Neutral Citation Number: [2020] EWCA Civ 283

Case Nos: B4/2020/0190 and B4/2020/0383

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Family Division
Sir Andrew McFarlane, President of the Family Division

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 28/02/2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BEAN
and
LADY JUSTICE KING

- -

Between :

HIS HIGHNESS SHEIKH MOHAMMED BIN RASHID AL MAKTOUM	**Appellant/ Father**
- and -	
HER ROYAL HIGHNESS PRINCESS HAYA BINT AL HUSSEIN	**First Respondent /Mother**
AL JALILA BINT MOHAMMED BIN RASHID AL MAKTOUM **ZAYED BIN MOHAMMED BIN RASHID AL MAKTOUM** **(By their Guardian)**	**Second Respondent/ Guardian**
ASSOCIATED NEWSPAPERS LTD **BRITISH BROADCASTING CORPORATION** **THE FINANCIAL TIMES LTD** **GUARDIAN NEWS & MEDIA** **TELEGRAPH MEDIA GROUP LTD**	

SKY PLC
TIMES NEWSPAPERS LIMITED
PRESS ASSOCIATION

THOMSON REUTERS **Media Respondents**

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Lord Pannick QC, **Mr Richard Spearman QC**, **Mr Godwin Busuttil** and **Mr Stephen Jarmain** (instructed by **Harbottle & Lewis LLP**) for the **Father**
Mr Justin Rushbrooke QC, **Mr Charles Geekie QC**, **Mr Tim Otty QC**, **Ms Sharon Segal** and **Ms Kate Wilson** (instructed by **Payne Hicks Beach**) for the **Mother**
Ms Deirdre Fottrell QC, **Ms Marlene Cayoun** and **Mr Thomas Wilson** (instructed by **CAFCASS Legal Department**) for the **Guardian**
Mr Andrew Caldecott QC and **Ms Sarah Palin** (instructed by **Legal Department Associated Newspapers Ltd**) for the **Media**

Hearing date: 26th February 2020

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Judgment Approved by the Court (redacted version)

Lord Justice Underhill :

INTRODUCTION

1. This is the judgment of the Court, to which all its members have contributed.

2. There are two appeals before us arising out of wardship proceedings relating to the welfare of two children, Sheikha Al Jalila bint Mohammed bin Rashid Al Maktoum ("Jalila") and her brother Sheikh Zayed bin Mohammed bin Rashid Al Maktoum ("Zayed"). Jalila is aged twelve and Zayed is aged eight. Their parents are HH Sheikh Mohammed bin Rashid al Maktoum, the Ruler of the Emirate of Dubai and Vice-President and Prime Minister of the United Arab Emirates ("the UAE") ("the father") and his former wife, Princess Haya bint Al Hussein ("the mother"), who is a daughter of the late King Hussein of Jordan.

3. The children came to this country with the mother on 15 April 2019. Shortly afterwards she made it clear that she did not intend that she or they should return to Dubai. In May 2019 the father commenced proceedings in the High Court seeking the return of the children. In July 2019 the Court made both children wards of court, and an independent Guardian, from the CAFCASS High Court team, was appointed to represent their interests.

4. In October 2019 the father accepted that the children should remain in this country with the mother, but he made it clear that he deeply valued his relationship with the children and wished to maintain regular direct contact with them. The focus of the proceedings is now on the arrangements for their life here, [redacted] particularly importantly, the arrangements for contact with the father. The mother fears that advantage might be taken of such contact to remove the children forcibly to Dubai.

5. The wardship proceedings have been case-managed by the President of the Family Division, Sir Andrew McFarlane. A final welfare hearing was originally listed before him for the end of March, though subsequent developments mean that that date may have to be changed. The contact arrangements between the children and the father will be a principal matter to be decided at that hearing.

6. To date, the President has delivered two substantive judgments in the proceedings. On 11 December 2019 he handed down a judgment making factual findings about three aspects of the father's conduct which are said to be relevant to the contact arrangements, including the risk of abduction ("the fact-finding judgment"). On 17 January 2020 he handed down a judgment determining issues which arose from certain assurances given to the Court on behalf of the Government of UAE and the Emirate of Dubai and from a waiver of immunity made by the father as Vice-President and Prime Minister of the UAE and as Ruler of Dubai, again principally directed at the mother's fear that the children might be abducted ("the assurances and waiver judgment"). We will refer to these as "the previous judgments".

7. The proceedings so far have been conducted in private, in accordance with the usual practice in cases concerning the welfare of children. Also in accordance with normal practice, accredited representatives of the UK media have been entitled to attend each hearing, and several have done so; but because of the private nature of the proceedings

there have been very strict limitations on what they could report. Neither of the two previous judgments was originally permitted to be reported.

8. A number of media organisations, to which we will refer as "the media" collectively, wish to be released from most of the reporting restrictions previously in place in order to report on what has taken place during the various hearings and, in particular, to report the two previous judgments.

9. On 17 January this year there was a hearing before the President to consider that question. His judgment ("the publication judgment") was handed down on 27 January. He decided that both the previous judgments should be made public and that the journalists who had attended the hearings should be able to report what they observed in so far as it related to them. Prohibitions on reporting the names, age and gender of the two children were lifted. Other restrictions, including the publication of where they live and go to school, and of their photographs, remain in place.

10. The primary appeal before us is the father's appeal, with the permission of the President, against the publication order. By an order dated 21 February the President also directed, consistently with that order, that the publication judgment itself, together with aspects of what occurred in Court, could be published. The father has appealed against that order also, again with the permission of the President. It is common ground that that appeal is in practice dependent on the outcome of the primary appeal. Publication of all three judgments has been stayed pending the decision on the appeals.

11. We will have in this judgment to refer frequently both to the publication judgment and to the two previous judgments. Since, to anticipate, we will be dismissing the appeal, those judgments will now be in the public domain, and we will accordingly, in the interests of economy and clarity, mostly refrain from setting out substantial passages from them and confine ourselves to brief summaries of the President's findings and reasoning. Those wanting more detail can of course refer to the judgments themselves.

