This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: BM14C00304

Neutral Citation Number: [2016] EWHC 1123 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2016

Before :

MRS JUSTICE ROBERTS

- -

Between :

Local Authority X	**Applicant**
-and-	
HI	**First Respondent**
IW	**Second Respondent**
I	**Third Respondent**
JAW	**Fourth Respondent**

(DISCLOSURE TO OTHER PARTIES IN CARE PROCEEDINGS)

- -
- -

Mr Matiss Krumins (instructed by **Local Authority X**) for the **Applicant**
Miss Ami Bartholomew (instructed by **Dowse and Co Solicitors**) for the **First Respondent**
Mr Dorian Day (instructed by **Hecht Montgomery Solicitors**) for the **Second Respondent**
Dr Andrew Bainham (instructed by **Anthony Collins Solicitors**) for the **Third Respondent by his Guardian ad Litem**
Mr Matthew Fletcher (instructed by **Morrison Spowart Solicitors**) for the **Fourth Respondent**

Hearing date: 5th May 2016

- -

Judgment

Mrs Justice Roberts :

1. This is an application by a Guardian who seeks an order restraining a local authority from disclosing to the parents of a child in care a specific piece of information which that child, I, has shared with professionals. As a result it has come to the attention of the local authority which seeks the court's guidance on whether or not this is information which should be passed on to his parents and step-mother, the respondents in the care proceedings.

2. I, whilst still a child for the purposes of the current care proceedings, is a young man who will celebrate his sixteenth birthday in October this year (2016). On learning that what he said might be shared with his family, he has very specifically asked the Guardian to ensure that the information remains private. His mother, the first respondent, supports his wish. In common with the Guardian, she is very anxious that his choice to confide in the professionals involved in his life about personal matters which may or may not be of any great consequence should be respected in accordance with the personal autonomy he is entitled to exercise as an increasingly independent young man.

3. The second and fourth respondents are I's father and step-mother. He has lived with them since August 2013 when, at the conclusion of earlier care proceedings involving the mother's children, a residence order was made in favour of the father subject to a supervision order. The child was originally placed with the father in August 2013 under an interim order made in favour of a different local authority. A residence order was made in favour of the father and a supervision order was made in favour of Local Authority X on 2nd April 2014. Local Authority X has therefore been involved with the child for just over 2 years. In March 2015, he was made the subject of a child protection plan because of the perceived emotional abuse he was suffering in his father's home. He has expressed great unhappiness in his placement with his father and step-mother and has absconded on more than one occasion. Very unusually, he wishes to remain in care in an appropriate foster placement for the remainder of his minority. He does not want to return to his father's home and has made it clear that he wishes to have no contact at all with either his father or his step-mother. Whilst he recognises that he cannot return to live with his mother, he does anticipate returning to her home once he has completed his secondary education and begins to make his way in the world as an adult with the freedom of choice which that status will bring.

4. Matters came to a head at the end of last year. In December 2015 I was placed in police protection and transferred to a local foster placement. An emergency protection order was made on 14 December 2015. In February 2016, Holman J made an interim care order at the conclusion of a contested hearing. There is a further hearing listed later this month with a final hearing in the substantive care proceedings on 17 May 2016. Throughout this year, I has lived at his foster placement and is

happy to stay there until further decisions are taken in relation to his immediate future. He attends school locally and, whilst it is recognised that he has special educational needs, he appears to be thriving in that environment. The local authority's care plan refers to the inability of I's father and step-mother to place his wishes and feelings above their own and their refusal to acknowledge his wish to leave their household. It is said that they have consistently failed to acknowledge and recognise the detrimental impact of their behaviour on I both during the period when he was living with them and during contact since his removal. It is said that they lack insight into his emotional needs and, were the court to force him to return to his father's home, the likelihood is that he would abscond again thereby putting himself at risk of unnecessary harm.

5. Whilst the mother supports the local authority's care plan for S, the father and his current wife do not. The father accepts that he operated what might be described as a disciplined household but he rejects the local authority's case that he is unable to meet I's needs in terms of providing a secure and nurturing home. He seeks the discharge of the interim care order and the return of I to his care notwithstanding the clear wishes which I himself has expressed. For all practical purposes it appears that the relationship between father and son has effectively broken down completely at this point in time. When I moved to his current foster placement, he asked for all of his belongings to be sent to him, including his clothing and his X-Box. He was adamant that he did not wish to return to his father's home. In a report which the Guardian prepared in January this year, she referred to the neglect which I had suffered over the years of his mother's care. He was exposed to episodes of domestic violence between his parents and he has reported at least one similar episode between his father and step-mother.

6. Thus, the central issues for the court at the forthcoming final hearing of these care proceedings will be the extent to which I's father and step-mother can provide adequate, or "good enough", care for this young man and whether his independent wishes and feelings should take precedence over their wishes to have him living once again in their home.

7. That is the context in which the present disclosure issue arises.

8. As to the substance of the information which I has shared, it was described by Holman J in an earlier judgment[1] in this way:-

[1] Holman J's earlier judgment delivered on 18 April 2016 is reported as *Re I (A Child)* [2016] EWHC 910 (Fam).

> "Relatively recently, the child concerned imparted some information to a social worker, which he has repeated also to the guardian. I stress that the information does not relate or pertain at all to either of his parents or his stepmother, but relates and pertains essentially to himself. Nothing in the information is in any way critical of anything done or not done, or said or not said, by either of his parents or his stepmother. The child himself has said very strongly that he does not wish either of his parents or his stepmother to know the information in question. The guardian considers that that confidentiality should be respected and that the information should not be disclosed or revealed to either of the parents or the stepmother. The local authority are very mindful and respectful of the confidentiality of a 15-year old child who is in their care, They do not consider that, realistically and objectively, the information could or should affect any issue at the forthcoming final hearing of the care proceedings. But they do consider that if one or other or both parents did know the information, one or other or both of them might wish to seek to deploy it in some way as part of their case in the care proceedings." (The emphasis is mine.)

