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

Neutral citation: [2023] EWFC 53 (B)

Case No: TA21P00273

IN THE FAMILY COURT

Date: 28 February 2023

Before :

RECORDER REED

- -

Between :

M	**Applicant**
- and -	
F	**1st Respondent**
-and-	
S	**2nd Respondent**
(a child through her Guardian, CB)	

- -

SH (direct access) for the **Applicant**

BM for the **1st Respondent**

IK solicitor for **the Child**

Hearing dates: 14, 19 and 20 October 2022

- -

JUDGMENT

Recorder REED :

1. In October 2022 I heard a final hearing in respect of S. During the court of that hearing I heard evidence from Dr X. I had cause to raise a number of queries in the course of that expert's evidence, which are set out in my first judgment (M v F & Anor [2022] EWFC 186). In large measure I accepted that expert evidence and found it helpful. However, Dr X took exception to the contents of my judgment (having been sent a draft of it) and to the suggestion that it should be published with their name included, as would be commonplace when a judgment is published in the Family Court.

2. As a result of the written representations made by Dr X it has been necessary to seek the views of the parties and to consider separately

    i) whether or not I should publish the judgment at all, and

    ii) if I do whether I should afford Dr X anonymity,

    iii) how I should deal with publication of my reasons in respect of the first two questions.

3. It will be immediately apparent from my use of the cipher Dr X in this judgment (and my use of the term they / their) that I have concluded that I should publish the judgment and that Dr X should be afforded anonymity. This judgment explains why I have reached those conclusions. It should be read in conjunction with my substantive judgment.

4. That the family members themselves should be afforded anonymity is uncontroversial.

5. No party has sought to challenge or appeal my judgment and order. The parties and advocates have disengaged from the process of resolving the issues set out in this judgment and matters has remained open only because of the issues raised by Dr X.

Procedural background

6. On 3 November 2022 I circulated my judgment in draft to the parties and requested that a copy was provided to Dr X as a courtesy with an indication that it was my provisional view that the judgment should be published.

7. By letter dated 17 November Dr X wrote to raise objections. Dr X proposed 'two options':

    i) 'Anonymisation (preferred).

ii) If publicly criticised, I request entitlement to respond publicly should I choose and therefore to be released from my duty of confidentiality.'

8. Option 1 was said to be justified because:

i) 'There is risk to my physical safety based on the nature of the case.

ii) There is a risk to me being vilified, targeted, and harassed.

iii) The judgment contains errors, omissions, misunderstandings, misrepresentations, and ambiguities.

iv) I can see no significant public interest in publishing my name.'

9. Dr X posited that 'The suggestion that my name be made public makes it is apparent that the judge does not understand the risks to my physical safety'. Issues relating to Dr X's safety (physical or otherwise) had not been raised at any point in the course of instruction / proceedings until receipt of this letter.

10. There were two limbs to the safety risk that Dr X raised. Firstly, it was suggested that 'any mention of honour abuse, including forced marriage, should be considered highly culturally sensitive and with the potential to lead to a hostile response from family members and the community more generally'. Dr X accepted that work in this field already puts an expert at some risk, but argued that publication of a judgment identifying such expert presents unnecessary additional risk. Secondly, it was suggested, there was a more general issue for psychologists working as expert witnesses in the family courts, who (it was said) are regularly subjected to harassment and vilification, based on the false belief among the general public that academic psychologists and/or chartered psychologists are not qualified to act as expert witness in the family courts. Dr X attributed these 'false beliefs' to certain unnamed investigative reporters covering the issue of parental alienation. Although of course this was not a field in which Dr X had professed any expertise and it was not the subject of their report, it was said that this recent (social) media attention 'has … led to misunderstanding among the general public who… increasingly perceive psychologists to be acting against the interest of the families. The result is a toxic environment in which many legitimate expert witnesses are being publicly attacked, harassed and vilified'.

11. Dr X went on:

> 'Whilst some of this public attention may be justified, it is, in this case, neither warranted nor fair that the judge drags my name into this toxic fray. Further, I question the judge's motivation in attempting to do so. My response to points made in the judgment (see below) allude to one possible explanation; that by publishing my name, the judge may be satisfying her own desire to contribute, irrespective of relevance, to this high-profile conversation'.

12. As to option 2, Dr X proposed that they should be

> 'allowed the opportunity to respond publicly to errors, omissions, misunderstandings, misrepresentations, and ambiguities in the judgment which, individually or in sum, may give rise to false assumptions among the public leading to risk to my physical and emotional safety and/or impact on my professional reputation and financial health.
>
> The format of my response may include digital media (website, social media, newsletter), other publications [example given], as well as in-person events' [example given]'.

13. I have removed reference to specific publications and events mentioned in the quotation above, to avoid identification of Dr X.

14. Dr X went on to set out across the next five pages, a number of perceived flaws in my judgment, given it appears as illustrations of the sort of public correction of the judgment that Dr X would wish to make if permitted to do so.

15. I think that it is necessary to set those out at length, because the criticisms made, the manner and accuracy of them, are materially relevant to the decision I have to make vis a vis identification. I say at length, but it has been necessary to somewhat condense the criticism and complaints made, rather than setting them out verbatim.

16. Dr X refers to paragraph 42 of my judgment pointing out (correctly) that I had acknowledged their expertise in relation to forced marriage and domestic abuse in South Asian communities, that Dr X's evidence had been important and helpful and that they had acted in good faith in carry out their assessment and giving their evidence.

