Neutral Citation Number: **[2023] EWCA Civ 206**

Case No: CA 2022 2484

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM CROYDON FAMILY COURT**
**Her Honour Judge Major**
**ZE22C00050**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2023

**Before:**

**LORD JUSTICE BEAN**
**LADY JUSTICE KING**
and
**LORD JUSTICE BAKER**

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**Between:**

**P, H-L (CHILDREN) (Mobile Phone Extraction)**

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**Deborah Bryan and Elise Jeremiah** (instructed by **National Legal Service Solicitors**) for the **Appellants**
**Jacqui Gilliatt and Bibi Badejo** (instructed by **London Borough of Croydon**) for the **Local Authority Respondent**
**Alison Easton and Rachel Cooper** (instructed by **Taylor Rose MW**) for the **Respondent (Mother of S)**
**Sam Momtaz KC and Dominique Gillan** (instructed by **Blackfords LLP**) for the **Respondent (Father)**

Hearing date: 7 February 2023

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# Approved Judgment

This judgment was handed down remotely at 11.00am on 27 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice King:**

1. This was an appeal against a case management decision made by HHJ Major ("the judge") on 15 December 2022. The order in question was made during the course of a lengthy fact finding hearing in care proceedings. By her order, the judge granted permission to the first respondent in this appeal ("the father") to instruct an organisation called Evidence Matters to conduct a mobile phone extraction exercise in respect of a mobile phone formally belonging to his daughter ("S"). Thereafter, provision was made for Evidence Matters to file a report to be sent to counsel and solicitors (but not the parties) disclosing all messages and social media communications as between S and the father, S and her former boyfriend ("G"), and S and three of her friends ("the friends") (all of whom were under 18).

2. The Children's Guardian ("the Guardian") who represents S in the care proceedings appealed against the making of the order, although only in respect of the numerous communications between S and her friends. The Guardian submitted that the interference in the Article 8 privacy rights of the three friends was such that the court should obtain the consent of the parents of each of the friends before the material could be either downloaded by Evidence Matters or disclosed into the proceedings. This Court rejected that submission.

3. We have allowed the appeal, to a limited extent. We rejected the primary argument of the Guardian that the judge was in error in making an order for mobile phone extraction without having the consent of the parents of the friends. The digital analysis by Evidence Matters is therefore still to take place. The appeal is to be allowed however in order to vary the time frame to be covered by the extraction and to provide a method of sifting the material extracted before its disclosure to the parties. This process will ensure that only material relevant to the allegations, which tend to support or undermine the allegations of acts of a sexual or violent nature (towards S or J) made by S against the father, will be disclosed and that the privacy rights of third parties will be protected so far as possible, by a strict application of relevance, redaction and proportionality.

4. In order to allow the fact finding trial to be resumed without further delay, the Court gave its decision to this effect at the conclusion of the appeal hearing. What follows are my reasons for agreeing that the appeal should be allowed in part.

*Background to the proceedings*

5. The care proceedings concern two children: S, a girl now aged 16 and J, a boy aged 11 years. The allegations which are made against the father and which the local authority contend will support findings that the threshold criteria is satisfied, relate to alleged physical abuse of J and alleged sexual abuse of S between March 2020 and June 2021.

6. The allegations of sexual abuse first came to light on 21 July 2021 when S made a complaint to a teacher at school. On 22 July 2021, S participated in an ABE interview where she repeated her allegations. The following day, the father handed himself into the police, a warrant having been issued for his arrest.

7. The police did not carry out a mobile phone extraction from S's phone as part of their investigations. On the information before the Court, it is impossible to have an entirely reliable account of the history of, who and when any individual had access to, S's mobile phone. What is however clear is that, as of July 2021, S did not have her phone, it having been confiscated by her father or step-mother. S was also unable to gain access to her social media accounts as her step-mother had changed her passwords. S's father, it would appear, started to use the confiscated phone but he subsequently told the police that he has 'no luck with phones' and that he had 'dropped the phone' the week before his arrest which 'broke it', meaning he threw it away.

