



Neutral Citation Number: [2024] EWFC 92

Case No: FD18P00168

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2024

Before:

MR JUSTICE MACDONALD

Between:

(1) Sanchia Berg	<u>Applicants</u>
(2) Ashley John-John-Baptiste	
- and -	
(1) The London Borough of Tower Hamlets	<u>Respondents</u>
(2) Margaret Codsi	
(3) Bertrand Coudie	
(4) Zahra Codsi	

Ms Claire Overman (instructed by **the British Broadcasting Corporation**) for the
Applicants

The Respondents did not appear and were not represented.

Hearing dates: 18 April 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE MACDONALD

This judgment was delivered in private. The judge has given leave for this version of the judgment, which includes the names of the parties, to be published.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter, I am concerned with an application issued on 12 February 2024 by Ms Sanchia Berg and Mr Ashley John-John-Baptiste of the BBC, represented by Ms Claire Overman of counsel, for the following:
 - i) Permission pursuant to FPR r. 27.9(5) to be provided with transcripts of the hearings held in the East London Family Court on 26 July 2018 and 30 August 2018 and any other hearings that addressed the applications for a deprivation of liberty order and/or a secure accommodation order in respect of Ms Zahra Codsí.
 - ii) Permission pursuant to FPR 12.73(1)(b) to receive copies of any orders made at the East London Family Court in proceedings for a deprivation of liberty order and/or a secure accommodation order in respect of Ms Codsí, and any position statements and/or case summaries from those hearings.
 - iii) Permission pursuant to FPR 12.73(1)(b) to report the contents of the foregoing transcripts and documents, if so advised.
2. The applications arise in the context of Mr John-Baptiste currently preparing, with the assistance of Ms Berg and her extensive experience of reporting on family law cases, a special report into the use by the family courts of Deprivation of Liberty Safeguarding Orders (colloquially known as DoLS orders) in respect of children and young people. Mr John-Baptiste has a particular interest in the care system arising out of his own experience as a looked after child.
3. During the course of his journalistic investigation, Mr John-Baptiste made contact with Ms Codsí in January 2024. Ms Codsí is now an adult. As a child, Ms Codsí was the subject of court orders that have had the effect of restricting her liberty. She recalls being the subject of a DoLS order before being subject to a series of secure accommodation orders pursuant to s.25 of the Children Act 1989. The orders that this court has been able to locate on the court file comprise the secure accommodation orders made pursuant to s.25 of the Children Act 1989. It has not yet been possible to locate the DoLS order that Ms Codsí recalls being the subject of.
4. Mr John-Baptiste considers that Ms Codsí has a compelling story to tell arising from her being under orders of the court that restricted her liberty (and a story that is not usually told from the perspective of someone who has been the subject of such orders). Ms Codsí wishes to contribute to the programme that will be produced as the result and to be identified in that programme. Ms Codsí hopes to highlight her experience of being the subject of such orders. Within this context, Mr John-Baptiste and Ms Berg contend that there is a public interest in reporting Ms Codsí's case in detail, including why the court made the orders it did. They are also anxious to ensure that the reporting of matters concerning Ms Codsí is fair and accurate, in line with the BBC's Editorial Standards as promulgated under its Royal Charter. Within this context, they seek material from the proceedings concerning Ms Codsí as summarised above.

5. In circumstances where the application concerns a request for disclosure from previous proceedings, on 7 March 2024 the court directed that the Court Office serve the parties to the previous proceedings, in circumstances where it is the court that holds the relevant contact information. The court further directed that any party to the proceedings who sought to oppose the applications should file a Position Statement by 4 April 2024. It has not been possible to serve Ms Codsi's parents, who were respondents to the previous proceedings, in circumstances where the court was never provided with their address or addresses. Indeed, the orders in the proceedings make clear that the whereabouts of Ms Codsi's parents remained unknown for the duration over which the court was seised of proceedings with respect to Ms Codsi (and despite the court making a disclosure order against the Secretary of State for Work and Pensions on 17 May 2018). The court has received no representations from the local authority or from Cafcass with respect to the application made by the Ms Berg and Mr John-Baptiste.
6. In the foregoing circumstances, in determining this application I have received written and oral submissions from Ms Overman. Ms Codsi supports the application for disclosure in circumstances that I set out in more detail below.

