



Neutral Citation Number: [2022] EWCA Civ 982

Case No: CA 2022 000732

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM**  
**THE HIGH COURT OF JUSTICE FAMILY DIVISION**  
**MR JUSTICE KEEHAN**  
**ZC18P01363**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15 July 2022

**Before :**

**LADY JUSTICE MACUR**  
**LORD JUSTICE PETER JACKSON**  
and  
**LORD JUSTICE NUGEE**

**Re B (Children: Police Investigation)**

**Appellant**

**Respondent**

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**Richard Horwell QC and Naomi Carpenter** (instructed by the **Commissioner of Police for the Metropolis**) for the **Appellant**  
**Stuart McGhee** (instructed by **W Legal**) for the **1<sup>st</sup> Respondent**  
**Anthony Metzger QC and Charlotte Proudman** (instructed by **Dawson Cornwell**) for the **2<sup>nd</sup> Respondent**

Hearing dates : Tuesday 28 June 2022  
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**Approved Judgment**

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down will be deemed to be Friday 15<sup>th</sup> July 2022 at 10.30am.

## Macur LJ:

### Introduction

1. This appeal concerns an injunction made in the High Court prohibiting any person serving with the Metropolitan Police (“MPS”) from interviewing either of two specified teenage children (“A” and “B”) without the “express order” of the judge, save for speaking to them “in order to determine whether they are at a real and immediate risk of being subjected to harm or ill-treatment and for the purpose of considering whether any immediate police or statutory powers should be exercised to avoid that risk”. The issue for this court to determine is whether the High Court (i) had inherent jurisdiction to do so, and if so, (ii) whether it should have exercised its powers to do so.

### Background

2. The context for the making of the order is in long running and complex private family law proceedings in the Family Division. At least four of the judgments have been reported under the title of *Re A and B (Parental Alienation)* at [2020] EWHC 3366 (Fam); [2021] EWHC 2601 (Fam); [2021] EWHC 2602 (Fam) and [2021] EWHC 2603 (Fam). However, a sufficient and succinct history of events giving rise to the making of the order under challenge is provided in a judgment delivered by Keehan J on 24 March 2022 in the following terms:

“2. This case has a long and tortuous history. It has been before me for at least the last three years. The case has involved the instruction of a child psychiatrist, Dr Julet Butler, a renowned expert in high parental conflict cases, Dr Janine Braier, who worked in association with a colleague, Ms Karen Woodall. Dr Braier and Ms Woodall worked for an extensive period of time of at least 15 months with the mother, the father and the children to try and resolve the conflict between the parents.

3. They ultimately came to the conclusion that they had failed to do so, that the mother had not achieved the degree of change required and that she had turned the children against the father and if the children remain living with her it was undoubtedly the case that the emotional and psychological harm that the children had already suffered would be reinforced and would be detrimental to the children, not only for the balance of their minorities, but throughout the whole of their lives. It would have an adverse impact on their ability to form relationships with partners and would have an adverse impact on their own ability to parent their own future children.

4. Accordingly, having heard all the evidence and taking into account the expert evidence, I ordered a transfer of residence of the children from the mother to the father. The mother challenged that decision on appeal and that was unsuccessful.

5. In November 2020, the children moved to live with their father. There were two early episodes where they ran away. The police were involved to recover the children. They then appeared to settle. There were various applications made on behalf of the mother, including for the children to be joined as parties. I refused that application on the grounds [that] given the damage they had suffered their real and true wishes and feelings could not be established. ...

6. The children appeared to be happy and settled in their father's care until the events of the summer of last year, 2021. The family travelled to the United States of America. Towards the end of that holiday, E ran away and went to the American police. He made allegations against his father. The police secured the [return] of [E] to his father and they returned home to this jurisdiction. ....”

3. At 7.20 am on 15 October 2021 an e mail was sent to the school which A attended, apparently signed by both children and which stated:

“My brother and I are victims, and we need help.

Currently our father, has custody of us. in the past we've been locked up, searched, hit, pushed, choked. Every time we take any action to leave, to get to a safe place, our father finds out and locks us up again and things get worse. With every day the things he does to us get worse.

We live in a state of constant terror. A constant paranoia that this day will be worse than the last. When our father causes trauma it goes unnoticed and we are told 'he is learning to be a better parent'. He hurts us physically and breaks us mentally.

We have spoken to the police, repeatedly. We have spoken to social services. We have run away time and time again and no one believes us. Karen Woodall. Judge Keehan. Social services. These are the people and organisations that have failed time and time again to help us and get us out of this unsafe and horrible place.

We are writing because we are terrified, constantly subjected to further, worse hurt to scare us into pretending everything is fine and acting like everything is fine at school. If we tell anyone, ask for help, he will immediately find out, I am sure. And I am terrified of what that will lead to.

Now you know.

Now, if anything happens to us there are people that know where we are and what we are being subjected to that can help. If

anything terrible happens to us and you don't do anything, the blood is on your hands.