8. No attempt to access any phone or social media records which might relate to S and her allegations was thereafter made by the police, notwithstanding that it was known from an early stage that S's first accounts of the alleged abuse had been made through mobile phone messages. S told the police that the messages would be on her phone but that she had not had it in her possession since February 2021. The father also knew this to be the case and made reference to this fact in his police interview.

9. On 4 December 2021, the police notified S that they would not be pursuing criminal charges against her father.

10. Care proceedings were issued on 10 February 2022. Absent any significant police investigation, the family court was faced with considerable difficulties in obtaining relevant evidence. This Court was told that 10 orders had been made for police disclosure and that statements had had to be obtained in the family proceedings from a number of S's friends in the absence of any police investigation, consent to do so having been obtained from the parents of the young people. This unsatisfactory state of affairs meant that, 16 months after S had made her allegations, the court was still making fruitless orders for disclosure.

11. Shortly before a case management hearing on 17 November 2022, S produced information from her phone including a Snapchat video of the father and J. As a consequence, the judge made a case management order which included a requirement that: 'If [S] is in possession of any further evidence on social media, particularly in the form of text messages, that is relevant to the issues before the court, these should be disclosed by [S] and served on the children's solicitor 4pm on by *(sic)* 23.11.22'. This was the only case management order which referred to the disclosure of messages. No further messages were provided by S before the fact finding began.

12. The fact finding hearing therefore began on 28 November 2022 without any police disclosure or detailed evidence by way of text or social media communications between S and G, who was then 17 and who had been her boyfriend in July 2021, or between S and various friends.

13. S gave oral evidence on 1 and 2 December 2022. She spoke about her separate communications with G, her father and her friends. She produced material from her phone including a video clip of her father allegedly mistreating J.

14. Inevitably, this disclosure from the witness box stalled the proceedings as consideration was given as to how to manage this new material. Following her oral evidence, S made contact with G who agreed to restore S to his contacts/friends. This

allowed S to gain access to her communications with G which included allegations that her father had abused her. S also gained access to her messages between herself and her friends. The Court has not been told, and it may be unknown, how it was that S was now able to access all these messages and her social media accounts. However it came about, S spent many hours that evening in the company of the Guardian taking screenshots of various messages. Inevitably, the results, although done with the best of intentions, were unsatisfactory.

15. In addition to S's disclosure of relevant social media communications, the father attached to his witness statement dated 19.7.202, messages between himself and S retrieved from the discarded phone. Once again, it is not clear to this Court in what circumstances that had been possible, it having been suggested by the father that communications made on that phone were irretrievable.

16. Over the next few days, the parties and the court were given tranches of evidence relating to messages between S and G and her friends. On 9 December 2022 the father made a formal application under Part 25 Family Procedure Rules 2010 ("FPR 2010") for permission to instruct Evidence Matters to carry out a forensic digital analysis of S's mobile device and social media platforms.

17. The application related to three separate tranches of material:

    i) Communications between S and G. There was no opposition to this. Even though G was not (then) 18, the court and parties approached his position as having 'implicitly' given consent.

    ii) Communications between S and the father. There was no dispute in relation to these communications.

    iii) Communications between S and three identified friends, two of whom had filed witness statements. The Guardian objected to the making of an order in relation to these messages saying, firstly, that analysis of this material was a 'fishing expedition' on the part of the father and, secondly, that it reversed the standard of proof resulting in S having to disprove the father's case. Further, the Guardian argued, the examination and disclosure of this material was a gross interference with the Article 8 rights of the friends and disclosure was not a proportionate interference with these rights. The local authority and the Guardian submitted that the consent of the parents of S's friends must be sought and obtained before any work could be carried out by Evidence Matters.

*The judge's decision*

18. By her order of 15 December 2022, the judge granted permission for the '*instruction of Evidence Matters to carry out a forensic digital analysis of [S's] mobile device and the social media platforms she has accounts for*'. The report was to be filed and served by 9 January 2023. By paragraph 12(f) of the order, the resulting report was to be disclosed only to the parties' counsel and solicitors.

