Neutral Citation Number: [2019] EWHC 1668 (QB)

Case No: F90BM145

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre

Date: 27 June 2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

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Re. AB
(Application for reporting restrictions: Inquest)

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Holly Quirk (instructed by **Browne Jacobson LLP**) for the **Applicant**
No appearance for any Respondent or Interested Party

Hearing date: 27 June 2019

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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 PEPPERALL:

1. By an application issued on 19 June 2019, Worcestershire County Council seeks an order for reporting restrictions pursuant to s.39 of the Children & Young Persons Act 1933 in respect of a forthcoming inquest into the death of a 17-year-old girl who died in custody.

In this judgment, I shall refer to the girl simply as AB. The application is made in order to protect AB's surviving siblings from distressing evidence about the fact that their sister took her own life and as to findings and further allegations of sexual abuse. There is evidence before me that the siblings are in foster care. They know that AB is dead but do not know how she died. They are described as vulnerable children who are struggling both with their grief and in their foster placements.

2. The Respondent to the application was named generically as the National News Media. The Council indicated its intention to serve the application on the Press Association.

3. On the day of issue, the application was considered on the papers by His Honour Judge Worster sitting as a High Court judge. Judge Worster ordered that the matter be listed before a High Court judge this week and gave directions for the filing and service of any evidence in response to this application and for the exchange of skeleton arguments. On the following day, the court sent out a notice of hearing listing this application for hearing today.

SERVICE

4. On 20 June 2019, the Council served the application notice and a short explanatory note upon the media by e-mail to the Press Association's Copy Direct service. In addition, it served the same documents by post upon a number of newspapers in both Worcestershire and the area in which the inquest will be held. The application notice states that the Council seeks:

> "An order for reporting restrictions in respect of an inquest listed on 1-12 July 2019 pursuant to s.39 of the Children and Young Persons Act 1933."

5. No further explanation was given save that the Council would rely on the attached witness statements and legal submissions. In fact, the attachments were not served with the application notice.

6. The Explanatory Note provided a little further information, namely that the forthcoming inquest into the death of a child, named as AB, would deal with "issues of a sensitive nature." Anticipating success upon this application, it was then said:

> "A Reporting Restrictions Order has been made to protect AB and her siblings' right to confidentiality and a private life. This does not restrict publication of information or discussion about the inquest, provided that such publication is not likely to lead to the identification of AB, her parents, her siblings and their parents or the local authority in which they are being cared for."

7. No media organisation appeared before me. I did, however, have the benefit of written submissions lodged by the British Broadcasting Corporation both on its own behalf and on behalf of Guardian News & Media Limited. The BBC had requested sight of the Council's submissions and draft order. These were provided in redacted form on the evening of Tuesday 25 June 2019. Holly Quirk, who appears for the Council, explained the redactions to me. In essence, all references to AB's actual name, her date of birth, to the

names of her parents and to the names and dates of birth of AB's siblings were redacted. Further, the details of a recent national newspaper article about the forthcoming inquest were redacted. In addition, all references to findings of sexual abuse by AB's father and of more recent disclosures of abuse by one of her siblings were redacted.

8. While ignorant of the detail of the case, the BBC expressed its concern as to the breadth of the order sought and therefore the extent of the infringement of the principle of open justice. It argued that the case would not be within s.39 at all unless the siblings were witnesses in the inquest and submitted that the relief sought appeared to go well beyond the scope of s.39.

9. Two local newspapers also contacted the Council's solicitors. One indicated that it had no interest in the matter. The other asked for and was given some information orally but was not provided with any further copy documents.

10. While not formally dealt with in the evidence before me, I was told that unredacted copies of the application, the supporting evidence and Ms Quirk's legal submissions were served upon the coroner scheduled to hear this inquest. No notice has, however, been given to the other interested parties in the inquest, being AB's parents, an NHS Trust and another local authority responsible for the secure accommodation in which AB died.

11. The general rule is that applications should be made by serving a notice of application on the proposed respondents not less than 3 clear days before the hearing. Rule 23.7(3) of the Civil Procedure Rules 1998 provides:

> "When a copy of an application notice is served it must be accompanied by–
>
> (a) a copy of any written evidence in support; and
>
> (b) a copy of any draft order which the applicant has attached to his application."