17. Dr X suggests that this is contradicted in paragraph 43. Paragraph 43 refers to what I had perceived to be a 'collective lack of focus or clear consensus' as to the nature of the

assessment sought. Dr X says that 'There is nothing in …my final report that suggests a lack of focus or clear consensus'. I selected the word 'collective' with care. My comment was not a criticism of Dr X but an observation as to what appeared with the benefit of hindsight to have happened in this case, which I had then had to work to understand at the final hearing.

18. Of the line in paragraph 43 of my judgment that read 'Through careful scrutiny of Dr X's CV and report I was able to ascertain that Dr X's expertise was as an academic not a practitioner', Dr X suggests that this 'may be perceived by the public as suggestion that I attempted to obscure the truth about my qualifications and that the judge, as sleuth, uncovered this deception'. I disagree. In the context of reading a bundle containing an application originally made for the instruction of a clinical psychologist, and with a letter of instruction that would in my experience more usually be answered by an expert in clinical practice, it was not apparent that the expert appointed was not a practitioner psychologist until I considered their CV. In addition, the CV was headed with the words 'forensic psychology': the title 'forensic psycholo*gist*' is a protected title, requiring registration as a practitioner with the HCPC, and I could not see any clinical posts on the CV itself. To describe judicial due diligence with the pejorative 'sleuthing' is, frankly, disrespectful. As will be seen, the tenor of the document was more generally disrespectful to the court.

19. Dr X complains that, in noting that when I observed that some of the questions posed to them would more usually be posed of a practitioner psychologist, I failed to specify which questions I meant. This complaint is misplaced. I did not criticise Dr X for answering questions outside of their remit, notwithstanding the fact that PD25B (which Dr X had not read before preparing their report and giving evidence) makes clear an expert should not do. Secondly, it is a matter entirely for me what needs to be included in my judgment, the purpose of which is not to validate or satisfy the expert, but to explain my reasoning. Thirdly, a number of the questions were plainly unrelated to an expertise in 'forced marriage and domestic abuse in South Asian communities' (for example questions on attachment, which in fact Dr X did not answer, for entirely unrelated reasons).

20. Dr X later complains that the remark in my first judgment that 'Dr X's expertise was not a good match for all of the wide-ranging questions posed' was 'sweeping and unqualified', and that a practitioner psychologist would be 'less qualified to answer the majority of the questions posed'. I have no doubt that the questions relating to forced marriage and domestic abuse in

South Asian communities would only be capable of comprehensive answers by a person with niche expertise. I remain of the view that questions relating to attachment ought generally to be posed to a psychologist in clinical practice. That ultimately is a matter of the court and not to be taken as a personal slight.

21. Dr X goes on:

'during the course of the hearing, the judge repeatedly scrutinised my qualifications over the 6.5-hour period and attempted to undermine the legitimacy of my report based on what appeared to be a false assumption that, as expert witness, I should be HCPC registered. This focused attention lasted, in total, several of the 6.5 hours, despite my having already stated my qualifications and credentials. Given that there the lives of 15,000 children have been in the limbo of ongoing proceedings for more than a year, the majority of whom are experiencing harm, or are at risk of being harmed (see BPS 2022, Crisis in the family court), this must surely constitute a gross waste of the court's time.'

22. I acknowledge that giving evidence in this case was a challenging experience for Dr X, in part it appears because Dr X was unfamiliar with the expectations of the tribunal for whom they were proffering expert evidence.

23. In light of the complaints made I have reviewed my notes with care. Dr X's assertions as to the duration of their evidence are materially inaccurate. Dr X's evidence ran from approximately 11.40 until 4.35pm, including a break for lunch and a short break mid-afternoon, imposed by me. Dr X is right to say in their letter that the link was beset with audio problems, which made the experience more challenging and extended the time the process took. The total duration of Dr X's evidence was 4 ½ hours.

24. Prior to the hearing I had drawn to the advocates' attention PD25B and the Family Justice Council / British Psychological Society joint guidance on the instruction of experts, and had requested and obtained the letter of instruction. The questions posed by the advocates of Dr X did not answer the queries I had about the parameters of instruction and the limits of Dr X's expertise. Rather than it being the 'gross waste of the court's time' that Dr X suggests it was, I considered it part of the judicial function to be satisfied of both the expertise and the match of that expertise to the questions before relying upon expert evidence, and was therefore left in the uncomfortable position of having to ask a number of questions myself. The need to

consider such matters is of particular current importance given (as identified by Dr X raised themselves), as regards public concern (sometimes misplaced) as to the credentials of experts the family court relies upon. These questions were prolonged because of the difficulty I had in obtaining clear responses, particularly around the nuanced point Dr X made as to the use of the term 'forensic psychology' as a specialist academic area rather than a practitioner title requiring registration with the HCPC. The tone of Dr X's criticism of the process adopted by the court is all the more baffling given that I concluded - and stated explicitly - that Dr X did have suitable expertise, that their evidence was helpful and I relied upon it.

25. Dr X set out the contents of an email from someone at BPS confirming that 'the BPS and FJC finds it acceptable for a chartered psychologist to act as an expert witness in their relevant area of expertise, which they should outline to the court. The court should expect that chartered psychologists will represent their expertise with integrity and honesty. Ultimately it is the court's decision as to whether the expertise of the psychologist meets their needs as an expert in the specific case.' Dr X asserts that 'HCPC registration was and is not required' (for them to act as an expert) and that they 'complied with BPS guidance throughout my involvement'. My judgment does not state otherwise.

26. I am surprised that Dr X describes their failure to include the correct statement of truth on their report as an 'administrative error'. It is not an administrative error. It is a fundamental requirement of an expert in the family court. It was only as a result of my querying this mistake that it became apparent that Dr X was entirely unfamiliar with those basic requirements because they had not read the Practice Direction accompanying the letter of instruction. Dr X is right to say that the failure ought to have been drawn to their attention by the instructing solicitor, but the fact is that none of the advocates identified the error (or if they did, none of them raised it).