BACKGROUND

7. Ms Codsi was placed in foster care in November 2016. Ms Codsi's foster placements broke down on several occasions and she experienced multiple moves within the care system before a decision was taken to accommodate her in a residential placement. As I have noted, Ms Codsi recalls first being made the subject of a DoLS order in the context of a residential placement, before being made the subject of a series of secure accommodation orders pursuant to s.25 of the Children Act 1989, Ms Codsi being placed at one stage in a secure unit in Scotland.
8. The court system records three sets of proceedings with respect to Ms Codsi. The first in time were proceedings for a secure accommodation order under s.25 of the Children Act 1989, issued on 20 March 2018. These were followed by proceedings with a public law case number issued on 13 June 2018 and further proceedings, again with a public law case number, issued on 21 September 2018. Court staff have been able to locate secure accommodation orders made in respect of Ms Codsi on 21 March 2018, 13 June 2018, 15 June 2018, 28 July 2018, 30 August 2018, 20 September 2018 and 1 November 2018.
9. It is apparent from an order of the court dated 15 June 2018 that, during the course of proceedings, the court expressed serious concerns regarding the local authority's conduct in discharging its responsibilities towards Ms Codsi, in particular the failure to search for and locate for Ms Codsi a therapeutic placement, rather than a placement that simply acted to contain her, and the failure to provide Ms Codsi with an Education and Health Care Plan (EHCP).
10. Ms Codsi is now supported by a friend, Ms Verna Casey, a qualified social worker with over thirty years' experience in fostering and adoption, who currently works as a supervising social worker supporting foster carers caring for looked after children. The statement of Ms Casey relates that Ms Codsi considers that being the subject of court orders restricting her liberty as a child has had a huge and continuing impact on her life. Ms Codsi did not understand as a young person why she was placed under

such restrictions, stating that no one explained this to her. Ms Codsí has further stated to Ms Casey that being the subject of such orders felt like a punishment and has created difficulties for her adjusting to life as a young adult and forming healthy relationships. In her own statement in support of the applications before the court, Ms Codsí states as follows:

“1. I am disappointed that my local authority deprived me of my liberty as a young teenager. I was vulnerable and needed therapeutic support in my area. Being placed on a Deprivation of Liberty (DoL) order and then in secure accommodation affected me terribly.

2. [...]

3. I lost the opportunity to pursue my talent in performing because of the DoL order and I continue to struggle day to day with my mental health. Being deprived of my liberty didn't feel like care, and as a vulnerable child, I needed to be cared for.

4. I support the BBC's application for these court documents and I have interviewed with them because I think awareness needs to be raised on this issue.”

11. By a statement of evidence dated 21 March 2024, Mr John-Baptiste sets out his reasons for seeking the orders that he does. Mr John-Baptiste contends that there is a strong public interest in his being able to report on Ms Codsí's experience of being the subject of orders restricting her liberty for the following reasons:
 - i) Despite the marked increase in the use of DoLS orders, there is limited data available on the number of children who are the subject of DoLS orders and, importantly, less information still on individual cases. In these circumstances, very little is known publicly about the individual circumstances, ethnicity and experiences of the children who are made the subject of such orders.
 - ii) Many judges in the Family Division and the President of the Family Division have expressed concerns about the use of the inherent jurisdiction of the High Court to make DoLS orders and the effect those orders have on young people and, on occasion, have declined to make them.
 - iii) Despite strong judicial comment on the difficulties associated with the use of DoLS orders and their impact on the children who are the subject of such orders, public knowledge of DoLS orders, and the impact they have on young people and their wellbeing, education and future outcomes, remains poor and most people are unfamiliar with them.
12. Mr John-Baptiste contends that it is important for the public to know that the High Court is making orders restricting the liberty of children and young people in the foregoing context, and to be provided with the opportunity to understand the difficult decisions the courts are required to make and the competing considerations the court must balance when making those decisions. Mr John-Baptiste contends that the best way to engage the audience on these issues is to focus on the experiences of the

children and young people who are made the subject of DoLS orders and provide them with the opportunity to tell their stories in detail.

