Neutral Citation Number: [2015] EWHC 2265 (Fam)

Case numbers omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of X (Children)
In the matter of Y (Children)

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Mr Simon J G Crabtree (instructed by the local authority) for local authority A
Mr Karl Rowley QC (instructed by Stephensons Solicitors LLP) for MX (mother of X1, X2. X3, X4)
Miss Ayeisha Khandia (of Fountain Solicitors) for FX (father of X1, X2, X3, X4)
Miss Linda Sweeney (instructed by AFG Law) for GX (the children's guardian of X1, X2, X3, X4)
Mrs Jane Crowley QC and Miss Rhian Livesley (instructed by the local authority) for local authority B
Miss Alison J Woodward (instructed by Stephensons Solicitors LLP) for MY1 (the mother of Y1, Y2 and grandmother of Y3, Y4)
Mr Karl Rowley QC (instructed by Linder Myers Solicitors LLP) for MY2 (mother of Y3, Y4)
FY2 (father of Y3 and Y4) appeared in person
Miss Julia Cheetham QC and Miss Elizabeth Morton (instructed by Temperley Taylor) for GY (the children's guardian of Y1, Y2, Y3, Y4)

Hearing dates: 1-2 July 2015 (Re X)
6-8 July 2015 (Re Y)

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

The proceedings were heard in private but this judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. I have been hearing two cases, which I shall refer to respectively as the X case and the Y case (the initials have been selected at random). The two cases are quite separate and involve different families but there are, as will be seen, many points of similarity, so it is convenient to give one judgment.

The background – the X case

2. This case involves four children: X1, a boy born in July 2002, X2, a girl born in September 2008, X3, a girl born in August 2010, and X4 a boy born in March 2012. I shall refer to their parents, who are now separated, as MX (the mother) and FX (the father).

3. On 2 March 2015, the mother and the four children, together with the maternal uncle and maternal grandmother, were detained at an airport in this country as they were about to board a flight to Turkey. The three adults were arrested by the police (they have since been released).

4. On 6 March 2015 the local authority (which I shall refer to as local authority A) applied for, and was granted, emergency protection orders in relation to all four children, the parents having refused to sign an agreement under section 20 of the Children Act 1989. The children were placed with foster carers, together. They remain, together, in foster care. On 9 March 2015 the local authority applied for care orders in relation to all four children. Interim care orders were made by the Circuit Judge on 12 March 2015. The order made by the Circuit Judge records that "The mother neither consents to nor opposes the making of interim care orders in respect of the children." The matter came back before the Circuit Judge on 26 March 2015 and then before Peter Jackson J on 22 April 2015. Peter Jackson J directed that there was to be a finding of fact hearing before me on 29 June 2015.

5. Local authority A's initial threshold statement dated 11 March 2015 listed a variety of concerns, reflected in what was set out in recitals to the Circuit Judge's two orders. One of the orders made by Peter Jackson J on 22 April 2015 recited the key issues in the case as being:

> "(a) When the mother was stopped boarding a plane for Turkey with the children on 2 March, was it her intention to travel there for a legitimate holiday or did she intend to travel for some other reasons and if so, was this to cross the border into Syria to join ISIS fighters?
>
> (b) Have any of the children been radicalised and if so, by whom?
>
> (c) The father's background and mental health.
>
> (d) The parents alleged involvement in serious criminal activity.

> (e) The capacity of the parents to meet the children's needs.
>
> (f) Assuming the mother intended to travel with the children other than for a legitimate holiday, did any members of the extended family know of her plans and if so, who?
>
> (g) Is the threshold satisfied for the making of final orders?
>
> (h) If so, can any or all of the children be placed in the future care of the mother and/or the father and/or with a family member and/or friend and if not, what is a reasonable, necessary and proportionate response in terms of their future placement and future sibling, parental and extended family contact?
>
> (i) If the threshold is crossed, whether a public law order is required and if so, what order is it reasonable, necessary and proportionate to make?"

6. The order recorded the mother's position as follows:

> "The mother disputes that the threshold criteria is crossed. She says that she was intending to travel to Turkey with the children for the purposes of a legitimate family holiday. She says that although she understands why the Local Authority has intervened, her wish is for the children to be returned to her care as quickly as possible or for them to be placed with a member of their family. Once the children have settled in their current placement, she would also like to have increased contact with them so that this takes place more than twice per week."

7. The order directed that the question to be determined at the finding of fact hearing was:

> "When the mother was stopped boarding a plane for Turkey with the children on 2 March 2015, was it her intention to travel to Turkey for a legitimate holiday or to make contact with rebel fighters and/or those assisting them and/or to cross with the children into Syria where they would join the ISIS caliphate and/or join ISIS fighters."

The local authority was directed to file and serve "a detailed schedule of findings it will seek at the finding of fact hearing and in a Scott schedule format." The parents were directed to respond to the schedule of findings, using the Scott schedule.

8. Reflecting provisions contained in previous orders, another of the orders made by Peter Jackson J on 22 April 2015 provided that:

> "4 The UK Passport Agency is requested until 16:00 hours on the 22.04.2016 or until further order not to issue any passport relating to the children … and to notify the local authority of any attempt by any other person and/or body to do so.
>
> 5 The mother is forbidden to remove or to attempt to remove [the children] from England until 16:00 hours on the 22.04.2016 or until further order.
>
> 6 The mother is forbidden to retain, obtain or to attempt to obtain any passport, identity card or papers or any other travel document and relating to [the children] until 16:00 hours on the 22.04.2016 or until further order.
>
> 7 The father is forbidden to remove or to attempt to remove [the children] from England until 16:00 hours on the 22.04.2016 or until further order.
>
> 8 The father is forbidden to retain, obtain or to attempt to obtain any passport, identity card or papers or any other travel document relating to [the children] until 16:00 hours on the 22.04.2016 or until further order."

9. A further order made by Peter Jackson J on 22 May 2015 identified the key issues in the same terms as in the order of 22 April 2015; recited that the parties' positions remained as set out in that order; and provided that the question to be determined at the finding of fact hearing remained as set out in that order.

10. The Scott Schedule was set out in 72 numbered paragraphs. Many of these contained what was described as an "agreed context". Paragraphs 13-24, 27, 29, 31-33, 35-45, 48, 51-59, 61, 63-65, 67, 69 and 71-72 contained the findings sought by the local authority which were disputed. The core allegations, set out in paragraphs 53-55, 65, were that MX had no intention of staying in Turkey; that she intended to travel from Istanbul to the Turkish border with Syria with the children; that once she had crossed the border into Syria she intended to join up with ISIS militants and to supply them with items of use to the group's combative activities; and that her sole purpose and intention was to take up arms with ISIS militants and/or live for the foreseeable future in the Islamic caliphate ISIS claims to have established in the region. It was said (paragraphs 57-58) that, in essence, MX's plan was to take the children to a war zone, and that she knowingly intended to place the children at risk of significant harm. It was further alleged (paragraph 69) that "The mother is a radical fundamentalist with links and contacts with ISIS militants and those who seek to recruit others to their cause."

11. None of this was accepted by MX. Her position, as encapsulated in her response to the local authority's allegation in paragraph 69, was that "I am a practising Muslim. I do not regard myself as a radical fundamentalist and have no links or contacts with ISIS militants."