Our address is ... We are taking action soon, doing something about it, so if we are locked up, that is where we will be.'

4. The safeguarding lead at A's school notified the police. Police officers attended at the father's address and spoke to B, then aged 12. B confirmed the allegations made in the e mail. No injuries were seen and there was nothing of concern in his physical surroundings. He was taken to school whilst the officers decided on next steps.
5. A had already left for school. CCTV showed her arrival at the school gates but, after she was seen speaking on her mobile telephone, she departed. She was reported as missing. This prompted an urgent and ex parte application for collection and port alert orders.
6. By that time, it transpires that the father's solicitor had been notified by the mother's solicitor that the children would seek separate representation in the ongoing proceedings. Applications dated 14 October 2021, supported by a statement dated 15 October 2021 of Mrs Janet Bradley, an experienced family solicitor with "significant experience" in representing children, sought an ex parte order that they live "other than with their father until the application is properly and fully considered by the court". The application was made ex parte "as they fear their father's reaction. They instruct me that they are petrified of their father and live in a constant state of fear of his emotional and physical abuse towards them that they can no longer cope with living with him and intend to run away such is their state of anxiety and distress." She regarded the children as having provided her with clear and compelling instructions of their father's particularised physical and emotional abuse upon them since they had lived with him from November 2020.
7. Later that day MPS officers and Children's Services, without knowledge of the statement, decided to conduct a joint investigation. A social worker and police officers went to B's school to talk to him. As they were doing so the father arrived and asserted that a court order prevented them from speaking to his children. B was crying and told officers that he would be hurt if his father took him home. However, at 4.27pm that day the police officers received notification that an ex parte injunction in terms described by the father had been made.
8. There is no transcript of the without notice and ex parte proceedings before Keehan J on the 15 October 2021, and it is difficult to ascertain from an attendance note prepared by the father's solicitor, when in the 'fast moving' sequence of events that had been prompted by A's failure to attend school, the father's solicitors had been notified of the e-mail and its contents, or what detail and evidence was provided to the judge in support of the application. However, the consequent order, dated 15th October 2021 contained a recital in these terms – "the court being satisfied that the Father had not acted inappropriately towards either of the children" – and it prohibited "the Metropolitan Police" and "Children's Services at [the local authority] or elsewhere" from interviewing either A or B without the judge's "express order". A further recital to the order provided that "This order shall have effect immediately, in advance of being sealed."

9. That night, at 11.25 pm, counsel for the Commissioner of Police of the Metropolis made an urgent application to the out of hours Family Division judge seeking deletion of the words “the Metropolitan Police” from the order. The application was adjourned on notice to 18 October 2021.
10. On 18th October 2021, the order of 15th October 2021 was varied to replace the words “the Metropolitan Police” with “any person serving with the Metropolitan Police” and providing that the prohibition did not prevent “a constable from speaking to either child in order to determine whether they are at a real and immediate risk of being subjected to harm or ill-treatment and for the purpose of considering whether any immediate police or statutory powers should be exercised to avoid that risk.” The father was directed to provide to the MPS, amongst other things, medical and therapist reports, copy judgments and orders, and Mrs Broadley’s statement dated 15 October (see [6] above) by 19 October 2021.
11. At the hearing on 18 October counsel for the MPS made written submissions that asserted that the order of 15 October overreached the court’s powers. A range of authorities were presented in support of the proposition that “the courts have been trenchant in their refusal to interfere with the operational decisions of constables to investigate criminal matters.” The submissions also drew attention to deficiencies in the process leading to the order of 15 October 2021.
12. In a subsequent statement dated 24 October 2021, Mrs Broadley confirmed that she had received instructions from the children in June 2021 but had been instructed not to proceed at that point and thereafter was prevented from doing so for practical reasons. In her view they were “delightful...extremely intelligent and academically very bright...” children who were “weighted down and worn out...They feel constantly controlled, bullied and punished by their father who can display unpredictable moments of anger and hurts them...[A] and [B] wish for their voices to be heard...”
13. On 24 October 2021, the MPS made an application to interview the children. At a hearing on 25 October 2021 at which all parties were represented, counsel for the MPS indicated that it was considered that the documents which had been disclosed in accordance with Keehan J’s direction indicated possible emotional or physical abuse. Officers had tried to speak to A and B on 22 October to ascertain whether an ABE interview was required. The primary purpose of the interview was to assess whether there were allegations that required further criminal investigation which could lead to criminal proceedings against either parent or third persons and what further lines of enquiry would need to be pursued. The father had been resistant to the MPS speaking with the children.
14. However, counsel for the MPS did not pursue the application to set aside, or amend the terms of, the order in the light of the judge’s stated concerns regarding the emotional impact upon A and B. Instead, counsel asked that the application be adjourned for a ‘Superintendent for Frontline Policing and Safeguarding’ or his reporting officer, Commander Dales to provide further evidence.
15. A monochrome document headed ‘draft order’ and with indication that it is a “Composite draft - Father contends for what is written in green and the solicitor for the children contends for what is in red” is inserted into the appeal bundle. It would

appear from that document, which is neither perfected nor sealed, that Keehan J made an order which, amongst other things, recorded that he would expect a “fully informed decision” to be made at a senior level in the MPS before officers spoke to the children about “the allegations that are the subject of this matter” and adjourned the application to 19th November 2021 provided at least two clear days’ notice was given. He gave permission for Mrs Broadley’s statement of 24 October (see [12] above) to be disclosed to the MPS.

