

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

MW's Application (Leave Stage) [2015] NIQB 50

IN THE MATTER OF AN APPLICATION BY MW FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW

GILLEN LJ

Anonymisation

[1] I have anonymised the names of the applicant in this matter by the use of initials. The reason for doing this is that children are involved in the nature of this application. I make an order providing that no person shall publish any material which is intended or likely to identify the applicant or any child involved in these proceedings or an address or school as being that of a child involved in these proceedings except in so far (if at all) as may be permitted by the direction of the court.

Introduction

[2] This is an application by MW for judicial review of the decision of a Health and Social Care Trust ("the Trust") to disclose to the fathers of his new partner's two children information likely to disclose MW's past sexual offences thereby allegedly placing him in danger and interfering with his ability to form a new relationship. The applicant's case, largely established through the affidavit of his partner, is that one of the fathers is violent and has assaulted her and the other has paramilitary links and thus MW's safety is in danger if this information is disclosed to them. A further likely result is a disruption of the relationship with his new partner. The central thrust of the applicant's case is that the Trust's intended course of action is not a proportionate one having regard to all the facts. Treacy J granted leave to make this application on 2 March 2014.

[3] The relief sought is:

- (a) a declaration that the decision of the Trust is unlawful and ultra vires;
- (b) an injunction to prevent the Trust from disclosing the information;
- (c) an Order of Certiorari quashing the decision of the Trust to disclose the information.

[4] The grounds on which the relief is sought are in essence that:

(i) The decision is irrational and illogical because:

- MW has adhered to all requirements imposed on him since his release from prison.
- His partner has been aware of the details of his past offending from the outset of their friendship.
- He has been categorised as a medium risk of re-offending.
- His partner is co-operating with social services in a manner that is protective of her children:
 - such as to render the decision 'Wednesbury Unreasonable'.

(ii) The decision is unlawful in that it is a violation of MW's privacy and of the privacy of his relationship with his new partner, being a disproportionate interference in his and their private life in breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

Background Facts

[5] The applicant, now 35 years old, was sentenced at Antrim Crown Court on 3 December 2009 on:

- three counts of indecent assault on a female child (aged 13);
- four counts of child abduction;
- two counts of gross indecency;
- one count of aiding and abetting indecent assault on a female child;
- one count of possession of a weapon namely a taser.

[6] From a document in my papers prepared by the applicant whilst undertaking an assignment whilst in prison headed 'Disclosure' he recorded that he had first encountered the 13 year old child at a club attended by her father. Thereafter he

made contact with her through a social network and met her on a number of occasions at various locations including a lane near her house and a car park where, inter alia, on various occasions he touched her breasts, caused the child to masturbate him, digitally penetrated her, conducted oral sex with her and on one occasion had purchased alcohol for her. Not only was the applicant in a position of trust with this child but she was a vulnerable child who attended a special needs school due to ADHD and Asperger's syndrome.

[7] As a result of these offences the applicant was sentenced to 5 years' imprisonment subject to release on licence and subject to a Sexual Offences Prevention Order (SOPO) and supervision by the Probation Board of Northern Ireland (PBNI).

[8] The applicant had a previous conviction in 1996 of indecent exposure with intent to insult a female. That offence is recorded as having occurred when he was driving to work on a country road. Having observed an 18 year old female, he had driven past her on two occasions and then masturbated before her within her sight.

[9] The applicant was released from prison on 18 November 2011 and was under supervision from the PBNI until 17 May 2014. The SOPO came to an end on 3 December 2014.

[10] The applicant asserts that whilst in prison he was assessed as being in the category of medium likelihood of re-offending. An affidavit from the Trust Family Resource Centre witness records that a detailed reading of the ACE report reveals that the marks recorded in the Offending Related Scores section were as follows, inter alia:

"Offence reflects an individual who is willing to take serious risk with a child to fulfil his sexual needs. Offence represents a lack of self-control and self-management. Targetted vulnerable victim by virtue of age and learning difficulties."

He scored marks equating to "a large problem" in the classes of 'impulsive/risk taking', 'sexuality/sexual behaviour' and 'responsibility/control'.