19. Further details of the proposed analysis by Evidence Matters are to be found in the letter of instruction dated 6 January 2023. The letter specifies that the period to be

covered was to be January 2020 to date, a period of three years, and that the analysis was to focus on communications between S, G and three of S's friends identified in the letter of instruction as S Ad and Al.

20. The part-heard finding of fact was listed to be resumed on 13 February 2023. In the meantime, the Guardian appealed the judge's order. On 24 January 2023, I granted permission on the basis that the case raised important issues in relation to disclosure of third party communications and that there was a real prospect of success in an appeal on the basis that the judge may have fallen into error in relation to the procedure for the obtaining of the evidence and for its subsequent disclosure to counsel and solicitors only.

21. S is a young girl of only 16. She made her allegations in July 2021 and has now found herself in a position where the finding of fact hearing which has taken so long to come to trial has been halted mid-way through. I took the view that it was imperative, if at all possible, to maintain the hearing date given the inevitable difficulty in finding a further 9 court days before the same judge, together with the strain yet further delay would cause primarily to S, but also to the father who faces these serious allegations.

22. I am grateful to all the parties for making themselves available at short notice, and also to the pragmatic and helpful way in which they made suggestions which would enable the hearing to be salvaged, notwithstanding that whilst the work had been done (but not disclosed) by Evidence Matters in relation to communications between S and her father and between S and G, the judge had on 23 January 2023 stayed the work in relation to S and her friends in the light of the as then undetermined, application for permission to appeal.

*The judge's analysis*

23. In considering the father's application, the judge rightly commented upon the unfairness to both S and the father for the application arising in the way it did, observing that the father faces the most serious allegations that any child can make against any parent, namely sexual abuse.

24. The judge went on to note that in her experience, in cases where there are allegations of sexual abuse of this type, there is usually a *'wealth of police disclosure and material'*. There appeared, she said, to have been '*little investigation and no primary witness evidence in the case from the police'*. As a consequence, the duty of disclosure and compliance, she said, has fallen on the local authority and the Guardian.

25. The judge went on to find that the relevance of the material was 'obvious' and a significant element in the 'evidential picture' in the case. Wisely, neither Ms Bryan, on behalf of the Children's Guardian, nor Miss Gilliatt, on behalf of the local authority, has rehearsed to this Court the submission made to the judge that interrogation of the contents of S's phone was a fishing expedition amounting to a reversal of the burden of proof.

26. In the absence of any direct assistance from the FPR 2010, the judge approached her analysis by reference to the Civil Procedure Rules 1998 ('CPR'). CPR 31.17 provides for the 'reasonable search for documents', together with CPR PD 31B which deals

with 'reasonable search' in the context of electronic documents. The judge, with considerable care, considered each of the factors set out in CPR PD 31B.

27. The judge then turned to the Article 6 and Article 8 arguments. The judge was of the view that there is a material difference between a minor child providing a witness statement to the court, bringing with it, she said, '*the legal obligations of truth, and the likely involvement of having to attend court to speak to that evidence and be challenged about it in cross examination and consideration of text messages passing between school friends.'* I agree and note that the court quite properly obtained the consent of the parents of those friends who have subsequently provided witness statements.

28. The judge observed that the argument that consent should be sought from the parents of S's friends was novel in the family courts and that social media evidence is frequently adduced in serious cases such as the present one. I pause to observe that none of the specialist counsel before this Court had come across an application of this type before. In their joint experience, third party rights are routinely protected by proportionality, relevance and redaction. However, I bear in mind that the novelty of the submission that consent should be sought from the third party recipients of S's social media communications does not necessarily mean that the application was misconceived.

29. The judge considered what steps could be taken to protect the privacy of S's friends. This, she held, involved limiting consideration to material relevant to the allegations before the court. She noted also that these are confidential family proceedings and that the material would not therefore go beyond that forum. The judge concluded that the proposed analysis of the social media communications between S and her friends represented a proportionate interference with the Article 8 rights of S's friends on the *'limited basis that it is sought'*.