9. Thus, the current dilemma arises in circumstances where the local authority perceives an obligation to disclose the information unless the court indicates that in its view, on the facts and in the circumstances of this particular case, there is no such duty or obligation. On the other hand, the authority is properly mindful of the confidence which I reposed in sharing this information with a professional and his adamant wish that it should not be discussed with or revealed to anyone else. He has made it plain that he regards what he said as an entirely private matter and, through the Guardian, he asks the court to respect that confidence. At this stage, there has been no investigation into whether or not the information is true in any event but that is not a matter on which I have been asked to express any view or make any findings.

10. When the matter came before Holman J on 18 April 2016, none of the three respondents had been given notice of the Guardian's application. In those circumstances, and following the guidance given in *Re: M (Disclosure)* [1998] 2 FLR 1028 and *Official Solicitor to the Supreme Court v K and Another* [1965] AC 201, the matter was adjourned to today on the basis that the respondents would be served with notice of the application. In accordance with the practice recommended in those authorities, his Lordship directed that the papers were to be released to counsel instructed to attend today but on the basis that those legal representatives should not disclose the papers or the information contained in them to their respective clients. Pending adjudication of the issue, the local authority was ordered not to disclose the information to any of the respondents.

11. So it was that, today, I have heard submissions from legal representatives for each of the parties. Each is aware of the substance of the information and all have articulated their respective cases in both written and oral submissions. Counsel for the Guardian, Dr Andrew Bainham, brings this application on behalf of I. Counsel for the mother, Miss Ami Bartholomew, supports that application. Mr Matiss Krumins appeared on

behalf of the local authority. It is opposed by Mr Dorian Day and Mr Matthew Fletcher, counsel for the father and step-mother. I am grateful to them all for the care and industry which each has expended on developing their arguments.

12. Before turning to the substance of those arguments, two points need to be made with emphasis. First, there is now a much greater move towards transparency in Family Courts sitting up and down the land and no more so than in the Family Division of the High Court. In accordance with the Practice Guidance issued by Sir James Munby, President of the Family Division, on 16 January 2014 under the banner of "Transparency in the Family Courts", there are now many more published judgments which are regularly made available to anyone who cares to read them. Sometimes the private family information recorded in those judgments will lead to the anonymization of certain names and details in order to protect the individual children or their parents who are the subject of proceedings. It is absolutely right and proper that this is so and nothing said or done in the context of these proceedings should be seen as diluting that fundamental and overarching principle in any way. Secondly, these are care proceedings by virtue of which, in appropriate circumstances, Parliament has sanctioned state intervention in the regulation of family life. Courts are required to make decisions on a daily basis which inevitably have far reaching consequences for the future lives, happiness and wellbeing of children and their families. The local authority's current application for a final care order will have a significant impact in this case for both I and his parents and step-mother. To that extent, they are entitled as of right to a fair trial of this issue. That right is enshrined in Article 6 of the European Convention on Human Rights. However, as I shall explain, in relation to disclosure for the purposes of such a trial, none of the respondents has an absolute right or entitlement to disclosure of every last piece of information which is, or may be, available. What they are entitled to is information or documents which are relevant to the issue or issues which fall to be considered by the court or which enable them, as litigants, properly to advance their respective cases and to challenge any defects or shortcomings in the case advanced by the local authority.

13. Those principles expose the conundrum in this case. As I shall shortly need to consider, the disclosure of the information which is the subject of the Guardian's current application is an issue which engages a balancing exercise. Each of the respondents in this case, including I, has the right to respect for his or her private and family life (Article 8). That is a qualified right. Where competing Convention rights are in issue, as here, neither Article 6 nor Article 8 has precedence: see *Campbell v MGN Ltd* [2004] 2 AC 457 and *R(L) v Commissioner of the Metropolis* [2010] 1 FLR 643. However, in terms of the competing rights of parents and a child under Article 8, the European Court of Human Rights has unanimously held that it is the interests of the child and his or her right to respect for private and family life which prevails in any balancing exercise undertaken by the court: see *Yousef v The Netherlands* (2002) 36 EHRR 290.

14. During the course of this hearing, I raised with counsel how I was to deal with the substance of the information provided by I so as not to defeat the purpose of this judgment. If disclosure is ordered, there is no difficulty because the information will be available to the respondents in any event together with my judgment. However, if the balance falls in favour of I's interests in preserving the confidentiality of that information, any attempt to define its substance, even in the widest terms, will expose that which he regards as essentially a private matter which should not, and need not, be shared with his family.

15. On reflection, I can do no better than to adopt the formulation proposed by Holman J to which I have already referred in paragraph 8 above. I wish only to reiterate that the information relates and pertains essentially to I himself and contains no element of criticism of either his parents or his step-mother or the care which any of them has provided in the past or is likely to provide in future. I would not wish the fact that there has had to be a judicial determination of the issue after a formal application by the Guardian to lend any additional weight or credence to a suspicion on the part of the respondents (or, indeed, anyone else who might read this judgment) that there is something essentially secret or sinister in what I has said. It is a personal matter which he wishes to keep privately to himself and those with whom he chooses to share the information. What I have to decide is whether his expectation of confidence is justified and permissible when weighed against the rights and expectations of the respondents and, in particular, the father who shares parental responsibility for I with the local authority and who has an absolute entitlement to a fair trial in the forthcoming care proceedings in accordance with his Article 6 rights.

