IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

NEUTRAL CITATION NUMBER] : [2015 EWHC 869 (Fam)

CASE NO: FD15P00125, FD15P00126, FD15P00127, FD15P00128, FD15P00129

Court 46
The Royal Courts of Justice
Strand
London
WC2A 2LL

27 March 2015

BEFORE:

MR JUSTICE HAYDEN

BETWEEN:

THE LONDON BOROUGH OF TOWER HAMLETS

Claimant

and

M & Ors

Defendants

MR BARNES appeared on behalf of the Claimant.

MS CARTER-MANNING appeared on behalf of the Metropolitan Police.

MS MARY HUGHES appeared for the First Respondent

MR SAM MOMTAZ appeared for the Second Repondent

MS DEIRDRE FOTTRELL QC appeared for the Third Respondent

Friday, 27 March 2015

JUDGMENT

1. Last week, I heard two cases, both of which were brought by local authorities who were concerned that a number of young people, all minors in their areas, were at risk of leaving the country to travel to ISIS countries, particularly Syria.

2. The two cases came from different parts of the country. The families of these children were, in each case, in the local authority's assessment, unlikely adequately to protect them from leaving the country.

3. The cases involved both girls and boys, each of whom was at risk, to my mind self-evidently, of significant harm in the sense contemplated by section 31(ii) of the Children Act 1989.

4. The risk plainly differs according to gender but is nonetheless grave in both instances and does not need to be spelt out.

5. In both sets of proceedings, I made the young people concerned wards of this court.

6. In the first case, the wardship application made by the local authority itself. The application, though of necessity brought before me urgently, sitting then as Applications Judge, was carefully thought through and well prepared.

7. In the second application, again brought urgently, I invited the authority to consider whether they wished to issue a wardship summons. Wardship, following the introduction of the Children Act 1989, which came into force in October 1991, has now much more limited scope than previously. It is primarily utilised in contemporary family law, in cases involving alleged international child abduction and in cases within the Hague Convention of 25 October 1980 on the civil aspects of international child abduction.

8. Conscious that this judgment has attracted some public interest, I should perhaps say, by way of short explanation, that the Hague Convention is a multilateral treaty which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a framework to secure their prompt return.

9. As such, the status of a Ward of the High Court of England and Wales has achieved international recognition. For this reason, and because it vests parental responsibility solely in the High Court, it is particularly apposite in circumstances such as those contemplated here. All the major decisions relating to such children for the period of the operation of the wardship require the approval of the High Court.

10. Thus, pursuant to this jurisdiction, I made orders relating to the retrieval of the passport of each of the young people concerned in order to use the full powers at the court's disposal to endeavour to prevent the wards leaving the United Kingdom.

11. This course, though it arises in circumstances which do not have recent precedent, did not in any way require an evolution in the law itself. For example, the jurisdiction was recognised in Re A-K (Foreign Passport: Jurisdiction) [1997] 2 FLR 569.

12. Both cases came before me last week on ex parte application. I was satisfied, on the evidence presented to me, both that the measures sought were proportionate and that there were strong grounds for believing the situation was urgent. I remain convinced of both.

13. The removal of an individual's passport, even on a temporary basis, be that of an adult or child, is a very significant incursion into the individual's freedom and

personal autonomy. It is never an order that can be made lightly. Where only the State, in this case through the arm of the local authority, appears in court, it must never be forgotten that the court requires a very high degree of candour on the part of all of those involved.

14. By this, I do not mean that the evidence should merely be presented with honesty and integrity. Happily, those standards are commonplace in this jurisdiction.

15. Rather, I wish to emphasise that the fullest possible information must be placed before the court in an entirely unpartisan way. Both the evidence which supports the application and that which runs counter to its objectives. Nothing less than that will suffice.

16. This duty, in such an application, extends not merely to counsel and solicitors but to all involved: police; social services; whichever professional capacity.

17. Moreover, the lawyers involved must take great care to emphasise and reinforce this obligation to their lay and professional clients in clear and unambiguous terms. This very high degree of candour must also be accompanied by careful consideration as to whether the facts present a real degree of urgency, which of themselves necessitate an application being made on an ex parte basis.