30. The judge was not referred to any material which would have demonstrated the approach the police would have taken to the task of carrying out the mobile phone extraction of S's phone and none of the parties dealt directly with the issue in their skeleton arguments in this appeal. I am therefore grateful to Miss Gilliatt who, when asked by the Court whether the police seek the consent of third parties whose messages will be potentially disclosed, was able to tell the Court that they do not. Miss Gilliatt went on to explain that this case is unusual as, in almost all cases, the police download material during the course of their investigations, the material is then disclosed to the family court through case management orders under the 2013 Protocol and Good Practice Model "Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings." Ordinarily, therefore, the issues before the family court turn primarily upon considerations as to the extent of the download and the appropriate redaction of the material disclosed.

31. Miss Gilliatt told the Court that the Information Commissioner had considered this very issue in 2020 and, whilst recognising the importance of incorporating a balancing exercise between competing Article 6 and Article 8 rights into the process of mobile phone extraction, the Commissioner had said in her report that mobile phones hold data about many individuals and that it is not feasible to obtain the consent of every third party.

32. Miss Gilliatt told the Court that the Information Commissioner's report had led to the revision of the Attorney General Guidelines on Disclosure of 2013 ("AG Guidelines") with new AG Guidelines which came into force on 31 December 2020. The Court was sent copies of the ICO report and the AG Guidelines 2013 over the short adjournment but, given the urgency of the case, we were unable to examine them in detail or to hear detailed submissions prior to giving our decision.

33. All parties, however, were in agreement that:

    i) This case was most unusual in having mobile phone extraction carried out through a FPR Part 25 application in the family court rather than by the police.

    ii) The police do not seek the consent of third parties but rely on a number of strategies including redaction and the use of keyword search in order to limit the impact on the privacy rights of any third parties.

*The parties' positions on appeal*

34. Mr Momtaz KC on behalf of the father maintained his position as at trial. He submitted that the disclosure is highly relevant and careful case management will give considerable protection to the privacy rights of any third parties including these minor children. On reflection, he fully accepted that the three-year period provided for in the letter of instruction (upon his suggestion) was excessive. He further accepted that, rather than the report being sent to those representing the father in the first instance, a more appropriate course would be for the local authority, through a solicitor or junior counsel instructed for that purpose, to conduct a relevance and redaction sift prior to disclosure of all relevant material (and nothing more) to each of the parties. S's mother supported the appeal, and in particular the arguments advanced in respect of the protection of the privacy rights of the third party minor children

35. Counsel for the Guardian also maintained her position notwithstanding the clarification of the police's approach. Miss Gilliatt, however, refined her submissions. She did not concentrate on the issue of the consent of third parties, but suggested that a more practical approach would be to give notice to those whose identities could be readily ascertained, enabling them to make submissions as to why their privacy should be protected in its entirety. Miss Gilliatt also highlighted the importance of any disclosure being proportionate and accepted that some sort of sift would be necessary once the report had been obtained from the provider (in this case Evidence Matters); otherwise, she submitted, not only would the volume of data be overwhelming, but swathes of irrelevant and potentially highly personal material would be disclosed to all the parties in the case.

*Extraction of mobile phone data by the police*

36. This judgment is not the place in which to conduct a detailed analysis of police procedure in relation to mobile phone extraction. It is however helpful to consider in general terms how, in light of the advances in digital technology and the expansion of social media, the Attorney General has updated her guidelines to reflect the reality of the challenges faced by the police and prosecuting authorities when presented with substantial volumes of data, balanced against their duty to disclose material in criminal proceedings, whilst protecting, so far as possible, the privacy of all involved.

37. Prior to the publication of a report from the Information Commissioner's Office ('the ICO report') in June 2020 on 'Mobile phone data extraction by police forces in England and Wales', guidance on the general approach to third party material was found at paragraphs 56 – 58 of the 2013 AG Guidelines on disclosure. These guidelines placed emphasis on the power of a third party to decline or refuse to allow access to third party material found to be relevant as a result of a criminal investigation. The guidelines also highlighted that consultation with the relevant third party 'must always take place before disclosure is made.'

38. By paragraph 57, in the event of a refusal by a third party to allow access to the material or information in question, the prosecutor or investigator could apply for a witness summons causing a representative of the third party to produce the material to the court.

