Re H (Children) [2009] EWCA Civ 704 (23 June 2009)

Case No: B4/2009/0745

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE BRIGHTON COUNTY COURT

(HIS HONOUR JUDGE LLOYD)

Royal Courts of Justice

Strand, London, WC2A 2LL

23rd June 2009

B e f o r e :

LORD JUSTICE THORPE

and

MR JUSTICE BODEY

IN THE MATTER OF H (Children)

(DAR Transcript of

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Mr M Downs (instructed by Sussex police Legal Services) appeared on behalf of the Appellant.

Ms L Theis QC and Mr A Smith (instructed by West Sussex County Council) appeared on behalf of the 1st Respondent, the father.

HTML VERSION OF JUDGMENT

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Mr Justice Bodey:

This is an appeal by the Chief Constable of Sussex against an order of HHJ Stephen Lloyd, deputy circuit judge, dated 23 February 2009. By that order he refused an application by the Chief Constable for certain disclosure out of care proceedings before him, namely of the statements made by the parents of the relevant children, of the expert medical reports and of any judgments or schedule of agreed facts. Leave to appeal to this court was given by the judge himself. The essential thrust of the appeal is that the balancing exercise about disclosure performed by the judge was flawed, not least because through inadvertence he was not referred to certain rule changes to the Family Proceedings Rules 1991.

The children with whom the care proceedings are concerned are F, who was born in December 2003, A, who was born in November 2005, T, who was born in October 2007 and AA, who was born in October 2008. The mother of all four children (whom I shall refer to as "the mother") was the first

respondent in the care proceedings. The father of AA was the second respondent (whom I shall call "the father" although he is not the father of the eldest three children). He was living with the mother at all material times.

On 10 April 2008, when he was some five months old, T was found to have sustained serious head injuries. This led to the care proceedings and to the assembly of a considerable body of expert medical evidence, which also found other injuries in the form of fractures.

On 16 January 2009 the father made a witness statement in which he confessed to having caused certain of the injuries to T, particularly the fractures to T's legs and the acute subdural and retinal haemorrhages. Later, on 29 January 2009, the father filed what is described as a threshold concession document.

In the result the intended fact finding hearing fixed for 10 February 2009 did not proceed on a contested basis and no judgment was delivered. An interim care order was made, prefaced by a recital recording the father's admissions, as already indicated; also by a recital that the threshold for state intervention was met. It was further recorded that it was not considered necessary for the local authority to pursue other findings, namely as to the causation of T's chronic subdural haemorrhages or of certain other bruising. The interim care order was made on the basis that the eldest three children were not to be rehabilitated with the mother, she and the father having separated, but on the basis that she was to be assessed as to whether AA could be safely returned to her care. The father also accepted that he would have no further role in the lives of the eldest three children, of whom he is not the father, but that he wished to remain involved in the life of his child, AA. He is currently having contact, which I presume to be supervised.

It was against this factual background briefly stated that the Chief Constable made his application for disclosure. This was with a view to assisting his officers in the further investigation of the injuries to T and of any potential criminal responsibility for them. The position of the other parties on the application was this: the father opposed the application; the local authority supported it, at least to the extent of disclosure of the expert medical material and of the recitals whereby the attainment threshold criteria was recorded; but not so as to include disclosure of the statements made by the father in which he made his admissions. The mother and the children's guardian were neutral.

At the hearing below the Chief Constable was represented by a solicitor and the father by junior counsel. HHJ Lloyd is an experienced family judge who until his retirement was a Designated Family Judge. He gave a careful judgment running to 29 paragraphs in which he followed the traditional guidelines for the balancing exercise in disclosure applications, namely those set out in Re: EC (Disclosure of Material) [1996] 2 FLR 725. There Swinton Thomas LJ laid down, and I will abbreviate it without, I hope, doing injustice to the Lord Justice's words:

"…the following are among the matters which a judge will consider when deciding whether to order disclosure. It is impossible to place them in any order of importance, because the importance of each of the various factors will inevitably vary very much from case to case.

(1) The welfare and interests of the child...

(2) The welfare and interests of other children generally …

(3) The maintenance of confidentiality in children cases ...