THE PREVIOUS JUDGMENTS

The Fact-Finding Judgment

12. The fact-finding judgment concerns three allegations of misconduct made against the father by the mother which the President summarises at para. 23 of that judgment as follows:

> "Firstly, that in August 2000 the father ordered and orchestrated the unlawful abduction of his daughter Shamsa from the United Kingdom to Dubai.
>
> Secondly, that, on two occasions in June 2002 and February 2018, the father ordered and orchestrated the forcible return of his daughter Latifa to the family home in Dubai. In 2002 the

> return was from the border of Dubai with Oman, and in 2018 it was by an armed commando assault at sea near the coast of India.
>
> With respect to both Shamsa and Latifa it is asserted that following their return to the custody of the father's family they have been deprived of their liberty.
>
> Thirdly, the mother makes a number of allegations to the effect that the father has conducted a campaign, by various means, with the aim of harassing, intimidating or otherwise putting the mother in great fear both in early 2019 when she was still in Dubai and at all times since her move to England in April 2019."

13. In circumstances explained at paras. 17-21 of the President's judgment the father chose not to play any part in the fact-finding hearing. That meant not only that he personally gave no evidence, about which there were real difficulties in view of his special position, but that he called no witnesses of his own and did not instruct counsel to cross-examine the mother and her witnesses or to make any submissions. The President was accordingly obliged to assess the truth of the mother's allegations on the basis of the evidence adduced by her; but he nevertheless carried out a thorough and careful assessment of that evidence. His conclusion was that each of the three allegations had been proved by the mother to the requisite civil standard of proof.

14. It is unnecessary for the purposes of this judgment to say anything about the details of the President's findings relating to Shamsa and Latifa except that he accepted in full the allegations summarised at para. 12 above. More detail can be found at paras. 44141 of his judgment, but it is sufficiently clear from that summary alone that there is an important public interest in the publication of the President's findings about the father's conduct. There has indeed already been considerable interest, both in this country and internationally, in what has happened to the two princesses, and it has received very wide coverage in the press, both in this country and abroad, and in online media. We mention specifically, because they formed part of the evidence before the Judge, (a) a YouTube video made by Latifa in 2018, speaking mainly about her own story from 2002 onwards but also about the abduction of Shamsa in 2000; and (b) a BBC documentary called "Escape from Dubai: the Mystery of the Missing Princess", first broadcast in December 2018, which focuses on Latifa's escape and recapture but also explores Shamsa's abduction. But there has never been anything in the nature of an independent inquiry, and the father's account, which presents his conduct in both cases as that of a rescuer, is widely circulated.

15. We need to say rather more about the President's findings about the third allegation. He found that from about January 2019 the mother had experienced an increasingly hostile climate in her dealings with the father and those around him, involving various humiliations and threats to her safety and to her relationship with the children: we need not give the details but they appear at paras. 144-151 of the judgment. He makes no express finding about the father's motivation: at para. 144 he finds that in 2017/18,

when she had not for some time been in an intimate relationship with the father, the mother had started an affair with one of her bodyguards, but that the change in the father's attitude did not begin when he first became aware of that but when she began to take an interest in what had happened to Shamsa and Latifa. He finds that it was as a result of his treatment of her over this period that she concluded that her position in Dubai was "wholly unsafe and untenable" (para. 152) and decided to come to England with the children.

16. The President finds that the father's campaign of intimidation and humiliation continued after the mother had come to England. Again, we need not give the details, which appear at paras. 153-157 of the judgment. More importantly for the purpose of the issues before us, he found that the father commenced a "media war" against the mother. In a three-week period in June/July 2019 over a thousand articles were published about her worldwide containing what the President describes as "hostile stories aimed at destabilising and harming her". The judgment does not contain full details, but he comments that many were "wholly inaccurate, for example, suggesting … that [she] is an agent of Hamas and intending to overthrow the State of Jordan". We have seen examples of the articles referred to, which relate both to her private life and to her alleged financial and political activities and are indeed deeply offensive; many of them contradict the President's findings about the circumstances in which, and the reasons why, she left Dubai. To anticipate, this part of the father's conduct is referred to in the subsequent evidence and the publication judgment as the creation of a "false media narrative" about the mother, to which she is acutely sensitive and which has had a serious impact on her relationships in the community and circles in which she would normally move.

17. The father has not appealed against the fact-finding judgment.

The Assurances and Waiver Judgment

18. One of the issues relevant to the welfare hearing is whether there is a risk of the abduction of the children and their forcible return to Dubai, either generally or in the context of such contact arrangements as might be made. Where a parent is an ordinary citizen there is a powerful deterrent to any such attempt because he or she would be subject to serious sanctions from the courts, here or abroad, if they acted in breach of a court order. But in this case the father enjoys various immunities because of his position as Vice-President and/or Prime Minister of the UAE and/or as Ruler of Dubai, which on the face of it would mean that such sanctions were unavailable against him personally and might prove ineffective against persons acting on his behalf. That issue was sought to be addressed by a number of assurances and waivers offered by the father personally, by the UAE and by the Emirate of Dubai. The purpose of the assurances and waiver judgment was to decide what weight could be given to them as providing protection for the children from the risk of abduction.

19. The conclusion of the President was that, despite the appreciation and respect which should be accorded both to the father and to the UAE and the Emirate of Dubai for

offering the assurances and waiver, they could not at present be treated as providing any such protection.

20. The father has not appealed against the assurances and waiver judgment.

THE PUBLICATION JUDGMENT

21. The President's judgment begins, at paras. 1-19, with a short introduction and explanation of the issues which we need not summarise. It then proceeds under the following headings.

The Legal Context

22. At paras. 20-30 the President identifies the legal principles applicable to the issue of publication, which he understood to be uncontroversial. As will appear, despite that understanding, the father now seeks on this appeal to challenge a central element in this approach on a basis not raised below.

23. The President begins his self-direction as to the law by referring, at paras. 21-24, to the provisions of section 12 (1) of the Administration of Justice Act 1960, relating to the publication of hearings conducted in private, and of section 97 of the Children Act 1989, which restricts the publication of specified information about children involved in proceedings under that Act except where those restrictions are dispensed with by the Court.

24. He then refers to the Human Rights Act 1998, which gives effect to the European Convention on Human Rights ("the ECHR") and says, at para. 25:

> "The case law establishes that, where a court is asked to lift or to extend reporting restrictions in a case such as this, a balancing exercise is required between ECHR, Articles 6, 8 and 10 (or, where applicable, other rights)."

