Case No: ZE20C00074 & ZE20C00129

IN THE EAST LONDON FAMILY COURT

11, Westferry Circus,
LONDON,
E14 4HD

Date: 11 February 2021

Before :

HER HONOUR JUDGE CAROL ATKINSON
(sitting as a Deputy High Court Judge)

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Between :

A Local Authority **Applicant**

- and –

A, B, A & B's mother, A & B's father and Y **Respondents**

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Lucy Cheetham and Emma Spruce for the **Applicant Local Authority**
Ruby Sayed (instructed by **Forida Hakim** of Duncan Lewis Solicitors) for the **1st Respondent 'A'**
Sarah Branson and Davinder Sehmi (instructed by Matwala Vyas LLP, through the Official Solicitor) for the **2nd Respondent 'B' and the Children's Guardian for A & B**
Nathan Alleyne-Brown and Manjit Dogra (instructed by SA Law Chambers) for the **3rd Respondent, 'A & B's mother'**
Twanieka Alcindor and Dolores O'Rawe (instructed by MW Solicitors) for the **4th Respondent, 'A & B's father'**
Ritu Sood (of Miles and Partners Solicitors) on behalf of '**Y' through their Guardian**

Ben Haseldine and Jennifer Lanigan represented the MPS

Hearing dates: 1st October 2020, 4th November 2020, 16th December 2020 & 11th February 2021; Judgment was handed down on 27th October 2020 and a Postscript to the Judgment was handed down on 11th February 2021

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JUDGMENT

HER HONOUR JUDGE CAROL ATKINSON :

Introduction

1. Baby Y is a child who was born in 2019. Y's mother and father are A and B respectively. A was 15 when she conceived baby Y. B was 14 when Y was conceived. A and B are brother and sister.

2. Following Y's birth, the local authority (LA), issued proceedings in respect of Y, and then subsequently, in respect of her parents, A and B. Consequently, this small, insular but close family unit, in respect of whom there has been no previous interest by any statutory agencies, has been under the very intense scrutiny of children's services, this court and the Metropolitan police (MPS).

3. The involvement of the statutory agencies began as a joint venture, and rightly so. Social services and police each have responsibility for the safeguarding of children and the identification of individuals who pose a threat to them. However, as is sometimes my experience, there comes a point at which the two agencies divide as they each seek to promote different priorities ostensibly in pursuit of those aims. In most cases this is not a problem but in a few unique situations the potential to do further damage to the children is very real. That is the situation in this case.

4. The MPS makes an application for disclosure of *'all social services records'* in respect of these children on the basis that these documents are necessary in order to inform the ultimate decision, to be made by the CPS, as to whether to pursue a criminal prosecution. Interestingly, the application states that the investigation is currently focused on B, the 14-year-old father, as the potential perpetrator. The offences being considered, I am told, are under s. 13 Sexual Offences Act (SOA) 2003 which tells me no more than that the police are considering one of the offences between ss.9 and 12 of the SOA 2003. In summary, those sections of the SOA 2003 are concerned with sexual activity with a child and s.13 permits the prosecution of a perpetrator who is also a minor.

The Law on disclosure

5. The law is subject to agreement between all advocates. The power to order the disclosure of information from proceedings in the Family Court to outside agencies derives from the Family Procedure Rules 2010, rule 12.73(1)(b):

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

6. The leading authority on how the Court should exercise its discretion in determining whether to give permission for information from family proceedings to be disclosed to the police is Re C (A Minor) (Care Proceedings: Disclosure) [1997] 2 WLR 322 (also cited as Re EC (Disclosure of Material) [1996] 2 FLR 725).

7. In that case, Swinton Thomas LJ identified ten factors which were likely to be relevant when determining an application for disclosure to the police. He emphasised that it is impossible to place those factors in any order of importance because the '*importance of each of the various factors will inevitably vary very much from case to case'*. Those ten factors are as 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 the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.*

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

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

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

10. *Any other material disclosure which has already taken place.*

8. The factors listed in Re C/ Re EC (supra) ('the EC factors') were recently endorsed as still being 'fit for purpose' and of current application by the Court of Appeal in Re M (Children) [2019] EWCA Civ 1364 and again more recently in Re A (Children) [2020 EWCA Civ 448.