(4) The importance of encouraging frankness in children's cases…

(5) The public interest in the administration of justice…

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children…

(7) The gravity of the alleged offence…

(8) The desirability of co-operation between various agencies concerned with the welfare of children…

(9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incrimination statement and any danger of oppression would also be relevant considerations ...

(10) Any other material disclosure which has already taken place."

The section 98(2) referred to in paragraph 9 of the above extract is a reference to section 98(2) of the Children Act 1989, which provides that no person is excused from giving evidence or answering questions in care proceedings on the grounds that so doing might incriminate him or her, but that a statement or admission made in such proceedings is not admissible in evidence against the person making the statement (or his or her spouse) in proceedings for an offence other than perjury.

Having carefully addressed all those considerations referred to in Re: EC, HHJ Lloyd refused the Chief Constable's application. Complaint is made on the appeal that in so doing he regarded the decision of Miss Elizabeth Lawson QC in Re: M (Care Proceedings: Disclosure: Human Rights) [2001] 2 FLR 1316 as something of a template, thereby being overly influenced against disclosure. That was a case in which Miss Lawson refused disclosure to the police where one of the parents had admitted responsibility for injuries to a child and where there were assessments ongoing with a view to possible rehabilitation. On the facts of that case, it was felt that the spectre of criminal investigations would compromise the parents' ability to go through with the assessment process; and so disclosure would be contrary to the interests of the child. It is a fair comment that the construction of HHJ Lloyd's judgment did follow closely much of the reasoning undertaken by Ms Lawson in her judgment, and indeed he came to the same result as she had done. There is no doubt in my view however that he was fully alive to all the competing considerations which had to be assessed and balanced in the case before coming to his conclusion.

The submission that the judge was derailed in the balancing process is based on his not having been referred to the revocation in October 2005 of Rule 4.23 of the Family Proceedings Rules 1991 and its replacement by Rule 10.20A of the amending Rules made that year. Those rules have in fact been further amended since the hearing below, and the new regime is now to be found in the Family Proceedings Rules new Rule 11, as inserted by the Family Proceedings (Amendment) (No 2) Rules 2009 SI 2009/857. Those 2009 amendments do not for these purposes change the 2005 Rules in any material respect. I shall however refer here to the 2005 Rules, as they were the ones which were in force (but not drawn to the judge's attention) at the hearing below.

Rule 4.23 of the Family Proceedings Rules used to read that:

"No document, other than a record of an order, held by the court and relating to proceedings [under the Children Act] shall be disclosed, other than to –

a) a party,

b) the legal representative of a party,

c) the children's Guardian,

d) the Legal Aid Board, or

e) a welfare officer or Children and Family Reporter,

f) an expert whose instruction by a party has been authorised by the court,

without leave of the judge or District Judge."

By the rule change in 2005, that rule was replaced by the more permissive (although still carefully structured) regime of an automatic right to make wider disclosures without the disclosing party being in breach of court. By being in contempt of court I refer to being in contempt of section 12 of the Administration of Justice Act 1960, which provides (in shorthand) that the publication of information relating to proceedings before any court sitting in private on a children case is a contempt of court. Rule 10.20A of the 2005 amendments to the original Family Proceedings Rules reads:

"(2) For the purposes of the law relating to contempt of court, information relating to the [children-related]

proceedings (whether or not contained in a document filed with the court) may be

communicated—

(a) where the court gives permission;

(b) subject to any direction of the court, in accordance with paragraphs (3) or (4) of

this rule; or

(c) where the communication is to—

(i) a party,

(ii) the legal representative of a party,

(iii) a professional legal adviser,

(iv) an officer of the service or a Welsh family proceedings officer,

(v) the welfare officer,

(vi) the Legal Services Commission,

(vii) an expert whose instruction by a party has been authorised by the court,

or

(viii) a professional acting in furtherance of the protection of children "It will be seen that this is a new category."

A "professional acting in furtherance of the protection of children" per sub-paragraph (viii) was defined by Sub-Rule (5) as including:

"(b) a police officer who is—

(i) exercising powers under section 46 of the Act of 1989, or

(ii) serving in a child protection unit or a paedophile unit of a police force;"

Other such professionals there defined as acting "in furtherance of the protection of children" were an officer of the local authority exercising child protection functions, any professional person attending a child protection case conference, or an officer of the NSPCC.