13. Mr John-Baptiste contends that the provision of the transcripts of the hearings at which orders were made with respect to Ms Codsí, the orders made at those hearings and the Skeleton Arguments and Case Summaries used will provide the proper context of her experience and will explain how the orders came to be made. Mr John-Baptiste further argues that these documents will permit reporting based on full information in circumstances where, for understandable reasons, Ms Codsí's recollection of these matters from her childhood is incomplete. Mr John-Baptiste also contends that this approach is consistent with the greater transparency the family courts are seeking to achieve in line with the Transparency Implementation Group Reporting Pilot that was extended on 29 January 2024.
14. The BBC, in line with its internal guidance on working with vulnerable contributors or contributors at risk of vulnerability, and in line with the Ofcom Broadcasting Code, has undertaken a 'contributor due care' risk assessment of Ms Codsí and is providing support for Ms Codsí in the form of psychotherapeutic support prior to and following the broadcast. It has been made clear to Ms Codsí that she is able to withdraw her consent to information being broadcast about her at any time. Mr John-Baptiste and Ms Berg continue to take advice from the Editorial Policy Team at the BBC regarding their duty of care towards Ms Codsí.
15. By her written submissions on their behalf, and as confirmed in her oral submissions, Ms Berg and Mr John-Baptiste do not seek disclosure of any expert reports or medical reports or information concerning Ms Codsí or other parties to the proceedings. Likewise, Ms Berg and Mr John-Baptiste do not seek permission to publish the names of the names of social workers or other professionals involved in the day-to-day care of Ms Codsí.

THE LAW

16. As I have noted, Ms Codsí was subject to proceedings under s.25 of the Children Act 1989 and proceedings under the inherent jurisdiction of the High Court for a DoLS order.
17. With respect to the proceedings under s.25 of the Children Act 1989, during the currency of those proceedings the borders of confidentiality were governed by s.97 of the Children Act 1989, the terms of which are as follows:

“97 Privacy for children involved in certain proceedings.

(1) (*repealed*)

(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—

(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.

(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it and, in the case of the Lord Chancellor, if the Lord Chief Justice agrees, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

(5) For the purposes of this section—

“publish” includes—

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

(b) cause to be published; and

“material” includes any picture or representation.

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

(6A) It is not a contravention of this section to—

(a) enter material in the Adoption and Children Act Register (established under section 125 of the Adoption and Children Act 2002), or

(b) permit persons to search and inspect that register pursuant to regulations made under section 128A of that Act.

(7) *(repealed)*

(8) *(repealed)*

(9) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (4).”

18. In addition, during and following the conclusion of the proceedings in respect of Ms Codsí pursuant to s.25 of the Children Act 1989, and for the duration of and subsequent to the proceedings under the inherent jurisdiction for a DoLS order in respect of Ms Codsí, the borders of confidentiality in the proceedings were and are further delineated by s.12 of the Administration of Justice Act 1960. That statutory provision provides as follows:

“12 Publication of information relating to proceedings in private.

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

(a) where the proceedings—

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

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

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

(b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;

(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;

(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

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

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

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

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

19. In addition to confirming that s.12 does not prohibit the publication of the text or summary of the whole or any part of the order made in proceedings relating to the exercise of the inherent jurisdiction with respect to children and proceedings brought under the Children Act 1989, in *Re B (A Child)(Disclosure)* [2004] 2 FLR 142, Munby J (as he then was) noted that s.12 also does not, of itself, prohibit the publication of:

- i) The fact, if it be the case, that the child is the subject of proceedings under the Children Act 1989, a ward of court and the subject of wardship proceedings or of proceedings relating wholly or mainly to his or her maintenance or upbringing;
 - ii) The name, address or photograph of such a child;
 - iii) The name, address or photograph of the parties or, where the child is a party, the other parties to the proceedings;
 - iv) The date, time, place or a past or future hearing of such proceedings;
 - v) The nature of the dispute in such proceedings;
 - vi) Anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;
 - vii) The name, address or photograph of the witnesses that have given evidence in such proceedings; and
 - viii) The party on whose behalf such witness has given evidence.
20. In *Re B (A Child)(Disclosure)*, Munby J (as he then was) further made clear that s.12 does prohibit the publication of the following information:
- i) Accounts of what has gone on in front of the judge sitting in private;
 - ii) Documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts, notes of evidence or submissions, and transcripts or notes of judgment.
 - iii) Extracts or quotations from such documents;
 - iv) Summaries of such documents.
21. In *A v Ward* [2010] 1 FLR 1497, the court held that what brings a given document within the scope of s.12 of the Administration of Justice Act 1960 depends not on whether it is otherwise or already confidential, but rather whether it is information relating to the proceedings.
22. In the foregoing context, with respect to the information that the BBC seeks to have disclosed to it and, subject to editorial decision making, to publish, the publication of the text or a summary of the whole or part of the orders made in respect of Ms Codsí will not of itself be contempt of court, except where a court having the power to do so has expressly prohibited the publication. The publication of the transcripts of the hearings in respect of Ms Codsí however, and of the documents utilised at those hearings, or extracts, quotations or summaries of the same, will be a contempt of court unless expressly authorised by the court.
23. FPR r12.73 provides as follows with respect to the communication of information relating to proceedings:

“Communication of information: general

12.73.—(1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated—

(a) where the communication is to—

(i) a party;

(ii) the legal representative of a party;

(iii) a professional legal adviser;

(iv) an officer of the service or a Welsh family proceedings officer;

(v) the welfare officer;

(vi) the Director of Legal Aid Casework (within the meaning of section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012)];

(vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

(viii) a professional acting in furtherance of the protection of children;

(ix) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;

(b) where the court gives permission; or

(c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G.

