RE T (WARDSHIP: IMPACT OF POLICE INTELLIGENCE) [2009] EWHC 2440 (Fam)

Family Division

McFarlane J

7 October 2009

Family proceedings – Wardship – Disclosure – Information from police – Police resistance to disclosure on public interest grounds – Special advocates – Procedure for dealing with allegedly sensitive material

The child was made a ward of court when he was taken to India by the father without the mother's consent. After over 2 years in India the father returned with the child to England, but neither the father nor his solicitors disclosed the child's whereabouts to the court. However, ultimately the child was recovered by the police. The father applied for contact with the child from prison, where he was awaiting trial for the criminal offence of child abduction; the paternal grandparents also applied for contact. On the day on which a directions hearing was due to take place, the police informed the family proceedings judge that there was credible intelligence, from an anonymous source, suggesting that the father had taken out a contract to have the mother murdered when she attended the hearing. Although the police were still investigating this claim further themselves they had decided to take the mother and child into police protection. The police stated that, for practical reasons, this police protection would be withdrawn if interim contact with the father were established. The police initially requested that none of this information be disclosed to the father, his family or any of the family's representatives. Subsequently the police told all the parties of the alleged contract to kill, and of the fact, but not the details, of the police protection. The court then had to investigate the claim that the father had taken out a contract to murder the mother, while affording due protection to material concerning the alleged murder contract, which the police asserted must, in the public interest, remain confidential and undisclosed to the parties and, crucially, their representatives. For professional reasons even the guardian ad litem was not shown the relevant sensitive information, although she was, unlike the court, privy to the details of the mother's police protection. For over 1 1/2 years, until the conclusion of the fact-finding hearing, the family court was engaged in dealing with this information, and its procedural consequences, in a mixture of closed and open hearings. Special advocates were appointed, possibly for the first time in family proceedings, to represent the interests of the father and the paternal grandparents at the closed hearings, 'filtering' the evidence whose disclosure was resisted by the police. Following a proper evaluation by the court, the police eventually voluntarily agreed to disclose the great bulk of its material at the open fact-finding hearing, however, certain key information concerning the original intelligence as to the contract remained closed and known only to the judge and the special advocates throughout the process.

Held – making a number of adverse findings against the father and his parents, including the abduction; but also finding that, even coupling evidence in the open proceedings with evidence from the closed proceedings, there was insufficient evidence to establish that the father had taken out a contract to kill the mother –

(1) In such a case, the court had to balance a number of important and potentially conflicting principles, namely the need for: (i) the court to evaluate the material and to determine whether or not the allegation was proved, so that any subsequent decision about the ward's welfare could be informed by the resulting finding; (ii) the court to conduct any fact-finding process relating to that allegation fairly and, in particular, in a manner which respected the parties' rights to a fair trial under Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; (iii)

the police and the court, as public authorities, to protect the Art 2 right to life of the alleged victim; (iv) the court to protect the rights or position of any third parties or agencies who were not party to the proceedings, but whose position might in some manner be adversely affected as a result of disclosure of material held by the police; (v) the court to respect the Art 8 rights to family life of each of the family members; and (vi) the court, and the parties, to avoid acting unlawfully in breach of Part 2, Chapter 4 of the Serious Organised Crime and Police Act 2005, by disclosing material relating to police protection (see paras [50], [81]).

(2) A positive finding on the 'contract to kill' issue could be made only if the court, having itself conducted a full analysis of the material, considered that the evidence as a whole proved certain facts on the balance of probability. The burden of proving the 'murder contract' allegation did not fall upon any of the parties to the proceedings, including the mother; most importantly, there was no burden upon the father or his parents to disprove the allegation. There was rather a duty on the court to analyse the relevant evidence with a view to determining whether any finding of fact could be made (see para [54]).

(3) Given an assertion by the police of credible intelligence of a contract to kill, there had been a responsibility upon the police to disclose all material to the court relevant to that intelligence and to the police investigation. It was not for a party or third party to decide what should and should not be put before the court; the court was to have all information put before it, and it was for the court to decide whether that information should be disclosed, bearing in mind the court's duty in respect of the parties' human rights (see paras [67], [68]).

(4) In cases in which 'PII material' (sensitive material, outside the disclosure rules) had been established, and the court considered that some material evidence could not be disclosed to all the parties, rights under Arts 6 and 8 fell to be adapted in a proportionate manner, to accommodate the priority to be given to the PII material (see para [87]).

(5) Because the wardship court had a duty to investigate all of the relevant circumstances that might touch upon the ward's future welfare, the wardship court could, unlike a criminal court, receive anonymous, hearsay evidence. The question for the wardship court was the weight to give to such material, not its admissibility (see para [89]).

(6) There was no general duty, absent a court order, requiring solicitors to disclose information as to the whereabouts of a ward, in breach of the duty of confidentiality owed to a client. If a child had been concealed by a client for 2 or more years in breach of longstanding wardship orders, a solicitor should consider whether those facts amounted to 'exceptional circumstances' justifying a breach of the duty of confidentiality, as described in the guidance to the Solicitors' Code of Conduct, but the final decision remained one for the judgment of the individual solicitor. However, once a solicitor was aware of court orders requiring the immediate disclosure of a child's whereabouts, and knew that the client was harbouring the child in breach of such orders, the solicitor was then under a duty to advise the client of the client's responsibility to make contact with the court or other authorities forthwith; in such circumstances it could not be legitimate for a solicitor to advise their client that there was no need to inform the court or authorities of the whereabouts of the child whilst an application for legal aid was being processed (see paras [102]–[105]).

Per curiam: (1) the court described the special advocate procedure adopted, and identified lessons to be learned. Crucially, the clash of cultures, or at least lack of understanding, between the police and the family justice system, had delayed, and at times risked thwarting, the discharge of the family court's duty to act in a manner that met the overall welfare needs of its ward. Having handed over important information to the wardship court, the police had some responsibility actively to assist the court thereafter, and to adopt a cooperative and facilitative approach. As a result perhaps of the radically different approach of the police and the family court to risk assessment, the good practice and custom of joint working for the police and child welfare

agencies in other respects seemed not to apply with regard to police protection (see paras [31]–[35], [44]–[47], [51], [56]–[59], [61]–[66], [69], [70], [75], [79], [84]–[86], [107], [110]–[112]).

(2) in cases like this, in which the fact-finding process was hampered by the lack of any party within the court process privy to all of the information, with some responsibility for investigating it, and able to act as prosecutor, it might be useful to draw the relevant local social services authority into the proceedings by way of a direction under s 37 of the Children Act 1989. If the authority then chose to apply for a public law order, under s 31, the authority might then be a candidate to whom full disclosure could be made (see para [109]).

Statutory provisions considered

Family Law Act 1986, ss 33, 34
Children Act 1989, ss 1(2), (3)(e), 31, 37
Special Immigration Appeals Commission Act 1997
Anti-Terrorism, Crime and Security Act 2001
Prevention of Terrorism Act 2005
Serious Organised Crime and Police Act 2005, ss 82(1), (4)(a), 86, 87, Part 2, ch 4, Sch 5
Solicitors' Practice Rules 1990, r 105
Family Proceedings Rules 1991 (SI 1991/1247), rr 5.1(8), (9)
Civil Procedure Rules 1998 (SI 1998/3132), r 76.24
Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034)
Allocation and Transfer of Proceedings Order 2008 (SI 2008/2836), Art 18
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 2, 6(1), 8

Cases referred to in judgment

AHK and FM v Secretary of State for the Home Department [2009] EWCA Civ 287, [2009] 1 WLR, CA
B (Abduction: Disclosure), Re [1995] 1 FLR 774, CA
B (Care Proceedings: Standard of Proof), Re [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, HL
B Borough Council v S (By the Official Solicitor) [2006] EWHC 2584 (Fam), [2007] 1 FLR 1600, FD
Chahal v United Kingdom (Application No 22414/93) (1997) 23 EHRR 413, ECHR
D (Minors) (Adoption Reports: Confidentiality), Re [1996] AC 593, [1995] 3 WLR 483, [1995] 2 FLR 687, [1995] 4 All ER 385, HL
H (Abduction: Whereabouts Order to Solicitors), Re [2000] 1 FLR 766, FD
M and R (Minors) (Sexual Abuse: Expert Evidence), Re [1996] 2 FLR 195, [1996] 4 All ER 239, CA
Osman v United Kingdom (Application No 23452/94) (2000) 29 EHRR 245, [1999] 1 FLR 193, (1998) 5 BHRC 293, ECHR
R (Malik) v Manchester Crown Court [2008] EWHC 1362 (Admin), [2008] 4 All ER 403, QBD
R v Davis [2008] UKHL 36, [2008] 1 AC 1128, [2008] 3 WLR 125, [2008] 3 All ER 461, HL
Ramsbotham v Senior (1869) LR 8 Eq 573, (1869) FLR Rep 591, ChD
Secretary of State for the Home Department v AF [2009] UKHL 28, [2009] 3 WLR 74, [2009] 3 All ER 643, HL
Secretary of State for the Home Department v MB [2007] UKHL 46, [2008] 1 AC 440, [2007] 3 WLR 681, [2008] 1 All ER 657, HL
T (Wardship: Review of Police Protection Decision) (No 1), Re [2010] 1 FLR 1017, FD
T (Wardship: Review of Police Protection Decision) (No 2), Re [2010] 1 FLR 1026, FD

Joanna Dodson QC and *Teertha Gupta* for the mother
Alison Ball QC and *Elizabeth Wilson* for the father
Lucy Theis QC and *Joanna Youll* for the grandparents
Susan Freeborn for the guardian ad litem
James Lewis QC and *Perrin Gibbons* for the Metropolitan Police
Judith Farbey as special advocate for the father
Marina Wheeler as special advocate for the grandparents

Cur adv vult

MCFARLANE J:

[1] On the morning of 15 December 2006, Hedley J will have been contemplating a court list which included the case of *Re TS*, wardship proceedings involving a child of nearly 3 years who had, for much of his life, been in the care of his father in India following abduction from his mother's care in July 2004. In mid-2006 TS and his father had returned to England and were eventually traced by the authorities with the consequence that TS had been returned to his mother's care and the father was, by December 2006, on remand in HMP Wormwood Scrubs pending trial for the criminal offence of child abduction. The hearing before Hedley J on 15 December 2006 was listed for directions in relation to interim contact, however, on that day the judge was given information which caused this case to develop into a piece of litigation of high complexity.

