Neutral Citation Number: [2020] EWCA Civ 1468

Case No: C1/2019/2728

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
MR MICHAEL FORDHAM QC
(Sitting as a Deputy Judge of the High Court)
[2019] EWHC 2638 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LORD JUSTICE DINGEMANS

- -

Between :

XXX	**Appellant**
- and -	
CAMDEN LONDON BOROUGH COUNCIL	**Respondent**

- -

Justin Bates and Alex Shattock (instructed by **Pro bono representation through Advocate**) for the **Appellant**
The Respondent did not appear and was not represented

Hearing date : 29 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 on 11 November 2020.

Lord Justice Dingemans :

Introduction

1. The appellant appeals against the refusal to make orders anonymising her name and redacting certain details from published judgments. The appeal raises a point about the proper approach to applications for anonymisation under CPR 39.2.

2. The appellant brought proceedings for judicial review against the Respondent to quash a decision relating to the award of housing points. Permission to apply for judicial review was granted in 2018 following a renewed application for permission. The substantive claim for judicial review was dismissed in 2019. No application for anonymity was made to the judges hearing either the renewed application for permission to apply or the substantive claim, and the judges gave judgments in open court in the usual way.

3. Following publication of the judgment in 2019 the appellant made an application for what she called "a sealing order", which was in effect an application for an anonymity order. This was said to be so that personal sensitive information contained in the judgment about the appellant would not be publicised. The order was refused on paper by Mr David Pittaway QC sitting as a Deputy High Court Judge. The appellant renewed the application at an oral hearing before Mr Michael Fordham QC sitting as a Deputy High Court Judge (now Fordham J) ("the judge"). The application was dismissed but the judge did order that the appellant's name should be anonymised in relation to the proceedings before him.

4. The appellant appeals against the dismissal of her application by the judge and seeks orders: preventing publication of her name in these proceedings and the proceedings below; for redaction of her name and details of her country of origin and ethnicity from the judgment of HHJ Walden Smith; and for similar redactions to the judgments published in 2018 and 2019; and on the appeal. Permission to appeal was granted by Males LJ.

5. Males LJ also stated that it would be in the appellant's interest to be represented and that if the appellant could not obtain public funding she should contact Advocate, the Bar's pro bono charity. Advocate have represented the appellant. I am very grateful to Mr Justin Bates and Mr Alex Shattock, instructed by Advocate, for their excellent written and oral submissions. The respondent took a neutral position on the appeal and therefore did not appear at the hearing but did file a helpful Skeleton Argument prepared by Mr Terence Gallivan identifying relevant principles and considerations for the Court.

The application for anonymity and redactions

6. The appellant made her application for anonymity because the case had "too much personal sensitive information about my physical and mental health as well as my background …". The appellant adduced medical evidence from two psychiatrists. The medical evidence showed that the appellant suffered from a psychotic disorder with significant social anxiety, paranoia and suspiciousness which has been disabling and distressing to her. One psychiatrist stated that the appellant lacked insight into her condition and refused to consider medication which would have been beneficial. The

medical evidence showed paranoid thinking by the appellant and very limited social functioning, and that the appellant's subjective fears about a number of matters had increased following the publication of the judgments, which had contributed to a worsening of the appellant's mental state. The appellant also relied on a letter from a faith leader. Although the evidence established the nature and effect of the appellant's fears, it also established that they are subjectively rather than objectively based.

7. There was a hearing before the judge on 4 September 2019. The appellant had not made a witness statement but at the hearing the appellant referred in submissions to her physical and mental health disabilities. The appellant stated that she had brought the proceedings against the respondent council because she considered that she met all of the criteria for social housing and that the respondent council had committed unlawful racial and disability discrimination. The appellant said that she had been unable to secure legal representation and had to represent herself. The appellant stated that losing the case was unexpected and a blow but what worsened her condition was that she found that the judgment had been made public. The appellant said to the judge that the easiest and best way of dealing with matters was for the judgments in the public domain to be withdrawn.

The judgment below

8. The judge gave an ex tempore judgment. He set out the relevant background and details of the medical evidence showing the link between the publication of the judgments and the appellant's worries and concerns. The judge referred to the test of necessity set out in CPR 39.2 and also noted that his decision had to be compatible with the appellant's human rights.

9. The judge held that the test of necessity was not met. He considered the appellant's rights under articles 2, 3 and 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). He found that it was neither necessary nor appropriate for the court to act retrospectively and make an anonymity order in relation to the previous judgments. The judge stated that the test of necessity to interfere with the open justice principle was not met. He also held that it was not appropriate when balancing article 8 rights to make the order.

10. The judge granted anonymity in relation to the hearing before him and his judgment. He stated that it might seem odd to have rejected the earlier application for anonymity for the earlier judgments and yet to maintain anonymity in relation to his ruling. He said that the appellant had had particular difficulties in attending court because of her anxiety, that there were considerations of access to justice engaged, and that promotion of her access to Court enabled him to make the order anonymising the appellant's name for the purposes of the application for anonymity only. There has not been an appeal against this part of the order made by the judge. When granting permission to appeal Males LJ directed that the proceedings in the Court of Appeal should be anonymised, and there has been no application to set aside that direction.

