Michaelmas Term
[2012] UKSC 60
On appeal from: [2012] EWCA Civ 1084; [2012] EWCA Civ 1204

JUDGMENT

In the matter of A (A Child)

before

Lord Neuberger, President
Lady Hale
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

12 December 2012

Heard on 29 November 2012

Appellant
Sarah Morgan QC
Andrew Bagchi
Lucy Sprinz
(Instructed by R Solicitors)

Respondent
Paul Storey QC
Camille Habboo

(Instructed by B Solicitors)

Respondent
Frank Feehan QC
Gemma Taylor
(Instructed by Bar Pro Bono Unit)

Respondent
Jane Crowley QC
Sharon Segal
(Instructed by Bar Pro Bono Unit)

Respondent
Roger McCarthy QC
Kate Purkiss
(Instructed by Legal and Democratic Services, ZCC)

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

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

The history

2. M, who is British, and F, who is Australian, married in 2000 and lived in England. A was born in June 2002. M and F separated in December 2002. A remained living with M and F returned to live in Australia in 2003. He applied for contact with A and there have since been six court hearings and six contact orders designed to ensure that A could see her father when he came to England. The most recent of these, made in February 2009, provided for A to stay with her father during his expected visits to England in February and summer 2010 and in later years.

3. In late 2009, X alleged that she had been seriously sexually abused by F when she was a young child. This account was first given to some adults she knew, who reported the matter to the local children's services authority. Social workers investigated and formed the view that the allegations could be true. X was however adamant that she did not want any action to be taken on her allegations or her identity revealed to anyone. In March 2010, knowing that F would be coming to England to see his daughter, the local authority informed M that a young adult had made serious allegations against F which the authority regarded as credible and that she should take steps to protect A from the risk of sexual abuse by F. After some "keep safe" work with A, and having advised M not to allow F to have unsupervised contact with A and to seek legal advice, the local authority closed the case.

4. In May 2010, M applied to vary the contact order made in February 2009. The county court ordered the local authority to disclose the information about the

allegations in its possession to the parties. The local authority resisted this because they wished to preserve X's confidence and her level of distress indicated that revealing her identity would expose her to the risk of further serious emotional harm. They recommended that contact between A and F be supervised pending the resolution of the issue of whether F presented a risk to A. The contact order was varied to this effect in September 2010.

5. After an inordinate delay, the proceedings were transferred to the High Court and A was joined as a party to the proceedings, represented by a Children's Guardian. When the matter eventually came before Peter Jackson J in September 2011, he adjourned it so that a report could be obtained from Dr W, a consultant psychiatrist who has been treating X since 2010, and X could be informed both of the advantages to A of her taking part in the proceedings and of the measures available to protect vulnerable witnesses.

6. In January 2012, Dr W produced two reports, one a full report reviewing X's medical and psychiatric records in detail and giving her answers to the specific questions asked by the judge, the other a shorter edited version but setting out her opinion and answers in identical terms. This Court has seen only the edited version. The salient points are as follows:

(i) X has a long history of repeated presentations with medically unexplained symptoms beginning in early childhood.

(ii) There appears to be a close temporal relationship between X's reported experiences of abuse and her presentation with episodes of medically unexplained symptoms.

(iii) Most recently, X has experienced episodes of physical illness which have at times been life-threatening. It is the opinion of a number of medical professionals caring for her that psychological factors are, at the very least, exacerbating her symptoms. X has received medical treatment for her condition which has had a number of damaging side-effects and there has been a significant deterioration in her health.

(iv) There does appear to be a pattern of worsening illness which coincides with the increasing pressures arising from the "legal issues".

(v) X feels that her initial disclosure put in motion a chain of events which has left her feeling distrustful and lacking confidence in processes that should have been protective of her. It is her perception that, despite reassurances about

confidentiality, it has at times been breached. She was also led to believe that she would not be required to speak of the allegations again and the present situation has undermined her confidence in the system.

(vi) In answer to the specific questions:

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

> "It is my opinion that disclosure of the social services records regarding X to other parties would be potentially detrimental to her health. As above, she appears to manifest psychological distress in physical terms both through medically unexplained symptoms and through the well recognised exacerbating effect of stress on a particular medical disorder. Her physical health has deteriorated considerably recently and, at times, has deteriorated to the point of being life-threatening. There is therefore a significant risk that exposure to further psychological stress (such as that which would inevitably result from disclosure) would put her at risk of further episodes of illness. It would also be working against the current therapeutic strategy of trying to help minimise stress and engage with psychological therapy."

