Neutral Citation Number: [2021] EWCA Civ 512

Case No: B4/2020/2156 and 2157

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
The Honourable Mr Justice Hayden
COP1337884

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LORD JUSTICE WARBY

- -

IN THE MATTER OF P (DISCHARGE OF PARTY)

Between :

AA	**Appellant**
- and -	
LONDON BOROUGH OF SOUTHWARK (1) **P (by her litigation friend** **The Official Solicitor) (2)** **SOUTH LONDON AND MAUDSLEY NHS** **FOUNDATION TRUST (3)**	**Respondents**

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- -

Timothy Nesbitt QC and Alex Cisneros (instructed by **Bindmans LLP**) for the **Appellant**
Katherine Barnes (instructed by **Local Authority Solicitor**) for the **First Respondent**
Fiona Paterson (instructed by **Edwards Duthie Shamash**) for the **Second Respondent**
Nicola Greaney (instructed by **Bevan Brittan LLP**) for the **Third Respondent**
Stephen Cragg QC as Special Advocate (instructed by the **Special Advocate Support Office**) for the **Appellant**

Hearing date : 9 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 16 April 2021.

LORD JUSTICE BAKER :

1. This is an appeal against two orders made in proceedings in the Court of Protection about a highly vulnerable 19-year-old woman, hereafter referred to as P. The appellant is P's mother who was joined as a respondent to the proceedings at their inception in April 2019. By the first order, dated 3 November 2020, the judge, Hayden J, the Vice-President of the Court, discharged the appellant as a party to the proceedings. By the second order, dated 8 December 2020, the judge adjourned the appellant's application inviting him to provide a judgment setting out his reasons for discharging her as a party.

2. The circumstances in which the appellant was discharged as a party were highly unusual. The order was made by the Court on its own initiative, without an application by any party. The appellant was given no notice that the order was going to be made, no notice of the evidence on which the Court relied when making the order, and no opportunity to make representations before it was made. No judgment was delivered at the hearing on 3 November and the appellant was given hardly any indication of the reasons why the order was made. At the same time as making the order, the judge directed that, if the appellant wished to make any representations in respect of the order, she should do so within three days, by 6 November. Despite having no copy of the order, nor any notice of the evidence supporting or the reasons for the order, the appellant's lawyers complied with that direction. A fortnight later, having heard nothing from the Court, they sent an email asking when they might expect a decision following the filing of their submissions. In reply to a further email dated 27 November, they received an email from the judge's clerk stating that the judge was unclear what they were inviting him to do and that, if they wished to make an application, he would try to accommodate it. On 8 December, the appellant's solicitors filed a notice of application asking for a judgment relating to or reasons for the order dated 3 November and any further decision made in the light of the submissions filed on 6 November. The second order under appeal, adjourning the application for a judgment, was made in response to that application.

3. The principal explanation for the judge adopting this highly unusual, if not unique, course was that the other parties to the proceedings had disclosed information to the court without notice to the appellant and the judge concluded that, if the information was disclosed to the appellant, there was a risk that P, who is, as I have already noted, a highly vulnerable young woman, would suffer serious harm.

4. On 22 December 2020, the appellant's solicitors filed notices of appeal against the two orders and, on 1 February 2021, I granted permission to appeal. But the preparation and conduct of the appeal has presented particular challenges. Although the appellant is now aware of part of the information on which the judge relied in making the order discharging her as a party, other parts have still not been disclosed and the Court of Protection remains concerned about the risk of harm to P if there is further disclosure. In addition, there is now a linked police investigation and the investigating officers have raised concerns about any further disclosure at this stage. For these reasons, this Court decided to conduct part of the hearing in closed session, with the appellant being represented in that session by a special advocate.

5. In the event, it has been possible to decide the appeal and give public judgments setting out the reasons for our decision without reference to the material disclosed in the closed session. This judgment will therefore focus principally on the issues arising on the

substantive appeals. In addition, however, it provides an opportunity to set out a description of how this Court has proceeded in these unusual circumstances which may be of assistance in any future proceedings of this kind which require a form of closed procedure. It appears that this is the first case in which a special advocate has been instructed in the Civil Division of the Court of Appeal.

Background

6. It is unnecessary for the purposes of this appeal to set out the background in detail.

7. P is a 19-year-old woman suffering from cerebral palsy, atypical anorexia, post-traumatic stress disorder and selective mutism. In August 2018, when she was 16 years old and living at home with the appellant, she was made subject to a child protection plan under the category of neglect. In the course of carrying out its assessments, the local authority became aware of allegations that P had been sexually abused by a male visitor to the family home. In April 2019, P's condition had deteriorated to such an extent that the local authority decided to issue proceedings in the Court of Protection. On 9 April, P was admitted to a paediatric medical ward of a hospital close to her home, where her body mass index was calculated at 10.9. Her treating psychiatrist described her as one of the most underweight patients his specialist service had ever seen. At the first directions hearing, P and the appellant were joined as first and second respondents to the proceedings, with the Official Solicitor acting as P's litigation friend. At the hearing, Hayden J made an interim declaration under s.48 of the Mental Capacity Act 2005 to the effect that there was reason to believe that P lacked the capacity to conduct the proceedings and to make decisions with regards to residence, care and contact. He made an order that she be removed from the family home and placed in a residential unit provided by the local authority. He further ordered that direct contact between P and the appellant be supervised and limited to once a week. Indirect contact, however, by telephone and social media continued without restriction.

8. On 30 September 2019, the Mental Health Trust responsible for P's psychiatric care as an outpatient was joined to the proceedings as third respondent. At a two-day hearing in October 2019, the interim declarations and orders were extended. In a judgment at the conclusion of the hearing the judge observed that the relationship between P and the appellant had been potentially associated with the cause of the eating disorder. After that hearing, P started therapy with Ms X, a psychotherapist at the Trust's hospital. At a further hearing in December 2019, the interim declarations on capacity were extended again, with the intention that they be re-assessed once P had completed her therapy with Ms X. At the end of 2019, P turned 18 years of age.

9. During 2020, P remained living at the residential unit and her contact with the appellant continued on the same basis – direct contact supervised but indirect contact unrestricted. Contact arrangements in 2020 were affected by the Covid-19 pandemic.

10. Meanwhile, two further psychiatrists were instructed, one, Dr J, to carry out an assessment of capacity and whether it was vitiated by the appellant's influence, and the other, Dr A, to assess the relationship between P and her mother and how it should be managed in future. In his report, Dr J expressed the opinion that P had capacity to make decisions about contact with family members including the appellant. He observed that the interaction between P and her mother was less fraught, adding that:

> "P understands contact with her mother and family members as helpful and fulfilling her basic needs to be part of a family and not to be isolated, which would be terrible and something she fears."

He described the relationship between P and the appellant as "very close and enmeshed", adding that P appeared dependent and closely aligned to her mother. Dr A thought there might be a "complex attachment relationship" between mother and daughter, but saw

> "no evidence … of the kind of malignant over-involvement that can sometimes lead to interference in a child's medical treatment."

Dr A thought that the positive elements in the relationship had contributed to P's recovery. At that point, the clinicians and experts envisaged a gradual increase in contact. Dr A observed that it was possible that P may want to see her mother at some times and not at others, adding that:

> "then she may need support to have a flexible relationship with her mother (much like any 18-year-old who has left home.)"

