Neutral Citation Number: [2020] EWCA Civ 448

Case No: B4/2020/0022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
Her Honour Judge Redgrave
ZE18C00641

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2020

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE KING
and
LORD JUSTICE HOLROYDE

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A (Children)

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Mr Christopher Miller (instructed by **Blackfords llp**) for the **Father**
Mr John Buck (instructed by **Metropolitan Police Service**) for the **1st Respondent**
Mr Brian Jubb (instructed by **A London Borough**) for the **2nd Respondent Local Authority**
Mr Steven Ashworth (instructed by **Charmini Ravindran Law**) for the **3rd Respondent Mother**

Hearing date: 13th February 2020

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Approved Judgment

Lady Justice King:

1. This is an appeal against an order made by Her Honour Judge Redgrave on 20 December 2019 whereby, upon the application of the Commissioner of the Metropolitan Police Service ("the Police"), she ordered the disclosure of a number of documents which had been filed in care proceedings.

2. The issue before the court is whether the judge was wrong to order the disclosure of the documents in question.

Background

3. The care proceedings were issued following injuries having been sustained by a baby, J, when he was 9 weeks old and in the care of the Appellant ("the father") and the 2nd Respondent ("the mother").

4. At the end of a lengthy finding of fact hearing, the judge made findings against the backdrop of J having sustained brain injuries of the utmost severity which injuries have left him "very severely disabled".

5. The key findings were as follows:

    1. J's injuries were caused by a shake, either with or without an impact on a soft/ semi-yielding surface;

    2. The force used was beyond normal handling;

    3. The injuries were inflicted at some point after his normal feed at 16:00 and 19:00 on 5 October 2018;

    4. Whoever shook J would have been aware that he/she went beyond normal handling;

    5. The possible perpetrators were the mother or the father.

6. The fact-finding judgment was handed down on 25 November 2019. The judge ordered that the judgment should be disclosed to the police in the normal way pursuant to PD12G 2.1 Family Proceedings Rules 2010 ("FPR 2010"), the rule which permits a judgment in care proceedings to be disclosed to the police "for the purpose of a criminal investigation". The judge adjourned any further application for disclosure to a hearing on 20 December 2020.

7. Following extensive discussions between the parties at court on 20 December 2019, agreement was reached that disclosure should be ordered in relation to documents which were set out in, what became, Schedule A to the judge's order. This list of documents is extensive and includes the expert medical evidence, statements from members of the extended family and accounts given by family members to various treating physicians. It was agreed by all the parties that such comprehensive disclosure was relevant and appropriate as one of the findings made by the court had been that the accounts given by the mother, the father and various members of the extended maternal family had changed over time.

8. Agreement could not be reached between the advocates in relation to the disclosure of documents referred to in Schedule B of the order. These documents are:

30/10/2018	First Statement of the Father
21/11/2018	Second Statement of the Mother
29/04/2019	Second Statement of Father
30/04/2019	Further Statement of the Mother
01/11/2018	Public Law Outline Case Analysis (Summary of Parents Account only)

9. These documents then are the narrative statements in which the parents gave accounts of the circumstances which they say gave rise to J sustaining his injuries, together with the Guardian's note of the accounts given to her by the parents. The statements do not contain any admissions by either the mother or the father. It is accepted by the father that the documents would be relevant to the police's investigation as to whether criminal charges should be brought against either him or the mother in relation to J's injuries.

10. On 20 December 2019, the judge conducted a substantive case management hearing during which she dealt with a large variety of issues. Having had the benefit of position statements and oral submissions in relation to the dispute as to disclosure, the judge gave a brief ex tempore judgment allowing disclosure of the documents in Schedule B.

The Re EC Checklist

11. The court was taken to the guidance in *Re C (A Minor*) (*Care Proceedings*: *Disclosure*) [1997] 2 WLR 322 sub nom *Re EC* (*Disclosure of Material)* [1996] 2 FLR 725, referring to the case (as I will in this judgment) as the "*Re EC* checklist".