[11] I had before me a Manual of Practice for Public Protection Arrangements Northern Ireland 2015 drawn up by a number of bodies including the PBNI, DHSSPS, DoJ and N.I. Prison Service. It evinces 3 categories of risk offenders. It is common case that the applicant is now placed in category 1 which is defined as "someone whose previous offending and/or current behaviour and/or current circumstances present little evidence that they could cause serious harm through carrying out a sexual contact or violent offence".

[12] In the course of his affidavit in this application, the applicant declares that during his supervision under PBNI he commenced attending a local church where he met his current partner ("X"). This woman has two children by two other fathers. The children are currently aged 14 (a male) and 7 (a girl). The applicant asserts that he commenced a relationship with X on 4 December 2014 and has continued in that relationship with her.

[13] The applicant is the subject of a contract, made with the church at which he attends, with PBNI and the PSNI about his attendance at that church. In essence that contract, inter alia, prohibits him being in a situation where he is alone with children under 18 years of age and permits him only to attend church when named males are in attendance. The applicant's partner has agreed to a contract dated 22 December 2014 to the effect that the applicant would not meet the children and that he would not be in any house where they were present. X has also permitted the children to be interviewed by Social Services. This woman has also agreed to undertake an Ability to Protect Assessment by the Trust. It is not known when this will happen but counsel for the Trust indicated that it could take several months. Issues of funding and availability are prolonging this process. For similar reasons a full risk assessment of the applicant will be delayed, possibly for some months.

[14] X had fully co-operated with Social Services when an issue of abuse arose with the uncle of her daughter and she has entered into a contract with the Trust to ensure that this man has no access to the child.

[15] The schools at which the children attend are aware of the concerns of the Trust and can share any information from the children which would suggest risk.

[16] The applicant is still subject to the additional notification requirements under the Sexual Offences Act 2003 and thus, for example, he is obliged to notify the police if he has resided or stayed for at least 12 hours at a household or other private place where a child under the age of 18 resides etc.

[17] In the course of his affidavit of 9 January 2015 the applicant admitted that he had been in breach of his SOPO in that on three occasions in October 2014 he had collected X and her daughter in his motor vehicle outside their home and driven them to church services.

[18] X has seen and is aware of all of the details of his criminal offences.

[19] The information about the applicant is not considered confidential information by the Trust. He was convicted and named in court, his conviction is a matter of public record and internet searches by the Trust reveal particulars of his offences through media reports at the time. By way of illustration the Trust referred to a Belfast Telegraph article obtained immediately from a Google search under the search terms of the applicant's full name. Accordingly it is the Trust's case that to

provide the fathers with some limited information about the applicant would not reveal anything which is not already in the public domain.

[20] The precise nature of the disclosure which the Trust wishes to make to the fathers of the children is that the applicant has been convicted of sexual offences against a minor and that there is a written agreement in place that stipulates that he is to have no contact with the children until assessments can be completed.

[21] Both fathers of these two children have parental responsibility for them. The Trust asserts that the boy appears to stay overnight with his father from time to time and can do so for 50% of his time. The younger female child has weekly contact with her father (although this is a matter of some dispute) including weekend contact. The Trust therefore suggests that both children are close to their fathers and have regular contact with them.

[22] The Trust draws attention to a guidance document issued by the Health and Social Care Children Services Improvement Board dated 5 August 2014 entitled "Good Practice Guidance for Information Sharing/Split Child Protection Reviews". Whilst this practice guidance has been delayed in implementation, the principles are relied on by the Trust. The document provides guidance to practitioners in relation to information sharing including reports about concerns in relation to children. In the introduction at page 2 it recites:

"The basic premise is that all information, other than restricted information, contained in reports will be shared openly with the parents, and as appropriate, the child during the Child Protection Conference. However sharing restricted information may be necessary in order to aid decision-making about the safeguarding of a child. Therefore the argument for sharing of information is twofold in that:

- Only information pertaining to the safeguarding of a child should be in the report.
- Persons with parental responsibility have a right to have information in order to safeguard their child."

[23] On page 6 of this document there is discussion referencing legal guidance and the final paragraph gives examples of information sharing which includes:

"For example, where a parent needs help or where they are not able to care for a child adequately and safely, then risk of harm to the child associated with

‘parenting capacity’ will be the focus of the assessment and report. Therefore it is reasonable to share information pertaining to this and could include relationships that they are in ... etc. as all are relevant to parenting.”

