

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

[2017] EWHC 692 (Fam)

31/03/2017

Barristers

Alex Verdan KC
Chris Barnes

Court

Family Division

Practice Areas

Public Children Law

Secretary of State for Home Department's claim for Public Interest Immunity within public law children proceedings upheld

The judgment concerned an application by the Secretary of State for the Home Department ("SSHD") for public interest immunity (PII). The background to proceedings is set out in *Re C (a child)* [2016] EWHC 3171 (Fam) (8 December 2016).

Disclosure orders against SSHD were made on 4 October 2016 but were not complied with. The 8 December 2016 order required SSHD to make any PII application and/or declaration pursuant to s.6(2) of the Justice and Security Act 2013 (JSA) by 20 January 2017. The SSHD did not do so, but instead requested a closed hearing before the Judge in which to make submissions in relation to sensitive material. A small bundle was provided to the Judge which she read. The Judge accepted in hindsight that she should not have done so, following complaints from father and local authority's counsel on the grounds that the SSHD was "attempting to initiate a closed material procedure notwithstanding that no application for one had been made" [§6]. It was accepted [§20] by the court that this gave rise to a potential for unfairness given the meeting between the Judge and two members of the GLD who handed over the bundle of closed material, and that the parties were unaware of the material provided.

The Judge subsequently confirmed nothing of substance was said in the meeting, and the documents provided were closed submissions and a Sensitive Schedule setting out why the material should be withheld, the nature of the damage if disclosure were ordered and reasons for delay in issuing a PII claim. Her Ladyship was satisfied that there was no reason to recuse herself.

Directions were made for submissions and a hearing. In written submissions the SSHD still did not confirm whether they would make an application for PII but highlighted that closed hearings are "inevitable and unexceptional vehicles" in cases of this kind. Following robust argument from the other

parties, the SSHD did issue a PII application on 7 March and the consequential closed hearing was not opposed.

Following the closed hearing, the SSHD had placed the Certificate, submissions and the gist in “open”. This was to enable the parties to advance submissions in relation to the Wiley balancing exercised (R v Chief Constable of the West Midlands Police, ex parte Wiley [1995] 1 AC 274. The test of (1) is the material relevant, and if so (2) does it attract PII by nature of a real risk disclosure would cause “real damage” or “serious harm” to the public interest. (3) if applying the “real damage” test does the public interest in non-disclosure outweigh the public interest in disclosure for the purpose of doing justice in the proceedings [§29].

The court was satisfied the material was relevant. The court accepted the argument that disclosure would do “serious harm” on the basis of closed materials.

The court also accepted that there were significant, weighty and powerful reasons against disclosure on the basis that the material engaged considerations of national security and there was a real risk disclosure would damage it.

The court also accepted the SSHD arguments that the care proceedings could conclude and threshold criteria could be met even in the absence of disclosure, and that the local authority could still safeguard the subject child, by using the ‘Channel Programme’ and the ‘Desistence and Disengagement Programme’, and by continued passport restrictions, albeit only by agreement from the parents.

Her Ladyship also concluded that the relevant material would not advance the local authority’s case to any significant degree [§58] and could not be used to inform a risk assessment, expert intervention and could not assist in understanding the parental relationship or intentions towards the child.

The Judge highlighted that the courts and SSHD are at the early stages of grappling with problems present in these proceedings and highlights [§14] where disclosure orders are made against the SSHD in respect of sensitive material, the GLD should set up a process for early and definitive decision making.

The Judge was critical of the GLD and SSHD in: their failure to provide timely and informative responses to requests for disclosure; the lack of clarity as to intended applications; and compliance with time limits, and concluded “it is my hope that the SSHD will be more rapidly and decisively responsive to the family courts’ requests for engagement” [§60-61]

Finally, the court referred to the President’s Guidance - Radicalisation Cases in the Family Courts (8 October 2015) [§59].

To read the judgment, please click [here](#).

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