A Mother v A Father & Ors [2009] EWCA Civ 1057

Case No: B4/2009/1500

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, FAMILY DIVISION,
PRINCIPAL REGISTRY
THE HONOURABLE MR JUSTICE HEDLEY
LOWER COURT NO. ME 09 C 00023

Royal Courts of Justice
Strand, London, WC2A 2LL
14/10/2009

B e f o r e :

LORD JUSTICE WILSON
LORD JUSTICE ETHERTON
and
LORD JUSTICE SULLIVAN

Between:

A MOTHER	**Appellant**
- and –	
A FATHER	**First Respondent**
- and –	
A LOCAL AUTHORITY	**Second Respondent**
- and –	
'A' A CHILD, BY HER CHILDREN'S GUARDIAN	**Third Respondent**

Mr Philip Newton (instructed by Holden and Co) appeared for the Appellant.
Miss Caroline Topping (instructed by Berry and Berry) appeared for the First Respondent.
Miss Alison Moore (instructed by its Legal and Democratic Services) appeared for the Second Respondent.
Mr Daniel Kingsley (instructed by Kingsfords) appeared for the Third Respondent.
Hearing date: 2 September 2009

HTML VERSION OF JUDGMENT

Lord Justice Wilson:

1. In highly unusual circumstances a mother appeals from a direction made in care proceedings by Mr Justice Hedley, sitting in the High Court, Family Division, Principal Registry, on 3 July 2009, that certain evidence referable to her which has been filed in the proceedings should be disclosed to another party thereto, namely the father, who is also her husband and with whom she presently cohabits. In principle her case is that the evidence is of a supremely sensitive character which, if disclosed to the father, might well have the most serious adverse consequences both for her, for certain female members of her family and, indeed, whether directly or indirectly through herself, for the child who is the subject of the proceedings. But her case before the judge, as also before this court, was cast on a narrower basis, namely that, before it could properly determine the likelihood and severity of the allegedly adverse consequences of disclosure, the court should permit completion of a professional risk assessment in relation to them.

2. In the event, by a reserved judgment handed down on 3 July 2009 following a hearing on 10 June, the judge made a robust decision not to permit completion of the risk assessment but rather, then and there, to permit disclosure of the evidence to the father. As I will explain, the evidence was already in the hands of the father's solicitors and counsel; and so the judge gave them liberty to disclose it to the father no earlier than 17 July. Although he refused the mother's application for permission to appeal, the judge's direction for a stay of a fortnight in the disclosure of the evidence to the father, designed by him to enable the parties to discuss the optimum method of effecting disclosure, enabled the mother to approach this court for a further stay of execution pending appeal. She duly obtained an extension of the stay, with the result that the father's lawyers have not yet been enabled, and have not, disclosed the evidence to the father.

3. In the light of the unusual nature of the application which he had determined, the judge directed that, in a form which he considered properly to reflect the need for anonymity, his judgment might be made public and reported. It is thus in the public domain under neutral citation number [2009] EWHC 1574 (Fam) and is already now noted in Vol. 39 (2009) Family Law at 926. Naturally the judgment identifies the evidence around the disclosure of which the dispute has turned. I confess that it crossed my mind that, in the light of the declared aspiration of the mother to seek to appeal to this court, it was unwise of the judge to permit publication of his judgment in advance of the outcome of the proposed appeal. For, although a stranger to the family would, by reason of its anonymisation, be unable to use the judge's judgment in order to trace the family, there is material within it, for example the date of birth of the child and the destination of a significant holiday taken by the mother in October 2008, which would lead members of the local community with existing knowledge of the family readily to recognise that it was the subject of the judgment. We are told, however, that there is nothing to indicate that publication of the judge's judgment has yet led to the identification of the family and thus to the leakage of the evidence to the father; and, in that the judge's judgment has been in the public domain for three months, there is no practicable way of withdrawing it.

4. We conducted the hearing of the appeal on 2 September 2009. Following preliminary submissions we directed, exceptionally, that the substantive hearing should be conducted in private pursuant to CPR 39.2(3)(a) and (d). We announced that direction in public. At the same time we announced that, were the appeal to be dismissed, our judgments would be delivered in open court in the normal way; but that, were the appeal to be allowed, we would deliver our judgments in private but on the footing of an undertaking, which the child's guardian had given to us, to inform this court in writing, on notice to the other parties, if the proceedings before the judge were later to develop in such a way that in her view it was at any rate arguable that the need for privacy of our judgments no longer obtained.

5. In her appeal the mother is supported both by the local authority and by the guardian. It is, of course, opposed by the father or, more accurately, by Miss Topping of counsel, and by his solicitors, on his behalf. As I will explain, the father has since as long ago as March 2009 been aware that court hearings were taking place in order to determine an issue whether

certain of the evidence filed in the proceedings should be disclosed to him. It is unclear whether he has become as desperately inquisitive about the material, and as angrily perplexed about the failure of the courts to date to resolve that issue, as one would expect him to have become. There is no doubt, however, that he, Miss Topping and his solicitors have been placed in a highly uncomfortable situation for an unfortunate length of time.