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

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

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

> "I believe that X has the capacity to participate in court proceedings. However, it should be noted that various professionals at different times have commented on the difficulty of interviewing her in relation to the alleged abuse. My own experience of exploring these issues with her is that many of my questions were met with silence;

> she was clearly very uncomfortable and distressed and seemed unable to respond. When I asked her about appearing in court she responded 'I can't'."

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

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

7. There is also a report, also dated January 2012, from her consultant physician, Dr MG, stating that X is under his care at a hospital, with a diagnosis of steroid dependent difficult asthma and steroid induced myopathy. She has "ongoing severe respiratory symptoms". Increasing stress would undoubtedly be of no benefit to her ongoing symptoms and would not help her rehabilitation to occur more quickly.

8. By the time the matter came to be heard by Peter Jackson J on 20 January 2012, the state of knowledge of the various actors was as follows. The local authority not only knew the identity of X but also had a full record of her allegations. M also knew the identity of X, because in July 2010 the local authority had inadvertently disclosed to her unredacted material which had enabled her to work out who X was. M states that she spoke to X as a result and has come to believe that her allegations are true. But she does not know the details. F has always denied that he has sexually abused anyone and has alleged that M is behind the allegations in order to prevent his having a relationship with his daughter. He states that he does not know who X is. The Children's Guardian inadvertently came to know her identity in September 2011 because her name was erroneously left in a document disclosed by the local authority. But the Guardian knows nothing more of the confidential material. The Judge did, however, have all the material as he had ordered in September 2011 that the material for which the local authority claimed public interest immunity be disclosed to the court.

9. On 16 February 2012, Peter Jackson J gave judgment dismissing the applications of M, F and the Children's Guardian for disclosure of the local authority's records: [2012] EWHC 180 (Fam). He accepted the medical evidence

about the potentially serious effect of disclosure on X's health. The information, once disclosed, could not be controlled. Her identity and the allegations were inextricably intertwined. Having earlier reached the conclusion that compelling X to give evidence would be "oppressive and wrong", to order disclosure when the court was not prepared to order her to give evidence would risk harming her health without achieving anything valuable for A and her parents. The nature of the allegations was such that they could not readily be proved or disproved by reference to third parties or independent sources. It was therefore unlikely that any outcome achieved in X's absence would clear the air between the parties or provide a solid foundation for future arrangements for A. The court must also have regard to the interests being balanced, contact on the one hand and physical and mental health on the other.

10. His judgment did not, in so many words, make it clear that the confidential material would henceforth play no part in the case. Indeed there are passages in his judgment which might be taken to suggest otherwise.

11. The Children's Guardian appealed and it was agreed that the Court of Appeal should also see the full material. On 24 July 2012, the Court of Appeal announced that the appeal was allowed: [2012] EWCA Civ 1084. McFarlane LJ gave short oral reasons. The principal reason was that the mother was now "in the worst of all possible positions", knowing and believing X, but not being able to have the truth of the allegations resolved in the proceedings. On 21 September 2012 McFarlane LJ gave a full judgment with which Thorpe and Hallett LJJ agreed: [2012] EWCA Civ 1204. The Court held that the judge had been wrong to link consideration of whether X could ever give oral evidence with the issue of disclosure. Until the relevant adults were told of the allegations, it was simply too early to decide whether or not they could be proved or disproved by reference to third parties or independent sources. Disclosure of the core material had a freestanding value irrespective of whether or not in due course X could be called to give oral evidence. The Court also held that it would have been wrong for Peter Jackson J to continue to hear the case having read the confidential material but having refused to order its disclosure.

12. The Supreme Court gave X permission to appeal. Unlike the High Court and the Court of Appeal, this Court has not seen the material for which public interest immunity is claimed. On the other hand, this Court has had the benefit of hearing argument from counsel appearing pro bono for both the mother and the father who were acting in person in the courts below. We are most grateful to Frank Feehan QC and Gemma Taylor and to Jane Crowley QC and Sharon Segal for offering their services, which have been very helpful to us in resolving this difficult issue.

13. The positions of the parties are as follows:

(i) Sarah Morgan QC, on behalf of X, resists disclosure on the primary ground that this will violate her right not to be subjected to inhuman or degrading treatment, contrary to article 3 of the European Convention on Human Rights. Alternatively, the balance between her right to respect for her private life and the rights of the other parties should be struck by the court adopting some form of closed material procedure which would enable the allegations to be tested by a special advocate appointed to protect the parents' interests but without disclosure to the father.