Position of the parties

9. The MPS seeks disclosure of all material available in these proceedings for onward disclosure to the CPS. Mr A on behalf of the MPS opened his argument by telling me that *'a crime has been committed'*; that is a biological certainty, it seems. Further, it is the view of the MPS that

this is a case with unusual features. Without any disclosure, the MPS, I was told, is of the view that those features amount to *'aggravating criminal factors'* setting it apart from other cases of sexual activity between children. Mr A argues that the CPS alone has the duty to consider whether it is in the public interest to pursue a prosecution. It may reach the conclusion that it is not, but that is for the CPS. The purpose of this application is to enable the CPS to gain a better understanding of the position and make appropriate decisions going forward.

10. The other parties to the case – every one of them - opposes the application. I pause to observe that it is rare indeed that applications for disclosure by the police are met with such unanimous opposition. In the family courts we seek to honour and promote a co-operative culture of 'working together' by statutory agencies in furtherance of the common aims to which I have already referred. The arguments opposing disclosure focus largely on lack of relevance and the serious and deleterious impact that such disclosure will have on the children in these proceedings.

Decision

11. I do not intend to order the blanket disclosure sought, nor will I permit limited disclosure at this stage beyond the information that I set out in the body of this Judgment. The reasons for this are set out below and follow a careful consideration of the factors set out in the case law.

12. I invite the MPS and the CPS to read this Judgment and reconsider their respective positions, and whether a charging decision is possible on the information already in their possession supplemented by the additional detail in this Judgment. In circumstances in which the CPS is encountering difficulties in properly and fully considering the application of any of the factors in the public interest test then I will consider further the issue of disclosure if an application is made specifying the issues in need of determination. In order to assist them in that application I will order disclosure of the index to the Bundle in the case.

13. I intend to vary the direction I made as to the communication of a charging decision extending the time by which this court should be notified of that decision to 28th October 2020. The remainder of that direction remains.

Background

14. Before turning to the ten EC factors, let me put a little flesh on the bones of this tragic story. It is important to note that what I am about to set out by way of background is information that the MPS already has.

15. The referral in respect of this family came on 4th Oct 2019 from the family GP. A had been taken to the GP by her mother. She was by then 24 or 27 weeks pregnant (it differs in the papers). The grandmother and A were at a loss to explain the pregnancy. As the police are aware, during that consultation the grandmother and A had seriously wondered whether A could have become pregnant from using a public toilet or sharing a towel with her brother. Their enquiry included a question as to whether they could secure a termination abroad despite the advanced state of the pregnancy and that prompted the referral to the LA.

16. A and her mother were first spoken to by the SW and a police officer following a decision to conduct a joint police and social services investigation. It was at that meeting, held on the same day as the GP referral, that A said she had been impregnated by her 14-year-old brother. It is important to record that she did not verbalise this because, as the MPS through this meeting became aware, A has throughout this process presented as selectively 'mute'. Initially, A refused to speak to the police, but when one of the officers asked her directly if her own father

had fathered the baby A shook her head indicating "no". She was then asked if her brother fathered the baby and she nodded her head.

17. The papers suggest that on the same day the police took both children into police protection. At that time, the police position was that both children were being treated as suspect and/or perpetrator. If they were both removed, I am aware that in due course it was A who continued to be separated from the family. It does not much matter because within a short space of time, to the satisfaction of the local authority, the parents put in place arrangements to ensure that the siblings were never left alone together and A returned home where she and her brother so desperately wanted her to be.

18. Initially the police interviewed the parents on suspicion of child neglect. They were interviewed under caution in the presence of a solicitor. The parents stated they were not aware of A being in any sort of sexual relationship. It was then decided by the MPS that the two siblings would both be interviewed under caution because, in the words of the officer (taken from an email exchange with the social worker), *'technically, criminal offences have been committed albeit by both parties'*.

19. A was interviewed first on 15th October 2019, in the company of her foster carer. I am unclear as to whether she had a solicitor with her, but I would hope so. A, once again, said nothing at all in her interview. B was interviewed on 17th October in the company of a solicitor. Initially he denied being the father of the baby. B was told that there would be DNA testing and it was only then that B made a disclosure to his mother and the social worker that he had fathered the baby.