27. Dr X takes issue with the passage in my judgment at paragraph 50 where I consider the difference between the original purpose of the assessment ('risk assessment') and the actual instruction. Dr X goes on to explain why it would not have been possible or appropriate to provide a full risk assessment (for various reasons I need not go into for these purposes. Dr X says that 'A full risk assessment (of sorts) may have been possible, but it would have been dependent on the use of unvalidated tools… This may have constituted something approaching a full risk assessment, albeit it of a necessarily caveated nature due to the non-

availability of validated tools.' It was the highly caveated nature of Dr X's oral evidence regarding the question of risk which led me to explore with them how much reliance I could place upon that analysis, to be sure that I gave that evidence appropriate weight.

28. It is then said that:

'The judge states '…but it was not until I pressed [them] that [they] offered any indication of the level of risk…' Firstly, the term 'pressed' does not properly capture the highly coercive nature of the pressure applied by the judge in 'pressing' me to quantify the level of risk. This included overt and passive aggression, attempts to shame and embarrass me, and repeating of the same question over and over. This same pressure was applied in what can only be described as an attempt to undermine my credentials as an expert witness'.

29. Dr X is mistaken. I was attempting to understand the boundaries of the evidence of the expert before placing reliance upon it – after all it was contended by one party that there was an unacceptable risk of really serious harm if I were to permit the child to move as requested. Dr X made recommendations for living arrangements that depended upon their assessment of the comparative risks. I simply asked Dr X if they were able to quantify that risk, for example in terms of high, medium or low. Dr X readily obliged and gave some broad indications. I have recorded in my judgment that Dr X subsequently told me that 'Risk assessment is not possible, essentially.' It was this that made me question whether I should then rely upon what they had told me about 'low' risk. Dr X then told me that they were 'confident' and there was enough information to make an assessment. What Dr X describes as 'coercive' and 'passive aggressive' etc was no more than an essential exploration of their evidence. Any expert who expects their evidence to be relied upon by Family Court judges when making decisions which might place children and adults at risk of harm should expect - and should be able and willing to engage in - respectful exploratory or clarifying questions from advocates and judges. It would have been better and more comfortable had those questions come from the advocates, but I reject the criticisms made of the approach taken by me. Dr X may not have been expecting such questions, but they were not improper and were asked in the spirit of respectful exploration.

30. Dr X complains about 'theatrical gesticulating' of one of the advocates who 'loomed large' on a computer screen. If there was such gesticulating going on during Dr X's evidence I did not see it and it was not drawn to my attention. Had it been drawn to my attention I would have ensured it did not happen again. I regret that if Dr X felt someone in the courtroom was being

disrespectful that they did not feel able to highlight that point. Such conduct would be entirely inappropriate.

31. In my judgment I wrote that 'What appeared on superficial consideration to be a diagnosis of CPTSD for the mother was confirmed in oral evidence to be no such thing, because Dr X is not qualified to make a diagnosis'. Again. Dr X interprets this statement of fact, wrongly, as a direct criticism of Dr X, complaining that

'the inference here is that the judge was led to believe that I had diagnosed the mother with C-PTSD. At no point in my report do I state anything that may reasonably be considered to be diagnosis. During the hearing I had expected the judge to have given this more than superficial consideration, although when it became apparent that she had not, I interrupted her to explain the facts'.

32. The inference is mistaken. I had read Dr X's report and picked up that although it did not amount to a diagnosis, others had appeared to think that it did. I wanted to check that this was correct to avoid misunderstanding and to avoid misstating the position in my judgment. The Guardian's analysis referred to a diagnosis (although the Guardian later told me that was a typographical error not an error of interpretation on her part), and one of the parents' position statements also adopted the 'diagnosis' as such.

33. Dr X's letter complains that my approach was 'unethical', that I behaved in an 'unruly' manner, and they suggest that I had a 'resolute focus on undermining' them as the expert. Ironically, Dr X fails to appreciate that it is the process of testing of an expert's evidence that often enables the court to place weight and reliance upon it.

34. Having criticised the court for being 'passive aggressive', Dr X's letter continues to deconstruct my judgment line by line, suggesting that 'perhaps the judge can provide a definition' for this or 'clarification' of that 'would be useful here'. This tone serves no obvious purpose other than to demonstrate Dr X's disrespect for the court.

35. The 8 pages are apparently only a 'representative sample' of the 'errors, omissions, misunderstandings, misrepresentations and ambiguities' that Dr X had found in my judgment.

36. Dr X concludes by asserting that my 'low opinion of [Dr X] personally' caused me to 'fixate on perceived problems'. I reject the assertion that I had a low or any opinion of Dr X, who is an

expert I have never encountered before. I based my questions and approach to this case on the evidence I read and heard, and asked appropriate questions in order to clarify where things were unclear.

37. So much for the contents of the letter. Having received these representations, I indicated to the parties that given the seriousness of the issues raised I was considering listing a further hearing at which Dr X might appear, with representation if they so wished. I indicated that I would need further clarification as to the safety issues raised, and made provision or that to happen. I directed that the parties should, if they so wished, set out their position and should indicate whether or not they sought a hearing, or to participate in that hearing.

