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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
COURT OF PROTECTION
[2019] EWCOP 66



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Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 22 October 2019

Before:

THE HONOURABLE MR JUSTICE KEEHAN

RE AB (Court of Protection: Police Disclosure)

B E T W E E N :

AB
(by his litigation friend, the Official Solicitor)

Applicant

- and -

(1) A Police Force
(2) WLCCG

Respondents

MR J. O'BRIEN (instructed by the Official Solicitor) appeared on behalf of the Applicant.

MR N. PALMER (instructed by Legal Services) appeared on behalf of A Police Force

J U D G M E N T

THE HONOURABLE MR JUSTICE KEEHAN:

INTRODUCTION

1 This is an application by a Police Force for disclosure of psychological reports prepared by a psychologist in relation to AB who was and is the subject of proceedings in the Court of Protection. AB is an immensely vulnerable person and the Official Solicitor acting as his litigation friend opposes the application for disclosure made by the police and submits that very limited information should be provided to the police in relation to those psychological reports.

BACKGROUND

2 During the course of the proceedings in this court, AB was assessed by a psychologist on a number of occasions. The psychologist prepared three reports dated 16 July 2018, 8 January 2019, and 23 May 2019. The first two reports relate solely to AB's capacity to conduct this litigation and to make decisions about his residence. Only the third report addresses the issue of AB's capacity to access the internet and social media.

3 For the purpose of preparing the capacity assessment on accessing the internet and social media, AB underwent an education programme in relation to decision-making relating to accessing the internet and social media. It was after he had undergone that programme that the psychologist prepared her third and final report in which she concluded that at that time, that is May 2019, AB had capacity to access the internet and social media.

4 The police have been undertaking an investigation into offences said to have been committed by AB in 2017 and 2018 relating to category C images of children. Subject to the issue of disclosure of the report sought by the police, this investigation is concluded. I am told by Mr Palmer, who appears for the police today, that if the expert had concluded that AB lacked capacity to access the internet and social media, it is likely the criminal proceedings would be discontinued against AB. Furthermore, if the court declined the police's application for disclosure, then the police would instruct their own expert to undertake a capacity assessment of AB.

THE LAW

5 The parties are agreed on the legal principles I should apply. Rule 5.9 of the Court of Protection Rules 2017 provides for an application to be made by a person who is or was not a party to proceedings in the Court of Protection to inspect any other documents in the court records or to obtain a copy of such documents or extracts from such documents. It is submitted by the Official Solicitor that there is no existing authority on the principles to be applied in relation to such a request for disclosure under Rule 5.9.

6 Mr O'Brien, on behalf of the Official Solicitor, submitted that the court should adopt the criteria set out in *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] 2 WLR 322 *mutatis mutandis* to the Court of Protection. Mr Palmer, on behalf of the police, accepted that submission. It is conceded by Mr O'Brien that when determining the application for disclosure of the expert reports, the court is not applying a best interests test but would be applying the *Re C* test.

7 The decision in *Re C* has recently been approved by the Court of Appeal in the case of *Re M (Children)* [2019] EWCA Civ 1364. The ten points set out by Swinton Thomas LJ in relation to family proceedings are as follows:

- “1. The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor;
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. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies...;
5. The public interest in the administration of justice. Barriers should not be erected between one branch of the judiciary and another because this may be inimical to the overall interests of justice;
6. The public interest in the prosecution of serious crime and punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor;
7. The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order;
8. The desirability of cooperation 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;
9. In the 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 incriminating statement and any danger of oppression would also be relevant considerations;
10. Any other material disclosure which has already taken place.”

8 I agree that I should apply those principles with the necessary changes for the purposes of the Court of Protection. I note and take account of the fact that AB does not wish these reports to be disclosed to the police. I take account and give considerable weight to the public interest in the administration of justice, the public interest in the prosecution of serious crime, and the public interest in convicting those who have been guilty of violent or sexual offences against children. Those are plainly important factors which ordinarily carry considerable and even determinative weight in applications for disclosure. In this case, however, I attach particular weight to issue 7:

“The gravity of the alleged offence and [more importantly] the relevance of the evidence to it...”

- 9 I accept, as Mr O’Brien submitted, that the first two reports of the psychologist are not relevant to the question of AB’s capacity to access the internet or social media and it is that issue of capacity which is of interest to the police in this particular case.
- 10 The third report does touch upon the issue of AB’s capacity to access the internet and social media but that assessment was reached after AB had undergone a programme of education to assist him to have capacity to make that particular decision. The assessment of the psychologist was that in May 2019, AB did have capacity to access the internet and social media. This third report does not deal with the question of whether AB had capacity on this issue in 2017 and 2018, the period covered by the index offences for which AB is charged. Accordingly, in my judgment, that third report contains nothing of relevance to the police investigation other than for the police to know that:
- a. prior to coming to a conclusion, the expert had arranged for AB to undergo educative work; and
 - b. that her assessment that, in May 2019, AB had the capacity to access the internet and social media, was limited to that time and in the context of the educative work undertaken with him.
- 11 I am fortified in coming to this conclusion by also taking account, as was prayed in aid by Mr O’Brien, the singular importance in cases before the Court of Protection of those who are the subject of the proceedings being frank in their discussions and their cooperation with professionals. It is vital that those who are the subject of proceedings in the Court of Protection have confidence in the confidentiality of the proceedings and, in particular, the confidentiality of assessments undertaken of them for the purposes of determining whether or not they have capacity in the various relevant domains.
- 12 It is, in my judgment, supremely important that those who are the subject of the Court of Protection are as frank as they possibly can be to those who are seeking to assess them and, accordingly, I would only consider disclosing the expert’s report to the police if the weight to be given to the public interest was so great as to outweigh the consideration of frankness by AB in the Court of Protection proceedings. As it is, I have come to the conclusion that the expert’s reports are not relevant to the issue that the police have to determine for the purposes of the prosecution of AB, namely between 2017 and 2018, did AB have capacity to access the internet and social media? As I have already said, the expert does not address that issue in any of her reports. Accordingly, the application is refused.
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