18. I should like to take this opportunity to distil a number of core principles.

    (i) The lawyers should take care to draft, at very least in outline, the scope and ambit of the orders they seek and in respect of whom they seek it. This should be undertaken before coming to court. That will not only expedite the subsequent service of the orders on those concerned, it is also a crucial forensic discipline, compelling the lawyers to think in a properly focused

manner about the specific orders they seek;

(ii) Thought should be given, from the very outset, as to how quickly the case can be restored on notice. This is the essential requisite of fairness in the process, now buttressed by article 6 of the European Convention on Human Rights;

(iii) Even though these cases will, of necessity, be brought before the court in circumstances of urgency, they nonetheless require the instruction of senior and experienced lawyers. The issues have profound consequences, not limited to the individuals concerned, and will frequently require a delicate balancing of competing and potentially conflicting rights and interests;

(iv) All involved must recognise that in this particular process it is the interest of the individual child that is paramount. This cannot be eclipsed by wider considerations of counter terrorism policy or operations, but it must be recognised that the decision the court is being asked to take can only be arrived at against an informed understanding of that wider canvas. It is essential that the court be provided with that material in appropriate detail;

(v) It will never be satisfactory, in applications of this kind, merely to offer verbal assurance, through counsel or any other individual, that the police, security forces or those involved in counter terrorism, are aware of and support the application. There must in future always be 'hard' evidence, i.e evidence

which is cogent and coherent, placed before the court and capable of being subject to appropriate scrutiny. The format of the evidence may vary from case to case. It may require a police presence in court. There may be the need for police/counter terrorism officers to be represented, written and sworn statements may sometimes suffice. On occasion evidence may be received by secure telephone or video link;

(vi) Justified interference with the article 8 rights of a minor will always require public scrutiny at some stage in the process. In both cases this week, the press attended. It was only necessary for them to withdraw on one occasion, at the request of a very senior police officer present in court, supported by the local authority. The request was made because sensitive issues of policy and national security arose. Transparency, that is to say the attendance of accredited press officials in court, remains the presumption here, as it now is in all aspects of the work of the family justice system;

(vii) Recognising that there will be an urgency to these applications, careful attention, in advance of the hearing, should be given to the framework of reporting restrictions required to protect the child from publicity. In this exercise, it should be remembered that some of the families involved may already have excited a degree of press coverage. Indeed, they may, on occasion, have sought it out. There is a risk that identification of the children might be revealed by piecing together information already in the public domain, i.e. the 'jigsaw effect'. As, in paragraph 1 above, and for similar

reasons, the restrictions contended for should be drafted before coming to court;

(viii) Though it may appear trite to say so, an evaluation of the reporting restrictions, as I have been reminded by the press this morning, should always have at the forefront of the exercise the reality that publicity is not confined to the conventional or recognised media outlets, but extends, with inevitably greater challenges, to the wide range of social media likely to be the primary sources of information for these children, their peers and those with whom they interact more generally;

(ix) The importance of coordinated strategy, predicated on open and respectful cooperation between all the safeguarding agencies involved, simply cannot be overstated. An ongoing dialogue in which each party respects, and I make no apology for repeating the word respect, the contribution of the other, is most likely to achieve good and informed decision making.

19. Ms Fottrell QC, who has appeared on behalf of one of the children in this case, draws my attention to the decision of Mr Justice Munby, as he then was, in Re S (Ex Parte Orders) [2001], 1 FLR 308. In that judgment, Munby J emphasised that generally, when granting ex parte injunctive relief in the Family Division, the court will require the applicant, and, where appropriate, the applicant's solicitor, to give a series of undertakings, (a) where proceedings had not yet been issued, to issue and serve proceedings on the respondent, either by some specified time or as soon

as practicable; (b) where the application had been made otherwise than on sworn notice, to cause to be sworn, filed and served on the respondents as soon as practicable an affidavit substantially in terms of the draft affidavits produced to the court or, as the case might be, confirming the substance of what was said to the court; (c) to serve on the respondents, as soon as practicable, notice of the proceedings and a sealed copy of the order, copies of the affidavits, any exhibits and notice of return date.