38. Hearing nothing further I proceeded to list the matter, only to receive an indication that Dr X was unavailable on that date. As Dr X had by this point provided further information vis a vis the safety issues I therefore reappraised the position (seeking the views of the parties and Dr X) and concluded that subject to any submissions to the contrary I could proceed to deal with the issues on paper. Dr X confirmed that they had no objection to this course of action. The other parties (the parents by now being once again in person) made no representations and have effectively disengaged, and Mr K for the child confirmed that no issue was taken on behalf of the child.

39. I directed that

    i) Unless by 4pm on 4 January 2022 the court has received confirmation that Dr X seeks an oral hearing or that any party to these proceedings in fact wishes to make representations, the court will proceed to determine the issues raised by Dr X on the papers after that date.

    ii) Subject to any further representations, the court intends to prepare a supplemental judgment dealing with the issues raised by Dr X post-judgment, and will stay any publication of both judgments until time for permission to appeal has elapsed in any event (i.e. would defer any publication whether anonymised or un-anonymised vis a vis Dr X until 21 days after the decision).

40. Having heard nothing further, I have therefore proceeded to deal with this matter on the papers.

41. The further information that was provided by Dr X comprised a position statement and two statements in support.

42. The position statement asserts that the judgment

    i) 'speculatively implies that a HCPC registered psychologist may have been better qualified than a BPS Registered chartered psychologist…to conduct a psychology assessment in this specific case'

    ii) 'implies that Dr X misled the court by stating that I was an expert in forensic psychology' and 'by stating I was 'not' a HCPC registered psychologist'.

    iii) 'Contains speculative statements, errors and ambiguities that may undermine Dr X's professional credentials, and that my 'intention to suggest' that Dr X attempted to mislead the court 'may inflame public sentiment'. I pause to state unequivocally that if I had concluded that Dr X had attempted to mislead the court I would have said so. I did not.'

43. The position statement contends that,

    'unless it is anonymised, the judgment places my safety at risk and may be used as justification to attack my physical self and/or professional status by, specifically a) members of the south Asian community across the UK who may believe that by using my professional expertise to identify forced marriage and honour-abuse, I have stigmatized the community, and Islam more broadly and/or b) 'keyboard warriors' who follow family court hearings for this exact reason. The CEO of Sikh Woman's Aid, and the organisation itself is currently facing threats on social media and in real life for this very reason.'

44. The first statement provided in support of anonymity is from the CEO of a national charity concerned with community specific domestic abuse and honour based abuse (amongst other credentials that I will not state to avoid identification). It says that

    'In my view, if [Dr X] has raised this as a concern, then [their] position in this matter must not be underestimated or undermined. My view is informed by the experiences of other Black and minoritised professionals who work with victims of honour based abuse and violence, who have endured professional and personal harassment, threats, and direct harm… publishing

their name against [their] wishes may compromise [their] physical and psychological safety, as naming [them] will make public [their] direct involvement with an individual case of honour abuse. The ramifications of this may have a detrimental impact on [Dr X] in terms of unnecessary emotional stress, and may also expose [them] to threats or actual harm, whether immediately, or at any time in the future. Unless the court finds it is in the public's significant interest to attach [Dr X's] name to a specific case, I hope that the court will consider [their] request for anonymity in this case.'

45. The second is from a prominent public figure with a great deal of experience in respect of domestic abuse, forced marriage, honour based abuse and criminal justice. That document states that:

'It is my firm belief that expert witnesses should be named in family court judgments: unless there is a compelling reason not to do so.

One such compelling reason is that professionals face a heightened risk to personal safety when working on cases that involve so-called 'honour'-based abuse and forced marriage.

Professionals who work with victims and/or perpetrators of 'honour'-based abuse must each time make a difficult personal choice that involves calculating the multiple risks for working on a case, and whether they should do so publicly or anonymously.

Experts in these cases may face a backlash from the family, extended family, and members of their wider community, in the UK and overseas. This risk is compounded where the expert is of South Asian heritage and may be considered to be shaming or bringing dishonour on the family/community by exposing historic or current abuse.

There are countless examples of professionals who, on one side, suffer public 'trial' by social media based on misleading or ambiguous information. On the other side is the very real threat of retribution by disgruntled family members. It is these elements that make 'honour' abuse cases markedly different from other cases that involve domestic abuse.

Family court judgments must consider these intricacies to avoid ambiguity in the language used that may be open to exploitation. Professionals like [Dr X], who have extensive experience and specialist knowledge in this area, may have their expertise challenged to

> undermine the case or judgement, thereby exacerbating the risk of harm, to [Dr X themselves], [their] family, and the individuals and/or family involved in a case.
>
> … if [they] were to claim that there was no significant public interest in publishing [their] name in a specific case, I would trust this implicitly, and I would support [their] request for anonymity, on the grounds of [their] physical and professional safety, as well as [their] emotional wellbeing.'

Parties positions (including Dr X)

46. The parents have understandably elected not to express any view as to the issues dealt with in this judgment.

47. The child's representatives did send in a short email early on, indicating that they could not support the release of the expert from their duty of confidentiality as proposed, and as regards anonymisation that was really a matter for the court, depending on the 'weight the Court attaches to Dr X's personal concerns.' They submitted that

> '…when considering the question of anonymisation, of course we are aware of the need for transparency but one has to balance this with the need to avoid the prolongation of these proceedings for the sake of the child, The issue of the publication was not raised at the hearing on 26 July 2022 (when the report was available and indeed considered by the Court) and therefore the current situation has a feel of 'prolonging the case' perhaps unnecessarily. Their report was still accepted by the Court at that hearing by all parties. The Court, whatever its views about the expert, still accepted the evidence of Dr X albeit in a limited way'.