(2) Nothing in this Chapter permits the communication to the public at large, or any section of the public, of any information relating to the proceedings.

(3) Nothing in rule 12.75 and Practice Direction 12G permits the disclosure of an unapproved draft judgment handed down by any court.”

24. When considering in this case whether to relax the protection afforded by s.12 of the 1960 Act to the transcripts of the hearings in respect of Ms Codsí and of the documents utilised at those hearings, or extracts, quotations or summaries of the same, and as confirmed in *Re S (Identification: Restrictions on Publication)* [2005] 1 AC 593 at [23], the court is required to balance the competing Art 8 rights of Ms Codsí and the other parties to proceedings, and Art 10 rights of the proposed

publisher, in this case the BBC, and to consider the proportionality of the potential interference with each right. Ms Codsí also benefits from Art 10 rights that fall to be placed in the balance. In *Re S (Identification: Restrictions on Publication)* at [17] it was made clear by the House of Lords that in balancing the competing rights engaged, the court proceeds in accordance with the following principles which comprise, as Eady J observed in *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), a very well established methodology:

- i) None of the rights engaged has, as such, precedence over the others.
 - ii) Where the rights are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.
 - iii) The justifications for interfering with or restricting each right must be taken into account.
 - iv) Finally, the proportionality test must be applied to each, known as ‘the ultimate balancing test’.
25. In applying what Lord Steyn described in *Re S (Identification: Restrictions on Publication)* as the “ultimate balancing test” of proportionality, it is important that the court consider carefully whether the order that is being sought is proportionate having regard to the end that the order seeks to achieve (*JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96).
26. Section 12 of the Human Rights Act 1998 provides as follows with respect to the right to freedom of expression:

“12 Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the

court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).”

27. Where the Art 10 right to freedom of expression is engaged and falls to be considered in the balancing exercise, s. 12(4) of the 1998 Act thus requires the court to have particular regard to the importance of the Art 10 right to freedom of expression and, where the material in question is journalistic in nature, to the extent to which that information is already in the public domain or the extent to which it is, or would be, in the public interest for the material to be published. Section 12(4) of the 1998 Act does not act to enhance the weight to be attached to Art 10 in the balancing exercise, in circumstances where none of the rights engaged in the balancing exercise has precedence over the others. Rather, it simply enjoins the court to have regard to the importance of freedom of expression and the matters set out in that section relating to journalistic material when undertaking the balancing exercise (see *PJS v News Group Newspapers Ltd* [2016] UKSC 26).
28. FPR 2010 r.27.9 provides as follows with respect to the provision of transcripts of the proceedings to parties and non-parties:

“Recording, transcription and informal notes of proceedings

27.9.—(1) At any hearing, the proceedings will be tape recorded or digitally recorded unless the court directs otherwise.

(2) No party or member of the public may use unofficial recording equipment in any court without the permission of the court. (To do so without permission constitutes a contempt of court under section 9 of the Contempt of Court Act 1981)

(3) Unless the court directs otherwise, a person to whom paragraph (4) applies may require a transcript of the recording of any hearing in proceedings to be supplied to them, upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript.

(4) This paragraph applies to—

(a) a party to the proceedings;

- (b) the King's Proctor; and
 - (c) where a declaration of parentage has been made under section 55A of the 1986 Act, the Registrar General.
- (5) A person to whom paragraph (4) does not apply may be provided with a transcript of the recording of any hearing—
- (a) with the permission of the court; and
 - (b) upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript.
- (6) At any hearing, the court may give appropriate directions to assist a party, in particular one who is or has been or may become unrepresented, for the compilation and sharing of a note or other informal record of the proceedings made by another party.”

29. Finally, with respect to the position statements and/or case summaries sought by the applicants, I note that, whilst this court is not part of the Transparency Pilot, the standard Transparency Orders made by the pilot courts can provide for pilot reporters to be provided with, on request, documents drafted by advocates or the parties if they are litigants in person comprising case outlines, skeleton arguments, summaries, position statements, threshold documents, and chronologies and an index to the bundle. This reflects what is now a relatively longstanding practice (see *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618).