The focus in this case is on the rights conferred by articles 8 (private life) and 10 (freedom of expression) of the ECHR: they are too well-known for us to need to set them out here.

25. At paras. 26-28 the President sets out passages from three leading authorities establishing the need for such a "balancing exercise" and giving guidance as to how it should be exercised. The cases are *Re S (Identification: Restrictions on publication)* [2004] UKHL 47, [2005] 1 AC 593 (to which we will refer as *S*); *A Local Authority v W* [2005] EWHC 1564 (Fam), [2014] EMLR 7, [2006] 1 FLR 1 (to which we will refer as *W*); and *Re J (A Child)* [2013] EWHC 2694 (Fam). He started with *Re J*, as the most recent. The passage quoted, from para. 22 of the judgment of Sir James Munby P, reads (omitting one short passage):

> "The court has power both to relax and to add to the 'automatic restraints.' In exercising this jurisdiction the court must conduct

> the 'balancing exercise' described in [*S*], and in [*W*]. This necessitates what Lord Steyn in [*S*], para [17], called 'an intense focus on the comparative importance of the specific rights being claimed in the individual case'. There are, typically, a number of competing interests engaged, protected by Articles 6, 8 and 10 of the Convention. … As Lord Steyn pointed out in [*S*], para [25], it is 'necessary to measure the nature of the impact … on the child' of what is in prospect. Indeed, the interests of the child, although not paramount, must be a primary consideration, that is, they must be considered first though they can, of course, be outweighed by the cumulative effect of other considerations: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, para [33]."

The passage which he quoted from the speech of Lord Steyn in *S* reads:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

The passage from the judgment of Sir Mark Potter P in *W* reads:

> "The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither article has precedence over or 'trumps' the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary before the ultimate balancing test in terms of proportionality is carried out. Having so stated, Lord Steyn [in *S*] strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test…"

26. Having quoted those passages he concludes:

> "29. It is plain that the interests of any children are not afforded 'paramount consideration' in the balancing exercise. However, as Baroness Hale warned in *PJS v News Group Newspapers*

> [2016] UKSC 26, the fact that the interests of a child may not be 'a trump card' does not mean that those interests should be dismissed.
>
> 30. In the present case, a good deal of information about this internationally prominent family is already in the public domain. HRA 1998, s 12(4)(a)(i) expressly requires the court to have regard to the extent to which the material has become available to the public. In recent times, in particular in the Supreme Court decision in *PJS v News Group Newspapers*, the court has identified the need to consider unwanted intrusion into aspects of a person's private life as being a separate matter deserving of protection under Article 8 which is distinct from the more traditional element of 'confidentiality'. The fact that confidentiality has already been breached to some extent, does not necessarily justify further intrusion."

The Parties' Submissions

27. At paras. 31-62 the President gives a very full account of the parties' submissions before him. We need not reproduce that account here. It is only necessary to identify the broad positions taken by the parties by way of introduction to the President's substantive reasoning.

28. Ms Sarah Palin for the media advanced the case for publication on the basis of article 10 of the ECHR, emphasising in particular the public interest in publicising the Court's findings about the father's conduct towards Shamsa and Latifa and also in understanding the role of the Court in determining the future of these two children.

29. Mr Charles Geekie QC for the mother supported publication on a quite different basis, based on the rights of herself and, in particular, the children under article 8 of the ECHR. He relied primarily on an extensive witness statement from her describing the impact on their lives of the negative media narrative promoted by the father about the circumstances in which she had left Dubai: see para. 16 above. It was said to be essential to their well-being to be able to counteract that narrative by reference to the Court's authoritative findings.

30. Ms Deirdre Fottrell QC for the Guardian supported publication of the fact-finding judgment, on the basis that publication now was in the best interests of the children. That position was based on a recent report from the Guardian directed specifically to the question whether the fact-finding judgment should be published (the assurances and waiver judgment had not at that point been handed down) and also whether that should occur in advance of the final welfare hearing. The Guardian had already had meetings [redacted] He saw them again for the purpose of the report. Although he had at an earlier stage expressed caution about publication in advance of the final welfare hearing, his

recommendation, after conducting a careful review of all the considerations, was that such publication would be in the best interests of the children. He believed that the absence of an authoritative account of the father's past conduct towards Shamsa and Latifa, and the dissemination of a distorted narrative of the reasons why the mother had left Dubai, was causing the mother what the President (summarising the Guardian's evidence) called "clear and stark psychological, social and emotional pressure", which in turn had a direct impact on the welfare of the children. The Guardian acknowledged that publication would be potentially harmful to the children by exposing their family history and their parents' relationship to public scrutiny but that that was outweighed by the advantage of there being what he called "an established narrative of their family history or life story". He believed that publication should occur now "so that contact can be re-established, supported and encouraged against a 'clean slate' rather than have any progress being derailed later".

[redacted]

The Guardian was not cross-examined on behalf of the father.

31. Lord Pannick QC and Mr Desmond Browne QC for the father opposed any publication at that stage, squarely on the basis that it was contrary to the interests of the children. That was both because publication would lead to a media frenzy which would impact on them (partly through the impact it would have on their mother) and because it would undermine the possibility of restoring contact between them and the father at a peculiarly critical stage. They did not attempt to dispute the weight of the article 10 considerations relied on by the media.

Discussion

32. It is under this head, covering paras. 63-92, that the President conducts the balancing exercise which he had described in his account of the relevant law and explains the orders to be made in consequence. He considers in turn the application of article 10 and article 8 to the circumstances of this case. We can summarise his reasoning and conclusions as follows.

33. He starts, at paras. 64-66, by noting by way of preliminary two striking features of the case – (a) the strength of the article 10 case in favour of publication, unchallenged by the father; and (b) the fact that the mother [redacted] was strongly in favour of publication. He then proceeds to a more detailed analysis of the relevant interests by reference first to article 10 of the ECHR and then to article 8.

34. As to article 10, at para. 67 he accepts the (unchallenged) case of the media that there is a very powerful public interest in the publication of the father's conduct as found in the fact-finding judgment.