[2] The reason for this change of course was that, rather than conducting an ordinary inter partes directions hearing, the judge was told that two officers of the Metropolitan Police Service (MPS) wished to speak with him privately about the case. When they saw the judge the officers informed him that the MPS had received 'credible intelligence' to the effect that, whilst in prison, the father had taken out 'a contract' to have the mother murdered when she attended court that day. The MPS explained that they were giving the judge this information but that he was asked not to disclose it to the father, or his parents or any of their representatives. The MPS also told Hedley J that, as a result of this information, they had taken the mother and TS into police protective arrangements. The judge was again asked not to pass that information on to the father or his family. Finally the judge was told that, as a result of the protective arrangements in place, it would be practically impossible for any interim contact to be arranged; the judge was also asked not to disclose that information to the paternal family.

[3] From that time in December 2006 until the conclusion of the fact-finding process relating to TS in August 2008, the family court became engaged in dealing with the information disclosed to the court by the MPS and its procedural consequences. The initial difficulty for the court was to manage the case fairly but without disclosing the existence of this material to the paternal family. Thereafter, once the paternal family had been told of the allegation, the key difficulty for the court and the parties was to balance the need to investigate the serious claim that the father had taken out a contract to have his wife murdered, whilst at the same time affording due protection to material which the police asserted must, in the public interest, remain confidential and undisclosed to the lay parties or their representatives. The whole process had to be conducted in a manner which respected not only the public interest immunity (PII) asserted by the MPS, but also the rights under

the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) (principally under Arts 2, 6 and 8) of the parties which were at times directly in conflict with each other and in conflict with the MPS assertion of PII.

[4] The purpose of this public judgment, given after the conclusion of the proceedings themselves, is to record the procedure adopted in this case and to flag up such lessons as may have been learned in the hope that, should another court in the future be faced with a similar set of circumstances, the court's experience in this case may be of some assistance.

Factual background

[5] The fact-finding process concluded with a judgment handed down on 10 October 2008 and it is, therefore, necessary to do no more in this judgment than to record the principal findings of fact that were made in order to set the discussion of the procedural issues in the correct context.

[6] TS was born on 8 January 2004. His mother, HS, was born in India but came over to England in June 2003 following her marriage to TS's father, KS, in India in January of that year. KS and his family had entered the UK some years before from their home in Afghanistan. In the course of the proceedings the mother made a number of serious allegations about the manner in which she was treated by KS and his family, with whom the young couple lived, once she arrived in England. The allegations, which included physical violence, deprivation of food and confinement to the family home, were found by the court to be largely proved. In addition the court found, as the mother had alleged, that, following TS's birth, the paternal family kept her apart from her baby for much of the time so that TS's primary carer became the paternal grandmother.

[7] In mid-April 2004 the mother travelled on her own (and without TS) to India. The father followed her there a short time later. The court has now found that the father engineered the mother's trip to India and once she was there attempted to seise her return ticket and passport in the hope that she would be 'stranded' in India and separated from her son. In the event the mother did not give up her travel documents and, in due course, she returned to England whereupon she removed TS from the care of his paternal grandparents.

[8] In due course, following the father's return to England, the mother and father set up home with TS and enjoyed a period of a month or so of relative domestic peace; or so the mother thought. In fact, as the court has now found, the father was already plotting to abduct TS and remove him to India. On 10 July 2004 the father removed TS from the mother's care on the pretext of taking him for a short visit to his parents. Instead the father, his parents and TS boarded a cross-channel ferry and thereafter travelled to Amsterdam before flying to India. The paternal family and TS remained in India for over 2 years before returning to England in August 2006. During his time in India the father issued divorce proceedings in the Indian court and made a number of attempts to have the mother deported from England back to India in order, as the court has now found, to permit him to return to England with TS and thereby continue to keep TS apart from his mother in the long term.

[9] The father's attempts to achieve the mother's deportation were unsuccessful. She remained in England (save for a short trip to India in an

unsuccessful attempt to find her son). On 16 July 2004 (the week after the abduction) the mother had commenced proceedings to try to trace TS and to achieve his return to her care; in due course TS was made a ward of court. Despite a series of court orders during the following 2 years, the authorities failed to locate TS. Throughout this period the father made no contact either with the mother or with the wardship court.

[10] Unbeknown to the mother, or to the authorities, the father and his family returned with TS to England on 13 August 2006. The father claims that he became aware of the detail of the English wardship proceedings about one week after his return. Thereafter he sought legal advice from two firms of solicitors, but neither he nor his solicitors disclosed his whereabouts to the High Court, the mother, or any other authority. It is right to stress that the fact that he was here, and had solicitors, was not known to the mother or to the court and there were, therefore, no court orders binding upon either of the solicitors requiring them to disclose his whereabouts.

[11] Matters came to a head on 20 October 2006 when the police, acting on information, located the accommodation where the paternal family were living, removed TS from their care and arrested the father. On that day TS was returned to his mother's care, and he has continued in her sole care since that time. The father was interviewed by police, charged with an offence of child abduction and remanded in custody to HMP Wormwood Scrubs.

[12] There matters rested until the evening of 14 December 2006 when an anonymous telephone call was made to the 'Crimestoppers' phone line alleging that the father had taken out a contract in the sum of £10,000 to have the mother murdered. As a result of that information the police removed the mother and TS into some form of protective arrangement, a state of affairs which continues to this day. The hearing to which I have already referred, before Hedley J, took place the following morning on 15 December.

'*Contract to Murder*': *procedural history*

[13] Having summarised the factual background, it is now necessary to look in more detail at the litigation history following the MPS's original disclosure to Hedley J on 15 December 2006. Initially, the court abided by the MPS request and, for other reasons connected with the case and the father's incarceration, adjourned the matter to a directions hearing on 19 January 2007.

[14] On 19 January 2007 the matter came before me for the first time. At part of the hearing attended only by counsel for Cafcass Legal (acting as TS's guardian ad litem) and counsel for the MPS, in terms similar to those uttered to Hedley J, the court was informed of the existence of 'credible intelligence' that the father had taken out a contract on the mother, the fact that the mother was being protected and the practical consequences of that which would render interim contact impossible. The court was asked not to disclose this information to the paternal family or their representatives on the basis that the police anticipated that the need for such secrecy would end within the course of the next month. On that basis the court acceded to the police request and simply adjourned the directions process relating to interim contact.

[15] At the next hearing on 2 February 2007 the court was told (again in private session) that the police did not have evidence to support charging the father in relation to the alleged contract to murder, but intended in the near

future to conduct a process known in criminal justice circles as a 'reverse *Osman*' (a reference to *Osman v United Kingdom* (Application No 23452/94) (2000) 29 EHRR 245, [1999] 1 FLR 193) within which the father would be told that the police had credible intelligence that he had taken out a contract on his wife's life and that, if in the future any harm should befall her, the police would regard the father as a principal suspect in any investigation. With the agreement of the MPS the legal representatives of the father and his family were told at that hearing for the first time of the alleged contract to kill. All the parties in the case were told of the police intention to conduct a 'reverse *Osman*' encounter with the father and were told that protective measures had been put in place for the mother and TS. The parties were also told that the court had been informed that any contact between TS and the paternal family was likely to undermine the protection arrangements and thereby compromise the mother's safety. The 'reverse *Osman*' encounter took place with the father on 13 February 2007.

[16] The matter returned to court for directions before Bennett J on 23 February 2007. During a 'closed' part of the hearing, attended only by counsel for the MPS, Detective Constable HB and counsel for Cafcass Legal, the judge was told the following in evidence by DC HB:

> 'On 14 December at 20.11 hours a telephone call was made to Crimestoppers and the caller stated that:
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> > "KS of Wormwood Scrubs, prisoner number [number given], has arranged for a contract on his wife, HK, [date of birth given] for her to be kidnapped and murdered after a family court case on 15 December. Court name and address unknown. … He has paid £10,000 upfront and will be paying another £10,000 when she has been murdered. KS is due to appear tomorrow morning with his wife at the family court case. He also has to appear at another court case at a later date when his wife is due to give evidence against him."'

[17] The court was also told that:

> 'the first port of call for the officers was to investigate whether [the call] could have come from the mother and, having investigated by way of her telephone records, they are satisfied that it could not have come from her'

In June 2008 this latter statement (insofar as it refers to an investigation of the mother's telephone records) was accepted by the MPS to be incorrect.

[18] By May 2007 the MPS were making it plain to the court that, whilst they regarded information relating to the contract to murder as 'credible' and they were prepared to disclose all the information available to them to the court, they opposed any onward disclosure of any part of that material to the parties in the proceedings (including the mother and her lawyers). At a hearing before me on 10 May, I directed that a request be made to the Attorney-General to consider appointing 'special advocates' to assist in managing the disclosure process. Following a positive response from the Treasury Solicitor's Office, on 18 June 2007, Sumner J appointed a special advocate for the father and a special advocate for the paternal grandparents.

Special advocates

[19] The use of special advocates has become accepted in some immigration and asylum cases where the intelligence material upon which the Home Office relies cannot be disclosed to the subject of proceedings and his ordinary legal representatives.

[20] The special advocate procedure, which was first used in Canada, found favour with the European Court of Human Rights in the case of *Chahal v United Kingdom* (Application No 22414/93) (1997) 23 EHRR 413 and has been adopted in the UK since then, first for cases such as in cases of detention under former provisions of the Anti-Terrorism, Crime and Security Act 2001, in cases of deportation on national security grounds, and in judicial supervision of control orders. The use of special advocates in the Special Immigration Appeals Commission (SIAC) is regulated by statute (Special Immigration Appeals Commission Act 1997 and the Special Immigration Appeals Commission (Procedure) Rules 2003).