16. In considering that question, as I made plain to counsel, I intend to confine my observations to the individual facts of this case. Whilst I was invited to make some observations about the more general application of the legal principles to which I shall shortly refer, time is of the essence in this case given the rapid approach of the final hearing in these care proceedings. I confine myself in this judgment to the proper balance and application of the law to the facts of this particular case and no more.

Legal principles

17. Section 22 of the Children Act 1989 provides as follows:-

> "Before making any decision with respect to a child whom they are looking after or proposing to look after the local authority shall, so far as it is reasonably practical, ascertain the wishes of:-
>
> (a) the child;
> (b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and
(d) any other person whose wishes and feelings the authority consider to be relevant regarding the matter to be decided."

18. On behalf of the Guardian, Dr Bainham submits that my starting point must be the decision in *Gillick v West Norfolk and Wisbeach Area Health Authority and Another* [1986] AC 112, [1986] 1 FLR 224, HL. Some thirty years ago, the House of Lords ruled that a parent's right to control a child in the exercise of his or her parental duty was a dwindling right which existed only to the extent necessary for the child's benefit and protection. In relation to medical treatment or advice, a parent's right to determine whether a child under 16 years should undergo such treatment came to an end once the child achieved sufficient intelligence and understanding to make the decision for himself or herself. The decision gave rise to the concept of *'Gillick competence'*, a developmental concept which has to be considered in the light of the age, understanding and intelligence of each relevant child. It is accepted by all parties that I is *'Gillick competent'*.

19. That case was followed some ten years later by *Regina on the Application of Sue Axon v The Secretary of State for Health and the Family Planning Association* [2006] EWHC 37 (Admin), [2006] 2 FLR 206. In the course of delivering his judgment, Silber J highlighted the prevailing and developing trend towards giving young people greater rights concerning their own future whilst reducing the supervisory rights of their parents. In relation to the respect to be given to a child's right to confidentiality, he cited the earlier reference of Thorpe LJ in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011 to 'the keener appreciation of the autonomy of the child and the child's consequential right to participate in decision-making processes that fundamentally affect his family life'. Silber J stressed the critical importance of the age and maturity of the young person concerned in any determination which involved a parent's right to exert parental authority over a child. He held that any right to family life on behalf of the parent dwindles as their child gets older and is able to understand the consequence of different choices and then make decisions relating to those choices (para 129).

20. Dr Bainham took me to the much more recent decision of Keehan J in *PD v SD, JD and X County Council* [2015] EWHC 4103 (Fam). In that case, a 16 year old child (P) was being voluntarily accommodated by the local authority. He no longer wished to have any communication with his parents. The local authority brought an application seeking guidance on the extent to which it should fulfil its statutory obligations to consult and give information about P to his parents.

21. Having considered the Article 8 rights of both P and his parents, Keehan J considered the case law including *Yousef, Gillick* and *Axon*. He accepted and adopted the views expressed by Silber J in paragraphs 130 to 132 and in particular the following passage:-

> "The European Commission on Human Rights has explained the existence of family ties depends upon the real existence and practice of close family ties. It is not clear why the parent should have an Article 8 right to a family life where first the offspring is almost 16 years of age and does not wish it, second where the parent no longer has a right of control over the child for the reasons set out in the last paragraph and third where the young person, in Lord Scarman's words, "has sufficient understanding of what is involved to give a consent valid in law". There is nothing in the Strasbourg jurisprudence which persuades me that any parental right or power of control under Article 8 is wider than in domestic law. Parental right to family life does not continue after the time when the child is able to make his own decisions. So parents do not have Article 8 rights to be notified of any advice of the medical profession after the young person is able to look after himself or herself and make his or her own decisions."

22. On the basis of his journey through the jurisprudence, Keehan J reached the clear conclusion that P's decision to disengage completely from family life with his parents was a decision which he was perfectly entitled to reach and one which the court should respect. The balance fell decisively in favour of P's Article 8 rights and against those of his parents. He concluded,

> "I have taken particular account of the genuine and sincere conviction with which P has expressed his views and wishes. It would, in my judgment, be wholly contrary to (a) his welfare best interests, (b) his Article 8 rights and (c) any hope of a reconciliation being effected for the court to override his views and permit or require the local authority to provide information about P to his parents."

23. That line of authority must nevertheless be considered in the context of the obligation or duty which arises in relation to the disclosure of information in care proceedings. Specific guidance in relation to the obligations on a local authority in care proceedings was provided by Lord Mustill in the leading case of *Re D (Minors)(Adoption Reports: Confidentiality)* [1996] AC 593. At page 615 D to H, his Lordship set out five principles with which the members of the full court were in agreement.

> "1. It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the

court when reaching a decision adverse to that party. This principle applies with particular force to proceedings designed to lead to an order for adoption, since the consequences of such an order are so lasting and far-reaching.

2. When deciding whether to direct that notwithstanding rule 53(2) of the Adoption Rules 1984 a party referred to in a confidential report supplied by an adoption agency, a local authority, a reporting officer or a guardian ad litem shall not be entitled to inspect the part of the report which refers to him or her, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.

3. If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.

4. If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.

5. 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."

24. This test has been held to apply in care proceedings brought under the Children Act 1989 as well as in adoption proceedings: see *Re C (Disclosure)* [1996] 1 FLR 797 (per Johnson J) and *Re M (Disclosure)* (per Pill and Thorpe LJJ) [1998] 2 FLR 1028.

25. The overriding principle which emerges from all the authorities to which I was referred is the need to strike a fair balance between all the various interests which are engaged.

