Neutral Citation Number: [2020] EWHC 1162 (Fam)

Case No: ZW19C00360

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2020

Before :

THE HONOURABLE MR JUSTICE HAYDEN

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Between :

A Local Authority	**Applicant**
- and -	
the mother	**1st Respondent**
- and -	
the father	**2nd Respondent**
- and -	
A & B	**3rd Respondent**
(by their Children's Guardian)	

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Mr Alistair Perkins (instructed by the Local Authority In-House Legal) for the **Applicant**
Ms Anita Guha (instructed by Freeman solicitors) on behalf of **M**
Ms Caroline Budden (instructed by Osbornes solicitors LLP) on behalf of **F**
Ms Gemma Kelly (on behalf of the Children's Guardian)

Hearing dates: 29th April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

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

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10:30am on Monday 11th May 2020.

Mr Justice Hayden :

1. Following a contested hearing in this matter I handed down a judgment in which, in addition to my findings on the evidence, I also made trenchant criticisms of the Local Authority's conduct of the case and of two social workers in particular. As I made clear in the judgment, now reported as (insert), I am usually disinclined to review a Local Authority's failings during the course of care proceedings unless it is necessary to do so in order to ensure fairness to all the parties. In this case I considered that was necessary but even had it not been I am clear that failings on this scale cannot go unheeded. I do not think that I have ever had to criticise a Local Authority to the extent that I have found it necessary to do in this case.

2. In the draft judgment, initially circulated to the parties, I named the Local Authority and the social workers. I did not intend that the published judgment should identify the subject children, the parents or the Schedule 1 sex offender who had brought such trouble to this family. To do so would have been manifestly corrosive of the children's privacy. Both of the children, subject to the Public Law proceedings are, in different ways, vulnerable. The social restrictions required in consequence of the pandemic public health crisis have added particular challenges especially, in my assessment, for B (the younger child).

3. This case has a long and complex history and first came before the Courts in the context of the parent's determination to ensure that the family home could be extensively adapted in order that their eldest child, who has a raft of disabilities, could live at home. In order to finance those proceedings, the mother was adroit in harnessing 'crowd funding' and in encouraging local media coverage. Inevitably, child A was named and, as I understand it, his images were broadcast in a variety of media. Mr Perkins, who appears on behalf of the Local Authority, now submits that if I were to name this Local Authority and/or the social workers it would, by means of 'jigsaw identification', quickly identify the subject children. Ms Kelly, who appears on the children's behalf, via their Guardian, agrees. Indeed, by entering three seemingly disconnected words in to a search engine Ms Kelly illustrated how easily child A could be identified. Though the Guardian had been forensically critical of the Local Authority's conduct of the case she did not consider that naming the authority or the social workers was in the best interests of the children.

4. The canard of secrecy has bedevilled the family justice system in the past. The significant strides towards transparency in recent years have not yet entirely changed the public perception. There is, in my view, an understandable concern amongst the public and members of the press that failings by public bodies, particularly on the scale I identified, should not be concealed in any way. For many the importance of scrutinising such failings in a fully transparent way transcends the need to protect the privacy of vulnerable children. There are two fundamental rights engaged here, freedom of speech and children's privacy as a facet of their family life. When evaluating where the balance lies between these two competing rights and interests it is important, to my mind, that judges of the Family Court do not allow ourselves to remain magnetically attracted to the welfare principle (i.e. that the welfare of the child is the paramount consideration). To do so distorts the relevant balancing exercise.

5. Perhaps the clearest iteration of the relevant law is that by Sir Mark Potter (P) in **Re W [2005] EWHC 1564** (Fam) in which he summarises the effects of the judgment in **Re**

S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47 [2005] 1 AC 593:

> "There is express approval of the methodology in Campbell in which it was made clear that each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary, and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or trumps the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided on the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary before the ultimate balancing test in the terms of proportionality is carried out."

6. In this clear and elegantly expressed passage, Sir Mark Potter emphasises that the exercise is a "parallel analysis" in which the starting point is presumptive parity, requiring an intense focus on the comparative importance of the competing rights rather than a mechanical exercise decided on the basis of rival generalities. Manifestly, it requires forensic rigour.

7. A considerable volume of case law has been generated concerning issue of identifying Local Authorities, particularly in the context of judgments where serious adverse findings have been made. Mr Perkins and Ms Kelly have directed my attention to them. A number require to be considered here.