20. The obvious good sense of that is clear and I have, in my exchanges with Ms Fottrell and other counsel in this case, indicated to the local authority that measures should be taken to comply with those guidelines.

21. That said, I emphasise, as did Munby J in his earlier judgment Re W (ex-parte orders) [2000] 2FLR 927, that the circumstances in which ex parte relief is obtained in the Family Division are likely to vary very widely. Moreover, relief is often granted by the Division in circumstances which are very much removed from those in which ex parte relief will be granted in other areas of the law.

23. In Re S, Mr Justice Munby expressed his view that he saw no reason to resile from anything that he ahd said in Re W (supra) or indeed in Kelly v BBC [2001] 1 FLR 197, a case in which he made similar observations. The essential objectives here are to ensure fairness in the process to each of the individual children involved.

25. That I have found it necessary to set out these principles foreshadows my clear conclusion that though the first of the two cases was in every way a model of many of the good practices that I have identified, this application, brought by Tower

Hamlets, fell short of it and, I regret to say, in some aspects, by a considerable distance.

26. I have no doubt that the applications, insofar as they represented a coherent analysis of the contemplated risk, were, to that extent, properly brought. The evidence on which the applications are predicated is, in my assessment, cogent, and the measures identified to ameliorate risk, in my judgment, proportionate.

27. Yesterday, the Metropolitan Police and the counter terrorism unit supported each of the local authority's applications. However, it is clear that they have been wrong footed in these proceedings.

28. I had been told by Mr Barnes, counsel who appears on behalf of Tower Hamlets, at the first hearing, on 20 March, when the Local Authority appeared alone, that the police supported the Local Authority's actions. In fact, I twice asked whether that was the case, and twice Mr Barnes reassured me, unequivocally, that it was. I have no doubt at all that those were his instructions.

29. However, on Saturday afternoon, I received a telephone call from the High Court Tipstaff to inform me that the police considered that they had not had proper chance to evaluate the risk identified in the Local Authority's application. And insofar as they had, they considered that enforcement of the orders might not be required.

30. In essence, I was told, they wished to see if it might be possible to secure the surrender of the passports, as contemplated by the orders, by cooperation with the families.

31. In view of the fact that this information, given to the High Court Tipstaff, came from a team specialist in counter terrorism, and I have been told authorised at very

senior level, I ordered the immediate suspension of my earlier order.

32. I also required the case to be listed before me immediately on Monday, 23 March. On that day, I sat in private at the request of both the Local Authority and the Metropolitan Police. I was satisfied that it was appropriate to do so given the policy and strategy issues that were being considered.

33. However, during the course of that hearing, Mr Barnes confirmed that a misleading impression had indeed been given by the Local Authority to the court on 20 March.

34. Whilst it is correct to say that the police had been informed of the applications, as I was told, investigation of how and when they were told, undertaken at my insistence, revealed that they had only been notified of the application at around 2 o'clock on 20 March by email and had, therefore, no real chance to consider their response.

35. I pause to say that by 3.30 that afternoon the Local Authority were already before me.

36. I regret to say that I have concluded that the Local Authority consciously misrepresented the extent of the police awareness of this application. I do not reach that conclusion lightly. It is for this reason that I have felt it necessary to restate that which, to my mind, ought properly to be instinctive to every professional in this field, that is to say the very high degree of candour required in applications of this kind.

37. On 25 March, I received, unsolicited, a letter from the Corporate Director of Education and Social Care at Tower Hamlets, Mr Robert McCulloch-Graham. In that letter he states as follows:

"I have reviewed events leading to the court application and hearing on 20th and 21st March 2015 with senior children's social care managers and legal officers of the council. The court's observations have been drawn to my attention. I write to sincerely apologise on behalf of the local authority in respect of the misleading evidence presented to the court in respect of the degree of consultation between the council and the police prior to the applications being placed before the court."

39. Mr McCulloch-Graham goes on to state:

"I am mindful that it is the duty of the local authority to take its own decisions in respect of how best to safeguard vulnerable children. However, I accept that, in light of the sensitive nature of the work being undertaken with all of these families and our ongoing strategic working partnership with the police, more effective consultation should have taken place with the police at an appropriately senior level to enable the police to plan its response to our application."