20. In January 2020, the DNA results, shared with the MPS, confirmed this, so both A and B were interviewed under caution again. A again said nothing, and B answered "no comment" to all questions. No interviews were carried out in the ABE format despite the ages and obvious vulnerabilities of both A and B.

21. Both children have suggested that this happened in their home when their mother was taking a shower. Although there is precious little detail of the circumstances it has been clear throughout, and this is also known to the police, that neither child alleges that they were forced or coerced. They are at a loss themselves to explain how it happened, in the sense of why they overstepped familial sexual boundaries, but it did.

22. On 22nd Feb, in an email exchange between the newly allocated social worker and the police officer explained that the police investigation was 'on-going'. The police officer sets out in that email that the file had been *'sent to the CPS so they can make a charging decision around this offence of underage sexual activity which obviously both parties have committed.'* On 9th March the social worker emails the officer asking if there has been a charging decision yet and is told that the CPS had *'sent the file back'* to the MPS as there was *'information missing'*.

23. In a further email exchange on 11th March, the Head of Service at the LA writes to the MPS, setting out the full facts of the case, and inviting serious consideration to be given to whether pursuing a prosecution in these circumstances is in the public interest. Correctly focusing on the second limb public interest part of the test she points out that A and B are, in the view of the LA, both victims and she questions the value in prosecuting them. So far as I am aware that email has received no substantive response. Further, the MPS was made aware that the intended specialist therapeutic work planned for the children could not commence until this issue of charging was resolved in favour of no further action or failing that, the criminal process concluded.

24. It is significant, in my view, that B has within these proceedings been assessed as lacking the maturity to be able to conduct proceedings on his own. As a result, he is represented by the

Official Solicitor in the proceedings in which he is a parent Respondent. On 30th April, the local authority was told that the CPS had given the MPS an *'action plan'*. I have not seen that action plan but recent experience suggests that it is likely to direct the MPS to seek the disclosure from social services. It was on the same date that A and B were asked by the officer to sign consent forms agreeing that the MPS could inspect *'social services records'*.

25. At a case management hearing on 21st May I was told that the MPS had sought the consents referred to above and further that there had been no charging decision because the investigation was ongoing. I expressed concern that these children – both subject to proceedings themselves – were asked to sign 'consents'. In the case management order made at that hearing I made it clear that any 'consent' given by these vulnerable children was unlikely to be valid and going forward, so far as the disclosure of any documentation from these proceedings to the MPS was concerned there would be no disclosure of any documentation to the MPS/CPS without my express permission. I directed that if there had been no charging decision by 30th September 2020 then the senior investigating officer should attend the IRH in November. It is worth noting that the deadline I imposed on the CPS for a charging decision was a few days short of a year since the commencement of the investigation.

26. On 27th Aug the MPS issued this application. In that application the MPS sets out that it is *'investigating allegations under s.13 of the SOA 2003 against B'*. It would appear therefore that the MPS/CPS has designated B as the potential perpetrator and A as the victim though on what basis it is difficult to discern. Of course, only B could be charged under s.9 SOA 2003, if that is what they are considering. I have no faith that there has been any real consideration given to who could or should be the 'perpetrator' here. Of course, if there is nothing to choose between them and they are both designated 'perpetrators' (as the officer consistently refers in her email exchanges), then by that means they are also both 'victims'.

27. Finally, I wish to add this in my recital of things already known to the MPS. In a covering email from the MPS lawyer I received a profuse apology for the genuine mistake made in seeking to secure consent from these children to this disclosure. The writer explains that the officer was *'unaware that the children were neither Gillick competent or were awaiting capacity assessments'*. Of course, by the time they were asked to sign the capacity assessments were already available. Whilst I am grateful for the apology and acknowledgement of the error, I think that this is another example of the complete failure to consider A and B as children though how that can have been so I find difficult to understand. A, had not even spoken to the police, only signifying her agreement or otherwise by nods. Her social communication difficulties would in my view have been plain and should at least have rung alarm bells. Both children are diminutive in stature and noticeably so. I have seen them only once, when they attended a hearing as the parents of a child, and it was frankly shocking. A looks much younger than her years. Her face was utterly blank and emotionless throughout. Most shocking was B who looked no more than 10 years of age and was quite visibly terrified. I have not seen them since, acceding to an entirely appropriate application that they need not attend the hearing, but the picture was so powerful that it has stayed with me.