6. The child who is the subject of the proceedings is a girl, A, who was born on 24 November 2006 and so is aged nearly three. She is the only child of the marriage between the mother and the father. The ethnic origins of both parents lie in Pakistan; and they are both, at any rate nominally, of the Muslim faith. They are first cousins and their marriage, which took place in Pakistan in 2004, was arranged by the family. Whereas, however, the mother was born and brought up in England and is a British citizen, the father was born and brought up in Pakistan; and he moved to England only in 2005 by reason of the marriage. Although the parents together occupy accommodation of their own in Maidstone, they live in close proximity to other members of the family of the mother, being also the family of the father. The head of the overall family unit appears to be the father of the mother, being also an uncle of the father. He separated from his first wife, the mother's mother, and, following her later adultery, he divorced her; he appears recently to have remarried. Other members of the family who are important for present purposes are a younger sister of the mother, whom I will describe as "the sister"; the sister's husband, of Afghan ethnicity, who stabbed her with a knife and is now serving a sentence of imprisonment in excess of six years; the two-year-old female child of that marriage, for whom the sister cares; and an aunt of the mother, who was married, was the victim of domestic violence and is now divorced, and whom I will describe as "the aunt".

7. The mother speaks fluent English and Urdu. The father speaks very little English and primarily speaks Urdu. No doubt such is the language in which they communicate.

8. Soon after A's birth the local authority became concerned about the capacity of the parents, in particular the mother, to care effectively for her. The mother, who has been assessed as suffering a mild/borderline learning disability, appeared inconsistent in her parenting of the baby; unable to implement a routine for her; and liable too easily to become frustrated with her. The local authority also noted allegations that the father was perpetrating acts of domestic violence on the mother. They were also increasingly concerned about developmental delay on the part of A in both physical, behavioural and emotional terms. Matters came to a head in October 2008. For several weeks the father left the home pursuant to a request by the local authority; but the mother's ability to provide sole care for A was considered to be lacking. From 1 December 2008 until 27 January 2009 the mother and A were placed together in a foster placement; but, allegedly, that effort to assist the mother to develop necessary caring skills also failed. Since 27 January 2009 A has been placed without the mother in a short-term foster home. Both the mother and the father have returned to their home, where they live together. They have regular supervised contact with A and, at present, put themselves forward to the court as a unit to whom it would be in A's interests to return. It is too early to predict whether, in their care plan, the local authority will contend for a long-term out-of-family placement for A and, if so, whether the guardian will agree with it.

9. In October 2008, perhaps unusually in terms of the culture of the family, the mother went on an all-female holiday to Turkey. There were five members of the party. The mother took A; and the sister and the latter's daughter went too. There has been some confusion whether the fifth member of the party was the mother's mother or the aunt but it now seems likely to have been the latter.

10. On 20 October 2008 the party returned from Turkey; and on that day Ms Goddard, the social worker allocated to A, visited the mother. During the visit the mother informed her that in Turkey she had had sexual relations with three different men whom she had met there, apparently on one occasion with each man; that the sister and the aunt had encouraged her to do so; that on one of the occasions A had been sleeping in the next bed while it took place; that on the two other occasions the sister and the aunt had cared for A; that she, the mother, had loved one of the men, who had referred to her as his wife and to A as his daughter but

that, on the last day of the holiday, he had failed to adhere to an arrangement to see her again; and that, were the father to discover this information, she would be killed.

11. Later that day Ms Goddard visited the sister. She confirmed that the mother had had sexual relations with three men; denied that A had been in the same room on any of the occasions; expressed surprise that the mother had volunteered this information to Ms Goddard; stated that, although the father had had sexual relations with other women during the marriage, it was not accepted in any way in their culture that a wife could commit adultery; that, were the father and/or their own father to discover the mother's acts of adultery, there would be likely to be an honour attack; and that not only the mother but she, the sister, and indeed also the aunt, would be in danger.

12. In the ensuing days it became clear to the local authority and to linked professionals working with the family that the mother and the sister were indeed profoundly concerned about the consequences of divulging the mother's acts of adultery to the father or to their own father. Later the mother was to allege that she had made the disclosure to Ms Goddard only in strict confidence; but Ms Goddard denied that she had been invited to receive the disclosure on that basis and unsurprisingly stated that it would not in any event have been open to her to do so.

13. Apart from one unfortunate mistake to which I will refer in [16], there is no criticism of the way in which the local authority have sought to manage the difficult situation in which their receipt of the information has placed them. At a child protection conference held in relation to A on 5 November 2008, the family members were invited to leave the meeting so that Ms Goddard could refer to the disclosure; indeed a speech and language therapist confirmed to the meeting that the mother had made a similar disclosure to herself. In the separate, confidential, minute of this part of the meeting the local authority recorded concern that the three women would be at some risk if the disclosure was shared with the father and with the mother's and sister's own father. But care proceedings in relation to A were not by then afoot and so the acute problem generated by the need to make all relevant disclosures to the court had not arisen.