35. He considers the article 8 rights of each of the parties at paras. 68-79, noting that he will "[afford] primary consideration to the welfare of the children" (para. 68). His essential conclusion is that the publication of the judgments will be of substantial benefit to the children for the reasons given by the mother and the Guardian. That is, it would

counteract the father's false narrative which, as he found, adversely influences the attitudes towards the mother and the children of most of the people with whom they come into contact, even the mother's own family, and which is very damaging to them and has led to a high degree of social isolation. He acknowledges that publication is likely to result in a media storm and that in normal circumstances the Court would not sanction publication of negative findings about a father "at the very moment that [it] is actively contemplating the delicate task of re-establishing the father's relationship with his daughter and son"; and he acknowledged (see para. 68) that for that reason both he and the Guardian had initially been very cautious about the idea. But he finds that in the very special circumstances of this case publicity will be beneficial because of its impact on "the landscape of public opinion" (para. 73). He summarises his position at para. 74:

> "On that analysis, and in the wholly unusual circumstances of this case, I consider that widespread media publicity with the aim of presenting the facts as found by a judge in a court of law is a necessary step in order to meet the private and family life needs of the mother and the children. The purpose of publication is to correct the false narrative that has been generated and currently surrounds their ability to have any form of family, private or social life outside the immediate confines of their home."

[redacted]

37. At para. 79 he notes that the father's own article 8 interests are engaged, but that his counsel had put the case squarely on the basis of the welfare of the children.

38. The President expresses his conclusion on the required balancing exercise at paras. 80-81, as follows:

> "80. Drawing matters together, it will be plain from the conclusions that I have now described that I regard the case in favour of publication as being strong to the extent of being almost overwhelming despite the weight that rightly attaches to the father's position [redacted] The Article 10 analysis, which is not challenged, goes way beyond the private interests of these family members and includes matters of genuine international public interest. In addition and at the same time the mother's Article 8 case in favour of publication is also extremely strong. Publication of the detailed findings of the court in a judgment which describes with clarity the evidence upon which those findings are made, offers

> some real prospect that those with whom the mother and children may mix, and, particularly, her family will have the material available to them to form a wholly different view of her than the one which apparently presently obtains.
>
> 81. In short, I consider that publication of the judgments is not merely desirable, it is necessary to meet the requirements not only of ECHR Article 10, but also Article 8."

It is important to note that this was not a case of the more usual kind where the article 10 and article 8 considerations were competing; on the President's findings, they pointed in the same direction.

39. Thus far the President had considered the question of publication generally. At paras. 82-84 he addresses the question of timing. We should set out this passage in full:

> "82. On the question of timing it is impossible to contemplate, upon the analysis that I have now undertaken, that the fact-finding judgment would remain confidential for all time. The case for publication under Article 10 is in the strongest terms. Further, it is not possible to contemplate that the mother's position under Article 8 is likely to change at any stage.
>
> 83. The father's case on timing is that publication now would unleash a media storm precisely at the moment when the children's overall welfare is to be assessed and further attempts at re-establishing contact are to be made. He is, of course, factually correct in that regard. However, the same factors will be in play if publication is delayed for, say, eight weeks until the conclusion of the welfare hearing. If the lives of the children are to be upset by publicity, that upset will happen at a stage during the process of considering contact and attempting to reintroduce it because that very process is bound to occupy the next six months or more, if not longer.
>
> 84. I have previously voiced the tentative opinion that it may well be right for the question of publicity to be evaluated along with all the other welfare issues and only determined at the final hearing. That view is one to which the father adheres and, through counsel, firmly submits to this court should be the outcome. I, however, no longer hold to that view for three principal reasons. Firstly, it is clear that, whatever the other welfare determinations the court may make, publication of these judgments in the course of the next two or three months is inevitable. On that basis, nothing is to be gained by awaiting an overall welfare evaluation and a full report from the children's guardian. Secondly, I accept the submission of Ms Palin that,

> with respect to Princess Shamsa and Princess Latifa and the implications that flow from the court's findings, the need for publication can be said to be urgent. Thirdly, the strength of the evidence in the mother's recent witness statement indicates that the need for publication in order to correct the negative narrative that surrounds the everyday existence of this mother and these children is also urgent and pressing. I repeat my observation that the baseline here is not of a family living in obscurity about whom nothing is known. Doing nothing, or postponing publication, allows for the continuation of the highly negative and harmful experience of living in circumstances in which all those with whom they have contact are likely to have been influenced by a largely false account of the mother's actions."

THE GROUNDS OF APPEAL

40. Two grounds of appeal are pleaded in the Appellant's Notice. The first contends that the President erred in principle in reaching a decision on the issue of the publication of

the judgment prior to the welfare hearing: Lord Pannick, who again appeared for the father before us, referred to this as "the prematurity ground". The second contends that, even if he was entitled to take that course, he was wrong to find that the outcome of the balancing exercise was in favour of publication. There is a good deal of overlap between the points relied on in support of the two grounds, and Lord Pannick in fact confined his oral submissions to the first, relying on his skeleton argument as regards the second.

41. As already mentioned, the father seeks permission to amend the grounds of appeal by adding a further ground the effect of which is that, at whatever stage the President should have considered the question of publication, he should not have conducted a balancing exercise of the kind that he did but should instead have proceeded on the basis that the interests of the children were paramount. We will postpone consideration of that application until we have considered the grounds of appeal as originally pleaded.

42. It is convenient at this stage to state the principles governing an appeal from a decision whether or not to publish a judgment handed down in private. In *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132, [2015] 1 Cr App R 1, which concerns an analogous kind of decision, Sharp LJ said, at para. 46:

> "The task the judge had to carry out was an evaluative one, akin to the exercise of discretion. This court will not interfere unless the judge erred in principle or reached a conclusion which was plainly wrong, that is, one outside the ambit of conclusions which a judge could reasonably reach".

Likewise, in *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR

1645, this court had to consider the test applicable to an appeal against the order of a judge granting the claimant anonymity. Lord Neuberger MR said at para. 26:

> "While that decision did not involve the exercise of a discretion, it involved a balancing exercise, with which, at least as a matter of general principle, an appellate court should be slow to interfere. When considering an appeal against such a decision, an appellate court is normally exercising a reviewing function, and should not allow the appeal unless satisfied that the judge was wrong. As I said in *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804, para 49, '[w]here the determination is a matter of balance and proportionality, it is, generally speaking, difficult for an appellant to establish that the judge has gone wrong'. All the more so, where, as here, the judge is very respected and highly experienced in the particular area of practice, and has given the issue very careful consideration."