26. In this case, the Guardian and the local authority are not agreed upon the correct approach to the determination of this matter. On behalf of the Guardian, Dr Bainham submits that the issue should be resolved by applying *Gillick* principles as subsequently explained and expanded by Silber J in the *Axon* case. In this case the information which I wishes to remain confidential does not involve any proposed medical treatment. That much I can properly say. Thus, on the Guardian's case as

advanced by Dr Bainham, the duty of confidentiality which was found to exist as between a *Gillick* competent child and a doctor or other medical professional advising on, or offering, medical treatment would necessarily be extended so as to cover social workers and other professionals engaged with the young person concerned. The local authority points to the existence of the specific statutory duty under section 22(4) of the Children Act 1989 to share information. This obligation, argues Mr Krumins, establishes a default position of disclosure unless and until a court decides that withholding information is justified in the particular circumstances of any given case. But for the existence of care proceedings, he accepts that there would be no obligation placed upon the local authority to disclose the information as the *Gillick* line of authority would apply. On the basis of *Gillick, Axon* and *Yousef*, I's Article 8 rights would take precedence over those of his family members. However, because of the existence of the current care proceedings, the competing rights which have to be considered are I's Article 8 rights and the respondents' Article 6 rights. Whereas Article 8 rights are qualified, Article 6 rights are absolute. Thus, on the local authority's case, the approach developed and applied by the courts through *Gillick, Axon* and *PD* applies but only insofar as it confirms I's entitlement to full consideration of his Article 8 rights. In order to strike a fair balance between the various interests involved, the test set out in *Re D* must be applied subject to the overarching consideration of the relevance of the information to these particular proceedings.

27. In terms of relevance, the local authority recognises and accepts that the information which I regards as private will not change or impact upon the final adjudication of the care proceedings or its own decision making for this young man. Nonetheless, Mr Krumins submits that the threshold for relevance must be low in order to enable the respondents to decide what weight it carries in terms of the presentation of their respective cases to the court.

28. On behalf of I, Dr Bainham accepts that there is an interaction in this case between principles governing the autonomy of adolescents, the duties of local authorities in respect of 'looked after' children in their care and the principles governing disclosure in public law care proceedings. He contends on behalf of the Guardian that the *Gillick* and *Axon* principles which recognise the respect to be accorded to a child or young person's autonomy in relation to contraceptive advice or medical treatment should also be applied in equal measure to a personal disclosure of the kind made by I.

29. As I have said, there is no issue between the local authority and the Guardian about I's *Gillick* competence. Each accepts that, notwithstanding his statement of special educational needs, his social skills are commensurate with his chronological age and he understands his situation and has the capacity to instruct his legal team in relation to this matter.

30. Whilst Dr Bainham recognises and accepts that, in the context of litigation such as the current care proceedings, non-disclosure is the exception and not the rule, he submits that the respondents' Article 6 rights to a fair trial do not create an absolute and unqualified right to see all the documents in the proceedings. In this respect he relies on the judgment of Munby J (as he then was) in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017. Having considered the principles formulated by Lord Mustill in *Re D*, his Lordship said this:

> "**[27]** The principles stated by Lord Mustill in *Re D (Minors)(Adoption Reports: Confidentiality)* [1996] AC 593, sub nom *Re D (Adoption Reports: Confidentiality)* [1995] 2 FLR 687 were applied by Johnson J in *Re C (Disclosure)* [1996] 1 FLR 797, a case where the issue arose in care proceedings. He cited two passages from *Re K (Infants)* [1965] AC 201. The first (at 799F) was the speech from Lord Jenkins at 226A where, speaking of something that had been said in the Court of Appeal by Upjohn LJ, he said:
>
> > '… the … Lord Justice commended as an excellent and commonplace practice a form of procedure whereby the judge declares his willingness to disclose the contents of the confidential reports to the parties' legal advisers provided they are not disclosed to the parties' themselves, and said he had never known any objection to it until the mother took the objection in the present case.'
>
> The other (at 802B) was the speech from Lord Devlin at 241F:
>
> > 'The basis of the discretion is a probability that harm would result to the ward from the disclosure. Granted that, there is, I think, a clear distinction to be drawn according to whether the evidence or observations from the parents could or could not assist the judge in making up his mind on the point to which the material in question relates. *Where there is* no allegation against a parent, *no point on which he could reasonably want to be heard or on which his evidence could throw light, there is no specific advantage to be gained from disclosure* to put against the harm it might do. In such a case the discretion can be freely exercised. But when these elements are present, the discretion should, in my opinion, be sparingly exercised.'(emphasis added)"

31. Having conducted a thorough and wide-ranging review of both domestic and European jurisprudence on the issue, Munby J went on to record in para 67 of his judgment his conclusions. (R was the natural father of the child at the centre of the relevant care proceedings in which disclosure was sought.)

"(1) R is entitled under Art 6 to a fair trial. So also, of course, are the mother, the children, W and G. The parties' rights to a fair trial are absolute. Their rights to a fair trial cannot be qualified by the mother's or the children's or anyone else's rights under Art 8.

(2) R's right to a fair trial means that he (like all the other parties) is entitled to be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests. He must be able to participate in such a way as will enable him not only to influence the outcome of the proceedings but also to assess his prospects of thereafter making an appeal to any relevant appellate court. He must have a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponents. He must have a reasonable opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other parties.

(3) Prima facie this means that R is entitled to disclosure of *all* materials which may be taken into account by the court when reaching a decision adverse to him. If he is a party to the proceedings he is prima facie entitled to see *all* the documents that are available to the other parties.

(4) Nevertheless the decision-making process, although it must be fair to R (and to all the other parties), must also, so far as is compatible with that overriding requirement, be such as to afford due respect to the interests of the children, the other parties and the witnesses safeguarded by Art 8.