11. On 24 June 2020, following these reports, the proceedings were adjourned again to allow the therapy to continue before further consideration was given to the extension of the declarations and orders. It was declared in the interim under s. 48 of the Mental Capacity Act 2005 that there was reason to believe that P lacked capacity to make decisions with regards to residence, care (including treatment) and contact, and that her capacity could not be re-assessed until she had completed therapy with Ms X. A court review was fixed for a date after 5 October 2020.

12. In October 2020, the appellant gave birth to a baby daughter, the father of the child being her current partner.

13. The previously scheduled hearing was listed on 3 November 2020. A few days before the hearing, the local authority and Trust received information which, if correct, indicated that P was at risk of further harm. They decided to disclose the information to the Official Solicitor and to the court but not to the appellant or her solicitors. As already noted, the appellant has subsequently become aware of some of the information, in circumstances described below. The information of which she is now aware indicated

- that P had been sexually abused by the appellant's partner;
- that P had told the appellant about the abuse but the appellant did not believe her;
- that P feared that the appellant's baby would be at risk of abuse by the appellant's partner;
- that earlier P had informed the appellant that she had been abused by the male visitor to the home but the appellant took no action about this; and

- that the appellant had told P not to mention the abuse by the male visitor of her partner.

14. In the light of the information, the local authority, the Official Solicitor and the Trust made a joint application to the Court to hold part of the forthcoming hearing in private, excluding the appellant and her lawyers, and to prohibit any further contact between the appellant and P. No formal notice of this application was given to the appellant or her legal representatives, although her leading counsel, Mr Timothy Nesbitt QC, was informed by the local authority shortly before the start of the hearing that an application would be made to exclude him and his client from part of the hearing.

15. For the purposes of the appeal we have been provided with transcripts and an agreed note of the various stages of the hearing on 3 November, which was conducted remotely via Microsoft Teams. P herself joined the hearing, as she had on a number of previous occasions. Up to that point, the hearings in the proceedings had taken place in open court subject to a "transparency" order restricting reporting in accordance with what is now the normal practice in the Court of Protection. On 3 November, however, after a short introductory session in open court, the judge directed that the hearing should continue in private. He then directed the appellant's counsel Mr Nesbitt QC and his instructing solicitor to leave the hearing, after reassuring them that he was alert to their client's interests (the appellant was at that point still in hospital). The judge then conducted a longer hearing in the absence of the appellant's representatives. The transcript of that part of the hearing has not been disclosed to the appellant or her representatives, save for the special advocate, but it is common knowledge that it was at this stage that the judge suggested that the appellant be discharged as a party.

16. At the conclusion of that part of the hearing, Mr Nesbitt and his instructing solicitor were invited back. This final section of the hearing has not been transcribed but we have an agreed note which begins with the following statement from the judge:

> "Mr Nesbitt I hope that you were able to use that time effectively. There were a number of difficult issues. Having heard from counsel I have come to the conclusion that contact between P and her mother is for the present inimical to her best interests, and I make such a declaration pursuant to s16. In the circumstances I consider that [the appellant] no longer needs to be a party to the proceedings, and therefore I plan to discharge [the appellant]. To do otherwise would compromise P's privacy at this point. Broadly proceedings will continue to determine questions in relation to where she should live and with whom she should have contact. If the question of contact between P and [the appellant] requires to be reconsidered, then [the appellant] will be contacted and invited to apply to re-join proceedings and participate in them if she so wishes. These are of course proceedings concerning an adult, in relation to contact. The preponderant evidence is that she is capacitous, nonetheless in light of her vulnerability I am satisfied that this is in her best interests. Of course it will be frustrating for your client not to know the reasons behind all of this but we are dealing with an adult and it is P's best interests that fall to be considered and not anybody else's."

At Mr Nesbitt's request, the judge agreed that the appellant's representatives could make written representations by 6 November.

17. Mr Nesbitt duly filed written submissions. It is unnecessary to set out the arguments he deployed which substantially anticipated those advanced on the appeal to this Court. When he filed the submissions, he did not have the benefit of seeing the sealed court order made following the hearing on 3 November which was not sent to the appellant's solicitors until forwarded by one of the other parties on 3 December. The sealed order of 3 November was, so far as relevant to this appeal, in the following terms (the appellant being described as the second respondent in the order):

> "UPON hearing counsel for the applicant, the first respondent and the third respondent; and upon hearing counsel for the second respondent in respect of part of the hearing only
>
> AND UPON the first respondent having joined the hearing remotely
>
> AND UPON the Court having made a Transparency Order at the outset of the proceedings
>
> AND UPON the Court having received a request from the applicant, supported by the first and third respondents, that the hearing take place in private and that the second respondent not be permitted to attend or be represented
>
> AND UPON the Court having
>
> 1. Read the applicant's bundle.
>
> 2. The Official Solicitor's note.
>
> 3. The applicant's, second and third respondents' position statements.
>
> 4. [The local authority social worker]'s fifth witness statement.
>
> 5. Considered the decision in *RC v CC* and heard submissions from the applicant, the Official Solicitor and the third respondent as to why the directions hearing should proceed in the absence of [the appellant], her representatives and the public.
>
> 6. Invited the second respondent's representatives to join the hearing at its conclusion and informed them of the order set out below
>
> AND UPON the Court concluding that the preponderance of evidence is that the first respondent has capacity to make decisions as regards to contact but upon the Court concluding that as a vulnerable adult it is not in the first respondent's best interests to have contact (directly or indirectly) with the second respondent and/or [her partner] and the Court considers that P should not have any contact either directly or indirectly with the second respondent and/or [her partner] at the present time.

AND UPON the Court noting that, should the question arise whether the first respondent should have contact with the second respondent in future, the second respondent can be informed, and an application made to Court if appropriate.

AND UPON the Court noting that the issue of the first respondent's residence and care will remain to be determined.

IT IS ORDERED THAT:

1. The transparency order is discharged and this hearing, and further hearings in these proceedings, will continue in private.

2. The second respondent is discharged as a party to these proceedings.

3. If the second respondent wishes to make any representations in respect of the terms of this order, she shall do so by 10.30 on 6 November 2020.

…."

18. Having, as mentioned above, sent a series of emails to the court inquiring when a decision would be made in response to the written submissions, the appellant's solicitors issued an application on 8 December seeking a judgment relating to or reasons for the order dated 3 November and any further decision made in the light of the submissions filed on 6 November. Having considered the application on paper, the judge made the following order on 10 December:

"Upon the Court recording that, on 3 November 2020, [the appellant] was discharged as a party to these proceedings concerning her adult daughter, who is represented by the Official Solicitor;

And upon the Court being satisfied that the discharge of [the appellant] as a party was clearly (and remains) in P's best interests;

And upon the Court recording that this application invited the Court to provide a judgment setting out the Court's reasons for the discharge of [the appellant] as a party;

And upon the Court being satisfied that the provision of a judgment to [the appellant] and/or her representatives is, at present, inconsistent with the best interests of P.