8. In **Re B; X Council v B - [2008] 1 FLR 482,** Munby J (as he then was) observed as follows:

> "**[18]** I can understand the local authority's concern that if anonymity is lifted the local authority (or its employees) may be exposed to ill-informed criticism based, it may be, on misunderstanding or misrepresentation of the facts. But if such criticism exceeds what is lawful there are other remedies available to the local authority. The fear of such criticism, however justified that fear may be, and however unjustified the criticism, is not of itself a justification for affording a local authority anonymity. On the contrary, the powers exercisable by local authorities under Parts IV and V of the Children Act 1989 are potentially so drastic in their possible consequences that there is a powerful public interest in those who exercise such powers being publicly identified so that they can be held publicly accountable. The arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling in the context of public law care proceedings: see *Re X; Barnet London Borough Council v Y and X* [2006] 2 FLR 998, at para [166].
>
> **[19]** Moreover, and as Lord Steyn pointed out in *R v Secretary of State for the Home Department ex parte Simms and Another* [2000] 2 AC 115, at 126, freedom of expression is instrumentally important inasmuch as it

> 'facilitates the exposure of errors in the governance and administration of justice of the country'. How can such errors be exposed, how can public authorities be held accountable, if allowed to shelter behind a judicially sanctioned anonymity? This is particularly so where, as in the present case, a public authority has been exposed to criticism. I accept, as the local authority correctly points out, that many – indeed most – of the matters in dispute in this case were never the subject of any final judicial determination, but the fact remains that in certain respects I was, as my judgment shows, critical of the local authority. And that is a factor which must weigh significantly in the balance: see *Re X; Barnet London Borough Council v Y and X* [2006] 2 FLR 998, at para [174]."

9. Earlier, at paragraph 14, Munby J recognised *"There will, of course, be cases where a Local Authority is not identified, even where it has been the subject of stringent criticism"*. In **Herefordshire Council v AB [2018] 2 FLR 784** Keehan J observed *"The President and the judges of the division have always previously taken a robust approach on the identification of Local Authorities, experts and professionals whose approach or working practices are found to be below an acceptable standard"*. I agree with Keehan J that the case law illustrates the balancing exercise, I have identified above, regularly results in Local Authorities being denied the anonymity they claim. Of course, and precisely because of the intense focus required on the individual factors in each case, there are circumstances in which Local Authorities have not been named. In **Z County Council v TS, DS, ES and A - [2008] 2 FLR 1800.** Hedley J identified the kind of circumstances which might result in a higher risk of identification of the child:

> *"**[9]** There are a number of relevant features from A's point of view. He lives in a rural community where, because of the comparatively unusual nature of his disability, he is more likely to be identifiable than if he lived in a massive conurbation. In the area of this county council there are only two schools, one in the north and one in the south, which cater for needs akin to those of A. The identification of the school is, therefore, a relevant issue. He is cared for primarily, but not exclusively, by his grandparents who oppose any relaxation of anonymity. His mother, who shares increasing care of him, clearly wants anonymisation relaxed. When she was represented it was said that she agreed that A should not be identified. Her own submission in para 28 is equivocal. I am, however, abundantly satisfied on the evidence that A's welfare positively requires that he be protected from identification.*
>
> ***[10]** The mother in this case has an agenda of her own in which she wishes to use publicity to highlight all her own complaints in this case, some of which, of course, have real substance as appears from my first judgment. ITV Wales have no such agenda and will, I have no doubt, seek scrupulously to avoid the identification of A. The difficulties in this approach are twofold. First once disclosure is allowed it is disclosure to all the world and not every organ of the media may be as scrupulous or indeed as concerned to protect the identity of A. Secondly, I doubt that the mother shares that concern to the same extent and, as I have indicated in earlier judgments, I have serious*

doubts about her judgment and that certainly extends to the assiduous protection of A's identity.

[11] *It follows that my guideline in this case is to refuse the disclosure of any person that not only would identify A but might reasonably in this case lead to his identification. In my judgment, it is not enough that it is unnecessary to identify the local authority or X; in order to prevent that disclosure it seems to me that I need to be satisfied that it might reasonably lead to the identification of A, no more and no less. Still less, in my view, should the court prevent the disclosure of X simply to save her the annoyance and discomfort of being pursued by ITV Wales and the mother over the criticisms of her found in my judgment. Of course it has always been (and remains) possible for the mother to make a formal complaint against X to the Care Council for Wales. However, as I understand it, she has not chosen to do so. In my view, the decisive issue in any balance in this case is the Art 8 rights of A reinforced by the demands of his welfare that he be not identified outside the scope of these proceedings. I do not disagree with the judgments of Munby J, Ryder J and MacFarlane J that are cited in the skeleton arguments, I merely conclude that in this case the position of A merits special protection.*

