Neutral Citation Number: [2014] EWCA Civ 1009

Case No: C1/2014/0414

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISON
ADMINISTRATIVE COURT
MR JUSTICE CRANSTON
CO/16688/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2014

Before :

MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY
LORD JUSTICE FLOYD

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Between :

C	**Appellant**
- and -	
Secretary of State for Justice	**Respondent**

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- -

Stephen Knafler QC and Roger Pezzani (instructed by **Guile Nicholas Law**) for the **Appellant**
Katherine Olley (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 2 July 2014

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Judgment Approved

Lord Justice Maurice Kay:

1. The appellant applied to the Administrative Court to challenge a decision of the Secretary of State for Justice to refuse his consent under section 41 (3) (c) (i) of the Mental Health Act 1983 to a grant of leave of absence from the medium secure psychiatric hospital in which the appellant is detained. His application was dismissed. That substantive decision is not the concern of his appeal to this Court. Our sole concern is with whether the Judge's refusal to make an anonymity order was correct.

2. Seventeen years ago the appellant was convicted and sentenced for a double murder. The sentence of life imprisonment eventually attracted a tariff of 11 years which therefore expired some time ago. In 2000 the appellant was transferred from prison to Broadmoor pursuant to a direction of the Secretary of State under sections 47 and 49 of the Mental Health Act 1983. In 2007 he was transferred to the medium secure psychiatric hospital where he remains. Since 2008 he has been permitted unescorted leave in the hospital grounds and since 2009 he has enjoyed occasions of escorted community leave.

3. On 31 July 2012 the appellant's responsible clinician applied to the Secretary of State for consent to the appellant being granted unescorted community leave. By a letter dated 13 December 2012 the Secretary of State refused consent. In April 2013 the First Tier Tribunal (Health Education and Social Care Chamber) (Mental Health) decided that if the appellant had been the subject of a restriction order under section 41, he would have been entitled to be discharged subject to conditions. However, it had no power to order his discharge nor was it concerned with unescorted leave which in the present circumstances is a matter for the Secretary of State. On 27 June 2013 the appellant's responsible clinician applied again to the Secretary of State for consent to unescorted community leave but it was again refused. It was this decision that the appellant sought to challenge by way of judicial review. The decision letter stated:

> "The Secretary of State is necessarily concerned with the protection of the public and the patient and needs to be satisfied that the patient will not present a risk in the community. Unfortunately the evidence is such that whilst [the appellant] has not shown signs of deterioration, neither has he shown the level of progress expected.
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> [The earlier] letter also highlights the potential vulnerability of [the appellant] as a result of wide exposure within the community from hostility and media interest as a result of poor or absent coping mechanisms. This presents another area in which the Secretary of State would require a degree of assurance.
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> In reaching this conclusion I have considered fully the most current information in the latest application, [the appellant's] history and progress and your comments. For a future request to be successful there would need to be clear evidence that the highlighted concerns had been addressed and that unescorted leave would not present an unacceptable level of risk."

4. Soon after the commencement of the proceedings in the Administrative Court an anonymity order was made. It remained in place until discharged by the Judge at the conclusion of the proceedings at which point an application had been made by a representative of the media. The Judge explained his decision to discharge the anonymity order in the concluding paragraph of his judgment:

> "35. There is an issue about publication of this judgment. Those considering his case at an earlier stage ordered anonymity. As I pointed out at the hearing, previous proceedings involving this claimant are publicly available and I cannot see the justification for anonymity: the public have a right to know what I have decided about his claim for judicial review…however, [his responsible clinician] has written requesting the hospital's identity and that of the staff be concealed to protect both the claimant and other patients from potential intrusion. That is a reasonable request and there will be an order for anonymity to that extent."

No one has challenged the appropriateness of concealing the identity of the hospital and its staff. The previous proceedings to which the Judge referred included not only the criminal trial and appeal but also a previous case in the Administrative Court: [2003] EWHC 1789 (Admin).

