



Neutral Citation Number: [2021] EWCA Civ 162

Case No: B4/2020/1197

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WEST LONDON FAMILY COURT
HHJ Oliver Jones
ZC1800558

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2021

Before :

LADY JUSTICE KING
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ELISABETH LAING

R (Children: Control of Court Documents)

Andrew Bagchi QC and Amean Elgadhy (instructed by Burke Niazi Solicitors) for the
Appellant
Nick Goodwin QC and Isabelle Watson (instructed by South London Legal Partnership) for
the Respondent Local Authority
Kate Branigan QC and Sarah Branson (instructed by Lock & Marlborough Solicitors) for
the Respondent Mother
Barbara Connolly QC and Hannah Gomersall (instructed by Powell Spencer & Partners)
for the Respondent Father
Andrew Shaw and Samuel Prout (instructed by Dawson Cornwell Solicitors) for the
Respondent Children by their Children's Guardian

Hearing date : 14 January 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 12 February 2021

Lord Justice Peter Jackson:

Introduction

1. This appeal concerns the power of the court in family proceedings to control the distribution of its judgments and of other documents filed for the purpose of the proceedings. It arises from an order made at the end of a fact-finding hearing in care proceedings whereby His Honour Judge Oliver Jones directed that the Appellant, to whom I shall refer as R, should not be provided with a physical copy of the judgment or of the written submissions made by the parties, but should instead receive a summary of the court's findings and a redacted version of the judgment from which explicit sexual references had been removed.
2. The order was made in extreme circumstances. R is the adult brother of two sisters who were the subject of the care proceedings, in which he became an intervener. After a hearing lasting 16 days, the Judge found that R is a predatory paedophile who had raped one of his sisters. By that time, R had become a serving prisoner, having received a sentence of 21 years, made up of 16 years imprisonment with an extended licence period of 5 years, after pleading guilty to the oral rape of his own three-year-old daughter, and to taking and sharing photographs of the assault, and to other child pornography offences.
3. The hearing before the Judge was an exceptionally demanding one. The proceedings were significantly delayed by R's arrest and by the need to obtain disclosure from the criminal proceedings. The pandemic meant that the hearing had to be conducted remotely, with technical challenges at every stage. Because of their cognitive difficulties, the children's father and R himself required intermediaries and frequent breaks. R's incarceration created additional problems, despite the cooperation of the prison authorities. However, these difficulties were all overcome, and on R's behalf, Mr Bagchi QC and Mr Elgadhly rightly described the trial as having been conspicuously fair. The Judge's handling of the case was equally warmly commended by the other advocates. Praise from professionals of this standing is worth having, and I would only add that the conduct of the proceedings also reflects credit on them and those who instruct them. It was, as the Judge said, a real collective effort.
4. The position concerning documents is this. The written evidence covered some 3000 pages. Restrictions were agreed whereby R was not allowed to retain the papers in prison. Instead, his lawyers showed him the documents during legal visits. After the oral evidence was heard in March and April 2020, the parties filed written submissions running to 160 pages. On 16 June, the Judge handed down his 91-page fact-finding judgment and R was discharged as an intervener. In December, the care proceedings ended with the making of care orders. Junior counsel have now undertaken the task of redacting the fact-finding judgment to remove explicit sexual references. The result is a judgment reduced to 77 pages.

The Judge's decision about disclosure

5. The fact-finding judgment ended:

“344. Subsequent to the provision of written closing submissions and of written responses, I have received an email from Mr

Elgadhy. Hitherto I have not permitted hard copies of the case papers to be retained by R in prison. The reason for this was to protect the children [names] from sensitive information including allegations of sexual abuse being misused or potentially being circulated amongst paedophiles within the prison.

345. I have previously made provision for R to be produced by video link so that he could discuss the closing submissions with his legal team supported by the intermediary. That has now taken place.

346. R now makes a request for a copy of the closing submissions prepared on his behalf to be released to him, so that he can fully understand what is said on his behalf. In addition, he requests a copy of this judgment. It is submitted on his behalf that the documents could be redacted prior to being sent to R to remove the names of the children and that he has a locked cabinet in his cell where he would keep the documents.

