supported by the mother. The applications were also, eventually, supported by the Guardian appointed to represent the interests of the child. The organisation Rights of Women ("RoW") was given permission to intervene. It also supported the reporters' applications.

5. The father resisted the applications. His final position was that he did not oppose publication of the factual content of the judgment as such. But he opposed the inclusion of any matter that would lead to the identification of him, the mother, or the child. He said they should all be anonymised. He also opposed publication of some of the detail of the factual findings. He did not assert any privacy rights or other countervailing rights of his own. His case was that these restrictions on publication were necessary in order to protect the child, whose rights and interests outweighed any competing factors.

6. By an order dated 30 July 2021 Lieven J granted the applications to the extent we have indicated. She set out her reasons in her judgment of the same date. She approached the matter on the agreed basis that her task was to strike a balance between rights that favoured publication and the rights of the child to respect for its private and family life, applying the principles set out by the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 ("*Re S*"). She

conducted a fact-sensitive scrutiny of the competing considerations. She considered and evaluated various factors that tended to favour publication. She listed and considered various aspects of the rights and interests of the child. Balancing these factors against one another, and applying a proportionality test to each, she concluded that the balance came down in favour of publication with names. Lieven J directed that the judgment of HHJ Williscroft should be published in redacted form on condition that the child must not be identified by name, sex, or date of birth and that the redacted parts of the judgment must not otherwise be published.

7. Permission to appeal was granted by Baker LJ on the footing that although an appeal had only limited prospects of success, there were compelling reasons for an appeal to be heard, within the meaning of CPR 52.6(1)(b). We heard the appeal in public, but to ensure that this did not defeat the entire purpose of the appeal we made an anonymity order in respect of the father, mother and child, to prevent public disclosure of identifying information until after we had given judgment. We heard oral argument on behalf of the appellant father, Ms Tickle, the mother, and the Guardian, and from Mr Farmer in person. Prior to the hearing of this appeal, RoW were given permission to intervene, as were the Association of Lawyers for Children, a national association of lawyers working in the field of children law. The interveners did not appear by Counsel at the hearing, but provided written submissions.

The grounds of appeal and our conclusions

8. The father's five grounds of appeal can be reduced to two main points.

9. The first is that Lieven J's approach was wrong in law because she misinterpreted and misapplied section 97 of the Children Act. On its face and on its true construction, section 97, so it is said, prohibits a court from authorising the publication of anything likely to identify a child as being the subject of proceedings under the Children Act unless it is satisfied that the welfare of the child requires such a publication. Put another way, the father's contention is that the statute provides for the welfare of the child to trump any other consideration.

10. This represents a complete change of position by the father. Before Lieven J he expressly conceded that, as earlier decisions had held, this is not the correct way to interpret and apply s 97 of the Children Act. This meant that Lieven J's legal approach to this issue was one that by the end of the hearing before her, was agreed on all sides to be correct. In the circumstances, it was argued before us, by several of those appearing, that the father should not be allowed to rely on this new argument in this appeal. The father accepted that, as a first step, he had to persuade us to allow this. The Court can allow a new point to be argued on appeal even where it was expressly conceded below, but this is a discretion to be exercised cautiously. We heard the father's argument on the merits of this point *de bene esse.* Having reflected on the matter, we decline to allow the father to rely on this ground of appeal.

11. We set out our reasons for this conclusion in more detail later on in this judgment. In summary, however, in our view there is no good reason why the construction argument, if sound, should not have been taken before the Judge, and if it had been, it is inevitable that the proceedings below would have been conducted differently. The point moreover is of some legal and practical importance, and is one on which it would be undesirable for the Court of Appeal to sit (in effect) as the court of first instance. The father's

challenge, if sound, might lead to a conclusion that section 97 is incompatible with the rights of others, guaranteed by the European Convention on Human Rights ("the Convention"); and if we were to permit him to mount this challenge before us, at least one further hearing would be needed. In all the circumstances we are clearly of the view that it would be unfair to the respondents and contrary to the interests of justice more generally to allow the father to rely on the new point.

12. The father's second main point is that, in the alternative, the *Re S* analysis conducted by Lieven J was legally flawed. It is said that in various ways her approach was wrongly biased or weighted in favour of publication and against the interests of the child; that her approach to the evaluation of the child's best interests was fundamentally wrong; and that she should have found that those interests prevailed. These criticisms of the judgment below are disputed by the journalists, the mother, the child's Guardian, and RoW. We reject these various criticisms on their merits. Again, we will expand on our reasons later on in this judgment, but in summary, they are these.

13. This court will not interfere with an evaluative exercise of this kind unless it is satisfied that the judge erred in principle or reached a conclusion that was wrong. Neither criterion is satisfied here. The father's criticisms of Lieven J's approach to the balancing process are unconvincing. Lieven J correctly identified the well-established principles she had been invited to apply. She took account of all relevant matters and did not take account of anything that was immaterial. Her assessment of the weight to be given to the specific rights in play involved no error of principle, and was legitimate. On analysis, the father's criticisms of Lieven J's decision amount to little more than disagreement with the conclusions at which she arrived.

14. Decisions of this kind are inevitably case-specific. The critical factors in this case included (1) the father's decision not to invoke any Article 8 rights of his own but to rely exclusively on the rights of the child; (2) the very young age of the child; (3) the Guardian's professional assessment, in favour of publication; (4) the mother's support for publication; and (5) the extent and nature of the information about the father that was already in the public domain. We do not think it can fairly be argued that Lieven J's conclusion, in the unusual circumstances of this case, was wrong. On the contrary, we consider that she was clearly right.

15. For these reasons, the appeal is dismissed. This judgment will therefore contain an overview of the factual findings of HHJ Williscroft, the names of the father and the mother, and some details about them drawn from that judgment and the judgment of Lieven J. This is necessary in order for our judgment to be properly understood. We shall not however go into the detail of the findings, or name the child, or include any of the other identifying details about the child that are to be redacted from the judgment of HHJ Williscroft when that is published (and a reporting restriction order in relation to the judgment of HHJ Williscroft will remain in place, prohibiting publication of those redacted matters.)

The proceedings below

The Williscroft judgment

16. What follows is no more than a selective summary of the most material aspects of the judgment. The father is Andrew Griffiths. He was aged 50 at the time of the judgment.

