



Neutral Citation Number: [2010] EWHC 2042 (Fam)

Case No: 11774770

IN THE COURT OF PROTECTION

Manchester Civil Justice Centre

Date: 30/07/2010

Before :

THE HONOURABLE MR JUSTICE BAKER

Between :

G

Applicant

- and -

E

**(By his litigation friend the
Official Solicitor)**

First Respondent

- and -

Manchester City Council

Second Respondent

- and -

F

Third Respondent

Miss Kerry Bretherton (instructed by Linder Myers) for the Applicant
Miss Amy Street (instructed by Irwin Mitchell) for the First Respondent
Miss Gillian Irving QC and Mr David Mackley (instructed by the Local Authority's
Solicitor's Department) for the **Second Respondent**
Mr Neil Allen (instructed by Linder Myers) for the **Third Respondent**

Hearing dates: 19 - 23 July 2010

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment is being handed down in private on 30th July 2010. It consists of 11 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that no report shall identify: (a) the person in respect of whom the proceedings have been brought, (b) the parties (save for the Second Respondent, Manchester City Council), (c) all witnesses (save for Christopher Read and Dr. Berney), (d) any other persons mentioned in the judgement (save for judges, counsel, their instructing solicitors, Official Solicitor and Mr. Mike Dodd), and (e) any company, organisation or establishment or location mentioned in the judgment, save for the Press Association and the Care Quality Commission.

MR. JUSTICE BAKER :

1. During the week 19-23 July 2010 I have conducted a further hearing in the Court of Protection in the case of E, a young man suffering from a significant learning disability and in respect of whom I conducted a hearing earlier this year. At the conclusion of the earlier hearing, I delivered a judgment on 26 March 2010, an anonymous transcript of which has been reported as *G v E, A Local Authority and F* [2010] EWHC 621 (Fam). In that judgment I considered and ruled on a number of important, complex and novel issues of law arising under the Mental Capacity Act 2005 as amended and in particular the new provisions inserted by amendments contained in the Mental Health Act 2007 and brought into force in April 2009 following the decision of the European Court of Human Rights in *HL v United Kingdom* (2004) 40 EHRR 761. Having dealt with those issues of law, I proceeded to make a series of declarations and interim orders concerning E and adjourned the case for this further hearing in July to deal with (a) further orders concerning E's future and (b) further ancillary issues and points of law arising as a result of my earlier judgment and order.
2. That judgment and order were the subject of an appeal by the applicant to these proceedings, E's sister G, on a number of points of law. Permission was granted by the Court of Appeal but on 16 July that court (the President of the Family Division and the Court of Protection, Thorpe LJ and Hedley J) dismissed the appeal. That decision of the Court of Appeal is itself now reported in various places under the neutral citation number [2010] EWCA Civ 822.
3. In the judgment dated 26 March I made findings against the local authority that it had infringed E's human rights under articles 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, inter alia by removing him from the care of his long term carer, F, and moving him to successive residential establishments where he was unlawfully deprived of his liberty. The relevant history and the details of my findings are set out in the earlier judgment and need not be repeated here. Amongst the issues I adjourned to be considered at this hearing in July was the question whether I should authorise the publication of the name of the local authority against which I had made those serious findings. During this hearing in July, I have duly considered that issue, amongst others, and concluded that the authority should indeed be identified as Manchester City Council. This judgment sets out briefly my reasons for that decision.
4. Before doing so, I should briefly mention relevant developments that have occurred since the hearing in March. At the conclusion of that hearing, I decided, for reasons set out at length in the judgment, that E should not be returned to F's care at that stage but rather in the interim he should remain in the residential accommodation at Z Road provided by X Limited where he had been living for the previous eight months. I anticipated making a final decision concerning E's residence at this hearing in July once I had received expert evidence from the psychiatrist instructed on behalf of all parties. In the event, following a further interim hearing in May, for reasons set out in a judgment that has not been reported but to which reference is made in the Court of Appeal judgment, I ordered that E should return to F's care immediately. Shortly afterwards, he duly returned and I am delighted to have been told at this hearing that all is going well. In addition, he continues to have regular contact with his sister, G, and her family. Finally, it is right to record that a new team within Manchester City

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Council has taken over responsibility for E's case under the overall direction of a senior manager, and relations between the Manchester social workers and E's family have very significantly improved.