43. Lord Pannick referred us to para. 64 of the judgment of Lord Carnwath in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, where he said:

> "[T]o limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, para 34):
>
> > "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong."

That is not in any way inconsistent with the authorities to which we have referred above.

GROUND 1: PREMATURITY

44. Lord Pannick submitted that the President had erred in principle in deciding the issue of publication at what he described as "an interim stage". The President, he said, made errors of principle, in respect of each of the three reasons he gave for having concluded at para. 84 of his judgment (set out at para. 39 above) that publication should be permitted forthwith, rather than being postponed to be evaluated along with all the other welfare issues at the final hearing.

45. The first reason ("Reason 1") identified by the President in para. 84 was his conclusion that publication of the judgments was inevitable during the course of the next two to three months. Lord Pannick submits that the President had been wrong to decide the publication issue prior to having all the evidence made available to him: he had, he said, not therefore been in a position to conclude that publication of the judgment was inevitable in two to three months, or at all. In particular, Lord Pannick identified that the Guardian had not filed a report in relation to contact, there had been no cross-examination of the Guardian and the court had not yet had the benefit of the submissions on contact.

46. Whilst Lord Pannick said that he did not go so far as to say that there were no circumstances in which the President could have reached the conclusion that he did, in order for him to have done so, he said, the most cogent of reasons would be necessary and none of the reasons given in para. 84 came close to justifying this "exceptional decision". Lord Pannick submitted that publication now would be an irrevocable act, but that the position in respect of publication might change by the time of the final welfare hearing. Should it be decided at a later stage that publication should not be allowed it would then be too late to put the matter right.

47. Lord Pannick characterises Reason 1 as being a classic example of impermissible predetermination and submitted that had the President delayed any decision until such time as he had available all the material presented at the welfare hearing, it would, at the very least, have been possible that he would have decided that publication would not be in the best interests of the children. In support of this submission, Lord Pannick relied upon a note prepared on behalf of the Guardian for a hearing on 13 December 2019. At that stage, the Guardian was of the view that any consideration of publication of the judgments was inextricably bound up with considerations of welfare. Whilst the Guardian, Lord Pannick says, is of course entitled to change his mind, the fact that he has done so once demonstrates that this order is premature since, upon preparing his welfare evaluation, he could change his mind again, by which time it would be too late if publication had already been permitted.

48. Ms Fottrell, on behalf of the Guardian, put the development of the views of the Guardian into context, particularly in relation to the events which had led up to the hearing which took place on 17 January 2020 and resulted in the making of the order now the subject of this appeal. As identified by Lord Pannick, at the hearing on 11 December the Guardian had raised [redacted] the [redacted] Whilst the President had, Ms Fottrell

question of whether the issue of publication might impact upon the welfare of the children. The Guardian had, at that stage, had no opportunity to see either of the children or the mother.
explained, accepted the Guardian's submission as to the necessity of proceeding with extreme caution, he had directed that the Guardian file an analysis specifically in relation to the publication issue. He then listed the matter for a discrete hearing of the issue for a full day on 17 January 2020.

49. Between 11 December 2019 and 17 January 2020 the Guardian had the benefit of receiving a witness statement from the mother setting out the intense psychological pressure which she was under consequent upon the false narrative which was in the public domain, and of seeing a note filed on behalf of the father in which he said that he did not accept the findings of the fact-finding judgment and made no proposals as to how to move forward in relation to contact. In addition, the Guardian had had the benefit of seeing the children and the mother. As noted at para. 30 above, he filed a detailed welfare analysis recommending immediate publication of the finding of the fact-finding judgment. That report was written on the basis of all his investigations and focused specifically and exclusively on the issue of publication.

50. In those circumstances, Ms Fottrell submits, the President had all the information necessary in order to decide the issue in front of him. It is, she says, too late for the father now to suggest that the forensic decision made on his behalf not to cross-examine either the Guardian or the mother at the hearing on 17 January 2019 should be regarded as some sort of significant lacuna in the information then available to the President. We agree.

51. Lord Pannick argues that once the President has all the evidence available to him at a welfare hearing there must be at least a possibility that he will change his mind (not only as to the timing of publication but whether publication should ever take place, at least for the foreseeable future) and for that reason alone the decision to publish the judgment now was premature.

52. In our judgment, the President's determination that publication was inevitable whether now or in the next few months, was not a premature conclusion on his part. Not only did the President have all the information necessary to make the decision he made, but there is no basis to suggest that the findings themselves may be varied or undermined at the welfare hearing. Whilst technically the proceedings are part-heard (the factfinding hearing having been completed and the welfare hearing yet to be heard), these findings of fact are not, in our judgment, "interim" findings and Lord Pannick accepts that the fact-finding judgment is itself a final judgment. In our view, given that the facts found do not relate directly to the children, this is not a case where there is any likelihood of those facts being revisited at the welfare hearing.

53. Further, the Guardian, having been expressly directed to conduct an investigation into the issue of publication, had concluded:

> "30. I have considered intensely whether publication might

> sabotage any progress in contact, [redacted]
>
> 31. I take the view it would be better to address publication now so that contact can be re-established, supported and encouraged against a 'clean slate' rather than have any progress being derailed later. However, the issues about how contact can be safely be progressed will be addressed in a future report."

54. Finally in relation to Reason 1, in our judgment, in considering whether the President had been premature in determining that publication of the judgment was inevitable in the foreseeable future, it is necessary to consider not only para. 84 of the judgment but also paras. 80 and 82 (set out at paras. 38 and 39 above). The President held that the balance in favour of publication was "strong to the extent of being almost overwhelming" and that "on the question of timing it is impossible to contemplate, on the analysis that I have now undertaken, that the fact-finding judgment would remain confidential for all time".

55. In our judgment the President was entitled to conclude that publication was inevitable and that nothing was to be gained by awaiting the subsequent welfare hearing in relation to contact.

56. Lord Pannick submits that the other two reasons ("Reason 2" and "Reason 3") found within para. 84 also reveal errors of principle.

57. Reason 2 was that it was "urgent" in the public interest that the findings relating to Princess Shamsa and Princess Latifa be published, in view of the implications that flow from those conclusions. Lord Pannick highlighted that it is accepted that the Princesses are not in any real or immediate risk of physical danger and that it is not suggested that the publication of the judgment would lead to any substantial change in their circumstances. The President therefore, Lord Pannick submits, was in error in regarding this to be a factor in support of his conclusion that there should be immediate publication.