347. I have not received any submissions from any of the other parties about this issue. I am prepared to entertain further submissions after this judgment has been handed down, but my preliminary indication is as follows:

348. Firstly, I am not minded to allow a copy of the closing submissions to be physically retained by R. They contain sensitive details about the sexual abuse allegations. Redaction would be no protection for the children given R would be able to identify the children concerned.

349. Secondly, this judgment has unfortunately had to go into careful detail about the sexual abuse allegations and a large amount of the paedophilic messages that R engaged in. He is a convicted paedophile. I am not prepared to allow for this sensitive material about these children to be provided to him to keep in his cell. I also take judicial notice of the fact that sensitive documents relating to the sexual abuse of children is highly prized amongst serving prisoners convicted of the sexual abuse of children. I will not countenance the potential for this material relating to [names], as well as others, to be abused in this way.

350. It is important that R be made aware of this judgment and my findings. Upon handing down judgment today, I have also made provision for a video-link session to take place today with his intermediary. That will enable his legal team to convey the content of the judgment to him with appropriate support.”

6. The case was listed on 17 June for consequential matters to be considered. That day, R had the opportunity to go through the judgment with his legal team and with his

intermediary for almost the entire day, but after 30 minutes he left the video suite, went back to his cell, and did not return. The matter was next heard on 26 June and on that occasion R was able to discuss the judgment with his lawyers and with his intermediary, who had prepared a summary of the judgment that was explained in full to him. At that point, and despite the Judge's indication, he asked to be given physical copies of the unredacted judgment and of the written closing submissions filed on his behalf and on behalf of the other parties.

7. On 16 July, having read written arguments and heard submissions, the Judge gave an extempore ruling, which includes these passages:

“18. The fact-finding judgment that I provided in these proceedings contains graphic, detailed accounts of sexual abuse, as well as detailed sexualised correspondence between R and others. The content is beyond doubt obscene and perverted. There is, as a result, a considerable level of sensitivity to be attached to this information for a number of reasons. In any care proceedings, there is obviously a legitimate public interest in protecting the children, including from the details of what has occurred with them becoming widely known or shared. Of course, in this case [the children] have a right to privacy arising from their Article 8 rights; and I am satisfied that their Article 3 rights may also be engaged if the contents of the full fact finding judgment were to be released and to be shared for sexual gratification. I consider that that would amount to degrading treatment.

19. [These] are highly vulnerable children. There is a risk pertaining to them, in my judgment, that if their experiences and vulnerability, as identified, were to become widely known, in particular to paedophiles or to people with an unhealthy interest in children, that could potentially place [them] at risk of being targeted or exploited in the future.”

8. The Judge then referred to Mr Bagchi's submissions that as a party R had an absolute right to access the papers in the case, that the court did not have the power to withhold physical copies of documents from a party once the proceedings were over, and that in relation to the closing submissions on R's behalf, it had no power to keep him from his own possessions. The Judge rejected these submissions. He relied on the court's general case management powers under the Family Procedure Rules 2010 ('the Rules'), and in particular rules 4.1 and 12.12. The documents had been placed on the court file, and so he retained case management jurisdiction in relation to them. That power did not fall away because R's role in the case was ending.

9. The Judge also rejected a range of arguments for why the documents should not in any case be withheld:

(1) Due to his cognitive difficulties, R struggles to retain information, so he needs the full judgment to read and consider so that he can fully understand it. *The Judge considered the benefit R could gain from reading the lengthy and detailed judgment on his own to be questionable.*

- (2) He may need a copy of the judgment if he were to lodge an appeal through other lawyers. *A remote likelihood, but if so, they could apply for a copy of the full judgment.*
- (3) He may need to give the full judgment to Parole Board. *That is very far in the future and he could apply for a copy at the time.*
- (4) He already has some documents relating to his criminal prosecution (about 130 pages consisting of the indictment, the prosecution statements and the pre-sentence report); he keeps these under lock in his cell. *Perhaps, but they do not relate to his sisters.*

10. The Judge concluded:

“32. When considering the competing human rights of the children in this case and those of R, I have in mind the words of Munby J in *Re B*: that it is an exceptional course to restrict a litigant's access to documents and that such a case should require the most anxious, rigorous and vigilant scrutiny. I apply that guidance in this case today. Indeed, the burden on those seeking to restrain or restrict the disclosure is a heavy one; no order should be made unless it is imperatively demanded by the situation.