12. In *Re EC,* Swinton Thomas LJ set out at p85 D onwards, a checklist designed to be applied by judges when considering an application to disclose evidence which had been filed in care proceedings. Swinton Thomas LJ started by saying that:

> "In the light of the authorities, the following are among the matters which a judge will consider when deciding 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."

13. The checklist then follows:

> "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 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 cooperation 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 the 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."

14. Unfortunately, the parties (and therefore the judge) were unaware that the Court of Appeal had, some months earlier on 31 July 2019, considered in *Re M (Children)*

[2019] EWCA Civ 1364 (*Re M*) whether, some 23 years after it had been decided, *Re EC* remained "fit for purpose". Sir Andrew McFarlane P said in this regard:

> "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*."

15. The President then went on to set out the ten factors referred to above. He continued:

> "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."

16. It had been submitted to the President in *Re M* that the *Re EC Checklist* had (at [44]) "set the threshold in applications for disclosure under *Re C* so low that almost any application is bound to succeed" and that an alternative test should be formulated drawing upon the Supreme Court decision in *Bank Mellat* v *Her Majesty's Treasury (no 2)* [2013] UKSC 38; [2013] *UKSC* 39; [2013] AC 700.

17. As in the present case, the statements the subject of the application for disclosure in *Re M* did not contain any material that might incriminate either of the parents in any criminal activity. The President (who had called the checklist the *Re C* checklist*)* dealt in detail with the right to silence and the privilege against self-incrimination. Relevant to the present appeal, he said:

> "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 fathers have failed to establish their central ground of appeal based on the 'right to silence' and the 'privilege against self-incrimination'."

18. The President moved on wholly to endorse the continuing role of the *Re EC* factors saying:

> "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."

19. It follows that *Re EC* remains good law and it is implicit that the Court of Appeal in *Re M* rejected the submission that the bar for disclosure is set too low by *Re EC.*

The Appeal

20. Turning back to the present appeal, the judge, having given judgment and ignorant of the President's recent endorsement of the *Re EC* checklist*,* granted permission to appeal her order for disclosure on the basis that "there are real prospects of success in arguing that there was an error of law made by the court". In my view, had the judge had the benefit of the President's judgment in *Re M,* it is most unlikely that she would have granted permission to appeal.

21. Finally, before turning to the grounds of appeal themselves, I would emphasise the nature of an application for disclosure and the context in which such applications are generally heard. First and foremost, these are decisions taken by a judge in the context of a trial of factual issues with which he/she will have become particularly familiar. This court is most reluctant to interfere with judge's decisions made in such circumstances. Secondly, they are dealt with, as was this application, at a case management hearing, hearings which often require decisions to be made under considerable pressure of time in relation to a significant number of issues including (for example, in this case a Part 25 FPR application for the instruction of an Independent Social Worker). It is, therefore, only to be expected that save in exceptional circumstances, the judge's rulings will be given by way of a short, ex tempore judgment, dealing with the essential issues by brief reference to the relevant law or rules. It follows that in cases involving disclosure to the police, the judges are considerably assisted in that exercise by the Re *EC* factors now ratified by the President in *Re M*.

22. The judge structured her judgment by reference to *Re EC,* addressing each factor in turn. Of particular relevance to the way the father puts his case are that the judge said:

> "3. The welfare and interests of other children generally. It must be a matter of public policy that children are protected and that

> the appropriate institutions are given the full information to be able to decide how to protect children as a matter of policy.
>
> 4…..to disclose this information to the police would not necessarily break that confidentiality for the child."

And later:

> "11. There is a great deal of other disclosure which has taken place and it seems to me that the issue of confidentiality is more apparent than real and bearing in mind that I have gone into considerable detail in the judgment, in actively highlighting aspects of the statements that were made by the parents where they differed in their accounts and during interviews, the statements and, in fact, in their oral evidence, and I think on balance that these statements should be disclosed, and that would I think, also include the two pages of the Guardian's initial assessment."

23. In reaching that conclusion, the judge had in mind at [10] that the statements cannot be used as evidence in a Crown Court trial, but that the information contained in the statements may be used to inform the police in their criminal investigation and, in particular, to help them to decide whether they would wish to re-interview either of J's parents.