40. That paragraph represents, to me, the very minimum that could have been said about the importance of this crucial working relationship. Finally, Mr McCulloch-Graham goes on to say:

"I am sorry the court was given inaccurate information in respect of the consultation with the police. The distinction

> *between informing police officers of the decision to seek urgent orders at very short notice and consulting with them is not merely a matter of semantics. It is with sincere regret that at a critical and highly sensitive moment in the court room, the evidence offered fell below the standard we would expect. Agreement has been reached with the police that these cases will be reviewed at a senior level, on a weekly basis, whilst the current level of concern for risk to the children remains."*

42. Failings of this kind are, in my experience, very rarely attributable to one individual. Occasionally, the sincere and real determination to achieve what is thought to be necessary and in the interests of a child can overwhelm the obligation to strive for fairness and proper process. It must never be allowed to. Reinforcing these principles is the responsibility of senior management and the legal advisers.

43. By 23 March 2015, when the case came back, the police were very unclear about the position they should take. Senior officers at chief inspector level, informed me that they supported the local authority's applications, but on the ground, at least one police constable plainly held strongly differing views.

44. Partly because of this lack of clarity, but primarily because I wanted to see what could be achieved cooperatively on the ground, I further adjourned the hearing, until 26 March. The passport orders remained suspended and the wardship extant.

45. The adjournment proved to be productive. Through what I find to be a constructive process of reflective social work, sensitive policing and, in some cases, where the families are concerned, access to extremely experienced senior lawyers,

a considerable number of passports were ultimately lodged safely with solicitors where they will remain until further order of this court. This simply would not have occurred, I find, without the local authority making the applications it did.

47. In my judgment, perhaps because what is being focused on here by the local authority is specifically the needs of the individual children at the centre of the process, rather than more general considerations of community policing, the local authority's risk assessment has, in my view, been far more searching, more healthily sceptical and more thorough in it's harnessing of material than has that of the police.

48. Perhaps this should come as no surprise because risk assessment of potentially vulnerable children is the professional skill set of the experienced social worker.

49. I do not propose here to address the details of the identified risk, partly because I do not wish to risk compromising the integrity of evidence, but also because it may be that the central objectives of the applications are, at least for the present, already achieved. Some of the concerns identified in the local authority's risk evaluation may, ultimately, never have to be determined. We are, as Ms Carter-Manning on behalf of the police, rightly emphasises, concerned entirely with risk assessment, itself an essentially fluid concept.

50. All that said, however, I was taken by surprise by one particular piece of evidence. It concerned a passport which was said to have been lost. I should add that this was not the only "lost" passport in this case. The school concerned, the Bethnal Green Academy, received an account from parents that that particular passport had been lost but had in any event expired. That appeared to have been accepted. Given that it concerned one of the subject children, it is manifestly highly relevant in

evaluating the risk to that child.

52. Earlier this week, the police discovered that the passport had not in fact expired but remained valid until 2016. Notwithstanding that there have been several lengthy meetings between police and social services during the course of this week, and that the issues are being subject to scrutiny here in the High Court, that information was not communicated to the local authority. Both they and I heard about it, again, because I pursued it, in the court room through counsel.

53. To the awkward question, why was this not communicated in a case where social services identified a vulnerable child at risk, there has been no satisfactory answer.

54. Counsel, on behalf of the police, suggested that it might have been possible that the school had misrecorded the parents' explanation, a submission that I felt had more to do with defending amour propre than with objective analysis.

55. In fact, the key social worker, on hearing the information, was able to confirm that she herself had been told that the passport had expired. More than that, she had been told it in the presence of two detective constables who, within minutes, she was, on consulting her notes, able to identify by name. I have no doubt that misinformation about that passport had been given to the school, the police and to the social services, a fact which plainly is relevant in evaluating the matrix of risk.

57. The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet

of vulnerability for children than that which the courts have had to deal with in the past.

58. What, however, is clear is that the conventional safeguarding principles will still afford the best protection. Once again, this court finds it necessary to reiterate that only open dialogue, appropriate sharing of information, mutual respect for the differing roles involved and inter-agency cooperation is going to provide the kind of protection that I am satisfied that the children subject to these applications truly require.