33. Bearing in mind those stark words, and balancing the competing rights of the children in this case with those of R, I am satisfied that the balance is properly struck by not allowing him to retain a full copy of the judgment in his prison cell. The contents are too graphic, and the potential for harm to the children arising from allowing that to occur is, in my judgment, too great. I remind myself of the practical considerations that are set out in relation to the anonymisation of judgments in the practice guidance from the President, dated December 2018, paragraph 5 of which talks about the treatment of explicit descriptions of the sexual abuse of children and young people.

...

34. Whilst I recognise that that guidance was designed with a view to the publication of judgments online, I cannot ignore that R is a predatory paedophile whose offending has taken place for his own sexual gratification. Nor can I ignore that he is a long-term prisoner. I take judicial notice of the fact that he will have to be housed on a sexual offender [sc. *Vulnerable Prisoner*] wing, no doubt for his own safety. That means, in basic terms, that he is likely to be surrounded by other sexual offenders and paedophiles.

35. A mainstay of R's evidence was that he said things when he communicated online with paedophiles and then carried out sexual abuse, including raping his own daughter and recording it, simply to please other paedophiles. I was not persuaded that

that evidence was entirely true, but I draw from it that I can have no confidence that R would not misuse in some way the full judgment and its contents, whether for his own sexual gratification or to gain favour with other paedophiles in the prison, or potentially even for financial reward. I can place no weight on any of the assurances given by R as to how he would treat any material released to him, because I found him to be a dishonest witness.

36. However, a balance does have to be struck so that R can be made aware of the findings that I have made against him, and I must take into account his memory deficits. I am therefore satisfied that a summary of my findings should be prepared and that he should be provided with a redacted and anonymised version of that summary, setting out only those findings that I have made against him.

37. In addition, in due course an anonymised and suitably abridged version of my judgment will be published on BAILII, and that version can also be provided to R.

38. In my judgment, those two provisions to R, allied to the two opportunities I have made available for him to have the judgment explained to him, supported by an intermediary, are sufficient to meet his right to a fair trial, without, in my judgment, offending the rights of [the children] to privacy, or risking offending their Article 3 rights.”

The appeal

11. R appealed on two grounds:

1. The court was wrong in holding that it had the power or jurisdiction to prohibit the disclosure of the full fact-finding judgment and/or the written submissions of each party to R and/or to prohibit his solicitors from disclosing a copy of the full judgment and/or submissions to him.
2. In the event it is held that the court does have the power to make the orders, the decisions were wrong in that; -
 - a. The Judge gave too much weight to the perceived risks of unlawful dissemination of the material by R in circumstances where there was scant evidence that R had disseminated or attempted to disseminate highly sensitive and/or sexually explicit material which is in his possession (in custody) from the criminal proceedings and,
 - b. The Judge gave too little weight to R’s right and/or future need to have access to the material to inform any further

judicial or quasi-judicial process concerning him, whether in family proceedings or relating to his status as a serving prisoner.

On 1 October 2020, I granted permission to appeal, not on the first limb of the appeal test but on the second, on the basis that it offered an opportunity for this court to consider the Family Court's powers to control the distribution of sensitive material and the principles on which such powers should be exercised.

12. R has now requested a copy of the entire court bundle from his solicitors although, on advice from the Law Society, it has not been delivered to him pending the outcome of the appeal.