The Grounds of Appeal

24. The three specific grounds of appeal are that:

1. The learned judge erred in law when she approached the issue of confidentiality of the evidence filed in the care proceedings on the narrow basis of confidentiality of the child's identity, rather than on the wider basis of the confidentiality that arises from care proceedings heard in private.

2. The learned judge erred in law when she treated as identical, or broadly identical, the public interest considerations which arise in respect of:

   i) Disclosure of material from police investigations into private care proceedings; and

   ii) Disclosure from care proceedings held in private into police investigations.

3. The learned judge appears to have conflated arguments that disclosure would compromise the parent's right against self-incrimination with whether or not s98(2) CA 1989 confers a right to silence.

Ground 1 Confidentiality

25. Confidentiality of a child's identity is protected by s 97 Children Act 1989 ("CA 1989"):

> "97. Privacy for children involved in certain proceedings.
>
> (1). . . . . .
>
> (2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—
>
> (a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or
>
> (b) an address or school as being that of a child involved in any such proceedings."

26. There is, however, confidentiality to the proceedings themselves which extends beyond s 97 CA 1989. The familiar terms of Section 12 Administration of Justice Act 1960 are as follows:

> "12 Publication of information relating to proceedings in private.
>
> (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) ……;
>
> (ii)are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
>
> (iii) ….."

27. The Family Procedure Rules and, in particular, FPR 2010 r12.73 and r12.75 set out exceptions to the general rule.

28. S98 CA 1989 deals specifically with the protection given to a person giving evidence in care proceedings:

> "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 put to him in the course of his 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."

29. Mr Miller, on behalf of the father, in support of his submission that Factor 3 of the *Re EC* checklist "The maintenance of confidentiality on children's cases" applies to the broad category of confidentiality found in s12 AJA 196 and s98(2) CA 1989, took the court to *Re X (Disclosure of Information)* [2001] 2FLR 440 where Munby J (as he then was) said at [24] that "wrapped up in the concept of confidentiality were a number of different factors and interests which need to be borne in mind". Those factors included the interests of the child at [24(i)], and the interests of litigants at [24(ii)] who should not fear that their private affairs will be exposed to the public gaze.

30. Part also of the concept of confidentiality Munby J said at [24 (iii) and (iv)] was the public interest in encouraging frankness from third parties as well as perpetrators of child abuse.

31. Mr Miller submits that the judge failed to consider the wider concept of confidentiality and factored in only the need to keep the identity of J confidential.

32. In my judgment, that submission relies on a reading of this judgment by reference only to the judge's specific reference to the interests of children at [3], set out at paragraph [22] above. In an ex tempore judgment such as this, it is of particular importance to look at the judgment as a whole in order to see if the judge in fact limited her consideration of confidentiality in the way Mr Miller asserts. In my judgment, she did not. The judge said (see paragraph [22] above) that on the facts of the case before her, the issue of confidentiality was "more apparent than real". That was an unsurprising comment given that there had already been considerable disclosure both as provided by the Annex A disclosure and in the detailed analysis identified by the judge in her judgment of the significant inconsistencies in the accounts given by the parents as to just how J came to suffer such terrible head injuries whilst in their care.

33. Mr Miller rightly asks the court to have in mind that the judge did not specifically refer to each of the statements in issue in her judgment. But that does not, in my opinion, undermine the basic premise that there had already been substantial disclosure and that nothing in the statements incriminated the maker of the statement in question, features that the judge was entitled to have in mind.

34. In my judgment, it is clear from a reading of the judgment as a whole that the judge had in mind the important and broad concept of confidentiality when deciding to disclose the documents in question.

Ground 2

35. I can deal with Ground 2 briefly. By this ground of appeal, it is suggested that the judge treated, as identical, the public interest considerations which arise in respect of, on the one hand, disclosure from the police investigations into care proceedings and disclosure from care proceedings into police investigations on the other. Factor (5) requires consideration of "The public interests in the administration of justice" and observes that "barriers should not be erected between one branch of the judicature and another as this may be inimical to the overall interests of justice".