(5) So, a limited qualification of R's right to see the documents may be acceptable if it is reasonably directed towards a clear and proper objective – in other words, if directed to the pursuit of the legitimate aim of respecting some other person's rights under Art 8 – and if it represents no greater a qualification of R's rights than the situation calls for. There may accordingly be circumstances in which, balancing a person's prima facie Art 6 right to see all the relevant documents and the Art 8 rights of others, the balance *can* compatibly with the Convention be struck in such a way as to permit the withholding from a party of some at least of the documents. The balance is to be struck in a way which is fair and which achieves a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, having regard to the nature and seriousness of the interests at stake and the gravity of the interference with the various rights involved.

(6) Bearing in mind the importance of the rights guaranteed by Art 6, and the fact that, as Sedley LJ pointed out in *Douglas, Zeta-Jones, Northern and Shell plc v Hello! Ltd* [2001] 1 FLR 982, para 141 Art 8 guarantees only 'respect' for and not inviolability of private and family life, any restriction of a party's right to see the documents in the case must, as it seems to me, be limited to what the situation imperatively demands. Non-disclosure can be justified only when the case for doing so is, to use Lord Mustill's word, 'compelling' or where it is, to use the Court's words in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, 'strictly necessary'.

(7) Moreover, to adopt Lord Mustill's word, the court must be 'rigorous' in its examination of the risk and gravity of the feared harm to the child or other person whose Art 8 rights are said to be engaged.

(8) Finally, any difficulties caused to a litigant by a limitation on his right to see all the documents must be sufficiently counterbalanced by procedures designed to ensure, in accordance with the principles in (2) above, that he receives a fair trial.

(9) At the end of the day the court must be satisfied that whatever procedures are adopted, and whatever limitations on a litigant's access to documents may be imposed, everyone involved in the proceedings receives a fair trial."

32. It is important in my view to bear in mind that these observations were made in the context of R's request for disclosure of documentation which included, inter alia, various psychiatric and psychological reports on a mother, the children and her present husband (not R who was the natural father of one of those children). Within that material were notes made by a therapist of the therapeutic work being undertaken with the mother and two of the children. She had claimed that disclosure of this particular information to R within the care proceedings was a violation of her Article 8 rights. Whilst allowing disclosure of some of the contested material, Munby J agreed that proper respect for the mother's Article 8 rights justified redaction and/or non-disclosure to R of certain parts of the evidence since the harm which disclosure would cause would be wholly disproportionate to any legitimate forensic purpose served. At para 86 of his judgment, he said this:

> "To permit R access to this material against the mother's wishes would, as it seems to me, amount to a gross invasion of her innermost private life. It is not something that is necessary if R is to have a fair trial. To allow him to see this material would, I am satisfied, fail to afford due respect for the mother's private and family life. So far as concerns (iii) *[those parts of the report of the consultant psychologist relating to sessions with two of the children, K and S]* the position is very much the same save that the primary focus is here upon K and S rather than the mother. As I have said, I cannot overlook what seems to me to be the important fact that both K and S have expressed their wish that R should *not* have access to that information…. Depriving R of the opportunity to see this material will not deny him a fair trial; allowing him to see it will, I am satisfied, breach the Art 8 rights in particular of K and S."

33. These observations were subsequently upheld by the Court of Appeal as a correct statement of the law in *Re X (Adoption: Confidential Procedure)* [2002] EWCA Civ 828. In that case, Lady Justice Hale (as she then was) said this at para 13 of her judgment:

"Unlike the right to respect for family and private life in Article 8, the right to a fair trial in Article 6 is absolute and unqualified. But the content of a fair trial in any particular case is more flexible and depends upon the context: as Lord Bingham of Cornhill said in *Brown v Stott (Procurator Fiscal, Dunfermline) and Another* [2001] 2 WLR 817 , at p 824,

> "What a fair trial requires cannot, however, be the subject of a single unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases. As the European Court has consistently done".

Departures from the usual requirements of an adversarial trial must, of course, be for a legitimate aim and proportionate to that aim. Protecting the welfare of these very vulnerable children is undoubtedly a legitimate aim."

34. In the context of the present application, it is important to state that the information in respect of which I seeks to maintain privacy is not information which will have a bearing on any evaluation undertaken by the court in relation to the issue of whether or not the care which the second and fourth respondents have given, or may give in future, to I is likely to cause him to suffer significant harm such as to justify the making of a final care order. In my judgment, it will have no bearing whatsoever on any judicial investigation into the quality of the care they have provided in the past or the care they are likely to offer to I in the future in terms of the sort of care it would be reasonable to expect a parent to provide. Further, the local authority accepts that the information has not, and will not, affect or influence their decision-making for I in terms of the final care plan which is now before the court.

35. On behalf of I's step-mother, Mr Fletcher took me to the decision of the Court of Appeal in *Re M (Disclosure)* [1998] 2 FLR 1032. In that case, a child's guardian and a local authority had sought to shield from disclosure to the parents certain sensitive information in its possession. It was accepted that the information might well have "extraordinary" adverse consequences for the design and implementation of the care plan if general disclosure was permitted. Counsel for the guardian accepted that the information which he sought to protect was not directly adverse to the mother who was resisting the care proceedings in the sense that it nowhere bore upon her suitability or the assessment of her capacity to provide good enough parenting in the life of her child. In delivering the judgment of the Court of Appeal, Thorpe LJ said this at page 1032 F:

> "…. the fact is that it *[the report]* is adverse to her case in the sense of Lord Mustill's first guideline in that it circumscribes such attack as she might instruct her advocate to make at the final hearing on the care plan and its implementation. Beyond that, if there is within the local authority's proposals for the future of her child a matter that could at any level be said to give rise to concern, then it is

adverse to her case, both as a litigant and as a mother, if that information is denied her."