39. In the introductory section of the ICO report the Commissioner identified some of the 'challenges and concerns' at p14 as follows:

> "The Commissioner recognises the challenges faced by the police and prosecuting authorities operating in a digital age. These challenges include the substantial volume of data available, the nature of the data, the complexity of criminal cases and the need to identify reasonable lines of enquiry, whether these point towards or away from a suspect. This creates a tension between balancing the obligation on the police and prosecutors to identify all reasonable lines of enquiry and acquire evidence, against the intrusion that their activities may have on the privacy of the holder of the device being examined, *as well as other individuals whose personal data is accessible through the device*." (my emphasis)

40. The Commissioner went on to outline this concern in further detail at p.15:

> "Large volumes of data are likely to include intimate details of the private lives of not only device owners but also third parties (eg their family and friends). In other words, it is not just the privacy of the device owner that is affected, but all individuals that have communicated digitally with that person or whose contact details have been added by the owner. This presents considerable risks to privacy through excessive processing of data held on or accessed through the phone."

41. The Commissioner considered the legislative framework including the Data Protection Act 2018. She regarded the key challenges when seeking to meet the high standards for consent in data protection terms to be valid (at p35) as:

> "*A phone is very likely to hold data about many individuals, and it would not be feasible to obtain Consent from each of these data subjects, not least since it is not possible to identify the individuals before processing has commenced*. The owner of the phone cannot, under DPA 2018, provide Consent on

> behalf of others whose data is stored on their device." (my emphasis)

42. Following the June 2020 ICO report, the revised AG Guidelines came into force on 31 December 2020 and replaced the 2013 guidance, as identified by Miss Gilliatt. In the event, further revised guidance has since been published on 26 May 2022. The new guidance came into force on 25 July 2022.

43. The 2020 guidelines removed the requirement that consultation with a third party must always take place before disclosure is made and amended the reference to the power of a third party to decline or to refuse to allow access to the material.

44. The AG Guidelines 2022 deal specifically with disclosure of the type with which this appeal is concerned. Against the backdrop of the balance between Article 6 and Article 8, paragraphs 11 – 13 of the AG Guidelines 2022 provide detailed guidance as to the appropriate way to obtain and process personal or private information. The guidance concludes at paragraph 13(h) by saying:

> "Where prosecutors and investigators work within the framework provided by the CPIA, any unavoidable intrusion into privacy rights is likely to be justified, so long as any intrusion is no more than necessary."
>
> (CPIA is the Criminal Procedure and Investigations Act 1996)

45. Third party material is dealt with in the AG Guidelines 2022 from paragraph 26 onwards. Third parties are defined as those who 'are not directly involved in the case in question but may hold information relevant to it'. The guidelines cover both material in the possession of the parties and material in the possession of the investigator.

46. Annex A supplements the Guidelines in relation to Digital Material. Annex A paragraph 12 applies paragraphs 11 – 13 above to digital material and goes on to say: 'Any intrusion into the personal and private lives of individuals should be carried out only where deemed necessary and using the least intrusive means possible to obtain the material required, adopting an incremental approach.'

47. The recently revised 2022 Guidelines contain a new Annex D: Redaction. Paragraph 3 of Annex D describes redaction as a 'vital tool, mandated by law, to protect fundamental rights when personal data is handled.'

48. Annex D paragraphs 5 – 18 set out a careful process for considering whether material that contains personal data (including third-party material) should be redacted. The proper approach can be summarised as follows:

    i) Is the material relevant? If not relevant, there should be no disclosure.

    ii) If relevant, does the material contain personal data? If not, no redaction is needed.

    iii) If the material contains personal data, is there a reasonable expectation of privacy? If not, no redaction is needed.

iv) If the material contains personal data and there is a reasonable expectation of privacy, is it necessary or strictly necessary to provide it unredacted in the circumstances? If it is necessary or strictly necessary, no redaction is needed.

v) Is redaction proportionate (with regard to the volume, time and/or expense of redaction)? If disproportionate, no redaction is needed.