12. The finding of fact hearing was listed to start before me on 29 June 2015, a Monday. On the previous Thursday, 25 June 2015, MX's counsel, Mr Karl Rowley QC, circulated a position statement on behalf of MX. This set out her position in relation to the findings sought by the local authority as being that:

> "she does not seek to oppose the making of a finding that she was intending to attempt to enter Syria and live in territory governed by the Islamic State. That is not to say that she accepts the truth of the allegations but she does not wish to resist the making of findings on the balance of probability. In these circumstances she does not require cross examination of the local authority witnesses and does not wish to give evidence herself."

13. Unsurprisingly, that radical shift in MX's position gave rise to a certain amount of discussion in court when the hearing began on 29 June 2015. There is no need for me to go into that here. In the upshot, it was left that MX would prepare and file a statement, pending which I had no alternative but to adjourn the hearing until the next day. The statement was circulated the next day, 30 June 2015, shortly before the court was due to sit. It represented another radical shift in MX's position. She acknowledged that she had not been fully open with the court and professionals. Her case now, in short, was that she had travelled to Turkey to meet up again with, and possibly marry, a man she had met in this country collecting money for Syrian refugees and whom she understood to be a doctor in Turkey. She denied any intention of travelling to Syria and said "I do not agree with or support or favour anything ISIS do … and have no wish to be involved with ISIS in any way."

14. In these circumstances, and in the light of other matters which there is no need for me to go into here, it became apparent that the finding of fact hearing would have to be adjourned and re-fixed. It has now been fixed for 19 October 2015; the final hearing is fixed for 7 December 2015.

15. Mr Rowley had made it clear in his position statement that he would in any event wish to apply to have the interim care orders discharged. I directed that his application was to be listed for hearing before me on 1 July 2015. I heard evidence from the social worker, who I shall refer to as SWA, from a Detective Sergeant in the relevant Regional Counter Terrorism Unit who I shall refer to as DS Y, from MX, and finally from the guardian, who I shall refer to as GX. Miss Ayeisha Khandia, on behalf of FX, supported Mr Rowley's application. The local authority and the guardian, represented by Miss Linda Sweeney, opposed it. The hearing concluded on 2 July 2015. I reserved judgment.

16. The Y case was due to commence before me on 6 July 2015. Thinking about the cases over the intervening weekend, it occurred to me to think about the possibility of electronic tagging. Accordingly, on 5 July 2015 I sent the following email:

> "I am sending this email to the advocates in both … cases. Please make sure that it is communicated as soon as possible to all concerned.

> It has occurred to me to wonder whether in these cases it may be appropriate to consider the making of electronic tagging orders: see *Re C (Abduction: Interim Directions: Accommodation by Local Authority)* [2003] EWHC 3065 (Fam), [2004] 1 FLR 653, and *Re A (Family Proceedings: Electronic Tagging)* [2009] EWHC 710 (Fam), [2009] 2 FLR 891 (setting out a form of order).
>
> Could counsel please consider this possibility."

17. I heard evidence relating to this the following week during the hearing of the Y case (see below). Transcripts of this evidence were made available to the parties in the X case. No-one sought to examine or cross-examine the witnesses further, though, with my agreement, MX, FX, GX and local authority A each filed further written submissions on 13 July 2015.

The background – the Y cases

18. These two linked cases involve four children: Y1, a girl born in February 2004, Y2, a boy born in July 2006, Y3, a boy born in July 2011, and Y4, a boy born in November 2013. I shall refer to the mother of Y1 and Y2 as MY1. Their father is dead. I shall refer to the mother of Y3 and Y4 as MY2 and their father as FY2. The children are related, because FY2 is an older son of MY1.

19. On 27 March 2015 MY1, FY2, MY2 and the four children left this country and flew to Turkey. On 1 April 2015, they were detained by the Turkish authorities close to the border with that part of Syria controlled by ISIS. On 3 April 2015, Newton J, on the application of a local authority which I shall refer to as local authority B, made an order making Y1 and Y2 wards of a court and a separate order likewise warding Y3 and Y4. The three adults and the children returned to this country in the early hours of 15 April 2015. The three adults were arrested and remained in custody until 18 April 2015. In accordance with the orders made by Newton J, the children were placed in two separate foster placements, where they remain.

20. The matter came before Peter Jackson J on 22 April 2015. He made separate orders, essentially in the same terms in each case. He discharged the wardships and made interim care orders in relation to all four children. The transcript of the proceedings, which I have seen, shows that although the making of the interim care orders was contested, the issue was not argued out in anything like the detail it has before me. Peter Jackson J consolidated the two sets of proceedings. He directed that there was to be a finding of fact hearing before me on 1 July 2015.

21. In the case of Y1 and Y2 the order identified the key issues in the case as being:

> "(a) Whether the mother intended to take the children across the Turkish border into a Syrian war zone;
>
> (b) The possibility of the children's radicalisation as a result of their exposure to the views held by the mother and/or extended family members."

The order recorded that:

> "This is a single issue case, and it is appropriate for there to be a fact finding hearing to determine the parent's intention in travelling with the children across Turkey towards the Turkish/ Syrian border."

In the case of Y3 and Y4 the order identified the key issues in the case as being:

> "(a) Whether the parents intended to take the children across the Turkish border into a Syrian war zone;
>
> (b) The possibility of the children's radicalisation as a result of their exposure to the views held by the father and/or the mother and/or extended family members."

The order recorded that:

> "This is a single issue case, and it is appropriate for there to be a fact finding hearing to determine the parents' intentions in travelling with the children across Turkey towards the Turkish/ Syrian border."

22. The care proceedings in each case were formally issued on 28 April 2015.

23. The matter came back before Peter Jackson J on 22 May 2015. He re-fixed the finding of fact hearing to commence on 2 July 2015. His order described one of the key issues in the case as being:

> "Would the children have been at risk of significant emotional and physical harm if they had been taken to Syria by their respective parents."

It described the question for determination at the finding of fact hearing as being:

> "whether in April 2015 it was the children's respective parent's intentions to go to a war zone in Syria controlled by Islamic State with the children and for them to remain there on a permanent basis."

Peter Jackson J directed the local authority to file and serve by 12 June 2015 "a Scott Schedule … confirming what findings the local authority shall be seeking at the finding of fact hearing." The parents were directed to file and serve their responses to the Scott Schedule by 25 June 2015. All have done so, though FY2's response has not yet been incorporated in the Scott Schedule.

24. The Scott Schedule is a long and detailed document. It seeks five findings: (1) The adults made plans and travelled to and across Turkey with the intention of entering an ISIS controlled war zone with their respective children and so putting them at risk of physical and emotional harm. (2) They made complex travel arrangements in an effort to conceal their intention to enter Syria. (3) They lied about their travel plans in order

to conceal their intention to enter the ISIS controlled Syrian war zone. (4) They made practical arrangements prior to their departure demonstrating their intention to leave their homes permanently and enter / move to Syria. (5) None of them has provided a plausible explanation for their travel plans and arrangements.

25. In essence, the answer to all this was that the family had gone to Turkey for a holiday and that there was never any intention to enter Syria.