(ii) Paul Storey QC, on behalf of the Children's Guardian, supports disclosure in the interests of A. A's right to respect for her private and family life is engaged, as potentially is her article 3 right to protection from abuse: see *Z v United Kingdom* (2001) 34 EHRR 97. The allegations cannot be ignored but they cannot be taken into account unless they can be properly investigated.

(iii) The mother is in the same position, but with the additional feature that she knows who X is and believes the principal thrust of her allegations to be true. She understands that it will not be possible to rely upon these unless they can be properly investigated but she will have great difficulty in agreeing that the father should resume unsupervised contact with A unless they are.

(iv) The father also supports disclosure. He might instead have relied on the mother's inability to pursue the allegations without disclosure but he wishes to have them resolved. Not having seen the history of how and when X's allegations were made, he does not accept the judge's conclusion that they were not prompted by the mother.

(v) The local authority now adopt a completely neutral stance as to disclosure. Roger McCarthy QC on their behalf accepts that if the material is not disclosed in these proceedings it would not be possible for the local authority to bring care proceedings to remove A from her mother unless the material could be disclosed in those proceedings. In other words, they accept that they cannot have it both ways and put all the burden of protecting A upon the mother without giving her the material with which to do so.

The common law principles

14. It is convenient first to look at the principles governing the issue at common law, before considering how these may have been affected by the implementation of the Human Rights Act 1998.

15. The local authority claim public interest immunity for their records relating to X and her allegations. They are doing so because of the public interest in maintaining the confidentiality of information given to the authorities responsible for protecting children from abuse. That this is a class of information to which public interest immunity attaches has been established since the decision of the House of Lords in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. That case accorded to people who informed the authorities of allegations of child abuse the same protection as informants to the police and the gaming authorities. It is not the fact that the information is communicated in confidence which attracts the immunity, but the public interest in encouraging members of the public to come forward to help the authorities to protect children. That this may also protect an untruthful or malicious informant is the necessary price to be paid. Although *D v National Society for the Prevention of Cruelty to Children* was concerned with a neighbour who claimed to have witnessed the alleged abuse, rather than a victim, I can see no reason why the same rationale should not also apply to the victims of alleged abuse.

16. That is not, of course, the whole story. The immunity is only the starting point, for without it there is no question that all documentation relevant to the proceedings must be disclosed. Public interest immunity is not absolute. The public interest in maintaining confidentiality must be balanced against the public interest in a fair trial, according to principles which have developed since the landmark case of *Conway v Rimmer* [1968] AC 910 required the court to strike that balance.

17. If the public interest against disclosure prevails, the decision-maker, whether judge or jury, is not entitled to take the information into account in deciding the result of the litigation. There is no hard and fast rule as to whether the same judge can continue to hear the case. It is well-established that a judge may do so in a criminal case, but then the jury and not the judge are the finders of fact. It may also be possible to do so in a civil case: see *Berg v IML London Ltd* [2002] 1 WLR 3271. The well-established test of apparent bias will apply: see *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

18. Are cases about the future care and upbringing of children any different? The whole purpose of such cases is to protect and promote the welfare of any child or children involved. So there are circumstances in which it is possible for the decision-maker to take into account material which has not been disclosed to the parties. As Lord Devlin put it in *In re K (Infants)* [1965] AC 201, 238, “a principle

of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed". He went on, at p 240, to approve the words of Ungoed Thomas J at first instance [1963] Ch 381, at p 387:

> "However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose. . . . In general publicity is vital to the administration of justice. Disclosure to the parties not only enables them to present their case fully but it provides in some degree the advantages of publicity; and it further ensures that the court has the assistance of those parties in arriving at the right decision. So when full disclosure is not made, it should be limited only to the extent necessary to achieve the object of the jurisdiction and no further."

Thus, while there was no absolute right for the mother to see the report made by the Official Solicitor as guardian ad litem for a ward of court, the discretion to refuse it was to be exercised "occasionally and with great caution". Lord Evershed had earlier set the bar extremely high when he said (at p 219) that "a judge should not reach such a conclusion without the relevant disclosure to the party or parent save in rare cases and where he is *fully satisfied judicially that real harm to the infant must otherwise ensue*" (emphasis supplied).