[21] A special advocate represents 'the interests of' a party, as opposed to fully representing that party (as a fully instructed legal team would do). In the context of the SIAC, the key functions of a special advocate are to become briefed by the party and his legal team, but thereafter to receive disclosure of all of the evidential material, both 'open' (ie disclosed fully to the party and his legal team) and 'closed' (not disclosed to the party or his legal team). A special advocate will seek to achieve the disclosure of such part of the closed material as may properly be discloseable (either fully or in a gisted or redacted form). A special advocate represents the interests of the party at closed hearings from which the party and/or his legal team are excluded. Following such a process it is normal for the SIAC to issue both an open and a closed judgment.

[22] Special advocates are appointed by the Attorney-General in her capacity as custodian of the public interest and are supported by the Special Advocates Support Office (located within the Treasury Solicitor's Department).

[23] At the time of the hearings in this case, the leading authority on the use of special advocates in this jurisdiction was the House of Lords' decision in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, [2007] 3 WLR 681. The case concerned the making of control orders under the Prevention of Terrorism Act 2005. More recently the House of Lords has handed down its decision in *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2009] 3 WLR 74 which covers related ground.

[24] In the course of his speech in *Secretary of State for the Home Department v MB* Lord Hoffmann (at para [54]) said:

> 'From the point of view of the individual seeking to challenge the order [the special advocate procedure] is of course imperfect. But the Strasbourg Court has recognised that the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest.'

[25] In his speech in *Secretary of State for the Home Department v MB*, Lord Bingham of Cornhill (at para [35]) states:

> 'I do not for my part doubt that the engagement of special advocates in cases such as these can help to enhance the measure of procedural justice available to a controlled person. The assistance which special advocates can give has been acknowledged [reference to case-law] and it is no doubt possible for such advocates on occasion to demonstrate that evidence relied on against a controlled person is tainted, unreliable, or self contradictory. I share the view to which the Strasbourg court inclined in *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Al-Nashif v Bulgaria* (2002) 36 EHRR 655 that the engagement of special advocates may be a valuable procedure. But, as Lord Woolf observed in *R (Roberts) v Parole Board* [2005] 2 AC 738 "the use of a SA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him". The reason is obvious. In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by a way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegation made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage", is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. I would respectfully agree with the opinion of Lord Woolf in *Roberts*, para 83(vii), that the task of the court in any given cases is to decide, looking at the processes as a whole, whether a procedure has been used which involved significant injustice to the controlled person.'

[26] In the course of her speech in *Secretary of State for the Home Department v MB*, Baroness Hale of Richmond pointed out that in the family jurisdiction relating to children there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise. The modern principles of this approach are explained by the House of Lords in *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, [1995] 3 WLR 483, [1995] 2 FLR 687.

[27] Having reviewed the relevant Strasbourg case-law, Baroness Hale of Richmond (at para [63]) states:

> 'I take several messages from those cases which are helpful for present purposes. First, even in criminal proceedings, it is recognised that there may be competing interests, which include national security, the need to keep secret police methods of investigation, and to protect the fundamental rights of another person. Secondly, evidence may only be withheld if it is strictly necessary to do so. Thirdly, any difficulties caused to the defence must be 'sufficiently counter-balanced' by the measures taken by the judicial authorities, that is, by the court itself. Fourthly, what is sufficient will be specific to the case in question. The

> European Court of Human Rights will not assess whether the non-disclosure was strictly necessary, but will review
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> > "whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused" (*Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 62).
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> Fifthly, however, there is a difference between background information which is not essential to the outcome of the case and evidence which is crucial to its determination. Sixthly, in none of those cases did the court have the assistance of a special advocate as now provided for in that context as well as in Control Order cases.
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> In several of the above cases, however, the Strasbourg court contemplated that the use of a special advocate might have solved the problem: this is one of the counter-balancing measures which might be adopted by the judicial authorities. This House too has endorsed their use in non-disclosure claims in criminal proceedings: *R v H* [2004] 2 AC 134.'

Later, at para [66], Baroness Hale of Richmond stressed the duty of both the judge and the special advocate to 'probe the claim that the closed material should remain closed with great care and considerable scepticism'. She went on to say:

> 'Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable to special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge.'

[28] Whilst the context in which the House of Lords and the Strasbourg court have considered the use of special advocates differs in terms of subject matter and the level of State intervention from the allegation of a contract to murder made in the course of wardship proceedings, much of what is said by their Lordships in *Secretary of State for the Home Department v MB* is, in my view, equally applicable to the procedural circumstances in the present case. The MPS having asserted that there was credible intelligence to support the allegation of a murder contract, the wardship court had a duty to investigate that allegation notwithstanding the fact that no party in the proceedings was in a position to prosecute that allegation before the court (a matter to which I will return at a later stage in this judgment).

[29] The fact that this is apparently the first case in the family jurisdiction in which special advocates have been used indicates that, as Baroness Hale of Richmond demonstrates in *MB*, the family courts have developed other

strategies for processing material which cannot for some reason be disclosed to a party. In other contexts in recent times the courts have encouraged judges to seek to deal fairly with disclosure issues without necessarily involving special advocates (*R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] 4 All ER 403; *AHK and FM v Secretary of State for the Home Department* [2009] EWCA Civ 287, [2009] 1 WLR).

[30] In the light of the wardship court's duty to investigate the 'contract to murder', and in the light of the fact that initially the MPS were declining to permit disclosure of *any* of the information held by them, it was essential for the court to establish some form of filter or buffer between the MPS and the parties in the wardship proceedings through which the relevant evidential material could pass or otherwise be assessed by the court in a manner that respected the parties' rights under Art 6(1) of the European Convention and in a manner that was as far as possible commensurate with any countervailing claims of public interest immunity. In this case the special advocate procedure allowed the court and the special advocates to discharge the duty described by Baroness Hale of Richmond in testing 'with the utmost scepticism' the MPS's blanket assertion of PII. The result was that the vast majority of the MPS material (some 90% in my estimation) was disclosed in one form or another. In relation to the small amount of material that remained undisclosed, the special advocates, again with Baroness Hale of Richmond's strictures in mind, conducted a process of cross-examination and submission designed to test the material and enable the court to see any weakness there may be in its evidential value.

Procedural history continued

[31] As it is thought that these wardship proceedings are the first occasion on which special advocates have been used in the family jurisdiction in managing the disclosure of intelligence material it may be useful to describe the process that was adopted. In short terms the two special advocates were respectively fully briefed by the legal teams representing the father and his parents and, at that early stage, the special advocates met their respective lay clients in conference. Thereafter the special advocates had little or no direct contact with the paternal family or their legal representatives. The parties' representatives remained able at all times to communicate with and pass information to the special advocates, but the special advocates could not communicate with the open parties save with their legal representatives in writing and with the permission of the court. I granted permission for a number of notes to be passed from the special advocates to the legal representatives. The notes concerned in the main the procedural steps which the special advocates were taking, and could be disclosed without harm to the public interest.

[32] The second stage of the process involved the police disclosing what was thought to be the entirety of their files to the special advocates. There followed a detailed discussion between the special advocates and the police as to which parts of the material could be disclosed to the 'open' parties, the role of the special advocates at this stage being to challenge the assertion of PII made by the MPS.

[33] The result of the process of the special advocates and the MPS consideration of the detailed material was that, at a hearing in October 2007,

the court was able to sanction the disclosure of the vast majority of the MPS material to the open parties either without alteration or in a form that was either 'redacted' or 'gisted' to prevent the disclosure of information which the special advocates and the court accepted was to be withheld on the grounds of PII. In general, PII was accepted as being applicable, and determinative of disclosure, if it fell into one or other of the following categories because it related to:

(i) internal MPS procedures;
(ii) protection arrangements for the mother and TS; or
(iii) identity of informants.

[34] The resulting material in the form of full, redacted or gisted:

(a) police logs;
(b) internal memoranda; and
(c) the witness statement from DC HB describing the investigation,

was disclosed to the open parties in early November 2007, some 11 months after the contract to murder intelligence was first communicated to the court by the MPS. At the end of that 11-month period, the MPS position had moved from one of total opposition to any disclosure of any material to the open parties, to one where they accepted that the vast majority of the material could and should be disclosed. It is also right to record that this degree of disclosure had been achieved through discussion between the MPS legal team and the special advocates, and did not at any stage of that process require a ruling from the court on any disclosure issue.

[35] Given the fact that the MPS in the end voluntarily agreed to disclosure of the great bulk of its material as a result of proper evaluation, the reasonable inference must be that its original stance of asserting PII and refusing to disclose any material must have been taken on an ill-informed or otherwise erroneous basis. The cost of the disclosure process and the enormous delay that it caused are serious matters in themselves, but when viewed against the effects of that delay on the life of this child and his immediate family the position of the MPS can only be seen as highly damaging. As a direct result of the police intervention, this child had been removed from a situation of having 24 hour a day contact with his father and grandparents to one of no contact with them at all. At the conclusion of the court process, the court was to be asked to reinstate contact between them. Whatever the ultimate decision of the family court on the issue of contact, it was in the interests of the child and each family member to get to the position of making that decision at the earliest possible stage. As s 1(2) of the Children Act 1989, says 'any delay in determining [any question with respect to the upbringing of a child] is likely to prejudice the welfare of the child'. For an arm of the State to create a standstill in proceedings relating to a child by informing the court of the contract to murder allegation and then to take 11 months deciding not to contest the disclosure of much of the material that it held was, from the point of view of the welfare of the child, totally unacceptable. It demonstrated

neither an understanding of, nor a respect for, the priorities of the family court. What was needed, from the family court's perspective, was a co-operative and facilitative approach.

Interim contact: impact of police intervention

[36] Following disclosure of the 'open' material, the paternal family issued an application for interim contact to TS. The two judgments relevant to the issue of interim contact are to be published alongside this judgment; what follows is, therefore, no more than a summary of the history and principal factors.

[37] The position of the parties at the initial interim contact hearing in November 2007 was that the paternal family limited their aspirations to achieving supervised contact once a fortnight. The mother was willing, and indeed keen, to promote this limited degree of contact. The guardian ad litem advised that as a matter of principle contact should be commenced with the paternal family. The position of the MPS was that it was impossible to envisage direct contact taking place in a manner that did not compromise the protection arrangements. The police, therefore, advised the court that it was likely that the protection arrangements would be withdrawn if contact took place.

