Judgments

Re A and others (adoption: notification of fathers and relatives)

[2020] EWCA Civ 41

Court of Appeal, Civil Division

Sir Andrew McFarlane P, Peter Jackson and Nicola Davies LJJ

29 January 2020

Judgment

James Cranfield (instructed by **Battrick Clark Solicitors**) for the **Appellant Child by his Children's Guardian**

Stuart Fuller for the **Respondent Local Authority**

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Case B

Dorian Day & Barbara Hecht (instructed by **Hecht Montgomery Solicitors**) for the **Appellant Mother**

Tahmina Rahman & Amy Slingo for the **Respondent Local Authority**

- -

Case C

Darren Howe QC & Charlotte Wilce (instructed by **Foys Solicitors**) for the **Appellant Mother**

Frances Heaton QC & Penelope Stanistreet-Keen for the **Respondent Local Authority**

Catherine Wood QC & Sara Anning (instructed by **Howells LLP**) for the **Respondent Child by her Children's Guardian**

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Hearing date: 21 November 2019

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. These three appeals concern babies whose mothers concealed their pregnancies and did not want the fathers and other relatives to know of the births. Should the local authorities and the court notify the fathers or relatives before plans for the children's future are made and put into effect? In each case the plan may involve adoption and in two cases that is what the mother wants.

2. Respect is due to the position of any mother who goes through pregnancy without family support and then chooses to relinquish the child at birth in the belief that it is for the best. Respect is also due to the position of the unsuspecting relatives. Some may have been a fleeting presence in the mother's life, but others may be more significant figures who have been kept in the dark and would be astonished to find that a baby (their child, sibling or grandchild) had been born and adopted without their knowledge, particularly if they were in a position to put themselves forward as carers. Most of all, the notification decision has life-changing implications for the baby. It may influence whether adoption happens at all and, even if it does, a sound adoption has its foundations in the integrity of the process by which it is achieved.

3. For social workers and courts these are not easy decisions. They have to be made without delay, on incomplete information, and in the knowledge of the profound consequences for everyone concerned. The law aims to distinguish those cases where a 'fast-track' adoption without notification of relatives is lawful from the majority of cases where the profound significance of the decision for the child demands that any realistic alternatives to adoption are given proper consideration. But in the end each case is unique and the outcome must depend on the facts.

4. The three appeals were heard together on 21 November 2019. At the end of the hearing, we informed the parties of our decisions and made orders so that planning for the children could continue. This judgment contains my reasons for agreeing with those decisions. It continues in these sections:

Section 1 A brief description of each case

Section 2 The law

Section 3 Analysis and Summary

Section 4 The three appeals.

Section 1: A brief description of each case

<u>Case A</u>

5. A is a boy born in February 2019. When he was born, his mother relinquished him to the care of her local authority and asked it to place him for adoption. A was placed with early permanence carers who would like to adopt him. On 22 May, the mother signed forms under sections 19 and 20 of the

Adoption and Children Act 2002, consenting to his placement for adoption and giving advance consent to his adoption by his carers.

6. A's mother is aged 21. She is a student. Out of term time she lives with her mother and brother. On her account, A's father is a student elsewhere. They were in a relationship lasting 4½ years and, though no longer together, remain friends. The mother did not tell her family, or the father or his family, about her pregnancy or A's birth. She has not named the father but the information she has given to the local authority probably enables him to be identified. Her own family is identifiable.

7. The mother gave these reasons for wanting A's birth to be kept secret and for him to be adopted:

· She has a history of depression for which she takes medication and did not feel physically or emotionally capable of caring for him.

· The father has also suffered with mental health issues.

· She had terminated two previous pregnancies, both by A's father, with his agreement.

· He would agree with the decision for A to be adopted as he would not want to be involved in the child's life.

· Her own mother would agree with the decision to adopt A. She too has mental health issues and her brother has learning difficulties. Other maternal family members are too old to care for A.

8. On 28 June the local authority belatedly issued an application under Part 19 of the Family Procedure Rules 2010 (FPR 2010) seeking a decision as to whether it should identify the putative father and members of the extended maternal and paternal families and offer to assess them as prospective carers. The application was determined by HHJ Marston on 16 August. He directed that the local authority was under no obligation to inform the father or wider family members of A's birth, or to seek to assess them as prospective carers. He declared that the lack of notice would not be regarded as a reason not to make an adoption order in due course. The Guardian applied for permission to appeal on 24 September and permission was granted on 16 October.

Case B

9. B is a girl born in July 2019. She has remained in the care of her mother, originally in a residential assessment unit but since the end of October in a mother and baby foster placement. The mother wants to care for B but the local authority has significant concerns.

10. The mother is aged 23. She came to the UK as a child. She has many siblings with ages ranging from their early 20s down to nursery age. She describes an abusive childhood. She suffered female genital mutilation as a young child and reports that her father regularly hit her, leading her to run away from home often. She has also reported being taken abroad at the age of 11 or 12 to be exorcised of evil spirits.

11. The mother has been known to the local authority since 2013, when concerns were raised about her chaotic behaviour and her use of alcohol and cannabis. She was placed under police protection at the age of 16. However, no safeguarding concerns were found in relation to any of her siblings.

12. The mother says that at the age of 16 or 17 she had an arranged marriage overseas and that she has a child from that marriage, now aged 4. She and her husband are divorced and have no contact. The child lives overseas with a maternal aunt. She has had no recent contact with that child.

13. The mother returned to the UK in 2018. She was homeless and staying with various friends. She began a relationship with a man she initially identified as B's father. She has since provided the local authority with the details of two other putative fathers and it is in the process of investigating paternity.

14. In the later months of the pregnancy medical staff recorded the mother attending hospital appointments seemingly under the influence of drugs or alcohol. She repeatedly missed antenatal appointments, including her induction date. Her ability to manage her finances or provide B with

consistent food and shelter is in doubt, and there is said to be a risk of exploitation and domestic violence.

15. The mother said that she had not told anyone in her family about her pregnancy or B's birth. She had not spoken to her parents for over a year, and has limited contact with her sisters via social media. The position is therefore that B's father has not been identified, while the identity the maternal family is known.

16. The mother gave these reasons for wanting B's birth to be kept secret:

· If she cannot look after B herself, she would rather she was adopted than be placed in the care of her family, so that B should not experience the abuse she herself suffered.

· She is scared of her family's reaction if they found out that she had a child outside wedlock with someone of a difference race and cultural heritage.

· The family would therefore be unlikely to respond positively to being told of B's existence, and it would cause them needless upset and distress.

· An assessment of her family would be likely to be negative and little benefit would be gained.

· The father (the first man so named) did not want to play any part in the baby's life and even booked a termination for the mother. He was violent towards her while she was pregnant. He is involved with drugs and gangs and is currently serving a long prison sentence. She is scared of what he would do if she shared information about him with the local authority.

17. When B was born, the local authority appropriately issued care proceedings and the court made an interim care order and an order for residential assessment. The local authority wanted to contact the maternal grandparents to tell them of B's birth, with a view to assessing them should they put themselves forward as alternative carers. On 23 September it filed a statement to this effect. On 25 September the mother issued an application seeking a direction or injunction to prevent this. The position of the local authority was supported by B's Guardian, who contended that on balance all options needed to be properly considered.

18. The application was heard by HHJ Willans on 7 October. He refused the mother's application. She was given seven days to inform her parents if she wished to do that herself. Permission was given for DNA paternity testing of any putative fathers. The mother applied for permission to appeal on 16 October and permission was granted on 30 October.

19. Since the judge's decision, the mother has told a female cousin about B's existence. She also told the social worker that she was considering informing one of her brothers, with a view to her whole family being told. The cousin has spoken positively about the grandparents to the local authority and said that they would be likely to want to care for B if the mother could not do so herself.

Case C

20. C is a girl born in April 2019. When she was born, her mother relinquished her to the care of the local authority and asked it to place her for adoption. She was placed in temporary foster care, where she remains.

21. C's parents are married. The mother is aged 29 and has had several other children. Her husband is the father of all of them except the eldest, whom he has treated as his own.

22. The family has been known to the local authority since 2013, and five assessments have been carried out. Issues included poor engagement by the mother with antenatal services, concealment of pregnancies and allegations of rape made by the mother against the father. However, at the end of 2017 the case was again closed on the basis that the children's needs were being met to a high standard.

23. The mother, having received no antenatal care, went to hospital and gave birth to C on the same day after leaving the other children in the care of the father. She asked for C to be placed for adoption. She said that C had been conceived as a result of rape and that she did not wish to care for

her, but she did not immediately disclose the identity of the man that had raped her. At a later stage she said that she had been raped by her husband, who had also facilitated her rape by his cousin in his presence. She reported a further rape by the cousin when the father was elsewhere in the home.

24. The mother's reasons for wanting to keep C's birth secret were these:

· Caring for C would remind her of the rapes.

· She and the father have an unconventional relationship. Although they are married he works away, was infrequently at home and rarely provided care for the children. They permanently separated in September 2018, following the rapes, but the father visits the home to see the children.

· The father has a bad temper and on one occasion punched and damaged a door. He has been intimidating and controlling. She is scared that he would assault her if he found out that she had kept C's birth a secret.

· He would humiliate her by informing members of the local community. She would then have to leave the area with all her children.

· He would not be willing or able to care for C.

· There is no other maternal or paternal family member who would be willing or able to care for C.

25. The local authority, inappropriately as it now accepts, issued care proceedings on 28 May and an interim care order was made on 5 June. DNA tests, carried out using samples obtained from siblings, show that the husband is C's father. In the course of the proceedings, the mother applied for an order that the local authority be permitted not to serve the father and wider family with notice of the proceedings. The local authority supported the application but the Guardian took a different view. She had concerns about the long-term consequences for C of being denied the opportunity to be part of her birth family.

26. The matter came before HHJ Carr QC on 27 September. Evidence was given by the mother. The judge refused her application. On 31 October, the mother applied for permission to appeal and this was granted on 14 November.

Section 2: The law

27. The following review considers relevant statutory material and European and domestic case law. During their written and oral submissions, counsel addressed this framework and referred to key passages in the main authorities. I acknowledge how helpful these submissions have been in relation to the survey of the law to which I now turn.

Statutory material

28. The principal statutory material, found in the Children Act 1989 (CA 1989) and the Adoption and Children Act 2002 (ACA 2002) and their associated procedural rules, practice directions and guidance, provides relevant context for local authorities, children's guardians and courts. It bears on the position of children who are in need or being looked after by local authorities and those who are subject respectively to proceedings for care orders, placement orders and adoption orders. The following brief summary focuses on provisions relevant to cases where adoption may be the eventual outcome.

29. Babies who may be adopted are likely to be children in need and/or looked-after children. Part III of the CA 1989 concerns support for children and families in England. Broadly, section 17 imposes a duty on local authorities to promote the upbringing of children in need by their families so far as is consistent with their welfare, while section 22C requires local authorities to place looked-after children with parents or relatives unless that would be inconsistent with their welfare or is not reasonably practicable. Where there are care proceedings, the s.1 checklist in the CA 1989 includes a requirement for the court to have regard to the capacity of the child's parents and of other relevant persons to meet the child's needs. In this context a parent includes a father without parental responsibility. Where there are proceedings for a placement order or an adoption order, the parallel checklist in the ACA 2002 requires the court and the local authority as the adoption agency to have

regard to the lifelong effect on the child of ceasing to be a member of the original family and becoming an adopted person, to the relationship the child has with relatives (defined in s.144 as grandparents, siblings, and uncles and aunts), to their ability and willingness to provide a secure environment and meet the child's needs, and to their wishes and feelings. These provisions are given procedural effect by the FPR 2010 and the Adoption Agencies Regulations 2005, which impose duties on the local authority as the adoption agency and upon the Children's Guardian as the child's litigation friend to obtain information about these matters.

