

## MEDIA ACCESS

# Eyes wide open

*Sarah Williams considers an application by a journalist for a disclosure order in the context of steps towards further transparency in the family courts*

In *Newman v Southampton City Council* [2020], Ms Newman, a professional journalist with a long-standing interest in the workings of the family courts, had applied for the wholesale disclosure of the court file. Roberts J refused Ms Newman access to the entire file and permitted only limited disclosure. As this was the first recorded judgment of the High Court to address the issue of journalistic access to a court file in public law family proceedings, it naturally attracted a lot of media attention.

In *Newman v Southampton City Council (No 2)* [2020], the court was concerned with the issue of costs and an application for permission to appeal arising out of the earlier substantive decision.

This article examines the tension between the need for transparency in family proceedings against the right of confidentiality, and especially in proceedings which reveal intimate personal aspects of the parties involved.

## Background

When the child's mother came to live in England 20 years ago, she trained as a nurse. She met the child's father ten years later. When the child was born in 2012, her parents had already separated. The child had some developmental speech and language issues and 'severe' allergies.

The first concerns raised about the mother's care of her daughter were on her presentation at hospital in October 2014 and May 2015. On both occasions, the child was admitted as an emergency with respiratory problems and the mother had administered medication in the form of an EpiPen. The local authority was concerned that the mother was overprotective in the 'inappropriate' use of the EpiPen and the mother was arrested by the police on suspicion of fraud and neglect.

With no other family members available to care for the child, she was placed in foster care and an interim care order was made in June 2015, confirming the child's placement with the foster carers.



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In March 2016, the care plan was amended for the child to live with her father, to which the mother consented, and a final care order was made in those terms. All parties signed a threshold document, recording the factual basis for the care order, which confirmed that the risk of significant harm to the child in her mother's care in June 2015 was such that she should now live with her father. In particular, the threshold document recorded that the mother was

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an overprotective parent who was not fully informed about the potential dangers of using an EpiPen. In this regard, the mother asserted that she used the EpiPen in the honest but mistaken belief that her child was suffering a severe allergic reaction and she accepted that her training as a nurse should have led to a more appropriate response.

On the breakdown of the care plan, the mother brought an application to discharge the care order, leading to a four-day hearing before HHJ Hess in June 2016, who rejected the mother's application to discharge the care order and authorised the local authority to place the child for adoption.

In early 2018, the matter first came before the Court of Appeal. King LJ delivered the judgment (*Re M (A Child)* [2018]), setting aside the placement order and remitting the matter for a rehearing. During the summer of 2018, the mother engaged positively with the local authority and the experts in the case, and consequently the expert assessments were positive for the mother. The child was returned to the full-time care of the mother and the local authority plan was amended to one of rehabilitation within the family. At this point, the child was six years old and had spent over half of her life in foster care.

On being remitted, the matter was listed before HHJ Levey in October 2018. Ms Newman sought access to the court file, having become interested in this case, along with other journalists, following the decision in the Court of Appeal. Specifically, Ms Newman was interested in the number of cases under this particular local authority which had resulted in adoption orders being made, as she felt this percentage was unusually high.

There was a consensus from all the parties that the care proceedings should be discharged and substituted with a six-month supervision order. The only contentious issue remaining was the extent to which there should be a relaxation of the existing reporting restrictions. HHJ Levey permitted the reporting of the judgment at first instance of HHJ Hess on an anonymised basis. He also approved a reporting restriction, which had the effect of restricting the reporting of information about the family, which was already in the public domain following the judgment of the Court of Appeal in February of that year.

Ms Newman remained in touch with the mother who did not oppose her application for the disclosure of the court file. However, both the local authority and the child's guardian opposed the reach of the application.

At this stage, Ms Newman had access to the original judgment of HHJ Hess delivered in 2017, in addition to the reported judgments in the case, ie the two Court of Appeal judgments reported as *Re M* and *Re R (A Child)* [2019]. Roberts J described these judgments as containing:

*The Family Procedure Rules state that no document, or copy of a document, which is filed or lodged with the court office may be inspected by any person, or issued to any person, without specific permission of the court.*

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... a significant amount of material about [the child's] early life, her medical history and the events which led to her being removed from, and ultimately returned to, her mother's care.