49. This brief but necessarily incomplete survey of the approach to electronic documents by the police and prosecuting authorities demonstrates that, through a raft of statutes, codes of practice and guidelines, the disclosure of electronic communications of third parties is regulated by way of a rigorous code devised by reference to, and with a clear focus on, the competing Article 6 and Article 8 rights of private individuals.

*Application of the FPR 2010 and the CPR 1998*

50. The family court has a discretion to control the evidence before it. FPR r.22.1(1) provides that:

"(1) The court may control the evidence by giving directions as to –

a) the issues on which it requires evidence;

b) the nature of the evidence which it requires to decide these issues; and

c) the way in which the evidence is to be placed before the court."

When applying this rule, the family court will have in mind the overriding objective to deal with cases justly, having regard to any welfare issues involved, as set out in FPR r.1.1.

51. The issues on which the court required evidence in this case clearly related, amongst other things, to the allegation of sexual abuse made by S. In *Dunn v Durham County Council* [2013] EWCA 1654, Maurice Kay LJ said:

> "23. First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include "train of inquiry" points which are not merely fishing expeditions. This is a matter of fact, degree and proportionality."

52. This judge was steeped in the case. She had conducted numerous case management hearings and heard days of evidence including, most recently, the oral evidence of S. It is hard to see how one could challenge her clear view that the mobile phone material with which she was concerned was highly relevant. That being the case, the case management decision for her was, in the light of the Guardian's objections, to determine 'the way in which the evidence [was] to be placed before the court'.

53. In those circumstances, consideration had to be given to the question (a) whether the consent of S's friends' parents should be obtained before mobile phone extraction could take place as is the Guardian's case, (b) if either that consent was forthcoming or was not in the judge's view required, should the court order the material to be

downloaded by Evidence Matters and (c) if so, how once downloaded, should the relevant third party material found within that proposed disclosure be treated?

54. It is well established that, where there is a gap in the FPR 2010, recourse is to be had where appropriate, to the CPR 1998 (see for example *Tchenguiz-Imerman v Imerman* [2014] 1 FLR 232 where Moylan J pointed out that the common law as now encapsulated in the CPR 1998 sets out a more detailed code than the FPR 2010 for the disclosure and inspection of documents).

55. FPR.r.21.2 covers 'Orders for disclosure against a person who is not a party'. A comparable although more detailed rule is found at CPR r.31.17 also carrying the title, 'Orders for disclosure against a person not a party'. The FPR 2010 does not specifically deal with the disclosure of electronic materials referring only to 'documents'. By contrast, the CPR 1998 have a Practice Direction dealing with the issue at CPR PD 31B: 'Disclosure of Electronic Documents'.

56. It follows in my view that the court may look to CPR 31.17 and CPR PD31B for assistance where necessary. FPR r.21.1(3) defines 'document' as 'anything in which information of any description is recorded'. This definition is developed in relation to electronic material in CPR PD 31B paragraph 1 which extends the broad definition of 'documents' to cover electronic documents. Significant also is that the purpose of the Practice Direction is stated at CPR PD 31B paragraph 2 to be 'to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner.'

57. CPR PD 31B paragraph 21 sets out factors which may be relevant in deciding the reasonableness of the *search* for electronic documents. These are the factors which the judge considered when deciding whether to allow the commissioning of an analysis of S's electronic documents. They are:

> "(1) the number of documents involved;
>
> (2) the nature and complexity of the proceedings;
>
> (3) the ease and expense of retrieval of any particular document. This includes:
>
> (a) the accessibility of Electronic Documents including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents;
>
> (b) the location of relevant Electronic Documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;
>
> (c) the likelihood of locating relevant data;
>
> (d) the cost of recovering any Electronic Documents;

> (e) the cost of disclosing and providing inspection of any relevant Electronic Documents; and
>
> (f) the likelihood that Electronic Documents will be materially altered in the course of recovery, disclosure or inspection;"

58. CPR PD 31B paragraph 21 is therefore focused on relevance and proportionality in relation to obtaining electronic material. There can be no question on the face of it that the judge, having decided that the material on S's phone and in her social media accounts was relevant, was right thereafter in concluding that the 'search' of S's electronic data was 'reasonable' or, put another way, relevant and proportionate. The question on appeal is whether she fell into error in carrying out that analysis and making that decision without having first obtained the consent of S's friends.