30. At the same time, the primary legislation specifically allows for consensual adoption, also known as 'fast-track' adoption. Section 18 ACA 2002 permits placement for adoption either with parental consent under s.19 or following a placement order under s.21, while s.20 allows for advance parental consent to adoption itself. In this context a parent means a parent having parental responsibility (s.52(6)), and Part 14 of the FPR 2010 likewise provides that a father without parental responsibility is not an automatic respondent to proceedings for a placement order or an adoption order. The legislative framework thus provides an avenue for adoption with the consent of the mother alone.

31. In the cases with which we are concerned, the issue is whether, irrespective of the mother being in two of the cases the sole person whose formal consent is necessary for adoption, the father and/or other relatives should nevertheless be given notification of the birth and of any court proceedings relating to the child. The procedural rules therefore provide a specific process by which the interests of a father without parental responsibility can be considered and if necessary protected, including by being joined as a party under rule 14.3(3)(a). Rule 14.21 ('Inherent jurisdiction and fathers without parental responsibility') reads:

"Where no proceedings have started an adoption agency or local authority may ask the High Court for directions on the need to give a father without parental responsibility notice of the intention to place a child for adoption."

The procedure for bringing such an application is set out in Part 19: see rule 19(2)(c).

32. There is also a considerable body of regulation and guidance, described in the panoramic judgment of Cobb J in *Re H* (see below) at [17]-[28] and [37]. I would for present purposes single out the Department for Education Statutory Guidance on Adoption for Local Authorities, Voluntary Adoption Agencies and Adoption Support Agencies (July 2013) which provides balanced guidance on the issue for those agencies at [2.38-2.47]. I am less sure about the equivalent passages in the Cafcass/ADCS Good Practice Guidance for Adoption Agencies and Cafcass: Children Relinquished for Adoption (undated), which at [3.9-3.15] places such heavy emphasis on the avoidance of delay as to discourage Part 19 applications in cases where they might be appropriate.

33. Nonetheless, as Cobb J notes, the statutory material as a whole provides strong indicators of the importance of engagement of the wider family in the adoption process. In the circumstances, any request for an adoption that excludes a father or close family members will naturally be carefully scrutinised by social workers and the court. That instinct is reinforced by the established domestic and European case law that emphasises that non-consensual adoption can only be approved if, after consideration of the realistic options, nothing else will do.

34. Before leaving the statutory provisions, it is convenient to identify (without at this stage deciding) an issue that emerges from the domestic case law and was argued before us. Section 1 of the CA 1989 is addressed to courts and s.1 of the ACA 2002 is addressed to courts and adoption agencies. They contain the familiar core principles of welfare paramountcy, the prejudicial effect of delay, and the welfare checklists. These core principles apply *when a court determines any question with respect to the upbringing of a child* (CA 1989) or *whenever a court or adoption agency is coming to a decision relating to the adoption of a child* (ACA 2002). The question is whether these principles, and in particular the welfare paramountcy principle, have direct effect when a local authority or a court are deciding whether or not to notify a putative father or a relative of the existence of a child or of proceedings. It is surprising that such an elementary question should remain open to argument, but a review of the cases shows that until relatively recently it was understood that the notification decision is not one to which these provisions directly apply, while later decisions appear to have assumed that they do.

35. Section 1 of the ACA 2002 is in these terms:

"**1. Considerations applying to the exercise of powers**

(1) Subsections (2) to (4) apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.

(3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.

(4) The court or adoption agency must have regard to the following matters (among others)—

(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

(b) the child's particular needs,

(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,

(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

(e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

(f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—

(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

(5) In placing a child for adoption, an adoption agency in Wales must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

(6) In coming to a decision relating to the adoption of a child, a court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so.

(7) In this section, “coming to a decision relating to the adoption of a child”, in relation to a court, includes—

(a) coming to a decision in any proceedings where the orders that might be made by the court include an adoption order (or the revocation of such an order), a placement order (or the revocation of such an order) or an order under section 26 or 51A (or the revocation or variation of such an order),

(b) coming to a decision about granting leave in respect of any action (other than the initiation of proceedings in any court) which may be taken by an adoption agency or individual under this Act,

but does not include coming to a decision about granting leave in any other circumstances.

(8) For the purposes of this section—

(a) references to relationships are not confined to legal relationships,

(b) references to a relative, in relation to a child, include the child's mother and father.

(9) In this section "adoption agency in Wales" means an adoption agency that is—

(a) a local authority in Wales, or

(b) a registered adoption society whose principal office is in Wales."

36. So, the core principles at subsections (2)-(4) apply where the court is "coming to a decision relating to the adoption of a child", as defined in subsection (7). I shall return to this issue after reviewing the case law.

European case law

37. There is no need for an extensive review of the decisions of the European Court of Human Rights concerning the reach of the protections afforded by Articles 6 and 8 of the European Convention on Human Rights 1950.

38. *Article 6* imposes obligations upon the court, as opposed to the local authority, but where adoption is contemplated, other participants in the process need to be aware of the framework within which the court must work.

39. The right to a fair hearing is not a qualified right but it may be subject to implied limitations: *Golder v United Kingdom* No. 4451/70 [1975] ECHR 1 at [38]. Any limitations must not impair the very essence of the right and they will only be compatible with Article 6 if they pursue a legitimate aim in a proportionate manner: *Ashingdane v. United Kingdom* No. 8225/78 [1985] ECHR 8 at [57]. In *Regner v Czech Republic* No. 35289/11 [2017] ECHR 1180 at [148] the Grand Chamber reiterated that the entitlement to disclosure of relevant evidence is not an absolute right. However (and here I adapt its reasoning to make a more general point), if measures restricting the rights of a party to the proceedings are to be permissible, any difficulties caused by the limitation must be sufficiently counterbalanced by the procedures followed by the judicial authorities. Where evidence has been withheld on public interest grounds, the court must ensure that, as far as possible, there are adequate safeguards to protect the individual's interests. This approach must be equally appropriate to cases where the existence of the child and of the proceedings is not known by the individual.

40. *Article 8* encompasses the right to respect both for private life and for family life where it exists. It is of direct relevance to both the local authority and the court as public bodies.

41. "Private life" is a broad term that includes aspects of an individual's physical and social identity including the right to personal autonomy: *Pretty v. United Kingdom* No. 2346/02 [2002] ECHR 427 at [62]. The circumstances of giving birth incontestably form part of one's private life: *Ternovszky v. Hungary* No. 67545/09 [2010] ECHR 2028 at [22]. A mother who wishes to relinquish a baby confidentially is entitled to make that choice, though she is not entitled to insist on the child being adopted. The guarantee afforded by Article 8 is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings: *Hannover v. Germany* No. 59320/00 [2005] ECHR 555 at [50]. It must therefore extend to the confidentiality of information about the birth as the disclosure of such information has clear implications for the personal development of the mother.

42. The existence or non-existence of family life is essentially a question of fact depending upon the existence of close personal ties: *Marckx v Belgium* No. 6833/74 [1979] ECHR 2 at [31]. The notion of "family" concerns marriage-based relationships, and also other *de facto* family ties where the parties are living together or where other factors demonstrate that the relationship had sufficient constancy: *Kroon v The Netherlands* No. 18535/91 [1994] ECHR 35 at [30]. In *Ahrens v. Germany* No. 45071/09 [2012] ECHR 515 at [59], the Court found no *de facto* family life where any relationship between the mother and the applicant had ended approximately one year before the child was conceived and the ensuing relations were of a sexual nature only. As to potential relationships, in *Lebbink v The Netherlands* No. 45582/99 [2010] ECHR 1418 at [36] the court stated:

"Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth."

43. “Family life” may also be established between a child and his or her grandparents and wider family. In *Marckx v Belgium* (above), the court held at [45] that:

“"Family life", within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life”

44. So, factors that may indicate the close personal ties that constitute family life (though their absence does not automatically negative its existence) include: marriage or a marriage-like relationship, cohabitation, length of relationship, intention to found a family, demonstration of commitment by having children together, demonstrable commitment to the child before and after birth. In cases of undisclosed pregnancy and birth, a father or other family member will have had no opportunity to demonstrate commitment to the child and the focus will inevitably be on other factors and a counterfactual assessment of the likely position had the facts been known.

Domestic case law

45. There is extensive domestic case law about disclosure of information in the context of adoption. The following review shows the generally consistent approach taken by experienced family judges down the years and identifies factors that speak for and against disclosure to putative fathers and relatives.

46. In the first place, there is a line of authority about the withholding of information in confidential adoption reports. This stretches back to *In re K (Infants)* [1965] AC 201, [1963] 3 All E.R. 191 and the topic was again considered by the House of Lords in *Re D (Minors)* [1996] AC 593, [1995] 2 FLR 687. In that case an adoption application had been made by a father and stepmother. There was an issue about the withholding from the children's mother of parts of the report of the guardian ad litem. Although the decision preceded the Human Rights Act 1998 and the ACA 2002, the right of the mother to a fair hearing as a matter of natural justice was acknowledged. The House of Lords set aside a decision that the information should be withheld. Lord Mustill's speech contains these passages:

“3. The procedure for the contested adoption of a child is one of the most anxious and difficult in the civil jurisdiction, for it deals with conflicting human needs and wishes which cannot be fully reconciled. This appeal is concerned with one aspect of that process, in which the dilemma is particularly acute, since the demands not only of human relationships but also of procedural fairness must be placed in the scales.”

And, as the last of a series of five propositions of principle:

“46. 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. “

In *Re A* [2011], a decision to which I refer below, Black LJ at [43] described Lord Mustill's principles as:

“… illuminating when considering the more fundamental prior question of whether a parent should be informed of the very existence of the proceedings or even that they have a child.”

47. In *Re X (Adoption: Confidential Procedure)* [2002] EWCA Civ 828, [2002] 2 FLR 476, an adoption application was made by foster carers who wished to prevent the parents from knowing that they, and not some other couple, were seeking to adopt children. The Court of Appeal dismissed an appeal made on behalf of the parents (though without their knowledge) from an order that they should not be told that the foster parents were the prospective adopters. Giving the judgment of the court, Hale LJ said this:

“14. It is clear that the House of Lords in *Re D* was well aware of the European Convention and its jurisprudence…

15. In the end, the issue still comes down to striking a fair balance between the various interests involved: the interests of all parties, but particularly the birth parents and the children themselves, in a fair trial of the issues, in which the evidence on each side can be properly tested and the relevant arguments properly advanced before the court; the interests of the children, their birth family and their prospective adoptive family, in protecting their family and private lives from unjustified interference; and the interests of the children in being protected from harm and damage to their welfare, whether in the short, medium or longer term."

48. I turn then to the cases about informing fathers and relatives of the birth of a child who might come to be adopted. The first is *Re X (Care: Notice of Proceedings)* [1996] 1 FLR 186. A child was born to a young unmarried Bangladeshi girl. The father, who was the husband of the mother's sister, was unaware of the birth. The effect of serving notice of the care proceedings on him would have been "catastrophic" for the mother, who would have faced ostracism from her community, and it would have had a destructive effect on the whole family. Stuart-White J held that the rules applicable to service provided the court with a discretion to disapply the normal procedures. He gave as an example a situation where service of particular proceedings might give rise to a real danger of very serious violence. He then considered the question of principle, namely whether in exercising the discretion the welfare of the child was to be treated as paramount:

"The question next therefore arises as to how I should exercise that discretion. There has been canvassed before me the question of whether, in deciding how to exercise that discretion, this question is a question with respect to the upbringing of the child. If it is, then the child's welfare is the court's paramount consideration. If it is not, then the child's welfare is not the paramount consideration though, of course, in considering any question relating to a child, the welfare of the child is likely to play a very large part in the court's thinking. There is, I am told, no authority… I have been reminded about the line of cases relating to the grant of leave to bring proceedings and the weight of authority in favour of the view that such applications… are not questions with respect to the upbringing of a child, and it is submitted by analogy that this question is not a question with respect to the upbringing of a child.

