Neutral Citation Number: [2016] EWCA Civ 597

Case No: C1/2015/0288

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
(MR JUSTICE DINGEMANS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 21 April 2016

Before:

Lord Justice Laws
Lady Justice Hamblen
and
Lord Justice Longstaff

- -

Between:

R. (on the application of A) — **Appellant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondent**

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Mr H Southey QC (instructed by Irwin Mitchell LLP) appeared on behalf of the **Appellant**
Mr J Moffett (instructed by Government Legal Department) appeared on behalf of the **Respondent**

Hearing date: 10 February 2016

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Judgment (As approved by the Court)

1. **LORD JUSTICE LAWS**: This is an appeal with permission granted by Vos LJ on 22 May 2015 against the decision of Dingemans J given in the Administrative Court on 12 December 2014, by which he dismissed the appellant's judicial review challenge to what is known as the Child Sexual Offender's Disclosure scheme ("the scheme"). It is set out in non-statutory guidance issued by the Secretary of State for the Home Department. The scheme has been adopted by all the chief constables in England and Wales.

2. The appellant is a convicted sex offender. As his challenge is to the legality of the scheme in principle, it is unnecessary to travel into the details of his offending. It is enough to say that in March 1992 he was convicted of two offences of indecent assault on a child aged under 14 and sentenced to two years' imprisonment. On 26 April 1996 he was convicted of three offences of indecent assault on a child under 16 and sentenced to four and a half years. His name is on what is known to the public as the Sex Offenders Register for an indefinite period. So far as is known, he has committed no further sexual offences since the 1996 conviction.

3. The scheme allows members of the public to make an application about a person, referred to as "the subject", who has contact with a child or children in response to which the police may disclose information about the subject's previous convictions or other relevant information held about him or her. It was introduced by the Secretary of State in 2010. Although the scheme's legal genesis is the common law, there is a statutory context. MAPPA, that is to say Multi Agency Public Protection Arrangements, were established by section 67 of the Criminal Justice and Court Services Act 2000, now re-enacted in section 325 of the Criminal Justice Act 2003. Broadly, the purpose of MAPPA is to provide a formal mechanism to secure cooperation between "responsible authorities", effectively the police, the probation service and the prison service, in the assessment and management of risks posed by violent and sexual offenders.

4. Under section 325(8) of the Criminal Justice Act 2003 the Secretary of State may issue guidance to responsible authorities as to the discharge of their functions under sections 325, 326 and 327A. By force of section 325(8A) responsible authorities are required to have regard to such guidance. The guidance that has been issued has been referred to as "the MAPPA guidance". It requires the systematic collection of information relevant to the risk posed by offenders, a regular review of the assessment of that risk and the plan for its management.

5. The MAPPA guidance divides offenders into three categories. Category 1 is registered sex offenders. Under section 327A of the 2003 Act responsible authorities are required to consider whether to disclose information in their possession about the relevant previous convictions of any child sex offender managed by them to any particular member of the public. There is a presumption in favour of disclosure where there is a risk of the offender causing serious harm to children and disclosure is necessary for the purpose of protecting those children; 327A(2) and (3)(a) and (b).

6. Section 10 of the MAPPA guidance also refers to disclosure. Paragraph 10.11 states that disclosure must:

> "... comply with the law, must be necessary for public protection, and must be proportionate."

10.12:

> "The likelihood and degree of harm which may arise as a result of the disclosure, including the potential impact on the offender, must be assessed. Information should be disclosed only where this is a necessary and proportionate step to protect the public."

10.13:

> "Seeking representations should be the norm, but there might be occasions where it is not possible or safe to seek representations."

7. The evolution of the scheme under challenge in these proceedings is described by Dingemans J at paragraph 45 of his judgment:

> "It appears from the introduction to the CSOD scheme guidance document ... that in June 2006 the Secretary of State for the Home Department commissioned a review of child sex offender

arrangements for protecting the public. It was decided to strengthen MAPPA and to introduce a pilot scheme in relation to the disclosure of information relating to sex offenders. The scheme was piloted in four police areas from September 2008 until September 2009. That showed that there were a manageable number of inquiries; 12 inquiries, seven applications, and one disclosure on average in each police area each month. Reports indicated that police officers considered that the disclosure scheme had tightened up procedures and given clarity about what the public could expect. Reports indicated that offenders were worried about negative reactions at the start but by the end of the pilots considered that this was an extension of existing schemes."