The mother is Kate Griffiths MP, aged 49 at that time. The couple met and formed a relationship in 2008. In 2010, Mr Griffiths was elected as a Member of Parliament. In 2010, Mrs Griffiths discovered he had been having an affair. In 2011, she discovered he had been sending sexual texts to, or "sexting" someone else. In July 2018, by which time the child had been born, Mr Griffiths was exposed by newspapers as having sexted two women constituents whom he had never met. He had sent them over 2,000 texts of a sexual and violent nature and paid them sums of money. The relationship between Mr and Mrs Griffiths ended and the couple separated. In 2019, Mr Griffiths "perhaps unsurprisingly", as HHJ Williscroft put it, was not confirmed as a Parliamentary candidate. Mrs Griffiths put herself forward as a Parliamentary candidate for the constituency which her husband had represented, at the last minute. She was selected, and, in due course, elected. At the time of the hearing before HHJ Williscroft, the parties were in the process of divorcing and resolving certain financial matters. These were complex, for various reasons. The father was unemployed and, he said, in significant debt.

17. In the course of the proceedings relating to contact with the child, Mrs Griffiths made a number of allegations against Mr Griffiths. HHJ Williscroft had to decide "on the simple balance of probabilities" whether these allegations were made out, bearing in mind that the inherent probability or improbability of an event is a matter to be taken into account in reaching that decision. She reminded herself that this is "very different from the criminal standard of proof". She directed herself that the facts mattered, as abusive behaviour is harmful to children either directly, if they are hurt or caught in the crossfire, or indirectly if they are present where it is happening. They also mattered because abusive behaviour affects handover arrangements and often raises concerns about the capacity of a parent who has been abusive to undermine the parent with care. The judge reminded herself of the applicable principles, many of them set out in Practice Direction 12J of the FPR, parts of which she quoted.

18. The judge went on to set out her assessment of the parties, both of whom had been subject to "testing cross-examination", and then to review the evidence and identify the conclusions she had drawn, and her reasons for doing so. For present purposes it is enough to record the following. The judgment contains findings that Mr Griffiths engaged in various kinds of behaviour towards his wife that were abusive. He had been abusive to her verbally and hurt her physically when drunk. He had undermined Mrs Griffiths' self-esteem in a number of ways. When his career was threatened by his own behaviour, he had used threats that she would be made homeless and left without money as a way of getting her to go along with a photograph designed to show she was "standing by him". He had pressurised her to engage in sexual activity by making clear he would be angry and hostile if she did not. He had insisted on some sexual acts which she found unpleasant. These matters were part of a pattern of controlling and coercive behaviour. The judge accepted Mrs Griffiths' evidence that Mr Griffiths "rape[d] her when sexual intercourse took place when he had already penetrated her when she was asleep". The judge said that although the distinction between submission and consent can be complex, "unconscious the question of consent cannot arise". The judge accepted the evidence of Mrs Griffiths that when she complained of his behaviour he had told her she would not be believed as he was an MP. The judgment was accompanied by a table of the findings made.

The applications

19. Ms Tickle and Mr Farmer applied to HHJ Williscroft for the release of the judgment to them. The judge granted that application on limited terms, to enable them to prepare an application to the court for its publication. Ms Tickle then applied in writing for permission to report "certain of the details contained in the judgment" on the basis that there were "overwhelming" public interest arguments for doing so. She indicated her preferred option, which was to publish specified parts of the judgment, which she had highlighted in yellow, but omitting other parts which related to "particularly private information that I do not believe there is a public interest in knowing and which could be redacted".

20. Ms Tickle identified three main aspects of the public interest as supporting publication to the extent indicated. The first was the public interest in transparency for decisions of this kind. She suggested that coercive control was not yet well understood in society. She described the judgment as a model of how a court should approach allegations of that kind. She submitted that publication would facilitate informed public discussion of the issue, and public understanding of how the courts reach decisions on such matters. Second, Ms Tickle pointed to Mr Griffiths' role as a politician. He had been an MP at the time of the behaviour identified in the judgment, and when the Domestic Abuse Bill was going through Parliament. In addition, she argued that it was in the public interest for voters to know that Mr Griffiths had abused his elected office by using it to pressurise and threaten his wife. Third, Ms Tickle argued that Mr Griffiths had deceived the public about the state of his family life, and his own behaviour. He had used a media interview to tell the public that his conduct in the 2018 sexting scandal was an isolated incident that flowed from abuse he had suffered in childhood, and occurred in the context of his having had a mental breakdown. It was now apparent from the judgment that his sexting conduct went back to 2011. There was a public interest in correcting the record.

21. Mr Farmer's separate application made similar points, though his submissions were of a more sweeping nature, contending that the fact that Mr Griffiths had been an MP made the argument for naming him in the public interest "plain" and "obvious".

22. It was these applications for permission to report the judgment of HHJ Williscroft, or part of that judgment, that came before Lieven J for resolution.

The positions adopted by the parties at the hearing before Lieven J

23. Mrs Griffiths supported publication of the judgment in the form advocated by Ms Tickle and Mr Farmer. She made clear that she was confident her ability to care for the child would not be adversely affected by publication. Her ability to do so had not been undermined by the scandal of 2018, and the accompanying media storm. She contended that the interests of transparency, her right to freedom of expression, and her right to share her private experience as a survivor of rape and domestic abuse, all weighed in favour of doing so. She argued that if family proceedings had never been commenced she would have been free to share publicly the abuse she had suffered, and she should not be barred from speaking publicly after seeking legal protection for the child through the family courts. She added that as an MP herself she could speak about these matters in Parliament with the protection of Parliamentary Privilege in any event. She should not be "silenced" by the court, at the instance of the father.

24. Aspects of these arguments gained support from RoW, as interveners. They argued that women who have been victims of domestic abuse are entitled to choose between anonymity and publicity. They have a right to freedom of expression and "informational self-determination" or, as the Judge put it, the right to tell their own stories. It was argued that women who do not seek the support of the Family Court are relatively free to speak out about their experiences. The freedom of those who are engaged in Family Court disputes is likely to be much more restricted. RoW supported the arguments of the applicants and the mother that the public interest in open justice meant there was a pressing need for the Family Court to publish more judgments.

