IN THE COURT OF APPEAL **APPEAL NO : B4/2021/1432**

ON APPEAL FROM THE HIGH COURT OF JUSTICE (FAMILY DIVISION)

B E T W E E N :

CHILD'S FATHER	**APPELLANT**
AND	
LOUISE TICKLE	**1st RESPONDENT**
AND	
BRIAN FARMER	**2nd RESPONDENT**
AND	
CHILD'S MOTHER	**3rd RESPONDENT**
AND	
THE CHILD ACTING BY X GUARDIAN	**4th RESPONDENT**

SKELETON ARGUMENT ON BEHALF OF
1ST RESPONDENT LOUISE TICKLE (LT)

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1. This skeleton argument sets out the 1st Respondent's position on the grounds of appeal advanced and the arguments made in the Appellant's skeleton argument dated 19 August 2021. It should be read in conjunction with the short response document filed on behalf of LT dated 26 August 2021.

2. This document does not at this stage attempt to deal with the issue of potential further guidance identified in the reasons of Baker LJ for granting permission to appeal dated 8 September 2021, save insofar as directly relevant to the instant case. Further submissions can be made orally or in writing if the Court provides for specific topics for consideration.

3. LT's position regarding reporting restrictions and live streaming is set out separately, as directed.

4. Given the nature of the appeal, and in particular the fact that two main strands of it amount to a) a revival of points initially argued but later conceded and b) raises new points not argued at all, the Court may take the view a transcript of the hearing below is necessary. As indicated in her email to the court dated 23 September 2021 on this topic, LT is not in a position to obtain

such a transcript and this skeleton is based upon contemporaneous notes where relevant and available.

5. The document is structured so as to give LT's response in overview, then taking each key point in more detail.

OVERVIEW

6. The key relevant facts are set out at §16 of LT's skeleton argument dated 8 July 2021.

7. The Appellant has set out his case at first instance and on appeal exclusively on the basis of X's welfare. Against the backdrop of his proven conduct the father is not the person best placed to advance such arguments. The more objective submissions of the guardian rightly carried greater force with Lieven J on issues of welfare and impact.[1] The mother's submissions also hold weight, but she was also advancing, quite properly, her own separate rights and arguments.

8. The public interest in this case has three broad aspects (and is articulated in more granular detail in LT's 8 July skeleton argument at §42) :
    a. public interest and confidence in government through Members of Parliament and of Ministers
    b. public interest in the correction of the record in relation to this specific former member of Parliament (and Minister), about whom there is already a body of relevant information in the public domain, some of it inaccurate.
    c. public interest and confidence in the administration of justice and specifically the family justice system, its treatment of and response to issues of domestic abuse and sexual violence

[1] Not only the proven domestic abuse, but also the sexting scandal and associated decision making. i.e. It is accepted by the Appellant that the course of the sexting scandal he chose to place baby X in the spotlight by participating in an interview in which X was extensively referenced and X photograph published, which is in marked contrast to his more recent focus on X's Article 8 rights. In the course of the hearing below the Appellant advanced a case that the judgment should be published without any reference to his identity, role or status, but with the inclusion of highly intimate matters the mother had not consented to be published and which no other party sought to publish and which had no possible benefit to X. It was later accepted that the father's position on these issues had been 'erratic' due to apparent 'confusion'. This resulted in the production of a chronology of proposed redactions.

The contention made by the appellant at §3 of his skeleton that the learned judge's decision amounts to a 'radical departure from established principles developed by the Family Court' is challenged. Rather, the decision represents an exercise in following established principle, namely the careful balancing exercise set out in §17 of *In Re S (A Child) (Identification: Restrictions on Publication) (HL(E))* [2005] 1 AC 593, [2004] UKHL 47, (per Lord Steyn), which the Appellant sought to persuade the court to depart from. The decision is not at odd with either *Re S* or the guidance derived from it[2], and it is not at odds with the general proposition that publication will usually only be made on an anonymised basis. The balancing exercise is highly fact-specific and this is not a typical case.

9. LT did not and does not base her request for publication on any suggestion that publication of findings (whether of rape or otherwise) should generally be published on a named basis. Nor did she suggest her application was straightforward, indeed had the mother not been willing to waive her statutory right to anonymity and supported publication it was expressly conceded that the application would have been in difficulty (in the form it was advanced). She agrees that in most cases identification of parents is neither necessary nor justified, and in cases of sexual assault findings it is not even (fully) possible without the support of the victim.

10. This application was made on its own very particular facts. There was an unusual convergence of factors which made it one of those rare cases in which publication with names was both necessary and justified. The particular key factors which came together to make this so were:
    a. The fact of the findings and the nature of the findings
    b. The mothers support and willingness to waive her right to Anonymity
    c. The child's age
    d. The particular characteristics i.e. roles of the respective parents as (former) MPs (and Minister),
    e. The history of prior media coverage, including material placed in the public domain by the father which was subsequently demonstrated to be misleading in light of the findings,

[2] *Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230 [20].

which, together, added weight to the other elements of more general public interest, and provided the particular need and justification for identification of the parents that would usually not be present in most cases. Moreover, this was not a case where it was possible to fully and accurately convey the dynamics and subtleties of the findings or the father's conduct without reference to the parents' former and current roles, which would inevitably render them identifiable in any event.