[38] The common view of the court and the parties in the case was that the court had a responsibility to determine the interim contact issue at that initial stage on the assumption that the police would *not* withdraw from providing protective cover. The court's decision was, therefore, based entirely upon ordinary welfare considerations within the context of continuing police protection. The police were to be invited to consider the court's judgment, the detailed structure of the supervision arrangements that were to be put in place and the court's assessment of the risk of the protection arrangements being breached. Thereafter if the police did indeed decide to withdraw protection if contact were to take place, the matter would be returned to court for further consideration.

[39] In the judgment given on 27 November 2007 (*Re T (Wardship*: *Review of Police Protection Decision) (No 1)* [2010] 1 FLR 1017) I concluded that it was in T's best interests to have some limited, highly supervised contact to his father and paternal grandparents and that, whilst there was a risk that he, aged 4 years, might say something to identify his placement or that he may be followed, those risks were low and the risks were justified when balanced against the benefit to him of achieving some contact with those with whom he had lived for over 2 years in India.

[40] At a high level internal meeting in December 2007, the MPS decided that if the contact arrangements proposed by the court were implemented, then the current protective arrangements for the mother and the child would be withdrawn with the result that they would be afforded no greater protection than any ordinary member of the public who has raised concerns about domestic violence. In January 2008 the MPS produced a revised internal risk management form supporting their earlier decision.

[41] The issue of interim contact was, therefore, reconsidered by the court. In the relevant judgment (*Re T (Wardship*: *Review of Police Protection Decision) (No 2*) [2010] 1 FLR 1026) 1 February 2008), handed down on 1 February 2008 I summarised the position of the parties which had, almost

inevitably, been influenced by the police position. The mother no longer supported any direct interim contact. The father and his parents sought orders from the court quashing the police decision and/or injuncting the police to continue protection. Alternatively they invited the court to investigate the police decision-making process. Counsel for the guardian, in slightly different terms, also invited the court to investigate the police process.

[42] For the reasons set out extensively in *Re T (No 2)* I concluded that what was being asked for by the paternal family and by the guardian was in reality for a judicial review of the police decision and that such a challenge was outside the jurisdiction of a Family Division judge sitting in wardship and could only (save in the case of an emergency) be determined by a judge of the Administrative Court (whether or not he or she was also a judge of the Family Division).

[43] I, therefore, concluded that the interim contact decision fell to be reconsidered against the background of the fact that (absent any proceedings in, and orders of, the Administrative Court) the police would indeed withdraw protective measures in the event that direct contact took place. Against that background the guardian reluctantly altered her recommendation to one that advised against any direct interim contact. Having reviewed the matter, and having T's welfare as the paramount consideration, I concluded that the loss of police protection, at that 'early' stage prior to the fact-finding hearing, was just too high a price to pay for a few interim direct contact sessions. I, therefore, revoked the earlier order and sanctioned only the continuation of indirect contact by way of videotape and photographs.

The fact-finding hearing

[44] The fact-finding hearing took place over the course of some 16 court days in May 2008. The role of the MPS at that hearing, and indeed in the earlier process, was that of providing evidence to the court rather than as a party to the proceedings. As a result the MPS were represented by counsel when any issue of disclosure of police material was before the court and/or when one or other of the two witnesses dealing with the investigation, DC HB and DI W, were giving evidence. As some distinct parts of the police material remained 'closed' so far as the 'open' parties were concerned, this oral evidence was presented in both in 'open' and 'closed' sessions. During the 'open' sessions, the parents' counsel were able to cross-examine the police officers on the information that had been disclosed. During the closed sessions, the police officers were cross-examined by the special advocates upon the material that remained confidential and had not been disclosed to the open parties. This cross-examination was obviously undertaken by the special advocates without being able to discuss the substance of, and obtain instructions upon, the undisclosed material with either their lay clients or the open legal teams.

[45] It is also necessary to record at this point that, following the conclusion of oral evidence from the police, during which the court was given the assurance that all relevant material in the possession of the MPS had been disclosed (either in open or closed form) and, therefore, the police 'cupboard is bare', some 3 days later the court was informed that, contrary to that assurance, a further large lever arch file of MPS documentation had been located. That discovery required a further process of disclosure evaluation by

the special advocates and the MPS with a hearing before me on contested issues followed by the return of the two police officers to the witness box.

[46] Much of the 3-week hearing was taken up by the ordinary inter partes evidence relating to the treatment of the mother at the hands of the paternal family and TS's abduction and subsequent 2-year stay in India. During that part of the hearing the MPS were neither present nor represented.

[47] The mother, who continued to reside under arrangements made by the police for her protection, gave her oral evidence over a video-link from a studio at an undisclosed location. When she was not giving evidence, she followed the hearing by listening down a telephone link to the court room.

[48] The fact-finding judgment, which was handed down in October 2008, ran to over 400 paragraphs and came to conclusions which were highly adverse to the father and his parents with regard to their conduct in relation to their treatment of the mother and the abduction of the child. It is neither relevant nor helpful to rehearse that detail within this judgment. It is sufficient to record that I found that the father and his parents had deceived the mother about his previous marital status, had, once she had arrived in the UK, treated her harshly and, once the child had been born, set about marginalising the time she spent with him and her role as his mother. I found that the father had deliberately orchestrated the abduction and had then sought to establish a permanent position of estrangement between the mother and child by attempting to have the mother deported back to India so that he could return to the UK with TS and the grandparents.

[49] On the separate issue of the 'contract to murder' I delivered both an 'open' and a 'closed' judgment analysing the relevant evidence in each of those compartments of the case. It was common ground that the material in the open proceedings was insufficient to make an adverse finding against the father on the contract issue. Even when that material was coupled with that which remained closed, and even when account was taken of the highly adverse findings that I had made about the father's other actions, I concluded that the allegation that the father contracted with another or others to murder his wife was not proved and, on the binary system within which this court must operate, the wardship case thereafter must proceed on the basis that he did not so contract.

Analysis and conclusions

[50] The difficulty for the court faced with an assertion from police that there is credible information to support the very serious allegation that a father has taken out a contract to have his wife murdered, but at the same time being told that none of the relevant material can be disclosed to that father or his legal advisers, can be readily contemplated. A number of important and potentially conflicting principles are thereby brought into play, namely:

(i) the need for the court to evaluate the material and to determine whether or not the allegation is proved, so that any subsequent decision about the ward's welfare may be informed by the resulting finding;
(ii) the need for the court to conduct any fact-finding process

relating to that allegation fairly and, in particular, in a manner which respects the parties' rights to a fair trial under Art 6(1) of the European Convention;

(iii) the need for the police and the court, as public authorities, to protect the mother's European Convention, Art 2 right to life;

(iv) the need to protect the rights or position of any third parties or agencies (such as 'Crimestoppers'), who are not party to the proceedings, but whose position may in some manner be adversely affected as a result of disclosure of material held by the police;

(v) the need for the court to respect the European Convention, Art 8 rights to family life of each of the family members;

(vi) the need for the court, and the parties, to avoid acting unlawfully in breach of the Serious Organised Crime and Police Act 2005, Part 2, Chapter 4 relating to police protection.

[51] For the purpose of this present judgment, the aim of which is to describe what transpired in the forensic context and to identify such lessons as may be learned from it, I propose now to focus upon the following topics:

(i) the effect on the forensic process of the absence of any party in a position to 'prosecute' the 'contract' allegation;

(ii) the clash of culture between the police and the family court;

(iii) the differing approaches of the police and the court to risk assessment;

(iv) the need for all, including the court, to be aware of potential offences relating to disclosing information about police protection that are created by the Serious Organised Crime and Police Act 2005;

(v) the potential consequences for a child of the differences of approach between the police and the family court;

(vi) the duty of special advocates in family proceedings;

(vii) the approach to evidence from an anonymous source;

(viii) whether the lawyers from whom the father sought advice before his detection were under any duty to inform the authorities.

The forensic process: *absence of a prosecutor and the role of the court*

[52] At the start of the fact-finding hearing the court was concerned that no party was actively seeking a finding against the father in relation to the alleged contract to murder. The role of the police was restricted to providing information to the court and the only other candidate for 'prosecutor' was the mother who was not, either by herself or through her advisers, privy to all of the material. The mother's position was that she simply wanted the allegation thoroughly investigated and did not have a desire to achieve a particular finding of fact on the 'contract' issue one way or the other. The court accepted that it was inappropriate to expect Cafcass and/or the guardian ad litem to take on the role of being an active litigant on this issue.

[53] Whilst the court accepted the basis for the position of each party, I was nevertheless left with the concern that no advocate would be cross-examining the father and his family in relation to any material 'open' evidence which

might support an adverse finding. In the event after further discussion, the mother's counsel accepted the burden of undertaking this task and the court is grateful to them for having done so. In the event, however, while some cross-examination was possible, the process was inevitably of limited value in that the mother had no free-standing information on the issue herself, as none of the open parties (including the mother) had access to the material which remained closed.