14. In December 2008 the local authority received further material about the mother, arguably no less important, at any rate in terms of her parenting of A, than the adultery in Turkey. For on 12 December 2008 the foster carer with whom both A and the mother had recently been placed informed Ms Goddard that the mother had claimed to her that she was bisexual and had told her that she wanted a sex-change. Let me hasten to recognise that her possible bisexuality and her possible ambivalence about her own true or natural gender are entirely different. Perhaps most worryingly of all, the foster mother reported that the mother had told her that, at home, she had encouraged A to refer to her as "Daddy" and had, for example, invited her to come to herself with the words "Come to Daddy". In separate notes later seen by Ms Goddard the foster mother wrote that the mother had also touched her inappropriately and had said that she had the "hots" for her. The foster mother also related that the mother claimed that she and the sister wished to move to London in order to be able to go clubbing and to meet men. On 20 December 2008 the mother also told Ms Goddard herself that she was bisexual but denied having had any actual sexual experience with a woman.

15. Henceforward in this judgment I will refer both to the mother's admissions of adultery in Turkey and to her assertions in relation to her possible bisexuality and gender ambivalence under the compendious rubric of 'the material'.

16. On 29 January 2009 the local authority issued their application for a care order in relation to A in the family proceedings court. Fortunately the parents instructed separate solicitors and counsel. On 6 March 2009 the proceedings were transferred to the local county court. The local authority had by then recognised that they should seek the court's direction in respect of the disclosure of the material to the father. For the purposes of the first hearing before the circuit judge, fixed to take place on 17 March, evidence was filed on behalf of the local authority and the mother; it was not intended that any of it should be served upon the father's solicitors but, by mistake, the local authority served them with the separate, confidential,

minute of the child protection conference held on 5 November. Very responsibly, the father's solicitors decided not to disclose its content to the father himself until the court had clarified their position.

17. In her statement dated 9 March 2009 Ms Goddard, having identified the material, averred that the sister had by then told her that, were the material disclosed, the risk of an honour killing would be low but that in her view she, the mother and the aunt would all be cast out from the family; that the first foster mother had noted the mother's allegation that her own father had tried to break her neck; that both the mother and the sister appeared to believe that, irrespective of their own immediate reaction to disclosure of the material, the father and their own father would both be subjected to pressure by wider members of the local Pakistani community to restore family honour; but that, quite apart from the normal right of the father to have access to all the evidence before the court, the material was of *prima facie* relevance to professional assessments necessary for the proceedings; and that the court was confronted by a difficult balancing exercise.

18. In her statement dated 13 March 2009 the mother sought to make clear that, whereas the father had sometimes pushed and slapped her, he had never hit her. She stated that she had indeed committed adultery with the three men in Turkey, albeit pursuant to encouragement on the part of the aunt and the sister; that A had not been present during any of the acts of adultery; that the adultery had been a huge mistake; that Ms Goddard had assured that her admissions to her would never be disclosed to the father; that she feared for the life of herself, of the sister and of the aunt, in the event of disclosure; that, even were she not to be killed, she would be disowned; that, obviously, her marriage would in any event come to an end; that the shame consequent upon disclosure would extend to A herself, with the result that she would also be despised and disowned; that in that way A's own life would be ruined and that, when an adult, she would find it difficult to find a husband within the community; that disclosure would create a risk either of an honour killing or at least of a violent assault on herself, the sister and the aunt from male members of the family; and therefore that, were disclosure to be directed to take place, they would all be in need of safe accommodation.

19. It had sensibly been arranged that, at the hearing before the circuit judge on 17 March, the parents would not themselves attend. In the event the circuit judge transferred the matter for hearing in the High Court on the following day and, again, excused and no doubt discouraged the parents from personal attendance at it. By the recital to his order, the circuit judge helpfully defined the issues referable to the deemed application of the local authority for directions as to disclosure. The formulation of the final issue now carries some significance: it was "whether and to what extent female members of the mother's family who may be affected by this disclosure should be given the opportunity to make representations".

20. The High Court judge before whom the application came on the following day, 18 March 2009, was Mr Justice Hedley. He adjourned it for determination by himself on 26 March, namely eight days later. Counsel for the father, probably Miss Topping, appeared before him. She and her solicitors no doubt had a clear indication of the nature of part of the material by virtue of the local authority's mistaken service of the copy of the confidential minute. But the formal evidence filed in respect of the application had not been served upon them. The main purpose of the judge's adjournment of the hearing was to give Miss Topping and her solicitors the opportunity to seek the father's waiver of his right to the onward disclosure to himself of all material disclosed to them, in order that, at the adjourned hearing, the material could be disclosed to them on that basis and that they could therefore more effectively join in the debate as to the proper determination of the application.

21. By the time of the adjourned hearing on 26 March 2009, Miss Topping and her solicitors had duly secured waiver on the part of the father of the right to which I have referred. Thus, at that hearing, all the evidence filed in respect of the material was served upon them. By then there was some further evidence. For on 17 March the guardian had spoken by telephone to the sister; and, although the guardian's written note of the conversation was compiled only on 12 April, no doubt the gist of the conversation was relayed orally to the court. The sister told the guardian that in her view disclosure of the material would place the mother at serious physical

risk from male members of the family, who would come under pressure from the wider community to take action. She suggested that the risk for the mother was heightened by the family's existing perception that the mother was a poor home-maker for the father. The sister also expressed great concern for the safety of herself, of her daughter and of the aunt in that she and the aunt might be regarded as having been complicit in the mother's acts of adultery in Turkey.