11. LT objects to the characterisation of the application and the learned judge's decision as an exercise in 'naming and shaming' (§2 skeleton). This is the lead point advanced in the Appellant's skeleton argument, yet it is not developed and is not identifiably linked to any specific ground of appeal. The allegation is not borne out by a reading of the judgment and was expressly disavowed in the course of the hearing by the learned Judge. The fact of its inclusion is indicative of the Appellant's approach to the media Applicants (who are assumed to be bad faith actors), and to both the application and to the findings made against him, which have not been the subject of appeal. This, and a number of other aspects of the father's skeleton, amount to a challenge to the validity and seriousness of the findings, not only in terms of the impact on the mother and on the father's relationship with X, but also in terms of the public interest. Although it is asserted at §50 of the Appellant's skeleton that the learned judge distinguished the case from *Campbell v MGN Ltd [2004] 2 AC 457, [2004] UKHL 22*, she in fact directed herself to the passages on the different types of speech, before rightly concluding that the features in this case pointed:

'much more strongly in favour of publication than in Campbell, given the role of the Father as an MP, the fact that his earlier inconsistent and untrue statements were made to protect his political career, and the gravity of the facts that the Judge found'

(Judgment Lieven J §§14-15 & 50).

12. The complaint of 'name and shame' is more consistent with an underlying focus upon the impact upon the father of publication, a failure to appreciate or acknowledge the serious and legitimate basis of the application for publication, and a failure to disaggregate (as the judge properly did) the potential harm to X arising from the fact and knowledge of X father's conduct, and the potential harm arising from publication of those aspects of that conduct which

are not already in the public domain. The point is well illustrated in Mr Farmer's characteristically eloquent oral submissions below when he said :

"…the added difficulty [X] is going to suffer anyway. Analogy - weather - I think you look at it like this : It's a beautiful day, [X] wakes up, says 'Mum, let's go to the beach'. That's all [X] can see. But [X's] mum sees two big thunderclouds : one has sexting scandal and the other one has family court finding rape - so mum says, 'Fine, let's prepare we are going to get rained on but let's pack umbrellas to make sure you're as dry as possible'. That's the point. X is going to get rained on for sure but Mum is aware and prepared and will do her utmost to ensure [X] is as dry as possible. The same argument applies to [The Appellant's] relationship with [X] -they are going to get wet and will need to prepare… it will probably be around the time of secondary school it may depend on whether [X] mum is still an MP, children would google [X] mum's name[…]I think there will be a problem, its difficult to anticipate but [X will find out what's online already, and [X] will find out, if you allow this judgment to be published. But [X] has two parents who can prepare [X]. But [X] has two parents, highly educated, both politicians and aware. And I think the weight in favour is very far on one side compared to the weight on the other, which is unknown and speculative. So I don't think in the balance the risk gets anywhere near competing on the article 10 side."

(composite of contemporaneous notes available to counsel – not verbatim)

13. Insofar as the Appellant contends that rape findings are in a distinct category warranting different treatment than other sorts of findings as a matter of principle (**Ground 4**), this is not accepted. They are grave findings, but fall to be considered in exactly the same way as other serious findings of domestic or other abuse.

14. LT takes issue with points made regarding the 'inevitable identification' of X and contentions about the 'catastrophic' impact of publication. The media's applications for publication properly acknowledged from the outset that through the necessary identification of the parents X would potentially be indirectly identifiable to those in X circle and community. However, the specific request the court was asked to determine was for publication on the basis that the image and

name of X should not be included in the judgment or otherwise published[3]. Without minimizing the potential for impact on X of the publication actually sought, there is no question of X being directly identified in the media. Unspecified remarks made by the judge in the course of the hearing are relied upon, but such remarks were made against that quite specific backdrop[4]. The Applicants have been at pains to consider the risks associated with publication, and having done so argued that the question of potential indirect identification did not lead inexorably to a conclusion of catastrophic harm to the child or X relationship with X father, as contended for by the Appellant. The child's primary carer, guardian and the learned judge agreed. No party contended that the publication of the judgment as a discrete document would prejudice the ongoing conduct of the main proceedings.

15. LT contends that the Appellant should not be permitted to advance **Ground 2** (Section 97(4) Children Act 1989), which was expressly conceded at trial and was therefore not the subject of any argument. If the court proceeds to deal with **Ground 2** LT will argue that the decisions in both *Re Webster; Norfolk County Council v Webster and Others* [2007] 1 FLR 1146, [2006] EWHC 2733 (Fam), and *Clayton v Clayton* [2006] Fam 83, [2006] EWCA Civ 878, were correct and persuasive or binding authority, and in any event should be followed. LT invites confirmation from the Court of the correctness of those authorities on the interpretation of s97(4) in a convention compliant way.

