



Case No: COP 12803319

IN THE COURT OF PROTECTION
Neutral Citation; [2019] EWCOP 67

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2019

Before :

MR JUSTICE KEEHAN

Re P (Court of Protection: Transparency)

Between :

A Local Authority

Applicant

- and -

P

1st Respondent

(by his Litigation Friend, the Official Solicitor)

-and-

National Probation Service

2nd Respondent

Mr I Brownhill (instructed by **the Local Authority**) for the **Applicant**

Mr J O'Brien (instructed by **MJC Law**) for the **1st Respondent**

Ms F Paterson (instructed by **Government Legal Department**) for the **2nd Respondent**

Application on paper

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE KEEHAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon. Mr Justice Keehan :

Introduction

1. These Court of Protection proceedings relate to a 25-year old young man P. He has a diagnosis of mild learning disability combined with significant deficits in adaptive functioning. He has autistic spectrum disorder and attention deficit hyperactivity disorder. P's cognitive impairment and concomitant ASD and ADHD place him at risk of offending.
2. P has been convicted of several sexual offences. He is subject to a Sexual Harm Prevention Order and to an extant suspended sentence of 4 months imprisonment suspended for 12-months. He currently resides at a supported living placement facility in the North of England. A requirement of the suspended sentence with that P should reside at this facility or at a place as directed by the National Probation Service.
3. P is likely to be charged by the police with a significant number of further offences in early course; all are of a sexual nature.
4. Earlier in these proceedings the judge to whom these proceedings were then allocated, a tier 1 judge, determined that the proceedings should be heard in private. Once the proceedings were re-allocated to me, I raised the issue of why the case relating to P should not be heard in public but subject to a suitably worded transparency order. I invited the local authority, in whose favour I had made a deprivation of liberty order, the Official Solicitor, as P's litigation friend, and the National Probation Service to file and serve written submissions on the issue of whether the proceedings should continue to be heard in private or heard in public with a transparency order.
5. I am immensely grateful to counsel for each of the three parties for their succinct but helpful submissions. The local authority and the National Probation Service contend the proceedings should be heard in private. The National Probation Service submitted in the alternative that the proceedings should be heard in public, but with the court making an appropriate transparency order, with which the Official Solicitor agreed.

The Law

6. The relevant legal framework is set out in the CoP Rules 2017. CoP rule 4 is supplemented by CoP PD4C.
7. The usual approach is that hearings are heard in public and a transparency order will be made (see paragraph 2.1). The background to the "usual approach" was a desire to ensure that the Court of Protection, which has the power to make a wide range of orders involving those who lack capacity including medical treatment and deprivation of liberty orders, avoided the label of "the secret court". This label had been adopted by numerous press organisations. The concept of a "secret court" had the potential to undermine the confidence of the important work of the Court of Protection.
8. Private hearings reinforce the concept of the secret court. The concerns about unwarranted and intrusive reporting could be addressed by an order which prevented the identification of information that could lead to the identification of the subject of the application and other parties.

9. Practice Direction PD4C sets out the factors to be considered when the court is deciding to hold a public hearing. These are:
- i) The need to protect P or another person involved in the proceedings;
 - ii) the nature of the evidence in the proceedings;
 - iii) whether earlier hearings in the proceedings have taken place in private;
 - iv) whether the court location where the hearing will be held has facilities appropriate to allowing general public access to the hearing and whether it would be practical or proportionate to move to another location or hearing room;
 - v) whether there is any risk of disruption to the hearing if there is general public access to it; and
 - vi) whether, if there is good reason to not allow general public access, there also exist good reason to deny access to duly accredited representatives of news gathering and reporting organisations.
10. I was referred to the case of *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL [2005] 1 AC 593, in which Lord Steyn said:

“By section 12(4) of the Human Rights Act 1998 Parliament made special provision regarding freedom of expression. It provides that when considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression, the court must have particular regard to the importance of the right.

The interplay between articles 8 and 10 has been illuminated by the opinions in the *House of Lords in Campbell v MGN Ltd* [2004] 2 AC 457. For present purposes the decision of the House on the facts of Campbell and the difference between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test....”

11. In *Re Guardian News and Media Ltd and Ors* [2010] UKSC 1 [2010] 2 AC 697 Lord Hope said:

“Lord Hoffmann's formulation was adopted by Lord Hope of Craighead in *In re British Broadcasting Corpn* [2010] 1 AC

145, para 17. Since “neither article has as such precedence over the other” (*In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603, para 17, per Lord Steyn), the weight to be attached to the rival interests under articles 8 and 10 —and so the interest which is to prevail in any competition—will depend on the facts of the particular case. In this connection it should be borne in mind that—picking up the terminology used in the *Von Hannover* case 40 EHRR 1—the European court has suggested that, where the publication concerns a question “of general interest”, article 10(2) scarcely leaves any room for restrictions on freedom of expression: *Petrina v Romania* (Application No 78060/01) given 14 October 2008, para 40.”