5. It is unnecessary for the purposes of this judgment to go into any detail about the other matters which I have been considering in the hearing in July, save to record that the principal issues have been (a) the arrangements as to E's future care, (b) whether I should appoint G and F as deputies under section 16 of the Mental Capacity Act 2005 (a question which has involved extensive legal argument on a range of complex issues), and (c) whether the Official Solicitor, currently acting for E in these proceedings, should be replaced as his litigation friend. These issues will be the subject of a further judgment to be delivered later in the summer. In addition there are two further issues on which I will conduct a further short hearing, namely (a) whether the Court of Protection has power to award damages for breach of human rights, and, if so, whether I should exercise that power in this case, or alternatively leave or transfer that claim to another jurisdiction, and (b) whether to make a costs order against Manchester City Council and, if so, on what terms. That further hearing will take place on a date to be fixed but in view of the time already expended on this case, and the very great pressure on resources in the Family Division to which I have already referred in the earlier judgment, that hearing will be confined to two days (including two hours' further reading time). I will be grateful if counsel would provide full written submissions in good time for that hearing and I give notice that strict time limits on all submissions will have to be imposed (coupled with equally strict restriction on judicial interventions).
6. I now turn to the issue of the identification of the local authority and the reasons for my decision to authorise the naming of the authority as Manchester City Council. In determining this issue, I have had the benefit of written submissions from counsel for all parties supplemented by their helpful oral submissions. In addition I was greatly assisted by written submissions from Mr Mike Dodd, legal editor of the Press Association. Following the publication of the anonymised report of my earlier judgment, Mr Dodd had contacted the courts seeking permission to identify the local authority and requesting an opportunity to make submissions at any hearing at which that issue was to be determined. I agreed to his latter request and duly received a detailed written submission. Not surprisingly, given Mr Dodd's great and widely respected experience in this area, his submissions have been enlightening, articulate and helpful.
7. The law concerning the publication of information relating to proceedings in the Court of Protection has strong echoes of that pertaining to family proceedings, but the source of the law is particular to this court. I quote from the relevant provisions of the Court of Protection Rules:

"90 - General rule – hearing to be in private.

(1) The general rule is that a hearing is to be held in private.

(2) A private hearing is a hearing which only the following persons are entitled to attend (a) the parties; (b) P (whether or not a party); (c) any person acting in the proceedings as a litigation friend; (d) any legal representative of a persons

specified in any of the sub paragraphs (a) to (c), and (e) a court officer.

- (3) In relation to a private hearing, the court may make an order (a) authorising any person, or class of persons, to attend the hearing or a part of it; or (b) excluding any person, or class of persons, from attending the hearing or a part of it

91 - Court's general power to authorise publication of information about proceedings

- (1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private may be published where the court makes an order under paragraph (2).
- (2) The court may make an order authorising (a) the publication of such information relating to the proceedings as it may specify; or (b) the publication of the text or a summary of the whole or part of a judgment or order made by the court.
- (3) Where the court makes an order under paragraph (2) it may do so on such terms as it thinks fit, and in particular may
- (a) impose restrictions on the publication of the identity of (i) any parties; (ii) P (whether or not a party); (iii) any witness; or (iv) any other person;
 - (b) prohibit the publication of any information that may lead to any such person being identified;
 - (c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify;
 - (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.

92 – Court's power to order that a hearing be held in public

- (1) The court may make an order (a) for a hearing to be held in public; (b) for a part of a hearing to be held in public; or (c) excluding any person, or class of persons, from attending a public hearing or a part of it.
- (2) Where the court makes an order under paragraph (1), it may in the same order or by a subsequent order
- (a) impose restrictions on the publication of the identity of (i) a party; (ii) P, whether or not a party; (iii) any witness; or (iv) any other person;

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- (b) prohibit the publication of any information that may lead to any such person being identified;
- (c) prohibit the further publication of any information relating to the proceedings from such time as the court may specify; or
- (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.