16. Insofar as it is - once again - argued that *Re S* is not the applicable approach, LT takes issue with that contention, as with any contention that Article 8 takes precedence over Article 10, or any contention that the judge wrongly gave priority to Article 10. *Re S* was applicable and it was correctly applied. As such, the learned judge's evaluation and conclusions are unassailable. This is explored below.

17. The Appellant's position on the applicable approach and its execution has been variable, although it was eventually conceded that *Re S* applied. The Appellant should not be permitted

[3] See order of 30 July 2021, which was framed in the terms sought by LT.

[4] LT's note is that the judge said 'everyone accepts that [X] would be identified even without [X] name – X] anonymity will not be materially protected'. The writers' is 'J: everyone accepts smallest amount of google research if it doesn't name X] but does name parents wld be poss to id. [X] anonymity will not materially be protected.'

to be resile from that concession, not only because it is an unmeritorious argument, but also on grounds of basic fairness.

ARE RAPE FINDINGS IN A SPECIAL CATEGORY?

18. **Ground 4** does not identify an error of law. There is no rule of law or principle that is specific to publication of a rape finding, although such findings are always serious. The correct test is set out in *Re S*, and in the context of CA 1989 proceedings, that test is fact specific and requires consideration of a range of factors not limited to the risk of indirect identification of the child *and the likely impact of that on him.* The learned judge carried out that exercise, permissibly rejecting the Appellant's contentions about the degree of impact on the child.

19. This ground is, in reality, no more than a further attack on the legitimacy of the rape finding itself: The Appellant complains that the 'generalised' nature of the 'allegation' (finding) is said to have 'serious implications for the soundness of the learned Judge's decision to publish the rape finding' (§54). This can only be interpreted as an assertion that the finding itself is unsound.

20. The Appellant complains that there was a 'material dispute of fact as to the *actus reus* and the 'complexity of the relationship that would otherwise be addressed at a criminal trial between submission and consent' (§55). Again, this can only mean the finding should not have been made. And yet it was. And it has not been appealed. Implicitly, it is a submission that the father did not really rape the mother.

21. The Appellant accepts that there is no reason in principle to 'shy away' from use of the term rape in the context of family court findings (§56.b.). Yet he further submits that 'in a case where the parties are to be identified and the child's identification is inevitable, the court is required to take a *different* approach' i.e. the court should shy away from using the term rape in this case.

22. Whilst notionally based upon the impact upon X, these submissions amount to a submission that the court should excise the rape findings, because the father does not accept them as correct and does not wish to be named.

23. Coupled with the submission at §58 that (in effect) the findings of rape are not really very relevant to the substantive welfare matters, these are both unattractive and misconceived arguments. They fail to appreciate the validity and significance of the findings. That lack of insight and acceptance of responsibility and impact is of itself a factor which *adds* to the public interest in the reporting of this case.

24. Moreover, publication of the findings without the rape finding would rob the publication of much of its ability to meet the public interest and would in effect prioritise the protection of the perpetrator of proven harm over the Article 10 rights of the victim of that abuse.

RE S **– IDENTIFICATION OF THE APPROPRIATE EXERCISE**

25. The applicable authority is *Re S*. The *only* gloss to *Re S* is that, following *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, [2011] UKSC 4, the child's interests are 'a primary consideration' (§25).

26. As regards **Ground 5** : the learned judge explicitly considered the best interests of the child as 'a primary consideration', an approach which all parties accepted was correct and in line with authority (namely para 17 of *Re S / ZH Tanzania*). Although in places and at moments the representations for the father refer to welfare as both 'paramount' and 'the primary consideration' it was expressly confirmed during the hearing that welfare was in fact 'a primary consideration'.

27. At paragraph 46 of her judgment, the learned judge records (with a significant degree of understatement) that 'By the end of the hearing Mr Clayton accepted that *Re S* did set out the relevant approach in this case, and in my view that is plainly correct.' In fact, a substantial part of the Appellant's submissions before Lieven J were taken exploring this point, and the learned judge allowed ample time for its development.

28. By way of background :

    a. The application was made on 5 February 2021.

b. In his first skeleton argument (§17) in response to the application dated 27 February 2021 the Appellant expressly relied upon *Re S*[5].

c. The Appellant's second skeleton argument largely dealt with other matters, but did assert that the mother's Article 10 rights were *not engaged* and that it was 'obvious that the Article 8 rights which the Court will regard as most relevant are the Article 8 rights of [X], the conventional approach the Court uses when considering this type of application.

d. It was only on 12 July 2021 via his third skeleton argument that the Appellant for the first time asserted that *Re S* did not apply :

"However, the fundamental fallacy in Ms Tickle's approach is her submission that the approach in Re S (A Child) (Identification: Restrictions on Publication) [2005] 1 A.C. 593 applies without qualification to the present case…Ms Tickle's submission is simply incorrect."

e. The hearing took place on 15 and 16 July 2021. At the outset of his oral submissions counsel for the Appellant confirmed that his contention was that *Re S* did not apply and that in the context of this case Article 8 in fact took precedence over Article 10, and that welfare was a primary (but not paramount) consideration. He relied upon *FZ (Congo) v SSHD* [2013] 1 WLR 3690.

f. He asserted that the Strasbourg authorities relating to termination of contact were relevant in light of the father's contention that there was a significant risk that X's relationship with X father would be terminated by reason of publication.

g. Mr Clayton accepted that it was very unlikely that there would be any immediate impact on X if the judgment was published immediately, and indeed this was consistent with the first skeleton argument filed on the Appellant's behalf (§29).[6]

h. At the very end of the Appellant's submissions it was conceded that *Re S* *was* the applicable test, as set out at §46 of the judgment.