5. Although it is of little relevance to the issue in the present case I should mention that the Secretary of State has referred the appellant's case to the Parole Board. The Secretary of State has accepted in correspondence that unescorted community leave would be a significant factor in the appellant's rehabilitation. For his part the appellant would like the opportunity to demonstrate his suitability for release by that prospect of rehabilitation.

6. I can now turn to the issue of anonymity. A century of jurisprudence from Scott v Scott [1913] AC 417 to A v BBC [2014] 2 WLR 1243 has established the fundamental place of open justice in our judicial system. It is amenable to exceptions but they require powerful justification. Anonymity orders are a derogation from open justice. Generally, the public has an interest in the unrestricted disclosure of the identities of litigants. This is incontrovertible. In civil proceedings, it finds expression in CPR 39.2, which, having dealt with the general rule that hearings are to be in public subject to exceptions (and there is no issue as to the public nature of the hearings in the present case), goes on to provide:

> "(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

Thus there are two stages: (1) necessity, in order to protect the interests of a party or witness and (2) discretion. This provision governs proceedings in the Administrative Court and in this Court.

7. The first submission of Mr Stephen Knafler QC on behalf of the appellant is that, when considering necessity and the exercise of discretion, the Court should recognise

that mental patients have always been treated as being in an exceptional category. This, he submits, was expressly acknowledged in Scott. He refers to three passages in particular. Viscount Haldane LC said (at page 437-438):

> "The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him through the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as a Judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.
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> …
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> In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic….There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

The Earl of Halsbury also referred to the practice in relation to wardship and lunatics. He said (at page 441-442):

> "My Lords, neither of these, for a reason that hardly requires to be stated, forms part of the public administration of justice at all."

Finally, Lord Shaw of Dunfermline, in his monumental speech, referring to wardship and lunacy proceedings, said (at pages 482-483):

> "[These] cases, My Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriae. The affairs are truly private affairs; transactions are transactions

> truly intra familiam; and it has long been recognised that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

In my judgment, the case for the appellant receives no support whatsoever from these passages. It is plain that they were concerned not with litigation such as that involved in the present case but with circumstances in which the Court carries out specific functions in relation to persons under disability. Hence the reference in the speech of Viscount Halbane to "administering their affairs, in the exercise of what has been called a paternal jurisdiction" and to the position of the judge "as an administrator as well as judge". Similarly, in the speech of the Earl of Halsbury, it is made clear that his concern was with a situation which does not form part of the public administration of justice at all. And the speech of Lord Shaw was expressly limited on this issue to "truly private affairs" and "truly domestic affairs". None of their Lordships was addressing wider issues concerning mental patients of the kind which sometimes arise in the context of contemporary legislation. The sort of statutory powers with which we are concerned did not exist at that time and public law litigation of this kind was virtually unknown. The present case is one of many concerned with risk to the public posed by the possible premature release of dangerous criminals. It is not possible to extrapolate from the exceptions acknowledged in Scott a principle which applies in this situation. There is a clear public interest in the disclosure of information as to why a person convicted of grave crimes is or is not considered suitable for discharge or leave of absence. That public interest may be overridden in a particular case but, to the extent that Mr Knafler is effectively contending for a presumption of anonymity, his submission is unsustainable.

8. Mr Knafler asserts that it is the almost invariable practice of the Administrative Court to grant anonymity in a case such as this. I do not doubt that it has often been granted but I do not think that the practice is as universal as Mr Knafler believes. Miss Olley's anecdotal experience resembles mine. The Secretary of State, whilst maintaining neutrality about anonymity in the particular circumstances of the present case, rejects any suggestion of a presumption in favour of anonymity in every case where a person is a mental patient. I agree that there is no legal presumption. Each case has to be considered by reference to CPR 39.2 (4). If there is a practice whereby the Administrative Court operates a presumption, it is wrong so to do.