It is ordered that

1. The application to stand adjourned until such point as the release of the judgment or record of the reasoning underpinning the decision can be achieved in a way which is consistent with P's best interests;

2. There be liberty to apply to any party in respect of this order;

3. Costs reserved."

19. As already noted, on 22 December, the appellant filed an appeal notice against the two orders. The seven grounds of appeal, in summary, were that the court had adopted a procedure "contrary to the open justice principle, natural justice and fair trial rights, including under Article 6 of ECHR" which included:

    (1) dealing with applications to exclude the appellant from the proceedings and prohibit her from having contact with P without notice to the appellant or the disclosure of evidence or arguments in support (grounds 1 and 2);

    (2) excluding the appellant from making any representations at the hearing on 3 November 2020 or participating in the decision (ground 3);

    (3) failing to give any or any sufficient consideration to the written representations filed after the hearing on 3 November (ground 4);

    (4) failing to invite representations and/or consider and adopt alternative procedures which might have protected P's best interests whilst limiting the incursion into the appellant's rights (ground 5);

    (5) failing to give reasons for its decision, and adjourning the application for a judgment (grounds 6 and 7).

20. Meanwhile, the local authority had started care proceedings in respect of the appellant's new baby. At the same time, the police, who had been informed of the allegations that P had been sexually abused by the appellant's partner, started a criminal investigation in the course of which the appellant and her partner were interviewed. As a result of disclosures made in the care proceedings and during the police interviews, the appellant became aware of some of the information which had been disclosed to Hayden J but withheld from her and her representatives at the time of the hearing on 3 November. The extent of her knowledge was, however, unclear. Following the filing of the notice of appeal against Hayden J's orders, the local authority submitted to the Civil Appeals Office a "closed bundle" including the documents which had been sent to the judge prior to the 3 November hearing but not disclosed to the appellant's solicitors. In granting permission to appeal, I listed the matter for a case management hearing on 10 February, directed the local authority to obtain an expedited transcript of the hearing on 3 November, and ordered that neither the closed bundle nor the transcript should be served on the appellant or her representatives until further order.

21. At the case management hearing, conducted by video link with counsel for all parties attending throughout, I listed the appeal for 9 March. It was the respondents' case that some of the documents in the closed bundle, the transcript of the hearing on 3 November (not at that stage available) and other documents to be filed in the appeal contained or would contain information which should not be disclosed to the appellant or her representatives (the "closed material"). After hearing submissions, I concluded and recited in the order that it would therefore be necessary in the interests of justice for a special advocate to be appointed on behalf of the appellant to consider the sensitive material and represent the appellant's interests alongside her legal representatives and that, if the appellant qualified for legal aid, for public finding to be extended to cover the costs of the special advocate. I therefore invited the Attorney-General to appoint a special advocate and gave directions for the disclosure of documents to the Special Advocates Support Office ("SASO") at the Government Legal Department to enable

the Attorney-General and her advisers to consider the invitation. In anticipation of the invitation being accepted, I gave directions as to how the special advocate should carry out his duties, and for the disclosure of the sensitive material to the special advocate, following the model for directions which I understand to be used in national security cases. The directions included a provision for the respondents to consider serving on the appellant a summary (or "gist") of the closed material. By a separate order at the case management hearing, I ordered the police to identify information disclosed to the appellant and her partner in the course of their investigation.

22. After considering the disclosed documents and following further communications between the Civil Appeals Office and SASO, the Attorney-General agreed to the appointment of a special advocate for the purposes of the appeal provided that the costs of the appointment were provided for. I was informed that the Legal Aid Agency had indicated that the appellant's public funding certificate would not extend to the cost of the special advocate, if appointed. A further case management hearing took place on 3 March, held partly in open session, during which the appellant was represented by her leading counsel, Mr Nesbitt, and partly in closed session, in which her interests were represented by the special advocate, Mr Stephen Cragg. The respondents continued to oppose the disclosure of the closed bundle to the appellant, but by this stage had agreed a "gist" of the material which they, and the police, agreed could be disclosed. I directed the respondents to forward the draft gist to Hayden J to determine whether or not its disclosure to the appellant would prejudice or risk prejudicing P's best interests. The judge promptly replied raising no objection and the gist, which contained the information now set out at paragraph 12 above, was duly disclosed to the appellant and her representatives. I also ordered the local authority and the Trust to bear the costs of the special advocate, subject to any further order as to contribution from the police. Subsequently, I was informed that the local authority, the Trust and the police had agreed to share the cost. In addition to other case management directions, I made a reporting restrictions order to last until the start of the hearing, in terms similar to those of the earlier transparency order which had been made at the outset of the proceedings but discharged by the judge when ordering that the proceedings should thereafter be heard in private. That order, which was renewed in slightly amended terms at the appeal hearing, was necessary because it was agreed that part of the appeal hearing should be heard in open court.

23. In preparation for the hearing of the appeal, counsel for all the parties filed open skeleton arguments and the respondents' counsel and Mr Cragg filed closed skeleton arguments. In passing I observe that the manner in which Ms Paterson's documents were drafted was particularly helpful, with the closed skeleton argument highlighting those passages which were excluded from the open skeleton. Regrettably, however, and in breach of the requirements set out in para 33 of PD52C, the parties' open skeletons were not all formulated in a way they considered suitable for disclosure to court reporters. As a result, the court was unable immediately to meet requests by two observers to provide the skeletons, and it was more difficult for those observers to follow the arguments during the hearing. In future, this is a point which should be considered by the parties and the court during preparation of an appeal.

24. I am satisfied, however, that, as a result of these case management preparations, it has been possible to conduct the appeal in a way that is fair to all parties. I am very grateful to the advocates and their instructing solicitors, to SASO, and to the Civil Appeals

Office, for their hard work and assiduous efforts which have ensured that the appeal has been heard promptly and efficiently.

The Law

25. The Court of Protection is a superior court of record, independent of the High Court of Justice, created by s.45 of the Mental Capacity Act 2005 to hear cases involving persons who lack capacity. Under s.15, the court may make declarations as to the capacity of a person ("P") and the lawfulness of any act done in relation to P. Under s.16(1) and (2)(a), if P lacks capacity in relation to a matter or matters concerning her welfare or property and affairs, the court may, by making an order, make the decision on P's behalf.

26. S.1 of the Act sets out the principles on which the Act is based and on which the court must act. These include, under subsection (5):

> "(2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

S.4 sets out the steps to be taken by the court when considering P's best interests. These include permitting and encouraging the person to participate as fully as possible in any act or decision (s.4(4)), considering her wishes and feelings (s.4(6)(a)), and taking into account the views of anyone interested in her welfare (s.4(7)(b)).

27. As King LJ observed in ***Re AB (Termination of Pregnancy)*** [2019] EWCA Civ 1215:

> "Part of the underlying ethos of the Mental Capacity Act 2005 is that those making decisions for people who may be lacking capacity must respect and maximise that person's individuality and autonomy to the greatest possible extent."

28. The court has its own rules – the Court of Protection Rules 2017. Like the Civil Procedure Rules and the Family Procedure Rules, they start in rule 1.1 by stating an overriding objective, in this case:

> "to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act."

Rule 1.1(3) provides that dealing with a case justly includes, so far as is practicable, *inter alia*:

> "(a) ensuring that it is dealt with expeditiously and fairly;
>
> (b) ensuring that P's interests and position are properly considered;
>
> …
>
> (d) ensuring that the parties are on an equal footing;
>
> …."