The grid set out at Rule 10.20A(3) of the 2005 Rules set out in detail such further information as could be disclosed without permission to specific recipients and for specified purposes, including, for example: to Mackenzie Friends, to a party's spouse or civil partner or a cohabitant, to a close family member for the enablement of support, to counsellors, mediators, approved researchers, accreditation bodies and so on. In particular, it became permissible for a party to disclose "the text or summary of the whole or part of a judgment given in the proceedings" (but not other information in the proceedings) to "a police officer for the purpose of criminal investigation". That in turn was defined as being an investigation conducted by police officers to ascertain "whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it".

Accordingly, Mr Downs for the Chief Constable submits that the Rules Committee has clearly intended over the last few years to free up the more restrictive approach to disclosure enshrined in the old Rule 4.23 in favour of a more liberal approach. The fact that disclosure to the police is now permitted without leave in two sets of defined circumstances supports, he says, this proposition.

Ms Theis QC, on the other hand, submits that nothing in the new approach has served to undermine the efficacy of the exercise conducted by HHJ Lloyd. She submits that he carefully weighed the decision before him and came to a conclusion which fell within the wide band of discretion afforded to a trial judge. Had he been aware of the rule changes the result would have been the same. She relies on G v G (Minors: Custody Appeal) [1985] 1 WLR 647 and Re: J (A Child) (Custody Rights: Jurisdiction) [2006] 1 AC 80 for saying that this court cannot and should not interfere, except if the decision of the judge was plainly wrong, such as he must have given far too much weight to a particular factor. As Ms Theis points out, there was no judgment given in the care proceedings here, with the result that the right to disclose a judgment to a police officer without the leave of the Court "for the purpose of a criminal investigation" would not have been engaged. She further relies on an observation of Sumner J in A Local Authority v D (Chief Constable of Thames Valley Intervening) [2006] 2 FLR 1053, when he remarked that the 2005 Rules do not seek to change the existing case law on the circumstances when a court document should or should not be disclosed. There is nothing

in that judgment of Sumner J, she says, which supports a proposition that there is any shifting towards an assumption of generally greater information sharing.

Ms Theis also draws attention most particularly to the weight which she says HHJ Lloyd rightly attached to the need to encourage frankness in family proceedings. The judge described the father's admissions as extremely important because, on the medical evidence, it would have been very difficult for the court to have been able to decide who was the actual perpetrator. She further submits that HHJ Lloyd had been in charge of these care proceedings at all material times and was far better placed than this court to carry out the fine balancing exercise with its several competing considerations.

It is undeniable that the rule change in 2005 introduced a far wider regime of disclosure without leave than that contained in Rule 4.23 of the 1991 Rules. The careful balancing act performed by the judge without taking account of that extension cannot in my view therefore stand, since it was based on a flawed perception of the degree of confidentiality generally ascribed to children proceedings by the Rules. Awareness of the fact that disclosure can now be made to the police in prescribed circumstances without the permission of the court would inevitably have influenced his exercise of the balancing exercise and might well (or might not) have tipped the balance the other way.

The precise application made to us by the Chief Constable is to remit the matter to the County Court for further consideration based on the correct Rules. That seems to me to be the appropriate course, because these cases inevitably involve a fine balance. This is so especially (a) where a parent has made a confession within what I will call the confines of the family Court, with all the consequential benefits within the family justice system and (b) where there is the ongoing possibility of rehabilitation, which might be impeded or harmed by further criminal investigations; but at the same time (c) where there is still, inevitably, a strong public interest in the investigation and prosecution of serious crime. Here there may well be a need for document-by-document consideration of the written materials which were and are before the County Court. That would require input from the Children's Guardian, which by reason of former neutrality, has yet to be given.

In my view, therefore, the appeal should be allowed and the issues remitted to the County Court for further consideration pursuant to the now-applicable rules.