22. At the hearing on 26 March 2009 the judge made a series of directions. In the light of the father's waiver, the judge formally directed that the material be not disclosed to him until further order. He also permitted the parties jointly to instruct Mrs Hossain to make two assessments, namely an assessment of the risk posed to the mother and other female members of her family if the material were to be disclosed to the father and also an assessment of the ability of the parents, jointly or separately, to care for A. Mrs Hossain is a social work consultant with extensive experience as a social worker and a Children's Guardian. She was born and educated in India; she is a Muslim; and her mother tongue, in which she continues to speak fluently, is Urdu. She has particular experience of working with Muslim families and, more generally, in cases in which ethnicity, race and culture are issues. Of course Miss Topping had no instructions actively to consent to the instruction of Mrs Hossain; but she did not oppose it. All three other parties consented to it. In those circumstances it would be wrong to surmise that the judge spent long in pondering the necessity of obtaining a risk assessment. In my view, however, it was undeniably necessary for the court to have the benefit of such an assessment before ruling on the issue as to disclosure.

23. It was also, however, agreed on all sides at the hearing on 26 March 2009 that Mrs Hossain should be instructed not to speak to the father or to the mother's father or to any other male member of the family; and, in the joint letter of instruction dated 23 April 2009, that prohibition was made clear. Mr Kingsley, on behalf of A by her guardian, told us that, at the hearing on 26 March, he had well in mind that, at a subsequent hearing, the prohibition might need to be lifted in order that Mrs Hossain could complete her assessment; but that, at that preliminary stage, there was disquiet that Mrs Hossain might be unable to interview the male members of the family without, in effect, disclosing the material; and that in his view therefore the decision whether to remove the prohibition would need to be taken in the future in the light, in particular, of whether Mrs Hossain considered both that she should interview them and that she could do so without, in effect, disclosing the material. Miss Topping, however, told us that her insistence that Mrs Hossain should be prohibited from interviewing her client reflected her inability to explain to him the purpose of the interview and thus to advise him whether to participate in it. By their joint letter of instruction, the parties did not specifically encourage Mrs Hossain to interview the mother, the sister and the aunt; but they clearly implied that it was open to her to do so. Miss Moore on behalf of the local authority told us that on 26 March her view was that interviews by Mrs Hossain with the sister and the aunt might be considered to afford them the "opportunity to make representations" which the circuit judge had listed as the final issue surrounding disclosure.

24. In the event Mrs Hossain, who had been given only three weeks for the preparation of her risk assessment, decided not to interview even the female members of the family; she considered that it would be unfair for her to interview them without interviewing the male members. Her short report dated 14 May 2009 thus reflected only a paper exercise. In it she stressed the enormity of the sin of adultery in Islam; that the fact that until so recently the father had lived in Pakistan rather than in Britain might be relevant to his reaction to disclosure; that the influence of the mother's father could not be underestimated; that physical punishment of the mother was not impossible but "would be at the severest end", i.e. would be at the worst extremity of what might happen; and that, at the lowest end, there was the prospect of ostracisation and of isolation of the mother on the part of the family. Mrs Hossain suggested that it was necessary to assess the likely reaction of the father and the mother's father. She concluded her report as follows:

> "It is extremely difficult to assess the repercussions and the impact on [A] or any other family members without direct interviews with individuals. The subject of adultery in

Islam and within Muslim families is extremely complex and serious with enormous variations in belief and value systems. To do this based on reading of the papers alone would not be helpful to the Court at all and certainly not in the rights, interests or welfare of [A]."

25. At the hearing on 10 June 2009 Mrs Hossain gave oral evidence, of which we have a transcript. The general effect of her oral evidence, given at length, was clear: that the risks consequent upon disclosure could not be discounted nor yet measured, that it was important that she should be enabled to complete her risk assessment and that she should be allowed to interview the father and the grandfather. She said:

    (a) that, in that she had been entrusted with the task of also compiling a parenting assessment, she could conduct the risk assessment as part of it and could properly explain to the father and the mother's father the need to interview them on the basis that it was relevant to the parenting assessment; that she considered that, by talking to them about their beliefs, values and social and cultural attitudes, she could make a reasonable assessment of their likely reaction to disclosure without herself effecting that disclosure;

    (b) that the traditional approach of the community to issues of sexuality and of gender would be "total denial and I think if not worse than adultery", by which she seems to have meant that its likely reaction to such issues might be even more extreme than its reaction to a wife's adultery;

    (c) that the life of the father until recently in Pakistan placed a particular question-mark against his likely reaction to the material;

    (d) that it was as yet impossible for her to discount a significant risk of serious physical violence consequent against disclosure;

    (e) that the mother's fears required serious consideration;

    (f) that the risk of ostracisation of herself and of A was considerably higher than normal in the UK;

    (g) that the court needed to know more about the family;

    (h) that (by way of response to the judge's own question whether there was evidence that this particular family was of murderous or gravely violent propensity) there was no such evidence at the moment but that such evidence might emerge;

    (i) that, in that the mother and the sister had already explained their fears, it would be much more important for her to interview the male members of the family than to interview its female members;

    (j) that the risks to the sister and the aunt, as well as to the mother, had to be considered; and

    (k) that there was "sufficient here to be concerned".