26. It became apparent even before the finding of fact hearing was due to start that, for various reasons which there is no need for me to go into, the case was unlikely to be ready for hearing. In the event it had to be adjourned. It has now been fixed for hearing on 5 October 2015; the final hearing is fixed for 14 December 2015.

27. In position statements dated 21 June 2015, Miss Alison J Woodward on behalf of MY1 and Mr Rowley on behalf of MY2 had made it clear that they wished to have the interim care orders discharged. I directed that the applications were to be listed for hearing before me on 6 July 2015. I heard evidence from DS Y, from the social worker, who I shall refer to as SWB, from Paul Fearnly, the head of equipment services for Electronic Monitoring Services (EMS), from a Detective Sergeant in the relevant police force currently working on counter terrorism who I shall refer to as DS Z, from MY2, from MY1 and finally from the guardian, who I shall refer to as GY. FY2 chose not to give evidence. The local authority, represented by Mrs Jane Crowley QC and Miss Rhian Livesley, and the guardian, represented by Miss Julia Cheetham QC and Miss Elizabeth Morton, opposed both applications. The hearing concluded on 8 July 2015. I reserved judgment.

Parenting

28. The starting point has to be that, so far as relates to the applications before me today, there is no suggestion, apart from the alleged journeys to Syria, that there is, either in the X case or in the Y case, any basis for complaint about any aspect of the parent's basic care for their children. It is accepted that they are, in other respects, good parents who are bringing up their children lovingly and well.

Radicalisation

29. As is apparent, allegations of radicalisation or future radicalisation of the children are made both by local authority X and by local authority Y. This is not the occasion, nor is there any need at this stage, for any examination of what is meant by the word, though I note what Holman J said in *Re M (Children)* [2014] EWHC 667 (Fam), para 23.

30. In the X case, the local authority explicitly disavowed any reliance on a risk of radicalisation for the purposes of determining the interim placement of the children.

31. At a directions hearing in the Y case on 30 June 2015, I had raised with Mrs Crowley and Miss Livesley, the question of what the local authority's stance was on the issue of radicalisation in relation to the question of whether the children should remain in care for the time being. Their response was in a position statement dated 1 July 2015 which, so far as it related to that issue, reads as follows:

> "The Local Authority's overarching case on "radicalisation" is dependent upon the court being satisfied that the purpose of the journey into Turkey was to reach and cross the border into Syria. If the court is so satisfied, the LA will invite it to draw the inference (in the absence of any alternative explanation from the parents as to their motivation for entering a war zone) that their decision-making was driven by the strength of their religious beliefs/ideology, which took priority over the needs of their children, for safety and security.
>
> Pending the determination of the fact finding, there continue to be reasonable grounds to believe that the parents intended to cross the border into Syria and therefore, by inference, also reasonable grounds to believe that they were motivated to do so by religious/ideological factors which could be described as arising from radicalisation.
>
> …
>
> - Whether any of the parents or members of their extended family to whom they are exposed has been "radicalised" or otherwise holds extreme Islamic beliefs/ views, and the resultant risk of the children's "radicalisation" or their otherwise being affected by those beliefs in a way which is inimical with their welfare, remains unassessed. There are however reasonable grounds for believing the attempt to cross into Syria was driven by religion/ideology and placed the children at risk of suffering significant harm.
>
> - The unassessed risk of familial radicalisation contributes to the risk of flight as it provides a motivation.
>
> - The potential harmful consequences for these children of any further attempt at flight are grave."

32. The question of radicalisation in the Y case has been considered by the guardian, GY. GY accepts that she has not seen any evidence of radicalisation in her conversations with the children or in the course of her inquiries so far, but notes the risk of radicalisation, even in the case of very young children, as indicated by *The Prevent duty – Departmental advice for schools and childcare providers* issued by the Department for Education on 1 July 2015. GY's evaluation is that, on an interim basis, there is sufficient evidence to consider that there is a risk of radicalisation of the children which cannot be ignored.

33. In addition to relying to some extent on a risk of radicalisation, Mrs Crowley also voices the fear of local authority A that, if returned to their parents at this stage, the children will "lose any opportunity to build a trusting relationship with non-familial

adults" and that the local authority's "attempts to safeguard the children through monitoring and relationship building will be thwarted."

34. In the case of the two youngest children, Y3 and Y4, the risk of radicalisation over the next six months, in my judgment, is fanciful given their ages. In the case of the two older children, Y1 and Y2, I would accept GY's view that there is a risk of radicalisation over the next six months which cannot be ignored, but the risk in my judgment is modest. The other matters relied upon by Mrs Crowley can only be of marginal, if indeed any, significance.

35. Given the marginal impact of these factors in the Y case, and their absence in the X case, the fundamental issue in each case relates to the degree of risk of the parents seeking to remove the children and take them to Syria.

The law

36. Neither Mr Crabtree, on behalf of local authority A, nor Mrs Crowley, on behalf of local authority B, disputed that it was in principle open to Mr Rowley and Miss Woodward to apply to have the interim care orders discharged, though questioning, in the case of Mr Crabtree, whether this was appropriate given the previous decisions of the court that such orders should be made.

37. I accept that there have to be solid reasons to justify the court re-visiting its previous decision and that there can be no question of a parent, as it were, renewing such an application merely because the case is now in front of another judge. I am also very conscious of the point made by Mr Crabtree in the X case as to the extent of MX's responsibility for the finding of fact hearing having been, as he put it, derailed by her. I have concluded, however, that I should nonetheless re-visit the question of whether the children, both in the X case and in the Y case, should remain in the interim care of the relevant local authority. The arguments, certainly in the detail in which they have now been put before, had not previously been deployed. In each case there is going to be a significant period of delay before the re-fixed finding of fact hearing. And in a matter as important as whether a child should be in the interim care of a local authority or remain living at home while the proceedings are ongoing, the court must be careful not to attach undue weight to the previous forensic stance of the parents. I am satisfied that, despite Mr Crabtree's submissions, there are here solid reasons justifying reconsideration of the issue in both the X case and the Y case.

38. Mr Crabtree and Mrs Crowley did not dispute that, if the matter was to be re-considered by the court, it was for the local authority in each case to establish the need for a continuation of the orders. Likewise, there was no dispute as to the principles I should apply.

39. I was taken to a number of authorities: *Re LA (Care: Chronic Neglect)* [2009] EWCA Civ 822, [2010] 1 FLR 80, *Re B (Care Proceedings: Interim Care Order)* [2009] EWCA Civ 1254, [2010] 1 FLR 1211, *Re B (Interim Care Order)* [2010] EWCA Civ 324, [2010] 2 FLR 283, *Re GR (Care Order)* [2010] EWCA Civ 871, [2011] 1 FLR 669, *Re G (Interim Care Order)* [2011] EWCA Civ 745, [2011] 2 FLR 955, and *Re L (Interim Care Order: Prison Mother and Baby Unit)* [2013] EWCA Civ 489, [2014] 1 FLR 807.