DISCUSSION

30. I am satisfied that permission should be given pursuant to FPR r. 27.9(5) for the applicants to be provided with transcripts of the hearings held in the East London Family Court that addressed the applications for a deprivation of liberty order and/or a secure accommodation order in respect of Ms Codsí. I am further satisfied that permission should be given pursuant to FPR 12.73(1)(b) for the applicants to receive copies of the court orders summarised above and any position statements and/or case summaries that addressed the applications for a deprivation of liberty order and/or a secure accommodation order in respect of Ms Codsí. Finally, save in respect of the court orders (for which permission is not required), I am satisfied that the applicants should be given permission to report the contents of the aforementioned documents, if so advised, and subject to the undertakings provided by the applicants that I deal with below. My reasons for so deciding are as follows.
31. The BBC wishes to tell Ms Codsí's story as part of Mr John-Baptiste's special report for the BBC on the use by the courts of DoLS orders in respect of children and young people. Ms Codsí is one of the subjects of that special report and, as an adult with capacity, also wishes to tell her story by participating in that journalistic endeavour. In that context, the applications made by the BBC, and supported by Ms Codsí, engage the Art 10 rights of the applicants and the Art 8 and Art 10 rights of Ms Codsí. Whilst not before the court, the Art 8 rights of the respondents to the proceedings under the Children Act 1989 are also engaged. Were the applicants seeking to publish the names of social workers or other professionals involved in the day-to-day care of

Ms Codsí, their Art 8 rights would likewise be engaged although, as confirmed by Ms Overman, the applicants do not seek to take that course in this case.

32. The analysis the court is required to undertake when deciding whether to grant the application before it is well established. In undertaking the required balancing exercise between the Art 10 rights of the applicants and the Art 8 and Art 10 rights of Ms Codsí, I start by reminding myself that neither the Art 10 right to freedom of expression enjoyed by the BBC and by Ms Codsí, nor the Art 8 right to respect for private life enjoyed by Ms Codsí and by the other respondents to the proceedings, has, as such, precedence over the other. By reason of Ms Codsí's agreement to the disclosure and publication of the information sought by the applicants, the rights engaged in this case do not compete as starkly as in some cases. However, where the material in issue is rendered confidential by operation of s.12 of the Administration of Justice Act 1960, where the rights engaged are nonetheless in tension with each other to a degree, and in circumstances where the rights of the other respondents to the proceedings are also engaged, I consider it remains the responsibility of the court to consider carefully the comparative importance of the competing rights and to take into account the justifications for interfering with or restricting each right.
33. I deal first with the importance of, and the justifications for interfering with, the Art 8 rights engaged in this case. Art 8 provides as follows:

“Article 8 Right to respect for private and family life

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

34. I cannot accept Ms Overman's submission that there are *no* countervailing Art 8 rights in this case. Even if they are outweighed in the balance by other of her rights or the rights of others, Ms Codsí continues to have inalienable rights under Art 8 of the ECHR. In the circumstances, pursuant to Art 8 Ms Codsí has a right to respect for private life. The ambit of that right under Art 8 is a wide one, encompassing not only the narrow concept of personal freedom from intrusion but also Ms Codsí's psychological and physical integrity, personal development and the development of social relationships and physical and social identity (see *Botta v Italy* (1998) 26 EHRR 241 at [32] and *Bensaid v United Kingdom* (2001) 33 EHRR 205 at [46] and [47]). In the context of the background set out above, Ms Codsí makes plain that she continues to struggle with her mental health and has had difficulties adjusting to life as a young adult and forming healthy relationships. In these circumstances, on the face of it, importance attaches to Ms Codsí's Art 8 right to respect for private life when placed in the balance. The Art 8 right to respect for private life is also important for the other respondents to the proceedings concerning Ms Codsí in circumstances where those proceedings dealt with matters arising in the context of private family life.

