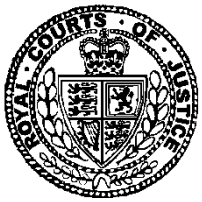

Neutral Citation Number: [2019] EWCA Civ 1364

Case No: B4/2019/0931

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
WOLVERHAMPTON
THE HONOURABLE MR JUSTICE KEEHAN
LE19C00048

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

THE RIGHT HONOURABLE SIR ANDREW MCFARLANE
THE RIGHT HONOURABLE LORD JUSTICE SIMON
and
THE RIGHT HONOURABLE LADY JUSTICE NICOLA DAVIES DBE

- -

Re M (Children)

- -
- -

Tim Moloney QC and Chris Barnes (instructed by ITN Solicitors) for the Appellant
Dijen Basu QC (instructed by Police) for the 1st Respondent
William Tyler QC and Catherine Jenkins (instructed by Local Authority) for the 2nd Respondent
Deirdre Fottrell QC and Laura Briggs (instructed by Burke Niazi Solicitors) for the 3rd Respondent
Hannah Markham QC and Ben Mansfield (instructed by Dodds Solicitors LLP) for the 4th and 5th Respondent

Hearing date: 25 June 2019

- -

Approved Judgment

Sir Andrew McFarlane P:

1. The focus of this appeal is an order made by Mr Justice Keehan on 8 April 2019 in the course of care proceedings, directing that the local authority must serve a copy of the parents' position statements and their statements of evidence, that had been filed in the proceedings, upon the local police force. Within the care proceedings the local authority assert that the Children Act 1989 ['CA 1989'], s 31 threshold criteria are satisfied on the basis that the children have been, or are likely to be, exposed to significant harm as a consequence of the parents' activities in circumstances where the parents, both of whom are UK citizens, have spent the past four years or more in Syria and are believed to have aligned themselves with a radical terrorist organisation during that time.

2. When granting permission to appeal, Lord Justice Peter Jackson concluded that there was a compelling reason for this court to hear argument on the correct approach when deciding an application for disclosure of material to the police in a case such as this, and in relation to the *President's Guidance on Radicalisation Cases in the Family Courts* (8 October 2015).

Factual Context

3. The factual context can be shortly stated. Both parents hold British nationality. Both left the UK and travelled to Syria in or around 2014. It does not seem that they knew each other at that time and only met after they had been in Syria for some time. At that time the Foreign and Commonwealth Office's advice was not to travel to Syria which, by the time of their departure, was riven with civil war and where significant areas of the country were exposed to sustained and fierce conflict. Both of the children, who are now aged three years and two years, were born in Syria following the parents' marriage.

4. In November 2018 the family came to the attention of the UK authorities whilst held in immigration detention in Turkey. At that time the parents indicated an intention to return with their children to the United Kingdom.

5. A temporary exclusion order ['TEO'] under the Counter-Terrorism and Security Act 2015 ['CTSA 2015'], s 2 was imposed by the Home Secretary on the father on 26 November 2018. This was an administrative decision taken within the Home Office. The order remains in force and, on 26 November 2018, a High Court Judge apparently made an anonymity order under the 2015 Act (although no copy of that order has been provided to this court).

6. The family returned to the UK by arriving at Manchester Airport on 9 January 2019. On arrival at the airport the parents were arrested under s 41 of the Terrorism Act 2000. The children were taken into police protection under CA 1989, s 46 and placed in foster care. Certain electronic devices were seized from the parents and, on 10 January 2019, the parents gave "no comment" interviews to the police. They were subsequently released on police bail.

7. The care proceedings commenced on 11 January 2019. The local authority asserted that the interim threshold criteria under CA 1989, s 37, were satisfied on the basis that:

> "The conditions in which the children were raised in Syria are not known, but Syria is currently characterised by violent conflict and the children have either been exposed to this or were at risk of exposure, and as such have suffered emotional harm or been at risk of suffering significant emotional and physical harm."

The parents did not contest the application and an interim care order was made with respect to both children.

8. On 1 February 2019 the police force tasked with investigating possible criminal activity by the parents issued an application in the Family Court seeking wide ranging disclosure of material. In the event the focus of the disclosure application was refined down simply to the release of the witness statements that had been filed by each parent together with position statements submitted to the court by the parents' lawyers. The disclosure issue was determined after submissions by Keehan J on 8 April 2019 who gave a full ex tempore judgment. The judge allowed the police application and it is against that decision that both parents now appeal. The appeal is contested by the police, the local authority and those acting on the instruction of the children's guardian on behalf of the children.