The court's power to control documentation

13. I first place the issue in this case in its wider context. There is no doubt that a court hearing family proceedings has the power to control the use to which documents filed for the purpose of the proceedings are put and that the power extends to the withholding of documents from parties where that is necessary. That is a matter of law and not merely of procedure, although the power is recognised in the Rules. Section 6 of the Human Rights Act 1998, which prevents a public authority from acting incompatibly with Convention rights, provides further support and a structured framework for the exercise of that power. The court has always been, and remains, under a duty to ensure a fair trial and to protect the rights of those who might be affected by the disclosure of information.
14. When faced with an application to withhold documents or information, the court is required to uphold the rights protected by Articles 6 and 8, and possibly Article 3. In family proceedings, the right to respect for private life will almost inevitably be engaged, but the transmission and preservation of private information in documents is a necessary part of any system of justice. There will however be rare cases where the possession of documents may amount to more than an interference with privacy. In this case the Judge considered that the use of descriptions of the children's abuse for the sexual gratification of the abuser and others would amount to subjecting them to degrading treatment within the meaning of Article 3. Whether that is so in a given case will depend on the circumstances: *Kudla v Poland* (2000) 35 EHRR 198 at 91-92. But the fact that there are cases in which a breach of Article 3 comes into question makes it self-evident that the court is entitled and may be obliged to control the possession and distribution of documentation. The existence of that power is reflected in the Rules.
15. The Judge referred to the court's general case management powers under rule 4.1 and its power to give directions under rule 12.12. However, he was not referred to rule 29, entitled 'Miscellaneous'. Rules 29.12 to 29.14 relevantly read as follows:

"Access to and inspection of documents retained in court

29.12

(1)-(2) ...

(3) Subject to rules 14.24 and 29.1(2) and to any direction given by the court, a party to any family proceedings, or the legal representative, children's guardian or litigation friend for a party in any family proceedings, may have a search made for, and may inspect, and obtain a copy of, any document or copy of a document filed or lodged in the court office in those proceedings.

(4) ...

Service of judgments and orders

29.13

(1) The court officer must, unless the court directs otherwise, serve a copy of a judgment or an order made in family proceedings to every party affected by it.

(2)-(4) ...

Power to require judgment or order to be served on a party as well as the party's solicitor

29.14

Where the party on whom a judgment or order is served is acting by a solicitor, the court may order the judgment or order to be served on the party as well as on the party's solicitor.

Rule 21.1(3) provides that a document means anything in which information of any description is recorded, and a copy means anything onto which information recorded in the document has been copied, by whatever means.

16. Sub-rule 12 therefore applies to documents such as the position statements and sub-rule 13 to judgments. As would be expected, the default position is that parties may obtain physical copies of documents filed or lodged in family proceedings, and that they must be served with a copy of a judgment or an order, but in each case this is subject to the court's directions.
17. In the lead-up to the appeal hearing, the court drew the parties' attention to Rule 29. They agreed that its provisions removed any doubt about the court's power to make orders of this kind and the first ground of appeal was therefore withdrawn.
18. I nevertheless note that it was originally submitted that the Judge's decision purported to authorise a very significant interference with the right of the individual to know why the state has made findings of fact against him. If that were true it would indeed be a startling state of affairs, since it is an integral part of the right to a fair hearing under common law and Article 6 that a reasoned decision is given. However, in this case, the Judge gave full and compelling reasons for his findings against R in the judgment as redacted. That document contains what Ms Branigan described as the working parts of the decision. Indeed, the parties could have had no complaint had the Judge delivered a judgment in that form only. It is not in my view surprising that he included the redacted material in the full judgment, so that the level of R's dangerousness and

dishonesty can be fully understood by those working with the family, but the redacted material does not underpin the Judge's reasoning.