36. His Lordship stressed the need for a careful balancing exercise to be undertaken. He criticised the procedure adopted by the judge at first instance who had withheld the material in question on the basis that his only obligation was to have regard to the welfare of the child at the centre of the care proceedings which he had put as his paramount consideration. Instead, he should have balanced welfare considerations with the requirements of the administration of fair justice. The judge's failure to address the latter pointed to 'a sadly flawed procedure'.

37. Dr Bainham on behalf of the Guardian contends with some force that it is difficult to see in what way knowing the one piece of personal information which I has shared with a professional will assist the respondents in advancing their case one iota. Nevertheless, even if he is wrong to exclude a strict application of the *Re D* test, he argues that an application of that test justifies the preservation of I's confidentiality in respect of the information.

38. In his written skeleton (para 117), Mr Day on behalf of I's father says that his client wishes to utilise the material at the forthcoming final hearing. He raises concerns that I *"will become involved [in] gang culture and criminality and that corporate care will not be in his best interests. The sensitive information very much supports and grounds that contention and is required for there to be a fair trial."*

39. With respect to Mr Day (who knows the nature of the confidential information), I can see no correlation at all between the information which I has imparted and the likelihood of his becoming involved in gang culture or the sort of criminality which is sometimes associated with such involvement or membership. The link between the two is not even tenuous in my judgment. Furthermore, the statement of intent to use the information at the forthcoming trial is made in an evidential vacuum. As matters stand, I's father does not know anything about the information and he will not know unless and until the court authorises its disclosure. Mr Day seeks to widen the ambit of his assault on confidentiality by asserting that the material is relevant to that part of his client's case which relates to an allegation that the local authority will not provide appropriate care for I if a final order is made. It seems to me that this is a matter for the trial judge who will be responsible for scrutinising with the utmost care the final plan advanced by the local authority.

Analysis and Discussion

40. The local authority was absolutely right to make this application. In my judgment, Holman J was also absolutely right to rule that the matter must come back to be dealt with on notice to the respondents.

41. In terms of the correct approach to the issue of disclosure, I do not accept that I can consider issues flowing from I's 'personal autonomy' in a vacuum. In my judgment, Mr Day is correct on this point. *Gillick* and *Axon* were both cases which did not involve any consideration of the engagement of Article 6 rights. In each, the applicant was seeking declaratory relief but no more. In this case, both Article 6 and Article 8 rights are engaged and accordingly the *Re D* test must form a part of the overall balancing exercise which I have to perform. However, it seems to me that the principles to emerge from *Gillick* and *Axon* become relevant at the stage of the balancing exercise where judicial focus is on the welfare of the child or young person. Respect for his or her views and the consequences of overriding those views where they are genuinely and strongly held must, in my judgment, form part of those welfare considerations.

42. Dr Bainham makes the valid point on behalf of the Guardian that if *Gillick* principles are not accorded priority, any 'looked after' child in these circumstances would be at a disadvantage since his views would be accorded less respect because of the fact that he is at the centre of contested care proceedings. Whilst I can see the force of that submission, it does not in my judgment mean that I can disregard the equally important considerations which flow from the engagement of the respondents' Article 6 rights. I's views are important. They are entitled to considerable respect but they are one aspect of the overall balance which has to be achieved in this case. In my judgment, they are not determinative of outcome. Further, the fact that neither of his parents is currently exercising day to day parental care for I does not dilute the parental responsibility which they currently share with the local authority.

43. The first question which must be addressed is that of relevance. Nothing which was said by I impinges upon, or affects in any way, the local authority's case in relation to the respondents' allegedly deficient parenting. On behalf of the local authority, Mr Krumins submits that it is important to distinguish in this context between the *relevance* of the information and the *weight* which can properly be attached to it. In relation to relevance, he contends that the threshold is low. Nevertheless, he concedes that the information is unlikely to assist the trial judge and will ultimately make no difference to outcome. I bear in mind the observation of Thorpe LJ in *Re M (Disclosure)* that if there is anything within the local authority's care plan which gives rise to concerns, that may well be adverse to the respondents' case should disclosure be withheld. However, where the principal challenge to, and defence of, the care proceedings amounts to a denial by the second and fourth respondents of the poor parenting which gives rise to the perceived risk of significant harm to I, it is difficult to see how a care plan which involves removal from that harmful environment can be

said to raise independent concerns. That will be the central issue for the trial judge to determine.

44. I have significant concerns about whether or not the information for which protection is sought is truly relevant to these proceedings. Whatever subjective views Mr Day may seek to advance on behalf of I's father, it is difficult to see how any objective analysis of the information *could* lead to the conclusion that it has any relevance to the issues to be determined later this month. However, for the purposes of my judgment and on the basis that Mr Day is right and it has some tangential (or greater) relevance, I must go on to apply the balancing test set out in *Re D*.

45. Thus, the next question to be answered is whether disclosure of this information would involve a real possibility of significant harm to I.

46. The Guardian and the local authority are not agreed on this aspect of the case. The local authority accepts that disclosure would be likely to expose I to an awkward and embarrassing situation, but no more. Within the material which has been put before the court is a statement prepared by a social worker on behalf of the local authority. It is dated 8 April 2016. In that statement, the social worker, AB, expresses the view that I may be embarrassed or ashamed as a result of disclosure. However, she acknowledges, too, that he may in future be reluctant to share information with professionals if the information is revealed to his parents against his wishes. Her statement also raises an issue as to whether what he said was true in any event.