25. The child's Guardian was initially opposed to any publication which could lead to the identification of the child. By 5 July 2021, however, the Guardian had signalled her intention to support the applications. Having considered the likely impact of publication on the child's home life with its mother, the Guardian accepted Mrs Griffiths' assessment of her ability to protect her child from any adverse effects arising from publication. The Guardian had focussed on the impact that publicity would have on the child's relationship with Mr Griffiths, assuming for this purpose that the child's name, age and sex would be redacted. The Guardian considered that the child would have to be told the facts in due course; and there would have to be conversations in due course with the child about the parents' relationship, their separation, and the reasons for it. The Guardian felt there was a firm argument in favour of publishing the findings in order to promote transparency within the Family Court system and shine a light on how the Family Court approaches the difficult area of coercive and controlling behaviour and sexual abuse in a civil-law context. Having considered the likely impact on the child both immediately and in the future when the child was much older, the Guardian was eventually drawn to the conclusion that publication would involve a limited and proportionate interference with the child's privacy.

26. The father's arguments developed over the course of three skeleton arguments, and in oral submissions at the hearing. But his fundamental submission throughout was that there could be no publication of any material that *could* lead to the identification of the child. He accepted that there were particular features of this case which are not typical of those which the court conventionally considers on applications of this kind. Nevertheless, he argued, the court should attach limited weight to the public interest in identification of the parents. It should attach particular and significant weight to the child's privacy rights, which should be regarded as the most important factor.

The legal and procedural framework

General principles

27. The right to freedom of expression, protected by Article 10 of the Convention, encompasses a right to speak to others, including the public at large, about the events and experiences of one's private and family life. As Munby J (as he then was) pointed out in *Re Angela Roddy* [2003] EWHC 2927 (Fam), [2004] EMLR 8 [35-36] this is also a facet of the right to respect for private and family life:

> "… amongst the rights protected by Article 8 … is the right, as a human being, to share with others – and, if one so chooses, with the world at large – one's own story…".

28. Corresponding to the right of an individual to impart information about his or her private and family life, without interference by a public authority, is the fundamental right of others to receive such information, without such interference. That is a right enjoyed by the media parties here, as well as the general public.

29. These are not absolute rights; they are qualified to the extent that is necessary in a democratic society for certain purposes. Those purposes include the need to protect the rights of others who are participants in the "story". As Eady J observed in *McKennitt v Ash*,

> "… if a person wishes to reveal publicly information about aspects of his or her relations with other people, which would attract the *prima facie* protection of privacy rights, any such revelation should be crafted, so far as possible, to protect the other person's privacy"

[2005] EWHC 3003 (QB), [2006] EMLR 10 [77] (affirmed [2006] EWCA Civ 1714, [2008] QB 73 [50-51]). But that is not what this case is about. Here, the relevant relationship is that between the mother and the father. Although the father's privacy rights are engaged, he does not invite the court to attach any weight to them. As an adult with capacity and legal advice, his decision is to be respected. The only privacy rights at issue here are those of the child, and the child has played no part in this "story", which is about the father and the mother.

30. The case of *O (A Child) v Rhodes* suggests that in circumstances such as these the right to tell one's own story is likely to carry considerable weight. The father was a well-known concert pianist who wished to publish a book describing his experiences of sexual abuse at school, and its effects. The mother brought proceedings for an injunction against the father and his publisher on behalf of the couple's 11-year-old son, contending that publication would cause him psychiatric harm. If the mother and son had still been living in England the appropriate tribunal to resolve such issues would be the Family Court, exercising its jurisdiction to make a prohibited steps order as defined in s 8 of the Children Act, or the inherent jurisdiction in relation to children. But as the mother and son were in the USA, the Family Court lacked jurisdiction. So the claim could only be brought in tort. The causes of action relied on were misuse of private information, negligence, and intentional infliction of mental suffering (also known as the tort in *Wilkinson v Downton* [1897] 2 QB 57). Bean J (as he then was) struck out the claim: [2014] EWHC 2468 (QB). The Court of Appeal agreed with him that the claims in misuse of private information and negligence were not arguable, but granted an injunction to restrain intentional infliction of harm: [2014] EWCA Civ 1277, [2015] EMLR 4. The Supreme Court allowed an appeal by the father and restored the decision of Bean J: [2015] UKSC 32, [2016] AC 219. It is not necessary to discuss the claim in negligence but some consideration of the other two claims is of value.

31. Bean J accepted the basic submission for the father, that the information at stake was "not information about [the child], but about his father". Although there was "a sense in which" Article 8 was engaged, because this was information about a member of the claimant's family, that was not sufficient: "A claim by a child seeking to restrain his father from talking about his (the father's) life largely before the child was born is misconceived." Even if the claimant did have some form of cause of action derived from Article 8, "the balancing exercise would come down very firmly on the side of the

father's Article 10 rights". The Court of Appeal dismissed the appeal on this point on the footing that the case law lent no support to the existence of a cause of action for misuse of one's own private information, to the detriment of a third party. Lady Arden observed that "[i]f it did, the result would be that a person could sue whenever his family life was affected even if the information does not belong to him … It would appear to apply even if the person proposing to publish the information was a third party and not a member of the family at all." Accordingly, it was not necessary to consider whether Article 8 was applicable or how the rights conferred by Articles 8 and 10 were to be balanced in accordance with *Re S.*

32. In the Supreme Court the only issue was whether the child could rely on *Wilkinson v Downton*. The court held that there was no arguable case that the conduct or mental elements of the tort could be established, and that the form of injunction was flawed and unacceptable as it assumed a form of editorial control over the language used by the father to describe his experiences. At [77] of their joint judgment, Baroness Hale and Lord Toulson (with whom Lords Clarke and Wilson agreed) said this:

> "Freedom to report the truth is a basic right to which the law gives a very high level of protection … It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself. That is not to say that the right of disclosure is absolute, for a person may owe a duty to treat information as private or confidential. But there is no general law prohibiting the publication of facts which will cause distress to another, even if that is the person's intention."

33. The case appears to show that outside the context of family proceedings a child will rarely if ever have any civil right to object if a parent chooses to make a true disclosure about an aspect of the parent's own life which did not involve the child. The parent's right to disclose, if he chooses, will prevail. That appears to be the right of which Mr Griffiths himself took advantage in 2018, when he told readers of *The Times* about his own experiences of abuse in childhood and his own poor mental health.