29. There are a number of other provisions in the Rules which are relevant to this appeal. First, Part 3 of the Rules provides extensive powers of case management, including, under rule 3.1(2)(n), the power to "take any step or give any direction for the purpose of managing the case and furthering the overriding objective" and, under rule 3.3, the power to "dispense with the provisions of any rule". Secondly, rule 3.4 provides for the exercise of powers on the court's own initiative in these terms:

> "(1) Except where these Rules or another enactment make different provision, the court may exercise its powers on its own initiative.
>
> (2) The court may make an order on its own initiative without hearing the parties or giving them the opportunity to make representations.
>
> (3) Where the court proposes to make an order on its own initiative it may give the parties and any other person it thinks fit an opportunity to make representations and, where it does so, must specify the time by which, and the manner in which, the representations must be made.
>
> (4) Where the court proposes
>
> (a) to make an order on its own initiative; and
>
> (b) to hold a hearing to decide whether to make the order
>
> it must give the parties and may give any person it thinks likely to be affected by the order at least 3 days' notice of the hearing."

Thirdly, the rules empower the court to exclude any person from attending a hearing or part of it, whether the hearing be in private (rule 4.1(3)(b)) or in public (rule 4.3(1)(c)), but only where it appears to the court that there is good reason for making the order (rule 4.4(1)(a)). Fourthly, the rules allow the court to order the editing of information in documents prior to service or disclosure (rule 5.11) and to dispense with any

requirement to serve a document (rule 6.10). Finally, Part 9 of the Rules, relating to the parties to proceedings, includes a provision that "the court may at any time direct that any person who is a party to the proceedings is to be removed as a party" (rule 9.13(3)).

30. The Court of Protection Rules therefore invest the court with wide powers to exclude parties from hearings, to withhold information from parties, to discharge parties from the proceedings, and to dispense with the rules altogether. Manifestly, however, as Mr Nesbitt submitted on behalf of the appellant, these powers have to be exercised in accordance with the overriding objective and with wider principles of law and justice which have been developed and recognised both at common law and latterly under the Human Rights Act 1998.

31. The leading authorities on fairness at common law and under the ECHR have mainly been concerned with the withholding of information from one party, but they are in my view of assistance when considering the issue that arises on this appeal, namely the exclusion of an individual from proceedings. In *Official Solicitor v K* [1965] AC 201 (at pages 237-238), Lord Devlin stated (at p. 238) that "the ordinary principles of a judicial inquiry" included the rules that:

> "… all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice. The rule in point here is undoubtedly one of those … But a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed: otherwise it would become the master instead of the servant of justice. Obviously, the ordinary principles of judicial inquiry are requirements for all ordinary cases and it can only be in an extraordinary class of case that any one of them can be discarded."

Further on, at p 240, Lord Devlin endorsed the observation of Ungoed-Thomas J at first instance:

> "In the ordinary *lis* between parties, the paramount purpose is that the parties should have their rights according to law, and in such cases the procedure, including the rules of evidence, is framed to serve that purpose. However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose. . . . In general publicity is vital to the administration of justice. Disclosure to the parties not only enables them to present their case fully but it provides in some degree the advantages of publicity; and it further ensures that the court has the assistance of those parties in arriving at the right decision. So when full

> disclosure is not made, it should be limited only to the extent necessary to achieve the object of the jurisdiction and no further."

32. In *In Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, Lord Mustill stated (at para 26):

> "it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion".

In Re D was a case in which the court was exercising its protective jurisdiction in adoption proceedings and objection was taken to the disclosure of confidential information on the grounds that it would cause harm to the child. It was accepted by the House of Lords that documents could be withheld from a party in such circumstances, but Lord Mustill warned that:

> "non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling."

33. *In Re D* was determined by applying common law principles of fairness before the passing of the HRA. Since the implementation of that Act, these principles have been underpinned by rights under ECHR, in particular Articles 6 and 8. The scope of Article 6 in this context was summarised by the ECtHR in *Regner v Czech Republic* [2018] 66 EHRR 9 at paragraph 99:

> "for Article 6(1) to be applicable under its "civil" limb, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play."

34. For Article 8 to apply in this context, there must be a family life which attracts respect. Not all relationships between related adults give rise to a right to respect for family life. In *Kugathas v SSHD* [2003] EWCA Civ 31 at paragraph 14, Sedley LJ approved a statement by the European Commission of Human Rights in *S v UK* (1984) 40 DR 196:

> "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection

> of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

35. Where Article 8 is engaged, the right to respect for family life entails certain procedural obligations on the part of the public authority. The question then is (per Munby LJ in *R (B) v Chief Constable of Derbyshire* [2011] EWHC 2392 (Admin) at paragraph 48, citing *W v UK* (1988) 10 EHRR 29)

> "whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, those affected have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests."

36. The Strasbourg jurisprudence now includes the recent decision in *Evers v Germany* [2020] ECHR 17895/14 which arose out proceedings in which the appellant had sought contact with the 22-year-old daughter of his former partner whom it was alleged he had sexually abused and who had given birth to a child of whom he was the biological father. During the proceedings, the national court imposed certain procedural restrictions limiting his participation and had ultimately refused his application for a contact order. The European Court dismissed the appellant's case that his Article 6 and 8 rights had been breached by the domestic court. His complaints under Article 6 included that the domestic court had arbitrarily refused to admit certain evidence, denied full disclosure of the case file, and denied him an oral hearing. The Court held that his complaints came with the scope of Article 6 and rejected his first two complaints, but in the circumstances held that the domestic court had acted in breach of the appellant's rights by failing to convene an oral hearing. His complaint under Article 8 arose from the domestic court's decision to prohibit him from having contact with the woman. The Court concluded that his challenge to the contact ban did not come within the scope of Article 8. The mere fact that he had been living in the same household as his former partner's daughter and that he was the biological father of her child did not constitute a family link which would fall under the protection of Article 8.

37. The impact of the Convention on the duty to disclose documents to parties to proceedings was considered at an early stage following the implementation of the 1998 Act by Munby J in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 and summarised in a passage (at paragraph 89) which has been cited and applied in many cases in the subsequent twenty years:

> "Although, as I have acknowledged, the class of cases in which it may be appropriate to restrict a litigant's access to documents is somewhat wider than has hitherto been recognised, it remains the fact, in my judgment, that such cases will remain very much the exception and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only

> if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary."