I agree with that submission. I think that it is not and that accordingly this child's future welfare, though it is plainly an important consideration, is not the paramount consideration, Thus, I am entitled to consider, quite independently of the welfare of the child, the effect on other persons, namely that child's family."

He dispensed with service of the proceedings on the father.

49. In parenthesis, the analogy relating to the grant of leave to bring proceedings can be followed through to the decision in *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093, a case concerning the interpretation of s.24(3) ACA 2002, which requires a person seeking to discharge a placement order to obtain the leave of the court. Reference was made in that case to the seemingly similar leave hurdle facing a person seeking permission to oppose the making of an adoption order under s.47(5). In the course of a judgment with which Thorpe LJ and Dyson LJ agreed, Wilson LJ said this:

"22. It is as clear that s.1 of the Act *does not apply* to an application for leave to apply to revoke a placement order under s.24(2) as it is that it *does apply* to an application for leave to oppose the making of an adoption order under s.47(5)…"

"25. I cannot explain why Parliament should have provided that, in the discretionary exercise which arises under s 45(2) of the 2002 Act, the child's welfare should be paramount but that, in the discretionary exercise which arises under s 24(3), it should not be paramount. I can think of no situation other than under s 47(5) in which the facility to participate in proceedings relating to a child is governed by the paramountcy of a child's welfare…"

50. In a similar vein is the approach taken by Charles J case in *R (On the Application of EL) v Essex County Council* [2017] EWHC 1041 (Admin). A local authority knew that a mother was about to issue an application for permission to apply to set aside a placement order. In order to avoid the embargo on placing a child for adoption contained in s.24(5), it hastened to place the child. In judicial review proceedings, Charles J quashed the decision. In reviewing the requirements of procedural fairness, he said:

"26. So, it is well established that what constitutes a fair process for a decision relating to the upbringing of a child is not governed by a test directed to what is in the best interests of, or what will best promote the welfare of, the child."

51. In further parenthesis, I would mention the pre-Human Rights Act decision in *Re O (Adoption: Withholding Agreement)* [1999] 1 FLR 451. A mother and father separated after a relationship lasting 3 years. The mother did not inform the father that she was pregnant, having decided to give the baby up for adoption. From the age of 2 months, the child lived with a couple who were considered likely to be ideal adoptive parents. The father only became aware of the child's existence when he was served with the adoption proceedings at the direction of the court. He was in a stable relationship, had a secure job, and wished to care for the child himself. He refused to consent to adoption and sought a residence order. It was accepted that he was an impeccable father, whose lack of contact with the child was through no fault of his own. There was a conflict of expert evidence as to the appropriate outcome. The judge decided that the father's consent was being unreasonably withheld and that there should be an adoption order, that the father should be granted parental responsibility, and that there should be contact twice a year. He trenchantly criticised the local authority for not informing the father about the proceedings. His decision was upheld by this court. In the course of his judgment, Swinton Thomas LJ said this:

"The father's case, put at its simplest, is that he is the child's blood father, the mother does not wish to care for him and that he and his future wife are the natural and the best people to care for S. He is, most naturally, deeply affronted that he was not told about the existence of his son and that the failure to tell him, by reason of the time that elapsed, has prejudiced his claim to look after his child. Although he is undoubtedly committed to looking after S, it is a fact that has to be faced that he and his fiancée, again through no fault of their own, are untried as parents and would be faced with caring for a small boy who, on any basis, does not know them and would be deeply upset at the concept of being removed from the only family that he knows, however carefully such a move was planned."

That case were clearly agonising for the adopters and for the father. I mention it, not for its outcome, but as an illustration of the consequences that may arise at a later stage if notification is incorrectly withheld.

52. Returning to the authorities on notification of fathers and relatives, in *Z County Council v R* [2001] 1 FLR 365 a mother concealed her pregnancy from her family and made pre-birth arrangements with the local authority for the baby to be fostered with a view to adoption. She refused to disclose the identity of the father who, she said, had no interest in the child and supported adoption. The child was placed with a prospective adoptive family. The local authority applied for a freeing order but the guardian ad litem raised the question of whether the mother's relatives should be told of the baby's existence and consulted as to whether any of them might wish to offer the child a home. Holman J first considered the position from a general standpoint:

"The dilemma must, in fact, be a very old one. Although no statistics are available, many children must have been adopted over the years, outside their birth families, with no knowledge by, or investigation of, other members of the birth family. Adoption exists to serve many social needs. But high among them has been, historically, the desire or need of some mothers to be able to conceal from their own family and friends, the fact of the pregnancy and birth. So far as I know, it has not previously been suggested, nor judicially determined, that that confidentiality of the mother cannot be respected and maintained. If it is now to be eroded, there is, in my judgement, a real risk that more pregnant women would seek abortions or give birth secretly to the risk of both themselves and their babies… There is, in my judgment a strong social need, if it is lawful, to continue to enable some mothers, such as this mother, to make discreet, dignified and humane arrangements for the birth and subsequent adoption of their babies, without their families knowing anything about it, if the mother, for good reason, so wishes."

Holman J then reviewed the procedural obligations imposed by domestic law and the Human Rights Convention and held that they did not go so far as to require the local authority or the Guardian to consult and inform the family of the parent. It would constitute a grave interference with the mother's right to respect for her private life for a public authority to breach her privacy by imparting information given in confidence to people from whom from the very first she had wanted to keep it a secret. A balance had to be performed between competing rights under Article 8 and on the facts of the particular case it came down in favour of preserving the confidence. However, in conclusion, Holman J stated:

"I wish to stress that it is a conclusion reached on the particular facts of this case. The same reasoning may, in practice, apply to similar cases. But this judgment is not intended in any way to suggest that the extended family can simply be ignored on the say-so of a mother. On the contrary, there should normally be wide consultation with and consideration of the extended family; and that should only be dispensed with after due and careful consideration, as has happened in this case."

53. In *Re M (Adoption: Rights of Natural Father)* [2001] 1 FLR 745 the parents had a relationship of two or three years punctuated by the father serving a year in prison. They had two children, but the father did not know about the birth of the second child as the mother had told him that it was stillborn. The child had in fact been placed with foster parents at birth. The mother gave evidence of serious violence by the father toward her, corroborated by medical evidence and the father's convictions for violent offences. The prospective adopters said that they might reconsider their willingness to adopt if the father were to become involved. Bodey J considered the position under domestic and European law. He concluded that it was not incumbent on the local authority to locate and interview the father. He concluded:

"I observe that this decision is very much the exception rather than the rule. Since the coming into force of the Human Rights Act 1998, quite apart from the position under the domestic law, the majority of cases will require natural fathers to be informed as regards adoption/freeing applications… howsoever unpalatable this may be for the mother or problematic for the adoption agency, and even though this may mean informing the father of the existence of a child of whose existence he was otherwise unaware."

54. *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646, concerned two cases where fathers were unaware of the birth of a child for whom adoption was proposed. In the first case (*Re H*) the parents had cohabited in a relationship that had lasted for several years and had had a child to whom the father had showed commitment. The mother then had a second child but did not tell the father and sought to place the child for adoption. It was held that the father had Article 8 rights and that pursuant to Article 6 he should be given notice of the proceedings. In the second case (*Re G*), the parents had been engaged but had never cohabited. The mother was concerned that the father should not be identified and that her family should not know of the birth. It was held that the parents' relationship did not have sufficient consistency to establish family ties for the purposes of Article 8 and that in the overall circumstances it was not necessary for the father to be given notice of the child's birth or be joined to the proceedings. In the course of her judgment, Dame Elizabeth Butler-Sloss P said this about the position where family life exists:

"(48) The European Court in *Keegan v Ireland* (1994) 18 EHRR 342 made it clear that a father who has had a substantial relationship with the mother, including cohabitation, should be in a broadly similar position to a father whose marriage has broken down prior to the birth of their child. In my judgment, in such a case the desire of the mother for confidentiality and therefore non-disclosure to the father of the proposed adoption proceedings cannot prevail over notice to the father unless there are strong countervailing factors. Among such countervailing factors might be for instance rape, or other serious domestic violence that placed the mother at serious physical risk. There may well be other situations in which a father should not be informed of the proceedings and my examples are, of course, not exhaustive…"

And she concluded:

"(53) I should however like to express a view on the difficult question of confidentiality, which has arisen in both cases. I recognise the importance of supporting unmarried mothers who wish to place babies for adoption and do not wish their family and friends or the natural father to know of the birth of the child. It is highly desirable that babies not able to be brought up by the natural mother should be cared for by local authorities and placed for adoption within a framework of confidentiality so far as it can be maintained. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, however, underpins the evolving culture in our adoption legislation of greater involvement of natural families in post-adoption placements and knowledge of the natural father. It also underlines the existing English law on the right of all relevant parties to notice of litigation, including potential litigation, and the relevance of r 15(3) to the natural father not married to the mother… A considerable degree of confidentiality is clearly important but it ought not, in the majority of cases, deprive the father of his right to be informed and consulted about his child. In my view, social workers counselling mothers ought to warn them that, at some stage, the court will have to make a decision in adoption proceedings as to whether to add the father as a respondent to the proceedings. The father should, therefore, be told as soon as possible in order to reduce delay, and certainly before

the child is placed with prospective adopters. If the mother refuses to disclose the identity of the father, her reasons must be carefully considered and, unless those reasons are cogent, it would be wise for the local authority to seek legal advice at an early stage. If necessary, the local authority should follow the prudent course adopted by LA2 of an application to the court for directions on whether to notify the father.”

55. In *Re AB (Care Proceedings: Service on Husband Ignorant of Child's Existence)* [2003] EWCA Civ 1842, [2004] 1 FLR 527, this court (Thorpe and Scott Baker LJJ) considered an appeal in a case where a married woman with two children became pregnant as a result, she said, of a rape by a stranger. She approached the local authority in the late stages of her pregnancy, stating that she wanted nothing to do with the child and asking it to arrange an adoption. It took care proceedings and sought directions as to whether the husband should be notified of the child's existence. The judge found that the mother's evidence was unreliable, including in relation to the rape, and concluded that the balance was decisively in favour of notifying the husband. The mother's appeal was dismissed. Thorpe LJ held that on the findings the judge had made, the outcome was inevitable. He stated at [3], [14] and [19] that:

“The court has a general discretion to grant exception from the requirements of the rules but that power is on the authorities only to be exercised in highly exceptional circumstances."

“The court would be exceptionally slow to grant a relaxation of the rules of service in any circumstances except the most extreme.”

“The responsibilities of a public authority, the rights of the child, the rights of the husband and the rights of the mother's other children could not be minimised or suppressed.”

56. In *Re C (Adoption: Disclosure to Father)* [2005] EWHC 3385 (Fam), [2006] 2 FLR 589, a mother considered that she was unable to care for a baby and decided to place her for adoption. She had six other children, three of whom had previously been adopted. The probable father of the baby and of four of the other children was serving a prison sentence for drugs and burglary offences. No member of the maternal or paternal family knew of the baby's existence. The mother did not agree to the father being told because she was afraid that he might respond violently and because either his family or her own might bring pressure on her to withdraw her consent to the child's adoption. Directing that notice should be given to the father, Hedley J held that where family life was established, as it clearly was in a case in which the couple had parented other children together, there had to be very compelling reasons indeed before a parent would be shut out from notice of the existence of the child or proposals for the child's future welfare. Those compelling reasons needed to find their expression in the welfare of the child as well as the welfare of the other parent. Given the strength and number of the links between the parents there was a real prospect that the father would find out about the child in due course. While the case was unusual, there was nothing exceptional to justify non-disclosure.