The Legal Context

9. By the Administration of Justice Act 1960, s 12(1):

> "The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say:
>
> (a) where the proceedings:
>
> i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
>
> iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.
>
> …
>
> (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court)."

10. Family Procedure Rules 2010 r 12.73(1)(b) is the relevant procedural provision:

> "For the purposes of the law relating to the contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated…where the court gives permission".

11. In part, the issues in this appeal turn upon the 'privilege against self-incrimination' and an accused's 'right to silence' in the course of the criminal process.

12. In paragraph [13] of his judgment (see paragraph 34 below), the judge referred to the parents' right to silence as a factor to be weighed in the balance, and at paragraph [14] to his view that making the order would not breach their right to silence, 'because the police would only use the information as a guide and [to] inform their investigative process'.

13. The expressions 'the right to silence' and 'privilege against self-incrimination' are sometimes used interchangeably. In *R v. Hertfordshire County Council, Ex p. Green Industries Ltd and anor* [2000] 2 AC 412 at 419A, Lord Hoffman introduced his consideration of the legal issues that arose in that case in this way:

> "As Lord Mustill said in *Reg. v. Director of the Serious Fraud Office, Ex parte Smith* [1993] A.C. 1, 30-31, the expression 'privilege against self-incrimination' or 'right to silence' is used to refer to several loosely linked rules or principles of immunity, differing in scope and rationale. Perhaps the best-known example is the rule that a person on trial should not be compelled to undergo inquisition by the prosecution or the court. Such methods were brought into disrepute by the practices of the prerogative courts of the sixteenth and seventeenth centuries and have since been regarded as inconsistent with a fair trial."

14. For the purposes of the present case it is convenient to attribute the expression 'right to silence' to the long-established rule that a person is not compelled to answer questions from those in authority, absent a statutory basis. The expression is now used most frequently in the context of the criminal law, where it remains a guiding principle, although adverse inferences may be drawn from the exercise of such rights, see for example, ss.34 and 35 of the Criminal Justice and Public Order Act 1994.

15. The parents' right to silence does not arise on the present appeal. They declined to answer questions put to them by the police in interview, as was their right.

16. The right with which this aspect of the appeal is concerned is the right in civil proceedings not to be put in the position of making an admission of criminal conduct: the privilege against crimination or self-incrimination.

17. This principle was established following the abolition of the Star Chamber and was well-developed by the time of *Thomas Rosewall's case* (1684) 10 Howell's St. Tr. 168-9, in which Lord Chief Justice Jeffreys and the other judges interposed to caution a witness. They stated that witnesses ought not to be asked, nor are they bound to answer, any question 'whereby they charge themselves with any crime, or subject themselves to any penalty.' In *Sir John Friend's case* (1696) 13 Howell's St. Tr. 15, the judges interrupted the defendant's question to a witness as to whether he was a

Roman Catholic, the answer to which might have rendered the witness subject to penalty.

18. In *R v. Slaney* (1832) 5 C & P 213, 214 Lord Tenterden CJ stated the principle thus:

> "You cannot only not compel a witness to answer that which will criminate him, but that which tends to incriminate him: and the reason is this, that the party would go from one question to another, and although no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him."

19. The principle was approved in *R v. Garbett* (1847) 1 Den 236, 257 by a majority of the judges (Parke B, Alderson B, Coltman J, Maule J, Rolfe B, Wightman J, Cresswell J, Platt B, and Williams J; with Lord Denman CJ, Sir Thomas Wilde CJ, Sir Frederick Pollock CB, Patterson J, Coleridge J and Erle J of the contrary view). The case concerned answers given by the defendant in a civil action, the details of which are immaterial for present purposes. During cross-examination in those proceedings, questions were put to the defendant which he declined to answer until ordered to do so by the trial judge (Lord Denman CJ). At the defendant's criminal trial, the prosecution sought to introduce the transcript of his answers, some of which incriminated him in a fraud in relation to a bill. The defence objected to those parts of the cross-examination being read. The trial judge (Alderson B) received the evidence but reserved the point for further argument. The majority of the court was of the opinion that:

> 'If a witness claims the protection of the court, on the ground that the evidence would tend to criminate himself, and there appears reasonable grounds to believe that it would do so, he is not compellable to answer; and if obliged to answer, notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given in evidence against him.'