Lord Justice Thorpe:

I agree with the order that my Lord proposes and with the reasons upon which his judgment rests. I add only two words, the first in relation to paragraphs 20 and 21 in the judgment below. In paragraph 21 the judge cited with approval a paragraph from the judgment of Ms Elizabeth Lawson QC in the case of Re: M. She had said:

"The problem comes if there is a prosecution resulting from that investigation which makes use of the disclosed material, albeit indirectly, because of the provisions of s 98(2) of the Children Act 1989. The information disclosed then passes into the public domain."

The judge in the preceding paragraph had adopted that approach, saying that counsel for the father was correct in the submission that:

"Once the documents are disclosed, if I allow it, that is beyond this court's control. They will be in the public arena."

In my judgment that point is not good in relation to an application for disclosure made by a Chief Constable. If the court entertained an application for disclosure by the press, then of course the resulting publicity would be the natural consequence and would be something which the court would have to weigh very carefully in the balance. But where the police apply, they are seeking a sharing of information between the two justice systems which are working side by side in cases involving the protection of children. The disclosure is to responsible professionals who will use the material for the purpose for which it is shared, namely criminal investigation and possible prosecution. The criminal justice system has its own responsibility and powers to protect the vulnerable.

Mr Downs has informed us that whilst in 2005 local authorities were requesting disclosure from police from the Chief Constable approximately ten times a month, by this current year the volume of requests has risen to approximately 50 a month. That is an indication of the extent to which the family justice system is reliant upon police collaboration for the discharge of the court's responsibility in public law cases. I would emphasise that the leading judgment in this field remains the judgment of Swinton Thomas LJ in the case of Re: C. At page 330 he drew attention to factors of general relevance to the exercise of the judicial discretion. In paragraph (5) he emphasised:

"The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice."

To like effect in paragraph (8) he said:

"The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children."

Of course Swinton Thomas LJ also included in his check list paragraph (3), "The maintenance of confidentiality in children cases". Let us remember that he was speaking 12 years ago when there was not so much public questioning the importance of confidentiality in children cases. Since he spoke the Government has embarked on extensive consultation as to the need for increased transparency in family proceedings, and the result has been the decision of the Secretary of State that, with effect from 27 April 2009, subject to the discretion of the judge, the press are to be admitted to most family proceedings excepting adoption proceedings. Ms Theis in her very helpful skeleton argument has noted that, in consequence, from the same date Rule 10.20A of the Family Proceedings Rules 1991 has been replaced by Rule 11. That has been affected by the Family Proceedings (Amendment) (No 2) Rules 2009 SI 2009/857.

My second point goes only to procedure. The application that HHJ Lloyd decided was issued on 11 February and the applicant was said to be Mr Gareth Jones, litigation solicitor at the Sussex Police Legal Services. The applicant was in fact the Chief Constable. The order sought was not particularly clearly identified in paragraph 2 of the form, and accordingly my Lord and I at the outset were in some doubt as to precisely who was to be in receipt of any disclosure which would be perhaps permitted on any remission, and we were clearly informed by Mr Downs that the recipient would be an officer in the child protection unit who would be the appropriate officer to carry out a criminal investigation as to possible criminality in relation to the injuries suffered by the child, T. Accordingly, it seems to me that in future an application brought under Rule 11 or otherwise should contain a clear statement of the identify of the named officer within the child protection unit to whom the Chief Constable seeks release. There should be an equally clear statement of the purpose to which the information will be put, and there should also be an application for the exercise of a discretion by the named officer to share the documentation with the Crown Prosecution Service in the event that his conclusion is that the material merits referral to the CPS. It is plainly absurd for the family justice system to be burdened with two applications where only one is essentially required. An application

first for release to the investigating officer to be followed subsequently by a freestanding application for onward release to the CPS is simply wasteful of time and resources. Once the application is properly prepared and carefully drafted the judge who determines it will be able to draw on the application in drafting the order, assuming the application succeeds. The order needs to be similarly specific in its definition of the person to whom the release is authorised and the purpose and use to which the officer must put the material.

So the order will be: appeal allowed; the application to be amended and determined by either HHJ Coates in the Brighton Court or such other judge as she may designate.

Order: Appeal allowed