36. In my judgment, the judge did not conflate the two directions of disclosure (police to Family Court and Family Court to police), rather she simply noted that applications for disclosure are mostly made in relation to police disclosure and are informed by the police's perceived reluctance to disclose "really important documentation". She noted that it is not usually the case that "people object to this kind (*Family Court to police)* of information being disclosed". Confirmation that she was applying the correct test is seen within her specific application of each of the factors in *Re EC.*

Ground 3

37. Mr Miller submits that the judge conflated the s98(2) right to avoid self-incrimination with the criminal right to silence and as a consequence, failed to put the matter (right against self-incrimination) properly into the balance. The judge dealt with this issue (which comes under Factor 4- the importance of encouraging frankness in children's cases), saying at [5]:

> "The importance of encouraging frankness in children's cases. This is something that Mr Miller has particularly argued: that 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 a criminal trial. Well, that remains the case, and I accept that, but it is not a corollary to the criminal arena where the right to silence is an absolute right and someone cannot be forced to make a comment or to respond."

38. The judge returned to the issue at [9]:

> "the parents accept that the material is relevant. I know that there is no admission within that evidence but it is relevant evidence and one of the features is the inconsistencies, not just of the parents but of the others as well. I bear in mind the desirability of co-operating with other agencies. There should not be secrets in relation to these matters. I do accept I did not give a warning to either parent pursuant to s98. It is my understanding that this information is disclosed and it will inform an investigation as to whether to further interview or to charge. They are not statements that can be used within the Crown Court process."

39. Ms Watson on behalf of the Guardian took the court to paragraphs 65 and 66 of *Re M,* set out at [35] above. She emphasised that the judge was not only completely aware of

what self-incrimination meant, including that it is different from a right to silence, but that she rightly factored in the "evidential reality" of the case, having properly conceded that no s98(2) CA 1989 warning had been given to the parents when they gave their evidence. (For completeness, it should be noted the failure to give such a warning is not determinative of an application for disclosure: see *Re X and Y (Disclosure of Judgment to Police)* [2015] 1 FLR 1218 at [33-34]).

40. Mr Miller categorised the statements in dispute in the following way:

> "…occupy(ing) an unusual position on the spectrum of relevance to criminal investigations. They do not contain any admissions by either parent or any information which would enable the police to conclude on the balance of probabilities (let alone to the requisite criminal standard) that one or other of the parents was the perpetrator of injuries to J. However, they are also not blandly anodyne."

41. Mr Miller submitted that the documents in this case fall into a middle ground being neither incriminating nor valueless. He submits that in such cases the court should be particularly careful not to allow disclosure by default. In my judgment there is no need to add such a gloss to the checklist in *Re EC.* Factor 7 of the checklist specifically requires the court to take into account: "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". The judge did precisely that in my judgment, she considered the gravity of the offence and the relevance of the evidence in relation to it.

Discussion and Conclusion

42. Mr Miller submitted that the three features in Grounds 1-3, which he highlighted as errors of law, resulted in the judge reaching the wrong conclusion and that she should have refused the disclosure of the documents to the Police. For the reasons given above, I do not agree that the judge made errors of law in respect of any of the three matters identified.

43. In respect of the present case I would wish to highlight the approach of Swinton Thomas LJ in *Re EC* itself where he said that it is impossible to place any of the factors in any order of importance, and that the importance of the factors will vary from case to case.

44. J has sustained devastating brain injuries at the hand of one of his parents. The police are rightly investigating the case. As the judge identified, there is little confidentiality to lose in circumstances where the police have already received the detailed finding of fact judgment together with all the medical and other evidence. What is left is the parent's inconsistent accounts, whether through their own statements or made orally to the Guardian. It is accepted that they are relevant to the police investigation even though they cannot be used as evidence. In my judgment, on any proper application of the *Re EC* checklist, an order for disclosure was inevitable.

45. I would therefore, if their Lordships agree, dismiss the appeal.

Lord Justice Holroyde:

46. I agree.

Lord Justice McCombe:

47. I also agree.