34. Other considerations may come into play when information is disclosed or ascertained in the course of legal proceedings. The court is directly involved and in control of the process. It has the ability and the right to control the flow of information. As a public authority it has a duty to do so in a way that is compatible with the Convention rights - which in this context include the fair trial rights guaranteed by Article 6 as well as those protected by Articles 8 and 10. But the firmly established starting point in the domestic jurisprudence is the principle of open justice. The general rule is that proceedings are held in public and what is said, including the names of the parties and witnesses, can be observed and reported. In a case which involves the "determination" of criminal liability or civil rights and obligations, Article 6 confers on each party to litigation the right to a public hearing and a public judgment. Publicity for what goes on in court may be embarrassing and painful for those involved and third parties who are indirectly and incidentally affected but in general, "the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public": *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC [34(2)].

35. The open justice principle and the related rights under Articles 6 and 10 are all subject to exceptions, but these are narrow and circumscribed and their application in an individual case requires strict justification. The category of exception that is relevant here is the need to protect private and family life rights, including in particular the rights of children. This was to the fore in *Re S,* where a mother was charged with the murder of one of her children. S, aged 5, was the brother of the deceased. The Guardian of S, concerned that reporting of the criminal trial would be seriously detrimental to S's welfare, sought an order for the mother and both children to be anonymised in any such reporting. The application was ultimately refused by the High Court, and appeals were dismissed by this Court and the House of Lords.

36. The House held that the jurisdiction to restrain publicity to protect a child's private and family life was now founded upon the Convention Rights. In a case where the child was not a party or witness and the interference with his Article 8 rights was indirect there was no justification for creating any new category of exception to the normal rule of open justice or otherwise interfering with free reporting of the trial. At [17], Lord Steyn famously identified four key propositions as to how the court should address a conflict between Articles 8 and 10. The passage is very familiar, but because it is so important to the present appeal we cite it:

> "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."

37. The "intense focus" must be brought to bear on the particular facts of the case. As Sir Mark Potter, P, memorably put it, the *Re S* approach "is not a mechanical exercise to be decided on the basis of rival generalities": *A Local Authority v W* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1 [53].

38. The four propositions distilled by Lord Steyn in *Re S* were derived from the earlier decision of the House in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. There, the House explored the interplay between Articles 8 and 10 in the context of a complaint about press disclosure of the claimant's drug taking and rehabilitation. In the course of so doing, the House affirmed a principle of relevance to the present case. The claimant had falsely denied taking drugs. As Lord Hope put it at [82], "where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight". (See also, to similar effect, Lord Hoffmann at [58] and Baroness Hale at [151]: "The press must be free to expose the truth and put the record straight"). The reporters rely on this principle as providing a public interest justification for the disclosure of at least parts of the judgment of HHJ Williscroft.

39. *Campbell* is also important for what it says about the hierarchy of different kinds of speech. As Baroness Hale said at [148]:

> "There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life."

40. Another factor relevant to the assessment of the comparative importance or weight of the specific rights in play in a *Re S* balancing exercise is the extent to which the information, the disclosure of which is under consideration, has or is about to become available to the public. Section 12(4)(a)(i) of the Human Rights Act 1998 ("HRA") requires the court to have regard to this factor, when considering whether to make an order which affects the right to freedom of expression, in proceedings that relate to journalistic material. This will be a relevant factor in decisions about publication of a judgment, whether or not the statutory wording is strictly applicable. It is obvious that where disclosure of the same information has already taken place, or is imminent, the case for keeping the judgment private is weakened.

Proceedings about the welfare of a child

41. Information about proceedings in the Family Court is the subject of specific statutory provision and Guidance. The confidentiality of children caught up in proceedings is protected during the course of those proceedings by s 97(2) of the Children Act and both during and after the proceedings have concluded by s 12 of the Administration of Justice Act 1960.

Section 12 of the Administration of Justice Act 1960 ("AJA")

42. Children Act proceedings are generally conducted in private, on the basis that this is necessary to protect the welfare of the child.

43. Section 12(1) AJA makes provision about the publication of information about such proceedings. This covers the publication of accounts of what has gone on in front of the judge, and the publication of documents such as transcripts of judgments, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings. Publication of such information may be a contempt of court. But by virtue of s 12(4) AJA, it will not be punishable as contempt if it is authorised by rules of court. Rule 12.75 of the Family Procedure Rules provides for some kinds of communication to be authorised by default. And the Court can authorise a disclosure that would otherwise be at risk of amounting to a contempt of court.

Section 97 of the Children Act

44. Section 12 AJA does not prohibit publication of the fact that a child is the subject of proceedings under the Children Act, or the identification of the child, or other parties or witnesses. Those matters fall, or may fall, under s 97 of the Children Act. This

creates an offence of likely identification of a child as involved in proceedings under the Act. It provides, so far as relevant, as follows:

> "(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 **…** 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.
>
> …
>
> (4) The court … may, if satisfied that the welfare of the child requires it …, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order."

45. The meaning and effect of s 97 were considered by this court in *Clayton v Clayton* [2006] EWCA Civ 878, [2005] Fam 83. The court held that, construed in accordance with the HRA, the prohibition in s 97(2) must be regarded as coming to an end when the proceedings are concluded. Mr Griffiths takes no issue with that decision. It follows that his argument based on s 97 would have a relatively short shelf-life, whatever its merits might be. Be that as it may, it is clear from s 97(4) that there are circumstances in which the automatic prohibition can be relaxed by the court during the proceedings.

46. The correct interpretation of s 97(4) was considered by Munby J in *Re Webster; Norfolk County Council v Webster* [2006] EWHC 2733, [2007] 1 FLR 1146. Applying the interpretative principle laid down in s 3 HRA, he held that a literal reading would lead to incompatibility with the Convention rights; but the subsection could and therefore should be read as permitting the court to dispense with the prohibition in s 97(2) if the Convention rights required it. More precisely, he held that the statutory phrase "if … the welfare of the child requires it" should be read as a non-exhaustive expression of the circumstances in which the discretion could be exercised. Accordingly, the power is exercisable wherever this is required to give effect to the Convention rights of others. The decision-making approach to be adopted, said Munby J, was the one identified by the House of Lords in *Re S*: [53-54]. In that process the interests of the child were a "major factor" and "very important", but *not* paramount: [56], [77].

47. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 the Supreme Court made clear that when conducting a balancing exercise in human rights cases a court must treat the best interests of a child as "a primary consideration". This is required in order to reflect the jurisprudence of the European Court of Human Rights on the impact of Article 3(1) of the United Nations Convention on the Rights of the Child. The point was reiterated when the relevant principles were summarised by the Supreme Court in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2014] 1 WLR 3690 (also known as *FZ (Congo)*) [10]. In *Re J (A Child)* [2013] EWHC 2694 (Fam), [2014] EMLR 7 [22], Sir James Munby, P (as he had by then become) set out how this point was to be accommodated within the *Re S* decision-making structure in a case engaging s 12 AJA and s 97:-

> "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 *In re S* ... and in *A Local Authority v W* ... . This necessitates what Lord Steyn in *Re S*, [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 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 F.L.R. 142, at [93], and in *Re Webster* ... at [80]. As Lord Steyn pointed out in *Re S*, [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)* ...."

48. The "nature of the impact on the child" of a publication that interferes with their privacy rights is to be measured objectively; the mere fact that the child is too young to understand does not mean there is no such impact: *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2016] 1 WLR 1541 [20] (Lord Dyson MR). But when measuring that impact the court should not simply assume, or treat it as inevitable, that publicity would have an adverse impact; in each case, the impact of publication on the child must be assessed by reference to the evidence before the court: *Clayton v Clayton* at [51]. This would seem to follow inescapably from the granular analysis required by the *Re S* approach.

49. In this appeal, Mr Clayton QC now submits that the welfare of the child is the paramount consideration under s 97. He argues that it is only where the child's welfare positively requires it that a court can authorise the publication of information identifying the child as being involved in Children Act proceedings. This is a challenge to the decision in *Webster* and, by necessary implication, the approach encapsulated in the above citation from *Re J (A Child)*. This argument, which we summarise at [73] below, is put before us against the following background.

50. In the 15 years since it was decided, *Webster* has been followed and applied on innumerable occasions. This interpretation of the law has formed the basis of an increasingly sophisticated regime of transparency in the Family Courts, which assumes a power to permit publication in cases where that is not "required" by the welfare of the child. The regime includes the Practice Guidance (Family Courts: Transparency) [2014] 1 WLR 230 ("the 2014 Guidance") and the Practice Guidance on Anonymisation, Practice Guidance: Family Court – Anonymisation Guidance (December 2018) ("the Anonymisation Guidance"). The 2014 Guidance lays down some default rules. These include a rule that a judgment arising from "a substantial contested fact-finding hearing at which serious allegations … have been determined" should ordinarily be published; and a rule that permission to publish a judgment should always be given whenever the court concludes that publication would be in the public interest. This is the regime under which the reporters' applications in this case were made. The normal rule under the 2014 Guidance is that the children should not be

named "unless the judge otherwise orders" but anonymity in the judgment "should not normally extend beyond protecting the privacy of the children and adults who are the subject of the proceedings …". The Anonymisation Guidance provides checklists for judges to refer to when writing or publishing a judgment in a family case relating to children. More recently, the President of the Family Division has published a report, "*Confidence and Confidentiality:* Transparency in the Family Courts", which reflects the generally understood legal position.

51. The researches of Counsel have not identified any decision of this court or the Supreme Court that has unequivocally endorsed the *Webster* approach to s 97(4) in the face of legal challenge. This may well be because it has not been controversial. In *Re W (Children) (Care Proceedings: Publicity)* [2016] EWCA Civ 113, [2016] 4 WLR 39 this court accepted and proceeded on the jointly argued approach of Counsel, that the exercise of the discretion to relax or increase the default restrictions under s 97(4) is not one in which paramount consideration must be given to the welfare of the child who is the subject of the proceedings: see [37]. McFarlane LJ (as he then was), referring to *Re S, Clayton v Clayton*, and *Webster*, described this as the "commonly accepted view".

52. McFarlane LJ also said, under the heading "A point not argued", that whilst preparing his judgment he had come to the preliminary view that there might be a conflict between that view and Court of Appeal authority: [41-43]. He did not elaborate. In *Al Maktoum v Al Hussein* [2020] EWCA Civ 283, [2020] 2 FLR 493, where the circumstances resembled those of the present case, there was a belated attempt to rely on these *obiter* observations to support a challenge to the *Webster* approach, but the court declined to permit it.

53. Those were proceedings concerning the welfare of two children aged 12 and 8 that came before Sir Andrew McFarlane, P as he had become. He gave a fact-finding judgment containing findings adverse to the father. Application was made for publication of the judgment. Giving judgment, the President observed that "the legal context within which issues of this nature fall to be determined is now well settled and well understood" and not in dispute between the "strong and extremely experienced legal teams" before the court. He was referring to the principles set out in *Re S.* Applying those principles, the President held that the judgment should be published. The father appealed, on the grounds that it was wrong in principle to allow publication of an interim decision, prior to the final welfare hearing, or, alternatively, that the President had been wrong to find that the outcome of the balancing exercise favoured publication. He then sought to amend his grounds to add that the Judge should not have conducted a balancing exercise at all but should instead have proceeded "on the basis that the children's welfare was the paramount and decisive consideration". Reliance was placed on *ZH (Tanzania)* and *Re W.*

54. The application to amend was refused on the basis that, on the facts found, it was not arguable that the different legal approach would have affected the outcome: [83]. But the court went on to say that its decision was reinforced by other considerations. These included its "strong provisional view that the argument which the father wishes to advance is ill-founded"; the profound consequences the point would have if it were correct; the consequent desirability of addressing it, if at all, with the benefit of a reasoned judgment at first instance; the weakness of the explanation for the father's change of position, which was a change of legal advice; and the fact that allowing the point to be raised on appeal for the first time would or might cause prejudice to the

mother and the children, as a further hearing before the President would be necessary if the point was good: see [84-85].

55. The complaint made by the father in *Al Maktoum* of premature publication and his criticisms of the President's conduct of the *Re S* balancing exercise were both rejected, the latter on the basis that the father had failed to show grounds for interfering with the evaluative decision of the President as to publication. The appellate court will not interfere with a decision of that kind unless the judge erred in principle or reached a conclusion which was wrong, that is, outside the ambit of conclusions which a judge could reasonably reach: *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132, [2015] 1 Cr App Rep 1 [46].