57. In *Birmingham City Council v S, R and A* [2006] EWHC 3065 (Fam), [2007] 1 FLR 1223, a father did not want his devout Muslim parents to be made aware of the birth of his daughter, who was the subject of care proceedings as the mother might be found to be unable to care for her. He sought an order forbidding the local authority and the Guardian from informing his family. In refusing the application, Sumner J said this:

"73. Adoption is a last resort for any child. It is only to be considered when neither of the parents nor the wider family and friends can reasonably be considered as potential carers for the child. To deprive a significant member of the wider family of the information that the child exists who might otherwise be adopted, is a fundamental step that can only be justified on cogent and compelling grounds. I find that there are no such compelling grounds here.”

“78. The court would wish to preserve the father's position within his own family, and to avoid upset to him and them, if that is in A's best interests and her rights permit it. Here for reasons I have endeavoured to give I am satisfied it is not. If the mother is unable to care for A, the only prospect she may have to grow up within her own family, and retain links with both her father and mother, is if her father's family can care for her.

[79] The importance of that for her has to be balanced against the breach of the father's rights to respect for his family life, and the risk of rejection for him and A by his family. That may be the result. I consider it less likely. Whilst the paternal grandmother may be willing to take on the care of A, I bear in

mind that for a grandchild to be adopted outside of a strict Muslim family may be something they would not wish to contemplate.”

“[82] Accordingly, balancing the rights of the parties, I have come to the clear conclusion that I should refuse the father's application …"

58. In *Re L* [2007] EWHC 1771 (Fam), [2008] 1 FLR 1079, the mother declined to name the child's father, with whom she had a very brief relationship. Munby J noted she could not be coerced into identifying him. In approving the local authority's proposal not to take further steps, he summarised the effect of the preceding cases:

“25. … The court has an unfettered discretion, to be exercised having regard to all the circumstances and in a manner compliant with the requirements of the Convention. That said, and where there exists family life within the meaning of article 8 as between the mother and the father, one generally requires "strong countervailing factors" *(Re H; Re G (Adoption: Consultation of Unmarried Fathers) [*2001] 1 FLR 646 at para [48]), "very compelling reasons indeed" *(Re C (Adoption: Disclosure to Father)* [2005] EWHC 3385 (Fam), [2006] 2 FLR 589, at para [17]) or "cogent and compelling grounds" (*Birmingham City Council v S, R and A* [2006] EWHC 3065 (Fam), [2007] 1 FLR 1223, at para [73]) to justify the exclusion from the adoption process of an unmarried father without parental responsibility. At the end of the day, however, every case is different and has to be decided having regard to its own unique circumstances.”

59. Pausing at this point, this body of authority at first instance and on appeal affirms that there is a discretion to be exercised by the local authority and by the court as to whether fathers and other relatives should be notified of the birth of a child. The discretion requires the identification and balancing up of all relevant factors. While the mother's right to confidentiality is important it is not absolute. The presence or absence of family life is an important, though not a decisive feature and where it exists strong countervailing factors are required to justify withholding knowledge of the existence of the child and the proceedings. The tenor of the authorities is that in most cases notification will be appropriate and the absence of notification will be the exception; but each case will in the end depend on its facts. In each case, the welfare of the child was regarded as an important factor but, significantly, there is no suggestion that the exercise of the discretion is governed by the paramountcy principle.

60. I next turn to the decision of this court in *Re C v XYZ County Council* [2007] EWCA Civ 1206, [2008] 1 FLR 1294. The mother was a young unmarried woman who became pregnant after a one-night stand. She kept the pregnancy secret and upon giving birth stated that she did not want to care for the child and wished for her to be placed for adoption. She did not identify the father. The local authority brought care proceedings with a care plan for adoption. The judge decided that under the ACA 2002, the local authority was under a duty to obtain as much information as possible about the child's family and directed it to disclose the child's existence to the maternal family and, if identified, to the putative father and his extended family. The mother appealed. By the time of the appeal the child was 4 months old. Two issues arose:

1. Was the judge right to decide that the ACA 2002 gave rise to a duty on the local authority to disclose the child's birth to the maternal family and, if identified, the paternal family?

2. If not, how should the court exercise its discretion in a case of this kind?

In giving her reasons for allowing the mother's appeal, Arden LJ said:

“3. In my judgment, for the reasons given below, when a decision requires to be made about the long-term care of a child, whom a mother wishes to be adopted, there is no duty to make enquiries which it is not in the interests of the child to make, and enquiries are not in the interests of the child simply because they will provide more information about the child's background: they must genuinely further the prospect of finding a long-term carer for the child without delay. This interpretation does not violate the right to family life. The objective of finding long-term care must be the focus of making any further enquiries and that means the court has to evaluate evidence about those prospects. That did not happen in this case. The judge consequently directed himself according to the wrong principle and his exercise of discretion must be set aside. This court must exercise the discretion afresh.”

61. At [8] Arden LJ set out the provisions of s. 1 of the 2002 Act, noting that “it puts the interests of the child at the forefront of decision making about a child who is to be adopted”. Between [14] and [22]

she undertook an analysis of the impact of s.1 on the first issue. For present purposes, it is sufficient to note that she considered that the child's welfare was to be the paramount or "overarching" consideration for the local authority. She also emphasised the mandatory injunction under s.1(3) to bear in mind the prejudicial effect of delay upon the child's welfare. Later, she responded to the submission of the Guardian:

"23. The guardian accepts that there can be no absolute obligation under section 1 to approach the father or the wider family of the child. But she submits that the circumstances in which this should not occur would be limited to cases such as those where the life of the child would be at risk. The guardian relies on the societal shift towards greater involvement of natural father in the upbringing of children. The guardian accepts that each case must turn on its facts, and that a balancing act has to be conducted in each case. But she rejects the mother's contention that the judge was plainly wrong. She submits that the effect of s 1(4) (c) and (f) is that there is now an *expectation* of disclosure and that the courts should require compelling reasons to prevent it taking place, certainly to a natural father and probably too to close members of the wider family. In my judgment, as I have already indicated, the overarching consideration is that of the interests of the child. In many cases disclosure will be in the interests of the child, but it cannot be assumed that it will always be so. Moreover, disclosure has to be directed to an end that furthers the making of the decisions which require to be made. That requirement was not met in the present case."

62. Accordingly, Arden LJ concluded on the question of statutory interpretation:

"24. The logical consequence of my interpretation of s 1 is that exceptional situations can arise in which relatives, or even a father, of a child remain in ignorance about the child at the time of its adoption. But this result is consistent with other provisions of the 2002 Act. There are situations when the court does not require the consent of the father. For example, the consent of the father without parental responsibility is not required for a placement under ss 19 or 20, and, even if E were to be placed for adoption with her mother's consent but her father later obtained parental responsibility, he would be deemed to have consented to the placing of E for adoption (see above)."

63. Turning to the second question, the factors relevant to the exercise of discretion, Arden LJ stated:

"40. I propose to start with a few general observations. There will inevitably be a wide variety of cases where there arises the question whether a newborn child should be adopted. Every case has to be determined on its particular facts. The fact that the father or a relative has no right to respect for family life in the particular case does not mean that their position should not be considered: s 1(4)(f) of the 2002 Act applies irrespective of art 8 rights. However, the position of a person would command more importance if they were entitled to that right.

41. I accept the submission of the local authority that the court or adoption agency cannot simply act on what the mother says. It has to examine what she says critically. It is a question of judgement whether what the mother says needs to be checked or corroborated.

42. The local authority goes on to say that the ordinary rule should be that the near family and father should be identified and informed unless the court is satisfied that such enquiries would be inappropriate. The local authority submits that there is a growing trend towards involving the natural family and the father in such cases. It is no doubt true to say that there are a substantial number of cases where a child who would otherwise be placed for adoption is offered long term care by a member of the family.

43. I do not consider that this court should require a preference to be given as a matter of policy to the natural family of a child. S 1 does not impose any such policy. Rather, it requires the interests of the child to be considered. That must mean the child as an individual. In some cases, the birth tie will be very important, especially where the child is of an age to understand what is happening or where there are ethnic or cultural or religious reasons for keeping the child in the birth family. Where a child has never lived with her birth family, and is too young to understand what is going on, that argument must be weaker. In my judgment, in a case such as this, it is (absent any application by any member of the family, which succeeds) overtaken by the need to find the child a permanent home as soon as that can be done."

64. Lawrence Collins LJ at [50] also considered that the paramount consideration must be the child's welfare, before going on to carry out a right-based analysis at [50-53].

65. Thorpe LJ agreed with Arden LJ. His judgment contains these passages:

"76. … In my judgment the Local Authority and court still has to exercise a discretion in what Miss Hamilton QC, counsel for the mother, has called the secret birth case as to whether to place the new born on the fast track to adoption under Section 19 or to explore a family placement. The outcome of that discretionary balance will of course always depend on the facts of the individual case."

And he referred to

"81. … the exercise of a discretionary judgment as to whether swift placement with a family selected as ideally suited to parent a child for life would better promote E's paramount welfare than breaking open the mother's secret and seeking a possible family placement, preceded by extensive investigation of the maternal and paternal families.

82. However I would add that I accept Miss Eleanor Hamilton's submissions on the importance of respecting the choice of a young mother who found herself in a terrible dilemma. There are good social policy reasons for accepting the option of a private birth as the law in France and ECHR decision of *Odièvre v France* [2003] 1 FCR 621 recognise. If we were to dismiss this appeal we would be effectively precluding private birth as a prelude to fast track adoption in almost every case…"

66. *Re C v XYZ County Council* confirms that in a proper case adoption can take place without the notification of father or relatives. There is no statutory obligation upon a local authority to make enquiries in every case, and the issue of notification is a matter of discretionary judgment in the light of all the facts of the case. It was a strong case on its facts, there being no reason to doubt the mother's account that her relationship with the father had been a fleeting one, with the consequence that her wish for privacy was always likely to prevail. It has been necessary to look in some detail at the court's reasoning only because of its observations about welfare paramountcy. There is no indication that the court heard argument on the question of whether a decision of this kind is, in the words of s.1(1), "a decision relating to the adoption of a child", or about the effect of the definition of these words at s.1(7). Nor, in my view, did the decision turn upon that issue – applying the definition of *ratio decidendi* in *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2019] 3 WLR 33 at [21], it was not seen by the court as a necessary step in reaching its conclusion. Arden LJ uses the word 'overarching' interchangeably with 'paramount', and none of the members of the court in fact reasoned the outcome by an application of the paramountcy principle, whereby other considerations are trumped by child welfare. Instead, the court performed a familiar balancing of rights and interests: see Arden LJ at [40-43], and the emphasis throughout the judgments on the need to consider all the facts of the individual case. I therefore conclude that we are not bound by the observations in relation to the issue of welfare paramountcy but must reach our own conclusion about it.

67. This position gains support from the only subsequent decision of this court: *Re A (Father: Knowledge of Child's Birth)* [2011] EWCA Civ 273, [2011] 2 FLR 123. The parents were married and had three adult children. The father had mental health issues and had previously been violent towards the mother and one of the children. The mother became pregnant by the father and concealed both the pregnancy and the child's birth from him. She said that she was concerned for the child's welfare and the family unit if the father were to find out, and therefore wished for the child to be adopted without informing him. She sought declarations to ensure that the local authority did not consult the father. The trial judge (Mostyn J) found that the case did not satisfy "the very high degree of exceptionality" required to deprive the father of the right to be informed of his legitimate child's birth and of the existence of the proceedings, in circumstances where he had parental responsibility. Nothing less than a significant physical risk must clearly be demonstrated.