[54] The position thus reached was plainly less than satisfactory and in the main 'open' fact-finding judgment I made the following observations on the absence of a prosecutor, the burden of proof and the role of the court:

> [46] That forensic arrangement [of the mother's counsel cross-examining on the "contract" issue], whilst assisting the process of calling and testing the open evidence, does not fully resolve the need to consider the burden of proof on the contract issue.
> [47] At the close of the case, the mother's counsel position was that they were unable to submit positively that the evidence available to the open parties is capable of proving on the balance of probabilities that there has been a threat to the mother's life, but, it was submitted, "the surrounding circumstances are supportive of there being a likelihood that there have been attempts to arrange a contract to kill". It was acknowledged that the court may, with the additional evidence that is not available to the open parties, make the finding that the contract to murder allegation is proved.
> [48] The mother's position at the close of the case is understandable. It is the case that the open evidence is insufficient to establish on its own that the father did contract with others in order to have his wife murdered.
> [49] None of those who take part in the closed sessions (which are limited to the two special advocates for the father and grandparents and the police) seeks a finding that the contract is proved; indeed the special advocates' role has been to argue against such a finding. At the same time, the closed nature of certain relevant evidence means that the father and his family are unaware of it, have not been able to give evidence about it, to challenge it or to be cross-examined about it. The paternal family advocates have been in the unsatisfactory position of "playing Battleships" and making scattergun submissions about what may or may not be within the closed material in the hope of offering an explanation of that information in order to neutralise its effect.
> [50] The result of this necessary, but highly uncomfortable and unusual forensic process, is that it cannot really be said that the burden of proving the "contract" allegation falls upon the mother or any of the parties to the proceedings. If it did, it would be impossible for them to discharge it on the open evidence alone and it is artificial to consider that they are in any way under a burden in relation to evidence about which they have no knowledge and cannot therefore use at all in the trial process.
> [51] The police have, however, received intelligence information that they regard as credible to the effect that the father arranged a contract to murder the mother. The court, which is charged with safeguarding the

welfare of its ward, has been told of this state of affairs and has now been furnished with, what the police assert, is the totality of the material relating to that intelligence report and its subsequent investigation. Insofar as some of that material has not been disclosed to the open parties, the court is unable to rely upon the normal adversarial process by which such material is normally tested. There is nevertheless a duty on the court to analyse that material with a view to determining whether any finding of fact, one way or the other, may be made. To do otherwise, and simply ignore the material on the basis that none of the parties can discharge the burden of proof, would be an abdication of the court's primary duty to its ward. If there was a contract to have the mother murdered, then both she and the ward need protection from it and the establishment of that fact will have a significant effect on his future care and contact arrangements. On the other hand, if it can be established that there was no contract to murder (for example because the police intelligence was invented by the source to do damage to the father) then the arrangements for the child's future care will fall to be determined in the light of whatever other findings are made and will not be overshadowed or determined by this, the most serious of the allegations.

[52] Whether the role that the court must therefore undertake is properly described as "inquisitorial" or not, I am satisfied that the onus of sifting through all of the evidential material, open or closed, in order to attempt to establish what is or is not proved in relation to the police intelligence, can only fall upon the court. That of course is not to say that the burden of proof is on the court and, as I have said, the reality is that it cannot properly be said that any party is in a position to accept or discharge the burden of proving this particular allegation.

[53] Having described the approach that the court has taken, it is all the more important to underline that there is no burden placed upon the father or his parents with regard to the contract to kill allegation. The forensic vacuum created by the lack of a "prosecutor" must not lead to the paternal family having to disprove the truth of the Crimestoppers message. The fact that the Crimestoppers call was made has led the father to offer a number of possible alternative explanations for its genesis; that he has chosen to do so in no manner alters the position of the burden or standard of proof. He does not have to prove, or disprove, anything. A positive finding on the "contract" issue can only be made if the court, having itself conducted a full analysis of the material, considers that the evidence as a whole proves such facts as are found on the balance of probability.'

The role of the guardian ad litem

[55] In part the absence of a 'prosecutor' arose from the fact that the guardian ad litem was not privy to the 'closed' material and, therefore, not in a position to cross-examine the paternal family upon it. The guardian was in a difficult and unusual position in the present case as, whilst she was excluded from knowledge of the closed evidence, she was privy to the protection arrangements surrounding the mother and TS and knew of their location.

[56] The role of a guardian ad litem will need to be considered on a case by case basis. In the present case there were sound professional reasons arising

from the perception of the paternal family as to the role of the guardian, which made it inappropriate to draw the guardian into the knowledge of the PII material and hence into the role of potential prosecutor. However, there must always be a strong argument that a guardian should see all available material if possible so that their recommendations may be founded on the fullest possible information. The role of the guardian is, therefore, an issue that should be given careful consideration at an early stage and, if necessary, kept under active review as the case develops.

Police and Family Court: *Clash of culture*

[57] There were a number of respects in which it became apparent that the approach of the police to their task in this case was hampered by a lack of understanding of the difference between the approach of the criminal justice system and that of the family justice system to similar allegations of fact. I shall turn in due course to describe the degree of delay and frustration that was generated in consequence of this clash of cultures, but for the present I will simply list the various matters in turn:

(i) the perceived role and significance of the primary police witness statement;
(ii) the absence of any interest from the police in disclosure to them of material from the family proceedings;
(iii) the police decision to leave the file open but not actively to investigate the matter further (despite the ongoing family proceedings);
(iv) the police approach to disclosure, which was based on the criminal justice model.

[58] One prominent example of the difference of approach, the impact of which was significant, relates to the primary witness statement which purported to set out the police material for the court. The purpose of the witness statement prepared by DC HB was to provide a detailed summary of the original intelligence and the subsequent police investigation. It was made at a time when the underlying material described by DC HB had still to be analysed for possible disclosure. It was a statement which, on any view, was likely to be disclosed in whole or in part into the 'open' proceedings and, therefore, relied upon by the court and the open parties as a source of scarce and important information on this aspect of the case. It was, therefore, essential that the content of that statement was as sound, measured and reliable as it could possibly be. By the conclusion of the fact-finding process, counsel for the father were able to point to a number of serious inaccuracies and exaggerations contained in the 'open' parts of DC HB's statement. It is neither necessary nor informative in this public judgment for me to list those matters here, save to record that counsel's submissions on each of the 10 points raised were, in my view, fully justified and represented serious inadequacies in the reliability of that statement.

[59] Turning to another matter, whilst at an early stage the MPS sought disclosure of material filed in the wardship proceedings, that application was not pursued. Given that, following receipt of the original intelligence, the police position was that the subsequent investigation was continuing, one

would have anticipated that the officers would have potentially been assisted by sight of this material. When asked why no application had been pursued, the two MPS witnesses seemed unaware of the possibility that disclosure from the wardship file could be sought. In the event, the MPS has now had a full copy of the resulting fact-finding judgment and it, therefore, seems unlikely that disclosure of the supporting evidence would be of use to the police at this stage.

[60] The family court is familiar with applications for disclosure of witness statements and other material being made by police who are investigating the allegations of child abuse that are also the subject of the family court proceedings. No doubt police child protection units are well used to working with and alongside parallel family proceedings. Whilst the court accepts that the two officers in this case were ignorant of the possibility that material could be disclosed to them from the family case, the court is surprised and concerned that this state of ignorance exists. One consequence of it might be that the court may have one body of material upon which it is basing its evaluation, whereas the police may have a different, and possibly contrary, body of material upon which they are basing their evaluation of the same risk.

[61] On this point the police would be justified in saying that no one within the family proceedings suggested the disclosure of material to them at any stage during the year or more that preceded the matter being put to the officers for the first time in cross-examination. Equally, had an application for disclosure been made, it might have been resisted. Thus the observations that I make in this context are not intended to be critical of the individual officers or unit. The point is to learn how the situation may be improved if it were to occur again in future. For my part, I am clear that the issue of cross-disclosure from both agencies, court and police, should be expressly considered at an early stage so that, as far as possible, both can be working on, or at least aware of, the type and quality of information that is being used to evaluate future risk.

[62] In the wider context, counsel for the paternal family have pointed out a long list of steps which the investigating police officers might have taken to further their investigation. Again, without going into unnecessary detail here, many of those points are well made. The fact that the police did not follow up these, many and varied, leads seems to be the result of a combination of:

(i) the decision reached at a comparatively early stage that they would not achieve any evidence sufficient to support a criminal prosecution;
(ii) the decision, again reached at an early stage and, in part, on material that remains closed to the open parties, that the original intelligence remained credible following their initial investigation;
(iii) the undoubted calls on the resources of the particular police unit to become involved in other developing, acute and high profile cases;
(iv) given (i) and (ii) the view that, from a police perspective, there was no pressing need to carry out a more thorough investigation.

[63] The thought process described in the previous paragraph may well be a normal and acceptable one within the context of ordinary police work, but it takes no account at all of the added dimension in this case caused by the police decision to impart to the wardship court the fact that they had credible intelligence that the father had taken out a contract to kill together with the fact that the mother had been placed under protective measures. Neither the wardship court, nor any of the parties before it, were in any position at all to investigate that allegation (if for no other reason because until the latter stages of our process none of the relevant information was disclosed to them by the police). The only body able to conduct an investigation was the MPS itself. The family court was not in a position to direct the MPS to conduct further investigation and was, therefore, reliant upon the thoroughness of the process that they chose to adopt. At no stage does the MPS seem to have considered whether it owed a responsibility to assist the family court by conducting a more thorough investigation than may otherwise have been acceptable in purely police terms. In the course of their closing submissions, counsel for the police sought to justify the content and extent of the police investigation. Those submissions were couched entirely from a police perspective. The court does not doubt that this may well have been an adequate investigation for police purposes, but the submissions made do not contemplate or seemingly understand that there was a need, or even a responsibility, to undertake further investigation in order to assist the wardship court which was having to accommodate the appraisal of the situation that the police had chosen to communicate to it.

[64] The consequences of any inadequacies (from the family court's perspective) in the police investigation are not confined to the forensic process, they also must affect the police risk assessment and its impact on the parameters within which the court must determine the ultimate welfare issue relating to contact. In simple terms the following highly unsatisfactory sequence may be established in a case of this type:

(a) the family court holds that, for its purposes, the police investigation is inadequate;
(b) the court finds that the key allegation relied upon by the police to support any protective measures is not proved;
(c) the police risk assessment, relying upon the results of the investigation which the court has held to be inadequate, continues to support the provision of protective measures;
(d) the existence of protective measures may well limit the court's ability to order effective contact between the child and the person against whom the police protection has been put in place.

[65] The police approach to disclosure seems to have been based upon the approach to such issues in the criminal justice system. In closing submissions, counsel for the police submitted:

> 'It must be remembered that disclosure of material is not made unless it is relevant whether or not it attracts PII. The test of relevance is whether the material assists in proving an allegation or assists in proving the defence case. It follows that until the factual defence case is known

> relevance cannot be fine tuned and final decisions on disclosure made. … The father and grandfather failed to make their case clear to the MPS and simply made demands for disclosure without explaining relevance to factual issues.'

In later submissions the MPS again plead that without knowledge of the issues in dispute in the wardship proceedings and without the paternal family explaining the reasons for disclosure, they were hampered in determining what material was relevant and, therefore, meet for disclosure. That submission is hard to understand, as it was the police themselves that had raised the issue of the contract to murder and the disclosure sought was to assess the validity of that allegation, rather than any other issue in the case. It was, therefore, irrelevant, in that context, for the police to know of other issues in the wardship. The reason for seeking disclosure of the police material, was solely in order to assess the validity of the assertion made by the police themselves concerning the alleged contract to murder.