59. It should be noted in this regard that FPR r.21.2(2)(a) allows an application to be made for disclosure from a person who is not a party 'without notice' in circumstances where 'disclosure is necessary in order to dispose fairly of the proceedings or to save costs'. FPR r.21.3 permits the third party to make an application to withhold inspection of the document in question.

60. This appeal by contrast, is concerned with the proposed disclosure into the proceedings of electronic data which is to be obtained not from a third party, but from a party to the proceedings with her consent. It would, at first blush, seem surprising if notice was required to be given to the non-party/third party recipient of messages held by S, when it is not required under FPR 21.2(2)(a) in circumstances when that non-party/third party is the exclusive holder of the subject material.

*Discussion and Decision*

61. In *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198 ('*Re R'*), McFarlane LJ said at [82]:

> "(c) Criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court (para [65] above).
>
> (d) As a matter of principle, it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings based upon criminal law principles and concepts (para [67] above)."

62. In *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448 ('*Re H-N*') at [74], Sir Andrew McFarlane P ('the President'), having reiterated his observations in *Re R* that family judges should avoid being drawn into an analysis of factual evidence based on criminal law concepts and principles, went on to draw a distinction in the family court between importing criminal definitions, for example of 'rape', from issues concerned with process such as the conduct of a hearing or the scope of cross examination. In such circumstances, the family court could, he said, potentially draw upon good practice in the criminal court. The

President said that 'Nothing that is said in *Re R*, or endorsed in this judgment, should inhibit further consideration of such procedural matters.'

63. In my judgement, the present situation presents the court with precisely the type of procedural matter the President had in mind; a situation where, absent any specific guidance to be found in the FPR (or the CPR) a judge can, and in this case should, draw upon good practice in the criminal court in order to inform the conduct of the family court proceedings.

64. In almost all cases where there is a fact finding hearing, the family court will have access to and be relying on relevant material which includes mobile extraction material, all of which has been obtained by the police by reference to criminal guidelines and in particular the AG Guidelines 2022. It would therefore in my judgement be inappropriate in those few cases where the family court has to order mobile phone extraction, for the family court to adopt a radically different approach from that adopted by the police under the umbrella of those guidelines, issued as they were following detailed consideration by the Information Commissioner of the same privacy issues which arise in the present case.

65. By this, I do not mean that the family court should painstakingly go through Annex A of the AG Guidelines 2022 in order to determine whether the application represents a 'reasonable search'. Relevance will be determined by applying FPR r.21.2, that is to say by asking what is 'necessary to dispose fairly of the proceedings,' bolstered, if appropriate, by reference to the factors set out in CPR PD 31B. In reality, detailed reference to many of the CPR PD 31B factors will not be necessary since, where mobile phone extraction has not been facilitated by the police, it is carried out by companies such as Evidence Matters. The work is not only done rapidly but is relatively inexpensive. Rather, the court's focus will be on the relevance of the material as a whole and in making case management orders which are not only proportionate in terms of cost and management, but which also protect so far as is possible the privacy rights of any third parties in much the same way as is done by the police under the AG Guidelines. In common with usual police practice, this will not involve routinely giving notice or seeking the consent of third parties who have been the recipient of social media communications from the user of the mobile phone in issue. Rather, it will involve a conscientious sift of the material for relevance once the material has been downloaded and thereafter careful redaction which is as described by Annex D a 'vital tool, mandated by law, to protect fundamental rights when personal data is handled.'

66. In *Secretary of State for the Home Department v G* [2020] EWCA Civ 1001 the issue of disclosure related to an application by a father for the disclosure of the asylum papers of the mother. Whilst the case was concerned with FPR r.21.3 'Claim to withhold inspection or disclosure of a document', the principle of the importance of a fair trial as emphasised by Baker LJ at para.[54] is equally relevant in the present circumstances:

> "As this Court emphasised in *Dunn v Durham County Council*, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary because, as Munby J observed in *Re B*, in most cases the needs of a fair trial will demand that there be no restrictions on disclosure. It

> follows that the judge was right to say, at paragraph 55 of the second judgment, that the starting point in any analysis must be that a party to family proceedings is entitled to consider all evidence that is relevant, pursuant to his cardinal rights under the ECHR and the common law principles of fairness and natural justice."