35. In addition to holding in mind the importance of the Art 8 rights engaged in this case however, the court is required also to consider the justifications advanced for interfering in those rights. In this case, I am satisfied that those justifications are powerful ones.
36. Section 12(4) of the Human Rights Act 1998 makes clear that, in balancing the competing rights, the court should have particular regard to the importance of the Convention right to freedom of expression. The right to freedom of expression constitutes one of the essential foundations of a democratic society. This is so because the foundations of democratic society rest, in part, on the free debate of information and ideas. In *R v Secretary of State for the Home Department ex parte Simms and Another* [2000] 2 AC 115 Lord Steyn observed at [126] that:
- “The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.”
37. In the context of the administration of justice, the free flow of information and ideas informing political debate in a democratic society itself rests on the principle of open justice. In *R v Legal Aid Board ex parte Kaim Todner (A Firm)* [1999] QB 966 at 977 the purpose of open justice was described by Lord Woolf MR as being (a) to deter inappropriate behaviour on the part of the court; (b) to maintain the public's confidence in the administration of justice; (c) to enable the public to know that justice is being administered impartially; (d) to result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with the parties' or witnesses' identities concealed; and (e) to make uninformed and inaccurate comment about the proceedings less likely. As Lord Reed observed in *Re BBC* [2015] AC 588 at [23]:
- “*Sed quis custodiet ipsos custodes?* Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.”
38. In the foregoing context, in *R v Secretary of State for the Home Department ex p. Simms*, in the context of the right to freedom of expression being the primary right in a democracy, the House of Lords recognised the importance of a person who has been the subject of a court process being able to engage with investigative journalism to demonstrate, publicly, what they contend is the fallibility of that process. Ms Codsí wishes to engage with the BBC to tell her story. In particular, she wishes to publicise her view that being the subject of orders that restricted her liberty had a huge and continuing adverse impact on her life, that she was left in the dark as to the reasons she was made the subject of such orders, that the orders resulted in her being supervised and restrained by male carers and that being the subject of such draconian orders felt like a punishment and created difficulties for her adjusting to life as a young adult and forming healthy relationships. In these circumstances, Ms Codsí wishes to exercise her right to freedom of expression to inform wider society of her belief, as someone who has been the subject of such court orders, imposed on her by

the State, that they are antithetic to the care vulnerable children need and wishes to do so through the medium of Mr John-Baptiste's special report.

39. I am satisfied that in these circumstances Ms Codsí's own Art 10 right to freedom of expression is firmly engaged and constitutes a powerful justification in this case for interfering with her Art 8 right to respect for private life as formulated above and of the Art 8 rights of the other respondents to the original proceedings. That conclusion is reinforced in circumstances where the BBC, in line with its regulatory and editorial obligations, is providing psychotherapeutic support to Ms Codsí to safeguard her psychological integrity.
40. Beyond Ms Codsí's wish to tell her own story, Ms Berg and Mr John-Baptiste wish to bring to the attention of the general public the broader fact that the High Court is making orders restricting the liberty of vulnerable young people with high levels of need and to provide the public with the opportunity to understand the competing considerations the court must balance and the difficult decisions the courts are required to make as a result. This in the context of Judges of the Family Division and the President of the Family Division having expressed concerns about the use of the inherent jurisdiction of the High Court to make DoLS orders and the effect those orders have on young people. Once again, I am satisfied that this constitutes a further justification for interfering with Ms Codsí's Art 8 right to respect for private life engaged in this case and the Art 8 rights of the other respondents to the original proceedings.
41. I accept Ms Overman's submission that there is an important public interest in the public being able to understand and scrutinise the operation of the family courts. The family justice system, and the family law that it interprets and applies, provides the forum in which, and the legal framework within which, disputes as between members of society and between members of society and the State arising out of the rights and obligations attendant on familial relationships can be determined. In these circumstances, the public has a substantial interest in the operation of the family courts. This interest will be particularly acute where the family court scrutinises and endorses, or refuses, intervention in family life by the State. As this court observed in *Lancashire County Council v G, N* [2020] EWHC 3280 (Fam) at [27]:
- “27. Amongst the fundamental principles reflected in the foregoing passage is that the development of children and the development of society are intrinsically and inseparably linked. As was recognised in the American case of *Brooks v Brooks* 35 Barb at 87-88 in 1861, the sound development of the child in all aspects is indispensable to the good order and the just protection of society. Human society benefits from the addition of the child as a member of that society, but the child and society will also suffer if society then fails to safeguard and promote the welfare of that child where the parents have proved, by reason of circumstance or inclination, unable to do so. G's welfare is the court's paramount consideration. But amongst the reasons that this is so is that the wellbeing of our society is dependent upon the physical, emotional and educational health of our children, including G.”
42. Ms Overman further submits that, in the foregoing circumstances, there is a particular public interest in the applicants being able to publish information regarding DOLs

orders. Again, I accept that submission.