[66] In contrast to the position in criminal proceedings where disclosure of material is to the defendant, in family proceedings the disclosure is to the court (with the subsequent issue, if relevant, of withholding disclosure to one or more parties). The approach of the family court is not one that necessarily requires 'a defence case' to be disclosed and is not one that relies upon a witness to the proceedings unilaterally to determine whether material in their possession is or is not relevant and, therefore, disclosable.

[67] Again, counsel for the police have suggested that it is for the party seeking disclosure to set out the factual issues that they assert, and what facts are admitted or not in dispute, so that the police may make an informed decision on relevance and disclosure. From the perspective of the family court, that approach is unacceptable in the context of a situation such as this. It was the police who were making the assertion concerning the credibility of the intelligence. The paternal family were not in a position to make any positive assertion. There was, therefore, a responsibility on the police to disclose all material to the court that was relevant to the intelligence and their investigation of it. It must be remembered that the family court has a duty to ensure not only that the European Convention, Art 2 rights of the mother are protected, but also those of each of the parties under Art 8 and Art 6.

[68] In their closing submissions, counsel for the grandparents put the matter in terms with which I am entirely in agreement:

> 'It is *the court* that should have *all* information/evidence put before it and it is for *the court* to decide whether that information/evidence should be disclosed. It is not for a party or a third party to decide what should and what should not be put before the court.'(Original emphasis)

As Charles J has stressed in the context of without notice applications generally (see *B Borough Council v S (By the Official Solicitor)* [2006] EWHC 2584 (Fam), [2007] 1 FLR 1600) there is a responsibility upon an applicant for relief who provides information to the court in the absence of other parties whose interests may be affected to give a balanced, fair and particularised account of the events leading up to the application and the matters upon which it is based.

[69] In recent years individual police forces have been encouraged to develop a protocol with the family courts in their region to govern the disclosure of information between the police and the family court. A link on the HM Courts Service website connects to those few protocols which have thus far been developed. There is such a protocol between the MPS and the family courts in London. In the present proceedings no reference was made by any of the parties or the MPS, or for that matter the court, to the MPS disclosure protocol until a brief reference was made to it during closing submissions. The circumstances of the present case, which did not arise out of a child protection investigation, are not such that they fit with the paradigm case at which the protocol is aimed. The purpose of referring to these protocols in this judgment is simply to point out that they exist in some areas and to make it plain that the present proceedings were conducted without reference to the local protocol.

[70] The circumstances of this case are highly unusual and the particular officers may be forgiven for not contemplating the more co-operative process with the family court that I am seeking to describe, but, whilst highly unusual, the circumstances of this case are unlikely to be unique. If they are repeated in any form again, I would venture to suggest that early on the following steps should be considered:

(i) full disclosure at the earliest stage to the court and the open parties of as much of the police material as is not rendered confidential by PII;
(ii) in parallel, full disclosure to the police of as much of the family proceedings evidence as is not rendered confidential by PII at the earliest stage;
(iii) thereafter a co-operative process between the police and the family court whereby reasonable requests for further police investigation are considered and implemented.

The approach to risk assessment: *differences between the police and the court*

[71] When it comes to assessing the risk of an adverse event occurring in the future, the police and the family court approach the task of risk assessment in a fundamentally different manner.

[72] The family court, working on the basis that an allegation is either proved on the balance of probability, or not so proved, adopts a binary approach (as described by Lord Hoffmann in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141) with the result that an allegation that is not proved is removed from the factual matrix on the basis that it did not occur. There is, as Lord Hoffmann says, no room for a finding that the alleged event 'might have happened'. When the court moves on, therefore, to seek to evaluate any future 'harm which [the child] … is at risk of suffering' (Children Act 1989, s 1(3)(e)), the court cannot consider any potential for harm if that potential is based on the unproven allegation (*Re B (Care Proceedings: Standard of Proof)* above, and *Re M and R (Minors) (Sexual Abuse: Expert Evidence)* [1996] 2 FLR 195).

[73] In contrast, the statutory scheme within which the police act in providing protection for individuals (Serious Organised Crime and Police Act

2005, Part 2, Chapter 4) is in wide terms and applies to (amongst others) anyone who is, or has been, or might be a witness in legal proceedings (whether or not in the UK) (SOCPA 2005, Sch 5). The police, acting as 'a protection provider' under the Act may make such arrangements as they consider appropriate for the protection of such a person if the police consider 'that the person's safety is at risk' by reason of being a witness or a potential witness. The wording is (no doubt deliberately) wide and the basis upon which being 'at risk' is established appears to be left very much up to the police to determine.

[74] Section 82(4)(a) of the SOCPA 2005, requires the police to have regard to 'the nature and extent of the risk to the person's safety' in determining whether arrangements are to be made, but again the definition of risk and the basis of evaluation seems widely based.

[75] It is thus the case that as a matter of law, and no doubt also as a matter of culture, purpose and training, the courts and the police may approach the evaluation of the risk arising from precisely the same material in a radically different manner.

[76] A further element must also inevitably be brought into the mix insofar as the family court is concerned. From the police perspective, it is the evaluation of risk that determines the need to act and the plan of action. The court in wardship and Children Act 1989 proceedings is charged with determining the issues by affording the individual child's welfare its paramount consideration. By the time a case reaches court, and in particular the High Court, most options for a child will involve some element of risk at least of emotional or developmental harm if not other forms of harm. The court cannot and does not have a default position of 'playing safe' or being 'risk averse'. In the interests of the child it is not infrequently necessary for nettles to be grasped and for decisions to be taken that may carry substantial elements of risk. A prime example is the decision to allow a child to travel abroad with one parent, where there is risk of non-return.

[77] It may, therefore, be the case, if one can imagine a wholly academic example, that the court and the police might come to precisely the same view as to the existence and level of risk of harm, but the decision as to whether a course of action is to be taken that increases that risk may be contemplated by the court (because there may be other driving factors connected with the child's welfare) but could not and would not be contemplated by the police.

[78] The purpose of describing these differing perspectives is, and again I stress this, not to be critical of the police. Indeed it is to be hoped that the manner in which I have described the position shows understanding of and respect for their position. My purpose is to flag up just how wide the gulf between the outcome of these two methods of risk assessment may be and to invite consideration of: (a) how the level of understanding of the processes involved on either side can be improved; and (b) how the divide may be lessened in some manner in the future.

[79] In the event in this case, the court for reasons unconnected with the 'contract to murder' allegation, which no longer can be given any weight in the court case, determined that it was not in TS's interests to have direct contact with his paternal family at this stage. Thus the potential for the police to contemplate removing protection from the mother and child did not become a reality as it had done at the interim stage in this case. Had the court,

as it may well have done, decided that there should be some direct contact then, in all probability, the wholly unattractive position would have been reached of there being a stand-off between two arms of the State (the High Court and the MPS) both of whom having a responsibility, in differing ways and degrees, for the welfare and safety of this child and his mother. The good practice and custom in other areas of joint working for the police and the child welfare agencies to work together seems not to apply with respect to the area of police protection. Again, it would seem that there is benefit for the future in there being discussion at a high level between the family justice system and the police service to see whether the position taken on the issue of interim contact in these proceedings was inevitable and proportionate. I have, therefore, referred a draft of this judgment to the President of the Family Division who has recommended that the issues that have arisen should be referred to the Family Criminal Interface Committee, chaired by Hedley J. The President advises that, pending any further guidance from the FCIC, judges should proceed in line with the guidance offered in this judgment.

Potential offences under the Serious Organised Crime and Police Act 2005

[80] It has been necessary to have regard to the provisions of the Serious Organised Crime and Police Act 2005 insofar as that statute creates offences relating to the disclosure of information concerning police protection arrangements. The relevant sections in the present context are ss 86 and 87:

> '86 Offence of disclosing information about protection arrangements
> (1) A person commits an offence if—
>
> (a) he discloses information which relates to the making of arrangements under section 82(1) or to the implementation, variation or cancellation of such arrangements, and
> (b) he knows or suspects that the information relates to the making of such arrangements or to their implementation, variation or cancellation.
>
> (2) A person who commits an offence under this section is liable—
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both;
> (b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum or to both.
>
> (3) …
> 87 Defences to liability under section 86
> (1) A person (P) is not guilty of an offence under section 86 if—
>
> (a) at the time when P disclosed the information, he was or had been a protected person,
> (b) the information related only to arrangements made for the protection of P or for the protection of P and a person associated with him, and
> (c) at the time when P disclosed the information, it was not likely that its disclosure would endanger the safety of any person.

(2) A person (D) is not guilty of an offence under section 86 if—

(a) D disclosed the information with the agreement of a person (P) who, at the time the information was disclosed, was or had been a protected person,
(b) the information related only to arrangements made for the protection of P or for the protection of P and a person associated with him, and
(c) at the time when D disclosed the information, it was not likely that its disclosure would endanger the safety of any person.

(3) A person is not guilty of an offence under section 86 if he disclosed the information for the purposes of safeguarding national security or for the purposes of the prevention, detection or investigation of crime. …'

[81] Initially consideration was given to whether or not the paternal family could even be told that the mother was under some form of police protection without in some manner rendering those who disclosed the information liable to prosecution. In the event, a pragmatic approach was taken on the basis that, given the overt level of police involvement and the seriousness with which the 'contract' allegation was being treated, it would be obvious to all in the case that it was likely that the mother would be under protection in some manner. Thus the proceedings were conducted on that general basis. At no stage was any disclosure made to the court as to the detail of any arrangements, though the guardian was privy to that detail and was able to visit the mother and TS in their new home.

Clash of cultures: *The potential consequences for the child*

[82] In the course of their final submissions, counsel for the MPS described the state of affairs reached after the police investigation had run its active course in early 2007 in these terms: 'ultimately there was no evidence, no reasonable grounds to suspect, so no arrest and no interview' of the father. Yet, despite this absence even of 'reasonable grounds to suspect', the police maintained their stance that there was 'credible intelligence' that the father had taken out a murder contract and that she and TS required protective measures. Given that stance, the wardship court, as it was obliged to do, included the investigation of the material said to indicate that a contract had been taken out as part of its overall fact-finding exercise and in the event concluded that it was not established that the father had taken out a contract and thereafter set about assessing the risk of future harm and the welfare of the child on the basis of other factors in the case. The police, however, maintain their risk assessment based upon the 'credible intelligence'.