48. I am not quite sure why it was thought I should have raised the question of publication at the pre-trial review. Although it is sometimes possible to anticipate that a judgment is likely to be one that ought to be published, that is not always so, and ultimately or not a judgment should be published will depend upon its contents. It is a possibility that experts and professionals should be alive to in any case. It is a matter of some regret that the nature of correspondence from Dr X has further prolonged this process.

The relevant law

49. *Re W (A Child)* [2016] EWCA Civ 1140, [2017] 1 FLR 1629, established that,

i) In principle, the right to respect for private life, as established by Art 8, can extend to the professional lives of professional witnesses in the family court

ii) Art 8 private life rights include procedural rights to fair process in addition to the protection of substantive rights

iii) The requirement of a fair process under Art 8 is of like manner to the entitlement to fairness under the common law

iv) At its core, fairness requires the individual who would be affected by a decision to have the right to know of and address the matters that might be held against him before the decision-maker makes his decision.

50. At paragraph 101 of that judgment MacFarlane LJ said,

'It is, unfortunately, sometimes the case that a judge in civil or family proceedings may be driven to criticise the professional practice or expertise of an expert witness in the case. Although what I have said with regard to a right to fair process under ECHR, Art 8 or the common law may in principle apply to such an expert witness, it will, I would suggest, be very rare that such a witness' fair trial rights will be in danger of breach to the extent that he or she would be entitled to some form of additional process, such a legal advice or representation during the hearing… If criticism is to be made, it is likely that the critical matters will have been fully canvassed by one or more of the parties in cross examination.'

51. In this case the issues were canvassed with Dr X in evidence. Dr X was provided with a copy of my draft judgment. I have considered their representations as regards that judgment. I have offered Dr X a further oral hearing. I do not consider it is necessary or proportionate to have required a further oral hearing in order to canvass my concern about the tone of the post-hearing materials with Dr X. They speak for themselves and were sent at Dr X's election.

52. Whilst children proceedings are heard in private and subject to automatic restraints on publication of information imposed by s12 Administration of Justice Act 1960 it has long been established that the protections afforded by s12 do not extend to afford anonymity to witnesses or experts (see for example *Kent County Council v B* [2004] EWHC 411 (Fam)).

53. Since (to the best of my recollection) around 2009 when the rules of court first permitted the attendance of the media at family court hearings, the standard terms of instruction for experts in family proceedings have warned of the possibility of being named in any published judgment.

54. The default position then, is that, if I publish my judgment I would ordinarily identify the expert. However, where there is an issue as to whether that ought to be so in this particular case (Dr X contending, in effect, that the decision would engage and offend against their Article 8 rights) I must perform a more sophisticated analysis before deciding whether and how to proceed. The exercise in question is set out at paragraph 17 of Lord Steyn's judgment in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593:

'First, neither article has as such precedence over the other.

Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.

Thirdly, the justifications for interfering with or restricting each right must be taken into account.

Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.'

55. I must start that exercise from a neutral position – once the issue is live there is no presumption either way, even if it is commonplace for experts to be named where a published judgment references them.

56. Next, I must apply thorough scrutiny to the specifics of the case rather than just relying on general propositions. I must think about what particular justifications are for interfering either with the Article 8 rights of Dr X or the Article 10 rights of the public. I must strive to find an outcome which properly balances those competing rights given their weight in the context of this particular scenario, and which represents as far as possible only such interference with either right that is necessary and proportionate.

92. In *Abbasi & Anor v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2021] EWHC 1699 (Fam) McFarlane LJ said that

'this court now has extensive, reliable and unchallenged evidence … establishing the highly negative impact of unfettered social media targeting both on the safety and well-being of individual staff but more generally on the system as a whole. I take that evidence very seriously indeed…. The situation thus described is a long way, and the wrong way, down scale of seriousness, from that described by Sir James Munby in *A v Ward*.'

93. *Abbasi* confirmed that *A v Ward* [2010] EWHC 16 Fam) should not be followed insofar as it indicated that 'compelling' reasons were required before professional anonymity could be afforded, that being inconsistent with the first of Lord Steyn's four propositions in *Re S* (that neither article 8 nor 10 was presumptively to be prioritised). That case of course involved treating professionals not found to have been at fault at all, rather than experts who had volunteered to play a role in the family court process, but the reminder that 'compelling' reasons are not a prerequisite for anonymity and that the *Re S* exercise must be faithfully carried out is important.

57. McFarlane LJ noted in *Abbasi* that the potential for 'harassment and vilification' of professionals via social media was well established at the time *A v Ward* was decided but had 'developed exponentially since then'. I accept that is so.

Analysis

58. The options available to me are:

i) To publish the judgments in a form that identifies Dr X, with or without giving Dr X permission to exercise their right of reply publicly,

ii) To publish the judgments in a form that does not identify Dr X by name nor render them identifiable,

iii) To publish neither judgment.

59. I discount the possibility of publishing one judgment but not the other. Neither would make sense without the other. Given the extensive critique of my judgment by Dr X it seems most transparent to publish that criticism and my response to it alongside the original judgment, if

it is to be published at all. If I am to publish and / or anonymise my workings should be shown so the reader can understand why.

60. I begin my analysis as a matter of logic by considering the inchoate reasons I had in mind when I first indicated a provisional intention to publish my judgment. These can broadly be characterised as follows:

i) A general public interest in more judgments arising from the family court, in particular below High Court level being published (particularly given the fact that I had in any event produced a written judgment which was capable relatively easily of being anonymised and published). The parties themselves did not demur from the general idea of anonymised publication, subject to any representations from Dr X.

ii) I considered that although the legal issues were not especially complex or novel, the facts of the case may be of general interest (in particular the religious and cultural issues and concerns about honour based abuse / forced marriage)

iii) I considered that the issues relating to the instruction of the expert, would be a useful reminder of the importance of reference back to PD25B for both experts and professionals, both at the point of instruction, during preparation of the report and on / following receipt of it – that is to say there might be some practice points that would be of some assistance to lawyers drafting letters of instruction or considering expert reports (not, I emphasise, guidance, which is above my pay grade).

iv) Publication would enable those who wished to make informed decisions about the instruction of experts to do so. It was only this latter point which really required the expert's name to be included.