16. The draft order also states that an oral application, made on behalf of the father for an order prohibiting MPS officers from speaking to the children, “whether for the children to substantiate their allegations or for the Commissioner’s officers to talk the children in any way, other than by way of a welfare change, is dismissed refused.” It is unclear whether this part of the order was colour coded as indicated above, or whether it was made by the judge but, if it was, I am unclear as to its intent. In any event, it appears that the MPS regarded the prohibition made against interviewing or talking to the children continued.
17. The MPS application was not heard on 19 November 2021, but in the course of his judgment in the application made by A and B to be joined as parties to the proceedings, Keehan J said at paragraph 33:

“Similarly, the Metropolitan Police had indicated an intention to seek to interview the children in case there were any criminal charges that could be pressed against the father. I required the Metropolitan Police in the figure of a senior officer in charge of child protection to file a statement setting out chapter and verse why, against the complex history of this matter, they wished to interview the children and that was a precondition to me allowing them to do so. No such statement has yet been filed. I therefore assume the Metropolitan Police do not wish to interview the children.”

18. On 15 December 2021, leading counsel for the father attended ex parte before Keehan J via Microsoft Teams. On that date Ms Woodall, a therapist working with A and B, gave evidence that the day before A, in the presence of her father, had revealed to her that she had been repeatedly contacted by her mother, through third parties, one of which was:

“a man who appeared on the street, she thinks in April. He is not of UK descent ... He systematically intercepted [A], and then also [B], giving them notes, instructions, phones, and arranged phone calls between the children and their mother. Their mother, ... instructed [the children] to make allegations that their father had harmed them.

...the maternal grandparents, are involved in this. They have, at times, ...[used] what I can only describe as threatening behaviour towards [A] in particular. Trackers, ... were given to the children, and they were asked to secrete them so that their mother would know where they were at all times.

...The man who regularly intercepted them gave [A] around £200 in cash, with which she purchased phones. Phones were left in various places around London for her to obtain, and then she was told by her mother to dispose of them.

... It was planned that they would run away together in America. [B was told] about the US having a different legal system.”

19. Keehan J understandably expressed concern during the course of the hearing and raised the possibility that A and B may need “bodyguards.” He indicated that:

“both the school and the local authority need to know that certain information has come to light which shows that the children are at exceptional risk of significant harm and need the highest degree of protection, which has been endorsed by the court.”
20. A recital in the order made subsequently stated that the court was satisfied that to put the mother on notice of the hearing prior to the hearing fixed on 12 January 2022 would “put the children at grave risk of significant harm” and that, based on the evidence of Ms Woodall it “would be appropriate for the children not to attend school until after the hearing listed on 12 January 2022. The judge directed that the order was not to be served on either party, but it was to “take effect forthwith upon being made and in advance of being sealed or served.” In the circumstances, it is difficult to understand how a direction contained in the order that forbade the local authority from including “the Mother or her legal representatives in any correspondence or provide her with any information regarding [Ms Woodall’s] work with the children” would legitimately come to their attention.
21. The anticipated hearing on 12 January 2022 did not take place until 19 January, during which leading counsel for the father invited the judge to make orders dealing with the extant police application to interview the children in terms that were subsequently incorporated into a “Directions Order” of the same date.
22. The said order provided that:

“UPON the court having received the application of the Metropolitan Police to interview the children

It is ordered and directed that: -

  1. The Commissioner of Police for the Metropolis or her designated officer is requested to read and consider the report of Ms Karen Woodall dated 19 January 2022, directed to be disclosed to her by the main order made today and to consider to seek permission to withdraw its application in light of the content of that report.
  2. In the event that the Commissioner of Police for the Metropolis seeks to pursue her application, the following directions shall apply: -

(a) it must be listed in consultation with Mr Justice Keehan's clerk after liaison with the clerks to Ms Janet Bazley QC and Mr Edward Devereux QC with a time estimate of 1 hour.

(b) it must be supported by a full and detailed explanation from a suitably qualified senior officer with knowledge of the facts as to why, despite the content of the said report, the application is being pursued.

3. Costs reserved.”

23. The case was listed on 24 March 2022. Leading and junior counsel were instructed on behalf of the MPS. Witness statements of Commander Melanie Dales and Commander Southworth had been filed. In summary, the MPS wished to proceed to interview A and B, and not confined to the allegations made in the email of 15 October 2021, since there also appeared to be material which gave rise to possible offences of “obstructing...or even perverting the course of justice”. Therefore, the application was for the injunctive order to be amended to permit the children to be “appropriately interviewed” or otherwise for the order to be discharged.