68. This court dismissed the mother's appeal, but it relaxed the judge's formulation to extend beyond physical risk and to include the risk of harm in all its guises. Thorpe LJ (with whom Longmore LJ agreed) stated at [21] that where the parents had a well-established relationship the father's exclusion would almost never be justified. He added:

"22. When the court formulates a test it is often helpful to illustrate the test by example but in family proceedings it is extremely dangerous to state that there is only a single path to exceptionality. To do so is to give a hostage to fortune, given the infinite variety of circumstances that challenge the definition of tests in family proceedings."

69. Black LJ set out her view of the legal framework. Having reviewed *Re X* [1996], *Re H; Re G* [2001] and *Re AB* [2003], she observed:

"37. The thrust of these cases is, therefore, that the court will not be persuaded to sanction the withholding of information about the existence of a child from that child's parent or to dispense with service on him of proceedings in relation to the child in anything other than exceptional circumstances where there are, as the President put it in *Re H; Re G*, "strong countervailing factors".

She then addressed *Re C* in these terms:

"38. *Re C (A Child) v XYZ County Council* strikes me as approaching the issue from a slightly different angle… The judgments include a consideration of the duties under the 2002 Act and of Article 8 ECHR. It was held that there was only a duty to make such enquiries as were in the interests of the child and what was in the interests of that child was to find a long-term carer without delay. On the facts, neither the maternal family nor the father offered sufficient prospect of a permanent home to justify a delay whilst they were informed and assessed.

39. Lady Justice Arden and Lord Justice Collins approached the issue as partly a question of statutory construction, in particular of s 1 of the 2002 Act. Arden LJ held that the paramount consideration was the child's welfare by virtue of s 1(2). She did not consider that the Act imposed any policy of preference being given to the natural family of a child in terms of placement; the interests of the child as an individual had to be considered. She observed that sometimes the birth tie would be very important and in other cases the argument for keeping the child in the birth family would be weaker.

40. The judgments give no reason to suppose that the court was contemplating a radical departure from authorities such as those I cited earlier. It can be seen that Arden LJ did not contemplate that the situation that had arisen there would often arise as she said, at paragraph 24,

"The logical consequence of my interpretation of s 1 is that *exceptional situations* can arise in which relatives, or even a father, of a child remain in ignorance about the child at the time of its adoption….." [my emphasis]

41. In the following paragraph she said,

"The effect of s 1 as I have held it to be is consistent with the refusal by the court under the Adoption Act 1976 to give notice of adoption proceedings to a father who had had only a fleeting relationship with the child's mother: in *Re H; Re G* …the President of the Family Division (Dame Elizabeth Butler Sloss) ordered that no notice of adoption proceedings needed to be given to a father who had never cohabited with the child's mother."

42. The particular facts of the case and the route to adoption provided by s 19 of the 2002 Act were clearly very influential in the decision. Thorpe LJ observed, at paragraph 69, that a disadvantage of the decision of the local authority to apply for a care order was that "it undoubtedly led all the professionals in the case to assume the duty and responsibility that arises in any application for a care order to explore profoundly the possibility of a placement, if not with a parent, then within the extended family" rather than concentrating on "the opportunity provided by s 19 of the Adoption Act to fast track [the child] into adoption in accordance with her mother's wishes"."

70. It is to be noted that in *Re A* Thorpe LJ, a member of the court in both *Re AB* [2003] and *Re C v XYZ County Council* [2007], did not frame his analysis in terms of welfare paramountcy, and nor did either Mostyn J or Black LJ. I would also agree with the observation made by Black LJ that the judgments in *Re C* give no reason to suppose that the court was contemplating a radical departure from preceding authority.

71. Since the decision in *Re A* there have been eight decisions of the High Court that I must mention.

72. In *Re M (Notification of Step-Parent Adoption)* [2014] EWHC 1128 (Fam), Theis J considered whether a father should be notified of a step-parent adoption application in respect of his 9-year-old child. The parents had cohabited very briefly at around the time of the birth and the mother complained of serious violence at the father's hands. He lived abroad, had seen the child only once since birth, and his whereabouts were unknown. Theis J held that he did not have existing Article 8

rights and that the mother's wish for confidentiality arising from her fear of him amounted to exceptional circumstances justifying dispensation of the service of the proceedings upon him.

73. *Re JL and AO (Babies Relinquished for Adoption)* [2016] EWHC 440 (Fam), [2017] 1 FLR 1545 concerned two pairs of parents from Eastern Europe who wished to relinquish babies born in England for adoption. Baker J affirmed the availability of consensual adoption under s.19 ACA 2002 in such cases, but observed that the local authority still had to carry out a thorough analysis of the realistic options.

74. *Re RA (Baby Relinquished for Adoption: Case Management)* [2016] EWFC 25, [2017] 1 FLR 1610 was also a case where Eastern European parents wished to relinquish their child for adoption, but in that case the grandmother offered to look after the child herself. Cobb J followed the approach taken by Baker J and added that analysis of the realistic options could be taken without full assessment. He noted that while the degree of interference with family life rights is likely to be less in a relinquished baby case than where the parent-child relationship is severed against the parents' wishes, the rights of the individuals involved are still factors that must be balanced when the local authority or the court is considering how to proceed.

75. In *Re TJ (Relinquished Baby: Sibling Contact)* [2017] EWFC 6 Cobb J approved non-service on a father who the mother had only met on holiday. He noted that the child, now aged 15 months, had been with prospective adopters almost since birth and that it was they, and not the father who enjoyed Article 8 rights.

76. *A Local Authority v Y* [2017] EWFC 69 concerned notification of the birth father of a baby for whom the mother had sought adoption. The mother was 18 and her turbulent relationship had lasted for six months. Theis J approved the local authority's proposal to take no steps to contact him. She said this:

“40. Each case is fact specific. The Court is not bound to accept the position of one party or another. What the Court has to do is to undertake an analysis of the information it has, consider whether it can or should take any further steps and this is guided by the Court's consideration of what it considers to be in the lifelong interests of X.

41. Cases such as this require the court to critically examine what the mother says. The Court is concerned with the competing Article 8 rights of the mother, X and potentially X's birth father but it has to be done in the context of the facts and reality of the case being considered.”

77. In *Re A (Relinquished baby: Risk of domestic abuse)* [2018] EWHC 1981 (Fam) Cobb J dispensed with service upon a father with whom the mother had had a very brief relationship characterised by abuse and harassment. He was satisfied that there was no realistic prospect of a placement with any family member. At [19] he set out a series of what he described as cardinal principles in cases of this kind:

“i) Each case is fact-sensitive (*Re RA* at [31]);

ii) The outcome contended for here is "exceptional" *(A Local Authority v the mother* at [1]/[7])

iii) The paramount consideration is the welfare of A; *section 1(2) Adoption and Children Act 2002* ('ACA 2002')

iv) The court must have regard to the welfare checklist in *section 1(4) ACA 2002*;

v) It is a further requirement of statute *(section 1(4)(f)(iii) ACA 2002)* that the court has regard to the wishes and feelings of the child's relatives;

vi) Respect can and indeed must be afforded to the mother's wish for a confidential and discreet arrangement for the adoption of her child, although the mother's wishes must be critically examined and not just accepted at face value; overall the mother's wishes carry "significant weight" albeit that they are not decisive (*Re JL and AO* at [47], [48] and [50], and see also *Re RA* at [43(vi)]);

vii) Article 8 rights are engaged in this decision; however, in a case where a natural parent wishes to relinquish a baby, the degree of interference with the *Article 8* rights is likely to be less than where the parent/child relationship is to be severed against the will of the parent (*Re TJ* at [26]];

viii) Adoption of any kind still represents a significant interference with family life, and can only be ordered by the court if it is necessary and proportionate (*Re RA* at [32]);

ix) A high level of justification is still required before the court can sanction adoption as the outcome, and a thorough 'analysis' of the options is necessary (*Re JL & AO* at [32]); 'analysis' is different from 'assessment' – a sufficient 'analysis' may be performed even though the natural family are unaware of the process (*Re RA* at [34]). As I said in *Re RA* at [38]:

"in order to weigh up all of the relevant considerations in determining a relinquished baby case it may be possible (it may in some cases be necessary) and/or proportionate to perform the analysis without full assessment of third parties, or even their knowledge of the existence of the baby. The court will consider the available information in relation to the individual child and make a judgment about whether, and if so what, further information is needed".”

78. In *Re C* [2018] EWHC 3332 (Fam), [2019] 1 FLR 930 the mother was just 14 when the baby was born and the father was 15. They had had an extremely short relationship which ended after the second occasion of sexual intercourse. The father, who was unaware of the pregnancy and birth, had a history of antisocial and criminal behaviour. The baby had been placed in foster care. The mother was vulnerable and feared that her life, which she was trying to rebuild after the turmoil caused by the birth, would be irreparably harmed if the father and his family became aware of the child's existence. After surveying the available information, Cohen J authorised non-disclosure, applying the principles summarised in *Re A* [2018]. To these he added:

“32. … First, I fully subscribe to the principle that the remedy sought by the mother is exceptional and the circumstances needed to justify that outcome have to be exceptional, but that does not mean that there has to be one magnetic factor. The combination of circumstances, none in themselves exceptional, may, when aggregated, satisfy the test. Secondly, in considering whether the test is met one needs to conduct a holistic exercise considering all the circumstances. This includes an assessment, imperfect though it will necessarily be, of what the paternal family is likely to be able to offer. Thirdly, the fact that the mother could, if she had known, have declined to name the father and thus avoid this problem with which she and the court are now faced is not a relevant factor, although its impact on the mother may be relevant.”

79. Finally, *Re H (Care and Adoption: Assessment of Wider Family)* [2019] EWFC 10, [2019] 2 FLR 33 was a case where parents wished to keep the birth of a child from the father's family. As acknowledged above, Cobb J considered the statutory provisions and the authorities concerning family life and confidentiality. In concluding that the paternal family should be informed of the child's existence, he made these observations:

“45. … none of the provisions of statute, regulations or rules to which I have referred, impose any absolute duty on either the local authority or the Children's Guardian, or indeed the court, to inform or consult members of the extended family about the existence of a child or the plans for the child's adoption in circumstances such as arise here. However, the ethos of the *CA 1989* is plainly supportive of wider family involvement in the child's life, save where that outcome is not consistent with their welfare.”

“48. … the court, and/or the local authority or adoption agency, is enabled to exercise its broad judgment on the facts of each individual case, taking into account all of the family circumstances, but attaching primacy to the welfare of the subject child.

49. In exercising that broad discretion, I would suggest that the following be borne in mind. There will be cases (if, for instance, there is a history of domestic or family abuse) where it would be unsafe to the child or the parent for the wider family to be involved in the life of the child, or even made aware of the existence of the child. There will be cases where cultural or religious considerations may materially impact on the issue of disclosure. There will be further cases where the mental health or well-being of the parent or parents may be imperilled if disclosure were to be ordered, and this may weigh heavy in the evaluation. But in exercising judgment – whether that be by the local authority, adoption agency or court – I am clear that the wider family should not simply be ignored on the say-so of a parent. Generally, the ability and/or willingness of the wider family to provide the child with a secure environment in which to grow (*section 1(4)(f)(ii) ACA 2002*) should be carefully scrutinised, and the *option itself* should be “fully explored” (see [28]). The approach taken by Sumner J in the *Birmingham* case more than a decade ago, to the effect that “cogent and compelling” grounds

should exist before the court could endorse an arrangement for the despatch of public law proceedings while the wider family remained ignorant of the existence of the child (see [29] above), remains, in my judgment, sound. This approach is in keeping with the key principles of the *CA 1989* and the *ACA 2002* that children are generally best looked after within their own family, save where that outcome is not consistent with their welfare, and that a care order on a plan for adoption is appropriate only where no other course is possible in the child's interests (see *Re B (A child)* and *Re B-S*).”