67. Having said that, the court must nevertheless conduct a proportionality check and consider the competing Article 6 and Article 8 rights which are in play. On the facts of this case, the parents of two of the friends gave permission for them to make witness statements with the attendant consequences of that permission. In my view, there can therefore be no question but that it is a proportionate interference with their privacy rights to permit the disclosure of relevant communications between them and S. To prevent such disclosure would be akin to refusing to permit source material in support of a witness statement to be attached as an exhibit to the statements.

68. So far as other third parties are concerned, in accordance with the equivalent police procedure, it will ordinarily be unnecessary, prior to the mobile phone extraction process, for third parties to be given notice or for the consent of the parents to be sought where minors are concerned. Rather, relevance overall having been established, careful case management following the downloading of the material will ensure that following a sift by a lawyer appointed by the local authority, only relevant and appropriately redacted material will be disclosed to the court and to the parties. As the judge rightly observed, the parties are not interested in the wider communications between these or any other young people but only on *'what goes to the heart of the case'*.

69. I am conscious that such a procedure, whilst only rarely necessary, adds a burden onto local authorities already stretched to breaking point. However, contentious litigation in all jurisdictions is having to find ways to deal with the avalanche of material downloaded from mobile phones and social media sites. As already discussed, in the criminal jurisdiction this is by application of the AG Guidelines. Absent disclosure from the police, a procedure has to be found which ensures relevant evidence is admitted into the proceedings whilst achieving a balance between the Article 6 and Article 8 rights of all concerned.

70. Each case will inevitably turn on its facts. It may be that the nature of the case and the contents of the communications exceptionally mean that, following the local authority sift, consideration does need to be given to a particular third party being put on notice in order to make representations should they choose to do so.

*Conclusions as to the case management decisions*

71. Reverting to the case management decisions reached by the judge as identified at [53] above, in my judgement the judge was correct to conclude that it was neither necessary nor a disproportionate interference with S's friends' Article 8 rights to seek the consent of their parents before mobile phone extraction could take place, regardless of whether they had filed witness statements or not.

72. That being the case, the judge was also right to order Evidence Matters to carry out a digital analysis of the material concerned.

73. In my judgement, the judge fell into error only in respect of the structure she put into place in relation to the extent of the analysis and the management of the material thereafter. The judge approved digital analysis of material for a period of three years. As noted above, it is now accepted by all parties that in respect of the female friends and G, that period is too long and would be better defined by reference to what is known to be the relevant period more akin to 18 months, from 1 April 2020 to 31 October 2021. Further, the judge was, in my view, in error in having ordered that the whole of the extraction report was to be disclosed to all counsel and solicitors absent any sift for relevance or any redaction.

74. Whilst the names of a number of S's friends are known to all the parties, there may be other children whose identities should be protected. It is also likely that there are highly personal communications between these young women which are irrelevant to these proceedings. That material must be removed before there is disclosure to the other parties. Absent the equivalent of the disclosure officer in criminal proceedings, the parties agree that the local authority is the appropriate party to sift the Evidence Matters report for relevance and to carry out a careful redaction of the material as appropriate. Any dispute which may arise as to the extent of redaction can be determined by the judge in the same way as is routinely done in cases where there has been police disclosure and there is disagreement as to the extent of any exclusion of material or of redaction.

75. It is for these reasons that, notwithstanding that this was a case management decision with which the Court is always reluctant to interfere, see *Re TG (A Child)* [2013] EWCA Civ5 at [35], I agreed that we should inform the parties that the appeal would be allowed to the limited extent outlined above in order to enhance the protection provided to the privacy rights of S's friends and any other hitherto unidentified third parties.

**LORD JUSTICE BAKER**

76. I agree.

**LORD JUSTICE BEAN**

77. I also agree.