20. The rule is acknowledged and put on a statutory footing by s 14 of the Civil Evidence Act 1968, as amended:

> "Privilege against incrimination of self or spouse or civil partner.
>
> (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty -
>
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty"

21. Section 72 of the Senior Courts Act 1981 provides an exception to the rule in particular circumstances:

> "(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse or civil partner, to proceedings for a related offence or for the recovery of a related penalty -
>
> (a) from answering any questions put to that person in the first-mentioned proceedings; or
>
> (b) from complying with any order made in those proceedings."

Sub-section (2) defines those circumstances: proceedings for infringement of intellectual property rights or passing off or related proceedings.

22. It is clear then that, at the time of the passing of the CA 1989, there was a statutory framework for both the Common Law rule and potential exceptions. As Lord Hoffman noted in *R v. Herts CC* (above)

> "All these principles are to a greater or lesser extent subject to exceptions, most of which have been created by statute."

23. The exception in CA 1989, s 98 is framed as follows:

> "98. Self-incrimination
>
> (1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from:
>
> (a) giving evidence on any matter; or
>
> (b) answering any question to him in the course of giving evidence,
>
> on the ground that doing so might incriminate him or his spouse or civil partner of an offence.
>
> (2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse or civil partner in proceedings for an offence other than perjury."

24. The statute provides that the rule against self-incrimination does not apply in care proceedings; but with the proviso that evidence or answers given in those proceedings are not admissible in any criminal proceedings other than perjury.

25. Nevertheless, an issue may arise as to the extent to which the prosecution may rely on a chain of enquiry deriving from inadmissible evidence and answers if disclosed to the police. If the evidence and answers are put to the witness during a police interview, the witness can refuse to comment and neither the question nor the 'no comment' answer would be admissible. That follows from the provisions of CA 1989, s 98(2). A further issue may arise if further questions are put that are founded on answers or evidence that are inadmissible. The admission of such answers or refusals

to answer will depend on the circumstances; and is not susceptible to any broad statement of principle.

26. As Swinton-Thomas LJ expressed it in *In re C (a minor)* (below) at page 86F:

> "The Judge conducting a criminal trial will exercise his discretion as to whether to admit in evidence any further admissions to the police at interview resulting from the admissions made in the care proceedings and would obviously bear in mind when doing so the provisions of s.98 and the warning to the accused person in the care proceedings"

The reference made by Swinton-Thomas LJ to a 'warning' refers to the practice in the Family Court by which the judge will give a short explanation of the position established by s 98 and *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76 (also reported as *Re EC (Disclosure of Material)* [1996] 2 FLR 725) to any witness in the family proceedings who might be required to answer questions which may incriminate them.

27. Some protection is provided within criminal proceedings with respect to unfair evidence by Police and Criminal Evidence Act 1984, s 78:

> "78(1) in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

Plainly the less reliant on compelled evidence, the less any unfairness there will be, but beyond that it is unnecessary to go.

28. The acknowledged and longstanding authority on the approach to be adopted by a court when determining an issue of disclosure of documents from family proceedings to the police is the decision of this court in *Re C* (see above). The leading judgment was given by Swinton Thomas LJ, with whom Henry and Rose LJJ both agreed. Although the wording of the relevant procedural provision applicable at that time [FPR 1991, r 4.23(1)] was in slightly different terms to FPR 2010, r 12.73, any difference is not material for present purposes.

29. Having reviewed the relevant authorities Swinton Thomas LJ identified ten factors which were likely to be relevant when determining an application for disclosure to the police. The list, which is set out at [1997] Fam 85 is preceded by an important caveat:

> "In the light of the authorities, the following are among the matters which a judge will consider when deciding whether to order disclosure. It is impossible to place them in any order of importance, because the importance of each of the various factors will inevitably vary very much from case to case.

(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies. The underlying purpose of section 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools etc. This is particularly important in cases concerning children.

(9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

(10) Any other material disclosure which has already taken place."

30. Despite the passage of over twenty years all counsel in the present appeal accepted that Swinton Thomas LJ's distillation of the relevant law in *Re C* has continued to be the leading authority to which all levels of the Family Court regularly turn when determining applications for disclosure of material to the police.

31. Finally, in terms of the legal context, it is necessary to record the terms of s 2 of the CTSA 2015 which relates to TEOs:

> "(1) A "temporary exclusion order" is an order which requires an individual not to return to the United Kingdom unless—
>
> (a) the return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or
>
> (b) the return is the result of the individual's deportation to the United Kingdom.
>
> (2) The Secretary of State may impose a temporary exclusion order on an individual if conditions A to E are met.
>
> (3) Condition A is that the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom.
>
> (4) Condition B is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the individual.
>
> (5) Condition C is that the Secretary of State reasonably considers that the individual is outside the United Kingdom.
>
> (6) Condition D is that the individual has the right of abode in the United Kingdom.
>
> (7) Condition E is that—
>
> (a) the court gives the Secretary of State permission under section 3, or
>
> (b) the Secretary of State reasonably considers that the urgency of the case requires a temporary exclusion order to be imposed without obtaining such permission.
>
> (8) During the period that a temporary exclusion order is in force, the Secretary of State must keep under review whether condition B is met."