8. And so the scheme was introduced. As I have said, it allows members of the public to make an application about a person, the subject, who has contact with a child or children (paragraph 2.2) so that parents, guardians and carers may better safeguard their children's safety and welfare.

9. Counsel's skeleton argument for the Secretary of State contains an accurate and useful outline summary of the scheme's general feature in these terms. The scheme contains:

"1. An application for disclosure must relate to a specific subject and to a specific child or specific children (paragraphs 3.2, 4.3, 4.6, 5.2.5).

2. A disclosure will only be made if a specific child is, or specific children are, at risk (paragraph 4.7).

3. Before any disclosure is made the applicant's identity and good faith will be verified (5.2.2, 5.2.5).

4. Decision makers are expressly reminded that all stages laid down by the guidance should be followed and they are consistently cross-referred to the three stage test that must be applied (2.2, 3.3, 5.6.22) [I will return to the three stage test].

5. Further, decision makers are expressly reminded that any disclosure must be in accordance with the subject's Convention right (3.5, 5.6.15).

6. A decision as to whether to make a disclosure is taken only after a full risk assessment has revealed concerns about the subject (5.4).

7. If concerns are raised about the subject, before reaching a decision as to whether to make a disclosure the decision maker must consider whether to seek representations from the subject (5.5.4). Further, the applicant for disclosure must be informed that such representations might be sought (5.2.9).

8. Where the subject is managed under MAPPA [as is the case with the appellant] the decision as to whether a disclosure should be made will ordinarily be taken at a MAPPA meeting (5.6.13).

9. When deciding whether to make a disclosure the decision maker must apply a three stage test which expressly directs the decision maker to balance the risk to the child against the potential consequences for the subject (5.6.14, 5.6.15) [I will return to those paragraphs].

10. A disclosure will only be made to a person who is in a position to use the information in order to safeguard the relevant child or children and therefore even if a disclosure is appropriate it might not be made to the applicant (2.2, 4.3, 4.8, 5.1.3, 5.5.5, 5.6.22).

11. The person to whom a disclosure is made will be told that the information disclosed can only be used for the purposes of safeguarding children and that person will be asked to give an undertaking to

keep the information confidential (5.2.11, 5.2.12, 5.6.24)."

10. The three stage test for disclosure is set out in the scheme as follows:

"5.6.14 ... [decision makers] must ensure that the three stage test set out below (5.6.15) is satisfied before a decision to disclose any information is made.

5.6.15. There is a general presumption that details about a person's previous convictions are confidential. The police will only be disclosing convictions or indeed intelligence lawfully under the CSO disclosure scheme if:

i. they have the power to disclose the information. If they are relying on their common law powers, the police must be able to show that it is reasonable to conclude that such disclosure is necessary to protect the public from crime. In the context of this scheme, the police would have to conclude that disclosure to the applicant is necessary to protect a child from being the victim of a crime (most probably, sexual abuse committed by the subject of the request);

ii. that there is a pressing need for such disclosure; and

iii. interfering with the rights of the subject (under Article 8 of the European Convention of Human Rights) to have information about his/her previous convictions kept confidential, is necessary and proportionate for the prevention of crime (or in the interests of public safety or for the protection of morals or the rights and freedoms of others). This involves considering the consequences for the subject if his/her details are disclosed against the nature and extent of the risks that subject poses to the child or children. The police should also consider the risk of driving the subject to become non-compliant where he/she may pose a greater risk to other children. This stage of the test also involves considering whether further information should be sought from the subject (see paragraph 5.5.4) and the extent of the information which needs to be disclosed eg the police may not need to tell the parent the precise details of the offence for that parent to be able to take steps to protect the child.