93 Supplementary provisions relating to public or private hearings

(1) An order under rule 90, 91 or 92 may be made (a) only where it appears to the court that there is good reason for making the order; (b) at any time; and (c) either on the court's own initiative or on an application made by any person in accordance with part 10.

(2) A Practice Direction may make further provision in connection with (a) private hearings; (b) public hearings; or (c) the publication of information about any proceedings."

8. A Practice Direction was duly made under the power in rule 92, entitled "Practice Direction A – Hearings (including reporting restrictions) (PD13A)". Part 2 of that Practice Direction is headed "Powers of the court to impose reporting restrictions". Paragraph 7 and 8 of this part read as follows:

"7. Section 12 (1) of the Administration of Justice Act 1960 provides that, in any proceedings brought under the Mental Capacity Act 2005 before a court which is sitting in private, publication of information about the proceedings would generally be contempt of court. However, rule 91 (1) makes it clear that there will be no contempt where the court has authorised the publication of the information under rule 91. Where the court makes such an order, it may (at the same time or subsequently) restrict or prohibit the publication of information relating to a person's identity. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.

8. The general rule is that hearings will be in private and that there can be no lawful publication of information unless the court has authorised it. Where reporting restrictions are imposed as part of the order authorising publication, they will simply set out what can be published and there will be no need to comply with the requirements as to notice which are set out in Part 2 of this Practice Direction. But if the restrictions are subsequent to the order authorising publication, then the requirements of Part 2 should be complied with."

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9. The following paragraphs of Part 2 of the Practice Direction set out provisions for notification in relation to reporting restriction orders. These provisions are not relevant to the current proceedings because the reporting restrictions governing the judgment of the 26 March were imposed as part of the order authorising publication. For that reason no further reference to those provisions is necessary, beyond pointing out that they set out procedures that are well established from other jurisdictions and include, for example, reference to the Press Association's CopyDirect Service. The Practice Direction concludes with a section headed "Scope of Order" which, whilst strictly speaking referring to reporting restriction orders rather than the provisions under the Administration of Justice Act and Court of Protection Rules governing the publication of information relating to proceedings, provides some guidance as to the general policy underpinning the provisions as to confidentiality in this jurisdiction, as follows:

"27. The aim should be to protect P rather than to confer anonymity on other individuals or organisations. However the order may include restrictions on identifying or approaching specified family members, carers, doctors, or organisations or other persons as the court directs in cases where the absence of such restriction is likely to prejudice their ability to care for P, or where identification of such persons might lead to identification of P and defeat the purposes of the order. In cases where the court receives expert evidence, the identity of the experts (as opposed to treating clinicians) is not normally subject to restriction, unless evidence in support is provided for such a restriction.

28. Orders will not usually be made prohibiting publication of material which is already in the public domain, other than in exceptional cases."

10. Some of these provisions were considered by the Court of Appeal (consisting of the Lord Chief Justice, the Master of the Rolls and the former President of the Family Division) in the case of *A v Independent News and Media Ltd and others* [2010] EWCA Civ 343 on appeal from a decision of Hedley J reported at [2009] EWHC 2858 (Fam). That case concerned an application by the media to attend a hearing of the Court of Protection. In giving the judgment of the court, the Lord Chief Justice made the following observations which have some relevance to the present case:

"11... [B]efore the court makes an order under rules 90 to 92, a two stage process is required; the first involves deciding whether there is "good reason" to make an order under rule 90(2) 91(1) or 92; if there is, then the second stage is to decide whether the requisite balancing exercise justifies the making of the order.

....

18 The jurisdiction is regulated exclusively in accordance with the new Act. The result is that the affairs of those who are incapacitated for the purposes of the Act are examined before a

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judge in court. The affairs of those who are not incapacitated are, of course, decided and handled privately, usually at home, sometimes with, but usually without, confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. And that, as we have emphasised, represents an entirely simple, and we suggest self evident aspect of personal autonomy. The responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy.