40. In the first of these cases, *Re L-A*, Thorpe LJ referred to three previous decisions of the Court of Appeal: *Re H (a child) (interim care order)* [2002] EWCA Civ 1932, [2003] 1 FCR 350, *Re M (Interim Care Order: Removal)* [2005] EWCA Civ 1594 [2006] 1 FLR 1043, and *Re K and H* [2006] EWCA Civ 1898, [2007] 1 FLR 2043. He continued (*Re L-A*, para 7):

> "What is it then that the three authorities in this court seem to establish? In the first, the case of *Re H*, the crucial paragraphs are [38] and [39], from which can be extracted two propositions, the first that the decision taken by the court on an interim care order application must necessarily be limited to issues that cannot await the fixture and must not extend to issues that are being prepared for determination at that fixture. The second proposition which appears from the final sentence of para [39] is that separation is only to be ordered if the child's safety demands immediate separation. In the subsequent case of *Re M* in para [27] I stated that a local authority in seeking to justify the continuing removal of a child from home necessarily must meet a very high standard. In the final authority, *K and H*, the key paragraph is para [16] in which I described the court's approach thus:
>
> > '… at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection.'"

41. In *Re B (Care Proceedings: Interim Care Order)* [2009] EWCA Civ 1254, [2010] 1 FLR 1211, para 31, Wall LJ approved as immaculate the direction the judge had given in that case:

> "whether the continued removal of KB from the care of her parents is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her parents' care?"

In *Re B (Interim Care Order)* [2010] EWCA Civ 324, [2010] 2 FLR 283, para 21, the same judge described this as being a "test … which can be universally applied." Subsequently, in *Re G (Interim Care Order)* [2011] EWCA Civ 745, [2011] 2 FLR 955, para 22, Sir Nicholas Wall P, as he was by then, summarised the authorities:

> "by asking ourselves the question whether the children's safety (using that term to include both psychological and physical elements) requires removal, and whether removal is proportionate in the light of the risks posed by leaving them where they are."

42. The same approach applies whether the court is considering whether to remove a child for his or her interim protection or, as here, to decline to return the child for that reason: see *Re L (Interim Care Order: Prison Mother and Baby Unit)* [2013] EWCA Civ 489, [2014] 1 FLR 807, paras 43-48.

43. There is no need for me to go to *Re GR (Care Order)* [2010] EWCA Civ 871, [2011] 1 FLR 669, or to the most recent decision of the Court of Appeal, *Re T (Children)* [2015] EWCA Civ 453, which, so far as material for present purposes, add nothing to the jurisprudence established in the other cases to which I have referred.

44. I add only that in evaluating the "risk of harm" in a case such as this the court will, as in a 'temporary leave to remove for a foreign holiday' case, need "to assess not only the magnitude of risk of breach of the … order but also the magnitude of the consequence of breach of the … order": see *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084, 1087, and *Re A (Prohibited Steps Order)* [2013] EWCA Civ 1115, [2014] 1 FLR 643.

45. Where the degree of potential harm if the risk becomes a reality is modest, it may be that a significant degree of risk can be contemplated. Where, in contrast, the degree of potential harm if the risk becomes a reality is large, it may be that only a small degree of risk will be tolerable. I also bear in mind the point made by Thorpe LJ in *Re K* that:

> "Of course the father's impeccable record as a carer was highly relevant to an assessment of the risk of breach. But it was irrelevant to an assessment of the magnitude of the consequence of breach. Where the consequence of breach would be the irretrievable separation of the child from previous roots, then in my opinion it is for the court to achieve what security it can for the child by building in all practical safeguards."

46. I will need to develop this in due course, but as matters have developed it can be seen that the central focus in each of the cases before me is on three factors: first, the magnitude of the risk that the parents will, if their children are returned to their care, be minded to remove them to Syria; second, the magnitude of the risk that, if they do, they will be able to evade the protective measures put in place by the court and designed to prevent their departure from this country; and, third, the magnitude of the consequences for the children if, in the event of their parents attempting to remove them to Syria, they are able to evade those protective measures. As Patten LJ said in *Re A (Prohibited Steps Order)* [2013] EWCA Civ 1115, [2014] 1 FLR 643, para 25, in the context of a temporary leave to remove case, such applications:

> "will inevitably involve consideration of three related elements:
>
> (a) the magnitude of the risk of breach of the order if permission is given;
>
> (b) the magnitude of the consequence of breach if it occurs; and
>
> (c) the level of security that may be achieved by building in to the arrangements all of the available safeguards."

Submissions: the families

47. Mr Rowley and Miss Woodward take as their starting point the fact that, the precipitating events apart, the parents are, in other respects, good parents who are bringing up their children lovingly and well. Although it would seem that all the children are doing as well as might be expected in foster care, there is no doubt that they are missing their parents very much and that they are, in consequence, suffering harm. In these circumstances Mr Rowley and Miss Woodward question both the necessity and the proportionality of the children remaining in foster care. Their safety, both physical and emotional, can, it is submitted, properly be met while the children remain at home; their safety, whether physical or emotional, does not necessitate their remaining in foster care.

48. In the final analysis, say counsel, my task is to evaluate the risk of harm deriving from the possibility of flight and balance that against the undoubted harm the children are suffering because of continued separation from their parents. Given the adequate safeguards against the risk of fight which they assert can be put in place, the balance, they submit, comes down in favour of returning the children to their parents.

49. Both local authorities are clear that they feel unable to exercise the parental responsibility vested in them by the interim care orders unless the children remain in foster care. That being so, Mr Rowley and Miss Woodward say that the appropriate order is, in each case, an order discharging the interim care orders, making the children wards of court, and placing them in the care and control of their parents, subject, however, to a raft of stringent protective orders.

50. What Mr Rowley and Miss Woodward propose is in each case an order containing: passport orders in the usual wide-ranging form and an all-ports alert; injunctions restraining the parents removing the children from the jurisdiction and requiring them to live with the children at a specified address; and provisions for the monitoring of the parents and the children by a combination of unannounced visits by the local authority, regular reporting to a specified police station or local authority office and, in the case of the parents, electronic tagging. It is proposed that the order should include a provision requiring the parents to swear on the Quran that they will abide by each and every provision of the order and that the order should spell out the consequences (including but not limited to committal for contempt of court) in the event of any non-compliance.

51. There is no need for me to consider whether I would have power to impose such orders on unwilling or recalcitrant parents, for all the parents here are willing to submit to whatever restrictions, including electronic tagging, I think it necessary to impose for the safety of the children. That said, I am inclined to agree with the views expressed by Singer J in the passage from his judgment in *Re C (Abduction: Interim Directions: Accommodation by Local Authority)* [2003] EWHC 3065 (Fam), [2004] 1 FLR 653, para 46, which I refer to below.

52. Mr Rowley and Miss Woodward realistically accept that, however stringent the protective measures which might be put in place, there will always be *some* risk that the parents will be able to flee with the children. But they counsel me against being too concerned by remote or fanciful possibilities. An order the court makes is not, they submit, to be measured by the standard of certainty or infallibility but by reference to what Mr Rowley called real-world possibilities. Judged by that standard,

he says, the risk is slight indeed, in reality reduced to an effective nullity if the parents are, as they propose, subjected to GPS electronic tagging (as to which see below).