“57. The line of 'relinquished' baby cases discussed above ([33] *et seq*.), where the court is prepared to offer discreet and confidential arrangements for the adoption of a child, all emphasise the exceptionality of such arrangements; in those cases, the court is only ever likely to authorise the withholding of information in order to give effect to a clear and reasoned request by a parent to have nothing to do with the child, usually from the moment of birth. In those cases, the local authority, adoption agency and the court seek to maintain the co-operation of the parent in making consensual arrangements for the child (a key feature of the decision in *Z County Council v R* (Holman J)) which is greatly to the child's advantage.”

80. That concludes my survey of the case law. It can be seen that there is a broad consistency in the court's general approach to the issue of notification of fathers and relatives. In my judgement, the balance that has been struck between the competing interests in these difficult cases is a sound one and there is no need for any significant change of approach.

Section 3: Analysis and Summary

81. In this section I seek to draw together the legal obligations upon local authorities and the court in cases of this kind. Before summarising the principles at paragraph 88, I turn to some specific matters: (1) Welfare paramountcy? (2) Consistency, and (3) Urgency and thoroughness of procedure.

Welfare paramountcy?

82. As noted above, there is uncertainty about whether what I have described as the core principles (welfare paramountcy, the prejudicial effect of delay and the welfare checklists) apply directly to a decision about notifying a father or relatives about the existence of a child or of proceedings. In a sense, not much turns on this: child welfare, prompt decision-making and a comprehensive review of all relevant factors are central to the notification decision, regardless of whether they are directly mandated by statute. Nevertheless, decision-makers are entitled to know whether their decision should place child welfare above everything else or not, and a correct formulation of the principles reduces the risk of error in decisions at the margins.

83. In the light of the observations in *Re C v XYZ County Council*, it is not surprising that a number of the later first instance decisions recite that the core provisions are engaged, or that a number of the parties before us so submitted. However, after closer examination, I am satisfied that the decision about notification does not directly engage these provisions. My reasons are these:

1. So far as the CA 1989 is concerned, the decision is not one “relating to the upbringing of a child”. It is a decision about who should be consulted about such a decision.

2. The same applies to the ACA 2002. The decision for the local authority and the court is not one “relating to the adoption of a child”, but a decision about who should be consulted about such a decision.

3. The terms of s.1(7) ACA 2002, which apply only to decisions by the court, do not lead to a different conclusion. The subsection is not without difficulty – see *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616; [2007] 2 FLR 1069 at [19-24] – and I cite it again for convenience:

“In this section, “coming to a decision relating to the adoption of a child”, in relation to a court, includes—

(a) coming to a decision in any proceedings where the orders that might be made by the court include an adoption order (or the revocation of such an order), a placement order (or the revocation of such an order) or an order under section 26 or 51A (or the revocation or variation of such an order),

(b) coming to a decision about granting leave in respect of any action (other than the initiation of proceedings in any court) which may be taken by an adoption agency or individual under this Act,

but does not include coming to a decision about granting leave in any other circumstances."

Although widely drafted, sub. (a) does not cover the paradigm situation where a Part 19 application has been made, nor is that an application for any form of leave as mentioned in sub. (b). And even if there are proceedings of the kind mentioned in sub. (a), it cannot properly be said that every case-management decision within those proceedings is one to which welfare paramountcy applies. Such decisions are more apt for the application of the over-riding objective in Part 1 of the FPR 2010, which requires the court to deal with cases justly, having regard to any welfare issues involved. In my view the correct interpretation of the expression "coming to a decision" in s.1(7) ACA 2002 means coming to a decision about the substance of the application, whether it be an adoption order, a placement order, or a contact order. It does not include coming to a decision about who should and should not be informed of the existence of the child or of the proceedings themselves.

4. This conclusion is consistent with the established distinction between decisions that are welfare-paramount and those that are not. This is made explicit in the cases reviewed at paras. 48-50 above and the corresponding silence in the entire line of authority preceding *Re C v XYZ County Council* is equally significant. To take one example, the decision of the House of Lords in *Re D* [1996] about withholding material in confidential reports did not refer at all to the equivalent provision to s.1 ACA 2002 in the Adoption Act 1976 (which by s.6 placed a duty on the court and the local authority to give first consideration to the need to safeguard and promote the welfare of the child). Likewise, in *Re X* [2002] this court determined the issue of whether the parents should be told that the foster parents were adopting the children by striking a balance between the competing interests, not by prioritising child welfare. This approach continued after the enactment of the ACA 2002, as can be seen in the comprehensive survey of the law conducted by Munby J in *Re L* [2007], which makes no reference to s.1 of the Act, to welfare-paramountcy or to the welfare checklist.

5. *Re C v XYZ County Council*, while plainly correctly decided, is not binding authority on this issue, for the reasons I have given above.

6. The later decision of this court in *Re A* [2011] does not support a welfare-paramountcy test.

7. Lastly, there is no reported decision of which I am aware in which the outcome has been dictated by the court finding that the welfare of the child trumps all other considerations; instead, there is an unbroken body of case law in which the outcome has been determined by a balancing of the rights and interests of all the individuals concerned.

84. For these reasons I conclude that while child welfare, prompt decision-making and a comprehensive review of every relevant factor, including those mentioned in the checklists, are all central to the notification decision, the decision is not one that is formally governed by the provisions of s.1 of the CA 1989 or of the ACA 2002 and the welfare of the child is not the paramount consideration of the local authority and the court in this context.

Consistency

85. Decisions in this field are taken both by social workers and by courts and the decisions themselves concern both putative fathers and close relatives. Although some aspects of the statutory material and the case law relate to one type of decision-maker rather than another, and some to one type of family member rather than another, there is in my view no reason for any essential difference of approach. On the contrary, there is great benefit in a consistency of approach to the very varied situations that arise. The decision of a social worker within his or her domain is as important as that of the court within its domain. Similarly, there is no automatic hierarchy as between, for example, a putative father and maternal grandparents. In some cases a notification decision will naturally focus on one or the other, and in some it will focus on both. The factors that govern the outcome will depend on the facts of the case, not on the identity of the relative or of the decision-maker. Nor should the calculus depend upon whether the issue arises within proceedings under the CA 1989, the ACA 2002 or Part 19, or whether the right kind of proceedings have been brought.

Urgency and thoroughness of procedure

86. A local authority, faced with a baby that may require adoption, either because a mother wishes to relinquish the baby for adoption or because there are proceedings with a plan for adoption, will be acutely aware of the need for a speedy decision. Where the mother requests confidentiality, it will need to decide at a very early stage whether an application to court should be made to determine whether or not the putative father or relatives should be informed and consulted. There will be cases where, applying the principles summarised in this judgment, the local authority can be very clear that no application is required and planning for placement on the basis of the mother's consent can proceed. But in any case that is less clear-cut, an application should be issued so that problems concerning the lack of notification do not arise when adoption proceedings are later issued. In relation to a putative father, that application will be under Part 19 unless issues of significant harm have made it necessary to issue proceedings for a care or placement order; I would suggest that an equivalent application under the inherent jurisdiction can be made where a local authority has doubts about notification of a close relative.

87. I have referred already to the Cafcass/ADCS protocol, which has been taken up by a number of local authorities. In the proceedings before us, which involved three local authorities, the parties collectively filed an agreed statement of the steps that will need to be taken by the local authority in cases such as these. It is not for this court to determine local authority procedures but I record the parties' agreement for the help that it may give to those facing these situations.

“1. A local authority should take these steps as soon as it is notified that a mother, or mother and father, are expressing a wish that an infant is placed for adoption without notification to either the child's father or extended family:

(i) The local authority files should be checked for background information about the mother and extended family and for contacts with other relevant agencies, such as health and police.

(ii) The allocated social worker, ideally accompanied by an adoption worker, should undertake at least one visit but preferably a series of visits to the mother, or mother and father, if she/they are willing, to discuss:-

· The decision to place the child for adoption.

· The reasons for not notifying the child's father, or extended family, where possible gathering details about the father's background and that of the family.

· The mother's background and information about her family.

· Any cultural issues and how they have affected the decision made by the mother, or mother and father.

· The implications of adoption for the child

· The legal process required to achieve adoption

· Other possible options for the care of the child

· The adoption counselling service and how to access it

· Whether the mother, or mother and father, require any other form of support and how that might be achieved

No assurance should be offered to a parent during the social work visit/s that notice of the birth of the child will be withheld from the father and/or extended family members.

(iii) The mother, or mother and father, must be provided with written information, where available, about the process and adoption counselling services.

(iv) Where the father is identified, the local authority should check its records for any background information known about him.

(v) The placement team must be informed immediately and it should begin the process of finding a suitable placement, preferably with 'foster for adoption' / early permanence carers.

(vi) CAFCASS must be informed as soon as the local authority is notified so that it can allocate a worker to the case for the purpose of meeting with the mother, or mother and father, to discuss and where appropriate take consent for adoption.

2. The local authority should critically examine all information that it receives and, in circumstances where the mother states the identity of the father is unknown to her, the local authority should carefully consider her statement and her explanation to consider whether there is any basis for considering that the statement might be false. If the local authority does form that view, it should consider if there is any reasonable way by which the identity of the birth father could be established.

3. The social worker should, as a matter of urgency, seek legal advice to ascertain whether the matter should be placed before the court in all cases where:

(i) the mother opposes notification to the father, if identified;

(ii) the mother knows the identity of the father but is unwilling to disclose this information;

(iii) the local authority has reason to doubt the reliability of the mother's claim that the identity of the father is unknown, or

(iv) the mother is opposed to any notification to her family or the father's family.

4. The legal advisors will need to consider and advise as a matter of urgency whether a Part 19 application or other proceedings should be issued.

5. If a decision is made that a Part 19 application is not required, the local authority should immediately notify CAFCASS, and provide detailed reasons for that decision, to allow CAFCASS to consider this information prior to meeting with the mother, or mother and father, when discussing consent under section 19 or for any later adoption application.

6. As non-means/non-merits tested public funding is unavailable to parents for a Part 19 application (and emergency funding may be difficult to access on an emergency basis even if merits and means tests are met), a local authority should provide the mother, or mother an father, with advice concerning access to independent legal advice and how that might be obtained and funded (including by the local authority considering the funding of such advice). A list of specialist solicitors available in the area should be provided.

7. Where an application is to be made, the social worker should prepare a detailed statement setting out the information gathered and providing the local authority's position regarding the wish of the mother, or mother and father, to relinquish the child without notifying the father and/or extended family members."

88. In cases where an application to the court is issued, the court should be equally alert to the need for urgency, bearing in mind that time has already passed in preparation for the application and the hearing. The following matters will require attention:

1. Identity of judge: If the application is under Part 19, it must be heard in the High Court and appropriate listing arrangements must be made. Upon issue, the application should immediately be referred to the DFJ for consultation with the FDLJ as to whether the application should be allocated to a High Court Judge or a section 9 Deputy High Court judge.

2. Identity of parties: (a) It is not mandatory for a respondent to be named in the application, although it will usually be appropriate for the mother to be identified as a respondent; (b) directions should be given on issue joining the child as a party and appointing a CAFCASS officer to act as Children's Guardian in the application; (c) neither a father (with or without parental responsibility) nor members of the wider maternal/paternal family are to be served with or notified of the application or provided with any of the evidence filed in support of an application.