[12] *Applying the guideline and following through the consequences of my conclusions about A's welfare, I turn to the specific issues of identification. I am wholly satisfied that the disclosure of the identity of any family member (and in particular the mother) will not only reasonably tend to the identification of A but will be highly likely to have that consequence especially if (as inevitably will be the case) disclosure once made is in effect made to all the world. I had wondered whether I could allow the mother's face to appear without her being named but I do not think that will guard against the risk of identification of A. I am also satisfied that the school and therefore staff members at the school should not be identified on the same basis. As I have said, this is a lightly populated rural area and information can all too easily get out. What I have, however, found more difficult is the question of the identification of the local authority or social worker X.*

[13] *Having thought carefully about this, I am satisfied that I should not allow the disclosure of the local authority. They hold the care order in respect of A and will continue to be closely involved in his welfare. Even assuming that the rehabilitation of A to his mother is achieved and the care order discharged, the needs of A are such that the local authority will continue to be closely involved. If the authority are named in the context of my judgment, particularly if (as of course there can be) there is discussion about their role in A's life, there is, for the reasons already appearing in the judgment, at least a serious possibility that A will identified."*

10. It is also necessary to consider the Practice Guidance (**Family Courts: Transparency [2014] 1WLR 230**) which provides:

> *"19. In deciding whether and if so when to publish a judgment, the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings*
>
> *20. In all cases where a judge gives permission for a judgment to be published:*
> *(i) public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named;"*

11. The more recent Practice Guidance: **'Anonymisation and Avoidance of the Identification of Children and The Treatment of Explicit Descriptions of the Sexual Abuse of Children In Judgments Intended for the Public Arena'** (December 2018) also emphasises: *"for a public body to be identified when acting in respect of citizens is recognised to be important"*. It goes on to state:

> "*nevertheless, we now know that naming the local authority in a public document may set clear geographical boundaries to the location of some children; their location may be further narrowed down by other information in a judgment."*

12. Whilst it is important to remember that this document is only guidance and not intended, in any way, to be read as mandatory, it is interesting to note some of the suggestions made concerning the identification of social workers in a judgment. Thus:

> *"In some areas naming a social worker narrows down the location of a child/family to an area team; consider this alongside other geographical/personal indicators in the judgment: does naming the social worker(s) add to a risk of identification of a child/family?*

13. Appended to that guidance is a document headed **'Checklist 1: geographical/personal data indicators in judgments and "jigsaw" identification'**. Initially, Mr Perkins sought to argue that the guidance should be interpreted as necessitating the anonymisation of Local Authorities unless the Court concluded that *"naming the Local Authority would carry with it **no risk** of identifying the children (or any of them)"*. In fact, that passage, taken from the Checklist, requires to be read in conjunction with the following sub paragraph which provides: *"or… Having balanced the remaining risks the judge concludes that the public interest in identifying the applicant is so important that it outweighs any risk of identification of the children (or any of them)."* It is specifically contemplated that *"it should be open to any party and representatives of the media, to apply to invite the Court to determine whether the case comes within the exceptions"* as identified. Accordingly, it requires to be stated, explicitly, that even where jigsaw identification may identify the children, the counter veiling public interest in naming the Local Authority may, nonetheless, prevail. In the course of exchanges and legal argument Mr Perkins conceded that this was the correct statement of the law.

To the extent that the Checklist suggests that *"the default position is that an applicant should be named"*, I consider that to be somewhat misleading. A parallel analysis of the competing rights and interests, predicated on presumptive parity does not, to my mind, logically permit of a "default" position.

14. A reading of my substantive judgment reveals my conclusion that this social work team, within this Local Authority, disregarded fundamental principles of safeguarding and child protection. The nature and extent of the failings, as well as their persistence, can only give real cause for public concern. There is an undoubted public interest in the Local Authority being named, in order that they might be subject to the kind of public scrutiny that many would regard as necessary. Mr Perkins has told me that, at the highest level within the Social Services Department for this Local Authority, there is real concern as to what has happened and a determination that there should be a full investigation. I am told and accept that there will be. Mr Perkins submits that there are "lessons to be learned". It has to be said that this phrase is deployed so regularly when public bodies fail that it is in danger of becoming platitudinous. It is easy to see how lessons might be learned more thoroughly in the spot light of media scrutiny.

