

Re C (A Child) (2016)

[2016] EWHC 3171 (Fam)

11/01/2017

Barristers

Alex Verdan KC
Chris Barnes

Court

Family Division

Practice Areas

Public Children Law

Judgment in relation to the application by the Secretary of State for the Home Department to discharge a disclosure order providing for the disclosure into public children law proceedings of information that she held.

Background

Information communicated by SO15 (the Counter Terrorism Command, a Special Operations branch with London's Metropolitan Police Service) to the London Borough of Tower Hamlets that a father was, in short, an Islamist extremist resulted in the LB of Tower Hamlets issuing care proceedings. That information was central to (and indeed, without, it would be questionable whether there would be) threshold under s. 31 Children Act 1989 substantiated by evidence. Without notice to the Secretary of State for the Home Department (SSHD), Pauffley J made a disclosure order against the SSHD for all information related to any extremist or radicalised conduct by adults in the family. Subsequently, the SSHD sought to discharge that order.

Decision-making of SSHD

In circumstances in which the disclosure of sensitive information is sought or ordered, the SSHD can seek to claim public interest immunity (PII) or a closed material procedure (CMP). That decision-making process properly is made up of three stages: (1) consideration of the relevance and materiality of the material to the proceedings, (2) a more detailed assessment of the sensitivity of the information: is there a real risk that disclosure would cause substantial harm to an important public interest? And, (3) a determination of whether to claim PII or seek a CMP.

In the event that the SSHD decides to claim PII, she will finalise and sign a PII certificate. That certificate contains an open part, a closed part and a sensitive schedule. The certificate is the SSHD's statement of her own judgment as to the likely harm to the public interest caused by disclosure and the weight to be given to competing public interests. Whilst the court makes the final decision on PII, considerable weight

is given to the SSHD's view.

Pauffley J was given to understand that this was not a case in which the SSHD would make an application for a CMP.

SSHD's arguments

SSHD put forward three primary arguments in support of her application to discharge the disclosure order. Firstly, that the LB of Tower Hamlets' approach to disclosure did not accord with the President's guidance on the same: in particular, that it was an inappropriately wide request, there was insufficient notification as to issues and it should not have been made without notice. Pauffley J dismissed these arguments: primarily because, it was the "tip off" from S015 to the LB of Tower Hamlets that triggered proceedings to argue subsequently that the LB of Tower Hamlets did not give sufficient information to the relevant agencies about the proceedings "defies logic", at [23], and was "fallacious", at [25].

Secondly, that the test of "necessity" for making the order had not been met. Again, Pauffley J firmly dismissed this: a recital to the order records that the court "needs" the information (at [28]), it did not appear factually to be true for the SSHD to argue that the material could be obtained from other (non-SSHD) agencies and it was not possible for the LB of Tower Hamlets to make a more focussed request as, by definition, it did not know what material the SSHD had.

Thirdly, the SSHD argued that a request for the disclosure of the underlying assessment to the SSHD's decision to refuse to issue a replacement passport to the father was erroneous: (1) the assessment was made on the basis of expert advice and the decision (not to issue the passport) is amenable to public law challenge in the administrative court, (2) it is wrong in principle for the Family Court to seek to revisit that assessment or reach its own non-expert determination by calling for the underlying material / assessment - and in any event, its disclosure would likely damage national security and (3) the Family Court should show deference to the decision (i.e. acknowledge the decision and draw appropriate conclusions from it): whether the decision, either by itself or in conjunction with other evidence, is sufficient to make findings / establish threshold is a matter for the court. Pauffley J's response was to make "abundantly clear" (at [41]), that she had no interest (or, indeed, jurisdiction) in re-visiting or challenging the refusal to issue the father with a passport. The underlying assessment could, however, be highly relevant to the fundamental question of threshold, that being a legitimate interest.

Reflection

Pauffley J made clear that, absent a disclosure mechanism for receiving and considering relevant, highly sensitive material from the SSHD, "then it is difficult to envisage a future for this application [the care proceedings]", at [42].

Following a short period of reflection, the court further stated that the likely impetus for the SSHD's application was to "short-circuit or head-off" (at [45]) what would otherwise be the necessary process of administrative decision-making likely leading to a claim for PII.

SSHD's application was dismissed. If and when a PII certificate is produced and claim made, consideration will be given by the court as to whether or not it should be upheld.