The Judgment

32. After reviewing the factual background, Keehan J identified five headline elements within the submissions made on behalf of each parent in opposition to the police application. They were:

(a) the application is made far too early in the course of the family proceedings and also of the police investigations;

(b) there is insufficient evidence provided by the police to justify the making of the application at this stage;

(c) the police have not yet taken steps to examine two of the electronic devices which are password protected;

(d) the parents have a right against self-incrimination (CA 1989, s 98(2)); and

(e) the parents have a right to silence.

33. Thereafter, having set out the relevant text from Swinton Thomas LJ's judgment in *Re C* in full, Keehan J described his analysis at paragraphs 10 to 19 commencing with a conclusion that the basic factual details of the parents' time in Syria were important factors for the court to consider and that the investigation of alleged offences contrary to the Terrorism Act 2000 established "particularly substantial weight to the public interest in such offences being investigated."

34. After noting that the welfare interests of the children had been met within the scheme of interim orders, which had reunited the children to the care of their parents under the supervision of the paternal grandparents, Keehan J went on, at paragraph 12, to consider the nature of the police application:

> "12. I do not consider that the application by the [police] is of the nature of a fishing expedition. I consider it to be a genuine application made on behalf of a police force investigating potential terrorism offences which, as I have already observed, attract a degree of seriousness by themselves. They are keen to undertake an investigation to determine whether the mother and/or the [father] have committed any terrorism offence, in which case no doubt criminal proceedings will follow; or whether in fact there is no evidence to substantiate the institution of criminal proceedings against either the mother and/or the father and to bring the matters to a close.
>
> 13. I consider it highly likely that a police investigation is likely to result in further information becoming available which will inform my ultimate decision making process in relation to the welfare best interests of the children…."

35. Keehan J did not consider that the fact that the parents have a right to silence in the criminal process was a bar to ordering disclosure to the police, rather, he held that it was "a factor that has to be weighed in the balance when considering all relevant matters and determining how the court should exercise its discretion".

36. Keehan J, who had of course seen, as this court has, the parents' witness statements, attached "particular weight" to the fact that nothing that might be termed an admission of wrongdoing or guilt of any offence is made by either parent in their witness statements. He regarded it as "one important factor to consider" that the account given was simply of life being lived in Syria and Turkey away from direct involvement in the conflict.

37. Keehan J concluded his analysis as follows:

> "15. The second factor to which I attach considerable weight is that I do not consider – absent binding authorities to the contrary – that my granting the application sought by the police at this stage would, in and of itself, breach the parents' right to silence, because the police, if the application was granted, will only use the information to guide and inform their investigative process. This might lead to the police instituting criminal proceedings against the mother and/or the father. The extent, however, to which, if at all, any information which has been disclosed by this court in relation to what the parents have said in statements or position statements could or should be used in any subsequent future criminal process, will be a matter for the Crown Court judge presiding over any criminal trial to determine, in addition to any potential arguments of abuse of process which may be advanced on behalf of the mother and/or the father. I do not consider that in approaching this application in this fashion I am abrogating my duty to carefully consider all of the matters set out in *Re C.* I take the view that this approach is entirely in keeping with what Lord Justice Swinton Thomas said in the case of *Re C* at factor 5 namely, "Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice".
>
> 16. In my judgment, I am entitled to take into account if I order the disclosure sought by the police, that prior to the information given by the parents in statements or position statements in the proceedings, being used in a criminal process against them, there are the further checks and balances within the criminal justice system and, ultimately, the issue of whether these documents may be used in criminal proceedings against them, will be determined by a Crown Court judge who will, at that stage, be in a far better position to determine the extent to which any information disclosed should be used against the parents.
>
> 17. It is submitted that this application is made too early. Given the nature of what I know to be set out in the parents' statements, I do not agree. It is not as though I have a factual matrix which is being challenged and which I need to determine before disclosing, for example, a judgment on a fact-finding exercise to the police and/or to the Crown Prosecution Service. What is being sought and what would be disclosed is an account given by the parents of what they say they have been doing over the course of the last three and half/four years. If I delay disclosing that information, I potentially cause not only a delay to the criminal investigation and to any criminal process that follows

> but, most importantly of all, I am building in a potential delay in this court finding itself in the position where it is in possession of all the necessary and relevant information about the parents and about their activities in Syria or elsewhere to enable me to make a final decision in the welfare best interests of the children. Given these children are so very young, it is essential, in their welfare best interests, that this court finds itself in a position to make a final determination about their welfare at the earliest possible opportunity."