However, Ms Newman sought further disclosure.

### Relevant law

Section 12(1)(a), Administration of Justice Act 1960 (AJA 1960) provides:

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;

It is important to note that the disclosure of information or documents to a journalist is a form of publication for these purposes, even if the material disclosed is anonymised.

The inherent confidentiality of documents concerning family proceedings is further reinforced by r29.12(1), Family Procedure Rules 2010 (FPR 2010), which states that no document, or copy of a document, which is filed or lodged with the court office may be inspected by any person, or issued to any person, without specific permission of the court.

Although the Children Act 1989 (ChA 1989) was not engaged at this stage in *Newman*, as the proceedings concerning the child had concluded, Parliament's intention with regard to the publication of family proceedings is set out in s97(2), ChA 1989 and provides that:

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.

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### **Evolving transparency**

In recent years, there has been a move towards increasing open justice and transparency in the family courts. In 2009, the then president of the Family Division, Sir Mark Potter, issued guidance following the government's announcement that duly accredited representatives of the media could attend family proceedings (*President's Guidance (Applications Consequent upon the Attendance of the Media in Family Proceedings)* [2009]). While a judge retained residual discretion to exclude the media, the default position from that point on was that, subject to statutory or judge-imposed restrictions on publishing material or reports of the proceedings, the doors of the family courts were open to journalists.

The 2009 guidance confirmed that in cases involving children, the court would need to consider the proper application of the existing statutory provisions, including s12, AJA 1960. It also acknowledged that the reach of this protection might need to extend beyond the individual children involved in proceedings, such as witnesses and other parties.

However, the guidance also recognised that there will be cases where access to statements and documents might give a fuller understanding of the matter. Thus, in response to a request from the media to see such documents, the guidance stated that case summaries and position statements from the parties' legal representatives (and later extended to include other documents that would appear necessary to a broad understanding of the issues in the case) would not be problematic, provided the parties consented to their release.

Amendments made to the Family Proceedings Rules 1991 were later encapsulated in FPR 2010, in particular r27.11(2) (as to who may be present at a private hearing, including duly accredited representatives of news gathering and reporting organisations), and provide for the implementation of the 2009 guidance and thus the admission of the media to family courts save where the exclusion of the media is necessary in the interests of any child, party or witness concerned.

In *Norfolk County Council v Webster* [2006], a matter which also involved potential care proceedings, Munby J (as he then was) outlined fundamental principles pertinent to this case, ie:

- Miscarriages of justice in the family justice system are possible and there is a need to maintain public confidence in its workings.
- Freedom of speech, as guaranteed by Art 10 of the European Convention on Human Rights (ECHR), constitutes one of the essential foundations of a democratic society.

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- The press and media play a vital role in ensuring the proper functioning of democracy and in furthering the rule of law and the administration of justice. In this context a court reporter is, in effect, the ‘public watchdog’ over the administration of justice and to this end investigative journalists and the media in general have ‘an absolutely vital role’ to play in ‘righting judicially-inflicted wrongs and highlighting miscarriages of justice’.
- Where the court is exercising an essentially paternalistic or quasi-parental role in relation to a child, this remains an exception to the rule of publicity.
- The court retains the ability to relax and increase these restrictions and the exercise of this power will involve the carrying out of a highly fact specific balancing exercise where conflicting rights under Art 8 (right to respect for private and family life) and 10 (freedom of expression), ECHR will often be engaged. The court must focus on the justifications advanced for interfering with, or restricting, each right and the proportionality test must be applied to each.

The House of Lords in *Re S (A Child)* [2004] gave important guidance as to how that balancing exercise might be undertaken. Lord Steyn remarked upon the interplay between Arts 8 and 10 when he stated (at para 17):

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.