47. The concerns of the social worker find strong reflection in the Guardian's evidence. She tells me that, knowing what she does about I's father and step-mother, she believes neither 'would … be able to respond to the information in a child-centred way at all, and that this could have emotionally devastating consequences for [I]'. She sets out in her evidence a report which she had received from a colleague who was present at a recent LAC review which was attended by I's father and step-mother. One of the issues for discussion on that occasion was their willingness to engage in some work with an appropriate professional in order to assist their understanding of I's needs. Their presentation on that occasion was said to be "extremely oppositional, even in [I's] presence". The report which emanated from that meeting is recorded in the body of the Guardian's statement in this way.

> "It was appalling … [I's father] totally took over, attempting to intimidate the professionals, leading to … [I] putting on the hood of his jacket and pressing his forehead onto the table in what appeared to be a combination of anxiety, frustration and sheer embarrassment. His wife [I's step-mother] then started a wholly inappropriate and crass attack on the social worker – how can she do the job at her age, not having children. Basically, following father's continued ranting

and finger-pointing at me, I had no choice but to prematurely bring the review to an end. I'm far from convinced that the LA should be promoting contact for [I] with them. Before there can/should be any relationship work undertaken, perhaps father in particular should be advised to see his GP regarding having anger management and/or counselling. He certainly won't be invited to the next review unless he makes some radical changes."

48. The Guardian expresses her very real concerns that the good relationship which I has managed to establish with his social worker and foster carer may be damaged by disclosure of the information which he wishes to keep private. Those relationships are important to him because they enable him to confide in these professional carers and, in turn, to receive appropriate support and guidance. To override his express wishes may undermine his trust in professionals making it difficult for them to offer the level of help and support from which he has so clearly benefitted to date. This would be entirely counter-productive and inimical to his best interests. She has no confidence in either the father's or step-mother's ability to respond appropriately or sensitively to something which I regards as a personal and embarrassing episode and she regards the prospects of disclosure as being 'highly detrimental' to his welfare.

49. Thus, it seems to be common ground that disclosure to the parents will cause I emotional upset and some distress. The disagreement centres on the level of emotional harm and whether or not this is likely to be "significant".

50. On behalf of the father, Mr Day submits that "the worst reaction could be that the father is dismayed, disappointed and at worst may remonstrate with his son". On behalf of I's step-mother, Mr Fletcher reminds me that I has been told by his social worker that it is not possible for her to provide him with a guarantee that anything he tells her will remain private as between them. He points to the absence of any direct statements by I himself as to his fear of his parents' reaction. He invites me to consider whether any perceived harm could be mitigated by putting in place safeguards so as to ensure that I was protected from any such reaction from his father and step-mother as that anticipated by the Guardian.

51. I have to bear in mind that I is a very vulnerable young man. He is not yet 16 years old and has already been the subject of two separate sets of care proceedings. He has been found to have suffered neglectful and abusive parenting at the hands of his mother. His experience of life was fractured when he left his home with her to live in a completely different part of the country with his father and step-mother. His unhappiness and distress in that placement is reflected in his attempts to abscond and his absolute resistance to any return to that household and any form of continuing relationship with his father and/or his present wife. Whilst I accept that it is an untested account, I regard the record of what transpired at the recent LAC review as providing a valuable insight into what I is likely to be experiencing at the present time in terms of the conflict which appears to exist between his family and the

professionals who are currently caring for him. The picture of I which emerges from the record of that meeting is one of a young man who has few, if any, coping strategies for dealing with that conflict. I do not accept that the absence of a specific reference by I to fear of his father's reaction should lead me to a conclusion that he has no such fear. On behalf of the mother, Miss Bartholomew supports the Guardian's position that there is a real risk of further significant harm to I in the event of disclosure. She records in her written submissions the mother's historic and ongoing concerns about the aggressive and inflexible behaviour demonstrated by his father. She is concerned that his reaction to the information may well place I at risk of significant harm.

52. In my judgment, whether one applies the label of "significant" or "real" harm to the question, there is indeed a real possibility of significant and detrimental harm to I if this information is disclosed. In his evidence in response to the local authority's case, I's father has denied entirely that his son is suffering, or has suffered, from any significant emotional harm. He accepts that he has shouted at I but justifies this on the basis that, *"If you don't stand up as a parent, the children are going to walk on you"*. It is said that he referred to I in highly derogatory terms because of his educational difficulties. He does not admit using any such inflammatory terms but still refers to I in his statement as "this little boy". I am satisfied that there is a clear risk that the consequences of disclosure of this material may well result in I's disengagement from the professionals who have provided him with guidance and support since his reception into care. He has been damaged by his experience of family life in recent years and findings in relation to threshold have already been made in the context of the interim care order which sanctioned his removal from his father's home. If his current support structure were to be put at risk for any reason, he may well withdraw and internalise issues thereby putting his happiness and future wellbeing at significant risk.

53. I bear in mind, too, that whether or not the trial judge makes a final care order at the conclusion of these proceedings later this month, any prospect of repairing the relationship between I and his father will inevitably have to involve some form of therapeutic input from an appropriate professional or professionals. In this respect, it is essential that I believes that he can repose trust and confidence in those professionals and the care and support they will be providing. It would be harmful to him, and significantly so, if the chance to restore some form of relationship between parent and son in future were jeopardised because of a disclosure now of information which he regards as confidential.

54. In terms of the *Re D* test, this finding engages the next stage of the balancing exercise which I must carry out. Thus, I ask myself whether the overall interests of I benefit from non-disclosure. In answering this question, I have to weigh the interests of I in having the material in question properly tested and the magnitude of the risk that harm will occur and the gravity of that harm if it does occur.