Legal principles governing this matter

[24] The legal principles were not really in dispute. They can be summarised as follows.

[25] Firstly, in the realm of evaluating an Article 8 of the Convention challenge to a disclosure decision, the applicable standard of review is not the *Wednesbury* test of irrationality but rather the much cited more intense standard of review described by Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 at para [27].

[26] Secondly, proportionality requires the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of reasonable or rational decisions. This goes further than the traditional grounds of review inasmuch as it requires attention to be directed to the relative weight accorded to interests and considerations (see R (B) v Chief Constable of Derbyshire [2011] EWHC 2362 at para [65] and R (H and L) v A City Council [2011] EWCA Civ. 403 at para [41]).

[27] Thirdly, decisions such as this need to be read in a broad and common sense way applying a fair and sensible view to what the decision-maker has said (See Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360 at 1372).

[28] Both parties relied on the case of R (On the Application of H) v A City Council [2011] EWCA Civ. 303. In this case the applicant had been convicted of a sexual offence against a child. That conviction was disclosed and widely dispersed to virtually all of his contacts and groups with which he had become associated. Understandably the court considered this to be disproportionate. The principles emerging from that case relevant to the instant case were as follows:

- Each case must be judged on its own facts in this area.
- The issue is one of proportionality.
- Such information should be disclosed only if there is “a pressing need” for that disclosure. There is no difference in this context between the common law and the approach mandated by Article 8 of the Convention.

[29] R's case cited the leading case of Huang v Secretary of State for the Home Department, Kashmiri v Same [2007] 2 AC 167 which crystallised four general principles on the subject of proportionality namely:

- (1) The legitimate aim in question must be sufficiently important to justify the interference.
- (2) The measures taken to achieve the legitimate aim must be rationally connected to it.
- (3) The means used to impair the right must be no more than is necessary to accomplish the objective.
- (4) A fair balance must be struck between the rights of the individual and the interests of the community. This requires a careful assessment of the severity and consequences of the interference.

[30] In essence the approach that I have adopted in this case, emanating from these principles, is this. There are here two competing rights. On the one hand there is the applicant's right to respect for private life. On the other hand there is a pressing need that children should be protected against the risk of harm. Neither consideration has precedence over the other, albeit this is a case within the confines of Article 3 of the Children (NI) Order 1995 which states that, where a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration.

[31] In adopting this approach I recognise that the applicant and X in the instant case must be afforded a proper opportunity to make their objections to what is proposed. The procedural requirements of Article 8, notwithstanding that it contains no explicit procedural requirement, demand that the participation of natural parents in the decision-making process involving children must be recognised. This must be measured to some extent by the fact that there will clearly be instances where the participation of the natural parents in the decision-making process either will not be possible or will not be meaningful. The court must have regard to the particular circumstances of the case and notably the serious nature of the decision to be taken. The involvement of parents in the decision-making process must be seen as a whole and considered to a sufficient degree to provide them with the requisite protection of their interests. (See W v UK [1988] 10 E.H.R 29 and R (L) v Commissioner of the Metropolis [2009] UKSC

The submissions of the applicant

[32] Mr White on behalf of the applicant, in summary, made the following points:

- Disclosure to the fathers in this case will bring great and immediate pressure on the applicant and his new partner to terminate their relationship as well as endangering his personal safety.
- This disclosure is being perfected before the Trust has carried out a full risk assessment of the applicant and before X has completed the Ability to Protect Assessment.
- The applicant and the partner have fully co-operated with Social Services in all that has been sought from them. Protection is afforded by the knowledge of the children's schools, the fact that he is subject to the public protection arrangements in which he has been characterised at the lowest risk level, the existing contracts etc.
- Whilst it might be more useful to Social Services that the respective fathers have this information there is neither necessity nor pressing need for them to be given this. Pressing need is being conflated with "convenience".
- These steps are being taken before a proper risk assessment of the applicant or, indeed, of the partner have been made. The Trust have not carried out a proper investigation of the circumstances to enable them to make a properly balanced decision, including assessing the significance of the failure of the female child's father to engage with the Trust's concerns in relation to his brother or the extent of the contact he has with his daughter.
- It is unclear as to whether parental responsibility confers a right per se to the obtaining of information about the child. The common law is largely silent on a parent's position with regard to having access to information about the child.
- These disclosures will not represent a proportionate interference with the Article 8 rights of the applicant given the likely adverse consequences to him and of his relationship with X.
- The procedural obligations under Article 8 have been breached by virtue of the failure of the Trust to carry out assessments of the applicant/partner, fathers of the children and a proper assessment of all the relevant paperwork from PBNI and Northern Ireland Prison Service in relation to the applicant.
- Parents are only required to act jointly in utilising their parental responsibility in a limited number of situations e.g. changing the child's name or arranging the child's removal from the UK. If there is a dispute between those who have parental responsibility for the child