53. To get the children to Syria, he says, the parents would: have to cut the tag (thereby triggering an immediate alarm), having made arrangements to travel immediately to a point of exit from the United Kingdom; have to evade detection while in transit there; have to evade detection at the point of exit despite their being in a family group, the all-ports alert, and publicity about them being on the run; have to be able to pass through the immigration controls of a second country without detection; and have to be able to cross from that country (or some third country) into Syria. Whilst he accepts the possibility that the parents have the connections and means to achieve all this, Mr Rowley disputes that there is any evidence upon which I could reasonably infer it.

54. More tellingly, perhaps, Mr Rowley makes the point that if the parents do indeed have the means to achieve this, the children are not safe in their foster placements. For if they have the resourcefulness and determination postulated by the local authorities and the guardians, the parents would by the same measure be able to track the children down and abduct them. The reality, he suggests, is that nothing short of actual incarceration of the children would ensure the complete eradication of all risk of their being removed to Syria. In truth, he says, the local authorities and the guardians are prepared to countenance a level of risk in the present placements while requiring from the proposed placements with the parents the certainty that all risk has been eradicated.

55. FY2 adopts the same position as MX, MY1 and MY2.

56. FX, although separated from MX, supports her application. He has witnessed firsthand the emotional harm his children are suffering by being separated from their mother. He would prefer the children to be returned to their mother's care rather than being placed in the interim, as local authority A and GX propose, with his relatives.

Submissions: the local authorities and guardians

57. Mr Crabtree on behalf of local authority A submits that the proposed safeguards are inadequate – although they reduce the risks they do not do so materially. He says that, at best, electronic tagging provides a prospect of apprehension if the tagged person cuts off the tag and absconds. He says that, on the working assumption on which I have to approach the matter, nothing is really likely to stop MX who, moreover, being aware of the evidence of DS Y, DS Z and Mr Fearnly (see below), is now better placed than before to know how to achieve her objective. There remains what he says is an unassessable and unacceptable risk.

58. Mr Crabtree also suggests that the intrusive, impractical and burdensome realities of the protective measures which are proposed will impact on MX's ability to function as a mother to such an extent as itself to be harmful to the children. He submits that without someone having a tag fitted and trying to go out being a parent, it is impossible to predict just how the parenting function will be affected and how adversely. What I am being invited to endorse is in reality, he says, an explorative leap in care cases of this nature, and this, he submits, is something to be factored in when looking at the balancing of what is or is not reasonable, necessary and

proportionate. The true comparison, he says, is between a significantly compromised family life if the children return to their mother with the family life they will have if placed with the paternal family. Here, he suggests, the reality would be that the children's day-to-day life will amount to imprisonment at home.

59. Mr Crabtree submits that if, contrary to his primary submissions, I am prepared to discharge the interim care orders, the protective measures to be put in place should include a requirement for the provision of up-to-date photographs of MX and the children, of all current telephone numbers for the parents, the children and members of the immediate family, of the log-in details and passwords for all email and social media accounts of MX and the children, and of the vehicle registration mark of any private vehicle in which the children will be permitted to travel.

60. Mr Crabtree raises an important point when he asks who is to decide what is to be done in the event of some apparent breach of the order: is this to be a matter for the police, the local authority or the court (perhaps a duty judge who knows little or nothing of the case beyond what is set out in this judgment)? And he conjures up the spectre of a removal or even a series of removals which the court might not wish to endorse.

61. Mrs Crowley makes much the same points on behalf of local authority B. The risks cannot be effectively managed – there is a risk of flight which cannot be overcome by protective measures. The family could vanish without trace even before the local authority became aware of it. Mrs Crowley adds that MY1 was born in Pakistan, so she, FY2 and the children have dual citizenship, do not require a British passport to leave the United Kingdom and could travel on a Pakistani passport or other Pakistani document the obtaining of which the court has no effective means of preventing.

62. GX and GY adopt much the same position. Miss Sweeney, on behalf of GX, submits that, although it may offer a degree of reassurance, even GPS electronic tagging is not infallible, as demonstrated by Mr Fearnly's evidence. GX would be strongly opposed on welfare grounds to any suggestion – in fact there is none – that any of the children should be tagged. GX is very concerned by what he describes as MX's fundamental and consistent lack of honesty during the course of the proceedings, as shown by her changes of position. He opposes the children's return to her before the local authority has been able to undertake a further assessment of MX in the light of her latest explanation of why she was heading for Turkey.

63. Miss Cheetham, on behalf of GY, submits that there is a significant risk of flight which is extremely difficult to manage in circumstances where the family is not co-operating with the local authority, aggravated by the fact that there is an inherent difficulty in monitoring the children during the long summer holiday. GY recognises the inherent and obvious emotional risk to the children in being separated from their parents, and that Y3 and Y4 in particular suffered emotional distress at the separation. Miss Cheetham points to what she calls the high degree of animosity towards the local authority demonstrated by FY2 and the absence of any co-operation or trusting working relationships with the local authority. On balance, and taking everything into account, GY believes, and Miss Cheetham submits, that at present – GY wishes to keep the position under review – the children's safety requires that the current placements are maintained.

Re M

64. Reference has understandably been made to my recent decision in *Re M (Children)* [2015] EWHC 1433 (Fam), where I approved an order providing for protection of children who had been returned from Turkey in circumstances superficially similar to those in the Y case by means of wardship rather than interim care orders. That case, however, provides no real assistance. All these cases have to be decided on their own particular facts. In *Re M*, the local authority felt that the parents were co-operating and so did not seek interim care orders. That is not a stance that either local authority A or local authority B feels able to adopt here. Moreover, Mr Rowley and Miss Woodward accept that, on any view, much more stringent protective orders are required here than anything suggested in *Re M*.

65. The one point which I do derive from *Re M*, and it is an important point, is the enduring relevance of what Lord Eldon LC said in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, at 18:

> "it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."

As I remarked, and I repeat, these words are as apposite today as they were over 180 years ago.

Analysis

66. Each of these cases has, of course, to be considered in the light of its own particular circumstances. That said, there are obvious similarities between them.

67. No-one disputes, or could sensibly dispute, that interim threshold is satisfied in both the X case and the Y case.

68. As I have already explained, the fundamental issue in each case relates to the degree of risk of the parents seeking to remove the children and take them to Syria.

69. In relation to this, I have identified the three factors, plainly common to each case, which have to be evaluated. I take them in turn.

70. It is convenient to start with the third of the factors I have identified, the magnitude of the consequences for the children if, in the event of their parents attempting to remove them to Syria, they are able to evade any protective measures put in place by the court. It is properly common ground before me that the potential consequences could not be more grave: given the realities of life on the ground in this part of war-torn Syria, really serious bodily injury or even death. So we are here concerned with potential consequences at the extreme end of the spectrum: death or mutilation.

71. I turn to the second matter, the magnitude of the risk that the parents will, if their children are returned to their care, be minded to remove them to Syria. Given that the finding of fact hearings have yet to take place, the answer to this question must in the nature of things be speculative. And I must resist any temptation to conduct some kind of pre-trial assessment of the merits. In the circumstances I can say only this. In

both the X case and the Y case the local authority has been able to assemble a very strong prima facie case against the parent or parents. The parents may be able to demonstrate – the burden of proof remains, of course, on the local authority throughout – that there are innocent explanations, but these are not cases that suggest, as some care cases do, obvious deficiencies in the case being put forward by the local authority, let alone the kind of case that can simply be 'laughed out of court.' In each case the prospect of the local authority making good its assertions is real, very real, not fanciful.