15. The Guardian, as is again clear from the substantive judgment, has been entirely unsparing as, in accordance with her duties she is bound to be, in her professional criticisms of the Local Authority. Additionally, she fully and unreservedly accepts the strength of the legitimate public interest in the Local Authority being named. She has however, come to the conclusion that the interests of these two subject children tip the balance in favour of preserving their privacy. I have considered the Guardian's argument with particular care because it strikes me that she, as the voice for these children in this hearing, might be instinctively inclined to a protectionist approach.

16. It is unfortunate that the parties did not inform the press about this application. They are entitled to be heard and regularly attend in 'remotely' conducted hearings such as this. The 'Checklist', referred to above, specifically provides for press attendance:

> *"it should be open to any party, and representatives of the media, to apply to invite the Court to determine whether the case comes within the exceptions in (a) or (b) above"*

17. However, I am entirely satisfied that the Guardian, no doubt with the assistance of her very experienced legal team, has not been deflected by rival generalities in what Sir Mark Potter described as "a mechanical exercise" but has rigorously focused on the competing rights and interests in consideration.

18. The potential for jigsaw identification, by which is meant diverse pieces of information in the public domain, which when placed together reveal the identity of an individual, can sometimes be too loosely asserted and the risk overstated. As was discussed in exchanges with counsel, jigsaws come with varying complexities. A 500-piece puzzle of Schloss Neuschwanstein is a very different proposition to a 12-piece puzzle of Peppa Pig. By this I mean that whilst some information in the public domain may be pieced together by those determined to do so, the risk may be relatively remote. The remoteness of the risk would require to be factored in to the balancing exercise when considering the importance of the Article 10 rights. Indeed, as I have averted to above the Article 10 rights may be of such force as ultimately to outweigh the risk of identification of the children. In this case the background of the proceedings is

important. Such is the level of information in the public domain including A's full name and images in national newspapers and various social media platforms that I am satisfied that were I to name the Local Authority, the family and therefore both children would be identified with ease.

19. Many of the families who live locally to the mother and who have children with disabilities themselves have, I am told, supported the fund-raising campaign and, no doubt, watched its success with interest. The social workers will be known to these families. I have heard how, in this area as is the case generally, there is a relatively tight network of families caring for children with disabilities. They and the professionals with whom they work form their own community.

20. The welfare solution arrived at in this case was, of necessity, second best. Though it may be painful to the family to express it bluntly, in my judgment, it requires to be. The care plan is a very poor second best. Child A wanted nothing more than to return to live permanently at his family home. The outcome of the case is that A now faces the prospect of a lifetime of institutional care, interspersed with occasional weekend and holiday visits to the home in which his father will now live. Child B is extremely close to his brother. He fervently wanted his brother to come home. I have no doubt that the extent of his disappointment, from what I have been told, is properly characterised as a grieving process. In light of my findings about M's deception regarding her ongoing contact with a Schedule 1 Offender, it was necessary for B to move to live with his father, in accommodation which is far too small for them. This was to have endured only until the tenancy of the former family home could be transferred in to the father's name. That has now been done. Into this sad cluster of circumstances must now be factored the 'social isolation' required by the current viral pandemic. This has left B living in unsatisfactory circumstances with no outside space and with limited contact to either his brother or mother. I am told by F's counsel that B has been stoic and mature. Nonetheless, I consider that both the Guardian and the Local Authority are right to emphasise his vulnerability and the present fragility of his situation. Ultimately, I have come to the conclusion that this tips the balance in favour of prioritising the children's family life and emotional well-being over the legitimate public interest in identifying the Local Authority and the relevant professionals.

21. The father, who is a key worker, was not able to attend the hearing of this application but had instructed solicitors and counsel as to his position. F remains very angry with this Local Authority. This is rooted in the earlier litigation and can only have been exacerbated by the issues I have analysed in my judgment. F's view was that the Local Authority and the social workers should be named. Ms Budden, acting on his behalf, advanced F's case with great fidelity to her instructions but she recognised and acknowledged that the father would prioritise his children's welfare above anything else. F did not have the advantage of hearing the arguments himself. I had a sense that his position may have reflected an instinctive reaction rather than a carefully considered conclusion.

22. As I have highlighted, the press was not afforded the opportunity, by the parties, to make any representations here. I hope it is clear that I have given the Article 10 arguments considerable weight in the course of my analysis. I make it clear however, that should the press wish to make representations to dislodge the anonymity that I have granted, they are entirely at liberty to make an application. I propose that this judgment will be sent directly to the Press Office in addition to being published on Bailii.