24. A transcript of the hearing reveals Keehan J’s antipathy towards the MPS application from the outset. During discussion with leading counsel for the MPS the judge questioned “Where [in the written statements] is it referred to exercising the discretion that the safety and well-being of these children has been entrusted to a High Court Judge for the last three years? And where is it referred to in either statement that a High Court Judge has determined that the safety and well-being of these children is met by being placed with their father and his partner.” During the oral evidence of Commander Southworth, the judge made clear his view that it was unnecessary to make A and B “the start point” for the investigation . After further discussion in which the officer maintained the MPS decision to seek to interview the children, the judge said, “ you know that some of those allegations were made previously, and I found them to be false.”

25. In his judgment Keehan J stated:

“21 There has, as Commander Southworth accepted, been no account taken of or consideration given to the welfare best interests of these children, of the potential adverse impact of them being interviewed on their emotional and psychological well-being and an analysis as to whether, rather than simply the broad duty upon the police to investigate crime, in this case and in the circumstances of this case it is necessary and appropriate to investigate or, as part of that investigation, to interview the children.

22 As I have made plain in all of my judgments and at this hearing today, I am exceedingly worried about the current emotional and psychological well-being of the children. I am similarly very worried and concerned about their future emotional and psychological well-being.



23 It is accepted on behalf of the Metropolitan Police, both by Commander Dales and Commander Southworth, that however skilled their officers are, they are not psychologically trained. I have very grave concerns that if these children are now, some five months on, asked in detail about what they alleged against their father or what they have now said about their mother it will cause them emotional and psychological harm with potentially grave consequences. Accordingly, in my judgment I would only permit the Metropolitan Police to interview either or both of the children, exercising the *parens patriae* jurisdiction of this court, if I was satisfied that it was proportionate and necessary in the interests of justice to do so. It will be plain to all that, absent the balancing exercise being undertaken by the police, I am not persuaded that it is proportionate or necessary for me to vary my order so as to permit the Metropolitan Police now to interview these children.”

26. Hence Keehan J refused the MPS’s application and said that the local authority “have satisfied themselves that the children are safe and well in the care of their father and there is no future role for them to play to ensure the safeguarding of either child.” However, it is not suggested on behalf of the Respondent father that the local authority had spoken to A or B before reaching this decision.
27. The proceedings are continuing in August 2022, and it appears that the judge’s intention is to investigate the manner in which the October 2021 email allegations came to be made, but not the substance of the allegations themselves.

### **The Appeal**

28. The MPS appealed, challenging the court’s powers to make an order of this nature (grounds 1, 2 and 3) and the judge’s welfare evaluation (grounds 4 and 5). Permission to appeal, limited to grounds 1 to 3 inclusive, was granted by my Lord, Peter Jackson LJ, on 23 May 2022 and the appeal was expedited and directed to be heard on 28 June. The three grounds overlap substantially and amount to the same challenge, namely that the judge overreached his otherwise extensive inherent jurisdiction and usurped the common law and/or statutory duties of the police in the detection, prevention, and prosecution of crime. An order was made that A and B should not be informed that the appeal was to be heard pending further consideration by this Court. That order was continued following the hearing of the appeal pending the hand down of this judgment.
29. Comprehensive directions were made as to the structure of bundles to be filed by specific reference to CPR PD52C paragraph 27, which itself contains reference to the Court of Appeal (Civil Division) section of the judicial website to inform content and form. A timetable was provided for the service of skeleton arguments and directing that the Respondent father shall be represented. The timetable was subsequently amended following a successful application by the MPS to amend the grounds of appeal, and more particularly the skeleton argument, but the requirement for the Respondents to serve a skeleton argument by 21 June 2022 was patently clear.
30. I feel it necessary, unusually, to refer to these details to highlight the evident wholesale lack of discipline in preparing this case for an efficacious hearing thereafter. If there

had been an attempt to agree the core bundle, not one counsel had challenged the failure to adhere to the Practice Direction. The index is shambolic. As it was, the inclusion of irrelevant documents, which may even have been surplus to the requirements of a supplementary bundle, was at the expense of a document of significant relevance, namely the transcript of the ex parte proceedings on 15 October 2021 at which the oral application for the injunction was made. Consequently, it was necessary to direct the production of the attendance note relating to the hearing that day and prepared by the solicitor for the Respondent father. It has since been produced but is of limited, if any, assistance; it does not appear to be contemporaneous; it does not indicate the nature of the submissions made to the judge regarding why the application was made without notice to the MPS, nor the submissions in support of the injunction, nor the relevant legal framework to embark upon such an exceptional course. I have already referred in [15] above to the unsatisfactory state of affairs regarding the unperfected ‘draft order’ of 25 October 2021 inserted into the bundle. The orders of 15 and 18 October 2021 do not appear to be to be sealed orders. Leading counsel appearing on behalf of the MPS before this Court indicates that these were the copies served, but it seems that no attempt has been made to obtain the sealed court orders, as they should be even if there is a direction that they are to be effective immediately and prior to sealing and service. Further, it would also have been of assistance to have before us the MPS skeleton argument for the purpose of the hearing on 18 October 2021 and upon which the submissions of the MPS relied in March 2022. This was produced at the Court’s request during the hearing and contained the submissions referred to at [11] above.