The appellant's case on the appeal

11. Mr Bates submitted that an anonymity order should have been made by the judge because the medical evidence showed that the effect of the publication of the judgments had been to worsen the appellant's mental health. It was submitted that the public

interest in open justice could be satisfied by ordering the anonymisation of the appellant's name from the judgments and redacting certain personal details which would leave the judgments comprehensible and the appellant protected. The appellant would then be able to contact those law reporting organisations which had the original judgments and ensure that only the anonymised versions were available, which would provide a real benefit to the appellant.

12. Mr Bates also submitted that the judge had not adopted the two stage approach to applications for anonymity suggested in Civil Procedure 2020 ("the White Book") at 39.2.14. Mr Bates submitted that the Court of Appeal should therefore undertake the balancing exercise again and take account of section 166(4) of the Housing Act 1996, which had not been referred to the judge below. This provides that the fact that a person was an applicant for an allocation of housing accommodation should not be divulged without consent to any other member of the public. Mr Bates recognised that it was unusual to order anonymity for a party after the judgment had been published, but he drew attention to the decision of *W v M* [2012] EWHC 1679 (Fam) where proceedings in the Family Division had been anonymised after the proceedings had been compromised, even though an earlier application for anonymity had been refused.

Relevant legal provisions and principles

13. Section 166(4) of the Housing Act 1996 provides: "the fact that a person is an applicant for an allocation of housing accommodation shall not be divulged (without his consent) to any other member of the public".

14. CPR 39.2 provides that "the general rule is that a hearing is to be in public". CPR 39.2(3) makes provision for specific situations where a court might sit in private, for example where publicity would defeat the object of the hearing (CPR 39.3(a)) or to protect the interests of a child or protected party (CPR 39.3(d)).

15. CPR 39.2(4) provides: "the court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness".

16. The Human Rights Act 1998 gives domestic effect to the provisions of the ECHR. Section 12 of the Human Rights Act applies whenever a Court is considering whether to grant any relief which might affect the exercise of the right to freedom of expression. In this case the relief sought is a prohibition on publishing certain material so section 12 of the Human Rights Act is engaged. Section 12(4) of the Human Rights Act directs the Court to have "particular regard" to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code.

17. CPR 39.2 reflects the fundamental rule of the common law that proceedings must he heard in public, subject to certain specified classes of exceptions, see *Scott v Scott* [1913] AC 417. In *Scott v Scott,* which concerned the publication of a transcript containing details about whether a marriage had been consummated, it was stated that:

"The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal

nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect".

The passage of time has not undermined the importance of open justice: "The principle of open justice is one of the most precious in our law", see *R(C) v Justice Secretary* [2016] UKSC 2; [2016] 1 WLR 44.

18. In addition to the exceptions set out in CPR 39.2(3) there are also automatic statutory reporting restrictions, which cover, for example, victims of sexual offences, family law proceedings and the identities of children in certain situations. As Lord Steyn recorded in *In Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593 at paragraph 20 "the Court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice". In *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 977 Lord Woolf MR explained why courts needed to be careful to prevent extensions of anonymity by analogy saying:

"the need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted … with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely …".

19. CPR 39.4 recognises that orders for anonymity of parties and witnesses may be made. The common law has long recognised a duty of fairness towards parties and persons called to give evidence, see *In Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135, and balanced that against the public interest in open justice in specific cases. Under the common law test subjective fears, even if not based on facts, can be taken into account and balanced against the principle of open justice. This is particularly so if the fears have adverse impacts on health, see *In Re Officer L* at paragraph 22 and *Adebolado v Ministry of Justice* [2017] EWHC 3568 (QB) at paragraph 30.

20. With the advent of the Human Rights Act 1998 the Courts have also been able to give effect to the rights of parties and witnesses who may be at "real and immediate risk of death" or a real risk of inhuman or degrading treatment if their identity is disclosed, engaging articles 2 and 3 of the ECHR. A person's private life may also be affected by court proceedings, engaging article 8 of the ECHR. The common law rights of the public and press to know about court proceedings are also protected by article 10 of the ECHR, see *Yalland v Secretary of State for Exiting the European Union* [2017] EWHC 629 (Admin) at paragraph 20. The importance of the press interest in the names of parties was explained by Lord Rodger in *Re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697 at 723. At paragraph 22 of *In re S (a child)* the House of Lords affirmed that the inherent jurisdiction of the High Court to restrain publicity was the vehicle by which the Court could balance competing rights under articles 8 and 10 of the ECHR.

21. Lord Steyn addressed the way in which competing human rights should be balanced in *In re S (A child)* at paragraph 17. He stated that when considering such a balancing exercise four principles could be identified.

> "First, neither article has as such precedence over the other. Second, 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".

It is also necessary to have particular regard to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code; pursuant to section 12 of the Human Rights Act 1998. Many of these principles were rehearsed by Haddon-Cave LJ in paragraphs 20 to 29 of *Moss v Information Commissioner* [2020] EWCA Civ 580, a case in which issues not dissimilar to those in this case arose.