26. The judge's own questions to Mrs Hossain clearly revealed his provisional thinking, namely that, in any community, the wife's conduct in Turkey would be regarded as outrageous and scandalous; that there was an absurd paradox in suggesting that, the more scandalous the behaviour, the greater the reason for non-disclosure; that the English court would never subscribe to a suggestion that in general the reaction of a Muslim family to such conduct would be murder or some other egregious breach of the law; and thus that the enquiry before him should be founded upon whether, in this particular family, there was evidence of extreme

conduct of that character. Of course this was a line of thinking which Miss Topping adroitly sought to develop. She asked Mrs Hossain to consider both that the mother's father's reaction to his first wife's adultery, albeit apparently committed following their separation, was to divorce her rather than to injure her and that the sister had not been ostracised from the community by marriage to a man of different ethnicity. Miss Topping did not, however, manage to dislodge Mrs Hossain from the strong view that, in A's interests, her risk assessment should be allowed to be enlarged and completed.

27. In his short, tightly-drawn reserved judgment, the judge embarked at an early stage on consideration of the jurisprudence surrounding non-disclosure of evidence, specifically in family proceedings, of which the foundation was laid in the speech of Lord Mustill in *In re D (Adoption Reports: Confidentiality)* [1996] AC 593 at 615D – H. Thus the judge reminded himself that non-disclosure should be the exception and not the rule and that the court should be rigorous in its examination of the risk and gravity of the feared harm to the child (also – so we must now add – to all others whose rights under Article 8 of ECHR 1950 are engaged) and should order non-disclosure only when the case for doing so was compelling. The judge stated that the admitted conduct of the mother in Turkey would be likely to elicit a fairly fervent response from even the most tolerant spouse, irrespective of his cultural milieu; and, equally, that many might be angered or even outraged at expressions of bisexuality or gender ambivalence. The judge considered that, within the particular family, there was no such history of domestic violence as should alert him to a propensity within it for serious violence and that there was no sufficient basis for concluding that the father or the mother's father would, or might reasonably be expected to, behave in the way feared. The judge concluded by acknowledging that the fears of the mother and of the sister were "genuinely experienced" but averring that, in the absence of evidence of a propensity of violence in the family, the mere fact that the family belonged to the Pakistani Muslim community could not justify further investigation or delay in disclosure; and that in the judge's view the conclusion applied equally, or even with greater force, to the material referable to bisexuality and gender ambivalence. The judge also came to a conclusion, wholly unsurprising when taken in isolation, that the material was relevant to a proper determination of the issues raised in the care proceedings.

28. The question raised by this appeal is whether in the event the judge observed Lord Mustill's injunction to be rigorous in examination of the risk and gravity of the feared harm. At the hearing on 26 March 2009 the judge did not dissent, could not reasonably have dissented, from the submissions at the Bar that a professional assessment of the risk was required; so he made the direction that Mrs Hossain should prepare it. What had occurred between 26 March and 10 June to eliminate or diminish the need for the assessment? Nothing at all. On the contrary, the only development was the contribution of Mrs Hossain herself, following paper review, to the effect that the expressed fears of the mother and sister could not be discounted and that the case required her to be enabled to interview the father and the mother's father, and perhaps also the three women, and to complete her report.

29. This leads to the question whether the judge squarely confronted Mrs Hossain's evidence and provided a reasoned acknowledgement of the fact that his decision ran contrary to her recommendation. In effect the judge's only reference to the contribution of Mrs Hossain was as follows:

> "Mrs Hossain gave oral evidence and said that she could not complete the risk assessment without speaking to the parties. In particular she needed to speak to [the mother's father] and the father (without of course disclosing the information) in order to be able to assess the magnitude of the risk and its capacity to be managed."

But, with great respect to the judge, the gist of Mrs Hossain's evidence was not that she was merely *unable* to complete her assessment without speaking to family members but that in her perception the circumstances of the case *required* her risk assessment to be completed; and that the fears expressed, namely that disclosure might lead to serious violence or, at least, to the ostracisation of the mother and of any child of hers, could not at that stage be discounted.

30. In the event the judge discounted the fears, at any rate of serious violence, without expressly acknowledging that he was doing so in the teeth of contrary evidence on the part of the expert. He did so by reference to the criterion which he had introduced at an early stage of the hearing, namely whether there was past evidence of serious violence within this particular family. I doubt whether such was a safe criterion for predicting the consequences of disclosure of material as *prima facie* shocking to the family as this. Moreover, in the light both of the mother's assertion that the father had perpetrated some violence upon her and that her own father had tried to break her neck, of the conviction of the sister's husband, albeit of different ethnicity, for an offence of serious violence upon the sister, and indeed also of the sister's assertion that the aunt had been subject to extensive domestic violence from the aunt's husband, I also doubt whether it was accurate for the judge to refer to "the absence of evidence of a propensity for violence within the family".

31. But, as Mr Newton on behalf of the mother made clear to us, the main objection to the judge's order is that the mother and the sister had postulated a risk of very serious consequences; that the judge accepted that their fears were genuine; that Mrs Hossain stated that they might be well-founded and so could not be discounted; that the mother and sister were never cross-examined in order that, in that way, the judge might test the basis for their fears; and that nothing had occurred since 26 March 2009 to justify the judge's *volte-face*.