5.6.14. Information about a person's previous convictions is also sensitive, personal data under the Data Protection Act 1998 and therefore the police must also be satisfied that disclosure is in accordance with the eight principles set out in that Act ..."

11. The appellant brought an earlier challenge to the scheme by way of judicial review in which the Divisional Court (Sir John Thomas, President, as he then was, and Hickinbottom J) gave judgment on 24 October 2012: X (South Yorkshire) v Secretary of State for the Home Department [2013] 1 WLR 2638. The challenge succeeded. The Divisional Court granted this declaration:

"It is declared that the terms of the Child Sex Offender Disclosure scheme guidance are unlawful insofar as it does not include a requirement that the decision maker consider, in the case of any person about whom disclosure should be made pursuant to the scheme, whether that person be asked if he wishes to make representations in order to ensure that the decision maker has all the information necessary to conduct the balancing exercise he is required to perform justly and fairly."

12. In consequence, a new paragraph 5.5.4 was inserted into the scheme with effect from 5 March 2013. It is referred to in the summary which I have already set out. It provides:

"If the application raises 'concerns', the police must consider if representations should be sought from the subject to ensure that the police have all necessary information to make a decision in relation to disclosure."

13. The Divisional Court also held as follows:

> "47. The presumption set out in paragraph 2.2 of the guidance [that is, in favour of disclosure in certain circumstances] read on its own may be difficult to sustain as lawful. However it is not necessary to consider that issue as the detailed process set out at paragraph 5.6.15-16 is careful and clear as to the process which must be followed. Subject to the issue on giving the offender the opportunity to make representations, the process there set out is unexceptionable and complies with the principles stated in ex parte Thorpe [1999] QB 396 as modified by Article 8 ...
>
> 48. As the presumption set out in paragraph 2.2 of the guidance is given prominence under the heading 'Aims', it would seem to us that, to avoid the risk that the productions under Article 8 might be rendered nugatory by an application of what it stated in paragraph 2.2, this part of the guidance must be revised to make clear that the detailed application of the process is contained in section 5 of the CSOD guidance. It will not be necessary to make any declaration or grant other relief to that effect, if the Home Secretary includes this amendment within the timetable we have requested ..."

14. Paragraph 2.2 of the scheme was duly amended to include the following:

> "The basis on which disclosure decisions are made is described in detail in section 5 below (in particular, see the legal considerations in paragraphs 5.6.15 and 5.6.16)."

15. The appellant's present case challenging the legality of the scheme has been somewhat refined for the purpose of his appeal to this court. Thus there is no longer any complaint as to the retention by the South Yorkshire police of information about him, nor any challenge to the legality of the MAPPA guidance as such. The appellant's case as it is now presented by Mr Southey QC may be encapsulated in these three propositions: one, the scheme is not "in accordance with the law" within the meaning of Article 8(2) of the Human Rights Convention because there is no independent supervisory authority or review body outside the police to review disclosure and to consider whether a criminal subject to the scheme should be exempted from disclosure. The possibility of an application to an Information Commissioner is insufficient.

16. Two, the scheme should include a presumption that a person in respect of whom an application is made ought to be consulted and have the opportunity to make representations. Absent such a presumption, the scheme offends against the proportionality rule, though Mr Southey submitted (in my view rightly) that there is a correlation between the requirement that a provision be in accordance with the law and the requirement of proportionality in the context of any argument seeking to justify what on the face of it is an interference with Article 8 right.

17. Three, the scheme contains at paragraph 2.2 a presumption in favour of disclosure in certain specified circumstances and that is objectionable on Article 8 grounds.

18. It was common ground before Dingemans J (see paragraph 52 of the judgment), as it is here, that Article 8 is engaged; that is that the Article 8 right of persons such as the appellant are potentially infringed by the scheme, so that the question is whether interference is justifiable under Article 8(2): whether the interference is "in accordance with the law" and "necessary in a democratic society in the interests of public safety for the prevention of disorder or crime or for the purposes of the right and freedoms of others". All of the appellant's three propositions as I have articulated them go to the issue of justifiability under Article 8(2).