22. It is well-known that the Court of Appeal will interfere only if the judge was wrong, see CPR 52.21(3). Appellate courts must be cautious about overturning evaluations by a judge who has had to balance a number of factors. In the absence of an error of law, it is necessary to show some omission to take into account material factors, a decision taking account of immaterial factors or an error in principle.

The judge's approach was correct

23. It is right to record that the White Book does suggest in the notes at 39.2.14 that the Court undertake a two stage test: first a threshold test showing that the grant of anonymity was necessary; and secondly, if that threshold is passed, balancing the interests of the parties and the public interest in open justice.

24. It appears that the notes in the White Book are based on what Turner J. said in *Kalma v African Minerals Limited* [2018] EWHC 120 (QB) at paragraph 29, namely that a threshold of seriousness was required before the court will undertake a balance of the competing interests to decide whether to make an order for anonymity. In *Suez Fortune Investments v Theo Blake* [2018] EWHC 2929 (Comm) at paragraphs 12 and 13 Teare J. said that the threshold test could only be met if the grant of anonymity was "necessary". As Mr Bates pointed out, the notes in the White Book 2020 at 39.2.14 also refer to the first part of the threshold test as being one of "necessity". In my judgment it is not helpful to require judges, when confronted with applications for anonymity under CPR 39.2(4) (which often have to be determined at short notice) to ask first whether a threshold of "necessity" has been passed before going on to carry out a balancing exercise of competing interests to determine whether an order for anonymity is "necessary" under CPR 39.2(4). This is because such a two stage test has the potential to create confusion by using "necessity" and "necessary" in different ways at different parts of the test. I agree that a Court may undertake an assessment of whether the application stands any prospect of success before carrying out a balancing exercise, but I do not consider that it is necessary to do so, nor do I consider that any failure to explain in the judgment that any such exercise has been carried out is a ground for setting aside the determination of the judge at first instance. In my judgment, when

confronted with an application for anonymity pursuant to CPR 39.2(4), the Court should have regard to the relevant principles set out in the authorities referred to in paragraphs 17 to 21 above, and carry out the balancing exercise of the relevant interests under CPR 39.2 to determine whether "non-disclosure is necessary to secure the proper administration of justice and in order to protect the interests of that party or witness". This is what the judge did below.

25. Further I do not accept that the provisions of section 166(4) of the Housing Act 1996 require this Court to come to a different result from that reached by the judge. Section 166(4) prevents the disclosure, without consent, of the fact that a person is an applicant for an allocation of housing accommodation. This is for understandable reasons given the scarcity of housing accommodation, and the need for applicants sometimes to satisfy detailed medical requirements which have been imposed by councils to form a basis for allocating accommodation. However Parliament did not extend the section to provide anonymity to claimants seeking judicial review of decisions made by the councils about the allocation of housing accommodation. It is apparent that many such claimants challenging decisions are not afforded anonymity, see for example *R(Gullu) v Hillingdon London Borough Council* [2019] EWCA Civ 692; [2019] PTSR 1738 where the names of the parties were reported in the Court of Appeal but were not reported at first instance. Although Mr Bates skilfully argued, by way of analogy with section 166(4) of the Housing Act, for the extension of anonymity to such claimants challenging decisions made by councils about housing accommodation, in my judgment the principled answer to the submission is that provided by *In re S (a child)*. *In re S (a child)* the House of Lords warned Courts about extending classes of anonymity by way of analogy. It may be that there are some cases where it may be necessary to provide anonymity to such a claimant, but that would be on the basis that it was necessary to do so under CPR 39.2 rather than simply because the claimant was an applicant for housing accommodation.

26. In these circumstances there is, in my judgment, nothing to show that the balancing exercise undertaken by the judge was wrong. Relevant factors considered by the judge included the facts that: the appellant was a party to the proceedings and not just a witness; and the appellant had not applied for anonymity at or before the hearings before the respective judges. In addition it is likely that there would be difficulties for the law reporting organisations in revisiting publications which they have already made in order to comply with an order for anonymity.

27. I should address one specific point made by the appellant, when acting in person, in her "replacement Skeleton Argument", which Skeleton Argument was itself replaced by the Skeleton Argument produced by Mr Bates and Mr Shattock. I address this point because it demonstrated a misunderstanding about the court's practice when dealing with medical information relating to claimants which seems to have left the appellant feeling she has been singled out for unfair and unfavourable treatment by the court below. The appellant appeared to believe that the courts would not normally publish medical information relating to claimants. This is not the case, as a reading of Kemp & Kemp: the Quantum of Damages will show. Such publications of medical information also extend to providing details of mental health illnesses. A recent illustration is *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB); [2019] Med LR 250 where the Court refused to grant an anonymity

order to a mother in a clinical negligence case claiming psychiatric injury following the stillbirth of her first child.

Conclusion

28. For the detailed reasons given above I would dismiss this appeal.

Lord Justice Moylan

29. I agree.

Lord Justice McCombe

30. I also agree.