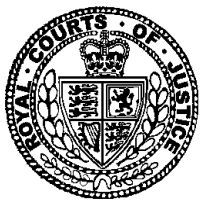

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Neutral Citation Number: [2022] EWCOP 3

Case No: 13585739

COURT OF PROTECTION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 04/02/2022

Before :

MRS JUSTICE LIEVEN

- -

Between :

KENT COUNTY COUNCIL

Applicant

and

P

(by her litigation friend, the Official Solicitor)

First Respondent

and

NHS KENT AND MEDWAY COMMISSIONING GROUP

(formerly NHS South Kent CCG)

Second Respondent

- -

- -

Ms Katherine Elliot (instructed by **Kent County Council**) for the **Applicant**

Ms Keri Tayler (instructed by the **Official Solicitor**) for the **First Respondent**

The Second Respondent's attendance was excused

Ms Isabella Crowdy (instructed by **Kent Police**) on behalf of **Kent Police**

Mr Brian Farmer on behalf of the **Press Association**

Hearing dates: **18 November 2021**

- -

Approved Judgment

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MRS JUSTICE LIEVEN

This judgment was handed down on 4 February 2022. It consists of 34 paragraphs. The judge gives leave for it to be reported in this anonymised form. Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Lieven DBE :

1.
This case concerns P, a 21 year old woman who is subject to proceedings in the Court of Protection. The issue in this judgment is whether the public should be admitted to the Court of Protection proceedings concerning P and whether this judgment should be published.

2.
P was recovered from her parents' home in the late Summer of 2019 after concerns had been raised by P's paternal aunt and grandmother. P was found by the police in a state of extreme neglect, suffering from malnutrition and in an exceptionally poor state of care. Since that time, P has been being looked after by the Local Authority ('LA') with considerable input from various NHS bodies. P currently lives in a flat together with a team of carers. She has suffered both physically and mentally as a result of her traumatic experiences.

3.
Kent County Council ('KCC') brought the substantive application in these proceedings in March 2020, seeking declarations that it is in P's best interests to continue to live and receive care and support at her current placement and for the necessary deprivation of liberty ('DOLs') authorisation. In the course of proceedings, P has been found by the court to lack capacity in relation to care and residence, property and affairs and decisions about contact with her parents for the purposes of s.48 Mental Capacity Act 2005 ('MCA 2005'). She has also been assessed as lacking litigation capacity and is represented by the Official Solicitor ('OS').

4.
The matter first came before me on 14 September 2020; I took the view, supported by the LA and the OS, that given the great sensitivity of the case, and the potential press interest in the circumstances in which P was found, the case should be heard in private. This is contrary to the normal practice in the Court of Protection where cases are open to the public but subject to transparency orders to ensure that P cannot be identified. I was particularly concerned, at that stage, about the potential impact on P if there should be any media or social media commentary about her case which might come to her attention and cause her distress.

5.

The matter has subsequently come before me on a number of occasions. On 25 February 2021 I made an order that P's parents be informed of the proceedings and of the process for applying to be joined. They have not made such an application.

6.
Kent Police have been investigating this matter since August 2019. There has been some disclosure by the police into the Court of Protection proceedings. In June 2021 the police contacted the solicitor to the LA seeking disclosure of certain documents from the Court of Protection to the police. On 23 July 2021 an application by the police for disclosure was made in these proceedings. The matter came back before me on 15 October 2021.

7.
At that hearing I expressed my considerable concern about the length of time that it was taking the police and the Crown Prosecution Service ('CPS') to carry out an investigation of the matter and reach a charging decision. It was over 2 years since P had been found and yet there was no charging decision, and the police at that hearing informed me that they were hoping to make a charging decision in early 2022.

8.
After submissions from the parties and Kent Police, I agreed to keep the matter in private until the next hearing and not to produce a public judgment. However, I said at that hearing that I would revisit the issue of opening the matter to the public and producing a judgment at the following hearing, which was on 18 November 2021.

The law and policy on openness in Court of Protection proceedings

Court of Protection: Proceeding in public

9.
The Court of Protection Rules ('COPR') include a 'general rule' that a hearing will take place in private (rule 4.1) but that the court may order that a hearing - or part of a hearing - will be heard in public (rule 4.3).