12. Finally, in *Re (C) v. Secretary of State for Justice (Media Lawyers Association intervening)* [2016] UKSC 2, Baroness Hale observed:

“jurisdictions dealing with detention, care and treatment of people with mental disorders and disabilities, the starting point is usually privacy and always anonymity, although either or both may be relaxed.”

Discussion

13. The risks to P if these proceedings are not heard in private are asserted by the local authority and/or the National Probation Service to be as follows:

- i) P has already been photographed by the press and been the subject of published articles as a result of his recent conviction and sentencing at the Crown Court;
- ii) if P is identified as a resident of the current facility where he lives, he and his fellow residents are at risk of abuse or harm by the local community;
- iii) he is at risk of jigsaw identification;
- iv) if identified he could be targeted by the vigilante groups who have been known to operate in the area of P’s facility;
- v) the risk of P being targeted is enhanced because of his lack of understanding that he needs to keep the details of his offending private; and
- vi) he is a highly vulnerable person.

14. The Official Solicitor submitted that each of these matters can be addressed by the court making a transparency order. She submitted as follows:

“The Practice Direction PD4C sets out the factors to consider when the court is deciding to hold a public hearing. These are:

- (a) In this regard, the evidence before the court confirms that P is a vulnerable adult. Previous placements have broken down

and the difficulties, in the event that this placement broke down, would be significant in terms of identifying an alternative placement. P himself appears to have no ability to control the information which may lead to reprisals against him. He reveals information to others about his offences. To the extent that P's welfare (in its widest possible sense) would be compromised by a public hearing, there is evidence to support the concern that P's welfare could be compromised. There is accordingly a need to protect P as a party to the proceedings.

(b) The Official Solicitor agrees that there is a risk that the evidence in the case could be reported in a sensationalist way given P's sexual interest in children and his fetishism surrounding urination. However, that risk can be reduced with appropriate orders in relation to what can be reported. Furthermore, the court should have confidence that accredited media organisations will report the proceedings in a responsible way.

(c) In these proceedings, District Judge Davies gave a judgment which resulted in the proceedings being heard in private. Furthermore, previous hearings have been in private.

(d) This application will be heard either at the Royal Courts of Justice (or any other main court centre). The majority of Court of Protection hearings before Tier 3 judges have appropriate facilities to allow the general public to access the hearing.

(e) A Local Authority asserts that there is a risk of disruption if the public have access to the hearing. The subject matter of the application may cause an adverse reaction from persons attending. The Official Solicitor submits that there is a risk of disruption to the proceedings but the nature of this risk cannot be predicted at this stage. Members of the public who have a genuine interest in the work of the Court of Protection are unlikely to be disruptive during the course of the hearing. However, members of the public who for example could be part of a vigilante group or family members of P's victims are more likely to be disruptive during the course of the hearing. In the absence of any evidence as to whether there would be disruption, this is speculative at this stage. Furthermore, if such disruption occurred the court would have the power to remove persons from the court."

15. When considering the factors set out in PD 4C, the need to protect P is a very powerful factor in favour of holding the proceedings in private. The sanction for a breach of a transparency order is contempt proceedings. If the order is breached, however, the information which the order sought to protect may already be in the public domain and the harm to P and/or his placement may have already occurred.

16. The importance of public justice, however, is a central tenet of the Court of Protection. It should only be overridden when the circumstances of the case compellingly, and on the basis of cogent evidence, require the proceedings to be heard in private.
17. I accept the submissions of the Official Solicitor that in her experience and that of her office is that those members of the accredited media who attend Court of Protection proceedings respect the orders of the court and report proceedings in a responsible manner. This mirrors this court's experience.
18. Accordingly, I am satisfied that if:
 - i) I exclude members of the public from attending future hearings of these proceedings; but
 - ii) permit accredited members of the press and broadcast media to attend; and
 - iii) I make a transparency order in the terms proposed by the National Probation Service and agreed by the other parties;the Article 8 rights of P will be protected and the Article 10 rights of the press and broadcast media will be respected.
19. With the exclusion of the public and the making of appropriately drafted transparency order the risks to P of identification, and the consequences of the same, are reduced very considerably. These reduced risks do not justify overriding the central tenet of open justice in the Court of Protection. Accordingly, I do not consider it necessary and proportionate for these proceedings to continue to be heard in private.