43. The jurisdiction of the High Court to make orders under the inherent jurisdiction restricting the liberty of minors is not in dispute. However, Ms Overman is correct to observe that the President of the Family Division and the Judges of the Family Division have voiced significant concerns regarding the deployment of that jurisdiction and with respect to the paucity of provision of secure accommodation for the purposes of s.25 of the Children Act 1989 or a restrictive clinical environment short of detention and treatment under the Mental Health Act 1983 that leads to the inherent jurisdiction being invoked. Those observations were summarised by the President in *Re X (Secure Accommodation: Lack of Provision)* [2023] EWHC 129 (Fam).
44. In articulating the “wholesale failure to provide adequate resources to meet the needs of the most needy and vulnerable young people”, the President recorded the observations made by Judges of the Family Division and the Court of Appeal between 2017 and 2023. Those observations included the President’s own observation in *Re T (A Child)* [2018] EWCA Civ 2136 at [5] that:

“[5] It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament”.
45. Within the foregoing context, I am satisfied that there is plainly a public interest in the applicants being able to publish information concerning the use by the court of orders restricting the liberty of children and young people, some of which, whilst lawful, are being made outside any statutory regime that has been the subject of democratic consultation and approval by Parliament. In *N.Š. v Croatia* (2020) Application No. 36908/13 at [103], the European Court of Human Rights confirmed that the course of public law proceedings concerning children and any deficiencies in that process are matters of public interest, particularly as regards the functioning of the system of family justice. I accept the submission of Ms Overman that it is important for the public to know that the High Court is making orders restricting the liberty of young people in the foregoing context and to be provided with the opportunity to understand the difficult decisions the courts are required to make, and the competing considerations the court must balance when making those decisions. In the circumstances, in undertaking the balancing exercise in this case I have particular regard, pursuant to s. 12(4) of the Human Rights Act 1998, to the importance of the public interest in the publication of the material the applicants’ seek.
46. Finally with respect to justifications for interfering with the Art 8 rights engaged in this case, it is incumbent on the press to impart information and ideas on matters of public interest and the public has a right to receive them (see *Sunday Times Ltd v United Kingdom (No 2)* (1992) 14 EHRR 229 at [50]). In *Financial Times v UK* (2010) 50 EHRR 46 the court made clear that that the exercise of freedom of expression in this context carries with it duties and responsibilities which also apply

to the press, Art 10 protecting a journalist's right and duty to impart information on matters of public interest provided that he or she is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. I accept Ms Overman's submission that in undertaking their reporting, given the time that has elapsed, making Ms Codsí's recollection of relevant matters is incomplete, access to the information sought by the applicants will assist in ensuring accurate reporting based on the fullest information available, allowing press reporting and debate to be based on full information, as opposed to speculation and partial knowledge of the circumstances of Ms Codsí's case.

47. I deal next with the importance of, and the justifications for interfering with, the Art 10 rights engaged in this case. Art 10 provides as follows:

“Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.”

48. I have already articulated above the importance of the Art 10 right to freedom of expression when considering the justification for interfering in the Art 8 rights engaged in this case, both generally and in the context of the operation of the family justice system and the use by the High Court of orders restricting the liberty of children and young people. In the foregoing context, both the Art 10 rights of the applicants and, given her wish to tell her story, Ms Codsí's own Art 10 rights are plainly of seminal importance in this case.
49. With respect to the justifications for interfering with the Art 10 rights engaged in this case, I have already set out above the importance of Ms Codsí's Art 8 right on the facts of this case. However whilst, for the reasons I have given, importance attaches to Ms Codsí's Art 8 right to respect for private life when placed in the balance, I am satisfied that, in the context of Ms Codsí's strong support for the publication of the information that is the subject of this application and her desire to tell her own story using that information, Ms Codsí's Art 8 rights do not in this case constitute a justification for interfering with the Art 10 rights of the applicants and her own Art 10 rights. Whilst, as I have noted, the other respondents to the proceedings concerning Ms Codsí also have a right to respect for privacy under Art 8, in circumstances where those respondents did not engage in any way with the proceedings, and did not therefore give evidence or make submissions in those proceedings, I am satisfied that

their Art 8 rights also do not operate in this case to outweigh the Art 10 rights of the applicants and Ms Codsí.