3. Case management: The application should be listed for an urgent CMH, ideally attended by the CAFCASS officer. At the hearing, consideration should be given to the need for any further evidence, the filing of the Guardian's analysis and recommendations, the filing of written submissions and the fixing of an early date for the court to make a decision.

4. Receiving the mother's account: It is a matter for the court as to whether it should require written or oral evidence from the mother. Given the importance of the issue, the court will normally be assisted by a statement from the mother, whether or not she gives oral evidence, rather than relying entirely upon evidence from the local authority at second hand.

5. The listing of the hearing of the application should allow time for whatever evidence and argument may be necessary, and for a reasoned judgment to be given. Even allowing for the pressure on court lists, these decisions require prioritisation.

Summary

89. The principles governing decisions (by local authorities as adoption agencies or by the court) as to whether a putative father or a relative should be informed of the existence of a child who might be adopted can be summarised in this way.

1. The law allows for 'fast-track' adoption with the consent of all those with parental responsibility, so in some cases the mother alone. Where she opposes notification being given to the child's father or relatives her right to respect for her private life is engaged and can only be infringed where it is necessary to do so to protect the interests of others.

2. The profound importance of the adoption decision for the child and potentially for other family members is clearly capable of supplying a justification for overriding the mother's request. Whether it does so will depend upon the individual circumstances of the case.

3. The decision should be prioritised and the process characterised by urgency and thoroughness.

4. The decision-maker's first task is to establish the facts as clearly as possible, mindful of the often limited and one-sided nature of the information available. The confidential relinquishment of a child for adoption is an unusual event and the reasons for it must be respectfully scrutinised so that the interests of others are protected. In fairness to those other individuals, the account that is given by the person seeking confidentiality cannot be taken at face value. All information that can be discovered without compromising confidentiality should therefore be gathered and a first-hand account from the person seeking confidentiality will normally be sought. The investigation should enable broad conclusions to be drawn about the relative weight to be given to the factors that must inform the decision.

5. Once the facts have been investigated the task is to strike a fair balance between the various interests involved. The welfare of the child is an important factor but it is not the paramount consideration.

6. There is no single test for distinguishing between cases in which notification should and should not be given but the case law shows that these factors will be relevant when reaching a decision:

(1) *Parental responsibility*. The fact that a father has parental responsibility by marriage or otherwise entitles him to give or withhold consent to adoption and gives him automatic party status in any proceedings that might lead to adoption. Compelling reasons are therefore required before the withholding of notification can be justified.

(2) *Article 8 rights.* Whether the father, married or unmarried, or the relative have an established or potential family life with the mother or the child, the right to a fair hearing is engaged and strong reasons are required before the withholding of notification can be justified.

(3) *The substance of the relationships.* Aside from the presence or absence of parental responsibility and of family life rights, an assessment must be made of the substance of the relationship between the parents, the circumstances of the conception, and the significance of relatives. The purpose is to ensure that those who are necessarily silent are given a notional voice so as to identify the possible strengths and weaknesses of any argument that they might make. Put another way, with what degree of objective justification might such a person complain if they later

discovered they had been excluded from the decision? The answer will differ as between a father with whom the mother has had a fleeting encounter and one with whom she has had a substantial relationship, and as between members of the extended family who are close to the parents and those who are more distant.

(4) *The likelihood of a family placement being a realistic alternative to adoption.* This is of particular importance to the child's lifelong welfare as it may determine whether or not adoption is necessary. An objective view, going beyond the say-so of the person seeking confidentiality, should be taken about whether a family member may or may not be a potential carer. Where a family placement is unlikely to be worth investigating or where notification may cause significant harm to those notified, this factor will speak in favour of maintaining confidentiality; anything less than that and it will point the other way.

(5) *The physical, psychological or social impact on the mother or on others of notification being given.* Where this would be severe, for example because of fear arising from rape or violence, or because of possible consequences such as ostracism or family breakdown, or because of significant mental health vulnerability, these must weigh heavily in the balancing exercise. On the other hand, excessive weight should not be given to short term difficulties and to less serious situations involving embarrassment or social unpleasantness, otherwise the mother's wish would always prevail at the expense of other interests.

(6) *Cultural and religious factors*. The conception and concealed pregnancy may give rise to particular difficulties in some cultural and religious contexts. These may enhance the risks of notification, but they may also mean that the possibility of maintaining the birth tie through a family placement is of particular importance for the child.

(7) *The availability and durability of the confidential information.* Notification can only take place if there is someone to notify. In cases where a mother declines to identify a father she may face persuasion, if that is thought appropriate, but she cannot be coerced. In some cases the available information may mean that the father is identifiable, and maternal relatives may also be identifiable. The extent to which identifying information is pursued is a matter of judgement. Conversely, there will be cases where it is necessary to consider whether any confidentiality is likely to endure. In the modern world secrets are increasingly difficult to keep and the consequences, particularly for the child and any prospective adopters, of the child's existence being concealed but becoming known to family members later on, sometimes as a result of disclosure by the person seeking confidentiality, should be borne in mind.

(8) *The impact of delay.* A decision to apply to court and thereafter any decision to notify will inevitably postpone to some extent the time when the child's permanent placement can be confirmed. In most cases, the importance of the issues means that the delay cannot be a predominant factor. There may however be circumstances where delay would have particularly damaging consequences for the mother or for the child; for example, it would undoubtedly need to be taken into account if it would lead to the withdrawal of the child's established carers or to the loss of an especially suitable adoptive placement.

(9) *Any other relevant matters.* The list of relevant factors is not closed. Mothers may have many reasons for wishing to maintain confidentiality and there may be a wide range of implications for the child, the father and for other relatives. All relevant matters must be considered.

7. It has rightly been said that the maintenance of confidentiality is exceptional, and highly exceptional where a father has parental responsibility or where there is family life under Article 8. However exceptionality is not in itself a test or a short cut; rather it is a reflection of the fact that the profound significance of adoption for the child and considerations of fairness to others means that the balance will often fall in favour of notification. But the decision on whether confidentiality should be maintained can only be made by striking a fair balance between the factors that are present in the individual case.

Section 4: The three appeals

The decision and appeal in Case A

90. The matter was heard on 7 August and HHJ Marston gave a reserved judgment on 16 August. He recorded that A was thriving in his placement. He noted a conflict between the mother's autonomy and the court's duty to apply the statutory checklist when considering an adoption application. He directed himself with reference to *Re A* [2018] and recited the competing arguments. He considered

the social worker's assessment that the mother presented as anxious and scared about the father and wider family knowing about A. He acknowledged that the available information came entirely from the mother, though via an experienced social worker, but said that "it seems to me that the Mother is entitled to be believed." He also noted the local authority's case that any attempts to contact family members against the mother's wishes could impose further delays on planning for A.

91. The judge then gave his reasons for his decision:

"9. My assessment is therefore that if further enquiries were made on the basis of the information we have at the moment it is highly unlikely that any candidate from within either family will come forward to look after A and that it is quite possible that it would have a deleterious effect both on the child's placement and on the Mother's mental health. Taking the mother's wishes, which carry significant weight, and the unlikelihood of there being a family placement on the information that is available as I analyse it, it seems to me that that significant weight attached to the mother's views is much greater than any weight that I attach to having regard to the wishes and feelings of the other relatives of this child. Given also that it is a natural parent's wish to relinquish a child it seems to me that there is much less interference with Article 8 rights here than there is in other situations for adoption except that adoption of any kind still represents a significant interference in family life and in the circumstances of a relinquished child I do not have to find that nothing else will do, see *Re J and AO (2016) EWHC.* Mr Fuller [for the local authority]… raises two potential risks that I have to consider very carefully. First of all the possibility of an unguarded remark by the mother leading to the existence of A becoming known by family members with a family member making a late, possibly too late, application. Balanced against that the only way I can be sure of that not happening is if the family are told, something which would, according to the Mother be disastrous. Secondly Mr Fuller mentions the fact that A himself might question the circumstances of the adoption and why there is nobody in his birth family who could care for him. We know the answer to that because he was surrendered for adoption and the judge had ruled that no further enquiries were to be made.

10. The guardian recommends that a more detailed analysis is carried out of the risks to A if his relatives, including the father, are informed of the proposed adoption.

11. I cannot see that there is a middle ground here. A more detailed analysis would involve the relatives being told, what else could one do? This would first of all involve the Mother's family being told and secondly involve finding out who the Father is from the Mother and telling him and his family. I can't see there is anything to be gained from that. It seems to me that there are no other realistic options on the information available and that in order to get more information one would have to cross the rubicon of telling everybody. It is not possible to check out or corroborate the Mother's information without doing that.

12. In all of the circumstances here I come to the conclusion after anxiously weighing the various factors and making as careful an analysis as I can in all the circumstances that it is not necessary for the Local Authority take any further steps in order to try and identify either prospective members of the Mother's extended family or the putative Father and the members of his family and this adoption should go ahead on that basis."

92. Presenting the Guardian's appeal, Mr Cranfield argued that the judge in effect incorrectly treated the case as exceptional and made the wishes and feelings of the mother determinative rather than significant. He placed too much weight on her assertions about the position of the father and of her own family, and on the likely effect of notification on herself. He appears to have accepted that the father had Article 8 rights but he gave them little weight, and did not adequately balance up the competing factors. The Guardian is open to a staged approach whereby the father is contacted first and notification of the wider family is reconsidered in the light of information provided by him.

93. On behalf of the local authority, Mr Fuller contended that the judge directed himself correctly, properly carried out a balancing exercise, and came to a considered conclusion in a case where there is no middle ground. Whether what a mother says needs to be checked out is a question of judgment. The father and wider families do not have Article 8 family life rights based on mere biological kinship. Meanwhile, A will likely have developed Article 8 rights with his carers. The possibility of a family placement had to be balanced against the certainty of delay and rejection of the mother's expressed wishes about what she believes to be best for her child. Notifying the family could "open a can of worms". There is nothing to indicate that the judge was wrong in the decision he reached.

94. Since the hearing before the judge, the mother accepted help from the local authority to obtain legal advice but her solicitor was unable to obtain legal aid. She would however agree to disclose her medical records to corroborate what she told the social worker.

95. Having heard the arguments, we informed the parties that the appeal would be allowed. We endorsed the Guardian's suggestion that the father should be told of A's existence, by the mother if she prefers. The parties should then take stock of whether notification of the wider families is appropriate, with any issue about that being resolved by HHJ Marston.

96. Procedurally, the local authority adopted the correct procedure by issuing a Part 19 application. Unfortunately, it only did so after a delay that has had two consequences. Firstly, A has naturally been strengthening his ties with his carers, for whom the delay and the outcome of the appeal is bound to be very difficult. Secondly, the local authority had made its own mind up by deciding that adoption is in A's best interests long before it placed the issue of family notification before the court.

97. A further aspect of the process in this case was that it carried on without the mother's direct participation, even to the extent of her filing a statement. There will, no doubt, be cases where there are good reasons why a parent cannot participate. The court will then have to make the best of hearsay evidence. But it is already a characteristic of these cases that the court is making an important decision on incomplete information. However, the court did not seek to engage directly with the mother so as to obtain the best evidence available.

98. As to the substance of the decision, it is not entirely clear whether the judge considered that the father had rights under Article 8. On the one hand, the parents were no longer in a relationship, but on the other their relationship had lasted for several years and they apparently remained on friendly terms. That would not make a very persuasive case for the father having Article 8 rights, but he clearly had an interest that needed to be considered and I would on the whole accept that this was the judge's view.