31. Skeleton arguments should have been served by the Respondents by 21 June 2022. The mother’s skeleton argument was served on time but contained gratuitous detail regarding matters quite clearly beyond the scope of the appeal, as is clear from the reasons given by my Lord to limit the appeal to the three grounds. It referred to these matters with an obvious partisan slant despite the rejection of the application for permission to appeal on the particular point expounded. That part of the skeleton argument had no regard to CPR PD 52A, paragraphs 5.1 and 5.2 or CPR PD 52C, paragraph 31. It certainly did not assist me to understand the issues in the case. These rules require skeleton arguments to set out concisely the arguments upon which a party intends to rely in respect of the issues before the court, and to define and confine the areas of controversy. A skeleton argument is not a vehicle for the pursuit of a partisan agenda in relation to other matters.
32. Instructions had been sent to counsel to redact the skeleton arguments in light of a request by a journalist for disclosure of the skeleton arguments notified to the Court on the eve of the hearing. The redactions which were made anonymised the names of the parties but did not seek to remove the extraneous material. This could not possibly be argued to assist the reporter to understand the issues in the appeal and to ensure transparency of anything other than the mother’s perspective about a topic irrelevant to the appeal. (See *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38.)
33. The skeleton argument on behalf of the Respondent father was served at approximately 9 a.m. on the morning of the hearing and entitled “1<sup>st</sup> Respondent’s Response to the Appeal”. It set out the father’s ‘position’ “resist[ing] the appeal and support[ing] the conclusions of the learned Judge in upholding the decision to not permit the children to be “*interviewed*” on the basis of the risk of harm to the children

in light of the considerations of the Welfare Checklist.” Counsel had no previous involvement with the case, and he had been briefed mid-afternoon the day before the hearing. This may well explain the deficiencies in the skeleton argument, in which there was no attempt to engage with the legal issues in the appeal. A casual reference to the necessity for the MPS, or any police force, to obtain parental consent prior to the interview of minors was not further developed nor fully informed. It had not been raised in the case before Keehan J and took counsel for the MPS by surprise. We did not hear argument on the point. The issue in this case is not ‘consent’ and whether A and or B may give it, and, if not, what happens if the parents, each with parental responsibility do not agree that the children should be interviewed, but about the decision of the judge to restrict the actions of the police in the way he did.

34. The reiteration of the Respondent father’s perspective of the merits on the facts was unnecessary and irrelevant to the appeal. However, of note, despite seeking to maintain the injunction against the MPS, the document served on behalf of the Respondent father concluded by indicating that he “has continued concerns as to the mother’s efforts to communicate with the children and involve third parties in sending clandestine messages to the children, including by red ribbons recently appearing on a tree outside of the family home, which has been a method used in the past to inform the children that they will be contacted; such is intimidating and of concern to both the children and the 1<sup>st</sup> Respondent and his wife.” It seems from the submissions of leading counsel for the MPS that the father has not otherwise notified the police of these facts.
35. That this Court did not reject bundles or any of the contents because of the non-compliance with recognised procedure and the failure to identify essential reading in amongst a core bundle exceeding 1300 pages reflects the urgent need to hear an appeal which has widespread implications for the interface of the police and family court jurisdictions and the court’s concern about the worrying facts of this case so far as the two children are concerned.

## **Discussion**

36. A similar lack of discipline is demonstrated by the procedural deficiencies which preceded the making of the original oral application for an injunction, without notice to the MPS or the Children’s Services and ex parte. Absent a transcript of the hearing, and with only an inadequate attendance note, I presume that the judge was not referred to the *Practice Guidance (Family Courts: Without Notice Orders)* [2017] 1 WLR 478. Paragraph 5 of that ‘Guidance’ details the relevant principles which it is “essential” for the court to observe. There was a lack of compliance in several respects as is demonstrated in the order as drafted. In particular, counsel for the Respondent father in the appeal, albeit attended by the solicitor present in court on 15 October 2021, has been unable to inform this court why it was deemed to be necessary to make the application ex parte without notice.
37. There is no indication of how the recital indicating that the Court was “satisfied that the father has not acted inappropriately towards either of the children” came to be made, or to what allegations it refers. There is no suggestion that there was any evidence upon which the judge could make this finding in relation to the allegations made in the email (see [8] above).