19. The new statutory structure starts with the assumption that just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so to the conduct of the affairs of those adults who are incapacitated is private business. Hearings before the Court of Protection should therefore be held in private unless there is good reason why they should not. In other words, the new statutory arrangements mirror and rearticulate one longstanding common law exception to the principle that justice must be done in open court. "

11. Following the conclusion of the earlier hearing, and the delivery of my previous judgment dated 26 March, I authorised the publication of the text of that judgment but on the following terms:

"This judgment is being handed down in private.... The judge hereby gives leave for it to be reported on the strict understanding that in any report no person mentioned in the judgment may be identified by name or location except for (a) the advocates and the solicitors instructing them and (b) Mr Christopher Read and Dr Berney [two experts instructed in the proceedings]. In particular the anonymity of the applicant, the first respondent and the third respondent must be strictly preserved. "

12. In his written representations, Mr Dodd submitted inter alia:

"The Press Association submits that this is clearly a case of great public interest, and one which should be reported. This is not because of some prurient interest in the awful disabilities and difficult realities of E's life, but because of the public interest in the local authority and its elected members and managers being held to account for [the] way in which the case has been handled – or mishandled, as the applicants can doubtless argue. This is an authority run by elected members, the managers and staff of which are paid out of public funds, both in council taxes and central government funds raised by general taxation. It is only right and proper that an authority which has behaved in the manner in which Mr Justice Baker has already found this one to have done should be held to public account and made to answer for its actions. The judge

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has criticised the authority for “grave and serious” errors and “blatant errors” the responsibility for which “clearly lies higher up the line of management” than individual social workers. Without the ability to identify the authority, its members managers and staff, the media - and the wider public – will be unable to call them to account.”

13. Later Mr Dodd added:

“This case involves serious, potentially devastating, intrusion into the lives of E, F and G by the local authority. The authority’s actions have, as Mr Justice Baker pointed out, made reaching a decision on what is in E’s best interests much harder than would have been the case had it acted properly in the first place either by following the Deprivation of Liberty Safeguards or by seeking a court’s authorisation for its actions. Mr Justice Baker’s criticisms of the local authority are detailed and devastating. But they will be to all and intents and purposes pointless if the local authority continues to remain anonymous.”

14. Mr Dodd buttresses these arguments by reference to various cases, including the observation of Munby J (as he then was) in *Re X: London Borough of Barnet v Y and X* [2006] 2 FLR 998 at paragraph 166.

“Such cases, by definition, involve interference, intrusion, by the state, by local authorities, into family life. It might be thought that in this context at least the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling.”

Similar views have of course been set out in other cases in which local authorities have been subject to judicial criticism, notably *Re B: X Council v B* [2007] EWHC 1622 (Fam), [2008] 1 FLR 482 per Munby J and the other cases cited therein at paragraph 14 of his judgment.

15. I have quoted Mr Dodd’s submissions at length because they express the argument for publication in particularly clear terms and in a way that is really, in my view, incontrovertible in this case. Publication was supported by those representing G and F and through the Official Solicitor E. Indeed, the local authority itself ultimately accepted that its identification was unavoidable.
16. I therefore name Manchester City Council as the local authority because the arguments in favour of publicity – openness and public accountability – are truly compelling. These arguments manifestly amount to a “good reason” for taking this step and, considering the various factors for and against, the balance manifestly comes down in favour of publication in this case. It would, of course, be a different matter if there was any significant risk that E and other members of the family might be identified as a result of the naming of the local authority. Manchester, however, is a large city and I am satisfied that no such risk arises. It is important that the residents and council tax payers of the city of Manchester know what has happened so that the