72. And if it turns out that the parents have in the past attempted to go to Syria, what is there to show that they will not try again? These are, to use Secretary Rumsfeld's famous taxonomy, known unknowns. But in a case such as this, one cannot safely rule out the possibility that there are also unknown unknowns.

73. In all the circumstances I can proceed safely only on the basis that the risk that the parents will, if their children are returned to their care, be minded to remove them to Syria is at present unknowable and unquantifiable but potentially very great indeed.

74. Thus far, this analysis is not seriously challenged either by Mr Rowley or by Miss Woodward or by FY2. They all accept the reality, that the outcome of these applications will turn on the answer to the third question: what is the magnitude of the risk that, if the parents do attempt to remove the children to Syria, they will be able to evade the protective measures put in place by the court and designed to prevent their departure from this country? In short, can the court adequately and safely manage what I have to assume is a very grave risk of flight?

Flight risk: the expert evidence

75. Evidence in relation to techniques for managing flight risk was given by DS Y, DS Z and Mr Fearnly. It will be understood that it would be most unwise for me to go into this in any detail in a public judgment. Transcripts of their evidence are available on a 'need to know' basis for those who need to see exactly what they said.

Flight risk: border controls

76. DS Y and DS Z gave evidence about UK border controls, about what I shall refer to as the port alert system, and about methods of evading border controls. For present purposes it suffices to say this. There are UK border controls at all airports and seaports. In the nature of things, those controls vary in their efficacy. The port alert system, one part of which is familiar to family judges and practitioners, operates by the electronic matching of names on what I shall refer to as the stop list with the names on passenger manifests previously supplied to the relevant authorities by passenger carriers. The system is not fool-proof. There are in principle two methods of evading border controls: one is by the use of a false passport (I do not propose to go into the various techniques in use though two will be familiar to those who have read the book or watched the film *The Day of the Jackal*); the other is by clandestine departure, for example avoiding a port and leaving by small boat or light aircraft.

77. The witnesses confirmed what one would in any case have surmised: that the system of UK border controls, though tight, determined, efficient and usually reliable, is not fool-proof, and that a resourceful individual with adequate resources can, if

determined to do so, evade the system and leave the UK without being detected. Plainly, the difficulties in evading the system are greater if a number of adults and young children are involved, but even that is not impossible.

Flight risk: electronic tagging

78. Mr Fearnly gave evidence about the technical aspects of electronic monitoring. Most monitoring is by a radio-frequency monitor, placed in the tagged person's home, which automatically alerts the monitoring control if the tagged person either interferes with the tag (or the monitor) or leaves the premises during a defined curfew period. A more sophisticated system of GPS monitoring is also available, which is programmed to track the tagged person's movements at defined intervals (if desired, a period measured in minutes or even parts of minutes) and programmed to send an automatic report to the monitoring control of those movements at pre-determined intervals (which, again, can be a matter of minutes rather than hours). It also alerts the monitoring control if the tagged person either interferes with the tag or travels outside a previously defined zone. The equipment is designed to 'fail safe', so it may occasionally send a false report that someone has absconded or interfered with the equipment when in fact neither has happened. Mr Fearnly was not aware of any occasion on which the equipment had failed to report when it should have done so.

79. The tag is designed to be very difficult to remove and any attempt to do so will send out an alarm message. However, even the GPS system is not fool-proof. If the tagged person is able to remove the tag and make an escape from his last known position before the authorities arrive, he may be able to evade capture, even though the alarm will have been transmitted within seconds of the equipment being tampered with. Mr Fearnly was aware of two such cases.

Electronic tagging: law and practice

80. The use of electronic tagging is very familiar in the criminal jurisdiction, where it is well established. In the family jurisdiction, its use, although not without precedent is still fairly infrequent.

81. The first recorded consideration of electronic tagging in the family jurisdiction appears to have been in the judgment of Singer J in *Re C (Abduction: Interim Directions: Accommodation by Local Authority)* [2003] EWHC 3065 (Fam), [2004] 1 FLR 653. That was an international child abduction case under the Child Abduction and Custody Act 1985 (CACA). Singer J explained the practice (paras 5-7):

> "5 It is a very common, if not indeed an almost invariable, practice in proceedings in this jurisdiction brought under the CACA where wrongful removal or retention are alleged and an order for the return of the child forthwith to the territory of the requesting State is sought, that protective measures are put in place designed to prevent any disappearance or removal of the child from England and Wales designed to thwart the proceedings. Thus, routinely, orders are made for passports and travel documents of both child and accompanying adult to be handed over and retained to the order of the court, and injunctions are granted to inhibit removal of the child from the

> address at which he or she has been located, and restraining removal from England and Wales. The port alert procedure can be activated in cases where there is a 'real and imminent' risk of removal. Sometimes further requirements are imposed, such as an obligation to report at specified times to a local police station. As it happens in this case a very innovative suggestion was made by the mother herself, that she should voluntarily subject herself to electronic tagging: a topic with which I will deal below.
>
> 6 In a very small minority of cases, however, powers such as these may not appear adequate to meet the degree of risk which pertinent circumstances suggest. Thus … the removal of passports might not to a determined or to a desperate individual represent any great or effective obstacle to flight and disappearance ...
>
> 7 Analogous problems can arise in rare cases of perceived 'high flight risk' when a direction for a child's collection is issued to the Tipstaff, authorising him not only to locate but also to remove a child ..."

82. Returning to the question of electronic tagging, Singer J said this (paras 45-46):

> "45 … an innovation in this case was the mother's suggestion that the package of protective measures should include a … that she undergo electronic tagging. I take the view that such a direction may be made …
>
> 46 … in principle arrangements for electronic tagging can be made if the court so orders, which I assume it would ordinarily only do with the consent of the individual concerned (or perhaps as a condition non-compliance with which might bring about alternative safeguards against the perceived risk). I emphasise that such requirements are unlikely to be appropriate save in a very few cases."

83. The next reported case is the decision of Parker J in *Re A (Family Proceedings: Electronic Tagging)* [2009] EWHC 710 (Fam), [2009] 2 FLR 891. That was another child abduction case. As Parker J recorded (para 5), the parties had agreed that, when the child was with the mother, the mother should be subject for the time being to a curfew supported by electronic tagging. Commenting that the availability of tagging arrangements in appropriate cases in family proceedings was apparently not widely known, and that counsel had asked that she describe them for the assistance of the profession, Parker J, having referred to Singer J's judgment in *Re C*, set out the arrangements for making such orders and a specimen draft electronic tagging order. She made clear (para 8) that "tagging is available in family cases."

84. I need not set out the arrangements as they were described by Parker J, for there have been some subsequent changes.

85. The first change was signalled in Guidance issued by Her Majesty's Courts Service in, I believe 2010, which stated that:

> "Previously such orders came through a central HQ team or the President's office however this is an unnecessary step and courts should now contact the service providers directly."

At that time the service providers were Serco and G4S. Revised Guidance, currently in force, was issued by Her Majesty's Courts & Tribunals Service (HMCTS) in April 2015. The service provider is now Electronic Monitoring Services (EMS), the operating name of Capita. The Guidance is available on the web at http://libra.lcd.gsi.gov.uk/hmcts/documents/family-courts-work/fc-electronic-monitoring-guidance.doc. Since it is not to be found in the Family Court Practice 2015, I set it out in an Annex to this judgment.