38. *Re B (Disclosure to Other Parties)* involved care proceedings in which, as in *Official Solicitor v K* and *In Re D*, the court was exercising the protective jurisdiction over children, analogous to that exercised by the Court of Protection over incapacitated adults. In *RC v CC* [2014] EWCOP 131, Sir James Munby P, having cited the authorities including paragraph 89 of his earlier judgment in *Re B (Disclosure to Other Parties)*, concluded that that the protective jurisdiction of the Court of Protection permitted the court to depart from the principles of disclosure but that the test of "strict necessity" applied to the withholding of documents in the Court of Protection as it did in the family court. To that end, in *Re D* [2016] EWCOP 35, Senior Judge Lush approved and applied the following guidance proposed by the Official Solicitor:

> "(1) A decision by the court to dispense with the service of an application on a person who would otherwise be entitled to it is not "an act done, or decision made, under [the Mental Capacity Act 2005] for or on behalf of P" within the meaning of section 1(5). It is therefore not a decision which is to be determined only by reference to an assessment of P's best interests.
>
> (2) The court's decisions on procedural matters should be considered with regard to the obligation to give effect to the overriding objective ….
>
> (3) The court should recognise that a decision to dispense with service on an individual otherwise entitled to it may engage that individual's rights under the European Convention on Human Rights, especially articles 6 and 8. In any event, P's own Convention rights are certainly engaged. More broadly, even if Convention rights are not engaged, issues of procedural fairness arise.
>
> (4) A decision to dispense with service on an affected party will mean that the court may have to decide the substantive application without all the relevant material before it.
>
> (5) Any decision to dispense with service on an individual will be taken by the court on the basis of untested evidence. The apparent merits of the substantive application should not be used to justify dispensing with service.
>
> (6) Fears about the consequences to P or the applicant of service on the individual in question can in many ways be

> ameliorated by the use of the court's powers under [rule 5.11] to redact relevant details, such as addresses.
>
> (7) The consequences of the application succeeding to the individual who is not to be served should also be considered.
>
> (8) Before a decision is taken to dispense with service because of practical difficulties, consideration should be given to the possibility of effecting service by means of an alternative route ….
>
> (9) Matters of procedural fairness should be given a high regard, and it is submitted that cases where it is appropriate to dispense with service on an individual who is directly and adversely affected by an application are likely to be exceptional.
>
> (10) Different factors may apply in cases where the application is to dispense with service on P or where there is genuine urgency and there is a need to balance the prejudice of proceeding in the absence of an affected party against the prejudice to P or another party of not proceeding at all."

39. As it happens, the approach to be adopted to applications for closed hearings in the Court of Protection has been the subject of a recent decision by Cobb J in ***KK v Leeds City Council*** [2020] EWCOP 64, handed down on 14 December 2020, after the orders under appeal before us. The facts of that case were somewhat similar to those in this appeal. The subject of the proceedings was also a vulnerable 19-year-old woman, DK, who for much of her childhood had been looked after by an aunt, KK. After DK alleged that she had been sexually abused by KK's son and husband, KK applied to be joined as a party to the Court of Protection proceedings. At first instance, the circuit judge had refused her application after a hearing in which he adopted a partially closed procedure in which he considered information which was withheld from KK and her representatives. KK appealed, contending that the closed procedure was unfair and that alternative procedures should have been adopted which would have enabled her to participate more fully in the hearing. Having considered extensive submissions on the case law, Cobb J (at paragraph 41) concluded that a judge faced with an application for party status should consider the following points:

> "i) The general obligation of *open justice* applies in the Court of Protection as in other jurisdictions …;
>
> ii) A judge faced with a request to withhold relevant but sensitive information/evidence from an aspirant for party status, must satisfy him/herself that the request is *validly* made …;
>
> iii) The *best interests* of P, alternatively the "interests and position" of P, should occupy a central place in any decision to provide or withhold sensitive information/evidence to an applicant (section 4 MCA 2005 when read with rule 1.1(3)(b) COPR 2017); the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's

> participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same …;
>
> iv) The expectation of an "equal footing" (rule 1.1(3)(d) COPR 2017) for the parties should be considered as one of the factors …;
>
> v) While the principles of natural justice are always engaged, the obligation to give full disclosure of all information (including sensitive information) to someone who is *not a party* is unlikely to be as great as it would be to an existing party …;
>
> vi) Any decision to withhold information from an aspirant for party status can only be justified on the grounds of *necessity* …;
>
> vii) In such a situation the Article 6 and Article 8 rights of P and the aspirant for party status are engaged; where they conflict, the rights of P must prevail …;
>
> viii) The judge should always consider whether a step can be taken … to acquaint the aspirant with the essence of sensitive/withheld material; by providing a 'gist' of the material, or disclosing it to the applicant's lawyers; I suggest that a closed material hearing would rarely be appropriate in these circumstances."

40. The prevailing importance of P's rights in the Court of Protection was emphasised by Sir James Munby P in *London Borough of Redbridge v G and others* [2014] EWCOP 1361:

> "24. … if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, X does not wish to have anything to do with Y, then Y cannot impose himself on X by praying in aid his own Article 8 rights. For X can pray in aid, against Y, X's own Article 8 right to decide who is to be excluded from X's 'inner circle', and in that contest, if X is a competent adult, X's Article 8 rights must trump Y's. It necessarily follows from this that, absent any issue as to X's capacity or undue influence, X's refusal to associate with Y cannot give rise to any justiciable issue as between Y and X.
>
> 25. … if X lacks capacity, Y's Article 8 rights can no more trump X's rights than if X had capacity. Y cannot impose himself on X by praying in aid his own Article 8 rights. Y's Article 8 rights have to be weighed and assessed in the balance against X's Article 8 rights. If Y's rights and X's rights conflict, then both domestic law and the Strasbourg jurisprudence require the conflict to be resolved by reference to X's best interests. X's best interests are determinative."

41. We were referred to only one reported case in which a party to family proceedings was discharged without notice. Under the Children Act 1989 and Family Procedure Rules rule 12.3, a father with parental responsibility for his child is an automatic respondent to care proceedings under s.31 of the Act. In *The Local Authority v The Mother, The Father. M and M* [2009] EWHC 3172 (Fam), at the outset of care proceedings, before the father had been served with notice of the proceedings, Hedley J made an order discharging him as a party. The father had a criminal record including offences of violence to the mother and had threatened to kill both her and the children. As a result, although the father was at that point in prison, the judge was satisfied that he represented an immediate and grave risk to their safety were he to discover their whereabouts. The mother's application for his discharge as a party was supported by the children's guardian but opposed by the local authority. At an earlier case management hearing, an advocate to the court had been appointed to make representations on the issue. It was accepted that the court had jurisdiction to make the order although the judge noted that it had been rarely exercised in respect of a party whose whereabouts were known and, where it had been exercised, the party had been heard on the application. In that instance, however, Hedley J concluded that that any legal representative instructed to act for the father on the application to discharge could not act without reference to his client "or else the whole exercise would be self-defeating." Furthermore, the advocate to the court had "clearly set out the issues that required to be addressed". In those circumstances, the court proceeded without notice to the father and, having considered the arguments, discharged him as a party. The judge set out his reasons in these terms:

> "26. The starting points are two fold: first, that the father should be entitled to participate in this case; and secondly that the children and mother should not be put at risk of serious harm by the conduct of the proceedings. In considering the first the court should start with full participation then consider partial participation effected in this case by disclosure of redacted documents and then, only as a device of last resort, his exclusion from the proceedings. In considering the second the court must be alert both to risk and to the magnitude of consequences should the risk eventuate and must also consider whether and to what extent that risk can be managed by the courts' control of its own processes.
>
> 27. As to the question of risk and consequences, I have already set out my view. In my judgment the father, although incarcerated, represents a real and substantial risk to the children and their mother. I am also satisfied that through his contacts outside prison he will pursue the mother and, if he finds her, seek vengeance upon her; nor will he scruple to ensure that the children are not affected. I have concluded that only his exclusion from the proceedings will realistically achieve that end; although extensive redaction of documents is possible, there are so many documents which would have to pass through so many hands that the risk of accidental disclosure of a crucial piece of information would be very high.