In July 2011, the then president Sir Nicholas Wall issued, jointly with Bob Satchwell, executive director of the Society of Editors, a paper titled *The Family Courts: Media Access & Reporting* (see: [www.legalease.co.uk/family-courts-media](http://www.legalease.co.uk/family-courts-media)) setting out the current law. In the preface,

the growing debate on increased transparency and public confidence in the family courts was recognised and that consideration of this difficult and sensitive area would need to include the questions of access to and reporting of proceedings by the media, while maintaining the privacy of the families involved.

Then, in 2014, as the then president of the Family Division, Sir James Munby issued practice guidance titled *Transparency in the Family Courts: Publication of Judgments* (see: [www.legalease.co.uk/transparency-guidance](http://www.legalease.co.uk/transparency-guidance)), which led to a significant increase in the number of judgments available on public platforms. This was supplemented in December 2018 by the

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current president of the Family Division, Sir Andrew McFarlane (see: [www.legalease.co.uk/anonymisation-guidance](http://www.legalease.co.uk/anonymisation-guidance)), with further instruction on the anonymisation of such judgments.

In October 2019, Sir Andrew McFarlane published guidance for family judges on how to approach an application by a journalist such as in *Newman* and, in particular, how to approach the balancing exercise between privacy and transparency when Arts 6, 8 and 10, ECHR are engaged and 'having regard to the best interests of any child as a primary consideration' (see: [www.legalease.co.uk/presidents-guidance](http://www.legalease.co.uk/presidents-guidance)).

Most recently, in his *View from the President's Chambers* (see: [www.legalease.co.uk/presidents-view](http://www.legalease.co.uk/presidents-view)), Sir Andrew McFarlane wrote that he intended to establish a transparency review and that the aim of the review would be 'to consider whether the current degree of openness should be extended, rather than reduced'. This review is ongoing (see: [www.legalease.co.uk/call-for-evidence-family](http://www.legalease.co.uk/call-for-evidence-family)).

### Submissions

Ms Newman sought access to the court files so that she could undertake an assessment as to whether they contained information that should be available to the public at large – after all, she asserted, this was an important debate concerning a child taken into care 'on the slimmest of evidence'. She accepted, however, that if she sought to publish any of the details she would need the permission of the court, and the court would conduct the balancing test between the Art 10 rights of the media and the Art 8 rights of the child (and anyone else affected by the publication).

Counsel for Ms Newman submitted that the focus needed to be the assessment of risk of harm from access to the files, as opposed to the publication of the files, and that the risk to the child was 'vanishingly small'. Her counsel then drew attention to the wider public interest issues, ie the open justice principle and the Art 10 rights of journalists to report on such proceedings and the corresponding rights of the public to receive such information. Further, if Ms Newman had access to the entire file, it would avoid the danger of inaccurate



reporting. Essentially, her counsel concluded, if the media are to discharge their function as a public watchdog, they must be able to examine the materials on which the courts reach their decisions.

The local authority primarily opposed the width and breadth of Ms Newman's request, a request that was unprecedented. It submitted that the full judgment of King LJ in the Court of Appeal exposed the flaws in the original placement order, thereby fulfilling its own checks and balances.

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Counsel for the guardian gave significant weight to the child's rights under Art 8(1), did not believe that disclosure was in the child's best interests and submitted that the correct approach was to ask two questions, ie:

- Where do this child's interests lie?
- What weight should be attached to those interests in light of the competing interests of the press under Art 10?

Counsel submitted that there was a very strong public interest in maintaining privacy in proceedings which concern children and more so where the disclosure is not for a family member, but a journalist who is a stranger to the child concerned. Essentially, the best interests of a child will always be the court's primary concern: the paramountcy principle goes merely to weight in any case where that principle is properly applied.

## Judgment

In considering her approach to this matter, Roberts J described Ms Newman's application as a request to see if this local authority acted lawfully in commencing care proceedings in respect of the child and that '[a]t the end of the day, it is not for journalists to determine the *lawfulness* of any particular decisions taken by judges or public bodies' (para 119), adding:

In this case, the important check and balance which exists as a function of the appellate process intervened to put right the potential injustice for this child which it agreed had occurred.