61. Until receipt of Dr X's response to the draft judgment I had not considered that publication was likely to be particularly controversial or time consuming. Clearly, I was wrong about that on both fronts. Although it seemed *appropriate* to publish, given the points set out above, there was in my mind no acute or particularly pressing *need* to publish associated with *this particular judgment*.

62. Whilst Dr X's subsequent communications with the court highlights a number of reasons why it is said I should not publish, the very fact that an expert has responded in such a strong and

strongly worded way towards a judgment of the court is itself of note, and in my view adds weight to the public interest in publication of the main judgment and the subsequent challenge to it. It is in my view quite an extraordinarily defensive response to a judgment which contained legitimate but limited criticism of an expert, and it materially misrepresents what that judgment says and implies. I do not think that the inferences Dr X has drawn from my judgment are inferences that a reasonable reader would infer, but if I am wrong this judgment makes plain that I meant what I said and no more, and because I have rehearsed almost in its entirety Dr X's correspondence, it cannot be said that the 'package' is one sided.

63. Whilst no party objected to the proposal to publish the judgment (as long as the family were anonymised) no party actively sought it either. That does not mean that Article 10 is not relevant, because the court still has a duty to adhere to the open justice principle insofar as is compatible with the ECHR rights. There is no obvious impact of my decision upon the Article 8 rights of the parties to these proceedings.

64. Turning to the question of Dr X's Article 8 rights: Dr X submits that the effect of publication of the judgment in conjunction with their name would be that they would be exposed to harmful vilification and harassment. I approach this matter on the basis that Dr X's request to the court is a request that falls under the auspices of Article 8, although it is not articulated explicitly in that way by them.

65. The question of the safety of experts and professionals connected to family court cases, including experts, is clearly an important issue. As *Abbasi* makes clear, on occasion experts and other professionals are subject to unwarranted attention and criticism and where appropriate the court will take steps to prevent or minimise that through anonymity.

66. I begin by considering the basis on which Dr X took on the work. The Law Society standard terms and conditions for instructing experts in family and children court proceedings (March 2020 version) (https://www.lawsociety.org.uk/topics/family-and-children/instructing-experts-in-family-and-children-court-proceedings) state clearly under the heading 'Publication of Judgments' that:

'Under the President's 2019 guidance on Transparency in the Family Courts, family court judges are encouraged to publish their judgments. As part of this process, you may be

identified in a published judgment. If you are concerned about being named in a published judgment, please raise this with your lead solicitor'.

67. Any expert working in the family court with regularity will be familiar with those standard terms and the expectation that if a judgment is published they may well be named. However, Dr X is not an expert who has so far carried out a lot of work in this field and I am conscious that in this case neither the letter of instruction nor the attachments contained that standard warning. PD25B was appended, but regrettably it was not read. That PD states that in response to preliminary enquiries the expert should confirm 'any representations which the expert wishes to make to the court about being named or otherwise identified in any public judgment given by the court.' (para 8.1). As far as I am aware no such representations were made, and as such, until mid November when Dr X sent their 8 page letter, neither their general objection to being named in any judgment nor their specific objection to being named in the context of this judgment was known by anyone.

68. In general terms, an expert who has been criticised by the court can expect to be named, because there will be a corresponding public interest in the public (including but not limited to others involved in family court cases) being made aware of those criticisms. The more serious the criticism the more weighty the public interest in identification will be.

69. In this particular case it is clear from a number of factors, that Dr X was not expecting to find themselves named in a published judgment. I think that Dr X's expectations as to the degree of their privacy, are a relevant factor, even if Dr X's expectations were not entirely in keeping with the usual parameters of engagement and practice of the family court. PD25B if followed, would have headed off this mismatch of expectations.

70. The information I have about safety issues is largely sketched in broad and general terms and would apply, it appears, to any expert in this discipline being named in any judgment of the family court or otherwise becoming known as a person who has given such evidence in a family court case. That evidence is somewhat circular, in that the witnesses who are relied upon by Dr X rely in turn upon Dr X's assertions as to the need and justification for anonymity and the assumption that there is limited public interest in the case / identification of Dr X. However, I do not think I should simply disregard the evidence I have, which I accept is made in good faith and is in part based upon direct experience of the potentially hostile environment which Dr X is referring to.

71. I accept and acknowledge the general proposition that, alongside legitimate criticism, there is potential for experts of many disciplines to be wrongly criticised, and for such criticism to escalate on social media. I accept and acknowledge that this may be distressing, though in itself it does not justify anonymity. This I think is a risk that all experts (and professionals) in the family court must face, to a greater or lesser degree, and it cannot, in and of itself, be a sufficient reason to abandon the open justice principle.

72. It is said that there is an enhanced or different risk in connection with expert evidence relating in particular to the south Asian community and HBV, extending to the risk of direct harm (which I take to mean physical harm i.e. HBV against HBV experts). If there is a generalised risk arising from simply being known to undertake this work it is somewhat surprising that this was not highlighted at the outset, but that does not in itself mean the risk does not exist. I take seriously the evidence from experienced professionals of 'other Black and minoritised professionals who work with victims of honour based abuse and violence, who have endured professional and personal harassment, threats, and direct harm'. Whilst the evidence is somewhat non-specific, the potential consequences of disregarding this risk are serious.