58. Mr Andrew Caldecott QC, on behalf of the media, emphasised that the plight of the two princesses remains wholly unresolved. There is nothing in the public domain, he submits, which is remotely comparable to a fact-finding judgment given by the President, which gives a definition to the issue and which makes crucial findings both as to the abduction and the current treatment of the princesses. The article 10 urgency is, he submits, self-evident.

59. Whilst it may well be that the President's Reason 2 could not have stood alone to support his decision in favour of immediate publication, in our judgment there was no error on

his part in factoring in this important public interest feature of the case as a part of the evaluation process.

60. Lord Pannick's focus in relation Reason 3 (the impact of the mother's witness statement) was twofold. First, he said that it was unrealistic to think that the nature of press reporting would be such that the narrative would in fact be corrected; and secondly, that the President had failed to give adequate weight to the circumstances in which the findings of fact had been conducted.

61. In respect of whether it was realistic to think that publication of the judgments would have the desired effect of putting the record straight, Lord Pannick suggested that the mother was doomed to "inevitable disappointment". The public, he said, would not read the judgment and, in any event, the manner of reporting would be such that any so-called correction would be lost within the noise surrounding the reporting, reporting which would be focused only on keeping the story going for as long as possible. Any notion of responsible reporting (a phrase used by the President at para. 87 of the judgment) was, he said, idealistic and unrealistic and, in any event, any responsible reporting that there may be would be drowned out by more colourful and irresponsible accounts.

62. The President was acutely aware of the inevitability of a "media storm" following publication. He found at para. 74, however, that "widespread media publicity with the aim of presenting the facts as found by a judge in a court of law is a necessary step in order to meet the private and family life needs of the mother and the children". That was a conclusion that he was fully entitled to reach. In our judgment it is entirely reasonable to believe that the publication of the fact-finding judgment, representing as it does reasoned conclusions reached by the President of the Family Division after a self-evidently careful assessment of the evidence which he heard, will carry considerable weight and will, if not completely and if not in relation to anything like all of those people who may see reports of the case, nevertheless go a long way to correcting the false narrative which the President found to be current. In particular, he was entitled to conclude that the judgments would be of considerable value in altering the attitudes of those friends and family who have been influenced by that narrative into so hurtfully withdrawing their support and company from the mother and children.

63. We do not therefore accept the contention that, given what is suggested to be the irresponsibility of the media as a whole, the weight which the President gave to "correcting the negative narrative" was unrealistic. Such a submission is particularly unattractive, made as it is against the backdrop of his findings about the father's campaign of intimidation and humiliation conducted via a media war against the mother, which has in large measure led to the false narrative which, the President believed, required to be corrected in the interests of the children.

64. Lord Pannick further attacks Reason 3 submitting that the judge had failed to give adequate weight to the circumstances in which the fact-finding hearing was conducted. It is implicit in this submission that the findings are in some way insecure because the

President heard from only one side, namely that of the mother, and that, as a consequence there has been no effective testing of the evidence.

65. During argument, Lord Pannick accepted that, whatever the difficulties about the father giving oral evidence himself because of his special status, there had been no similar inhibition preventing him from instructing his substantial legal team to play a full part in the finding of fact hearing. He could, had he chosen, have tested the evidence, in particular by cross examination of the mother, and by calling evidence of his own. Lord Pannick told the court that the reason the father had not given instructions to his legal team to play a part in the trial was because he regarded the subject matter of the finding of fact hearing to relate to deeply private and personal matters and he was not, therefore, prepared to engage with the process.

66. Whilst sympathising with the father's understandable sense of intrusion in relation to these deeply private and personal matters, this is an intrusion suffered by every litigant in such finding of fact hearings, be they prince or pauper. The father elected not to take part in the proceedings and has not appealed against the findings made by the President. It cannot in our view now be said, in reliance upon that forensic decision, that the President should in some way have put into the balance against publication a view that his judgment, which is final in character, should be regarded as inadequate or its findings treated as unreliable. It is in fact clear from a reading of the fact-finding judgment that the President scrupulously tested the reliability of the evidence which was before him.

67. In truth, this is a paradigm example of the kind of evaluative decision by a trial judge with which this Court ought not to interfere. The decision which the President had to make was, as he himself acknowledged, not one that would be made in the ordinary case. But he carefully assessed the particular, and unusual, circumstances of the case, addressing head-on the objections raised by the father, and gave a fully reasoned decision. There was a clear evidential basis for his decision to permit publication at the stage that he did, including the report of the Guardian. He neither made any error of principle in his approach nor reached a conclusion which was plainly wrong.

68. Finally, Lord Pannick submitted that even if the President had been entitled to conclude that the fact-finding judgment should be published the factors relied on in that regard did not justify the publication of the assurances and waivers judgment in advance of the welfare hearing. He did not develop the submission with any force, and he was plainly right not to do so. It is hard to see what harm, given its very specific subject-matter, the publication of the assurances and waivers judgment could do to the article 8 rights of the children. It is true that its backdrop is the perceived risk that they might be abducted, but that is equally apparent from the fact-finding judgment. The President held, at para. 85 of his judgment, that if the one was to be published there was no principled reason why the other should not be. That was in our view entirely correct. He went on to advance an additional reason supporting publication of the assurances and waivers judgment. Lord Pannick advanced some criticism of this, but since the President's primary reason is sufficient we need not take up time in addressing the issue.

GROUND 2: ERROR IN STRIKING THE BALANCE

69. Lord Pannick did not develop ground 2 in his oral submissions. He acknowledged that there was a considerable overlap with ground 1, and in so far as additional points were made in the father's skeleton argument he was content to rely on them as they stood.

70. In fact the great majority of the points that are made in the skeleton argument under ground 2 are covered by our conclusions above. For example, it is said that the Judge under-estimated the force of the likely media storm following publication of the judgments, that he made an unrealistic estimate of the ability of such publication to vindicate the mother, and that he failed to take account of what was said to be the shift in the position of the Guardian. As to the first two points, we have held that the President's conclusions were entirely open to him on the basis of the evidence which it was his role to evaluate; as regards the third, we have accepted Ms Fottrell's explanation that there was no inconsistency in the Guardian's position at different stages, and the President of course expressly referred to his initial caution.

