

Re C (A Child) (No 2) (Application for Public Interest Immunity) (2017)

[2017] EWHC 692 (Fam)

31/03/2017

Barristers

Alex Verdan KC
Chris Barnes

Court

Family Division

Practice Areas

Public Children Law

Judgment in relation to the claim by the Secretary of State for the Home Department for Public Interest Immunity in relation to documents ordered to be disclosed into care proceedings.

Background

This case is a sequel to Re C (A Child) [2016] EWHC 3171 (Fam) in which Pauffley J had dismissed the application by the Secretary of State for the Home Department (SSHD) to discharge an order made against her in care proceedings for the disclosure of all information relating to extremist or radicalised conduct by the adults in the family. The local authority had initiated care proceedings as a result of a tip-off from SO15 (a Special Operations branch with London's Metropolitan Police Service) to the effect that the father was an Islamist extremist likely to travel to Syria in terrorism-related activity. Pauffley J now considered the SSHD's significantly delayed application for public interest immunity (PII).

Delay

The disclosure order had required the SSHD to make any application for PII and/or a declaration pursuant to s.6(2) of the Justice and Security Act 2013 (JSA) by 20 January 2017. No such application was made. Rather, on 20 January 2017 the SSHD sought a 'closed' hearing in order to make submissions in relation to the withholding of 'sensitive' material, and submitted a small bundle of 'closed' material which was then read by the Judge (Pauffley J later acknowledging that she should not have done so without hearing from the other parties). In response to the objection that the SSHD was now trying to 'initiate a closed material procedure notwithstanding that no application for one had been made' the Judge then adjourned the matter in order for the SSHD to make written submissions as to the basis on which such a closed hearing was required. That resulted in the PII application then being issued on 7 March.

Whilst Her Ladyship recognized the administrative burden on the Government Legal Department ('GLD'), which was responsible for the SSHD's decision-making as to whether to claim PII or seek a closed material procedure, Pauffley J was critical of its failure to issue the PII application until some three

months after the disclosure order had been made. Given that the possibility of a PII claim had been obvious since as far back as November, this was particularly concerning and had resulted in unnecessary hearings and avoidable delay to the care proceedings. Her Ladyship recommended that mechanisms be put in place within the GLD to avoid anything similar from happening in the future.

Procedure

Pauffley J highlighted that she had not seen the material underlying the PII claim: in contrast to the Minister signing the PII Certificate who must see those documents in order to assess sensitivity, the potential damage to the public interest and to conduct the balancing exercise, the Judge is not required to do so. The SSHD's claim for PII had followed the three-step procedure: (a) assessment of whether the material is relevant and passes the test for disclosure; (b) assessment of whether there is a real risk that disclosure would cause 'real damage' or 'serious harm' to the public interest; (c) consideration of whether the public interest in non-disclosure is outweighed by the public interest in disclosure for the purpose of doing justice in the proceedings.

Findings

Pauffley J gave an open judgment following the closed PII hearing in which she had heard from counsel for the SSHD and had received the Sensitive Schedule (ie the damage assessment):

1. The material is relevant and in principle disclosable as a result of the Order made back in October.
2. The material referred to in the Sensitive Schedule would cause, as the SSHD had asserted, a real and significant risk of damage to national security.
3. The fact that the material engages considerations of national security is a significant, weighty and powerful factor militating against disclosure.
4. The SSHD contended that in any case there was other available evidence from which the court may be able to draw inferences and find the threshold satisfied. Whilst the refusal to replace the father's passport (on the basis that he is an Islamist extremist who seeks to travel to Syria for jihad) was significant, it would not by itself be sufficient to establish the threshold criteria. However, contrary to the doubts that the Judge had expressed in Re C (No 1) it was not clear that non-disclosure would result in the local authority being unable to establish threshold in this case.
5. The type of order being sought by the local authority (ie care order or supervision order) has no bearing on the PII balancing exercise.
6. The SSHD referred to the alternative methods of safeguarding the child as a factor in her argument against disclosure. The fact that these strategies depended on the co-operation and agreement of the parents did not tip the balance in favour of disclosure.
7. The balance fell in favour of non-disclosure: the SSHD was not able to be more specific in open submissions as to the nature of the harm or how it would be occasioned because that would be likely to cause the very damage that non-disclosure seeks to prevent.
8. It seemed highly unlikely that the material on which the SSHD had formed the assessment leading to the claim for PII would advance the LA case to any significant degree: it would not assist with understanding the parental relationship or contact with or intentions towards the child.
9. Whilst para. 7(e) of the President's Guidance on Radicalisation Cases in the Family Courts cautions against it, it had been impossible to avoid seeking disclosure of material which 'may be subject to PII, or

the disclosure of which may compromise ongoing investigations, damage to the public interest or put lives at risk' when the Local Authority (and the Judge) had had no basis for concluding that it did.

Permission

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