55. To an extent there is a degree of elision between the first and second stages of the test. I have already recorded my doubts about the relevance of the information to the issues which are likely to be addressed at the final hearing. In this context, I can see little benefit to I in ventilating the material before the court later this month. If his wishes are overruled in this respect, I can see his distress in relation to disclosure to his father and step-mother being compounded by the knowledge that these very private matters may well be the subject of forensic scrutiny and debate in court. That distress may well compound fears he may harbour about maintaining an open relationship in future with the professionals who are charged with responsibility for his wellbeing, whether teachers at school, social workers who continue to be involved in his care, foster carers or therapists. There is ample evidence in the papers to substantiate the positive benefits which have already flowed from his ability to confide in others. I regard both the magnitude of the risk of harm occurring and the gravity of that harm if it does occur as being substantial and significant. The balance at this point clearly falls in favour of non-disclosure. Indeed, I can find no positive benefits to I whatsoever in disclosure at this stage.

56. In these circumstances, the final step is to weigh the interests of the respondents in having the opportunity to see and respond to the material. This involves a rigorous consideration of the engagement of their Article 6 and Article 8 rights.

57. Given what I have already said in my judgment, I can dispose of the issue in relation to their Article 8 rights in fairly short order. These rights, whilst engaged, cannot take precedence over I's Article 8 rights and he is clearly expressing a wish for no communication with his father or step-mother at the present time. As *Yousef* makes clear, the child's rights are the paramount consideration in any balancing of competing Article 8 rights.

58. As to the respondents' Article 6 rights, the relevance of the information to outcome has already been addressed. In my judgment, it is of tangential or minimally indirect relevance at its highest and is completely irrelevant at its lowest. The local authority accepts that it will not impact upon outcome or future planning for I. The respondents' rights to a fair trial are, of course, absolute but, as Lady Justice Hale acknowledged in *Re X*, in deciding how to conduct a fair trial, it is perfectly reasonable to take account of the facts and circumstances of the particular case with which the court is dealing. The concept of a fair trial is inviolable but the *content* (including the evidence) which is placed before the court is flexible and depends upon context and the issues with which the court is dealing. Whilst I accept that any departure from the usual requirements in relation to the disclosure of evidence in an adversarial trial must be for a legitimate aim and proportionate to that aim, the Court of Appeal has held that protecting the welfare of vulnerable young persons is a specific and undoubtedly a legitimate aim.

59. In my judgment, the harm which would be caused by disclosure of information which has very little, if any, relevance to the issues which need to be determined by the court would be wholly disproportionate to any legitimate forensic purposes served. I am entirely satisfied that depriving the respondents of the opportunity to have this information will not deny to any of them a fair trial. Disclosure would, however, be a breach of I's Article 8 rights.

60. Considering all these matters in the round, I have reached the clear conclusion that the case for non-disclosure of the information which is the subject of the Guardian's current application is compelling. The circumstances of this case, looked at in the round, do make it exceptional and I regard it as entirely necessary that I's confidence and privacy in this information is maintained. I cannot overlook the fact that, as a *Gillick* competent young person, he has expressed in the clearest terms his wish that the family should not have access to the information. Those wishes deserve the court's respect, albeit in the context of the overall balancing exercise which I have conducted.

61. The injunction made by Holman J in paragraph 6 of his order dated 18 April 2016 will continue in full force and effect unless and until the court orders otherwise. The hearings listed on 12 and 17 May 2016 shall remain in the court list as effective fixtures. I am aware that there was some discussion at the hearing before Holman J as to whether or not these hearings should be dealt with by the designated judge at the Family Court where the care proceedings are due to be heard. On one view, if this information is not relevant to the proceedings and has not been disclosed to the respondents, the judge who hears the case should not know about it either. However, I am aware (because I was told by counsel for the father) that there are ongoing discussions about this case. I say no more about those discussions because they are legally privileged despite the fact that no one has raised any objection to my being alerted to their existence. There appears to be a consensus that the IRH listed before the designated judge on 12 May 2016 should proceed in any event. I propose to leave it to her to consider whether she should hear the final hearing or whether she should allocate the case to a different judge for the purposes of a final disposal, should matters reach that stage after what I anticipate will be careful discussions at the IRH..

62. Whilst invited to do so by Miss Bartholomew on behalf of the mother, I decline to address any further guidance which may be needed in the event that I should disclose information to his mother in the future with a request that she should not tell his father and/or the local authority. We are in the realms of speculation and these matters are much better dealt with, if at all, in the context of the final hearing and any consequential directions which may flow from the judge's findings of fact. Miss Bartholomew also raised the issue of the mother's representation at the IRH and final hearing. In the event that she is not available to represent the mother as seems likely,

she seeks guidance on whether or not alternative counsel should be made aware of the information which I have said must not be disclosed on the basis that counsel will provide the same written assurance as that provided today by all four legal representatives pursuant to Holman J's order. It seems to me that any alternative counsel should conduct the hearing from the same footing as all the other legal representatives in the case. In these circumstances, and because everyone in court is aware of the (now) embargoed information, I shall give permission for the release of the information to any alternative counsel instructed by the mother. That information will be disclosed to him or her on condition that he or she complies with paragraph 4 of the order made by Holman J on 18 April 2016.

63. Finally, I would conclude by echoing the words of Holman J which are exquisitely apt in this case. I, too, am deeply conscious that whenever disclosure issues of this kind arise, there is inevitably a problem once parents or other interested respondents are put on notice that there exists some information in respect of which the court has supported an application for non-disclosure. As Holman J observed, '"conspiracy theory" and imaginings may inevitably take over'. The parents and step-mother may well be concerned that the information is graver than it actually is. I would hope to reassure them by my finding in relation to the likely relevance of the information to the issues which are at stake.

Order accordingly