12. Equally, paragraph 2.2 of PD25A provides that the evidence in support of any application for an interim order must be served together with the application notice at least 3 clear days before the hearing.

13. Of course, justice is best done when the court hears both sides of a case. The rules do, however, allow parties to make applications without notice in appropriate cases. Rule 25.3(1) provides:

> "The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice."

14. There is a further consideration in any case such as this where the relief sought might affect the exercise of the right to freedom of expression pursuant to Article 10 of the European Convention on Human Rights. Section 12(2) of the Human Rights Act 1998 provides that in such a case:

> "If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied–
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified."

15. Warby J observed in Birmingham City Council v. Afsar [2019] EWHC 1560 (QB) that the law is "particularly strict" when it comes to applications for relief which, if granted, would interfere with the Article 10 right to freedom of expression. As he identified, s.12(2) is a jurisdictional threshold in that, unless the requirements of the subsection are satisfied, the Court has no power to grant an injunction. Warby J added, at [20]:

> "The Court has repeatedly deprecated the making of applications without notice in cases which engage s.12 Human Rights Act 1998, without adhering to the requirements of the applicable rules and practice: see, for example, ND v. KP [2011] EWHC 457 (Fam); O'Farrell v. O'Farrell [2012] EWHC 123 (QB); Bristol City Council v. News Group Newspapers Ltd [2012] EWHC 3748 (Fam), [2013] 1 F.L.R. 1205, [23-24] (Baker J)."

16. On 1 August 2011, the then Master of the Rolls issued the Practice Guidance: Interim Non-Disclosure Orders reported at [2012] 1 W.L.R. 1003. Lord Neuberger MR dealt with questions of notice at paras 18-23:

> "18. Applicants must comply with the requirements set out in section 12(2) of the HRA, CPR r.25.3(2)(3), and paragraph 4.3(3) of Practice Direction 25A.
>
> 19. Section 12(2) of the HRA applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order, because they have an existing interest in the information which is to be protected by an injunction: X v. Persons Unknown [2007] E.M.L.R. 290, paras 10-12. Both respondents and any non-parties to be served with the order are therefore entitled to advance notice of the application hearing and should be served with a copy of the application notice and any supporting documentation before that hearing.
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> 20. Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application. At the hearing they should inform the court of any non-party which they intend to notify of the order as the court is required to ensure that the requirements of section 12(2) of the HRA are fulfilled in respect of each of them. A schedule to any interim non-disclosure order granted should provide details of all such non-parties.
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> 21. Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose (RST v. UVW [2010] E.M.L.R. 355, paras 7, 13), for instance, where there is convincing evidence that the respondent is seeking

to blackmail the applicant: G v. A [2009] EWCA Civ 1574 at [3]; T v. D [2010] EWHC 2335 at [7].

22. Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. It will only be in truly exceptional circumstances that failure to give a media organisation advance notice will be justifiable on the ground that it would defeat the purpose of an interim non-disclosure order. Different considerations may however arise where a respondent or non-party is an internet-based organisation, tweeter or blogger, or where, for instance, there are allegations of blackmail.

23. Where notice of the application is to be given to a media organisation it should be effected on the organisation's legal adviser, where it has one. The court will bear in mind that such legal advisers are: (i) used to participating in hearings at short notice where necessary; and (ii) able to differentiate between information provided for legal purposes and information for editorial use."

17. The net effect of the approach taken to service in this case is as follows:

17.1 First, notice of the bare fact that this application is being made has been given to the media. So little information was provided that potentially interested media organisations do not know the inquest to which the application relates or the evidence upon which the application is made.

17.2 Secondly, the BBC and the Guardian know the nature of the order sought, but not the identity of the persons who are sought to be protected nor the evidence or full argument upon which an order is sought.

17.3 Thirdly, the one thing that all those served with the application notice know is that the application was to be made for reporting restrictions in respect of an inquest concerning the death of a child pursuant to s.39 of the 1933 Act in order to prevent the identification of that child and her siblings. In fact, as became clear in the course of Ms Quirk's submissions, the application is not pursued under s.39 at all.

17.4 Fourthly, other interested parties, including in particular the parents of AB, know nothing of this application. Indeed, I was told by Ms Quirk that some of the most sensitive material relied upon by the Council is not known to the parents.