38. If it was a legitimate order, it is inadequate in that it is intended to prevent any police officer interviewing A and B since the order is directed against the MPS, and not any other police forces which may have become involved.
39. It seems that Keehan J recognised these deficiencies, brought to light by the skeleton argument filed by the MPS for the hearing on 18 October 2021, since during discussion, he questioned himself if there was a “need for the order to remain in force at all” and apologised that “certain matters did not take place in terms of serving the order which should have taken place ...[as] a consequence of the speed with which we had to react to the events as they unfolded on Friday morning”. In further discussion Keehan J acknowledged that “the limitation on the exercise of statutory powers of the police is exceptional to a high degree” and hoped that there could be a “consensual way forward” and, after discussion between counsel, he was invited to make the order of 18 October (see [10] above).
40. Regrettably, it seems to me, the skeleton argument filed by the MPS failed to cite those authorities which are referred to at [44] below and make clear beyond peradventure how vanishingly rare will be the circumstances in which a High Court should, in the exercise of its *parens patriae* jurisdiction, make a prohibitory order against a public authority exercising statutory powers. No other party’s skeleton argument served for the hearing on 18 October 2021 has been disclosed into this hearing. It may be that they did give further assistance in this regard, but I doubt it having regard to the transcript of the hearing that day.
41. Further, whilst understanding the professed desire of the MPS to work collaboratively with the Court as an independent body without bias to either parent or professional, I regard it to be unfortunate that the MPS did not proceed with its application to set aside the injunction and, if necessary to accelerate such a hearing as this. As it is, it is clear from the transcript of the hearing on 19 January 2022 that without further reference to the highly exceptional nature of the order the judge would be invited to make, leading counsel for the father asserted that “It seems quite clear that [the MPS] have not been liaising with the local authority as they should have been”, persuading the Court to “invite the police to withdraw that application in light of material [to be directed to be ] provided to them and if they do not do so [to be represented at the next hearing indicating] why they should be permitted to interview the children...”.
42. There is no indication that counsel for the MPS were heard that day. The return date was ordered to be fixed in liaison with leading counsel for the Respondents’ clerks. There was a delay of two months. This was unfortunate to say the least. The convenience of counsel should have been secondary to the importance of the issue of principle involved in the application, namely, to review a highly exceptional order which directed “the limitation on the exercise of statutory powers of the police.” (See [39] above.)
43. The transcript of the hearing on 24 March indicates that leading counsel for the father continued in similar vein to encourage the judge’s resistance to the MPS application. Leading counsel then appearing for the MPS relied, to great extent, upon the skeleton argument produced for the hearing on 18 October 2021 (see [11] above). On this occasion the application was vigorously pursued in the face of obvious resistance by the judge based on his stated concerns for the welfare of A and B, but again, no reference was made to the authorities below.

## Analysis

44. There is no issue but that, regardless that A and B were neither wards of court nor subject to care proceedings, the High Court has retained a *parens patriae* jurisdiction by which, theoretically at least, it may prohibit a police officer from questioning the children. However the exercise of that jurisdiction must be approached by reference to a considerable body of jurisprudence which has endured more than 40 years, conveniently summarised by Sir James Munby, President in *A Ward of Court* [2017] EWHC 1022 (Fam). As indicated above, there is no indication that *A Ward of Court*, or the subsequent and equally august authority to the same effect, namely *Re A (A Child: Female Genital Mutilation: Asylum)* [2019] EWHC 2475 (Fam), were cited in argument in the Court below. I venture to suggest that if they had been, it would have been unnecessary to burden the court with further authority on the principle in point.
45. In *A Ward of Court*, the President took as a starting point the “fundamentally important principle identified by the House of Lords in *A v Liverpool City Council* [1982] AC 363 and restated in *In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791” in which latter case, Lord Scarman at p 797 said:

“The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the court, if seized by the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority.”

46. The President clarified:

11. Lord Scarman was not of course disputing the High Court’s power of judicial review under RSC Ord 53 (what is now CPR Pt 54) when exercised by what is now the Administrative Court. What he was disputing were the High Court’s powers when exercising in the Family Division the *parens patriae* or wardship jurisdictions. This is made clear by what he said, at pp 795–796: “The ground of decision in *A v Liverpool City Council* [1982] AC 363 was nothing to do with judicial discretion but was an application in this field of the profoundly important rule that where Parliament has by statute entrusted to a public authority an administrative power subject to safeguards which, however, contain no provision that the High Court is to be required to review the merits of decisions taken pursuant to the power, the High Court has no right to intervene. If there is abuse of the power, there can of course be judicial review pursuant to RSC Ord 53: but no abuse of power has been, or could be, suggested in this case. It is important to appreciate that Lord Scarman was

not referring to a rule going to the exercise of discretion; it is a rule going to the proper ambit of the powers of the wardship court.”