10.
Practice Direction 4C (entitled 'Transparency') provides at para.2.1 that, unless it appears to the court that there is a good reason not to, the court will "ordinarily" deploy its power under rule 4.3 and order that "any attended hearing shall be in public". In the same order the court will ordinarily also impose restrictions on publication of any information from the proceedings. An attended hearing is defined in PD4C para.2.2 as: "a hearing where one or more of the parties to the proceedings have been invited to attend the court for the determination of the application" and the COPR envisaged such hearings being able to take place by remote means (rule 2.1).

11.
The Vice President of the Court of Protection has made clear his commitment to achieving transparency, saying "transparency is central to the philosophy of the Court of Protection" (foreword to the Remote Access to the Court of Protection Guidance (31 March 2020), Hayden J). The volume and necessity of remote hearings brought about by the COVID-19 pandemic has presented a challenge to the extent to which this "ordinary" course can be followed but the need for transparency has not abated. In his Remote Access to the Court of Protection Guidance (March 2021) Hayden J has said:

“[54] The culture of the COP is one of transparency, and I am determined to maintain this insofar as possible.

[…]

[57] The essential tenets of Practice Direction 4C are [ ] unworkable at present and it is to be disapplied in cases where a remote hearing is ordered. In established applications moving to a remote hearing any transparency order will need to be discharged and specific directions made. I am satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having regard in particular to the public health situation which has arisen, and also the detailed steps set out below designed to ensure that the consequences on the rights of people generally and the press in particular under Article 10 are minimised.

[58] The powers of the court are to permit both public and private hearings, or parts thereof. The court will make the most appropriate order for the case before it.

[59] In each case active consideration must be given as to whether any part of any remote hearing can facilitate the attendance of the public, if so Practice Direction 4C may be applied and the transparency order reissued. […]

[60] Where the attendance of the press can be accommodated in the remote hearing (whether or not it is a case that was originally proceeding under the provisions of Practice Direction 4C) this should be an available facility for them. […]”

12.
When deciding whether there are good reasons to depart from the ‘ordinary’ course under PD4C the court is to have regard in particular to the matters set out in PD4C para.2.5:

a. the need to protect P or another person involved in the proceedings;

b. the nature of the evidence in the proceedings;

c. whether earlier hearings in the proceedings have taken place in private;

d. whether the court location where the hearing will be held has facilities appropriate to allowing general public access to the hearing, and whether it would be practicable or proportionate to move to another location or hearing room;

e. whether there is any risk of disruption to the hearing if there is general public access to it;

f. whether, if there is good reason for not allowing general public access, there also exists good reason to deny access to duly accredited representatives of news gathering and reporting organisations.

13.
A private hearing is not the only way to protect participants or the integrity of the proceedings. Where the court does order that a hearing - or part of the hearing - is to be heard in public it may also do any of the following (r.4.3(2)):

a. impose restrictions on the publication of the identity of—

i. any party;

ii. P (whether or not a party);

iii. any witness; or

iv. any other person;

b. prohibit the publication of any information that may lead to any such person being identified;

c. prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or

d. impose such other restrictions on the publication of information relating to the proceedings as the court may specify.

These are the restrictions envisaged in PD4C para.2.1.

14.
Additionally and more generally, by way of rules 4.1, 4.2, and 4.3, the court is given broad powers to: (a) authorise the publication of information about a private hearing; (b) authorise persons to attend a private hearing; (c) exclude persons from attending either a private or public hearing; or (d) restrict or prohibit the publication of information about a private or public hearing.

The position of the parties

15.
KCC, represented by Ms Elliot, consider that all hearings should be conducted in private for the foreseeable future. They point to the risk that P would be able to be identified relatively easily because of the almost unique nature of the case and the initial press coverage relating to it. KCC points to evidence that P becomes upset if she thinks that people are talking about her and that she appears to be concerned about her privacy. They argue that, although there may be a legitimate public interest in the police and criminal justice processes, there is no similar level of legitimate public interest in the Court of Protection proceedings and the decisions about P's care and support. They point to the very personal and intimate information which is necessarily before the Court of Protection and in which there would be no public interest in being published.