With regard to the disclosure of the medical records, Roberts J was obliged to balance Ms Newman's Art 10 rights with the fact that the records might disclose some information regarding the child which was not already in the public domain. Having regard to the child's best interests, such a step would 'represent a clear court-directed intrusion of this child's most

basic and fundamental rights to a private family life', and if those rights were to be the subject of court-sanctioned interference, 'there has to be a proper justification' (para 136). The judge concluded that she was satisfied that Ms Newman had sufficient material about the medical history of both the child and the mother.

Roberts J added that she would adopt the same approach with the contact records, namely that their release would amount to a significant interference with the child's Art 8 rights to a private family life (paras 139-140).

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With regard to the child protection conference and multi-agency minutes, while Ms Newman submitted that their release was essential for her understanding of the local authority's policy and approach to child protection issues, Roberts J denied this request and found that child protection professionals should not be constrained by concerns over confidentiality (paras 144-145).

However, the judge adopted a different approach to the reports and assessments relating to the mother, and the balance fell in favour of Ms Newman being granted access, redacted as required to preserve the rights of any third parties. The release of these reports, position statements and case summaries was justified to contextualise the information already available (paras 155-156).

In her concluding remarks, Roberts J was at pains to point out (at para 162) that she was not deciding matters of general principle, but rather this was a:

... targeted and fact-specific exercise which has involved a careful balancing exercise of all the competing rights involved as between the individual parties to this particular case...

and that (para 163):

The principle of transparency and openness is of crucial importance in a democratic society. There have been significant developments towards greater transparency in the Family Courts but any wholesale departure from the principled and well-recognised protection afforded to the interests of children is one which will need to be informed by a careful evidence-based review.

While Ms Newman was not required to pay towards the costs of the substantive application, the local authority sought £1,200 for the costs of redacting and copying the documents authorised for release. Ms Newman agreed to fund the costs of the redaction but as she was not financially backed by a media organisation and her legal team had acted pro bono, Roberts J ordered that she was only required to pay limited costs towards the copying. The decision



in *Newman* goes some way to ensuring that the costs of similar applications should not be prohibitive and provide some comfort to other journalists seeking similar applications in the future.

## Conclusion

This judgment reiterates the public interest in respecting and maintaining the privacy of the parties involved in family proceedings. The disclosure of documents to external interested parties, particularly in the digital age, when material can be published widely, requires the court to balance the fundamental rights of confidentiality within the proceedings against the need for transparency within the workings of the family court. In this case, significantly, the judge made a clear distinction between forbidding disclosure in relation to the child and allowing further, albeit limited, disclosure pertaining to the mother. While the media generally might be critical of this judgment, it does acknowledge the evolving need for transparency while still fiercely protecting the private rights of the child within the context of family law proceedings.

As Bodey J remarked in *Tickle v Council of the Borough of North Tyneside* [2015] (at para 7), '[t]hese are not easy applications. They require time, effort, research and expense on what is essentially a satellite issue'. Thus, for practitioners concerned with an application such as this, it is worth bearing in mind any application should be carefully targeted and proportionate, having regard to the court's paramount consideration for the child's welfare and the requirement to balance the right of privacy with the need for transparency.

On this note, while it is not yet clear when Sir Andrew McFarlane will publish the findings of his transparency review, it will be eagerly awaited. ■

*Re M (A Child)*

[2018] EWCA Civ 240

*Newman v Southampton City Council & ors*

[2020] EWHC 2103 (Fam)

*Newman v Southampton City Council & ors (No 2:*

*costs and the application for permission to appeal)*

[2020] EWHC 2148 (Fam)

*Norfolk County Council v Webster & ors*

[2006] EWHC 2733 (Fam)

*President's Guidance (Applications*

*Consequent upon the Attendance of*

*the Media in Family Proceedings)*

[2009] 2 FLR 167

*Re R (A Child)*

[2019] EWCA Civ 482

*Re S (A Child) (identification:*

*Restrictions on Publication)*

[2004] UKHL 47

*Tickle v Council of the Borough of*

*North Tyneside & ors*

[2015] EWHC 2991 (Fam)

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