47. The President identified the modern starting point, which pre-dated *A v Liverpool City Council*, as the “much-cited” judgment of Russell LJ in *In re Mohamed Arif (An Infant)* [1968] Ch 643, 662:

“It is, however, quite obvious that there are circumstances in which control over the person of a ward is not committed or referred to the judge but is by the law of England committed or referred to another agency or person. As a simple illustration, it could not be contended that the judge would have any jurisdiction to order that a criminal ward be transferred from place of detention A to place of detention B, however much of the medical evidence before the judge suggested that the ward would be in better health at place of detention B. The reason is that the jurisdiction of the judge over the person of the ward is necessarily restricted by the fact that the law has given that aspect of control over the ward’s person exclusively to another agency.
48. He cited several authorities and their different scenarios which demonstrated what he called “the *A v Liverpool City Council* principle” and which had been “reiterated at the very highest level on a number of occasions in recent years.”
49. At [48] in *Re A (A Child: Female Genital Mutilation: Asylum)*, Sir Andrew McFarlane, President said the “words of Lord Scarman in *Re W*, of Hoffmann LJ in *ex parte T* and of Sir James Munby in *Re A, R (Anton) and GD (Ghana)* are firmly couched in terms of structure and principle, with no contemplation of any exception.” He went on to say in [49] “As Lord Scarman, Hoffmann LJ and Sir James Munby separately make clear, the Secretary of State and the family courts are each operating a different and entirely distinct jurisdiction that has separately been entrusted to them by Parliament.”
50. It has not been, nor could it sensibly be, argued before this Court that the same “fundamentally important principle” is not applicable to the facts in this case. Keehan J described the case as exceptional, but it cannot be differentiated from those other cases in which the child’s welfare is not paramount to the determination of the relevant public authority entrusted with such things as education, immigration, housing, criminal prosecution, military, and prison placement. The facts as found by the family court may be influential but do not bind another public body from exercising a power based on “altogether different considerations.” (See *R v Secretary of State for Home Department ex parte T* [1995] 1 FLR 292.)
51. There is no exhaustive definition of police powers and obligations. Arguably, the core duty is to protect the public, including by detecting and preventing crime, although there is no duty to investigate every crime. Decisions in this regard may be subject to judicial review but the Administrative Court and Divisional Court has almost always refused to interfere in operational decisions made by individual Chief Constables as to which criminal offences will be investigated and how that investigation will be

conducted. See, for examples, *R (Birmingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin) and *R (Soma Oil and Gas Limited) v Director of the Serious Fraud Office* [2016] EWHC 2471 (Admin).

52. The Family Court necessarily has a different focus to that of the Administrative Court and Divisional Court, and also to the MPS or other police forces. Understandably, and for a significant number of years, Keehan J's focus has been upon A and B's welfare and, in refusing their application for separate representation on 22 November 2021, he determined that they do not "have sufficient understanding of the risk to which they would put themselves were they to become a party to these proceedings to be involved in acrimonious litigation ...", having previously concluded Mrs Broadley's discussion of the allegations with A and B, (see [6] and [12] above), albeit with the "very best of motives ...has caused them to become more entrenched in their skewed views of the father".
53. It seems to me from reading the transcripts of all the proceedings and judgments in which the MPS application to interview the children is either referred to or considered post the order of 15 October 2021 that the judge has been unwilling to contemplate that another public body will take a different perspective to this view. This is patently so in [21] of the judgment delivered on 24 March 2022, (see [25] above.) Whether it was fair to categorise the MPS as taking "no account" of the welfare best interests of A and B is not the subject of this appeal, but the judge's subsequent comparison of "welfare best interests" as against "*simply the broad duty* upon the police to investigate crime..."(emphasis provided) is suggestive that the judge had lost sight of the "altogether different considerations" which fall within the remit of other public bodies. As it is, I find the order of 15 October 2021, (as amended), impermissibly interferes with an operational decision made by the MPS regarding the scope and manner of the criminal investigation to be conducted into the circumstances of the case.
54. I do not find it difficult to understand why the MPS would wish to interview the children to assess the direct evidence of alleged criminal behaviour by the father when couched in the terms of the email sent on 15 October 2021 and, then to have every reason to want to do so, upon sight of Mrs Broadley's statements. Keehan J's previous findings, that the children were manipulated to make false allegations against the father, do not exclude the possibility that those more recently made were credible, nor do they absolve the MPS from its responsibility to consider whether to investigate the allegations and, if so, the most efficacious way of doing so.
55. The disclosure of the transcript of Ms Woodall's evidence in January 2022 raised allegations of serious criminal activity in which the children appeared to have been stalked and groomed. Keehan J justifiably questioned the need for 'bodyguards' and made clear his concern as to the children's safe keeping. I find it difficult in those circumstances to understand why he, and leading counsel for the father, considered that Ms Woodall's evidence would, or should, deter the MPS from wishing to proceed with the application.
56. It is an unfortunate fact that the police will interview many children, some younger than B and some emotionally damaged by their experiences, relating to 'historical' incidents recently disclosed. The authorised professional practice provided by the College of Policing: "Managing Investigations" last updated in November 2021 and

specifically covering the “Investigation: Working with victims and witnesses” including those who are vulnerable and intimidated, and dealing with initial contact strategy to conclusion of prosecution (if applicable), makes clear that welfare considerations are not to be ignored, but they are not paramount when placed in the balance with other considerations. “Achieving Best Evidence in Criminal Proceedings,” (last revised 2022) provides further guidance in relation to interviewing children and other vulnerable victims or witnesses. If the MPS determine that A and B should be spoken to as part of their investigation, this guidance would no doubt be observed.