19. Mr Southey submitted this morning that the extent of the interference with Article 8 rights is important. He says a subject's liability to disclosure is potentially lifelong. Disclosure might be made at any time and it may be made to anyone. That in my view is not quite right. The accurate position is that anyone can apply for disclosure. Mr Southey was also at pains to insist that disclosure of a subject's convictions as such engages Article 8 (see L [2010] 1 AC 410 at paragraph 27).

20. I turn to the appellant's first proposition. A number of authorities have been referred to. Mr Southey relies on F [2011] 1 AC 331 in the Supreme Court and MM v United Kingdom application number 24029/07 in the European Court of Human Rights. In F Lord Phillips stated at paragraph 34 that:

> "The Strasbourg Court considers that the possibility of reviewing the retention of sensitive personal information and notification requirements in respect of such information is highly material to the

question of whether such retention and notification requirements are proportionate and thus compliant with Article 8."

21. Mr Southey submits at paragraph 6.11 of his skeleton that:

"It is difficult to see why the same approach should not apply to disclosure."

22. F concerned a scheme which required that certain sexual offenders should inform the police of certain personal details and details of any foreign travel plans. These requirements were imposed for life without provision for review. MM concerned a scheme involving the automatic retention of information about the subject's convictions and cautions until he reached the age of 100 and the automatic disclosure of such information in the event of a criminal record check. In MM, the Strasbourg court said at paragraph 199:

"The court recognises that there may be a need for a comprehensive record of all cautions, convictions and even other information. However, the indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, inter alia, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed."

23. As regards the policy in question in that case, the court said this at paragraph 203:

"The guidance explains that in this context a balancing exercise must be carried out, but specific information regarding the scope of the discretion to disclose and the factors which are relevant to the exercise of such powers in the context of disclosure of criminal record information is not provided."

24. The court held at paragraph 159 that the possibility of judicial review on application to the Information Commissioner would not ensure compliance with Article 8. Mr Southey submits that the court in MM concluded there was a breach of Article 8 because (paragraph 206):

"The court highlights the absence of a clear legislative framework for the collection and storage of data and the lack of clarity as to the scope, extent and restrictions of the common law powers of the police to disclose caution data. It further refers to the absence of any mechanism for independent review of a decision to retain or disclose data under common law police files."

25. I observe that there is no trace of this first proposition advanced by Mr Southey having been raised before Dingemans J in the present case. Dingemans J had this to say about MM:

"In my judgment the statements of the European Court of Human Rights in MM of which Miss Simor [Mr Southey's predecessor] relied were not statements of general principle which might be taken into account by this court under the provisions of the Human Rights Act. The statements in MM were statements made on the facts of the particular case of MM. The European Court of Human Rights has never held that the police are restricted to exercising statutory powers if they are to show that they are acting in accordance with the law. The common law provides a sufficiently certain source of powers in this case. Reports show that there had been an increased consistency of practice following the production of the CSOD scheme; see paragraph 45 above."

26. I think this is right. It is to be borne in mind that the Strasbourg court always, or at least generally, measures its conclusions by reference to the facts of the particular case. That is perhaps especially so with regard to Article 8 where the Convention right is very open-ended. The scheme under scrutiny in this case is far different from that involved in the MM case. The features of the scheme which I have taken from the summary in the Secretary of State's skeleton demonstrate to my mind that there are proper controls on the disclosure of information to satisfy the requirement that any interference with the Article 8 right is "in accordance with the law" and indeed proportionate.

27. Every application for disclosure is individually examined. I will not repeat all the individual requirements. In sum, disclosure will only be given if it is necessary and proportionate. There is no general requirement

of an independent overseer though of course it is right to say that the judicial review jurisdiction provides a supervisory discipline to ensure the legality of individual decisions. The existence of that jurisdiction may not have saved the scheme in MM, but here it seems to me that it takes its place at the apex of a set of arrangements that is full of detailed provisions for the achievement of balanced proportionate decisions, and of course the application of those provisions is liable to scrutiny in the judicial review court.