9. Mr Knafler's next submission is in the form of a complaint that it is unfair if the Administrative Court must deal with the issue by applying rule 39. 2 (4) on a case by case basis because, when cognate issues arise in the First Tier Tribunal and the Upper Tribunal, there is a strong presumption in favour of anonymity. It is certainly true that rule 38 (1) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 provides that all hearings in this part of the First Tier Tribunal "must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public". That may properly be described as a presumption and the First-Tier Tribunal's published guidance refers to it as a "strong" presumption. The position in the Upper Tribunal is different in that rule 37 of the Tribunal Procedure (Upper Tribunal) 2008 Rules prescribes that all hearings must be held in public unless the Upper Tribunal directs that a hearing or part of one is to be held in private. However, there is a provision in rule 14, which is

headed "Use of documents and information", that "unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in these cases must not be made public" (rule 14 (7)).

10. I do not accept that the Administrative Court is bound to create a presumption to reflect the position in the First-Tier Tribunal. When the specialist chamber of the First-Tier Tribunal is dealing with cases under the Mental Health Act, it will often be deciding essentially medical issues. Indeed, the hearings often take place within psychiatric hospitals away from the public eye. The present case is different. It takes the form of a challenge to the decision of the Secretary of State who has decided, as is his right, that whatever view the First-Tier Tribunal may have expressed as to the medical position, he does not believe that the risks which would flow from a grant of permission for unescorted community leave are justified. In a case involving two murders of some notoriety, there is a clear public interest (including but not limited to the interests of the bereaved families) in knowing that it is still considered unsafe for the appellant to be unaccompanied in the community and why it is so considered, notwithstanding that the tariff element of the sentence of life imprisonment expired several years ago. Secrecy about such a matter in a case such as this would require justification.

11. Mr Knafler's next submission is that the Domestic Violence, Crime and Victims Act 2004 demonstrates that there is an expectation of anonymity in the present circumstances. In my judgment, that Act is irrelevant to what we have to consider. Its concern is with facilitating the participation of victims (including the bereaved) in decision-making processes, whether or not the convicted criminal is a mental patient. It makes no assumptions, one way or the other, about whether, in proceedings such as the present, the criminal should enjoy anonymity.

12. The final submission on behalf of the appellant is concerned with the risk of physical attacks on the appellant when in the community. It seeks to rely on a passage of the judgment which was not articulated in the context of the anonymity issue. The Judge said (at paragraph 20):

> "Leave within the hospital grounds is by definition amenable to greater control by hospital staff, and would not expose the claimant to the range of people or potentially stressful situations that would be encountered in the wider community. The claimant did not accept that he would be vulnerable. Given the high levels of previous media interest and victim issues in the case, unescorted leave would bring with it an increased risk of media intrusion, and potential hostilities from member of the public. While those risks may be greatest in the area in which the index offence took place, the claimant had been subject to national media interest. That in itself would not be a reason to refuse permission for unescorted leave. However, it was far from clear whether the claimant has the coping mechanisms in place to deal with this possibility without putting himself or others at risk."

I accept that the need to protect a released criminal from media intrusion or physical attack can be a material consideration in the context of an anonymity application.

However, it is of limited weight in the present case. The position is not significantly different from that which arises when any notorious violent or sexual offender leaves prison on licence or otherwise and regardless of whether or not he has been a mental patient. Malevolent people are unlikely to be concerned with whether or not the target of their malevolence has emerged from a psychiatric hospital. Moreover, in either case the danger is more likely to be real and present when the offender has recently succeeded in gaining or increasing his liberty than when, as in the present case, he has failed to do so.

13. For all these reasons, I have concluded that the judge was not wrong to refuse an anonymity order. It will be apparent that I have addressed the issues entirely from the perspective of the common law. Mr Knafler accepts that his case would not be strengthened by reliance on Article 8 of the European Convention on Human Rights and Fundamental Freedoms, not least because the appellant's right to respect for his private life would have to be balanced against the rights of others, including the media, pursuant to Article 10.

LORD JUSTICE FLOYD:

14. I agree.

MASTER OF THE ROLLS

15. I also agree.