71. The points made in the father's skeleton argument that are not sufficiently covered by what we have already said are threefold.

[redacted]

[redacted]

74. Thirdly, reference is made to the extent of information already in the public domain and to *PJS v News Group Newspapers* [2016] 1 AC 25, [2016] UKSC 26. That does not assist. *PJS* is wholly different, as highlighted by Mr Caldecott, it related to a wholly private matter containing none of the confines of a judgment and has nothing to do with this case where, pursuant to the Transparency in the Family Courts: *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by Sir James Munby P on 16 January 2014 (reported at [2014] 1 WLR 230; [2014] 1 FLR 733), the starting point is (pursuant to para. 17) that the judgment should be published. In any event, the primary element in the Judge's reasoning in the present case was the need to counteract the information in the public domain generated by the father's media war.

THE APPLICATION TO AMEND

75. The skeleton argument on behalf of the father was lodged and served on 14 February 2020. It argued that the President made an error of law in failing to treat the welfare of

Jalila and Zayed as "the paramount and therefore determinative consideration". When it was pointed out by Ms Palin for the media that this point had neither been argued below nor made the subject of a ground of appeal, the father's solicitors issued an application notice on 20 February 2020 seeking:

> "Under CPR 52.17, an order (if necessary) permitting the amendment of the appeal notice hearing to include a new Ground 1A in the following terms: 'Both (a) in deciding whether to embark on a determination in advance of the final welfare hearing of the issue of whether to allow publication of the two earlier judgments of the Court and the other forms of publicity permitted by the Order dated 28 January 2020 and (b) in then determining that issue as it did the Court erred in law by not proceeding on the basis that the welfare of the children was the paramount and determinative consideration'."

76. This is a striking departure from the way in which the case was argued before the President. At that hearing it was common ground that the correct approach to the questions of publicity raised by the media was to apply the *S* balancing exercise. In oral submissions on 17 January Mr Browne said:

> "The balancing exercise where Convention rights are in conflict is by now so well established that it is not necessary to teach the court to suck eggs."

He went on to say that

> "… in measuring the nature of the impact on the child of what is in issue, the interests of the child are a primary consideration. They are very important and a major factor."

He adopted what had been said on that topic by Ms Deirdre Fottrell QC, representing the Guardian, at a previous hearing.

77. Indeed, even without reference to these oral submissions by Mr Browne or to the skeleton arguments at first instance, it is plain from the entirety of the President's publication judgment that before him the applicability of the *S* balancing exercise was common ground. As he said at para. 20:

> "The legal context within which issues of this nature fall to be determined is now well settled and well understood. It is of note that there is no issue at all as to the law taken by any one of the strong and extremely experienced legal teams who have appeared before this court. I will not, therefore, do more in this judgment than describe the underlying statutory position together with the balancing exercise which all agree the court must undertake."

Those acting for the father at the hearing about publication were indeed a "strong and extremely experienced legal team", consisting as they did of Lord Pannick QC, Alex Verdan QC, Desmond Browne QC, Lewis Marks QC and Adam Speker of counsel and instructing solicitors of great experience.

78. In oral argument before us Lord Pannick said:

> "The mother's skeleton argument says we failed to provide an explanation for the change of position, paragraph 67 of her skeleton argument. I'm not sure it matters, but if your Lordships are interested, we've looked at the matter again with the benefit of new counsel, my co-counsel in this case who were not previously instructed, in particular Mr Spearman, Mr Busuttil, Mr Jarmain, and new solicitors, Harbottle & Lewis.
>
> My submission is that this new point raises an issue of pure law. We're either right on this point or we're wrong. And as the media say at paragraph 17 of their skeleton argument, they have set out their answers to the point of law. They do not suggest that they are prejudiced in any way if we are now allowed to take this point. On the contrary they say, very fairly, at paragraph 17 of their skeleton argument, they leave it to the court to decide whether to allow the point to be argued.
>
> Nor does the mother suggest in her skeleton argument any prejudice to her in being allowed to argue the point. Her position in her skeleton argument, is the point has no legal merit on its substance. I also point out before briefly addressing the substance of the point that this question, that is should we now be allowed to argue this new point, arises in a context, that is the welfare of the children, where the court should, we suggest, be especially slow to rule out a point of law where there is no prejudice to any of the parties."

79. We allowed the new point to be argued *de bene esse*, that is to say without prejudice to our decision on whether or not to grant permission to amend the grounds of appeal.

80. Lord Pannick argued that, however widespread the assumption by members of the legal profession that issues of publication of judgments concerning children involve "the *S* balancing exercise", that assumption is misplaced. He drew our attention to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, an appeal by an unsuccessful asylum-seeker against a decision that she should be removed from the United Kingdom. The leading judgment was given by Lady Hale, with whom Lord Brown and Lord Mance agreed. Having stated at the outset that "the over-arching issue in this case is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country", Lady Hale continued:

"25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration'. Of course, despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'. Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:

'When a court determines any question with respect to –

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.'

However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

> 'The term "best interests" broadly describes the well-being of a child. . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:
>
> - the best interests must be **the determining factor for specific actions,** notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
>
> - the best interests must be **a primary** (but not the sole) **consideration for all other actions** affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

This seems to me accurately to 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.
>
> 26. Nevertheless, even in those decisions, the best interests of the child must be a primary consideration…"

81. Lord Pannick submitted that the mother's argument in this case is that publication would benefit the children; the decision about it therefore "directly affects their upbringing"; and that *ZH* thus dictates that the paramountcy principle must be applied.