[83] The result for a child and caring parent caught in the situation that I have described is all too plain to see. Understandably, the carer, as was the case in the present proceedings, respects the views of the police who are providing protection for her. Given the nature of the threat, the stakes for her could not be higher and she may understandably wish to abide by the advice of her protectors. In the present case there were a number of very substantial and serious matters proved against the father and his family, which caused the

court to rule out direct contact on those grounds. But there may well be other cases where the police 'intelligence' is the only substantial factor in the case.
[84] Given the outcome of the present case it is neither necessary nor appropriate for this court to attempt to map the way forward in determining orders that should be made for contact and on what basis. It may be that proceedings in the Administrative Court would be required to challenge the validity of the decision made by the police, as was contemplated but never pursued by the parties in this case (on the basis that the length of the interim period was by then so short).

The duty of special advocates in family proceedings
[85] There will, hopefully, be a very limited number of family cases in which key evidence must be withheld from a party on the grounds of public interest. As I have already observed, the family courts have developed a number of strategies for dealing with controlled or limited disclosure without, before now, using special advocates. However, there may well be other cases where the procedural imbalance and potential unfairness created by difficulty over disclosure can be alleviated by the use of special advocates in the manner that has transpired in these present proceedings.
[86] I have already described how the special advocate process was adapted to the needs of this hearing. The court was fortunate in the two individual counsel who were appointed as special advocates and who assisted us on this journey into uncharted territory. They were, in my view, most impressive in the manner in which they discharged their various duties to the parties whose interests they represented and to the court.
[87] With regard to the approach of the special advocates in this case, it is necessary to address a particular matter raised by counsel for the father in their closing submissions in relation to the material which remained undisclosed to the open parties at the end of the case. In a written document on 21 November 2007 the special advocates stated that they had not submitted to the court in closed session that the extent of the MPS disclosure was incompatible with Art 6 or Art 8 of the European Convention. On the basis of this report counsel submitted that it was difficult to envisage how there could be any additional material that remained 'closed' which was nevertheless capable of supporting an adverse finding of fact against their client. In the court's view that submission affords too rigid an interpretation of Arts 6 and 8. In cases where PII is established and the court considers that some material evidence cannot be disclosed to all of the parties, rights under Arts 6 and 8 fall to be adapted in a proportionate manner to accommodate the priority that is to be given to the PII material. As Baroness Hale of Richmond observed in *Secretary of State for the Home Department v MB*, the need in an exceptional case in the family jurisdiction to take such a step has long been accepted.
[88] In relation to counsel for the father's particular submission on this point, I made the following observations in the main fact-finding judgment:

> '[54] The paternal family's counsel have made detailed submissions based upon the duty that a special advocate has to raise any potential breach of Art 6 with the court and the fact that on two occasions (21 November 2007 [I26D para 11] and 11 April 2008 [I42 para 4]) the special advocates have indicated that:

> "The leading authority is *Secretary of State for the Home Department v MB*; *Secretary of State for the Home Department v AF* [2007] UKHL 46 which holds that proceedings may be unfair and in breach of Article 6 ECHR where a court relies on material in coming to a decision which the person at risk of an adverse ruling has no adequate opportunity to challenge or rebut. *MB & AF* suggests that in proceedings in which evidence is withheld from a party, the SA (in possession and knowledge of all the evidence) has a duty to raise any potential breach of Article 6 ECHR with the court. For the sake of openness, the SA wishes the parties to know that neither she nor [the grandparents SA] have submitted to the court that the extent of MPS disclosure is incompatible with Article 6 ECHR."

[55] The paternal family's counsel also point to the police position which is that no further information has come to light since January 2007. The assumption (made in the written submissions) is therefore made that there can be no material in the closed session to which Art 6 applies.

[56] The above assumption, whilst understandable from the partial picture that the open advocates necessarily have, is not sound, and indeed was corrected by the SA's after receipt of Miss Ball QC's written submissions. It is correct that no new information that might implicate the father has come to light since January 2007. There has, however, since the start of the proceedings, always been information that has remained "closed" which might tend to support a finding against the father. The matter has been kept under regular review by the SA's and the court. The material attracts public interest immunity of a high order and it was accepted by the SA's and the court throughout the proceedings up to July 2008 that the PII considerations would be bound to outweigh the Art 6 considerations, strong though those undoubtedly were. It was within the contemplation of the court and the SA's that "the position as to disclosure is not a static one" and that as a case progresses "the balance can change" (*R (Roberts) v Parole Board* [2005] 2 AC at [71], as cited in the special advocates' initial written disclosure submissions). The SA's also drew my attention to Lord Bingham's speech in *Roberts* where at [19] he commented that the Parole Board might take a different view of disclosure having heard the sensitive material tested by the special advocate.

[57] Towards the conclusion of the evidence, the court having indicated that the "contract to murder" allegation was still very much under active consideration, it then became essential for the SA's to argue that this closed material should now be disclosed to the father so that his Art 6 rights could be exercised in relation to it. For the reasons given in the closed judgment given on the 28 July 2008, I continued to give priority to the PII attaching to this material in preference to the father's Art 6 rights and I refused to order disclosure of the material.'

The approach in the family court to evidence from an anonymous source

[89] A further submission raised by counsel for the father was that the court could not rely upon the content of the 'Crimestoppers' call in that it was made by an individual whose identity was unknown, who was anonymous and

who, obviously, did not give evidence at the hearing. That submission was made in robust terms, supported as it was by the decision of the House of Lords in *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128, [2008] 3 WLR 125 which had recently been handed down. In *Davis* the House of Lords held that in a criminal trial the use of anonymous evidence was not acceptable and did not satisfy the requirements of Art 6 of the European Convention. In considering that submission, there is, in my view, a clear and vital distinction between the criminal jurisdiction and the wardship jurisdiction. Unlike the criminal jurisdiction, where the sole issue before the court is determining the guilt or otherwise of the defendant on a particular charge, the wardship court has a duty to investigate all of the relevant circumstances that may touch upon the ward's future welfare. That investigation must include receiving evidence, even if it is anonymous, hearsay evidence from an unknown individual, as part of the process. Thus, for the wardship court, it is not a case that a certain category of evidence cannot be acceptable or must be excluded, rather, it is a question of what weight is to be attached to that evidence when the court comes to evaluate it. During the exercise of determining the weight to be given to material such as the 'Crimestoppers' call, the principles underpinning the House of Lords decision in *R v Davis* will be of substantial relevance and may well be determinative, but the issue will be weight rather than admissibility. In this context the distinction apparently drawn by the MPS as to 'information' or 'material' or 'intelligence' was, in the family court's eyes, a distinction without a difference; all of the data produced by the MPS was in some form or other evidence which was admissible in family proceedings; the task for the court was to evaluate it and determine what, if any, weight it may attract in the overall process.

Did the father's solicitors owe a duty to inform the authorities of his presence in the UK?

[90] The father arrived back in the UK in mid-August 2006. His evidence was that about one week later he was given copies of the wardship papers by his brother (who at an earlier stage had been brought before the court in an attempt to trace the child). By that time, at the latest, he was aware of the existence of court orders requiring him to inform the authorities of the whereabouts of TS.

[91] The father claims to have visited solicitors, who are not the solicitors who now act for him, soon after receiving the wardship papers. He says that he showed the court papers to his lawyers. He claims that the solicitors then spent some weeks attempting to obtain legal aid for him. In the event, that firm declined to take his case on and he was introduced to the firm who now act for him, who were in the process of applying for legal aid when events moved on and the police located the paternal family and removed TS from their care.

[92] There was, therefore, a period of some 7 weeks during which solicitors acting for the father were aware that TS was a ward of court and the subject of strict orders requiring their client to disclose his whereabouts to the High Court forthwith, yet these solicitors took no unilateral action to contact the court or otherwise to inform the authorities of the father and child's location while application was made for legal aid. During the course of the hearing I inquired what, if any, duty was owed by solicitors to the court in

such circumstances. In particular I questioned whether there was a positive duty upon solicitors, irrespective of their client's instructions, to inform the court of his whereabouts and those of the child.

[93] The court is grateful to counsel, particularly those acting for the father and for the guardian, who have researched this issue and made submissions on the point.

[94] As a result of those submissions, the position seems to be relatively clear. In the circumstances it has not been necessary to involve either firm of solicitors in the process and no question arises as to the propriety of the actions that they took, or more properly did not take, in this case. As the matter was raised it may nevertheless be of value to set out in short terms the conclusion to which the court came on this aspect.

[95] The starting point is that there was undoubtedly a duty upon the father to inform the court of the child's whereabouts 'forthwith' upon gaining knowledge that TS was a ward of the High Court. That duty, which applies to any defendant to a wardship (as opposed to his legal advisers) arose not only from orders made in these proceedings, but also under the rr 5.1(8) and (9) of the Family Proceedings Rules 1991 (FPR), of which provide as follows:

> '5.1(8) Upon being served with the summons every Defendant other than the minor shall forthwith lodge in the registry out of which the summons is issued a notice stating the address of the defendant and the whereabouts of the minor. …
> 5.1(9) Where any party other than the minor changes his address or becomes aware of any change in the whereabouts of the minor after the issue, or, as the case may be, service of the summons he shall, unless the court otherwise directs forthwith lodge notice of the change in the Registry. …'

[96] The Family Law Act 1986, ss 33 and 34 give the court power to direct any person, including solicitors, to give information as to a ward's location. Such an order requiring disclosure made against a solicitor overrides the solicitor's ordinary duty of confidentiality to his client (*Re B (Abduction: Disclosure)* [1995] 1 FLR 774).

[97] The question raised on the facts of the present case is, absent a direct order against the solicitor, does the very existence of wardship itself override the solicitor's duty of confidentiality and place the solicitor under a duty to disclose information to the court notwithstanding that duty. It is of note that the commentary to r 5.1 of the FPR 1991 in the *Family Court Practice 2009* (Jordan Publishing, 2009) claims that 'a solicitor is under a duty to disclose information which may assist in locating a ward even if such information has been conveyed to him in confidence by his client'. The authority cited for this proposition is *Ramsbotham v Senior* (1869) LR 8 Eq 573, (1869) FLR Rep 591.