Flight risk: discussion

86. The law, even the criminal law in the days of capital punishment, has never adopted a standard of absolute certainty or infallibility. So the mere fact that there is, as Mr Rowley and Miss Woodward accept, *some* risk that the parents will, if so minded, be able to flee with the children, the fact that it is no doubt possible to construct hypothetical scenarios of how they might achieve this, is not determinative of the question I have to decide. That question, in the final analysis comes down, in my judgment, to two linked inquiries: how great is the risk that the parents will, if so minded, be *able* to flee with the children, and is that a degree of risk which the court is, in all the circumstances, prepared to accept as tolerable?

87. Given the potential consequences if the parents, being minded to flee with the children, were able to achieve their objective, it seems to me that what the court needs is a very high degree of assurance, albeit falling some way short of absolute certainty, that the protective measures put in place will be effective to thwart any attempted flight. This is ultimately a matter for judgement and evaluation, in relation to matters, in particular those dealt with DS Y, DS Z and Mr Fearnly, which I am in as good a position to assess as any of the social workers or guardians, none of whom can bring to this particular exercise in evaluation either professional training or (as they all accepted) any previous experience of any remotely comparable case. Accordingly, I have to come to my own conclusion, though obviously feeding into my overall evaluation the expert views of the social workers and the guardians as to the impact on the children of their continuing separation from their parents.

88. At the end of the day, and having given the matter the most anxious thought both during and since the two hearings, I have concluded that the comprehensive and far-reaching package of protective measures proposed by Mr Rowley and Miss Woodward *does* provide the necessary very high degree of assurance that the court needs, that I need, if the children are now to be returned to parental care. Taking into account all the points pressed upon me by those opposing such an order, I am at the end of the day persuaded by Mr Rowley and Miss Woodward that I should make the orders they seek, and essentially for the reasons they have articulated.

89. I accept that there is *some* degree of risk of successful flight. I cannot go quite as far as Mr Rowley when he asserts that it is reduced to an effective nullity by the

protective measures he proposes, but taking a realistic view, though not forgetting that we are here in the realm of unknown unknowns, my considered assessment is that the degree of that risk is very small, indeed, so small that it is counter-balanced by the children's welfare needs to be returned to parental care. I should add, to make plain, that in relation to their welfare (leaving flight risk on one side), the benefits all of these children will derive from being returned to their parents clearly, in my judgment, outweigh any and all of such contrary welfare arguments as have deployed by the local authorities or the guardians.

Conclusion

90. I shall therefore make orders essentially in the terms proposed by Mr Rowley and Miss Woodward. The orders will contain the additional provisions proposed by Mr Crabtree and Mrs Crowley. The orders will spell out that nothing is intended to prevent the police exercising any powers which would otherwise be available to them, including, in particular, their powers under section 46 of the Children Act 1989. I invite counsel to consider two further matters: whether the proposed oaths on the Quran should be sworn before a notary or an imam, and what, if any, provisions should be included in the orders to enable the relevant local authority to remove the children in an emergency if there has been some breach of the order and there is no time to apply even by telephone to the duty judge. I am inclined to think that the local authorities should have that power, but strictly confined to circumstances of emergency and subject to an unqualified obligation to make an application to the court immediately.

Postscript

91. This judgment was sent out to the parties in draft in the usual way on 22 July 2015.

92. Acting in accordance with the HMCTS Guidance, local authority B contacted EMS. The response is recorded in an email which local authority B circulated on 23 July 2015 at 1420:

> "Catriona Combe from the National Offenders Management Unit has telephoned me to confirm that at the present time the funding for the tags has not been agreed and the local authority may need to fund the costs of the tags. The local authority is not agreeable to funding the tags and until we have further information in respect of this issue then no further steps will be taken in respect of the children returning home."

93. The day before, 22 July 2015, my private office had received at 1713 the following email from an official in the Ministry of Justice (MoJ), referring to an earlier telephone conversation with my assistant private secretary:

> "Further to our discussion this afternoon, I understand that the President is considering making an order in a family case for GPS satellite tracking. We have been liaising with NOMS about the implications and wanted to raise our concerns and if possible seek to make representations before such an order is made.

We have little information on the case in hand. The information we do have is that the case was in front of the President at the … Family Court. We understand that [local authority B] have approached EMS, the company that deliver tagging services, about what would happen if GPS was ordered in this case. We assume to prevent abduction. I understand that three GPS tags have been ordered.

As far as I am aware the power for family courts to make a tagging order comes from the judgment of Mrs Justice Parker which makes clear that tagging is available in the High Court where there is an agreement between the parties that tagging should be used. We are not aware of any power in the family courts to impose tagging against the will of the party or parties involved. The description of tagging in the judgment is based on a curfew rather than the GPS system. As you are aware we have updated guidance on tagging and electronic monitoring in the family courts which was published earlier this year. The responsibility for the tagging contracts lies with NOMS. I am certain that in working with colleagues on drawing up the revised guidance we did not consider that GPS was within the scope of the powers available to the family court.

We (MoJ family justice policy) and NOMS have concerns about the use of GPS technology in the family courts. In criminal cases GPS tagging is currently available on an exceptional basis only, where individuals are deemed to pose an exceptional risk, primarily where there are security concerns. Each case is the subject of an approvals process and a unique protocol agreement backed up by robust process to manage monitoring and respond to any breaches. The use of GPS in family cases also has resource implications that have not been considered in the context of any previous guidance. In addition, there are concerns around what the expectations around the monitoring would be, whether there would be requirements such as exclusion / inclusion zones, what breach process and enforcement action would look like, and critically who would be responsible for enforcement.

If the President is minded to continue with making such an order we would welcome the opportunity to make representations before such an order is made. We understand that Capita attended the most recent hearing to describe the technology. However, this did not cover or reflect the responsibilities of NOMS which we believe require consideration.

I am sorry for the rather rushed email but as we discussed we felt that given the urgency we needed to provide something for the President's immediate consideration. I am happy to discuss

> further and myself and NOMS colleagues stand ready to assist the President."

I forwarded the email the same day (at 1933) to the parties in both cases.