38. Keehan J was therefore entirely satisfied, having weighed all of the ten factors set out in *Re C*, that the application should be granted.

The Appeal

39. The parents raised two central grounds of appeal. Firstly, that the police were unable to establish a prima facie case that a crime had been committed and that disclosure was therefore necessary.

40. Secondly, that the judge had given no real, or alternatively insufficient, weight to the parents' right to silence in that:

i) he misdirected himself on whether the right to silence was breached by the disclosure order;

ii) he erred in placing reliance upon a categorisation of the disclosed material as not containing "any admission of wrong doing or guilt of any offence";

iii) he placed insufficient weight on the importance of parents being able to engage frankly with child care proceedings;

iv) he was wrong to rely upon the theoretical later decision of a judge in the criminal process to remedy any unfairness or abuse created by his decision.

41. For the father, Mr Tim Moloney QC, who had not appeared below, leading Mr Chris Barnes, who did, stressed the unusual nature of the present application, where there is a total absence of material disclosed by the police establishing any case against the parents, in contrast to more ordinary proceedings where disclosure is sought, which tend to follow a factual investigation by the Family Court into evidence which includes material (for example evidence about physical harm to a child) which the police have already disclosed into the family proceedings.

42. Mr Moloney made reference to the *President's Guidance on Radicalisation Cases in the Family Courts* (8 October 2015) and in particular paragraph 12:

> '12. … The police and other agencies also recognise the point made by Bodey J that "It is no part of the functions of the Courts to act as investigators, or otherwise, on behalf of prosecuting authorities … or other public bodies." But subject to those qualifications, it is important that the family justice system works together in cooperation with the criminal justice system to achieve the proper administration of justice in *both* jurisdictions, for the interests of the child are not the sole consideration. So the family courts should extend all proper assistance to

those involved in the criminal justice system, for example, by disclosing materials from the family court proceedings into the criminal process.'

43. The appellants correctly characterise this as 'non-statutory practice guidance' and submit that the judge erroneously applied it to this case. They further submit that the guidance itself wrongly links disclosure from the police with the need for disclosure to the police.

44. More generally, the appellants submit that the Family Court has set the threshold in applications for disclosure under *Re C* so low that almost any application is bound to succeed. In the present case there is no evidence that the children had been harmed whilst in the care of their parents and no evidence more generally, other than the suspicion arising from the parents' time in Syria. If disclosure is justified on that basis, it is difficult to identify circumstances, submitted Mr Moloney, in any radicalisation case where disclosure would not be made.

45. The appellants' case is that no disclosure should take place until the police have established the need for disclosure based upon a prima facie evidential basis. To do otherwise is to devalue the importance of the privilege against self-incrimination.

46. In relation to the right to silence, the appellants submit that the element of compulsion within family proceedings amounts to a breach of the right to silence in circumstances where the police have no similar power to compel a parent to answer. The point is made that in a similar case, but where a couple do not have children, the police could not obtain evidence by this means.

47. It is submitted that the appellants' Article 6 rights to a fair trial are engaged. It was, Mr Moloney respectfully submitted, for the Family Court judge to ensure a fair process rather than speculating over a future Crown Court judge's actions in circumstances which are currently highly uncertain. The appellants' case is that it is crucial for the Family Court to give proper and anxious consideration to any disclosure application; it is submitted that the judge fell into error in the present case by failing to do so.

48. The appellants consider that the order of Peter Jackson LJ granting permission to appeal included an implied invitation to put forward an alternative test to that which had been adumbrated in *Re C*. They did so by drawing upon a Supreme Court decision in wholly different circumstances: *Bank Mellat v HM Treasury (2)* [2013] 3 WLR 179. It is not necessary, and indeed potentially confusing, to set out extracts from the *Bank Mellat* judgment here. It is, however, helpful and relevant to summarise the test proposed by the appellants which is as follows:

    a) Sufficiently important objective: the police would need to demonstrate that i) a matter of sufficient importance was being investigated, and ii) that the evidence that their investigation had generated establishes a real prospect of an individual being charged with a specific offence;