16.
KCC oppose the press being allowed to attend the hearings as they say there is no benefit to P in this and there is a potential disbenefit of the dissemination of personal information.

17.
The OS, on behalf of P, represented by Ms Tayler agrees with KCC. She refers to the deeply personal nature of the information before the Court of Protection and the likelihood that the case might attract media attention because it is at the "more prurient end of the scale".

18.
Kent Police, represented by Ms Crowdy, also argues that the case should continue to be heard in private and the press should not be allowed to make any public report upon it. They argue that to allow any public reporting would interfere with the "integrity" of any future trial. After the concerns that I raised at the hearing in October 2021, the police filed a detailed witness statement from DI Miller setting out the investigations that had been undertaken and seeking to explain why the process was taking so long. Ms Crowdy submitted that the investigation into offences that may have been committed against P was a complex and challenging one and the assistance of the National Crime Agency's Major Investigative Support Service had been required.

19.
DI Miller provided a very detailed chronology setting out all the steps, including interviews and other inquiries, that the police had undertaken since August 2019. She refers to the need to conduct inquiries over the events of the last 19 years, including of a number of different public authorities. She also refers to the need to instruct experts, which has taken up considerable time. She relies on the fact that P is not in a position to provide a witness statement herself, or to give consent for her records to be used in evidence. DI Miller also says:

"It is also relevant to note that much of the life of this investigation has coincided with the COVID-19 pandemic and all of the many difficulties that that has brought. Further, Kent Police as a police force has been facing resourcing challenges with a number of other serious and complex investigations."

20.
DI Miller says that she cannot give a definitive date for a charging decision, but the end of February 2022 would not be an unreasonable time period.

21.
Ms Crowdy submitted that any press reporting of the Court of Protection proceedings risked the identification of P and that this could interfere with the criminal trial. I have to say that I found it quite hard to understand the specifics of the impact on the criminal trial upon which she was relying. She said there was a risk that a future juror would attend the Court of Protection proceedings and either see documents which might be prejudicial or hear submissions. In my view these concerns are significantly overstated, not least because in respect of the primary documentation this would not normally be released to members of the public who attended Court of Protection hearings, whether in person or remote. As far as potential future jurors hearing submissions are concerned, as I return to below, this is the type of matter which would be routinely dealt with in a criminal trial, both in the jury selection process but also the Judge's summing up if there had been any publicity around a case.

22.
Ms Elliot referred me to Bankas Snoras v Antonov [2013] EWHC 131 (Comm) where the issue was whether a stay should be granted of civil proceedings whilst criminal proceedings have been determined. The relevant principles are set out at [18]. I do not find that case of much assistance as the issue was a very different one, namely that of a stay of proceedings. The most relevant passage is at [18ix] which states that even if the court is satisfied that there is a real risk of prejudice leading to injustice, the proceedings should not be stayed if safeguards can be imposed.

23.
Ms Elliot also referred to Jefferson v Bhetcha [1979] 1 WLR 898 where at [10] the Court of Appeal considered the potential prejudice to a jury and said:

"Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases – no doubt there are – where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. By way of example, a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings. It may be that, if the criminal proceedings were likely to be heard in a very short time (such as was the fact in the Wonder Heat case in the Victoria Supreme Court) it would be fair and sensible to postpone the hearing of the civil action. It might be that it could be shown, or inferred, that there was some real – not merely

notional – danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way."

Conclusions

24.
There is an important public interest in holding court hearings in public and allowing the press to report upon them. The presumption should always be for open hearings unless there is a strong countervailing factor, whether analysed under Article 10 of the European Convention on Human Rights ('EHCR') or normal common law principles.

25.
There are two potential countervailing factors here, interference with P's privacy and her Article 8 rights, and a potential impact on any future criminal trial. I have concluded that the balance comes down in favour of allowing the press to report these proceedings and allowing the public to attend, subject to an appropriate reporting restriction order.