32. My reference to the lack of oral evidence from the sister leads to a subsidiary point. Like the mother, the sister claimed that disclosure would also have serious adverse consequences for herself, her daughter and the aunt. It is common ground that the rights of those three persons under Article 8 were engaged. The circuit judge had defined the final issue as being whether and to what extent the sister and the aunt should be given the opportunity to make representations. At least by Miss Moore, Mrs Hossain had been regarded as an appropriate conduit for conveyance to the court of their views following interview. Although reference was made to their interests at the hearing on 10 June, there is no reference to them in the judge's judgment. In the absence of any consideration of the Convention rights of those three persons, I find it impossible to avoid the conclusion that, by mistake, the judge acted incompatibly with them.

33. I believe that I know what drove the judge to take the excessively robust line in his judgment dated 3 July 2009. In the course of Mrs Hossain's oral evidence the judge observed that non-disclosure would cause havoc with the psychiatric evidence. Valid though that observation was, the judge might well have cast his concerns about the effect of non-disclosure on the overall proceedings in much broader terms. At any rate my own concerns are much more broadly based. The court is in possession of material which, if disclosed to the father, would on any view, and irrespective of any other reaction on his part, give rise to a real prospect that he would elect to separate from the mother and to divorce her. Were the care proceedings to continue, without disclosure, on the basis that the alternative to a long-term out-of-family placement for A was her restoration into the joint care of the parents, the court could not but regard itself as proceeding on a wholly false dichotomy. Would it be in any way open to the court to accede to the parents' joint application in such circumstances? Could the court be confident that the material could be kept secret from the father indefinitely in any event? Is not A herself entitled to have a more solid case for her retention within the family put forward, namely one predicated upon the father's informed decision whether to separate from and to divorce the mother and, in those circumstances, perhaps upon his presentation of himself as a sole carer for A (and indeed perhaps upon an analogous presentation by the mother)? All three counsel who argued to us in support of the appeal readily acknowledged the grave difficulties which would attend an ultimate decision not to permit disclosure of the material. But for the judge, such concerns, not articulated in judgment but surely a factor driving his conclusion, should have been down the line. The court's choice between disclosure and non-disclosure has to be made on an informed basis. The grave complications attendant upon non-disclosure have to be weighed against the risks, potentially of great seriousness, attendant upon disclosure. The judge's decision was premature. Even if the ultimate decision were to be to authorise disclosure, it would be likely that the court would need to consider whether all the material needed to be disclosed and, in particular and probably with the help of Mrs Hossain, the least unsafe method of effecting disclosure. For the judge simply to have invited the parties during the following fortnight to devise the optimum method of effecting

disclosure was consistent with his view that the risks attendant upon disclosure were no greater than those which would obtain in any section of the national community; but, in the light of Mrs Hossain's completed report, it may prove to be an insufficiently cautious approach to the method of effecting disclosure.

34. It is for those reasons that I consider that the judge erred in the exercise of his discretion. I would allow the appeal; would set aside paragraphs 1 and 2 of the judge's order dated 3 July 2009; and, in the light of the continued delay and thus in preference to a remission at this stage of the matter to the judge for further directions, would substitute a direction that Mrs Hossain be authorised to interview all members of the family as she may see fit and to complete her risk assessment. Were she able to confirm that she would be likely to be able to complete her report by, say, 20 November 2009, I would direct that a further hearing for directions before Hedley J be at once fixed to take place during the following fortnight.

35. I should add that, on instructions, Mr Newton, supported by Mr Kingsley, made an appropriately delicate and respectful submission that it might be preferable for another judge of the High Court to be deputed to conduct the remainder of the proceedings. There is no doubt that, during the oral evidence of Mrs Hossain, the judge articulated in extreme terms the gravest criticisms of the mother's conduct in Turkey. In my view he was justified in so doing and it cannot be said, in particular of this very experienced judge, that he will not give the contentions put forward by the mother in the care proceedings the closest and fairest consideration. I would therefore refuse the application that the proceedings henceforward be conducted by a different judge.

36. By way of postscript I record the concerns articulated by Miss Topping in relation to the consent or otherwise to be given by the father to Mrs Hossain's proposed interview with him. Without being able to explain the purpose of the interview to him, how, asks Miss Topping, can she give such advice to the father as it is necessary for him to receive before he can make an informed consent whether to participate in it? I entirely respect Miss Topping's concern to conduct herself with meticulous professionalism; and I applaud the liaison with the Bar Standards Board which she has already initiated. I agree with her that, to the extent that Mrs Hossain was suggesting that her interview with the father around the subject of non-disclosure should be presented to him as part of her work in preparing a parenting assessment, such would be inappropriate. But, as the judge himself pointed out to Miss Topping when, during her cross-examination of Mrs Hossain, she sought to highlight this problem, the father already knows that one of the issues before the court relates to disclosure to him of material presently kept secret from him and he can properly be told that the proposed interview relates thereto. At first sight I would be very surprised if, on that basis, Miss Topping's professional duty was either to advise the father not to participate in the interview or even to inform him that she could not advise him whether to participate in it. But, if the result of Miss Topping's advice to the father, or indeed of her informing him that she was unable to advise him on the subject, were to be that he declined to be interviewed by Mrs Hossain, the moment would be ripe for a further, urgent approach, on notice, to the judge for further directions which might iron out the difficulty.