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[5] Although this paragraph did misstate *Re S* to the extent that it referred to welfare as 'the primary consideration' rather than 'a primary consideration'.

[6] Counsel's note : "J: Are you saying risk on social interactions with others is a realistic risk now? RC : at 3 probably not though may be some risk of school. It's important to appreciate info will remain available in public domain and over time it may be easy to track.
J V unlikely if published now will have any immediate impact? RC : Accept that."

29. As to the potential unfairness of raising new points on appeal or reviving points conceded at trial, flagged at §16 above and expanded upon below at §54-67 in the context of the new s97 point (ground 2), are broadly applicable here. Here, LT is disadvantaged in terms of a) the delay to her being able to carry out her public interest journalism, b) by having to secure extra funding to pay for representation, and c) by having to rehearse her arguments in this appeal, arguments which led to the Appellant's position on the applicable test being (quite properly) abandoned in the hearing before Lieven J.

30. The Appellant's appeal skeleton appears to make the same points on the topic of the balancing of the competing ECHR rights as were advanced in the court below.

31. The submission at §63 that 'the learned judge failed to either refer to or apply the steps which Lord Hodge identified' (In *FZ*) is simply not accurate. The learned judge sets out the steps *in full* at §§41 and 46 of her judgment, concluding rightly that there was no inconsistency between the approaches set out in *Re S* and *FZ*.

32. Whilst no issue is taken with the correctness of ECHR authorities which emphasise the importance of maintaining family ties, issue is taken with their *application* to this application. The submission that the learned judge ought to have applied such authorities is misconceived and amounted to an attempt to reinsert Article 8 as taking precedence or as being the paramount consideration.

33. By s1 Children Act 1989 Parliament requires the court to treat the child's welfare as the paramount consideration 'when a court determines any question with respect to the *upbringing* of the child'. In such a case the court has a positive duty to promote contact, pursuant to Article 8, as elucidated in the ECHR authorities.

34. The case of *Clayton* draws a distinction between proposed publicity which would involve the direct participation of the child, where the court's 'custodial' welfare jurisdiction is engaged as a result of the parents' proposed exercise of parental responsibility, and cases where injunctive relief is sought contra mundum, where the impact on the child would be indirect only. In the

former type of cases the court can injunct the individual parent (potentially by means of a PSO). In such a case the child's welfare is paramount, because the question is one of upbringing.

35. The same distinction is drawn in *ZH (Tanzania)*, where the court notes the provisions of the UNCRC, which :

> *"distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death."*
>
> *(§25, per Baroness Hale)*

36. This is a case of publication *by the court* of *its own judgment* without the direct involvement of the child. The relaxation sought (through publication of the judgment) and the corollary residual restrictions imposed (regarding X's naming or identification via pictures etc.) apply *contra mundum*. In determining the application for publication, the court was not determining a question with respect to the upbringing of X and as such X welfare was not paramount.

37. The ECtHR cases relied upon[7] are cases where the court was concerned with orders directly defining, limiting or terminating a child's relationship with its parent (contact, adoption etc). The domestic parallel is 'upbringing' cases, which would include applications for private and public law orders.

38. Even if this were an 'upbringing case', the court was not deciding whether to terminate the relationship between child and parent, nor even deciding whether to limit it – that issue remains live and is being dealt with in the main s8 proceedings. Any restriction on contact at present is a consequence of the father's own conduct as established through the findings. The main source of jeopardy to the father's relationship with X is his own conduct (including that notorious part which is already in the public domain, and well known within the local community and indeed nationally : i.e. the sexting scandal).

[7] E.g. *Strand Lobben v Norway* and *Jansen v Norway*

39. The learned judge rightly rejected the submissions that permitting publication would lead inexorably to a termination of the child's relationship with the Appellant. As such the authorities relied upon are not applicable. The learned judge permissibly concluded that the child's age at the time of publication was a protective factor in the short term (in that it would have the effect of limiting the potential for upset resulting from any comment flowing from any media storm, as compared to the likely position if the child had been older at the moment of greatest media and public attention). The development of the relationship in the longer term is far more likely to be impacted by factors other than a media storm taking place aged 3, not least the ongoing s8 proceedings, any work the father does in light of the findings, and the extent to which the arrangements progress appropriately.

40. *Sheikh Mohammed Bin Rashid Al Maktoum v Princess Haya Bint Al Hussein & Ors* [2020] 2 FLR 493, [2020] EWCA Civ 283 was an appeal against the President's decision to publish a fact finding hearing in ongoing private law proceedings, with the names of the parents included. As in this case, the facts of that case were exceptional (the father was the ruler of Dubai), though very different.