    b) Rational connection: that i) there was a demonstrable link between the materials sought in the application for disclosure and the ongoing investigation, and ii) that the connection asserted was grounded on a cogent analysis and not merely speculative;

c) Less intrusive measure: that i) particular scrutiny should apply to an application for disclosure prior to the preparation of a judgment, and ii) the police must demonstrate that other reasonable investigative routes have been pursued;

d) Fair balance: whether, having regard to the matters set out above and the severity of the consequences, a fair balance is struck between the rights of the respondents in family proceedings and the interest of the community by directing disclosure including:

i) the best interests of the children as a relevant (but not paramount) consideration;

ii) specific recognition of the prejudice arising from the disclosure of a statement and/or evidence produced under compulsion infringing a suspect's right to silence;

iii) the interests of the individual concerned and the nature of any prejudice and/or benefit arising

iv) the public interest in the investigation of serious crime and protection of children.

49. It was submitted that if the proposed guidance were applied to the present case the application for disclosure should have been dismissed given the absence of evidence pointing towards likelihood of charge, the speculative nature of the application, the fact that other investigative routes were still available and that directing disclosure gave rise to substantial unfairness and was not justified.

50. In the course of oral submissions Mr Moloney conceded that the alternative form of test that he had put forward could only be advanced if this court were to conclude that the test in *Re C* was no longer fit for purpose.

51. The mother is represented before this court by Ms Deirdre Fottrell QC and Ms Laura Briggs, who made written submissions but, with the court's agreement, did not appear at the oral hearing. The Mother supports the appeal and aligns herself with the father's case. The submissions on her behalf firstly note the circularity of this case in that the LA has no evidence other than that which might come from the police investigation, yet the police investigation is apparently stalled pending the outcome of this disclosure application seeking to obtain information from the family process.

52. In addition to supporting the father's submissions, Ms Fottrell draws attention to the fact that position statements are not "evidence" and it is submitted that, as a matter of principle, they should not be disclosed to the police. If material adverse to the parents were contained within position statements, the police might argue that a position statement, not being evidence, is outside the protection of CA 1989, s 98(2) and therefore directly admissible in the criminal process.

53. Responding to the appeal for the police, Mr Dijen Basu QC, who did not appear below, submitted that a combination of CA 1989, s 98(2) and Police and Criminal

Evidence Act 1984, ss 76 and 78 ensured an overall fair process where disclosed material enters a criminal trial.

54. Mr Basu submitted that police are often greatly assisted by information despite the fact that the disclosed material may not itself be directly admissible in the criminal process and even where no express admissions of criminal wrongdoing are contained within it.

55. The police submit that reference to the *President's Radicalisation Guidance* is irrelevant. That guidance is not directed toward police applications for disclosure. The test established by *Re C* was the authoritative approach, and the guidance added nothing to it.

56. Mr Basu submitted that the court is entitled to take note of the fact that a TEO was made against the father. The information upon which the Home Secretary made the TEO is not disclosable, but the court is entitled to conclude that there must have been information which justified imposing such a restriction. That factor, set against the general background of the parents' behaviour in going to Syria at this time, established a sufficient prima facie case to justify disclosure of material from the family proceedings.

57. More generally the police sought to uphold the analysis conducted by Keehan J and submitted that there was no basis upon which this court could now embark upon a root and branch reformulation of the test that had been cased in *Re C*.

58. For the local authority Mr Will Tyler QC, who did not appear below, leading Ms Catherine Jenkins who did, opposed the appeal. They, too, upheld the continued validity of the test in *Re C*. They submitted that, in modern times, to accommodate cases such as this, two additional factors might be added to the test:

    i) the desirability of protecting society at large from the risk posed by those who might seek to do it harm;

    ii) the desirability of ensuring that those agencies charged with the protection of society are provided with all material which might reasonably assist that endeavour.

59. The local authority support the police submission that there was sufficient material before the court to establish "a significant index of suspicion" sufficient to justify disclosure.

60. Mr Tyler cautioned against the Family Court being drawn, as the appellants seek to do, into evaluating the state of the police investigation, at the time that the disclosure application is made, with a view to determining whether there are alternative potential investigative leads which have not yet been followed. Such satellite litigation would, he submitted, be fraught with difficulties and be wholly disproportionate to the issue of disclosure.

61. Finally, on behalf of the children, Ms Hannah Markham QC, leading Mr Ben Mansfield and Ms Jackie Matthews-Stroud, aligned herself with the submissions of the local authority and the police with respect to the overall fairness of the process

and the irrelevance of the *President's Guidance on Radicalisation*. With respect to the proposed alternative test based upon *Bank Mellat*, Ms Markham submitted that, on proper analysis, *Re C* sufficiently reflects the need for proportionality when determining a disclosure application. There was, Ms Markham submitted, no need for a new alternative formulation of the test.