82. Lord Pannick also pointed out that in *Re W (Children)* [2016] EWCA Civ 113, [2016] 4 WLR 39, McFarlane LJ, with whom Macur and King LJJ agreed, said:

> "37. In the present case, Jackson J used the power available to him to move from the default position so as to allow a controlled degree of publicity. This was a matter for the judge's discretion. It was common ground before this court that that discretion must be exercised by conducting a balancing exercise between the rights to privacy and a private life which are encompassed within ECHR Art 8, on the one hand, and the right to freedom of expression reflected in Art 10. The parties in this appeal each accepted that the exercise of judicial discretion whether to relax, or increase, the default restrictions upon publication of information from CA 1989 proceedings is not one in which paramount consideration must be afforded to the welfare of the child who is the subject of the proceedings. That acceptance was based upon a number of first instance decisions, together with the *President's Guidance* on the publication of judgments.
>
> …
>
> *A point not argued: Is the child's welfare paramount?*
>
> 41. During the hearing of the appeal we accepted the jointly argued approach of counsel and that, in turn, was the basis upon which we came to the decision on the appeal which we announced at the conclusion of the oral hearing. In the process of preparing this written judgment, however, I have come to the preliminary view that there may be a conflict, or at least a tension, between the apparently accepted view that welfare is not the paramount consideration on an issue such as this, on the one hand, and Court of Appeal authority to the contrary on the other hand. As this present judgment is a record of the reasons for our decision announced on 23rd November 2015 and that decision was based upon the children's welfare not being the paramount

> consideration, I do no more than flag up this potential point which, if it is arguable, must fall for determination by this court on another occasion.
>
> 42. The key authorities to which I am referring are a criminal case in the House of Lords, *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593, a private law family case in the Court of Appeal, *Clayton v Clayton* [2006] EWCA Civ 878; [2007] 1 FLR 11 and a public law child case in the High Court, *Re Webster; Norfolk County Council v Webster and Others* [2006] EWHC 2733 (Fam); [2007] 1 FLR 1146.
>
> 43. Although, in my view, a reading of those cases may give rise to a potential point relating to the paramountcy of the child's welfare, which, as I have stated, must fall for determination on another occasion, it is not necessary to go further in this judgment and consider the matter in any detail."

83. The short and simple answer to the application to amend is that given by Mr Geekie on behalf of the mother: namely that on the facts as found by the President it makes no difference whether the welfare of the children is the paramount consideration or only a primary consideration. The mother points in particular to the President's finding at para. 74 of the publication judgment, which we have cited above, that widespread media publicity with the aim of presenting the facts as found by a judge in a court of law was "a necessary step in order to meet the private and family life needs of the mother and the children"; and to the President's conclusion at para. 80 that he regarded "the case in favour of publication as being strong to the extent of being overwhelming", precisely because publication was in the interests of the children as well as in the public interest. We reject as not arguable Lord Pannick's suggestion that the President might have reached a different conclusion if he had applied the paramountcy test.

84. We would refuse the application on that basis alone. But our decision is reinforced by other considerations. We are bound to say that it is our strong provisional view that the argument which the father wishes to advance is ill-founded. But if it is indeed arguable that the question whether a judgment in proceedings involving children can be published is "a question with respect to the upbringing of a child" within the meaning of section 1 (1) of the Children Act 1989, and thus to be governed by the paramountcy principle, that is indeed an issue of great importance. Quite apart from anything else, the practice of the Family Court embodied in the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by Sir James Munby P on 16 January 2014 would require significant reconsideration. It is all the more important that this Court should consider the question, if at all, with the benefit of a reasoned judgment at first instance, and with the benefit of full argument and in a case where it will or at least may determine the outcome. Lord Pannick was right to say that the media did not claim to be prejudiced by the father's very belated *volte-face*, and we did hear some helpful submissions from Mr Caldecott; nevertheless, there was not the opportunity for the full examination of the authorities that the issue would merit.

85. In these circumstances it is unnecessary to refer to the authorities on when a party should be permitted to raise on appeal an argument which was not raised below. But we would add two points. Firstly, Lord Pannick's explanation for the change of position that "we have looked at the matter again" with the assistance of three new counsel and of new solicitors does not take the case for allowing the amendment any further. Secondly, we do not accept his argument that this is a "pure point of law" which can be raised for the first time on appeal without causing any prejudice to the mother or the children. It was not suggested that (if we rejected the pleaded grounds of appeal, as we have) we could decide ourselves that, treating the welfare of the children as the paramount consideration, the judgments must not be published. That issue would have to be remitted to the President and argued before him. This would involve further delay.

THE FORM OF ORDER: REPORTING OF ARGUMENT IN COURT

86. For those reasons we dismiss the application for permission to amend the grounds of appeal.

87. It will be seen from the President's order as annexed that paragraph 8 (b) of the President's decision of 27 January allows "journalists who have attended the court hearings to report what they have observed taking place in court *only insofar as that reporting concerns the proceedings directly related to the fact-finding judgment or the assurances and waivers judgment* [emphasis supplied]". Paragraph 9 (b) uses the same formula. (There is also a similar formula, though the permitted areas are differently expressed, in paragraph 4 of the President's order of 21 February.)

88. There was no challenge to that aspect of the order in the father's grounds of appeal, but in his skeleton argument it was submitted that the order is "too vague and/or too broad to enforce in circumstances in which children are meant to be protected". Lord Pannick, in oral argument, said that it was "not an easy test to apply", though those aspects of the case were plainly not the father's main concerns. He did not identify any specific matters, mentioned in court but not in the President's judgments, which gave cause for concern, but the possibility was at least canvassed that the legitimate interests of the press would be sufficiently respected by allowing the publication of the judgments and that the publication of anything that was said during the hearings was unnecessary.

89. Mr Caldecott told us that Ms Palin, who had appeared for the media before the President, and the media representatives who had attended the hearing, had been sensitive to the possibility of there being material which should be excluded and had "reacted sympathetically" to any proposals made. He was not asking for a blanket right to report the argument.

90. We do not consider that it would be right to impose a blanket prohibition preventing the accredited representatives of the media who attended the hearings before the President from reporting anything which was said or which occurred at the hearing: such an order would render pointless the practice of allowing such representatives to attend. It is

therefore inevitable that there has to be some definition of the dividing line between what can and cannot be reported. We do not know whether there was any dispute at the time of the original formulation of paragraph 8 (b) of the President's order. But it was not the subject of an appeal by any of the other parties, and in particular not by the Guardian, who might have been expected to object if he believed that there was a risk that the restrictions were too loosely expressed. We are not persuaded that they are. The phrase "directly related to" the two judgments clearly means that publication, for example, of things said at the hearings relating to other aspects of the welfare of the children remains prohibited – for example, about their experiences, their health and education, or their views about publication, or the history of contact between them and their father. We will hear submissions about the precise form of any order relating to the hearing before us and also about the extent of any necessary redactions in the published form of this judgment.

CONCLUSION

91. We accordingly dismiss the appeal against the President's order of 27 January. It was, as we have said, common ground before us that in those circumstances the appeal against his order of 21 February must also be dismissed.