73. There is an additional layer of concern raised by Dr X as a result of what they perceive as the criticism contained in my judgment in this case.

74. I appreciate that my judgment was received as critical and may have been a somewhat uncomfortable read for Dr X, but, read carefully, the criticism in it is really limited to a failure to read the instructions and as a result to properly take on board the important provisions of PD25B. Much of what Dr X has taken as direct personal-professional criticism is an elucidation of the practical and judicial difficulties that had flowed from a less than focused adherence by *a number of actors* to PD25B. The purpose primarily to explain why the hearing had unfolded as it had, and why I had ultimately moved past the queries raised about CVs, credentials and basis of instruction and relied on the expert evidence (as the parties who had to understand and accept the decision were entitled to expect I should do). Had PD25B been fully absorbed by Dr X I dare say their report might have been approached somewhat differently, but that does not take away from the fact I relied upon the expertise and advice of Dr X on the main issues. The failures, such as they were, are correctable. In my view the initial criticisms of Dr X were very specific and limited, and I have struggles to see how those criticisms could have significantly added to the risk of harassment or harm.

75. In my view, that the way in which Dr X has responded to my judgment was far more concerning than the original and very limited criticism of them in my report. The contents and tone of Dr X's correspondence with the court were entirely inappropriate and unwarranted. It is of course quite acceptable for an expert to correct an error or misreport of an expert's evidence in a judgment, but the criticism Dr X levelled went far beyond a respectful correction and trespassed into telling the judge that their conclusions were wrong, and doing so in a way which failed to appreciate the limits of the expert's role in proceedings. 'Experts advise, courts decide', as the mantra goes. If a judge makes a wrong decision by misinterpreting the evidence it is for one of the parties to appeal. There is no roving right for an expert to demand a judgment is changed to fall in line with their perspective.

76. I have had to consider whether the contents of Dr X's post-hearing communications in themselves tip the balance so as to justify their identification. They certainly add weight to the Article 10 side of the equation. However, as Dr X themself points out, the greater the criticism the greater the likely vilification, so it cuts both ways. Whilst it is no part of the function of the family court to protect experts from *justified* criticism (or indeed to use publication as a means of punishment), where that criticism is likely to intersect with pre-existing risks to their safety arising from the sensitive and controversial (in some communities) nature of the work undertaken, the position may in my view be rather different. There is a clear tension in this case between the demands of 'transparency' i.e. the need for the public to know who is discussed in these two judgments (for example so that they can make informed decisions as to who to instruct in other cases, so they can be satisfied that the rules of the family court are rigorously applied, so they can form their own view as to whether I have been entirely fair), and the need to ensure that a professional is not harassed or placed at unacceptable risk as a result of doing their job (which may on occasion include getting things wrong, as we all do).

77. I have also considered whether Dr X's reaction to my judgment was coloured by their pre-existing anxiety about the risks of undertaking work in this field. I think I must accept the possibility that this was the case, and that there is a degree of hyper-sensitivity that flows from working in such a contentious area and from being constantly aware of the risks that are set out in the supporting statements.

78. I imagine that this has been an extremely stressful experience for Dr X. That is regrettable. It is never the court's intention (or my own) to cause unnecessary stress or upset for witnesses or professionals, but the court process does depend on a degree of probing, and judges often have to express views that someone disagrees with. Providing Dr X ensures that they are up to speed with and comply fully with the requirements of PD25B in future, providing they read with care the letter of instruction, and providing they work constructively with the court and parties, respecting the distinct roles of the expert and judge, I am sure Dr X will continue to make a valuable contribution as an expert within their field in future cases. There are some cases where conduct is so egregious or criticism so trenchant that it is essential to name the person talked about for the protection of others. This case is not in that category. Those involved with the instruction of an expert in this field or any other should scrutinise the CV with care, should ask questions about credentials before instruction, and should ensure compliance with PD25B at all stages. That detailed framework is the primary route through which parties can ensure they have the right expert for the job, and through which they are protected.

79. It would have been very easy in this case to have concluded that it was easier for all concerned if I just abandoned consideration of the publication of either judgment, but it seems to me that in light of the stringent criticism made of my judgment and conduct, that is not a proper course of action. I cannot sweep this criticism under the carpet and I must be careful not to be dissuaded from a course of action that I would otherwise consider appropriate because of squeamishness about the need to incorporate Dr X's strongly worded criticism of my actions into any reasoned judgment.

80. I say for the sake of completeness, that I have considered whether I should refer this issue to another judge to determine, but have concluded that I cannot and should not pass the buck in this way. Firstly, because I have not been asked to do so (no recusal application has been made), secondly because in my view there is no need to do so given that the criticisms made are based upon wholesale misinterpretation of my judgment and inferred criticism. There is neither bias nor appearance of bias (if there were no judge would ever be able to decide on the publication of their own judgment which contained criticism of an expert or party). Thirdly, because how could another judge deal with the 8 pages of criticisms made?

81. I do not think that it would be appropriate – and I do not think it is necessary – to give Dr X an unrestricted right of reply as they seek in option 1. In any event such an order, which involves a material relaxation of s12 Administration of Justice Act 1960, ought arguably to be dealt with on application to the high court and by a High Court judge under the inherent jurisdiction. This option would inevitably involve a material interference with the Article 8 rights of the family, and there are other more proportionate ways of meeting the needs of this case, which I set out below.