50. Finally, with respect to the balancing exercise, the court must apply the test of proportionality to each right engaged. Stepping back and considering each of the matters set out above, I am satisfied in this case that the interference in the Art 8 rights engaged in this case that will result from the granting of the applicant's application would be proportionate. By contrast, the interference in the Art 10 rights of the applicants and Ms Codsí that would be caused by a refusal to accede to the application, and thereby the maintenance of the confidentiality of the information in question, would plainly be disproportionate.
51. The publication of the information sought by the applicants is desired by the person who is the subject of that information. Publication meets a clear public interest for the reasons I have set out. The proceedings from which that information arises have now concluded and the circumstances to which the information relates are historic. Whilst Ms Codsí was a child when the subject of those proceedings, she is now an adult. Whilst the other respondents to the proceedings benefit from Art 8 rights, they did not at any point participate in those proceedings.
52. In these circumstances, the disclosure and publication of the information that is the subject of the current application being necessary in a democratic society for the protection of the rights and freedoms of others, I am satisfied that the interference in Ms Codsí's Art 8 rights and the Art 8 rights of the other respondents to constituted by publication is proportionate. Likewise, in the circumstances described above, prohibiting the publication of the information sought by the applicants cannot be said to be necessary for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary for the purposes of Art 10. In such circumstances, I am satisfied that refusing the application would constitute a disproportionate interference in the Art 10 rights that are engaged.
53. Finally, as the family courts continue to promote greater transparency, it may be anticipated that there will be further applications for retrospective disclosure and publication by the press of material from concluded family proceedings. Indeed, Ms Overman informed the court of a further, and identical application due to be made before Judd J in the days following this hearing. Where such applications are made, the following matters will need to be borne in mind:
 - i) The application for permission to obtain transcripts from proceedings, disclosure of information from proceedings and permission to publish material from proceedings should be made in the first instance to the court in which the original proceedings were conducted. Consideration can thereafter be given to the correct tier of Judge to hear the applications, having regard to the allocation guidance.
 - ii) The information sought by applications of this nature is likely to concern proceedings that have concluded. In the circumstances, careful consideration will need to be given to how service of the application concerning disclosure and publication will be effected on the parties to the concluded proceedings, whose rights may be engaged. In cases where only the court which dealt with

the proceedings has the contact details for the former parties, it may be appropriate to direct that the court serves the application on such parties.

- iii) Where it becomes apparent that there is a dispute regarding the provision and publication of transcripts, it may be necessary for the court to adopt a two-stage process, whereby the transcripts are obtained first, before the court determines whether and to what extent the material in those transcripts can be published.
- iv) Where however, as in this case, there is no dispute as to what material should be published from the series of short hearings that occurred (the applicants having indicated that they do not seek to publish medical reports or information concerning Ms Codsí or other parties to the proceedings or the names of the names of social workers or other professionals involved in the day-to-day care of Ms Codsí) it will not ordinarily be necessary for the court to have the transcripts before determining the application.
- v) Before determining the application, the court considering the question of disclosure and publication will need to ensure that it is aware of the existence any prior orders made in the original proceedings to regulate publicity following the conclusion of those proceedings.
- vi) Where the application is granted, there will need to be clarity as to who will apply for the transcripts and seek any documents from former parties or legal representatives which the court has given permission to publish.

CONCLUSION

- 54. For the reasons set out above, and upon the applicant's undertaking not to publish medical reports or information concerning Ms Codsí or other parties to the proceedings or the names of social workers or other professionals involved in the day-to-day care of Ms Codsí, I am satisfied that the court should give permission pursuant to FPR r. 27.9(5) for the applicants to be provided with transcripts of the hearings held in the East London Family Court that addressed the applications for a deprivation of liberty order and/or a secure accommodation order in respect of Ms Codsí, permission pursuant to FPR 12.73(1)(b) for the applicants to receive copies of the court orders summarised above and any position statements and/or case summaries that addressed the applications for a deprivation of liberty order and/or a secure accommodation order in respect Ms Codsí and, save in respect of the court orders for which permission is not required, permission to report the contents of the aforementioned documents.
- 55. The desire of an individual to tell their story can be a strong one, particularly where that individual considers that he or she has been the victim of an injustice. Each application of the type made by Ms Berg and Mr John-Baptiste in this case will fall to be determined on its own facts, having regard to the nature of the information from the proceedings which it is sought to publish and the balance of the competing rights engaged. However, I venture to suggest that it will be an unusual case where the balancing exercise falls against a person who has had their childhood liberty restricted by the State being given permission to publish information relating to the proceedings in which that deprivation of liberty was authorised. Perhaps more than any who have

experienced the family justice system, such children and young people require the hallowed principle of open justice to aid them in drawing their breath and telling their story.