62. In response Mr Moloney questioned whether any reliance could be placed by the Family Court on the fact that the TEO had been made against the father. Although the TEO had been made by the Home Secretary, the Home Office have subsequently stated that it does not have any material relevant to these care proceedings. The clear import of the Home Office response, it is said, is that there is indeed "no material", whether open or closed in this case.

Discussion

(a) Right to Silence and privilege against self-incrimination

63. For the reasons I have already given when summarising the relevant law, the right to silence relates to the parents' position, in the present case, when they were questioned by the police. They exercised that right by declining to answer any questions. There was, seemingly, no breach of the right to silence within the police process.

64. In the Family Court it is the privilege against self-incrimination which directly applies, rather than the right to silence, which does not. In the circumstances, rather than misdirecting himself, Keehan J was correct, as a matter of law, in holding that granting the application would not breach the parents' right to silence [paragraph 15].

65. An analysis of the privilege against self-incrimination in the present case cannot be conducted in a vacuum and without reference to the evidential reality of the case, which is that the parents' witness statements and position statements do not contain any material that might incriminate either of them in any criminal activity. If the contrary were the case, Mr Moloney's submissions might begin to gain traction, but without some indication that the relevant material might incriminate either parent, their counsel's legal argument must fail. Keehan J was justified in attaching 'particular weight' to this aspect and in holding that it was 'an important factor' that the material simply gives an account of ordinary activities when in Syria with no direct involvement in the conflict.

66. Even where, in another case, the material that is subject to a disclosure application might contain potentially incriminating evidence, that factor would not establish a complete bar to disclosure. In such circumstances, the court would evaluate the application by giving careful consideration to the *Re C* factors before determining whether disclosure was necessary and proportionate.

67. In the circumstances, the appellants have failed to establish their central ground of appeal based on the 'right to silence' and the 'privilege against self-incrimination'.

(b) The Re C *test*

68. This court is grateful to, and impressed by, Mr Moloney's endeavour in putting forward a reformulated test based upon *Bank Mellat*. It is not, however, in my view

possible to read into Peter Jackson LJ's grant of permission to appeal any indication that such a reformulation may be required. Significantly, those acting for the police, the LA and the children's guardian are unanimous in submitting that, despite the passage of 20 years, the test formulated by this court in *Re C* remains fit for purpose and does not require revision. From my perspective, I too agree that that is the case. This court does not regularly see, as it did in the time around the decision in *Re C*, applications to challenge disclosure decisions. This is despite the fact that such applications are a regular feature of family proceedings. Other than the need, from time to time, to consider a novel set of circumstances, such as the present case, there is no evidence that the test in *Re C* is causing difficulties or failing to deliver a fair and proportionate outcome when it is deployed.

69. The two additional sub paragraphs proposed by Mr Tyler for consideration in a case of alleged radicalisation or terrorism such as the present do no more than point to the need to attach particular weight to the public interest in the protection of the community (as indicated by the attribution of the highest level of seriousness to the investigation of crimes of this nature). Whilst it would be appropriate in such cases for express regard to be had to that element, it is of note that Keehan J did in fact attach 'particularly substantial weight to the public interest in such offences being investigated', without a bespoke additional paragraph having been added to *Re C*. There is, therefore, no need to add further wording to the *Re C* test, although, in terms of spelling out the public policy behind this element of the test, Mr Tyler's formulation is plainly helpful.

70. Mr Moloney conceded that this court would only consider establishing a new test for disclosure from family proceedings if it were established that *Re C* is no longer fit for purpose. For the reasons that I have given, to the contrary, I consider that the approach described by Swinton-Thomas LJ in *Re C* continues to point to the likely relevant factors and describes how the balance is to be struck between the competing factors that are in play. There is no basis for this court now abandoning this well established and familiar test, and I respectfully decline the invitation to do so.

(c) Disclosure of Position Statements

71. Insofar as Ms Fottrell for the mother seeks to draw a distinction between witness statements and position statements in this context, it is, certainly in the present case, a distinction without a difference.

72. CA 1989, s 98(2) applies to 'a statement or admission made in such proceedings'. The word 'statement' is not further defined and is not confined to witness statements. A position statement will normally focus on the forensic process and is unlikely to be the sole source of material that is of evidential value which is not otherwise also in a format that can be properly adduced as evidence in the proceedings. In those circumstances, the content of a position statement might, on the facts of any given case, be held to be of insufficient relevance to any police investigation to justify disclosure.