94. On 24 July 2015 I made an order in the following terms:

> "The draft judgment in … (the Cases) having been sent to the parties on 22 July 2015
>
> UPON READING (a) the email sent by the Ministry of Justice to the assistant private secretary of the President of the Family Division at 1713 on 22 July 2015 (the contents of which were forwarded to the parties' representatives by email at 1933 on 22 July 2015 and subsequently on 24 July 2015 to the third respondent in … who acts in person) and (b) the email sent by [local authority B] at 1420 on 23 July 2015 (and forwarded to the President by email at 1550 on 23 July 2015)
>
> IT IS ORDERED by the President of the Family Division of his own motion that:
>
> 1 The Ministry of Justice (MoJ) the National Offender Management Service (NOMS) and Electronic Monitoring Services (EMS) must notify the President of the Family Division by 4pm on 27 July 2015 by email to … as to:
>
> (a) whether they wish to make any representations in the Cases;
>
> (b) whether those representations will relate to (i) the availability (or otherwise) of the GPS tagging equipment required for use in the Cases (ii) the cost of providing the GPS tagging equipment required for use in the Cases (iii) who should be liable for meeting such cost or (iv) any other (and if so what) matters.
>
> (c) how much time they need in order to prepare those representations (the President of the Family Division being minded to require such representations to be lodged by 4pm on 29 July 2015).
>
> 2 If MoJ NOMS or EMS wish to apply to vary or discharge any part of this order they must communicate that fact at the earliest opportunity by email to … "

95. On 27 July 2015 my Clerk received (at 1532) the following communication from MoJ:

> "I am writing in response to the attached order … in which the President of the Family Division made an order in the following terms: [quoted].
>
> We are grateful to the President for his further consideration of this case and the revised order.
>
> On Point A of the revised order. I am responding on behalf of the MoJ and NOMS to confirm that we do wish to make representations in these cases.
>
> On point B of the order. I can confirm that our representations will relate to the availability of GPS equipment. Depending on our full response to this point our representations may also include responses to the other matters raised in B ii, iii and iv.
>
> On point C. We acknowledge the President's view that he is minded to require representations by 29 July. Both the MoJ and NOMS are acutely aware of the need to respond quickly given the facts of these cases. However, given the issues in hand we respectfully seek a short extension in order to prepare our representations. We would ask that the President order that representations be required by 4pm on Friday 31 July. I hope the President is able to agree with this timeline.
>
> I would be grateful if you would make sure that this email is placed before the President for his consideration. I am happy to discuss further if required."

96. My Clerk responded the same day (at 1640) as follows:

> "The President has seen and thanks you for your emailed response.
>
> He is prepared in the circumstances to extend your time for submissions until 12 noon on Friday 31 July 2015. He wishes me to draw your attention to the likelihood that a hearing to deal with these and related issues will take place in the week commencing Monday 3 August 2015, possibly very early in the week."

97. This interchange was forwarded to the parties in both cases the same day at 1645.

98. On 28 July 2015 the parties in both cases and MoJ were notified that both cases were to be listed, for dealing with the matters raised by MoJ, on Monday 3 August 2015.

99. I now, 30 July 2015, hand down judgment. Because of the intervention by MoJ I have not as yet been able to make any orders.

Annex

100. The Guidance, *Tagging or Electronic Monitoring in Family Cases*, is as follows:

> "Occasionally a judge will request a parent or party to the proceedings to be electronically tagged. This is a device that is fitted on the leg and allows the Electronic Monitoring contractor to monitor compliance against a curfew. It is normally referred to as a curfew or tagging order in family proceedings and is only available in High Court matters.
>
> It is usually ordered in children's cases when there is a real risk of one of the parents' abducting the child. These matters clearly need to be dealt with as a PRIORITY and should be processed on day of receipt.
>
> The National Offender Management Service (NOMS) is responsible for the electronic monitoring contract and there is a contract in place with Capita, operating as Electronic Monitoring Services (EMS), who monitors these orders on behalf of agencies. If possible EMS need to be contacted by 15:00hrs to ensure that the tag can be fitted the same day but if they receive the order after this time then they will endeavour to install that same day but they are permitted, under the contract, to install the tag the following day.
>
> This guidance shows you how to deal with such a request once an order has been made.
>
> 1. Q: Have family courts the legal power to make such orders?
>
> The judgment of Mrs Justice Parker from March 2009 makes clear that electronic monitoring is available in High Court matters.
>
> 2. Q: Is there a specific protocol/contract in place to deal with tagging requests in family proceedings?
>
> Due to the relatively low number of such requests there is not a specific contract in place to provide this service. NOMS have a contract in place with two providers for tagging orders in the criminal courts and we operate within this to get family orders actioned.
>
> 3. Q: What are the requirements for the order?
>
> The order or an attachment to the order must contain:
>
> • Full name of the person to be tagged
>
> • Date of birth of the person to be tagged.
>
> • Full address of the place of curfew

• Date and time which the electronically tagged person agrees to be present at the address to allow the device to be fitted.

NOTE: usually the provider will fit the device anytime prior to midnight (22:00 for young people) the day that the curfew is due to start, or the following day.

• A schedule of the times at which the court expects the person to be at home (or any other relevant place), so that the service provider can monitor compliance.

a) the start date of the curfew, and if known,

b) the end date of the curfew

c) the days on which the curfew operates

d) the curfew hours each day.

The name and contact details of the relevant officer/ solicitor whom the service provider should report to if there is any breach of the above schedule or if the person appears to have removed, or attempted to remove the tag. NOTE: a named contact must be given – usually the solicitor in the case.

4. Q: Who do I need to contact and by when?

A: Once an order has been made you should contact the service provider directly.

Due the rarity of these orders it is best practice to call the providers initially so they can prepare for the incoming order. EMS can be contacted on 0161 862 1200

Be sure to contact the solicitors in the case, if appropriate, to confirm that the order has been received and has been processed by the provider.

5. Q: What if a tagging order is subsequently extended?

Occasionally, the judge will extend the time of the curfew that is already in place.

REQUIREMENTS:-

• Sealed Order giving further leave to extend the time of the curfew – note any new instructions there may be.

• New schedule, setting out the information as stated above.

Repeat all the actions at point 4.

6. Q: What happens once a curfew has expired?

Unless the provider receives instructions to the contrary once a curfew order has expired the service provider will automatically remove the electronic monitoring device without any further contact from the court.

7. Q: What happens if a curfew is breached?

Depending on the contents of the order the service provider will normally contact the named person on the order to notify them of the breach. This is why it should usually be a solicitor to the case as they will be able to take immediate action. If the named contact is a member of court staff you should notify a member of the judiciary immediately to get further directions.

At annex A there is an example of what a tagging or curfew order may look like"

101. The annexed form of order is as follows:

"IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

PRINCIPAL REGISTRY

BEFORE xxxx SITTING IN CHAMBERS AT xxxx ON xxxx.

IN THE MATTER OF xxxx (BORN ON xxxx) (A CHILD)

AND IN THE MATTER OF AN APPLICATION UNDER THE INHERENT JURISDICTION OF THE HIGH COURT

AND IN THE MATTER OF AN APPLICATION UNDER THE SENIOR COURTS ACT 1981

BETWEEN:

xxxx

Applicant

and

xxxx

Respondent

UPON HEARING xxx

BY CONSENT

IT IS ORDERED THAT:

1. EMS is requested to take such steps as are necessary to effect and to continue the electronic tagging of the Respondent xxxx, xxxx (D.O.B. xxxx) in accordance with the schedule of information provided below.

Schedule of information provided for the purposes of effecting and continuing the electronic tagging of a person

Name and date of birth of person to be electronically tagged	xxxx (D.O.B. xxxx)
Address of the place of curfew	xxxx
Date and time at which the electronically tagged person agrees to be present at the address of the place of curfew for the purposes of the installation of the monitoring device	xxxx
State date of curfew	xxxx
End date of curfew	xxxx (include time curfew ends)
Days on which curfew is in place	xxxx
Curfew hours	xxxx
Name and contact details of relevant person whom should be contacted if there is a breach of the curfew or if the tag is removed or otherwise interfered with	xxxx

DATED xxxx”