> 28. On the other hand to do that would be to take the unprecedented step of excluding a father with parental responsibility, whose whereabouts are not unknown, from any knowledge of, let alone participation in, care proceedings involving his children. Clearly the countervailing features must be overwhelming to justify such a course …
>
> 29. There are two further factors that influence my decision in this case. First, the father has shown no interest in making any contact with his children. … Secondly, the order to discharge him must be kept under review; were he actually to seek contact or were the local authority to seek to remove the children from the care of the mother, the matter would have to be reconsidered and the balance re-addressed."

42. No other case was cited to us in which a party has been discharged as a party without notice. In ***Re X (Children)*** [2018] EWHC 451 (Fam), a local authority supported by the children's guardian applied for the discharge of a father from proceedings involving his children and initially asked the court to make the order without giving the father any notice whatsoever of what was being done or giving him any opportunity to be involved in the proceedings. They revised their position in the light of observations made by the judge, Gwynneth Knowles J, about the unusual nature of the relief sought and the potential unfairness of proceeding in circumstances where the father had not been involved at all in the court's decision-making. The application proceeded on notice to the father and, after considering representations, the judge made the order discharging the father as a party and a declaration absolving the local authority from its duty to give him notice of future applications.

Submissions

43. In addition to the open and closed skeleton arguments, we received oral submissions on behalf of all the parties. We then adjourned into a closed session and heard further submissions from the special advocate, Mr Cragg, and the respondents' counsel. We then returned into open court and heard submissions in reply.

44. On behalf of the appellant, Mr Nesbitt submitted that the test of strict necessity was not satisfied in this case. There were several respects in which normal processes were not followed at and around the hearing on 3 November 2020, including:

(1) no notice provided of any application to conduct the hearing in the absence of the appellant and her representatives and no disclosure of any evidence or other information relating to that application;

(2) no notice of any application to terminate or suspend contact between the appellant and P and no disclosure of any evidence or other information relating to that application;

(3) no notice of any application or proposal to discharge the appellant as a party and no disclosure of any evidence or other information relating to that application;

(4) no opportunity to the appellant to file evidence in relation to any such application;

(5) no opportunity to the appellant's representatives to address or make submissions before the decision was taken to discharge the appellant as a party;

(6) no judgment or reasons provided for the decision.

45. Whilst recognising that there was information in the closed bundle and the transcript of the closed hearing before the judge of which he was unaware, Mr Nesbitt submitted that the gist of the information disclosed to him, whilst it plainly gave rise to serious issues, did not justify the wholesale abandonment of normal processes which had occurred. The permission given to file written representations after the decision did not provide sufficient procedural safeguards because at the time the appellant had no idea of the reasons for the decision. A limited and unsighted opportunity to address the court after it had already made its decision could not amount to a proper modified form or participation in the decision-making process. Mr Nesbitt pointed out that the procedure adopted by this Court in relation to the appeal demonstrated the scope that there was in the court below for a modified form of procedure to be devised and adopted that would have allowed the appellant to participate fairly in the decision-making process.

46. Unsurprisingly, counsel for the three respondents to the appeal made substantially the same submissions in response, albeit couched in slightly different terms. The judge's conclusion that continued contact between P and the appellant was inimical to P's best interests was, in the words of Ms Paterson for P acting through the Official Solicitor, cogent and forensically sound. Having reached that conclusion, it was contrary to P's best interests and to her Article 8 rights for the appellant to remain a party, and it would have been "illogical" to allow the appellant to participate in the proceedings as a party. On behalf of the local authority, Ms Barnes submitted that, given the court's conclusion that P was now capacitous to make decisions about contact, and its conclusion that as a vulnerable adult contact was not in P's best interests, the appellant's input to the decision-making process was "effectively academic". Ms Greaney for the Trust submitted that in these proceedings P's Article 8 rights were determinative and that, given the judge's conclusions about capacity and contact, the appellant's continued status as a party would have been a "gross invasion" of those rights. In oral submissions, she argued that, as none of the information could have been disclosed to the appellant, her continued party status would have been devoid of purpose. All counsel argued that there was a risk that the appellant would use her status as a party or information obtained through that status to apply further pressure to P in a way that would be likely to cause her further harm.

47. The respondents submitted that the test of strict necessity was satisfied. The withholding of information from the appellant met the test of necessity because of the risk of prejudicing ongoing police and local authority investigations and because the very serious concerns about P's wellbeing arose from private information about her health and therapy which should attract the highest protection under Article 8. The new information became available at very short notice and the issues were pressing. It was neither feasible nor proportionate to redact the information or produce a gist or appoint a special advocate. The opportunity given to the appellant's counsel to file written submissions afforded sufficient protection to her procedural rights. Furthermore, it was not possible for the judge to have given any reasons for his decision either before or after 10 December because of the risk of undermining the ongoing investigations and the need to protect P from further harm. Ms Barnes for the local authority accepted that it will only be in exceptional circumstances that it would be appropriate to discharge a

party in this way. In this case, however, there was clear evidence of emotional abuse and manipulative and intimidatory behaviour by the appellant towards P. These proceedings were a clear mechanism by which the appellant would be able to carry on her intimidating behaviour. In the circumstances, the procedure adopted and the decision reached was not unfair and the departure from the principle of open justice was fully justified.

48. In submissions that were echoed by the other respondents, Ms Paterson contended that the orders under appeal fell within the wide ambit of discretion afforded to the judge by the Rules, in particular rule 3.4 and 9.13(3). She stressed that the Court of Protection, charged with promoting the autonomy and welfare of incapacitated adults, is a protective, not an adversarial, jurisdiction, illustrated by the primacy of P's best interests in s.1(5) of the Act and the inquisitorial nature of the proceedings. Other than P, parties to the proceedings do not enjoy the same level of procedural safeguards as they would in adversarial proceedings. Ms Paterson further submitted that Article 6 should be assessed in the context of the proceedings as a whole, including any appeal, so that, in so far as there had been any infringement of the appellant's Article 6 rights at first instance, that had been repaired by the appointment of a special advocate in the course of this appeal.

49. All the respondents agreed that, in the event that this Court concluded that the decisions under appeal were unlawful, the matter should be referred back to the judge for re-determination. It was said that such a course was necessary to protect P's best interests given the emergence of further information since the hearing in November. The respondents were concerned that the appellant might use her restored party status to obtain sensitive information, the sharing of which the court had found to be contrary to P's best interests, before the respondents were able to obtain an order to prevent this happening.

50. Further submissions were made in closed skeleton arguments filed on behalf of the respondents and by the special advocate Mr Cragg on behalf of the appellant and in the closed session at the hearing. The submissions advanced on behalf of the respondents during the closed session focused on the detail of the information and the risk of harm to P. Those submissions reinforced the importance of withholding certain information from the appellant at this stage. In my view, however, they did not add materially to the weight of the open arguments advanced by the respondents on this appeal in support of the decision to discharge the appellant as a party. In his submissions, Mr Cragg emphasised a point – unknown to Mr Nesbitt in November and December but plain from the documents served during this appeal – that none of the parties had applied for the appellant's discharge as a party. It was the judge who first raised it in the course of the closed session on 3 November. Mr Cragg contended that, given the haste with which the applications had been made to the court, the judge should have stepped back before making final orders in relation to the appellant. It would have been possible to make short-term orders relating to the suspension of contact and direct a return date at which the parties and the court could have considered what information could be provided to the appellant and what notice should be required. As demonstrated by this appeal, once the respondents had an opportunity to consider the issues, it has in fact been possible to provide the appellant with considerable information about the events leading up to the hearing on 3 November. Mr Cragg submitted that the totality of the documents put

before this Court demonstrate that the decision to remove the appellant as a party was unnecessary, unasked-for and premature.