Lords Justices Etherton and Sullivan:

37. We agree with Wilson LJ, for the reasons he gives, that the appeal should be allowed and the matter proceed in accordance with the directions in paragraph [34] of his judgment. We add a short judgment of our own since this appears to be the first case in this Court in which Articles 2 and 3 of the ECHR ("the Convention") feature in child proceedings in the context of non – disclosure of relevant information, and out of respect for the Judge who is pre-eminent in his experience and reputation in this field.

38. The basic principles which the Court applies to determine whether or not to prohibit disclosure of relevant information in this type of case are clear and now well established. While the historical starting point is the speech of Lord Mustill in *Re D (Adoption Reports: Confidentiality)* [1996] AC 593, the incorporation of the Convention into our law by the Human Rights Act 1998 has inevitably raised awareness that the relevant principles apply to the

rights of all those, in addition to the child, who would be adversely affected by disclosure or non-disclosure: *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017. The fundamental objective of the Court in every case is to strike a fair balance between the various rights and interests in the context of achieving a fair trial: *Re X (Adoption: Confidential Procedure)* [2002] EWCA Civ 828 at para [15]. It is an inevitable consequence of Article 6, but would be the same under the common law, that non-disclosure of relevant material is the exception, and should only be ordered where the case for doing so is compelling. On the other hand, it is obvious that a fair trial for the purposes of Article 6 may still be achieved without disclosure of every piece of relevant material. These are the fundamental principles which underlie the balancing exercise which the Court undertakes. While the focus in child proceedings is inevitably on the best interests of the child, there is, beyond those fundamental principles, no rigid universal starting point for carrying out the balancing exercise.

39. In the reported cases the conflict is usually between those who call for full disclosure of the information in order to achieve a fair trial under Article 6 and those who claim that disclosure will infringe their rights under Article 8, whether on the ground of privacy or confidentiality or some other reason. Unlike the right to a fair trial, which is absolute and unqualified, Article 8 rights are qualified rights. They are expressly subject, among other things, to protection of the rights and freedoms of others. This case concerns not only Article 8 rights, but also Article 2 and Article 3 rights, of the mother, sister and aunt of A. Article 2 and Article 3 rights are not qualified rights, and that fact as well as their position in the list of rights and freedoms in the Convention highlight their importance. A danger of vigilante style physical punishment, whether or not likely to result in death, is plainly a matter of gravest concern. That is especially true in child proceedings if the danger is to the mother or close family members of the child.

40. There is no doubt that the information in question in the present case, which Wilson LJ has compendiously called "the material", would be relevant to the just disposal of the proceedings on a number of grounds. It would be relevant to psychiatric and psychological assessments of the mother, to the belief and desire of the father that A could be properly cared for within a stable relationship between himself and the mother, and to the mother's parenting skills.

41. Underlying the Judge's approach was a concern, expressly articulated in para [8] of his Judgment, that the Court should not be seen to be adopting a position that:

> "In any case within the Pakistan Muslim community where sexual deviance is raised, or where outrageous sexual behaviour by a wife occurs, a real risk exists that death or really serious bodily harm is a likely consequence against which the court ought to guard and, where such behaviour is unknown to others, to sanction the withholding of such information even though it may be relevant to the issue of whether a child can or should be returned to the family."

42. The Judge found on the evidence that there was no systematic violence or any recourse to violence which would tend to put the court on guard, and that there was no history of domestic violence in the family that should alert him to a propensity for serious violence, and no sufficient basis for saying that the husband or the wife's father would or might reasonably be expected to behave in the way feared. In para [13] of his judgment, he summarised his reason for disclosure as follows:

> "… I find myself quite unable to conclude, in the absence of evidence of a propensity for violence within the family, that the fact of belonging to this community means that in the context of this conduct of this mother a risk of the feared behaviour should be further investigated and that material, which is otherwise discloseable, should be further withheld. In my view that applies equally or greater force in connexion with issues of gender or sexual ambivalence and also applies even where these matters are considered altogether."

43. The Judge did, however, acknowledge in his judgment that disclosure of the material "may have consequences directly for the mother and other female family members and quite

possibly indirectly for "A", but they are not of the nature or degree that would justify non-disclosure." He stayed his order for two weeks so that thought could be given as to, among other things, "how any consequences of disclosure should be handled". The Judge, therefore, did carry out a balancing exercise, but without identifying precisely what were the possible consequences of disclosure he envisaged for the mother and other female members of the family or the measures he thought could be implemented to mitigate them.

44. In our judgment, the approach of the Judge was fundamentally flawed. There was evidence before him in the 2nd witness statement of the social worker Andrea Goddard, the 1st witness statement of the mother, and notes of A's Guardian, that not only disclosed real concerns of the mother and sister for their lives and physical safety, and that of their aunt and the sister's young daughter, if disclosure was ordered, but also evidence of specific past acts of domestic violence affecting them. The sister had told the Guardian that the aunt had been subjected to extensive domestic violence from her husband. The records of social services record a statement that the mother's father had tried to break her neck. The mother said that the husband had sometimes slapped her. The sister's husband was in prison as a result of violence towards her involving stabbing.