[98] With respect to the learned editors of the *Family Court Practice* (of which, of course, I am one) it would seem that this short commentary extends the effects of the decision in *Ramsbotham v Senior* beyond it true extent. The issue in *Ramsbotham v Senior* was whether or not an order should be made requiring a solicitor to produce envelopes sent by his missing client in order that the postmarks might be examined in an attempt to trace the ward. Nothing

in the judgment of Sir R Malins V-C, or in the decision itself, provides authority for a general duty of disclosure where there is no direct order made against a solicitor.

[99] The researches of counsel could find no authority which provides for a duty upon solicitors to breach the duty of confidentiality that they owe to their client absent there being a court order requiring them to do so. The general position is most aptly summarised by Hughes J (as he then was) in *Re H (Abduction*: *Whereabouts Order to Solicitors)* [2000] 1 FLR 766 at 770:

> 'The difficulty is not, it seems to me, solved by leaving the matter to the discretion of the solicitor, because his discretion is greatly limited by the duty he has to the client and, in the absence of an order, there is little or nothing to put into the scales on the other side.'

[100] This position is supported by the Solicitors' Code of Conduct 2007 which, at para 4 provides that 'you and your practice must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by your client or former client'. This provision is in like terms to its predecessor under the Solicitor's Practice Rules 1990 which were in force at the time of the relevant events in this case.

> '[105] Guidance note 13 to para 4 sets out examples of situations where, despite the duty of confidentiality, a solicitor is permitted to disclose limited information:
>
> > "There may be exceptional circumstances involving children where you should consider revealing confidential information to an appropriate authority. This may be where the child is the client and the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another adult against a child but refuses to allow any disclosure. You must consider whether the threat to the child's life or health, both mental and physical, is sufficiently serious to justify a breach of the duty of confidentiality."'

[101] In similar terms the Law Society's Family Law Protocol deals with wardship at para 3.3.5:

> 'Solicitors are reminded that they are obliged to disclose the whereabouts of a child who is the subject of a seek and locate order or a child who is a ward of court or otherwise if so directed by the court regardless of the rules of client confidentiality. If solicitors feel concerned that such disclosure puts a client or their child at risk they must seek direction from the court as a matter of urgency.'

[102] On the basis of the authority referred to above, I am fully satisfied that there is no general duty, absent of a court order, requiring solicitors to disclose information as to the whereabouts of a ward in breach of the duty of confidentiality that is owed to their client.

[103] In the course of submissions, counsel instructed on behalf of the guardian, argued that there may in the future be a case of a child in similar circumstances to TS, who has been abducted for a period of 2 or more years and whose continued concealment by a solicitor's client is in breach of long-standing wardship orders. In such a case, it was submitted, a solicitor should consider whether or not those facts amount to the 'exceptional circumstances' described in the guidance to the Solicitors' Code of Conduct amount to 'abuse' of the child which involves 'a threat to the child's life or health, both mental and physical, [which] is sufficiently serious to justify a breach of the duty of confidentiality'.

[104] I would endorse that submission. It must be a matter for the individual solicitor to determine on a case by case basis. General guidance on the point by this court, however carefully it may be phrased, may well cause more confusion than clarity. I would, however, point to the devastating effect that the father's actions have had in the present case on the life of young TS. I found in the course of the substantive judgment that the father's actions 'must have caused TS significant emotional harm'. A solicitor who knew the circumstances as I have now found them to be might well conclude that this was a case which was sufficiently serious to justify a breach of the duty of confidentiality. But, I stress, it is a matter for the judgment of the individual solicitor in each individual case.

[105] Against that general background it is, however, possible to make observations on two matters:

(i) whether or not a solicitor has a duty to contact the authorities himself once he is aware of court orders requiring the immediate disclosure of a child's whereabouts and he knows his client is harbouring the child in breach of such orders, the solicitor must be under a duty to advise his client of the client's responsibility to make contact with the court or other authorities forthwith;

(ii) in the circumstances described above, it cannot be legitimate for a solicitor to advise their client that there is no need to inform the court or authorities of the whereabouts of the child whilst an application for legal aid is being processed. In making that general observation I should stress that the court has no information that such advice was given in the instant case.

[106] Having described the apparent state of the current law and professional code of conduct, I propose to leave this issue but would hope that the Law Society and the Solicitors Regulation Authority might use the occasion presented by the publication of this judgment to review the application of the Code of Conduct insofar as it applies to the recovery of abducted children.

Conclusion

[107] The central observation that this court makes at the conclusion of this most lengthy and at times highly frustrating process, has been well trailed throughout this judgment and relates to the unhelpful clash of cultures or, at the very least, lack of understanding that exists between the police and the family justice system. It may be entirely understandable from the internal

perspective of each of these two arms of the State, but the fact that it exists has delayed, and at times risked thwarting, the discharge of this court's duty to act in a manner which meets the overall welfare needs of its ward. Whilst the police are plainly not under an overt legal 'duty' to assist the wardship court in these circumstances by investigating the case in a manner that goes beyond what is required for police processes, I do believe that once the police have delivered highly significant information to the wardship court, which the court is obliged to analyse and assess in order to undertake its own risk and welfare evaluation, the police must have some responsibility (albeit with a small 'r') or obligation actively to assist the court in that process.

[108] In the circumstances I would urge some extra-curial consideration to be given to how issues such as the present may be addressed more efficiently and co-operatively in the future so that other families and other courts do not face the unnecessary difficulties encountered here.

[109] One post-script on this central point may be of assistance. I have described the difficulty encountered by the lack of any party within the court process who was privy to all of the closed information, had some responsibility for investigating it and also could act as a 'prosecutor' with respect to the allegation of there being a 'contract to murder'. One avenue which was not considered by the court or by any of the parties in the present case, but which, with hindsight, may have proved of value could have been to draw the relevant local social services authority into the proceedings by way of a direction under s 37 of the Children Act 1989. If, and it is an 'if', a local authority in a case such as this chose to apply for a public law order under s 31 of the Children Act 1989, then the authority might be a candidate to whom full disclosure of PII material could be made and might, following its own investigation (with or without collaboration with the local police force under child protection procedures), act as 'prosecutor' on the relevant issue at the fact-finding stage. In making the above suggestion, I should stress that it is in no more than that and does not arise out of our own process here, or out of counsel's submissions, as the present proceedings developed in a different direction by relying totally upon the police investigation and any resulting material as the source of any information as to the validity, or otherwise, of the alleged 'contract to murder'.

[110] The present case was already proceeding as a wardship case in the High Court long before the issues of PII and disclosure of police intelligence material arose. The President of the Family Division, having read this judgment in draft, wishes to stress that any issue of PII which raises issues of complexity will come within Art 18 of the Allocation and Transfer of Proceedings Order 2008 on grounds of 'exceptional complexity' and should trigger a transfer to the High Court.

[111] Finally, it may be helpful to record that, because of the risk of the fact-finding judge becoming in some manner 'contaminated' or placed in a conflicted position by exposure to material during the management of the early PII/disclosure process, the court arranged for an alternative fact-finding judge to be kept on stand-by; in the event it was not necessary to call upon the stand-by.

[112] In closing I propose now simply to list the procedural and other observations that arise from the body of this judgment so that they may be of use should another court encounter a similar set of difficulties in the future:

(i) full disclosure to the court of all material relevant to the allegation and its investigation at the earliest possible stage;
(ii) disclosure, again at the earliest stage, to the open parties of as much of the police material as is not rendered confidential by PII;
(iii) thereafter, establish a process, again at the earliest stage, to evaluate the PII claim and, if appropriate, arrange for the disclosure of further material to the open parties either in a full, gisted or redacted form;
(iv) in parallel, full disclosure to the police of as much of the family proceedings evidence as is not rendered confidential by PII;
(v) thereafter a co-operative process between the police and the family court whereby reasonable requests for further police investigation are considered and implemented;
(vi) the family court should consider providing a clear explanation to the police of the differing priorities and processes that drive the family court proceedings in contrast to those which may apply to the processes of a police investigation and the criminal justice system. For example, an early explanation that in the family proceedings, disclosure of material that is relevant to an assertion made by police is not dependent upon a party to the family proceedings putting forward a 'defence case'; the material is disclosable (initially to the court) in any event;
(vii) in the same context, the police should be reminded of the responsibility upon an applicant for relief, who provides information to the court in the absence of other parties whose interests may be affected, to give a balanced, fair and particularised account of the events leading up to the application and the matters upon which it is based;
(viii) consider, at an early stage, requesting the Attorney-General to appoint a special advocate for the party to whom full disclosure of sensitive, but highly relevant, material may not be made;
(ix) in cases of particular difficulty it may be appropriate to consider whether the police should be joined as a party to the proceedings (and not simply act as a witness as in the present case) so that they may be more directly subject to the direction of the court. This is a matter that may require careful consideration if, as here, the police are not making any application for relief;
(x) following disclosure of material to the 'open' parties, those parties should be tasked with identifying any further investigation that they may suggest is necessary so that a request for such investigation can be made for the police to consider undertaking well before the fact-finding hearing;
(xi) at the start of this process, the court should establish a procedure and practice for the case which supports 'open' and 'closed' sessions. This is likely to involve separate 'open' and 'closed' files, separate hearings where different teams of advocates are present and, from time to time, the giving of both 'open' and 'closed' judgments;
(xii) the court would be wise to consider at an early stage the

question whether, and if so, which party should 'prosecute' an allegation/assertion which is or may be based upon material which remains partially 'closed';

(xiii) in the above context, consideration may be given both to the role of the guardian ad litem and/or to seeking to draw the local social services authority into the case by means of a direction under s 37 Children Act 1989;

(xiv) plainly, it is essential that there should be judicial continuity throughout the PII process.

Order accordingly.

Solicitors: *Dawson Cornwell* for the mother
JR Jones for the father
IBB for the grandparents
Cafcass Legal for the guardian ad litem
John Hardy QC for the Metropolitan Police
Treasury Solicitor

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