The exercise of the power

19. The power to limit access to documents before and during a hearing can only be used where it is strictly necessary, with the court being rigorous in its examination of the feared harm and careful to counterbalance any resulting disadvantages to ensure a fair trial: *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017. That case concerned keeping sensitive documents in care proceedings away from a father at the request of a mother. The interference with the father's rights was justified by the need to protect other rights.
20. The present case is different in that the restrictions imposed during and after the trial were not aimed at withholding information but at controlling the physical possession of documents from an individual, though not from his lawyers. The agreed restriction on possession of documents during the trial did not prejudice the effective presentation of R's case and likewise the withholding of documents after the proceedings represents a markedly lesser degree of interference with his rights than arose in *Re B* and in *X and Y (Children)* [2018] EWHC 451 (Fam), where a father was discharged from care proceedings altogether. The Judge's self-direction by analogy with these cases led him to apply the very rigorous discipline they rightly demand in the circumstances with which they were concerned. At paragraph 39 of his judgment (see above) he referred to the heavy burden on those seeking to *restrain or restrict* disclosure, but in fact this was not such a case. R was given the redacted information, but not in physical form, and he was to be physically given all the other information in the redacted judgment and in a specially created summary. The Judge's approach to the applicable test was therefore more than fair to R. It would have been enough for him to say that the strong expectation is that parties are to be treated alike, and that any departure from that position must be necessary and proportionate.
21. By Ground 2, R argues that the Judge gave too much weight to the risks attaching to his having possession of the unedited judgment and the written submissions and too little weight to his need to have the material in case it was needed for legal proceedings or the Parole Board in the future. Mr Bagchi accepted that the Judge accurately identified all relevant factors. His argument was that the Judge had given inadequate weight to R's need to understand fully why the findings had been made and that the detail of the allegations was necessary for that purpose. At the same time, the risks of dissemination in prison were generalised and had no specific evidence to back them.
22. The hurdle faced by an appellant when challenging an evaluative judgment of this kind is a high one. In the present case, R's arguments do not get off the ground. The Judge conducted a conspicuously careful balancing exercise and his conclusion was not only beyond criticism but, in my view, sound. The material that has been and will be available to R amply satisfies his entitlement to a reasoned decision and any further material is being withheld in pursuance of a legitimate aim. In plain language, R has everything he needs to understand the Judge's decision. He should not be allowed to prolong his abuse of these children by being given possession of graphic descriptions of what he has done to them, and he is not to be trusted not to pass the material on to others like him.

23. Before leaving the case, I would make these points.
24. First, the circumstances of this case are, in the experience of the court, extreme. Issues of this kind are only likely to arise in the gravest cases. The fact that serious consideration is being given to the protection of rights under Article 3 may be an indicator that one is in that territory. As to that, see analysis of Baroness Hale in *Re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60; [2012] 2 AC 66, at [31 – 32].
25. Next, I would also dispose of the argument, wisely not pursued, that a party ‘owns’ documents filed on his behalf so that he cannot be deprived of them. The document is nothing without the information it contains, and the information falls under the control of the court. In any case, a client does not own a written submission prepared by his counsel, using professional judgement within the scope of the client’s instructions, any more than he owns counsel’s oral submissions to the court.
26. Then, it had been argued that the court’s power to control possession of documents ends with the conclusion of the proceedings. That argument, which rested on the unsound proposition that the power was a case management power that could only be exercised during the currency of the proceedings, was not pursued. In the first place, I have expressed the view that the court’s powers do not find their origin in the Rules. But even if it were otherwise, one does not have to look far to see powers that clearly outlast the proceedings: for example rule 12.75 and PD12G, which concern the communication of information to permitted persons for specified purposes, or indeed rules 29.12 and 13 themselves, where a direction for non-service of documents will plainly be of continuing effect after the proceedings have ended.
27. Finally, there is the position of lawyers. The Law Society gives guidance to solicitors about the ownership of documents (Practice Note 19 January 2019: *Who Owns the File?*). However, whatever the document, the solicitor’s duty to the court will override any duty to the client and an order that a document is not to be disclosed or given to a client will bind the solicitor as agent for the client and relieve the solicitor of any professional duty that would otherwise exist.
28. Further to that, now that R has instructed his solicitor to give him a copy of the trial bundle, we should in my view extend the Judge’s order to include all documents filed within the proceedings, resolving the position in which his solicitors find themselves. That course was not opposed by any of the parties if the appeal itself were to fail.
29. For these reasons I would dismiss the appeal.

Elisabeth Laing LJ

30. I agree.

King LJ

31. I also agree.