41. In that case, Lord Pannick (for the father), sought to raise a new point on appeal relating to whether Re S was applicable to cases involving publication of judgments and whether they fell to be treated as 'upbringing' matters, and therefore with welfare as the paramount consideration (see §§84-85). Firstly, the court was unpersuaded that the reasons given for the issue being raised on appeal for the first time were sufficient ('we've looked at it again'). Perhaps more importantly, in that case the publication of the judgment would have a positive benefit to the children (and that was in part the purpose of the proposed publication). As such, all factors pointed in the same direction (rather than being in tension as in this case), and the distinction between a primary and paramount was redundant. The court declined to deal with the issue but gave a strong provisional view that the arguments that *Re S* was not apt (and that welfare was paramount) were 'ill founded'. The court noted in its judgment that were the argument that *Re S* did not apply correct, it would require reconsideration of the various guidance on the topic of 'transparency' and publication of judgments.

42. As in earlier cases, the court was not prepared to deal with the issue where it did not squarely arise. LT says it does not properly arise here, or if it did it has been both argued and conceded.

    a. Though it is not captured in the judgment, the court received submissions and heard argument on the 'upbringing' points. Those matters are presumably not captured because they were no longer in issue in light of the concession made concerning Re S.
    b. In some cases the distinction between welfare as a primary consideration and welfare as paramount, would make a material difference. Here, given the judge's conclusions as to the extent of public interest and manageable and limited nature of harm, particularly in the short term, it would not have altered the ultimate conclusion that the balance fell in favour of publication.

RE S **– APPLICATION OF THE REQUIRED EXERCISE**

43. Contrary to the contention in **Ground 3**, the learned judge neither gave precedence to Article 8 nor to Article 10, instead analysing the comparative importance of each competing right in the particular circumstances of the case, before drawing conclusions about where the balance fell. It is comparatively unusual (notwithstanding clear guidance) for findings of this sort to be published at all. It is vanishingly rare for findings to be published alongside the names of the parents, particularly where the parents are public figures. The application was only made and pursued because of the particular public interest attaching to the identity and role of the parents, in particular the father. It was therefore necessary for the judgment to set out in some detail the unusual features of the case which tipped the balance in favour of publication.

44. Insofar as it is argued that the learned judge gave impermissible priority to Article 10, LT contends that this is not the case. Rather, the learned judge properly carried out the *Re S* exercise, she correctly started from the premise that neither Article 8 nor 10 had precedence, but went on to assess the relative importance of the competing rights on the (undisputed) facts of this specific case, weighing them up and concluding that Article 10 outweighed Article 8 in respect of the specific – but carefully considered and limited - publication proposed.

45. Of course, the court should be cautious of being drawn into a narrow textual analysis of the judgment. Neither the sequence in which the judge set out her reasons in her judgment nor the number of paragraphs devoted to each part of the analysis is an indication that the learned judge gave precedence to Article 10. The unusual nature and breadth of public interest in this particular case required to be set out fully, whilst the Article 8 issues were simply capable of more compact analysis.[8]

46. The judgment should be seen as the product of a dynamic and thorough evaluative exercise conducted through trial over two days, where the question of potential harm to the child was the subject of detailed and anxious exploration through interchanges between the judge and counsel (primarily LT's and F's counsel) about the likelihood, nature and timing of potential harm arising from publication, with the learned judge inviting counsel to assist with thinking through and spelling out the potential mechanisms of such harm (doorstepping, peer bullying, googling etc.) and clarifying the various contentions and concessions.

47. As such, the question of Article 8 was given prolonged and anxious consideration throughout the hearing which spanned two days. Article 8 issues were amply explored, but ultimately the particular Article 8 issues applicable in *this* case and in relation to *this* child, on *these* facts could be boiled down quite simply - and as such did not need many paragraphs to be set out in the judgment.

48. It must be recalled that a judgment is a document which sets out in a logical form for the reader the reasons for the decision and the sequencing of issues is to assist the reader, and does not necessarily reflect either the order of priority or the order in which the judge has dealt with matters.

49. The application was case managed with the agreement of the parties on the basis that evidence was not required. The appellant submitted (correctly) that the learned judge should assess the level of risk applying her own commonsense based on experience[9]. This is what the judge did.

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[8] *Piglowska v Piglowski* [1999] 2 FLR 763, HL. See also *In Re R (A Child) (Adoption: Judicial Approach) (CA)* [2015] 1 WLR 3273, [2014] EWCA Civ 1625, in which McFarlane LJ confirmed that the appellate court's focus should be on the substance of the analysis not the form or order of it within a judgment.

[9] Consistent with para 41 of *Weller*, now relied upon though not relied upon below.

50. The learned judge's conclusions are parsed wholly inaccurately when it is suggested at §70 that Lieven J concluded that 'no 3-year-old is capable of successfully invoking Article 8 rights'. The learned judge considered the short and long term potential impact on *this* child of the *specific and defined* publication proposed by the applicants. It is a fact that X is 3 and the judge was entitled to conclude that this was relevant to her evaluation of short term impact – which was in any event conceded by the Appellant as marginal.