Discussion and conclusion

51. By the time of the hearing on 3 November 2020, there had plainly been a serious development in the case which required the court to take action. The court could have made injunctions or other protective orders. It could have directed that some of the evidence be withheld from the appellant for a period of time, or served in a redacted or gisted form. It could have excluded the appellant from hearings for a period of time. It could have appointed a special advocate to represent her. If satisfied that the circumstances were exceptional, it might conceivably have been appropriate to discharge the appellant as a party after giving her a fair opportunity to make representations. What was unprecedented, however, was to discharge her as a party without notice, without disclosure of any evidence, and without giving any reasons for the decision.

52. I agree with Senior Judge Lush's observation in *Re B* that "different factors may apply where there is genuine urgency and there is a need to balance the prejudice of proceeding in the absence of an affected party against the prejudice to P of not proceeding at all". Such considerations may justify excluding a party from a hearing or withholding information from a party for a period of time. They may in exceptional circumstances justify discharging a party. It is, however, difficult to think of any circumstances in which a party who has played a material role in the course of proceedings can fairly be discharged without notice, without any opportunity to make representations, and without being informed at all of the reasons for the decision.

53. As Senior Judge Lush concluded in *Re B* (when endorsing the draft guidance submitted by the Official Solicitor in that case) and as accepted by all the parties before us, a decision by the court to dispense with the service of an application on a person who would otherwise be entitled to it is not a "decision made, under [the] Act for or on behalf of P" within the meaning of s.1(5). Accordingly, it is not a decision which "must" be made in P's best interests. Case management decisions to discharge a party from proceedings or withhold reasons for a decision are similarly outside the ambit of s.1(5). On the other hand, Cobb J was plainly right when he observed in *KK v Leeds City Council* that "the best interests of P… should occupy a central place in any decision to provide or withhold sensitive information or evidence to an applicant" and that "the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same". Here, the appellant's rights under ECHR were plainly engaged, both under Article 6 and Article 8. She came within the scope of Article 6, as summarised in *Regner v Czech Republic* and *Evers v Germany*, and her relationship with P fell within the category of relationships identified in *S v UK* and *Kugathas v SSHD* as giving rise to a right to respect for family life under Article 8. Insofar as her rights conflicted with P's, the law required the conflict to be resolved by reference to P's best interests: *London Borough of Redbridge v G and others.* *KK v Leeds City Council*. But any restriction on the appellant's rights should have gone no further than strictly necessary.

54. In this case, there was at the date of the hearing a very strong argument for withholding information from the appellant and suspending her contact with P for a period. But I

have reached the clear conclusion that it was not shown to be necessary to discharge her as a party and that there was certainly no basis for discharging her without notice.

55. The wide powers entrusted to a judge sitting in the Court of Protection do not entitle him or her to act without regard to "the ordinary principles of a judicial inquiry". As Lord Devlin observed in *Official Solicitor v K*, these principles "are requirements for all ordinary cases and it can only be in an extraordinary class of case that any one of them can be discarded." Of course, where the paramount purpose is the welfare of a child, or the best interests of an incapacitated adult, the procedure and rules of evidence should, in Lord Devlin's words, "serve and certainly not thwart that purpose". But I do not accept Ms Paterson's submission that in the Court of Protection the parties other than P do not enjoy the same degree of procedural safeguards as in adversarial litigation. The correct approach in my view is that the same legal principles of fairness and natural justice apply across all jurisdictions, but the way in which they are applied varies depending on the nature of the proceedings and the circumstances of the individual case.

56. As Warby LJ pointed out during the hearing, whilst rule 3.4(2) of the Court of Protection Rules entitles the court to make an order of its own initiative without hearing the parties, rule 3.4(4) provides that, if the court has a hearing, it must be on notice to the parties. It is true, as Ms Greaney retorted, that r.3.3 permits the court to dispense with the requirements of any rule – a provision which, as the editors of the Court of Protection Practice (2020 edition, para 4.15) point out, gives the court "immense power" which has no equivalent in either the Civil Procedure Rules or the Family Procedure Rules. In exercising that power, however, the court must not only have regard to the overriding objective in r.1.1 but also the ordinary principles of a judicial inquiry.

57. As Warby LJ also pointed out during the hearing, the reason given by the judge for discharging the appellant as a party – both in his remarks to Mr Nesbitt when the open hearing resumed and in the recital to the order – was not that P was being harmed by the appellant being a party but rather that it was no longer in P's interests to have contact with the appellant. But that conclusion, whilst plainly justified as an interim measure, was only a provisional decision made on the basis of evidence from one side. The local authority had only reached the view that contact was no longer in P's interests a few days before the hearing. Ms Paterson emphasised that a cardinal principle of the Court of Protection is the need to promote P's autonomy so that, if an adult decides that she does not want to see her mother, that is the end of the matter. The history of the proceedings demonstrates, however, that P's attitude to contact had fluctuated. It could not be assumed that the position that had emerged in the days leading up to the hearing was permanent and definitive. Given the complex history of the case, it was not possible for the court to reach a final decision on contact at that stage. For that reason, I do not accept Ms Paterson's submission that it would have been "illogical" to allow the appellant to continue to participate in the proceedings as a party, nor Ms Barnes' submission that her input was "effectively academic", nor Ms Greaney's description of her party status as "devoid of any purpose". The appellant had been joined as a party at the outset of the proceedings, when P was already aged 17½ . She had been an active party in the proceedings for over 18 months. Until shortly before the hearing on 3 November, it had been anticipated that P might return to live with the appellant in due

course. Even if contact was to be suspended indefinitely, and evidence withheld from the appellant, it did not follow that she should be instantly discharged as a party.

58. Moreover, none of the respondents to this appeal applied for the discharge of the appellant as a party at all, let alone without notice. If the Trust believed that the appellant's continued status as a party was a "gross invasion of P's Article 8 rights" as Ms Greaney asserted to us, it is surprising that it did not apply for her to be discharged. Whilst all of the respondents went along with the proposal once it was suggested by the judge, I did not detect from reading the transcripts any strong support for it. None of the advocates had any opportunity to take any instructions on the proposal, nor to reflect on the ramifications of what the judge was suggesting. The only case cited by any counsel in position statements filed before the hearing was a passing reference to the decision of Sir James Munby P in *RC v CC* [2014] EWCOP 131 in which the President had quoted paragraph 89 of his earlier judgment in *Re B (Disclosure to Other Parties)* and concluded that the test of "strict necessity" applied to the withholding of documents in the Court of Protection as it did in the family court. Although the recital to the sealed order, when it was eventually produced, referred to that authority, there was no discussion of the application of the test of strict necessity during any part of the hearing.