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- local authority can be held accountable. And it is to be hoped that the publicity given to this case will highlight the very significant reforms of the law implemented by the Mental Capacity Act and in particular the DOLS in schedule A1, and the consequent very considerable obligations imposed on local authorities and others by the complex procedures set out in those reforms.
17. I make it clear, however, that the identification of Manchester City Council as the local authority is the only relaxation I am permitting of the restrictions on publication of information relating to the proceedings. In Mr Dodd's submissions, and in the initial submissions advanced by some of the parties, it was suggested that I should also allow the identification of some of the local authority employees and also the company ("X Ltd") responsible for running the establishment at which E resided prior to his return to F's care, and the manager of that company ("Mr Y"). At the outset, I indicated my provisional view that no other such relaxation was appropriate, and by the end of the legal argument counsel for G had withdrawn her application in respect of any further relation, and counsel for F had indicated that she no longer pursued any application in respect of X Ltd and Mr. Y.
 18. I remain of the view that no further relaxation is justified for the following reasons. So far as the social workers were concerned, of course I bear in mind the policy considerations set out in paragraph 27 of the Practice Direction. However, as set out in my earlier judgment, I formed the very clear view that the responsibility for what had gone wrong rested at a much higher level within the local authority, and that one of the most damning criticisms of Manchester City Council in this case was it had seemingly failed to provide any or any adequate training to its staff to prepare for the radical changes introduced by the DOLS provisions. Accordingly it would in my judgment be inappropriate and unfair in this case to identify the social workers.
 19. So far as the company running the establishment (X Ltd) and its manager (Mr Y) are concerned, there were three reasons for not relaxing the anonymity. First, neither the company nor Mr Y were represented either at the earlier hearing, when criticisms were made about certain of their practices, or at this hearing, on the issue of whether or not they should be identified. Secondly, the criticisms and concerns raised concerning their practices, although canvassed at some length in the earlier hearing, were not ultimately points on which I felt it necessary to make findings. Insofar as those criticisms and concerns reflect a wider practice across the country, I am satisfied that the appropriate course is for the Official Solicitor to raise the issue with the Care Quality Commission which has some responsibility for establishments such as that run by X Ltd. Indeed, I apprehend that the CQC will already be aware of my earlier judgment. If it wishes to apply for disclosure of any further information, an application can of course be made to me at any time.
 20. The third argument against publishing the name of the company, which to my mind is ultimately the most important, and which was succinctly but effectively deployed by Miss Street on behalf of the Official Solicitor, is that there is a significant risk that the identification of the company would lead to the identification of E, F and G by persons not involved in these proceedings. Bearing in mind the observations of the Lord Chief Justice in *A v Independent News and Media Ltd* quoted above, and the terms of the Practice Direction, this is clearly a crucial factor in making the decision as to whether or not anonymity should be lifted. In all circumstances, I conclude that there is no good reason for the company or its manager to be identified. In the event

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that such a good reason could be established, in my judgment the discretionary balancing exercise would unquestionably come down in favour of retaining anonymity.

21. Accordingly, I authorise the identification of Manchester City Council as the local authority in this case but all other restrictions on publication of information relating to these proceedings remain fully in force. I also propose to authorise the publication of this judgment on the same terms.
22. In passing, I should record that those who carried out the onerous task of anonymising the earlier judgment inadvertently allowed three isolated names to remain in the final version released for publication. Despite attempts to correct this, those names have appeared in at least two electronic reports of the judgment. It is of course the responsibility of those who publish reports to ensure that the publication is within the terms of the authorisation granted by the court. The parties are taking steps to ensure that these names are removed from the electronic reports, and it should be noted that the inadvertent publication of those names has not placed them in the public domain to an extent which would excuse their re-publication.
23. I therefore make the following order: "upon hearing leading and junior counsel for the Second Respondent and counsel for the Applicant, First and Third Respondent, and upon reading written submissions prepared on behalf of all parties and the Press Association, it is ordered that there be permission to publish the text of the judgments delivered in these proceedings on 26th March 2010 and 30th July 2010 on condition that no such publication shall identify: (a) the person in respect of whom the proceedings have been brought, (b) the parties (save for the Second Respondent, Manchester City Council), (c) all witnesses (save for Christopher Read and Dr. Berney), (d) any other persons mentioned in the judgement (save for judges, counsel, their instructing solicitors, Official Solicitor and Mr. Mike Dodd), and (e) any company, organisation or establishment or location mentioned in the judgment, save for the Press Association and the Care Quality Commission".