82. I have reached the conclusion that although there is a clear public interest in publishing both judgments, and in doing so in naming the expert, there is a countervailing need to protect the expert from harassment and / or harm. I have concluded that anonymity will not materially or at any rate will not disproportionately interfere with the court's responsibility to work openly in accordance with the open justice principle. The workings of the court, it's rationale and conclusions will all be made clear, the granular detail of the facts and process laid out. The aspects of the case which have exercised the court and Dr X in different ways are fully articulated and insofar as there are learning points for the court, for Dr X or for lawyers and experts more generally they are there to be seen. I have decided therefore, that in order to balance the competing demands of this case, I should publish both judgments and that I should anonymise the expert.

83. This has the advantage of

i) enabling the public to read the substantive details of the case, which involves the interplay between child arrangements and the risk of honour based abuse,

ii) enabling the public to consider the issues which arose in relation to the expert instruction and how they were ultimately dealt with, in particular to see the difficulties that may arise where proper attention is not had to the terms of PD25B and associated guidance (whether by experts or professionals) and when the template letter of instruction is not used,

iii) Albeit that their identity will not be known, demonstrating that the criticisms made and concerns raised by Dr X have been thoroughly considered before publication, and any reader who reads my judgment will see alongside it the criticism made of it and my response. They will be free to form their own view of both perspectives,

iv) Protecting Dr X from unwarranted harassment, abuse or harm.

84. It has the disadvantage of preventing the public (including litigants, lawyers and judges) from knowing the identity of an expert who has been criticised via my second judgment, in rather more serious ways than they were in the first. That does mean that there is potential for others to unknowingly instruct Dr X in future cases and for them to encounter similar issues, but as I have indicated above I anticipate that Dr X is highly likely to pay close attention to PD25B in any future cases in which they are instructed.

85. Had Dr X complied with PD25B and notified the lead solicitor at the outset of the safety issues, much of the contention involved in resolving the issue of publication might have been avoided. I venture to suggest that in cases involving experts in this field it would be prudent for close attention to be paid by experts and lawyers to these issues at the outset, so that there are clear parameters of engagement from the outset.

86. Were it not for the potential safety issues, I would potentially have published the judgment and identified Dr X, but ultimately I have concluded that would represent a disproportionate interference with Dr X's Article 8 rights (incorporating their safety and wellbeing). The public interest in publication was not so acute as to demand identification (as opposed to anonymised publication), but Dr X's Article 8 rights would be potentially significantly compromised if I were to name them. Accordingly, I have removed references in both judgments to Dr X's name and sex, and the academic institution where they work.

The decision in Re C

87. By the time I was in a position to prepare this judgment it was apparent that the decision in *Re C (Parental Alienation) [2023] EWHC 345 (Fam)* was expected imminently and that it might bear upon the approach I should take in this case. Accordingly, I have delayed finalising my judgment until its publication.

88. That judgment is concerned with the instruction of experts who are neither HCPC regulated nor chartered, which is not this position in this case. However, it also :

i) confirms that there is no prohibition on the instruction of (HCPC) unregulated psychologists, or even on the instruction of psychologists who are neither HCPC registered or chartered (here the latter does not apply),

ii) It emphasises the need for rigour in the appointment of (psychological) experts, by reference to Part 25 FPR and PD25B, and the guidance I have previously referred to, and for a full appreciation of the actual qualifications and expertise of the proposed expert,

iii) It indicates the importance of clear CVs and of explicit confirmation on those CVs of whether or not an individual psychologist is HCPC regulated,

iv) In my view it also raises the need for scrutiny of the match between the questions posed in the letter of instruction with the expertise of the proposed expert (See paragraphs 75 and 99 where the President refers a number of matters for further consideration by the FJC),

89. The judgment also illustrates the importance of keeping in mind the need for fairness of all involved when dealing with such issues, including ensuring that reputational damage is not unfairly visited upon an expert without proper due process. The court is not a disciplinary body.

90. Overall, the judgment provides confirmation that the court was right to strive to ensure it had a proper understanding of the expert's credentials and expertise before placing reliance upon their evidence.

91. Had it not been for the post-judgment approach taken by Dr X this lengthy judgment would not have been necessary. My objective in publishing it is derived from the need for the family court process to be accountable rather than for any punitive or quasi-disciplinary reason.

92. In line with that approach I have decided to anonymise the names of advocates. Whilst I make no individual personal criticism of them it seems to me that there is no particular need for them to be identified, particularly so where Dr X is anonymised, and where the advocates were themselves criticised by Dr X (a criticism which it was necessary to refer to in this judgment, albeit that I did not think it desirable or necessary to determine it).

93. Insofar as *Re C* bears upon this case I am satisfied my approach is consistent with it.

Delay and resource implications

94. The resolution of the issues relating to publication of this single judgment have taken over two months to resolve, in part because of the need to obtain the parties views on the issues and to afford due process, in part because of the need to await the publication of the President's decision in *Re C,* and in part as a result of the need for me to find time to prepare this judgment. Although Mr K has kindly assisted with anonymising the parties, it inevitably falls to me to anonymise both judgments in respect of Dr X. This case has driven home to me how vital the creation of an anonymisation unit to assist with the burden of ensuring anonymisation is carried out effectively, will be to achieving greater levels of published judgments as per the stated aim of the president of the family division. I suspect that for many full time judges finding time to prioritise this on top of an additional caseload would have been extremely challenging if not impossible.

95. As promised when making arrangements for the determination of this issue I will arrange for this judgment (and the anonymised version of the first judgment) to be provided to the parties and Dr X, and for them to be published only after 21 days have elapsed. In this way any anonymisation errors can be highlighted or representations can be made as appropriate.

Recorder Reed

28 February 2023