an application can be made under the Children's Order (NI) 1995 to the court. The applicant's partner is perfectly entitled to determine, as part of the lawful exercise of her parental responsibility, that she will not disclose to the children's fathers these matters. The Trust ought not to interfere with the exercise of parental responsibility by the applicant's partner unless failing to do so would lead to the children suffering significant harm. There is no evidence that the children have suffered significant harm or that she is exposing them to such a risk.

The respondent's submissions

[33] Mr Montgomery on behalf of the respondent, in essence, made the following points:

- There are a number of factors pointing in the direction of the children's rights taking precedence over the right of privacy of the applicant.
- Breaches of the contracts that the applicant has entered into will not be identified if those who have regular, close and personal contact with the children are unaware of the contract much less its terms. The persons to whom a child is likely to disclose what has been happening to them are those with whom they have a regular and/or close relationship. Estranged fathers who have regular contact fall within this category
- The pressing need for disclosure is principally child protection in the context of an applicant who has been convicted of a very serious sexual offence against a vulnerable minor.
- This applicant has proved to be manipulative, prepared to breach his duty of trust to a vulnerable child and has admitted to actions amounting to a breach of his SOPO.
- The information about the applicant is not confidential material since he was named in court and the press.
- It is contrary to the principles of child protection that a person is deemed to have been of no risk until formally assessed to be a risk. The conviction of this man establishes such a risk. Such assessments as are available to the Trust demonstrate clear and expressed concerns about him in the area of sexual behaviour with children. The safety of the children cannot await the completion of time consuming and lengthy assessments.
- The applicant's partners' allegations about the fathers are based on her ipse dixit. There was no independent evidence produced.

- In the event that the fathers are informed the Trust can give cautionary advice about their use of that information and the police can be kept in the frame.
- This is a case within the confines of Article 3 of the Children (NI) Order 1995 which states that where a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration.
- The court is entitled to take into account the impact of this decision upon the Article 8 rights of the natural fathers.
- X does not seem to recognise any risk that the applicant presents to her children.

Conclusions

[34] Each case has to be decided on its own facts. In reviewing this matter I have applied the intense standard of review outlined in Daly's case. I have assessed the balance the decision-maker has made, not merely asking myself whether it is in the range of rational or reasonable decisions. I have looked at the decision in a broad and common sense way applying a fair and sensible view to what the decision-maker has said. In doing so I have asked myself whether the risk posed to these children by non-disclosure constitutes a pressing need and clearly outweighs the disruption to the applicant's private life.

[35] I have come to the conclusion that there is such a pressing need. The Trust is pursuing a legitimate aim in seeking this disclosure, namely the protection of children. The measure they wish to take is rationally connected to that aim. I consider that the means being used are no more than I consider necessary to accomplish that object. Finally, I conclude that the Trust has made a careful assessment of the severity and consequences of the interference with the applicant's Article 8 rights and has struck the appropriate balance between his rights and the interests of these children. I have therefore concluded that this application should be dismissed for the following reasons.

[36] First, the shade of these criminal offences still lingers. The grim truth is that the squalor of this applicant's sexual predilections carries with it a dark disquieting opportunist edge. His first relevant offence was with a very young woman alone on a country road. In the later offences, he abused a vulnerable child with a profound disability whom he ruthlessly exploited over a period of weeks unknown to her parents and associates. These offences expose a cold calculating predatory mind alert to the opportunity to exploit defenceless young women and children in circumstances where there are unlikely to be independent witnesses.