### **Conclusion**

57. I answer the question in [1] (i) above as ‘yes, but with a significant caveat’. I unhesitatingly answer the question posed in [1](ii) above as ‘no’.
58. Consequently, and subject to my Lords, I would allow the appeal and set aside the extant injunction directed to MPS.

### **Peter Jackson LJ:**

59. I agree that the appeal should be allowed for the reasons given by Macur LJ and Nugee LJ and for these reasons. The context is that the judge had conducted proceedings about these children since March 2019 and had found that they had come to emotional and psychological harm in the care of their mother. The father now alleges that she has continued on the same course since the children moved to his care. The judge, motivated by a concern to shield the children from a police inquiry, imposed his own assessment, as seen by the recital to the order of 18 October 2021. But even if the without notice order could be justified at the outset, the question of whether it could continue should have been decided at a very early stage in accordance with correct principles. Instead it remained in force for several months, in effect by default, preventing an investigation that might have revealed useful information. When an effective hearing did take place, the court focused on the potential risks to the children of being drawn into a police inquiry and gave very little weight to the public interest represented by the police or to the possible advantages to the children of their allegations being professionally investigated as well as an attempt being made to identify the source of any third-party interference. Although the judge had acknowledged at an earlier stage that “the limitation on the exercise of statutory powers of the police is exceptional to a high degree”, he in fact treated the question of whether to grant or withhold permission for the children to be spoken as if it was first and foremost a matter for the court to decide, with the police being required to justify their decisions – see paragraph 23 of his judgment, cited at [25] above. That was not the correct approach. The children’s circumstances were undoubtedly sensitive, but they did not justify such a highly exceptional order. One practical consequence is that the court is now about to resume its own investigation of the mother’s alleged role in unsettling the children through third parties without the assistance that the police might have been able to give on that subject, or any resolution of the children’s complaint, whether or not it was at all justified. I therefore accept the argument of the MPS that the court overreached its proper powers in making and continuing the order and that in consequence the appeal must succeed.

### **Nugee LJ:**



60. I agree with both judgments. I add just a few words on the practice in relation to urgent applications for injunctive relief. The Court has undoubted power to grant such relief on the application ex parte of the applicant, and will not hesitate to do so when the circumstances are either of such urgency that proper notice cannot be given to the respondent, or that it is essential to proceed without tipping off the respondent because of the risk that he would frustrate the proposed order by pre-empting it.
61. But precisely because the respondent is not present at such a hearing, it is in general essential in the interests of fairness that he is fully and properly informed of what happened at the hearing. My experience is based on the practice of the Applications Court in the Chancery Division. Three aspects of that practice are well established.
62. First the applicant provides the respondent with the evidence on which the ex parte order was obtained. If the evidence was put before the Court by way of witness statements (or affidavits) copies are served together with the order. If, as happens in cases of great urgency, the application is made without time for formal evidence to be prepared and the application is supported by draft witness statements or affidavits, or is made on allegations put forward by counsel on instructions, an undertaking is given to confirm the drafts, or the facts alleged, by way of signed or sworn evidence, and that is again served on the respondent.
63. Second, a full and proper note of the ex parte hearing is prepared and served on the respondent. That is in large part for the benefit of the applicant himself, to demonstrate that the Court was referred to the appropriate evidence and legal principles and hence that the duty of full and frank disclosure was complied with; but it is also of course for the benefit of the respondent who is entitled to know the basis on which the Court made its order against him, and for the benefit of any other judge who has to consider the matter.
64. Third, a proper order is drawn up, sealed and served as soon as possible. I do not doubt that the Court's order is effective as soon as pronounced, and in appropriate cases the respondent is informed of the effect of the order without waiting for the formal order to be drawn up and sealed. A respondent informed that the Court has made an order against him is obliged to comply with it even before sight of the sealed order and is in contempt of court if he does not do so. But this is no reason not to have the order properly drawn up, sealed and served as soon as that can be done. Sealing and serving an order enables the respondent (and any other judge, including this Court) to see clearly and unequivocally the precise terms of the order which the Court has approved.
65. These principles apply in other divisions of the High Court, and certainly in the Family Division. As Macur LJ has explained, it was – and remains – unclear what evidence was put before Keehan J on the ex parte application on 15 October 2021, or what took place at that hearing (the note of the hearing belatedly provided being hopelessly inadequate for that purpose); and the bundle included a number of orders headed “draft” and unsealed. Counsel for the MPS was, unsurprisingly, unable to confirm whether orders in that form had in fact been made, being only able to say that that was what the MPS had been served with. That was all obviously unsatisfactory.

66. I agree that the appeal should be allowed.