73. In the present case, whilst the parents' position statements do not seemingly add any further information to that which is contained in their witness statements, there is no reason in principle or in law for holding that there is a distinction between a witness

statement and a position statement, and no ground for holding that Keehan J was in error in ordering disclosure.

(d) President's Radicalisation Guidance

74. The *President's Radicalisation Guidance* offers important practice guidance for courts dealing with cases where radicalisation or terrorism is alleged or suspected. It is not intended to be, and nor does it purport to be, anything more than practice guidance. With respect to issues of disclosure the high-water mark in the guidance amounts to no more than encouragement to courts to extend 'all proper assistance' to those involved in the criminal process. The content of the guidance can have no impact upon the substantive law which is contained in the relevant statutory provisions and caselaw, in this context, in particular, *Re C*.

75. In the present case, although Keehan J was referred to the guidance during submissions, he did not refer to it in his judgment and there is no indication that he relied upon it, at least in any manner that may have led him into error.

(e) Application of the Re C *test in the present case*

76. I therefore turn to the application of the guidance in *Re C* to the present case and, in particular, the analysis described by Keehan J in his judgment.

77. The first point to note is that this was an ex tempore judgment. In that context, the judgment is impressive for the manner in which the judge summarised the issues, correctly described the applicable law and then set out a full summary of his reasons, point by point.

78. Once the appellants' attempt to put forward an alternative test to that in *Re C* and the challenge based upon right to silence/privilege against self-incrimination have failed, the appeal falls to be determined solely upon criticism of the attribution of weight made by the judge to each of the relevant factors. An appellant in such circumstances inevitably faces an uphill task; all the more so when the judge is one who is as experienced as Keehan J.

79. The appellants' case insofar as it relies upon asserting that there is no evidence that the children have been harmed, coupled with the submission that if disclosure is justified in the present case then it will be justified in all cases of alleged radicalisation or terrorism, ignores the admitted fact that the parents spent three or four years in Syria at a time when there was Foreign Office advice not to travel there. That core factual context does indeed establish a significant index of suspicion that the parents were engaged directly in radical or terrorist activities. It has been accepted as being a sufficient factual basis to establish 'reasonable grounds for believing' that the statutory s 31 threshold criteria were established for each child in order to trigger jurisdiction to make interim care orders [CA 1989, s 38].

80. The judge rightly attributed significant weight to the factual context which, as well as indicating a reasonable belief as to likely harm to the children, underlines the importance of supporting the investigatory agencies involved in protecting society at large.

81. In addition, although this was not a matter to which Keehan J referred in his judgment, in my view a court is entitled to have regard to the fact that the Home Secretary has concluded that 'Condition A' and 'Condition B' of CTSA 2015, s 2 are met on the basis that he 'reasonably suspects' involvement with terrorism-related activity outside the UK and that it is necessary to impose a TEO 'for purposes connected with protecting members of the public in the UK from a risk of terrorism'.

82. A judge at the early stages of family proceedings, where any potential prosecution and criminal proceedings are matters that may occur in the future, is not in any position to ensure the overall fairness of the entire investigatory and trial process. He or she can, and must, do what they can to undertake a fair process in the Family Court and that includes affording careful consideration to applications for disclosure, which should only be granted if the criteria in *Re C* are satisfied and it is necessary and proportionate to do so. There is every indication that this is precisely the approach taken by Keehan J in this case and the judge's *Re C* analysis is, in my view, not open to serious challenge.

83. In furtherance of the substantial weight that he had attributed to the importance in the investigation of potential serious criminal activity, Keehan J was justified in relying upon factor 5 identified in *Re C,* namely that barriers should not be erected between one branch of the judicature and another.

84. In addition, Keehan J was justified in concluding that it was very much in the interests of the children for the investigation to move forward to a conclusion, one way or the other, and that to refuse the disclosure application would introduce yet further delay in concluding the family proceedings.

85. In all the circumstances, I can detect no basis for holding that the judge fell into error in the attribution of weight in one factor or another or, more generally, that his conclusion on the issue of disclosure was wrong in terms of proportionality. Despite the factual circumstances of cases such as this, which I accept are outside the norm, an order for disclosure to the police may nevertheless be justified and, for the reasons given by Keehan J, was so justified here. In the circumstances, therefore, I would dismiss this appeal.

Lord Justice Simon:

86. I agree

Lady Justice Nicola Davies:

87. I agree.