99. However, although the judge directed himself on the law, his decision does not in my view identify sufficient reasons to justify the father being kept in the dark about the birth and adoption of A. The reasons given for non-disclosure concerned the risk to the mother's wellbeing and her account of the improbability of a suitable family placement. As to the first, disclosure would be likely to be difficult for the mother, but there was no convincing evidence to support the judge's conclusion that it might be “disastrous”. The rejection of the possibility of a family placement was based on the mother's account without there being any objective basis for believing that the father and the wider families were very likely to have nothing to offer. Nor was any real weight given to the potential benefits to A of growing up in his birth family if that is a realistic possibility, or of his adoption having his father's participation, and even his blessing, if it is not. I would not accept the local authority's characterisation of the process of notifying a father of the birth of his child as “opening a can of worms” where the characteristics of the father or wider family raise no particular cause for concern. The judge was entitled to note the delay involved in notification, but as the child had already been placed with prospective adopters, little weight could attach to that aspect of the matter. In summary, while the judge rightly gave significant emphasis to the mother's point of view, he did not sufficiently balance it against the other important considerations bearing on A's lifelong welfare and the position of family members, and his decision cannot therefore stand.

100. After this passage of time it would not have been in anyone's interests for the decision to be remitted and it therefore fell to this court to remake it. As to the balance to be struck, I bring forward my observations from the preceding paragraph. While I would not myself attribute Article 8 rights to the father, he has an interest to be considered. The mother's account does not provide a strong objective basis for discounting him as a suitable carer without further investigation. The difficulties that notification is likely to cause to the mother do not outweigh the considerations relating to the interests of the father and the child in the context of a plan for adoption. This interference with the mother's right to respect for her private life is necessary and the staged approach proposed by the Guardian is proportionate. For these reasons, I agreed that the appeal should be allowed.

The decision and appeal in Case B

101. Giving an extempore judgment, HHJ Willans described his decision as a significant one. He summarised the positions of the parties and identified what he saw as the task facing the court:

"3. … There is obviously a balance to be drawn in respect of both Article 6 rights and Article 8 rights, with respect for a private family life. I accept the principle put forward that the quality, or lack of quality, of a relationship with family members is such that Article 8 rights are not engaged in all directions. Of course the paramount consideration will be B's welfare interests."

He then stated that he did not consider that the mother's arguments were fanciful or tactical and referred to corroboration of her account in certain respects, and in particular as being a victim of FGM. He directed himself with reference to the recent case law. He accepted that the mother is a vulnerable individual and that there are cross-cultural complications. He accepted that issues of safety are a very real consideration in cases such as this. He noted the mother's account of her own childhood experiences, but also that there were positive aspects of the maternal family situation. He continued:

"10. So I have to balance these features and plainly it is not an easy balance. One must respect that the mother's position is, as I have said, one that is not based simply on fanciful points, but one also has to have regard to B's welfare interests, one has to bear in mind, albeit not place overdue weight on the fact that mother's assessment at this time has had some problems, which elevates the potential for there to be stark decisions to be taken in this case… There is a very real risk in this case that the court would be confronted by a situation at that stage in which that question will be asked in circumstances where neither father's family nor mother's family have been considered in any meaningful way whatsoever. That creates a problem within these proceedings but undoubtedly would also pose a potential problem within future proceedings under the 2002 Act were someone to come forward at that stage and raise the question of a failure to assess. So that focuses attention on the significance of this decision.

11. Having considered the factors, I consider on balance it is right for the local authority to seek to investigate this matter. If … the pointers demonstrate no wish [on the part of the family] to be involved with the child, or the information, such as is available for the viability assessment, suggests [the family] is inappropriate to care for the child, then the court will have taken the appropriate steps to ensure that all options have been properly considered. But to shut those off at this stage it seems to me is not to properly meet the welfare needs of B…"

102. On the mother's behalf, Mr Day and Ms Hecht described the judge's decision as a difficult one, taken in the midst of a busy list. However, having accepted that the mother's concerns were not fanciful, the judge should have seen the case as falling at the extreme end of the spectrum and sufficient to warrant an order preventing the extended family from being informed. The mother's rights should have prevailed over those of the extended family and there was no attempt to measure the proportionality of the interference with them.

103. For the local authority, Ms Rahman and Ms Slingo argued that the judge's decision was one he was entitled to reach. The mother's concerns may not be fanciful but they do not amount to cogent and compelling grounds for not notifying the grandparents where there is no independent evidence of safeguarding concerns in respect of the mother's large sibling group. The majority of the risks identified by the mother arise from B being placed in the care of the family, and not merely in them being informed. The judge was right to place weight on the ethos in favour of family placements and the future implications of incomplete assessments. Even if the family does not have Article 8 rights, that does not mean they should not be assessed as alternative carers.

104. The Guardian supported the position of the local authority.

105. In assessing the merits of the appeal, I would start by acknowledging the burden that the judge assumed in giving judgment on the spot in a case of this sensitivity. The decision was rightly taken within care proceedings in which a placement with the mother remained at least a possibility. Given the uncertainty about paternity, the judge's focus was upon the grandparents rather than the father, and the possibility that B might find a home with them if she could not remain with her mother. He was alert to the risk of violence, to cultural and religious considerations, and to the mother's vulnerability. He considered these issues more fully in passages from the judgment that I have not cited, and he found that they did not amount to sufficient reasons to outweigh the potential welfare benefits to B of a family placement being investigated.

106. No doubt due to the circumstances in which it was delivered, the judge's analysis lacked some of the analysis that might have been achieved in a reserved judgment. But despite this, I am persuaded that he approached matters from a broadly correct perspective. It cannot be denied that the mother's subsequent recognition of the difficulty in keeping B's existence a secret indefinitely from her

family lends support to the essential soundness of the decision, as does the light shone by the cousin on the possibility of a suitable family placement. But even without that additional information, it would not be open to us to depart from the judge's conclusion, which was that in these complex circumstances B's interests in a potential family placement outweigh those of her mother and that there was no strong reason to justify the prevention of normal enquiries. For these reasons, I agreed that the appeal would be dismissed.

The decision and appeal in Case C

107. In this case HHJ Carr QC also gave an immediate judgment in the course of a full list. Having identified the parties and their positions, she gave herself an extensive legal self-direction, which she then pithily encapsulated:

"20. In determining this matter, firstly does the Father have a right to family life and if so, is there justification for interfering in his Article 8 and Article 6 rights by granting the declaration that Mother so fervently seeks? Are there strong countervailing factors justifying this exceptional outcome? Of course, pursuant to the Adoption and Children Act 2002, the child's welfare throughout her life is paramount."

108. The judge then reviewed the quite extensive documentation that was available about this family. She viewed the mother's case at its highest and accepted that the rapes must have been grossly distressing to her. She was similarly prepared to work on the basis that the father had played a minimal role in helping the mother care for the older siblings. She found it extremely strange that he did not realise that the mother was pregnant even though he was present in the home on the day the baby was born. Nevertheless, all things considered:

"26. … I do consider, and I think this is a crucial finding I have to make, that Father has Article 8 and Article 6 rights on Mother's evidence and the assessments by the local authority and therefore my starting point has to be that he should be informed about C.

27. The strong countervailing factors that are cited by both the local authority and by Mother and again, accepting Mother's evidence at face value, that he raped her, he allowed his cousin to rape his wife and obviously, there is a very real concern here about how far they will deal with it and whether he considers he has been deceived.

28. I have no reason to believe that Mother is in any sense telling me lies, but I did find that she undervalues the relationship that the children have with Father… She allows Father access to her home, allows him to sleep there and allows him, essentially, to come and go. Many may congratulate her for that, that the children do have a relationship in relation to his [other] children, and his stepchild, do have a male in their life in the form of their father and although Mother urges that there could be domestic violence, the real effect is that she asserts he has never physically assaulted her…

30. I am not sure where I can find the evidence that Father will make her life unbearable…

32. … I have reached the clear position that Father has to be informed and I do not see that, on the law as it stands, I could possibly find any other way forward. As far, unfortunately, as I am concerned I do this with a great deal of sadness, but I think Mother is to be congratulated and respected for the level of care that she gives her children and the fact that persistent looking at by the Local Authority make it abundantly plain that Mother does a very good job.

34. Mother has her hands full and I am bound to say it is with an enormous amount of regret that I do not regard this as so exceptional with strong countervailing factors, that I should exclude him from any knowledge about this little baby and I emphasised to Mother, it is with a great deal of regret. In so far as the extended family is concerned, I think Mother's evidence on this was compelling and there must be no further delay. … It is going to be dreadful for Mother. I accept that, when this happens and really, the damage is done now."

109. On behalf of the mother, Mr Howe QC and Ms Wilce argued that the judge did not adequately evaluate the comparative risks and benefits of disclosure and non-disclosure. She should have placed her favourable assessment of the mother at the forefront of her consideration and was wrong to find that there were not sufficiently strong countervailing factors in the circumstances of C's conception and the mother's wishes to justify the court taking the exceptional step of withholding notice of the proceedings from the father. Instead, having identified the correct legal principles applicable to the

application, she treated her finding that the father had family life as determinative of the application. In support of this, they note that at a later hearing on 1 November the judge remarked that her decision had arisen from the fact that the father had human rights and that that was “an end of the matter”.

110. The local authority, through Ms Heaton QC and Ms Stanistreet-Keen, acknowledged that it had been wrong to issue care proceedings rather than a Part 19 application. As to the substance of the decision, it continued to support the mother's position and invited this court to make the declaration refused below. More weight should have been given to the circumstances of the conception and the likely impact on the mother, on C and on the other children. The judge approached matters on the basis that adoption was the most likely outcome and she should therefore have accepted that the emotional and physical risks to the mother and the other children of disclosure far outweighed any advantages that may be gained. She failed to address C's welfare and did not carry out sufficient analysis by reference to the welfare checklist. Informing the father and the wider family must be for the purposes of identifying a possible alternative carer and not just for the purposes of informing them.

111. For C's Guardian, Ms Wood QC and Ms Anning opposed the appeal. They accepted that the case is sensitive but maintained that it is in C's interests for there to be the fullest possible exploration of the welfare outcomes that might be available in circumstances where the father is not only married to the mother, albeit now separated, but is also the father/stepfather of C's siblings. The finding that the father had rights under Articles 8 and 6 has not been challenged. The decision is of importance not just for C's minority but for the rest of her life. This court should be slow to conclude that the judge, who correctly identified the law and who had the considerable advantage of hearing evidence from the mother, was wrong. It is of note that the mother herself had considered telling the father about C as recently as June and that her main reason for relinquishing C was not because of how she was conceived but because of her concern at the father's reaction to the concealed pregnancy. The judge balanced up all of these matters. A fair reading of the judgment shows that she clearly did not treat the finding that the father had Convention rights as being conclusive.

112. The submissions that we heard in this case are similar to those made in Case B in that they principally concern the way in which the judge explained her decision. Here again I consider that the judge sufficiently explained a decision that she clearly found unpalatable. The distressing circumstances of the conception and the impact of them on the mother, which the judge fully considered, had to be set alongside the fact that C's father has parental responsibility for her and is the father/stepfather of her siblings. To proceed without notifying him of the birth would be an extremely strong course to take and in my view the judge was right to resist the temptation to do so. For these reasons, which echo the submissions of C's Guardian, I agreed that the appeal would be dismissed.

113. In conclusion, I would stress that these appeals concern notification, not adoption. Nothing that I have said is intended to influence any decision that may have to be made as to whether A, B or C should be adopted. The only question at this stage is who should be consulted.

Lady Justice Nicola Davies

114. I agree.

Sir Andrew McFarlane P

115. I also agree.