

## M (Children)

### [2019] EWCA Civ 1364

31/07/2019

#### **Barristers**

Chris Barnes

#### **Court**

Court of Appeal

#### **Practice Areas**

Public Children Law

The Court of Appeal dismissed an appeal against an order for disclosure of the parents' statements and position statements, filed in the early stages of care proceedings, to the police. The leading authority, *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76 (also reported as *Re EC [Disclosure of Materials]* [1996] 2 FLR 725) remains fit for purpose and was correctly applied.

#### **Background**

The parents, both holders of British nationality, left the UK and travelled to Syria in or around 2014. Their two children were born there following their marriage. In November 2018 they came to the attention of the UK authorities whilst held in immigration detention in Turkey. A temporary exclusion order (TEO) under the Counter-Terrorism and Security Act 2015 was imposed by the Home Secretary on the father, which remains in force. A TEO may only be imposed if, inter alia, the Secretary of State both reasonably suspects that the individual is or has been involved in terrorism-related activity outside the UK and considers the order necessary, for purposes connected with protecting members of the public in the UK from a risk of terrorism.

On the family's arrival in the UK in January 2019 the parents were arrested under s41 of the Terrorism Act 2000 and the children taken into police protection. The parents were subsequently bailed following "no comment" interviews. Care proceedings were immediately initiated and interim care orders made, the court finding the interim threshold criteria met on the basis that the children had been exposed, or were at risk of exposure, to violent conflict in Syria.

On 1st February the police issued an application for disclosure of material, eventually refining the disclosure sought to the statements filed by the parents and their lawyers' position statements. At that point the parents had not been charged with any offence and indeed no material had been disclosed by the police which established any case against the parents.

#### **At first instance**

Mr Justice Keehan heard submissions and gave a full ex tempore judgment on 8th April, applying the

checklist of ten factors set out in *Re C* (supra) and allowing the police application.

#### The appeal

The parents appealed the decision, their central grounds being:

- The police were unable to establish a *prima facie* case that a crime had been committed and that disclosure was therefore necessary;
- Keehan J had given no real, or insufficient, weight to the parents' right to silence.

The appellants put forward an alternative test to that adumbrated in *Re C*, drawing on a Supreme Court decision, *Bank Mellat v HM Treasury* (2) [2013] 3 WLR 179, in wholly different circumstances. They argued that if this alternative test was applied, disclosure would not have been granted.

The police, local authority and guardian all opposed the appeal, arguing that the *Re C* test continued to be valid. The local authority suggested that two additional factors might helpfully be added to the test to accommodate cases of alleged radicalisation or terrorism.

#### Held

The right to silence relates to the parents' position when they were questioned by police. This right does not arise in the Family Court, and Keehan J was correct in holding that granting the application would not breach that right.

The right that does directly apply is "privilege against self-incrimination", namely the right in civil proceedings not to be put in the position of making an admission of criminal conduct. In care proceedings s98 CA1989 disapplies that privilege, with the proviso that evidence or answers given in such proceedings are not admissible in any criminal proceedings. An issue may however arise about the extent to which the prosecution may rely on a chain of enquiry deriving from inadmissible evidence and answers that have been disclosed to police.

In the present case, the parents' statements and position statements contained no material that might incriminate them in any criminal activity; Keehan J was right to give particular weight to that factor. The appellants therefore failed to establish their central ground of appeal based on the right to silence and privilege against self-incrimination.

Sir Andrew MacFarlane, P, delivering the judgment of the Court, commented that in a case where the material sought to be disclosed might contain potentially incriminating evidence, that would not be a complete bar to disclosure; the application would be evaluated, considering the *Re C* factors, before determining whether disclosure was necessary and proportionate.

The President considered there to be no evidence that the test in *Re C* is causing difficulties or failing to deliver a fair and proportionate outcome when it is deployed. Accordingly the appellants' attempt to put forward a new test also failed and the appeal was determined on the criticisms of Keehan J's attribution of weight to each of the relevant factors in the *Re C* test.

There is no need to add additional factors for cases of alleged radicalisation or terrorism; in the instant case Keehan J had attached "particularly substantial weight to the public interest in such cases being investigated" in evaluating the *Re C* factors.

The Court rejected the argument that there was no evidence that the children had been harmed and that if disclosure was justified in this case, it would be justified in all cases of alleged radicalisation or

terrorism. This ignored the central fact that the parents, at a time when FCO advice was not to travel there, spent three or four years in Syria, which establishes a significant index of suspicion that they were engaged directly in radical or terrorist activities. Although Keehan J did not refer to the TEO in his judgment, a court is entitled to have regard to the existence of a TEO given the conditions that must be met to put such an order in place.

Keehan J was justified in relying on the fifth Re C factor, namely that barriers should not be erected between one branch of the judiciary and another. He was also justified in concluding that it was in the interests of the children for the police investigation to move forward to a conclusion, one way or the other, and that refusing disclosure would cause delay in concluding the family proceedings.

There was no basis for holding that Keehan J had fallen into error in his attribution of weight to the factors or that his conclusion was wrong in terms of proportionality; despite the unusual circumstances, disclosure was justified and the appeal was dismissed.

To read the full judgment [click here](#).

**Permission**

 **Family Law Week**