The judgment of Lieven J

56. Having recited the essential features of the applications and the parties' positions upon them, the Judge devoted the second part of her judgment ([9-18]) to a summary of "The law on the Article 8 and 10 balancing exercise". She cited the passages from *Re S, A Local Authority v W, Clayton v Clayton, Webster, Re J, Weller* and *Campbell v MGN Ltd* to which we have referred above. The next section of her judgment ([19-45]) was devoted to a thorough rehearsal of the parties' submissions of law and fact. This section included citation of *Re Roddy* [38], relied on by RoW. She also cited *ZH (Tanzania)* and *Zoumbas*, which were relied on by Mr Griffiths as reflecting the need to treat a child's interests as a primary consideration.

57. The Judge's reasoning was set out at [46]-[59]. She began by recording that "[b]y the end of the hearing Mr Clayton accepted that *Re S* did set out the relevant approach in this case and in my view that is plainly correct." She expressed the view that there was no inconsistency between that approach and the principles in *ZH* and *FZ*: the child's interests are *a* primary consideration but not *the* primary consideration.

58. Lieven J went on ([47-51]) to consider factors favouring publication under Article 10. She identified four such factors: (1) the vital importance of the open-justice principle meant there was a considerable and legitimate public interest in the publication of the judgment, including identification of the parties; (2) the father's role as an MP and Minister gave rise to a strong public interest in publication of the Judge's findings about him; although politicians retain Article 8 rights, the father was not relying on these, and "if it were not for the interests of [G] there could be no doubt that the Judge's findings would be published"; (3) the inconsistency between the father's public statements about his sexting in 2018 and the findings of HHJ Williscroft gave the media a strong Article 10 right to set the record straight; the case was stronger than *Campbell* given the father's role as an MP, the fact that his untrue statements were made to protect his political career, and the gravity of the facts found; and (4) the real public interest in a judgment such as this being brought to the public's attention to show the workings of the Family Court in a transparent fashion, in a case where a powerful man is held to account in respect of abuse of his female partner.

59. The Judge then turned to the mother's Article 10 and 8 rights ([52-55]). Noting that the mother has "a right to speak to whomsoever she pleases about her experiences", the Judge observed that this "would normally be very significantly interfered with by the privacy requirements of the Family Courts". "In most cases", said the Judge, such interference is likely to be justified by the interests of the child, and the consequent

need to protect its anonymity. This "will usually … be an overwhelming (though not a paramount) factor". But "the level of the interference in the mother's rights should not be underestimated". The mother felt that, having been subject to coercive control by the father, she was now being silenced by his resistance to the publication of the judgment. The Judge regarded the mother's suggestion that if the court refused to sanction publication, she might use Parliamentary Privilege to achieve the same thing as an irrelevance. But she concluded that the court should be slow in all cases to be used as a means by which one parent seeks further control over the other, and particularly so where there have already been findings of coercive control.

60. The Judge considered the mother's rights were bolstered by the "very unusual" fact that not only she but also the Guardian supported publication, and the "unusual" fact that those supporting publication wanted to use the case as an example of good handling by the Family Court. We interpose to note that the Guardian's view is of particular significance given that a child has their own individual rights and that the Guardian is appointed to protect those rights. Whilst weight and respect must be given to the views of the mother as the holder of parental responsibility, that parental responsibility is not a trump card and the Guardian's assessment of the impact upon the child's own privacy rights is of considerable importance: *Newman v Southampton City Council* [2021] EWCA Civ 437 [63].

61. The Judge held that there is a "significant public interest" in fully informed, open discussion and debate about domestic abuse and the way in which it is dealt with in the Family Courts. It is usually only those cases in which something has gone wrong that are published. That leads to an erosion of public confidence in the family justice system which is hugely detrimental to the public interest. The unusual features of this case meant that it offered an opportunity "to slightly redress" that problem.

62. Turning to the child's Article 8 rights (at [56]-[58]), Lieven J first considered the direct impact on the child of publication and any media or social media interest which followed. If G were older and likely to be on social media or watching coverage, the Judge would be very concerned. A somewhat older child could be placed in a very vulnerable situation by unpleasant or intrusive responses from children and other parents. But the child's very young age meant that G had no access to social media and would not have for some time. Any comments at nursery were likely to pass the child by completely. Next, the Judge addressed the prospect of direct impact from continued media interest in years to come, and "the fact that things said on the internet do frequently remain in perpetuity". She considered that any media storm would pass fairly quickly and that explanations would have to be given to the child in any event, at an age-appropriate time. "I am as confident as I can be that X will be protected from the ramifications of the publication of the Judgment."

63. Finally, the Judge considered the impact of publication on the child's relationship with Mr Griffiths. She concluded that this "can be appropriately controlled". Contact was "significantly circumscribed" at present. The findings themselves would have a very material impact on contact and doubtless with their ongoing relationship. This was a consequence of the behaviour, not publication. The child's young age and "likely obliviousness to the fact of the Judgment itself" made it hard to see how publication would have any greater impact than the behaviour. Again, the child could be protected from any short-term media storm.

Was the Judge's Re S *analysis legally flawed or wrong?*

64. Mr Clayton QC begins his argument by pointing out that the identification of the mother and father is likely to lead to the identification of the child. This was expressly acknowledged by the Judge, and we accept it. But we do not accept the next step in the argument, which is that "the fundamental question posed by this appeal is, therefore, whether the inherently uncontrollable and unpredictable consequences of publishing the Judgments (with obviously direct and immediate impacts on the child's Article 8 rights) is justifiable on Article 10 grounds, as the learned Judge found it to be." (We quote Counsel's speaking note for the appeal, and the emphasis is his.)

65. We consider this way of putting the matter to be flawed. It assumes that an appeal to this court is a re-hearing rather than a review on the principles we have identified. It looks at the matter from one side only, without examining the justification for interference with the applicants' rights under Article 10 and those of the mother under Articles 8 and 10. It presumes, without proof or even evidence, that there are "obvious" direct and immediate impacts on the child's Article 8 rights. That is contrary to the law as declared by this court in *Clayton* and *Weller*. And it seems to be an exercise in deploying "rival generalities", of the kind deprecated in *A Local Authority v W.*

66. It is not enough to rely on sweeping assertions that the impact of publication in the internet age is unpredictable and uncontrollable. The authorities show that the nature and extent of the impact of publication in the particular case needs to be carefully assessed on the basis of the evidence. That is not an inherently impossible task and, as it seems to us, it is what the Judge did. We add that one feature of this case is that although the father made a number of assertions about the welfare and best interests of the child, he adduced no evidence at all. It is fair to say that most of the other parties did not do so either. But there was one party with relevant expertise, the Guardian, with a professional responsibility to safeguard the welfare of the child, who provided an expert social-work assessment, to which the court was bound to attach real weight. This favoured publication. The father disputes that assessment, but has advanced no specific criticism of the Guardian's reasoning.