51. As regards the issue of 'reasonable expectation of privacy', this is a red herring in that a) it was uncontentious that X had such a reasonable expectation and therefore X Article 8 rights were engaged and b) the discussions of reasonable expectation of privacy in the context of 'after the event' remedies for breach of that expectation are of little utility to cases where a court is asked in advance to authorise - and carry out - publication.

52. The submission at §73 that the learned judge held publicity would have no impact on X based on X age is a misstatement of the judgment (See 47/58). In light of the Appellant 's express concession that it was unlikely there would be any short term impact on X this would be a surprising criticism to make even if it were accurately summarised, as is the complaint that LT asserted that there was no 'immediate' risk to X (§74.g).

53. That the Appellant disagrees with Lieven J's properly drawn conclusions as to the level and nature of risk does not form the proper basis of a challenge and seeks to re-run those arguments. See for example §64 where it is asserted that the impact of publication 'will profoundly disrupt the relationship', and §68 where it is asserted that the impact of publication is 'inherently uncontrollable and unpredictable'. The court should resist the temptation to conduct its own evaluation. This is not a re-run.

SECTION 97 – SHOULD THE APPELLANT BE PERMITTED TO RUN GROUND 2?

54. The discrete issue of publication was listed over two days and was given extensive consideration by the learned judge. The father was represented by leading and junior counsel. Contrary to §9 of his skeleton, the father's counsel was permitted to make submissions for some 2 hours, longer than any other party (rightly so, no objection was taken to this). The Appellant's team filed three separate skeleton arguments and 800 pages of authorities.

55. The issue of s97 and its effect was canvassed in both skeleton arguments on behalf of LT. In her first skeleton argument the possibility of postponement was explored in the event that the court considered there could be publication but 'not yet'. *Webster* was expressly relied upon.

56. In the Appellant's third skeleton argument at §63 it was conceded that : *"[LT] submits that s 97 must be construed in a Convention compliant way. We do not dispute that contention".* There was therefore no argument on the s97 issue at all, because it was uncontentious[10]. The focus of argument was on whether Re S applied (the Appellant argued for much of the hearing it did not), and how catastrophic the father said the harm to X would be if publication were permitted.

57. **Ground 2** thus purports to raise an entirely new issue relating to the correct application / interpretation of s97(2) CA 1989, which was not raised at all in writing or during the course of the hearing, and in fact was expressly conceded. If this ground was really thought to be a fundamental point of general public importance it would have been argued at trial.

58. Whilst a substantial portion of the Appellant's skeleton argument is taken up on **ground 2** and s97, there is absolutely no explanation given for the raising of this new point, nor has permission been sought to rely upon it (and no further skeleton argument has been filed dealing with the issue since this was flagged in LT's response document of 26 August 2021.)

59. In his order of 8 September 2021 Baker LJ did not give specific permission on any individual ground nor did he give permission to withdraw from the concession made at trial[11], nor to raise a new point. Such permission should not be given.

60. Whilst the welfare of X is a primary consideration it is not paramount. Even in a case where welfare is paramount a party is entitled to expect finality in litigation and, where a party wishes to raise a new issue, a Respondent – and the court - is entitled to expect an explanation.

[10] To the best of her recollection, the writer believes that the concession in the skeleton was confirmed in a brief exchange between the Judge and RC in the course of the hearing but regrettably does not have a note of that exchange.
[11] *Mullarkey v Broad* [2009] All ER (D) 143 (Jan), [2009] EWCA Civ 2.

61. Whilst the new point is one of law, the way in which the matter was dealt with below would have been different at first instance had it been raised at the proper time i.e. at first instance. LT would have pursued her postponement arguments in the alternative and would have dealt at the time with the arguments relating to s3 Human Rights Act 1998 (HRA) and *Webster*. She has acted to her detriment in not doing so.

62. The difficult economics of court reporting by the mainstream media are well known to the court. It is very difficult for reporters, particularly independent journalists like LT, to find funding to resource applications of this sort. Typically, and in this case, such applications involve a heavy investment of time at considerable personal risk. Mainstream media outlets find such applications difficult to justify from an economic or editorial perspective, given the risks, and often cannot commit to funding an appellate stage.

63. It is relevant that LT began this application as a litigant in person, with counsel acting pro bono. Having secured a commission, she was able to access some financial support for the hearing before Lieven J and counsel was instructed in the usual way. The trial in July was not a dry run. Having succeeded in her application, LT now finds herself unable to fulfil her commission and her editors are unable to continue funding the legal costs of an appeal beyond the instruction of counsel, now on a direct access basis. Were the matter to return for a rehearing LT would almost inevitably be in person. She cannot be protected in costs in any meaningful way given the father's financial situation (his counsel is understood to be acting pro bono). LT has invested substantial personal time in this application, and Tortoise Media have invested substantial funds in supporting her.

64. These issues are materially relevant to the exercise of the court's discretion regarding the new point.

65. If the Appellant wishes to raise new issues or resile from concessions made it is his burden to show that is appropriate. The court ought to have been provided with a transcript of the hearing below in order to deal with these issues, but in the absence of such a transcript, and without means to obtain one the writer can only refer to contemporaneous notes.