19. In *In re D (Minors)(Adoption Reports: Confidentiality)* [1996] AC 593, referred to by the Court of Appeal in this case as the "starting point", Lord Mustill, at p 611, did not accept that Lord Evershed intended those words to be read literally as a standard applicable in every wardship case, let alone in adoption cases which were governed by the Adoption Rules. These then provided that all reports were confidential, but that an individual could inspect any part of such report which referred to him, subject to the court's power to direct otherwise. In Children Act proceedings, Lord Mustill preferred the broader principle enunciated by Glidewell LJ in *In re B (A Minor)(Disclosure of Evidence)* [1993] Fam 142 at p 155:

> "Before ordering that any such evidence be not disclosed to another party, the court will have to consider it in order to satisfy itself that the disclosure of the evidence would be so detrimental to the welfare of the child or children under consideration as to outweigh the normal requirements for a fair trial that all evidence must be disclosed, so that all parties can consider it and if necessary seek to rebut it."

20. Thus Lord Mustill concluded, at p 614, that "the presumption in favour of disclosure is strong indeed, but not so strong that it can be withheld only if the judge is satisfied that real harm to the child must otherwise ensue". He went on, at p 615, to enunciate the principles which have been recited ever since:

(i) It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party.

(ii) When deciding whether to direct that a party referred to in a confidential report in adoption proceedings should not be able to inspect the part which refers to him or her, the court should first consider whether disclosure of the material "would involve a real possibility of significant harm to the child".

(iii) If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.

(iv) If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.

21. It will thus be seen that these principles are designed to protect the welfare of the child who is the subject of the proceedings, to prevent the proceedings which are there to protect the child being used as an instrument of doing harm to that child. If they were to be applied in this case, it is clear that there is little or no risk of harm to A if the material is disclosed. The risk is if the material is not disclosed and a wrong decision is reached as a result.

22. The principles enunciated by Lord Mustill do not address whether it might be possible in Children Act proceedings to withhold information which is to be taken into account by the court from any of the parties on the ground that disclosure might cause harm to someone other than the subject child. In *In re B*, above, the proceedings were about a father's contact with his 12-year-old son. His 15-year-old half-sister had made serious allegations of sexual abuse against her stepfather which the mother wanted the court to take into account without

disclosing them to the father. As Glidewell LJ pointed out, at p 156, the order was sought, mainly if not entirely, for the protection of the half-sister and it was the son's welfare which was the court's paramount consideration. Even if it were suggested that in some way the son might be harmed by disclosure (though the suggestion was rather that having to keep his sister's allegations secret would be harmful to him), that possibility had to be weighed against the grave injustice which would result from non-disclosure. So even in a case where the third party was a child, it was the interests of the subject child which might have justified non-disclosure.

23. We therefore have to look outside those authorities for the source of any power to withhold such information in the interests of a third party. As the common law stands at present, in the absence of a statutory power to do so, the choice is between the case going ahead without the court taking account of this material at all and disclosing it to the parties.

The Human Rights Act

24. To what extent, if at all, are these principles affected by the Human Rights Act 1998? In *A Local Authority v A* [2009] EWCA Civ 1057, [2010] 2 FLR 1757, the Court of Appeal accepted that the principles of non-disclosure might now have to be extended to other people whose Convention rights might be violated by disclosure.

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

26. However, Miss Morgan on behalf of X has relied principally (as did the mother in *A Local Authority v A*) upon her article 3 right not to be subjected to inhuman or degrading treatment. Requiring X to give evidence in person would, she argues, amount to treatment for this purpose, but so too would the act of disclosure because of the effect that it would have upon X. Dr W was specifically asked to distinguish between the effect of disclosure and the effect of giving evidence (see para 6(vi) above). She replied that disclosure alone would potentially be detrimental to her health. She pointed out that her condition had deteriorated considerably recently, to such an extent as to be life-threatening. Disclosure would

inevitably subject her to further stress. There was therefore a significant risk that exposure to further psychological stress would put her at risk of further episodes of illness. That, argues Miss Morgan, is sufficient to bring the effects of the treatment up to the high threshold of severity required by article 3. X has therefore an absolute right not to be subjected to it.

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

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

Discussion

29. If we were dealing with the common law principles alone, the answer would be clear. There is an important public interest in preserving the confidence of people who come forward with allegations of child abuse. The system depends upon the public as its eyes and ears. The social workers cannot be everywhere. The public should be encouraged to take an interest in the welfare of the children in their neighbourhoods. It is part of responsible citizenship to do so. And that includes victims of historic child abuse who have information about the risks to which other children may now be exposed.