45. Furthermore, on 27 March 2009 the parties had agreed, and the Judge had ordered, that Mrs Hossein, a social work consultant with expert knowledge of the Pakistani Muslim community, carry out an assessment of the risk posed to the mother and other female members of her family if the material was disclosed to the father. Mrs Hossein's report dated 14 May 2009 did not dismiss the possibility of the physical violence feared by the mother and sister. She said that the risk of the mother being punished for adultery was somewhat high, and that the father's education and upbringing was entirely in Pakistan and it was likely that he may have strong views on the subject of his wife's adultery. Her report concluded that she could not carry out a risk assessment without speaking to members of the family. It said:

> "2.8 It is extremely difficult to assess the repercussions and the impact on [A] or any other family members without direct interviews with individuals. The subject of adultery in Islam and within the Muslim families is extremely complex and serious with enormous variations in belief and value systems. To do this based on reading of the papers alone would not be helpful to the Court at all and certainly not in the rights, interests or welfare of the child Ameira Mahfooz."

46. Mrs Hossein was extensively questioned by the Judge and counsel on 10 June 2009. She remained constant in her evidence that she could not discount the risk of serious violence if disclosure was made. She said that certain features of the case were unusual, namely encouragement of the mother's conduct on the holiday in Turkey by another member of the family, and that all the females knew what was happening, and that the adulterous conduct was not just with one stranger. She said that she could not say at that moment that, if the material was disclosed to the father, there was not any significant risk of serious physical violence.

47. The Judge, in effect, discounted that evidence of Mrs Hossein, notwithstanding she had been appointed as an expert in the case, and notwithstanding that the mother, the local authority and the Guardian wished her to continue the assessment. Moreover, the Judge terminated Mrs Hossein's assessment even though, as a result of her evidence in her report and in her oral evidence that there was a risk of serious violence that required further investigation for proper assessment, there was a stronger case for assessment than had existed on 27 March 2009 when the original direction for assessment was given.

48. Furthermore, the Judge formed a view on the facts without having given any directions for the joinder of the sister or the aunt, or that evidence be obtained from them, and without any reference to their position in his judgment. This was so notwithstanding that the application to HH Judge Polden on 17 March 2009 had expressly flagged up the issue of whether, and to what extent, the female members of the mother's family should be given the opportunity to make representations.

49. The reason why no such directions were sought from the Judge by the parties on 10 June 2009, and presumably why none were given by the Judge on his own initiative, was that it was envisaged, consistently with the joint letter of instructions to Mrs Hossein, that she would speak to the sister and aunt. In the event, without the knowledge or agreement of the parties, she decided not to do so because, as directed, she could not also speak to the male members. The Guardian ceased to make her own enquiries when Mrs Hossein was appointed since it was envisaged that further enquiries and interviews would then be conducted by Mrs Hossein. Accordingly, the position on 10 June 2009 and at the date of the Judgment was that, even though the evidence clearly identified a concern about the Article 2 and Article 3 rights of the sister and aunt, no statement from the aunt had ever been sought or obtained by anyone and the views of the sister were only reported briefly in Ms Goddard's witness statement and the Guardian's notes. Those notes of the views of the sister were based on a telephone conversation. She had never been invited to make a statement of her own.

50. Miss Topping has raised an issue about the practical viability of any continued assessment, particularly in relation to the father. Miss Topping reserved her position on 27 March 2009 about whether the father could properly give an informed consent to being questioned if the material was not disclosed to him. She repeated that objection on 10 June 2009. It is apparent, however, from the transcript of the oral examination of Mrs Hossein on that day that her objection was not regarded by either the Judge or Mrs Hossein as an insuperable difficulty if the questioning was carried out in an appropriate way. Nor does it appear to us to be insuperable. In any event, it did not feature at all in the judgment as a reason for not continuing with the risk assessment.

51. In all those circumstances, the Judge did not have the material before him to reach his conclusion of fact in his judgment as to the risk of violence with regard to each of the mother, sister and aunt. He carried out a balancing exercise on the assumption of some risk, but without articulating it or being in a position fully to assess it. He did so without being in a position to assess that risk against the steps that might be needed or appropriate to mitigate the risk of violence, or to judge the relative importance of the material in the light of other information or knowledge of the father and whether it could be disclosed in a less than complete form but in a sufficient way still to provide a fair trial.

52. The significance of the privacy and confidentiality rights of the mother, sister and aunt under Article 8 might not, in the final analysis, weigh heavily when balanced against the right to disclosure under Article 6. Further, we acknowledge and endorse the Judge's sensitivity to differences in cultures and traditions within our society. Nevertheless, in our judgment, on the specific facts of the present case, the Judge acted outside the ambit of a proper exercise of discretion in terminating the risk assessment in view of the seriousness of a possible infringement of the Article 2 and Article 3 rights of A's mother, sister and aunt. That conclusion is reinforced by the indirect consequences for A herself if any serious harm was caused to her mother or other close members of her family.