28. There is in my judgment no freestanding general requirement that a subject should have an opportunity to seek exemption from the scheme. The general law does not so require. Nor does the Strasbourg jurisprudence impose such a requirement as a matter of overall principle. Mr Southey referred to a Council of Europe document known as the Police Recommendation. It contains this:

29. "Each member state should have an independent supervisory authority outside the police sector which should be responsible for ensuring respect for the principles contained in this recommendation."

30. Principle 5.3.i in the Police Recommendation states:

> "The communication of data to private parties should only be permissible if, in a particular case, there exists a clear obligation or authorisation, or with the authorisation of the supervisory authority."

31. There is no doubt that this document has been taken into account by the Strasbourg court, but it is not a source of law. I should say that the issue whether the scheme is "in accordance with the law" marches closely with the issue of proportionality here. I have already referred to this. The reference given by Mr Southey is T [2015] AC 49 per Lord Reed at paragraph 114. It seems to me that Mr Southey's first proposition is not made out and I would for my part reject it.

32. Proposition two. This is the supposed need for a presumption that the subject be consulted and invited to make representations. In the earlier challenge brought by the appellant the Divisional Court said this at paragraph 41:

> "In the generality of cases without that person being afforded such an opportunity, the decision maker might not have all the information necessary to conduct the balancing exercise which he is required to perform justly and fairly. Whilst each case will turn on its own facts, it is difficult to foresee cases where it would be inappropriate to seek representations, unless there was an emergency or seeking the representations might itself put the child at risk."

33. The test for the legality of a public scheme in relation to a complaint of a failure to provide proper opportunities for affected persons to make representations is, as a matter of domestic law, whether the scheme is "inherently unfair"; see for example Tabbakh [2014] 1 WLR 4620 per Richards LJ at paragraphs 35 and 49. Here it is plain from the terms of the scheme that if a disclosure might be made the decision maker must consider whether to seek representations from the subject; paragraph 5.5.4, introduced, as I have said, after the appellant's last challenge. Moreover, the decision maker is required to consider whether he has all the information necessary to make a decision concerning disclosure; 5.6.15(iii). That is very important. I have set out the passage.

34. Mr Southey refers to what was said by Lord Hope in L [2010] 1 AC 410 at paragraph 45 that neither protection of the vulnerable nor the right to respect for the subject's private life has precedence one over the other. I am sure, with very great respect, that that is so as a matter of overall principle; but in any given case all depends on the details of the scheme. It seems to me that the arrangements made, now including paragraph 5.5.4 together with the terms of 5.6.15, satisfy the legal standards which the court has to apply. There will be cases where representations should not be invited: cases of urgency or where the invitation itself would cause harm or where the decision maker is properly confident that he has all necessary information. I would reject proposition two.

35. Proposition three complains of presumption in favour of disclosure in paragraph 2.2. Paragraph 2.2 includes this:

> "In the event that the subject has convictions for sexual offences against children, poses a risk of causing harm to the child concerned and disclosure is necessary to protect the child, there is a presumption that this information will be disclosed."

36. It must be obvious that the presumption is limited to very pressing cases. Other than in the specific circumstances there envisaged the presumption is against disclosure: 5.6.15, to which I have referred several times. I have also already cited paragraph 47 of the earlier Divisional Court case. It seems to me that paragraph 2, read with paragraph 5.6.15, satisfies the appropriate legal standards. It seems to me moreover that the Divisional Court thought the same at the time of the first challenge. Their decision was not appealed. I would reject proposition three.

37. Accordingly, for all the reasons I have given for my part I would dismiss this appeal.

38. **LORD JUSTICE HAMBLEN**: I agree.

39. **MR JUSTICE LANGSTAFF**: I too agree.

I would add only this in respect of the second of Mr Southey's propositions: that the occasions upon which it might be appropriate to exercise a discretion not to seek representations are spelt out in some detail in paragraph 10.1.3 of the MAPPA guidance. It is unnecessary for present purposes to spell that out, but merely to observe that that guidance which Mr Southey contended should be read together with the disclosure scheme under challenge before us, of which it forms in these circumstances part, emphasises that seeking representations should be the norm but need not always be the case.

With those observations, I agree entirely with my Lord's judgment.