66. Furthermore, the s97 argument purports to be put for the child's benefit and yet it was not advanced by either the child's representatives or X's other parent, who is responsible for X primary care.

67. The argument is in any event without merit for the reasons set out below.

SECTION 97 – MERITS OF GROUND 2

68. There is no dispute as to the ordinary meaning of the words used in s97(4). The clause is expressed in mandatory terms. However, that is not an end of it.

69. The provisions still fall to be interpreted in line with the interpretative duty in s3 Human Rights Act 1998 even if there is no ambiguity in the wording of the legislation on the basis of ordinary statutory interpretation (*Ghaidan v Godin-Mendoza* [2004] All ER 411, [2004] UKHL 30, pa 29). This is not understood to be contentious. Authority is very clear that the court must look to the broad thrust and purpose of the legislation in working out whether it is possible to interpret the provision in a convention compliant way. The following principles can be drawn from *Ghaidan*:

    a. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear
    b. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
    c. The mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively.
    d. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

e. In doing so the courts should not adopt a meaning inconsistent with a fundamental feature of legislation… The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must 'go with the grain of the legislation'.

f. The court should not apply excessive concentration to linguistic features of the particular statute. A literalistic approach when considering whether a breach of a Convention right may be removed by interpretation under section 3 is inappropriate.

g. Section 3 HRA requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.

(§§30-33, Per Lord Nicholls, and 40-42, per Lord Steyn)

70. It can be seen from this that the Appellant's contention at §31 that s3 HRA 1998 'does not permit the court to relax a mandatory statutory provision when the effect of doing so is to override plain statutory words' is wrong. S3 may require just such a course. Equally, the submission that the interpretation in *Webster* 'cuts against the 'grain' of the clear and unambiguous meaning of section 97' does not reflect the law as set out in *Ghaidan*, which is that s3 must not cut across the grain of the legislation, though it may need to cut across the express wording of a particular provision within that legislation.

71. The court will note the parallel between s12(4) HRA, which on its face appears to give primacy to Article 10, and section 97 which again on its face appears to give primacy to Article 8. Just as it is quite correct to say that s12 does not amount to / permit the court to give precedence to Article 10, and that it must be read in a conventional compliant way, the same point of principle must apply to section 97(4). There can be no quibble with the authority of *Webster* on this basis.

72. For another example of the application of s3 HRA in a family law context where the ordinary meaning of the words seemed on their face to preclude the outcome sought, see the line of Parental Order cases, in particular *In Re X (A Child) (Parental Order: Time Limit)* [2015] 2 WLR 745, [2014] EWHC 3135 (Fam).

73. The broad thrust of the purpose behind the Children Act 1989 is to regulate the law relating to children in a wide range of areas, and in doing so to promote the welfare of children. The Introductory Notes describe the Act as :

"An Act to reform the law relating to children; to provide for local authority services for children in need and others; to amend the law with respect to children's homes, community homes, voluntary homes and voluntary organisations; to make provision with respect to fostering, child minding and day care for young children and adoption; and for connected purposes".

74. By its framing it is apparent that s97 was intended to protect the subject child from being harmed by the identification of him as subject child, but only for the duration of proceedings and not in all circumstances. Parliament intentionally gave a discretion to the court and it did not apply s1 to the exercise of that discretion. Nor did Parliament provide for the anonymity of parents in such cases, save insofar as indirectly caught by the 'likely to identify' provisions of s97.

75. There is limited material available on Hansard relating specifically to s97 CA 1989, but it appears to have been introduced as an amendment. The discussion is not particularly illuminating, and appears to relate to s97(1), which has since been repealed (and which provided for Magistrates Courts to sit in private). There are some references to setting the record straight as a possible circumstance in which the discretion might be exercised, though indications are this was anticipated to be exceptional[12].

76. Section 97 was of course enacted prior to the HRA 1998[13]. Section 3 of the Human Rights Act 1998 applies to the interpretation of the Children Act 1989 as it does to any other piece of legislation. Parliament has not elected to amend the section (save to repeal various subsections not material for our purposes and in 2004 to narrow the definition of publication to reduce the scope for parents to be inadvertently caught by the penal provisions of the section.

77. The approach propounded by Munby J in ***Webster*** is entirely consistent with ***Clayton***.

[12] Attached for completeness
[13] Prior to 1999 S97(2) applied only to proceedings in the Family Proceedings Court (s72 Access to Justice Act 1999).

78. In *Clayton*, Wall LJ expressly accepted the proposition that s97(2) CA 1989 *"must be construed as permitting the court to lift the prohibition where article 10 of the European Convention requires it"*[14].

79. These remarks (and others along similar lines relating to the interpretation of s97) are not *obiter*. The court was required to decide: whether s97 still applied to the case (proceedings had concluded), and if it did whether it could / should be relaxed. The fact that the answer to the first of two central questions was 'No, it has lapsed' does not render the conclusion on the second issue *obiter* (See §13 of Clayton, which set out the basis of the father's appeal).