26.
Despite the fact that the norm is now for Court of Protection proceedings to be held in public subject to a reporting restriction order, I did agree initially that this particular case should be held in private. That was because I was very concerned about the impact on P of allowing any reporting, particularly in the light of the very unusual facts and the consequent danger of her being identified and highly personal information being put in the public domain and causing her distress. At the time I made that order, I thought that P was likely to become much more engaged with the outside world and was at real risk of hearing and understanding any public comment which might have a negative impact upon her.

27.
However, as time has gone by, the evidence suggests that that risk is not so great. In practice, P has engaged very little if at all with the outside world, never goes outside her accommodation and does not listen to the news or read any commentary. She might hear something on the radio, but the chance of her realising it was about her or really engaging with it seems quite remote. I therefore consider that the risk of personal distress to her is significantly less than I had initially feared. I accept that there is still some such risk, but that must be balanced against the other factors in play.

28.
In any event, if there are criminal charges and a trial there will undoubtedly be press coverage and steps will have to be taken to manage this and to protect P so far as is possible. Sadly, when someone (whether a vulnerable adult or a child) is caught up in court processes, particularly criminal justice processes, it is not always possible to fully protect them from commentary that may be very upsetting. I cannot discount the possibility that P will be identifiable, but in practice she is wholly insulated from the outside world, other than through the radio. Therefore, this is not a case where even if she was identified she would be distressed by social media or other press comment, save to the limited extent referred to. I therefore accept that if I allow the press to report this case, albeit anonymised, there will be some interference with P's Article 8 rights, but I think it will be a limited one.

29.

The justification for such interference is the media's Article 10 rights and the public's legitimate interest in knowing what has happened in this case. There is a strong public interest in knowing how the criminal justice system, including the police and the CPS are operating. That is even more the case at the present time when it is known that there are very long delays in getting cases to trial, or even to reach charging decisions. The effect of the current restriction on reporting the Court of Protection proceedings is that there is no ability of the public to be informed about what is happening in the police investigation. This is a case which may well attract a level of public interest because of its extreme and unusual facts. However, I do not accept that that means that such interest is "salacious". There is a legitimate public interest in the fact that deeply distressing cases, such as that of P, happen in the UK and how they are dealt with by the relevant authorities.

30.
I accept that there are considerable complications for the police in this case, in particular because P herself can only give such limited information about what has happened to her. It is not for me to judge the strength of the arguments put forward by DI Miller as to why the investigation has taken so long. However, I do think that the public has the right to know that in a case such as this it will have taken over 2 and a half years to even get to a charging decision. If there are charges brought, it is unknown how much longer it will take to get to trial. Delays in the system of justice, whether the police or the CPS, are a matter of legitimate public interest.

31.
I do not accept the argument that the public will ultimately know about these matters because if there is a trial the delays will then be obvious. The public interest is in knowledge now, not at some unknown date in the future. Equally, the press may wish to report the matter now, rather than simply if and when there is a criminal trial.

32.
I do not accept the argument advanced by the police that to allow the press to attend and report on the Court of Protection proceedings might undermine the integrity of the criminal trial. Firstly, I simply cannot see why it should. The Court of Protection case is focused on P and her welfare interests. Reporting on those proceedings will not involve evidence about the conduct, and certainly not the culpability, of her parents. Secondly, it is often the case that there are civil proceedings or inquiries in the public domain before a future criminal trial. One need only consider high profile recent examples such as the Grenfell Tower inquiry or the Manchester Arena inquiry. These involve very considerable press coverage, but that does not prevent any future criminal trial from proceeding fairly. If the criminal trial judge is concerned that publicity may have an impact on the jury, doubtless s/he will make clear to the jury that they should disregard any press commentary.

33.
In my view, to use the words of the Court of Appeal in Jefferson v Bhetcha the risks are merely notional rather than real. There is no danger of any press comment now having an immediate impact on a jury member as it seems inevitable that if there is a criminal trial it will not be for many months, if not over a year. The very passage of time will lessen the impact of any publicity, and in any event such impact can be fully dealt with by the normal trial processes.

34.
For all these reasons, I have concluded that the balance lies in allowing the press to report this case and the public to attend, subject to the usual order to protect P's anonymity.