30. But many of these informants will not be required to give evidence in order to prove a case, whether in criminal or care proceedings, against the perpetrators of any abuse. Their information will simply trigger an investigation from which other evidence will emerge. Their confidence can be preserved without harming others. In this case, however, that is simply not possible. We do not know whether A is at risk of harm from her father. But we do know of allegations, which some professionals think credible and which would, at the very least, raise the serious

possibility of such a risk. Those allegations have to be properly investigated and tested so that A can either be protected from any risk of harm which her father may present to her or can resume her normal relationship with him. That simply cannot be done without disclosing to the parents and to the Children's Guardian the identity of X and the detail and history of the allegations which she has made. The mother can have no basis for seeking to vary the arrangements for A to have contact with her father unless this is done. If this were an ordinary public interest immunity claim, therefore, there would be no question where the balance of public interest would lie.

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

32. However, when considering what treatment is sufficiently severe to reach the high threshold required for a violation of article 3, the European Court of Human Rights has consistently said that this "depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim": see, for example, *Kudla v Poland* (2000) 35 EHRR 198, para 91. The court has also stressed that it must go beyond "that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment": para 92. Thus the legitimate objective of the state in subjecting a person to a particular form of treatment is relevant. A well-known example is medical treatment, which may well be experienced as degrading by a patient who is subjected to it against his will. However, "A measure which is therapeutically necessary from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading": *Juhnke v Turkey* (2008) 49 EHRR 534, para 71, citing *Herczegfalvy v Austria* (1992) 15 EHRR 437, para 82. Obviously, the ends do not justify the means. But the context in which treatment takes place affects the severity of its impact. The context here is not only that the state is acting in support of some important public interests; it is also that X is currently under the specialist care of a consultant physician and a

consultant psychiatrist, who will no doubt do their utmost to mitigate any further suffering which disclosure may cause her. I conclude therefore, in agreement with the Court of Appeal, that to disclose these records to the parties in this case will not violate her rights under article 3 of the Convention.

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

34. It is in this context that it has been suggested that the court might adopt some form of closed material procedure, in which full disclosure was made to a special advocate appointed to protect the parents' interests, but not to the father himself. It faces two formidable difficulties. The first is that this Court has held that there is no power to adopt such a procedure in ordinary civil proceedings: *Al Rawi v Security Service (JUSTICE intervening)* [2011] UKSC 34, [2012] 1 AC 531. That case can be distinguished on the ground that it was the fair trial rights of the state that were in issue, and the state does not enjoy Convention rights. It is arguable that a greater latitude may be allowed in children cases where the child's welfare is the court's paramount concern. But the arguments against making such an inroad into the normal principles of a fair trial remain very powerful. The second difficulty lies in the deficiencies of any closed material procedure in a case such as this. We have arrived at a much better understanding of those difficulties in the course of the control order cases, culminating in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. The essential requirement of any fair procedure is that the person who stands to lose his rights has an opportunity effectively to challenge the essence of the case against him. There may be cases in which this can be done by offering him a "gist" of the allegations and appointing a special advocate to scrutinise the whole of the material deployed against him. In a case such as this, however, it is not possible effectively to challenge the allegations without knowing where, when and how the abuse is alleged to have taken place. From this information it is inevitable that X's identity will be revealed. Even if it were theoretically possible to devise some form of closed material procedure, therefore, it would not meet the minimum requirements of a fair hearing in this case.

35. The only possible conclusion is that the family life and fair trial rights of all three parties to these proceedings are a sufficient justification for the interference

with the privacy rights of X. Put the other way round, X's privacy rights are not a sufficient justification for the grave compromise of the fair trial and family life rights of the parties which non-disclosure would entail.

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

37. I would therefore dismiss this appeal and uphold the order for disclosure made by the Court of Appeal. It is usual to make no order for costs in cases about the care and upbringing of children. That will be the order of this court unless any party makes submissions to the contrary within seven days of this judgment.

Postscript

38. I cannot leave this troubling case without voicing my disquiet at the length of time it took for the first instance decision on disclosure to be made. The mother's application to vary the contact order was made in May 2010. The District Judge made a disclosure order in July 2010 and the local authority challenged that

order that same month. The father's contact was reduced in September, as a temporary measure. But it was not until May 2011 that the case was transferred to the High Court and not until September 2011 that it came before Peter Jackson J for a public interest immunity hearing at which X was represented. Obtaining the medical report took another three months. Nor has the appellate process been as speedy as it might have been. But in retrospect it should have been obvious at the outset that the stance taken by the local authority raised difficult questions of law and fact which required speedy resolution, principally in the interests of A but also in the interests of her parents and of X. The contact arrangements ordered in February 2009 have been interrupted and it is still not possible to say when the matter will be resolved. The parties deserve better of the family justice system than this.