80. Even if *Clayton* was *obiter*, it is nonetheless obviously correct as a statement of principle, and Munby J was right to follow that dicta in *Webster*, concluding with specific reference to *Ghaidan* that s97(4) :

"should be read as a non-exhaustive expression of the terms on which the discretion can be exercised, so that the power is exercisable not merely if the welfare of the child requires it but wherever it is required to give effect, as required by the Convention, to the rights of others."

(§§58-59, per Munby J, as he then was)

81. The reading in of the additional words does not amount to an abandonment of the importance of welfare, which is still 'a primary consideration'. As such it does not cut across the general thrust of the Act, nor even the intentions of the legislators in respect of s97 (to the extent that these are identifiable).

82. The learned judge correctly applied *Webster / Clayton*. Both decisions should be endorsed by this court. Although the Appellant contends that *Webster* was wrongly decided and as such wrongly followed, the real challenge is really to the judge's conclusion that *in this case* a convention compliant interpretation of s97(4) required an exercise of the discretion i.e. it is a further means of attacking the judge's conclusions on impact and the balance she struck following intense focus.

[14] §97(5) and §105.

83. The argument that s97(2), read through the lens of s3 HRA 1998, cannot properly be stretched to permit publication *in this case*, depends upon an acceptance of the Appellant's position: namely, that the consequences for the child (and/or X relationship with the Appellant) would inevitably be devastating. The court quite properly rejected those contentions, concluding any impact on the child would likely be far more limited, primarily because of the protective factors of the child's age and the mother's care ('mitigation'). When at §31 the Appellant complains that the learned judge's 'failure to make findings' is fatal to her decision, this once again is predicated upon the judge's actual evaluative conclusions (not strictly findings) being wrong, and it ignores the court's duty under s3.

84. In a case of this sort, the questions of relaxation of s12 and s97 stand or fall together. The application of *Webster* / *Clayton* in the specific case flows from outcome of the *Re S* exercise: if after intense scrutiny the balance falls in favour of publication, having taken into account welfare as a primary consideration and all other relevant factors, then the s97 discretion can – and must - be exercised, because it is required to give effect to the Article 10 (and 8) rights of others.

85. Conversely, if the court's evaluation is that the potential harm /interference with Article 8 is such that it outweighs the particular public interest in the case or that it is simply irreconcilably incompatible with the welfare of child in any serious way - then balance will have fallen the other way under *Re S* and s97 will not be lifted. Thus, the welfare of any given child is protected in accordance with the court's broader HRA duties to uphold and balance ECHR rights – as mandated by Parliament.

86. Were this not so there would have to be a declaration of incompatibility because the judge's *Re S* conclusion would be incompatible with s97(4). Put another way, it is difficult to see how it can properly be said that the words of the statue are strained to breaking point given the limited adverse impact on the child that the court has concluded would flow from it.

87. If proposed publication was so obviously incompatible with s97(4) why was the point simply conceded? Why was no argument to this effect run? s97 was specifically canvassed in documents prepared by LT and an express concession volunteered in response. In the absence

of any other explanation, it must therefore be considered that the Appellant's team considered this point and rejected it.

88. That part of the *ratio* in *Clayton* which is now relied upon by the Appellant in support of the contention that s97(4) should be interpreted narrowly, related to the *duration* of s97 as a whole, and was aimed at ensuring there was not impermissible interference with Article 10 rights in its interpretation, and at the particular need for certainty in relation to provisions with penal consequences. It cannot be prayed in support of an argument that the same court was wrong in its conclusion that interpretation of s97(4) should be ECHR compliant.

CONCLUSIONS

89. The learned judge identified the correct process, namely that set out in *Re S* :
    a. Lieven J was right to start from a position whereby neither Article 8 nor 10 had presumptive precedence (Judgment §§46, 47, 56)
    b. Lieven J was right to treat X's rights as of very great importance but not paramount (§56)
    c. She correctly carried out the *Re S* exercise, focusing intensely on the particular facts and circumstances and evaluating the comparative importance of the ECHR rights engaged based on those particular facts. Her evaluation was soundly based on the facts and submissions made about risk and impact, taking a commonsense approach.
    d. The judge's conclusions on the nature and extent of public interest, in particular the importance of setting the record straight (§§49-50) positively demanded the identification of the parents. Self-evidently, no lesser step would meet the public interest that the judge identified (proportionality / necessity) :
    "It is apparent from these facts that if the Judgment is redacted in such a way as to effectively protect the anonymity of X, a significant part of the public interest in the Judgment will be removed."

    (Judgment of Lieven J, §4)

90. The learned judge was right to conclude that the case of *FZ* does not mandate out a materially different exercise.

91. The decision is not wrong, on the grounds pleaded or otherwise. There is no compelling reason why the appeal should be allowed.

OTHER MATTERS

92. In the event that the appeal is dismissed, LT seeks permission to publish the contents of this skeleton argument, and to quote from the other skeleton arguments below and on this appeal (on the same basis as the redactions approved in respect of judgment of HHJ Williscroft, i.e. without reference to X's name or sex, and the various other items of information redacted by agreement).

Lucy Reed

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30 September 2021