[37] Notwithstanding the recent categorisation of his risk level, I consider that any focused regard to the impact that he might have on the well-being of these children, particularly the younger girl, is such that I cannot ignore any sensible modest precaution to prevent a significant risk of harm to them.

[38] Secondly, whilst procedurally the Trust could arguably have been more active in speeding up and delving into assessments of the applicant and his partner, together with a more thorough investigation of the allegations made by the partner against the natural fathers, and indeed the precise nature of the contact of these fathers with the children, the fact remains that there is a great deal of objective assessment material available to this Trust to make a decision in this matter. I am content that X has been sufficiently involved in the decision-making process and the Trust has fully and properly canvassed her views and her reasons for concluding that the fathers should not be told. Her opposition to the Trust's intention has been clearly voiced and considered by the Trust. I am therefore satisfied that there has been sufficient procedural compliance in this instance by the Trust in circumstances where lack of funding over which it has no control has clearly played a part in delaying full assessments which in themselves can take several months. Where the safety of children is concerned, I cannot allow the indication of such delay to create a significant risk of harm to them.

[39] Thirdly, although I recognise that there are some protections in place in terms of the contracts that have been drawn up and the degree of supervision that exists with the applicant, I have concluded that these are insufficient to meet the risk of someone who has displayed in the past an ability to isolate a child, abusing the trust of her parents, and who manipulated the child to the extent that she did not disclose what was occurring for several weeks, especially in a context where she was a very vulnerable young girl. Given this degree of manipulation, which the applicant clearly has exercised in the past, I consider it crucial that those who are close to these children, e.g. the natural fathers, should have sufficient disclosure to ensure that they are alert to matters which might not on the face of it appear suspicious in the absence of this information. Innocent disclosures which can serve to alert a well-informed parent might not emerge with a school teacher or social worker. It must be borne in mind that the applicant was quite prepared to breach his SOPO when he permitted X's young daughter in the instant case to accompany him in a car with his partner, an act which might not have carried any significance to other adults in the absence of the knowledge which the Trust now wishes to disclose. That is one clear illustration of the need to disclose such information to the limited audience of the natural fathers.

[40] Fourthly, I am not satisfied that the applicant's partner is fully aware of the risks that this man may present. It is disturbing that in the course of her affidavits she has failed to voice her recognition of such risks. On the contrary, she has become convinced that he does not represent any risk at all. Indeed it looks as if she lent herself knowingly to a breach of his SOPO. I therefore am not convinced that

she alone is a sufficient protection for these children against the predilections of this applicant.

[41] I recognise that parental responsibility does not accord to each parent – especially, as in this case, the absent fathers – the right to disclosure of everything. Moreover one parent may at times act alone without the other in meeting parental responsibility. However, where, as here, I consider there is a real risk to the physical and moral integrity of these children, I believe that there must be a right to know accorded to the fathers in question so that they can participate in preserving the safety of their own children.

[42] It must be borne in mind that this is a limited disclosure. It is quite unlike those instances cited to me where disclosure was refused in circumstances where a wide circle of disclosure was posited. The disclosure sought here is a very limited one of the Trust giving limited information to the fathers. I consider the modest degree of disclosure is wholly proportionate in the circumstances.

[43] I must also bear in mind that the information which is sought to be disclosed is already in the public arena with the publication of the applicant's name associated with the offences that he committed. To Google his full name is to reveal the nature of his offences.

[44] In looking at the possible severity and consequences of this interference with the applicant's rights under Article 8, I bear in mind that the threat from these other fathers is somewhat speculative and unclear. The allegations are essentially based on the ipse dixit of the mother. No step has been taken by her to independently verify these through the police or Social Services or other independent verification. Moreover steps can clearly be taken to obviate any risk that exists by virtue of the Social Services making clear to these fathers the consequences of any misbehaviour on their part and indeed by reference to the police.

[45] The Trust, as Mr Montgomery has rightly asserted, is under a duty to children under Article 66 of the Children Order (Northern Ireland) 1995 where it has reasonable cause to suspect the child is likely to suffer significant harm. I consider that this Trust is carrying out its statutory duty in taking these steps.

[46] In all the circumstances I therefore dismiss the applicant's case.