18. In my judgment, the Council has not taken all practicable steps to notify the media about this application. Further, it has taken no steps whatsoever to notify other obviously interested parties, such as AB's parents and the other interested parties in the forthcoming inquest.

19. Further, there are no compelling reasons why proper notice of this application could not have been given to the media. Responsible media organisations can be expected to respect the confidentiality of the evidence disclosed until the court has ruled upon the application. Notice simply that an application is being made in respect of some unidentified person's inquest and stripped of the evidence and full argument in support is not proper notice. Equally, I consider that if reporting restrictions are to be sought in respect of their

daughter's inquest, AB's parents are entitled to proper notice of both the application and the supporting evidence.

20. Even where some notice is given, justice is not done by one party enjoying privileged access to the judge and placing before the court evidence and argument that it is not willing to share with the other parties. In a passage cited with approval in the Master of the Rolls' Practice Guidance, Munby J (as he then was) said in Kelly v. BBC [2001] Fam 59, at pages 94-95:

> "If one party wishes to place evidence or other persuasive material before the court, the other parties must have an opportunity to see that material and to address the court about it. One party may not make secret communications to the court. It follows that it is wrong for a judge to be given material at an ex parte, or without notice, hearing which is not at a later stage revealed to the persons affected by the result of the application."

21. These failings go to jurisdiction and accordingly, in my judgment, the threshold criteria pursuant to s.12(2) of the Human Rights Act 1998 are not met in this case. Such conclusion is sufficient to dismiss this application.

THE BASIS OF THIS APPLICATION

22. There is, however, another problem with the true basis of this application. Section 39(1) of the 1933 Act provides:

> "In relation to any proceedings, other than criminal proceedings, in any court, the court may direct that the following may not be included in a publication –
>
> (a) the name, address or school of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein:
>
> (aa) any particulars calculated to lead to the identification of a child or young person so concerned in the proceedings;
>
> (b) a picture that is or includes a picture of any child or young person so concerned in the proceedings;
>
> except in so far (if at all) as may be permitted by the direction of the court."

23. If, as drafted, this is an application for an order pursuant to s.39, then the application can and should be made to the coroner:

    23.1 The coroner has jurisdiction to make an order pursuant to s.39.

    23.2 Accordingly, it would, in my judgment, be infinitely preferable if this court deferred to the coroner who will have the benefit of a far greater understanding of the issues in this inquest and who will be able to hear all interested parties, together with any representatives of the media who attend the inquest, before ruling on the application. The High Court may of course interfere with an unlawful exercise of the coroner's powers under s.39 through an application for judicial review. It should not, however, unnecessarily take on the mantle of making the original decision, especially

where it does not have all of the proper parties before the court and does not have the benefit of adversarial argument.

24. While the coroner can make an order pursuant to s.39, she does not have a wider power to impose reporting restrictions save in order to protect national security. Here, an application pursuant to s.39 is unlikely to succeed since the siblings will not be witnesses at the inquest. Recognising that limitation on the jurisdiction in her oral submissions, Ms Quirk argued that "s.39 was not engaged to its full extent" and that an order was nevertheless appropriate upon balancing the siblings' Article 8 rights to respect for their private family life against the Article 10 interest in the free reporting of this case. The true application before the court is therefore for the exercise of the court's inherent jurisdiction in accordance with the decisions in Re. S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47, [2005] 1 A.C. 593; Re. LM (Reporting Restrictions; Coroner's Inquest) [2007] EWHC 1902 (Fam) and Mr Z v. News Group Newspapers Ltd [2013] EWHC 1150 (Fam).

25. This conclusion, however, only serves to exacerbate the problem with the lack of notice. As I indicated above, the one thing that has been clearly disclosed to the media is that this application is for an order pursuant to s.39. No notice has been given of any application for a more wide-ranging order pursuant to the court's inherent jurisdiction.

OUTCOME

26. For all of these reasons, the court does not have jurisdiction to consider this application and it is dismissed. If a fresh application is to be pursued upon proper notice, and nothing I say should be taken as encouraging such a course, I consider that the Family Division could most appropriately balance the Article 8 rights of these vulnerable children against the Article 10 right to freedom of expression.