67. Three further criticisms of the Judge's *Re S* assessment are made. It is said that the Judge erred in law (1) "by giving precedence to Article 10 over Article 8"; (2) "in her assessment of the child's Article 8 rights"; and (3) "by publishing a finding of rape in circumstances where the child will be identified." We are not persuaded that any of these points is arguable.

    (1) On the first point, the Judge began the relevant section of her judgment by expressly acknowledging that neither Article 10 nor Article 8 has precedence, as such. The argument runs that the conduct of the father – which gives rise to the arguments in favour of disclosure – does not relate to the child, which ought not to be subjected to detriment on account of the conduct of its parent. On one view, this is an attempt to create a rule or principle that prioritises the rights of children over the rights of others in such circumstances. There is no authority for such an approach, which would be contrary to *Re S*. Alternatively, this is a contention that the Judge placed the wrong weight on the competing rights in this individual case, which cannot qualify as an attack on the lawfulness of her approach. In our judgement, the Judge was loyal to the established principles, and we can see no merit in this part of the father's argument.

(2) The core submission on the second point is that the Judge approached her task on the legally incorrect footing that the fact that the child, as an infant, is unaware of what is presently going on and accordingly has no relevant Article 8 rights. We can see no justification for that criticism. The Judge rightly approached the matter on the footing that the child's rights were engaged, (*PJS v News Group Newspapers* [2016] AC 1081 [72]) but not weighty enough in all the circumstances to outweigh the competing considerations. The legal principles are clear from *Clayton* and *Weller*, both of which were cited by the Judge. The fallacy in the father's submission is clear: the fact that an objective approach is taken to the privacy rights of a child does not mean that the fact that the child is an infant is to be altogether ignored.

(3) The third point is, on analysis, a complaint about the extent of the disclosure approved rather than a criticism of the decision to allow publication as such. The criticism is that the Judge nowhere specifically addressed the potential impact on the child's welfare of the potential disclosure of this particular facet of the fact-finding judgment. In our judgement, it is clear that the Judge had all these matters firmly in mind. The father did no more than to assert the likely harm that is now relied on. The Guardian made an expert assessment which was to different effect. The Judge made an assessment, on the basis of the evidence and argument before her, that cannot be impugned on the basis now advanced.

68. For these reasons, we do not consider the father has identified an arguable basis for criticising the Judge's approach as legally flawed. We must now consider the father's contention that, standing back, the Judge's conclusion can be seen to be simply wrong; that is to say, that she struck the balance in a way that was not reasonably open to her on the facts. In our judgement, this argument is unsustainable.

69. The Judge's four Article 10 factors were all plainly relevant, and in our view she was entitled to place real weight on each of them. She was plainly correct to start with the open justice principle. It would have been wrong to proceed on the basis that the father's public, political roles were enough in themselves to justify the disclosure of wrongdoing in his private life. But that is not how the Judge approached the matter. She acknowledged that public figures have private life rights too; but she pointed out that the father was not relying on those rights. He did not contend that he had, in his own capacity, any grounds on which to object to disclosure. So there was nothing capable of justifying an interference with the free communication of this information about a powerful public figure, other than the rights of the child. The Judge's conclusion that the public interest called for correction of the false public statements the father had made in 2018 was clearly right, for the reasons she gave. She was right to conclude that there was a specific public interest in the publication of this particular judgment, showing the Family Court working effectively in this difficult context.

70. The Judge's approach to the mother's right to tell her story was firmly grounded in principle and authority. Lieven J may, if anything, have slightly undervalued this aspect of the case. As set out above, there are two unusual features of this case: the father does not challenge the adverse findings of HHJ Williscroft, and claims no Article 8 privacy rights for himself. In such a case the restrictions imposed by the AJA and s 97 of the Children Act represent a fetter, not a bar, on what can lawfully be disclosed by a person such as the mother in this case, who is prepared to open up a painful aspect of her private life. The statutory provisions do not prevent disclosure of the underlying facts;

they prohibit identification of a child as involved in Children Act proceedings, and what went on in court. In our judgement, the Judge was right to put issues of Parliamentary Privilege to one side, but it follows from what we have said that we do not accept the overarching submission made on behalf of the mother that refusal of an order for publication would amount to "silencing" her at the instance of the father.

71. The critical question, therefore, is whether the best interests of the child, treated as a primary consideration, are weighty enough to justify maintaining that fetter, during the course of the proceedings under s 97(2) Children Act, and indefinitely as a consequence of s 12 AJA. Put another way, do the child's best interests make it necessary and proportionate to impose those restrictions on the Article 8 and 10 rights relied on by the applicants and the mother? On the unusual facts of this case, given the age of the child and all the other circumstances identified by the Judge, the Guardian's expert assessment was that the answer was no. The Judge agreed, and so do we.

The new point on s 97 of the Children Act

72. The argument that Mr Clayton QC seeks to advance for the first time on this appeal has six main steps: (1) On the plain meaning of the language used, s 97 contains an absolute prohibition on the publication to the public at large, or any section of the public, of any material which is likely to identify the child, to which the sole exception is a discretionary power to dispense with the prohibition if (but only if) it is satisfied that the welfare of the child requires it. (2) The interpretative duty imposed by s 3 HRA is to read and give effect to legislation in a way which is compatible with the Convention Rights "so far as it is possible to do so". (3) The meaning to be given to these words has been put in various ways (for instance, words cannot be given a meaning which is incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would change the substance of the provision completely, or violate a cardinal principle of the legislation), but the simple test is contained in the words of s 3 themselves: *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 [28] (Lord Bingham). (4) It is constitutionally vital to adhere to this limiting principle, as it demarcates the boundary between interpretation and legislation. (5) Munby J's decision in *Webster* was arrived at without any or any proper regard to this crucial limiting principle, and without argument to the contrary; and (6) the decision is wrong because it is not possible to read or interpret the statutory language in the way that he did. Mr Clayton argued that this interpretation is at odds with "a cardinal principle" of the Children Act, namely that the focus must always be exclusively on the welfare of the child.