59. Despite the assertion in the recital to the order, there was no clarity as to P's capacity to make decisions about contact, and the recital was at odds with the recital to the order of 24 June. There had been no further analysis of that issue since the experts' reports earlier in the year and the plan had been to revisit the question of capacity after the therapy had been completed. No party was inviting the court to review the question of capacity at this hearing, none of them came prepared to debate the issue, nor was it debated at the hearing. Although the judge informed Mr Nesbitt when he returned to court after the closed session that he was making a declaration under s.16 that it was not in P's interests to have contact with her mother, the sealed order does not include any such "declaration". Instead, it contains a recital that the Court was "concluding" that "as a vulnerable adult" it was not in P's best interests to have contact with the mother or her partner. If the judge concluded that P had capacity to make decisions about contact, the Court of Protection would no longer have had jurisdiction to make any orders or declarations under the Mental Capacity Act about P's contact. The reference in the recital to P being a "vulnerable adult" suggests that the judge may, at least provisionally, have decided to address that possible problem by invoking the inherent jurisdiction relating to vulnerable adults. It is noticeable that the heading to the sealed order of 3 November includes the rubric "IN THE MATTER OF THE COURT OF PROTECTION AND IN THE INHERENT JURISDICTION OF THE HIGH COURT". The other eight orders from the proceedings included in the open bundle, including the order of 10 December 2020, all had the heading "IN THE MATTER OF THE MENTAL CAPACITY ACT 2005".

60. No doubt it was necessary to withhold information at that stage because of the police investigation and the local authority investigation relating to the new baby, but that did not justify discharging the appellant as a party. It is often the case that serious allegations of child abuse lead to contemporaneous care proceedings and a police investigation. In those circumstances, it is not infrequently necessary to withhold information from one or other party to the care proceedings while the investigations are carried out. It is never necessary to discharge the individual from whom evidence is temporarily withheld as a party while the investigation is completed. I can see that, had

the judge decided to follow the course proposed by the respondents of granting an injunction without notice to the appellant, it would have been necessary to direct that the extension of the injunction should be reconsidered at a further hearing at which the appellant would have been entitled to know something about the evidential basis for the order. Before us the respondents acknowledged that an advantage of the course taken by the judge was that, by simply discharging the appellant as a party and by refraining from giving any reasons for that decision, there would be no need to disclose the evidence. I do not consider this to be a proper basis for departing from the ordinary principles of a judicial inquiry.

61. I agree with the approach advocated by Cobb J in *KK v Leeds City Council* that a judge considering an application to be joined as a party "should always consider whether a step can be taken … to acquaint the aspirant with the essence of sensitive/withheld material, by providing a 'gist' of the material, or disclosing it to the applicant's lawyers". In the *M and M* case, Hedley J had identified a staged approach to applications to discharge a party, starting with full participation then considering partial participation, for example by redacting documents and then, only as a last resort, excluding the party from the proceedings. In this case, the judge adopted the opposite approach, asking whether there was any reason for the appellant remaining a party, and having concluded that, given the priority of P's rights, there was no reason, discharging her without notice. Had the judge simply decided to suspend contact and withhold information from the appellant for a period of time, he would have been in a better position to determine whether it was necessary or appropriate to discharge her as a party once the picture had become clearer. In all probability it would have been possible at a subsequent hearing to disclose at least part of the information, either redacted or in the form of a gist document.

62. If necessary, the judge could have instigated the special advocate procedure. This is undoubtedly a more complex and costly option. But as Mr Cragg submitted to us in the closed session, the special advocate procedure is flexible and can be implemented quickly, as this appeal has demonstrated. On instructions from SASO, Mr Cragg confirmed that it can be used in this rare type of case. As Cobb J observed in *KK v Leeds City Council*, a closed material hearing will rarely be appropriate in these circumstances but it is an option to be considered wherever important evidence has to be withheld from a party.

63. The decision in *M and M* is the only reported authority in which a party has been discharged without notice. In that case, the issue arose at the outset of the proceedings and concerned a father who had shown no interest in contact with the children. In the present case, the appellant has been actively involved as a party in the proceedings for over 18 months and heavily involved in P's care through her life. Hedley J emphasised that, when considering an application to restrict a party's role in proceedings, the court should start with full participation, then consider partial participation through redacted disclosure, and only resort to exclusion as a last resort. He described the course he was taking in that case as "unprecedented" and recognised that "the countervailing features must be overwhelming to justify such a course". In the present case it seems that, without the benefit of considered legal submissions, the judge did not recognise the strength of the features required to justify discharging the appellant as a party at all, let alone without notice. In *M and M*, the decision to discharge the father as a party, whilst taken without notice to the father, was made on application by the mother supported by

the guardian but opposed by the local authority. Hedley J had the advantage of fully prepared legal submissions from the other parties on the merits of discharging the father as a party, and furthermore had the benefit of additional submissions from an advocate to the court to provide a measure of independent assistance. No such assistance was available to the judge in the present case because no party applied for the appellant's discharge and counsel were unsurprisingly unprepared to argue the point. Having heard argument, Hedley J reserved judgment. In the present case, no judgment has been delivered setting out the judge's reasons for his decision.

64. Ultimately, there is nothing in the closed material which goes substantially beyond the gist document. I agree with Mr Nesbitt's submission that, as the decision to discharge his client had already been taken, the very limited opportunity to file written representations after the event provided no real safeguard. Mr Nesbitt had no idea of the reasons for the decision and was therefore unable to put forward any meaningful arguments against it. As he observed in submissions to this Court, the procedure adopted in relation to this appeal demonstrates the scope that there was in the court below for a modified form of procedure to be devised and adopted that would have allowed the appellant to participate fairly in the decision-making process before the judge as she has before us.

65. To sum up, given the serious concerns about the harm allegedly suffered by P and the risk of future harm, the judge was entitled to consider the matter in the first instance without notice to the appellant and to withhold evidence from her. He would have been fully entitled to make the order which the respondents were asking for, suspending contact between P and the appellant for a limited period, probably measured as a few weeks in the first instance, to allow the parties to reflect. In my judgment, however, he plainly went too far by discharging the appellant as a party without giving her the opportunity to make representations and by failing to consider alternative procedures which might have protected P's best interests whilst limiting the infringement of the appellant's rights. I see no reason to doubt that he considered the written representations subsequently filed on the appellant's behalf, but in my judgment he ought to have provided reasons for his decision, albeit in brief terms, and was wrong to adjourn indefinitely the application for a judgment.

66. Accordingly, I would allow the appeal against paragraph 2 of the order dated 3 November 2020 discharging the appellant as a party. With regard to the order dated 10 December 2020, I would allow the appeal but, if my Lords agree that the appeal against the earlier order should be allowed, the later order becomes redundant in any event.

67. The effect of this will simply be that the appellant is restored as a party. Meanwhile, in order to prevent disclosure of evidence or information which might be harmful to P, I would propose that this Court now directs that no further evidence or information relating to the proceedings be served on the appellant for a period of 28 days after handing down of this judgment to allow the respondents time to take stock and decide what course to follow. Mr Nesbitt rightly recognised that, if the appellant is restored as a party, it would not be inappropriate for the other parties to withhold disclosure of evidence to her pending a decision about what course should now be taken. This will no doubt depend to a considerable extent on developments since December 2020, about which we have no information. If the circumstances warrant it, the respondents may have to apply to the court for orders restricting the appellant's participation in the proceedings. If the circumstances are exceptional, they may apply to discharge her as a

party. But any such applications must be made and determined in accordance with the legal principles set out above.

LORD JUSTICE WARBY

68. I agree.

LORD JUSTICE PETER JACKSON

69. I also agree.