28. As at the date of this application, the following information, in summary, was clear to the MPS and I assume therefore to the CPS:

    a. A teenage brother and sister engaged in sexual intercourse resulting in the birth of a child.
    b. Each of the child-parents present with extreme vulnerabilities beyond their chronological ages – the boy in particular lacks the capacity to instruct his own legal team.
    c. There is no evidence to suggest wilful neglect or abuse of these children by the grandparents of the baby.

d. There is no familial history of sexual abuse or any safeguarding concerns – historical or current - about the family at all.
e. There is no evidence to suggest any force or coercion or even an imbalance of power as between A and B.
f. The insular nature of the children's upbringing is considered by the LA to be key to the development of this relationship.
g. There is no evidence that this overstepping of sexual boundaries has or is likely to be repeated or go beyond the family unit.
h. The entire family is subject to the support, monitoring and enquiry of social services with which they are completely compliant and engaged.
i. The children, A and B, are awaiting the conclusion of the criminal process before being able to undergo the therapeutic intervention necessary to enable them to understand the significance of their actions (in so far as that has not been made obvious to them already) and prevent any repetition.
j. Whilst the MPS has not been privy to the detail of the information that I shall set out below concerning the likely impact on these children of the ongoing criminal investigation, it is self-evident that an ongoing criminal investigation, a prosecution and the criminalisation of one or more of them will impact upon the welfare of all three children subject to my proceedings.

The decision to prosecute

29. The decision whether to prosecute B or A is not mine and it is not the LAs. I am aware of that. However, it is worth setting out that the decision, which is entirely the preserve of the CPS, is made within a published framework. Every charging decision is based on the same two-stage test:
    a. Does the evidence in the case provide a realistic prospect of conviction?
    b. If so, is it in the public interest to prosecute?

    Only if the evidential stage of the two-part Code test is met, can the prosecutor move to the second element - is it in the public interest to prosecute? As Mr A for the MPS set out in his submissions, so far as the MPS is concerned there is clear evidence that *'a crime has been committed'* and thus the CPS needs nothing from me to cross that threshold. The focus then moves to the second limb.

30. The public interest test should be a reasoned assessment, based on consideration of the questions clearly defined in the Code. Broadly speaking those questions cover factors such as how serious the offence is, the harm caused to the victim, the impact on communities and whether prosecution is a proportionate response. I have those issues in mind when I look to see whether there is material here of relevance to this investigation, to the alleged offence and to the public interest test.

31. Finally, it is worth mentioning that the consideration of the public interest does not take place in a vacuum and without reference to life events. In a recent published address, the DPP made the following observations regarding the impact of the current pandemic on decisions to prosecute. He said:

    'In the face of a national lockdown and the immense impact on criminal justice proceedings - the system could only cope with a fraction of the normal caseload during lockdown - we took the decision early on to ask our prosecutors to consider the impact of the pandemic when weighing up whether criminal charges were in the public interest. Our prosecutors always consider the public interest - but this was a request, via interim guidance, for additional consideration in the face of extraordinary circumstances. Our consideration of the public interest does not take place in a vacuum - it must reflect the reality in which we are operating, and so it was vital we responded to extraordinary changes in our society.'

I feel bound to mention this in circumstances in which, as this history discloses, there has been no urgency in the consideration of this case by the CPS, and as a polite reminder of the reality of restricted court resources set against the growing backlog of cases in the criminal courts – a factor which should be weighed in the balance together with the other second limb factors.

THE EC FACTORS AND THEIR APPLICATION TO THIS CASE

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.

32. There are three children in the proceedings before me. There is strong evidence in these proceedings that A and B will be adversely affected in a serious way by the making of the blanket order for disclosure sought – expressed as it is for the purposes of their criminal investigation and extending to permit onward disclosure in anticipation of proceedings. It matters not to these two children that there is a possibility that such information might cause the CPS to consider that prosecution is not in the public interest. This factor weighs very heavily in the balance against blanket disclosure. I cannot explain the reasons why this factor weighs so heavily in the balance without disclosing some of it. To that end, I intend to reveal the view of the expert on this limited issue within the body of this Judgment.