73. The principles that guide a decision on whether to allow a point to be raised on appeal when it was not raised below are well-known. Two sources that are commonly cited are the judgments of this court in *Singh v Dass* [2019] EWCA Civ 360 [16-18], and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 [21-26]. The points of importance for the purposes of this case are the following. The decision is always one for the court's discretion. The case does not have to be exceptional, but the court will always be cautious before allowing a new point to be taken. The decision on whether it is just to permit the new point to be taken will depend on analysis of all the relevant factors. Among these are the nature of the proceedings, the nature of the new point, the impact it would have had on the proceedings below, and the impact of allowing it to be taken for the first time. Even where the point is a "pure point of law", the appellate court will only allow it to be raised if the other party

(a) has had adequate time to deal with it; (b) has not acted to its detriment on the faith of the earlier omission to raise it; and (c) can be adequately protected in costs.

74. We have identified our discretionary decision and summarised our reasoning at [11] above. It is only necessary to add a few points of elaboration. First, as we have made clear, this is not merely a new argument not raised below. It is a reversal of the stance previously adopted by the father on the applicable law and hence a challenge to a legal analysis which the appellant expressly endorsed. Secondly, for reasons we have set out, the point could have significant ramifications. That makes it highly undesirable for this court to decide the point without the benefit of a reasoned decision below, and to be the court of first instance in this respect. Thirdly, the explanation offered for not advancing this argument below is unsatisfactory. It is said that *Webster* did not feature prominently in the argument before Lieven J and the point about s 97 did not occur to Counsel until after he read the judgment. Those are not good reasons. There was no actual or perceived obstacle to raising the point. And in our view the *Webster* point was obviously central to the issues. Further, though we have heard only limited argument on these matters, we would be disinclined to accept that *Webster* was *per incuriam*. Our strong provisional view is that Munby J's interpretation accords with the language of s 97(4), and the HRA, including the interpretative principles expounded in *Sheldrake.*

75. Finally, we are satisfied that it would be unfairly prejudicial to the respondents and contrary to the public interest to permit the point to be run now. If s 97 can only be given the narrow construction contended for, the court might conclude that it is incompatible with the Convention Rights relied on by the respondents. That would trigger the duty to consider whether to make a declaration to that effect, and whether to adjourn to notify the Crown and allow the Attorney General to be heard: see s 4 HRA and PD19 para 6.1(2). If the argument prevailed, there might need to be a re-hearing of the applications, on a different legal footing. Alternatively, and perhaps more likely, the Children Act proceedings would have concluded in the meantime, rendering the point academic.

76. There would be unfairness to the mother in prolonging these proceedings. Quite apart from the obvious impact upon her if that were to occur, the father is, or appears to be, impecunious, so there is at least real doubt as to whether he would be able to compensate the respondents for the financial consequences of his unjustified delay. We also accept the submission of Ms Reed for Ms Tickle, that had the new argument been advanced before Lieven J, the reporters might have asked for the determination of their application to be adjourned or deferred until after the Children Act proceedings were over, and the s 97 restrictions had lapsed. Ms Tickle is an independent journalist and her application was made some considerable time ago. Mr Farmer acts in person, albeit with the backing, as we understand it, of his employer, PA Media. The parties to the applications made before Lieven J were each entitled to expect the father to run his principal arguments at the first opportunity.

77. In conclusion, we should mention one of the reasons for the grant of permission to appeal in this case which was that an appeal might provide the court with a suitable opportunity to provide further guidance on the publication of judgments in cases of this kind. In the event, the substantive and procedural law that applies to this particular case is clear, and was correctly applied by Lieven J, and we do not consider it necessary for us to say more than we have in giving judgment. We also note that some of the issues raised may come under consideration in the process of implementing the President of

the Family Division's transparency review, which is currently under way, and, which could provide a possible opportunity, if it were considered appropriate, for more to be said about such matters.

Ancillary matters

78. There are two ancillary matters. First, in her written submissions, Ms Tickle sought permission if the appeal were to be dismissed, to publish the contents of her own skeleton argument, and to quote from the skeleton arguments of the other parties deployed below and on this appeal (subject however to the same redactions as have been agreed and approved in respect of the judgment of HHJ Williscroft). We have received no further written submissions about this between the hearing and the handing down of this judgment. We have however been told that none of the respondents or interveners has any objection to such publication. The appellant father has not raised any objection. We therefore grant the application subject to the caveat dealt with in paragraph [79] below.

79. The second ancillary matter concerns the disclosure by Mr Clayton QC of some of the appeal papers in circumstances that appear arguably to fall outside the scope of FPR 12.75. The issues that this matter raises are separate and distinct from those addressed in this judgment, and will be dealt with separately. For the avoidance of doubt the observations in paragraph [78] above do not apply to the documents relating to this matter that were not read or referred to at the hearing of this appeal as specified in our order.

Postscript

80. This morning, the day after the deadline for doing so expired, Mr Clayton QC applied to us in writing for permission to appeal to the Supreme Court, and for a stay on the implementation of our decision pending an appeal or application to that Court. We refuse both applications.

81. The application for permission to appeal is made solely in relation to the father's first main point: the construction of s 97 of the Children Act. It is now said that the fact that Baker LJ granted permission to appeal meant we were duty bound to decide that point. This is a further change of position. In his speaking note for the appeal, Mr Clayton QC said that the first issue raised for decision in relation to s 97 was "whether Father is entitled to raise this submission before the Court of Appeal". He did not say we had no choice in the matter. He proceeded on the footing that we did and argued, in reliance on *Singh v Dass*, that we should exercise our discretion to allow it (see [10] above). That was clearly a correct legal analysis. We accepted it, and decided to exercise our discretion against the father. There is no suggestion that our exercise of discretion is open to challenge. The proposed appeal would in our judgment have no real prospect of success. Indeed, it would represent a misuse of the court process. The application for permission is therefore totally without merit. It is in these highly unusual circumstances that we have addressed the application for a stay. A stay would be a further interference with Article 8 and 10 rights, requiring justification. We consider it wholly unarguable that such an interference could be justified.