33. The psychologist instructed in the proceedings has interviewed the children, A and B, twice. The first time was in April. This prompted her assessment of their respective capacities to engage in the proceedings and instruct lawyers. Dr P met both children a second time at the end of August.

34. As the MPS knows, in April she concluded that B was unable to instruct his own lawyer and he has therefore remained represented by the Official Solicitor in the proceedings in which he is the Respondent parent. Following the August meeting it was noted by the psychologist that B presents as an *'extremely anxious, highly stressed and profoundly sad child'* who has *'considerable insight into the truly distressing and complex situation with which he now has to live for the rest of his life'*. Testing revealed that B was *'experiencing significant symptoms of trauma'* with *'elevated levels of anxiety, moderately elevated levels of depression and significantly low self-esteem'*.

35. So far as A is concerned, whilst she considered that A, who is older and more mature, was capable of instructing her own solicitor directly it is of note that following the second meeting with A, which was face to face, she noted two significant things. The first was a marked decline in A's presentation observing A to be more *'shut down'*. More significantly, her face to face observations also led her to re-evaluate A's functioning determining it possible that A suffers from *'social communication difficulties'* which need to be considered as part of her normal presentation.

36. Also, of significance was her view that both children were clearly socially isolated and generally considered to lack certain social skills, and a sense of social awareness. They were insular, without obvious friendships outside of their family unit and the expert considered, more likely to look inwards for comfort where needed.

37. Dr P has been asked to consider the impact of a continuing criminal investigation or criminal proceedings on each of the children. I note that for reasons I do not quite understand, she has

assumed (or possibly been told) that any criminal investigation or charges would be considered against A and not as the MPS apparently intend, against B. I hasten to add, for fear that her approach will be leapt on by the MPS as supportive of some evidence that suggests A is the more likely 'perpetrator', that this is simply not the case and I suspect that the psychologist has approached the issue simply on the basis that A is the older and more mature sibling. Despite this, her assessment of their respective reactions, it seems to me, holds true whomever the MPS chose to pursue.

38. Her professional opinion is that further criminal investigation would *'significantly compound the trauma suffered by A and her brother'*. She considers that A's social communication skills and ability to express herself is already compromised, the impact of further police processes is likely to shut her down even further and may profoundly impact her already fragile psychological functioning. Criminalising A will have a lifelong impact on her and may significantly hinder any therapeutic process.

39. For B, she considered that his *'shame and sense of responsibility for what has happened in his family is profound and significantly impacts his mental health'*. Again, in case this is misconstrued, I should add that this sense of responsibility is no 'admission' that he alone was responsible for what has happened between them. He feels deeply the impact this will have upon Y, their child, and for their family as a whole and the ongoing investigation *'presents a direct risk to his mental health'* not least because he will be unable to access therapy until that process is concluded.

40. Indeed, it is worth repeating that both children are in urgent need of the intervention and support of a specialist psychotherapist which they cannot access until the criminal process is ended.

The welfare and interests of other children generally.

41. There is no evidential basis to suggest that either one of these children forced or coerced the other into this sexual act. There is no evidence, not even a suspicion, that either one of them has a tendency towards predatory or grooming behaviours. There is no evidence that either one of them would venture to do the same with any other children. All of this is already known to the MPS and so this factor does not weigh in the balance in favour of disclosure.

The maintenance of confidentiality in children cases.

42. Whilst I accept that the handing over of this information does not of itself suggest that it will be made available to the wider public it will make it available to a wider audience and remove the power to control its dissemination from the family court. This concerns me greatly in a case in which there is likely, if prosecuted, to be a high level of media interest. There is no guarantee, in those circumstances that background information regarding these children would not seep into the public consciousness through the trial, offending against the promise of confidentiality for all three of these children. In this case, the lack of specificity in the application itself combined with the express intention to share the documents more widely means that this factor weighs in the balance against disclosure.

The importance of encouraging frankness in children's cases.

43. This factor has no real bearing on my decision. The damage has already been done in this regard, in my view. The involvement of the police, so obviously investigating a 'crime' and

paying minimal regard to their vulnerabilities as children (no ABE procedure, signing of consents) must surely have already contributed to A and B's minimal responses.

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.

44. I have very much in mind the importance of enabling the CPS to complete its statutory functions. This factor does not weigh heavily in the balance in favour of disclosure here because I am satisfied that unless and until I have described to me how they are so prevented through not having this information, for the reasons set out elsewhere, I do not consider they need more.

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

The gravity of the alleged offence and the <u>relevance</u> 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.

45. I will deal with these two factors together. First, the relevance of the evidence that I have in these papers to the alleged offence and in a criminal trial. In my judgment there is nothing contained in the papers within these proceedings that either assists or undermines the case that a 'crime' has been committed. As has already been said – the MPS has sufficient evidence of this already. The biological facts speak for themselves. And for these purposes I have considered offences more broadly than those set out in the application. Offences in which A or B would be perpetrator.

46. In the hunt for greater detail and potentially aggravating features, the same applies. There is no evidence of force. There is no evidence of coercion. There is no evidence of grooming or predatory behaviour. There is no additional evidence in these proceedings which assists as to 'gravity' or even in determining which of the two children in the frame most deserves to be cast as 'perpetrator' rather than 'victim'. Nor is there any evidence which would undermine the fact of the sexual act and assist any 'defence'. I say that as someone who sits in the Crown Court and has direct experience of trials of sexual offences.

47. I will reveal, though it seems to me clear from the position taken by the social worker in exchanges with the MPS, that within these proceedings the unified professional opinion is that both A and B are 'victims'. The expert in the care proceedings hypothesises that the insular and 'closed' nature of the children's upbringing has prompted the over stepping of familial sexual boundaries within the family home as A and B have turned to each other for comfort. It seems to me that this neither assists nor undermines the prosecution case against either one of them. Why this might have happened is not relevant to the proof of the alleged offences though it does have a bearing upon the public interest limb of the test to be applied when considering whether a prosecution is a proportionate response and should be pursued. This weighs in the balance in favour of disclosure of a limited number of documents. However, absent greater specificity in the application and given that the MPS is already

possessed of much of the information regarding the children's home circumstances, it does not weigh heavily at this stage.

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

48. Of course, I recognise the desirability of co-operation. However, I would observe that it appears to me that in the history of this joint investigation there has been a constant flow of information from social services to MPS sufficient to enable the MPS and CPS to discharge their respective functions. This factor has no bearing on my decision.

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

49. As I have already set out, these children have given a consistent albeit limited account absent any real detail. The MPS already has that information. This factor does not influence my decision.

Any other material disclosure which has already taken place.

50. As already set out, it is my view that the CPS has everything it needs to make a decision on both limbs of the test. The facts, it seems to me, speak for themselves but I am not the decision maker on that issue.

Discussion

51. I begin by reminding myself that the application is for disclosure of all social services records and the order sought is for permission to make onward disclosure to the CPS, any Defence teams and into criminal proceedings. There is no focus on what is needed or why leaving the family lawyers and the court to work that out for the MPS. Whilst in some cases a 'scatter-gun' approach is taken because the police have no information about what social services have, that cannot be said of this case. This has been a joint investigation. I have set out above the extensive information currently held by the MPS. Even the instruction of the expert was known to them. It is simply not helpful for the MPS to make such a broad and unfocused application.

52. Nevertheless, drawing everything together and balancing all the EC factors set out above, I am quite satisfied that there should be no wholesale disclosure of social services records to the MPS for onward disclosure to the CPS.

53. In balancing these factors I have at the forefront of my mind the need to ensure that I do not impede the ability of the MPS and the CPS to perform their own statutory functions in the investigation of crime and the decision whether there is a public interest in prosecuting it. However, the determinative factors for me are relevance and welfare set in the context of what the MPS already knows and its unfocused approach to the seeking of all information.

54. As I have set out repeatedly above there is nothing of relevance to the alleged offence or to any aggravating features. The CPS does not need anything from my proceedings to consider whether they get over the first limb of the test for prosecuting offences. Nor is there anything in my proceedings that might undermine their prosecution and leave them open to the criticism that drives them in such applications.

55. What I do have in my papers is evidence that might assist in the public interest determination. There is, for example, confirmatory evidence regarding the age and vulnerability of both A and B, the impact upon them of events, the lack of aggravating features of 'culpability' beyond the consensual sexual act. I say confirmatory because these facts are already known to the MPS. This does not warrant the blanket disclosure sought, however.

56. Balanced against that I must consider the welfare of these two perpetrator/victims. The sharing of all personal information about them with the police is likely to cause them to shut down even further. The impact upon them of such wholesale disclosure will be, in my Judgment, considerable. Having said that, I am equally mindful of the fact that if in failing to order disclosure I do leave the CPS unable to make a proper decision then my actions in refusing the disclosure will only serve to add to their distress. For this reason, I have anxiously considered whether this might persuade me to make limited disclosure. However, the broad nature of the order sought and the lack of focus has persuaded me that the appropriate course for now has been to disclose through this Judgment some elements of the evidence and invite the MPS to reconsider its position with the CPS as to what else, if anything, they are justified in seeing and why. To assist they should be given an index to the current Bundle.

57. This is not the first time that I have had to devote precious court room time and resources to this sort of application, but I am pleased to observe that it is a rare occurrence. In most cases, I deal with disclosure to the police on paper, without the need for a hearing and in the face of no or negligible objection. However, there has been a noticable increase of late in applications for blanket disclosure by the MPS made at the behest of the CPS who refuse to make a charging decision until they have in their possession every piece of paper relating to the individuals under consideration, or so it seems.

58. I completely understand that this approach has grown out of a series of cases in which the late discovery of evidence which should have been considered at the outset has very publicly undermined confidence in the process. However, the need to investigate thoroughly does not mean that investigation should proceed blindly. A tick box approach in which there is no charging decision is even considered until all social services records have either been secured or refused by court order is unhelpful and has been a waste of my very limited and precious court time. It is an exercise which is focused on ensuring that no criticism will be made further down the line and has replaced the exercise of professional judgment.

Delay

59. Finally, in the interests of the child who is the innocent product of this 'incident', can I politely remind the MPS and the CPS of the potentially devastating impact any further delay in the decision making is likely to have on Y? Although I have yet to see evidence from the family finders, it seems obvious to me that the fact of her parentage, together with possible genetic uncertainties, will narrow the pool of people prepared to care for her. A continuing criminal investigation and, worse, the spectre of a criminal trial looming may only serve to narrow the pool even further; possibly even empty it. It may not be possible to conclude the processes in relation to her until after the conclusion of a trial, if there is to be one. The older she is, the harder she will be to place and the harder it will be for her to settle in a new placement. In short

there is the potential for further damage to be done here by reason of the unforgiveable delay in the process. Not just to A and B through their inability to access their much needed therapy, but also to Y. I would respectfully invite the decision makers to bear that in mind.

POST SCRIPT

60. I handed down a copy of this Judgment on 27th October 2020. On the same day the MPS made a further application for disclosure of documents; this time specifying the documents so as to narrow the focus but by very little. The application included a request for documents that I had made clear, in my Judgment, contained nothing of additional value for the police or CPS.

61. The MPS attended the Issues Resolution Hearing on 4th November but there was insufficient time for a further argument on disclosure and so I had to earmark more court time for a full contest a little over a week later. By then there had been a further petition on behalf of the child-parents from the NSPCC expressing concern that in the view of that organisation any prosecution was very obviously not in the public interest and the failure to make a swift decision, one way or another, on the ample information available was contrary to good practice in matters involving sibling sexual abuse. Keen to ensure that this Judgment had been read, and to understand what more the CPS needed to make a swift decision, I directed the attendance of the officer in the case and the CPS reviewing lawyer.

62. Three days before the listed hearing the MPS withdrew its application indicating that the CPS lawyer had marked the case as 'finalised' and without the need to view anything else. It was confirmed that by 'finalised' it was intended that there would be no further action taken against either of these child-parents.

63. This chronology speaks for itself. In the space of a matter of days a decision was made by the CPS on the merits of pursuing a prosecution in this case without the need for any further documentation from the family proceedings. It must follow that this is a decision that could have been made many months before. It is unfortunate and indeed a terrible waste of court time and effort that the impetus to reach this decision seemingly required my intervention. That is to say nothing of the impact of such additional delay on the three children at the centre of these proceedings.