

THE HONOURABLE MR JUSTICE COBB

Approved Judgment

Re L (Third Party Disclosure: HMPPS)



Neutral Citation Number: [2022] EWHC 127 (Fam)

Case No: NE21C00246

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2022

Before:

THE HONOURABLE MR JUSTICE COBB

Between:

A LOCAL AUTHORITY

- and -

J

K

(L, M, N, P, four children by their Children's Guardian)

Re L (Third Party Disclosure Order: Her Majesty's Prison and Probation Service)

Nicholas Stonor QC and Claire Gibson (instructed by **County Solicitor**) for the Local Authority

Penny Howe QC and Lindsay Webster (instructed by **Ben Hoare Bell**) for the Mother

Tim Donnelly (instructed by **Mortons Law**) for the Father

Jonathan Flower (of **Ward Hadaway**) for the Children's Guardian

Fiona Paterson (instructed by **Government Legal Department**) for the Secretary of State for
Justice, Respondent to the Application for Third Party Disclosure

Hearing dates: No Oral Hearing.

Written Submissions: 6 December 2021 (SSJ) and 23 December 2021 (all other parties)

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

1.

Introduction: These public law proceedings under Part IV Children Act 1989 concern four children; they range in age from 17 ¹ to 7. They are the younger children of Ms J (“the mother”) and Mr K (“the father”). The proceedings were launched by the Local Authority in late-April 2021, and are due for final hearing in February 2022.

2.

In 2015, the father was convicted of several terrorist offences under the Terrorism Acts 2000 and 2006, and has served the relevant part of his 8-year sentence in prison. In April 2021 he was released from prison on licence.

3.

The central issue within the care proceedings is the potential risk which is posed to the children by having contact with their father given his proven engagement in terrorist activities. Both the mother and the father remain married and ideally wish to live together with the children. The four children currently have supervised contact with their father twice a week while he continues to live in “approved premises”. Mr K’s current religious/political ideology will be critical to the assessment of any ongoing risk he may pose to his children.

4.

At an earlier stage of these proceedings, at a case management hearing and at the request of the parties, I directed disclosure of documents from Her Majesty’s Prison and Probation Service (“HMPPS”); the direction sought discovery of documents which would shed (it is hoped) more light on the circumstances of the father’s offences, his current attitude to those offences and his conviction, and his ideology. Disclosure was provided.

5.

A jointly instructed psychologist was then appointed within the proceedings in accordance with the Part 25 FPR 2010 to advise the court on the family’s functioning, the risk posed by the father and the mother’s capacity to protect; the psychologist requested further information which it was thought would be contained in documents generated within the criminal justice process. Accordingly, and pursuant to a formal application which I considered on the papers, I made a further direction, by consent, for further disclosure from HMPPS. In response to my direction, the Secretary of State for Justice (“SSJ”) responded. Through counsel, Ms Fiona Paterson, he indicated a willingness to comply with the direction (and did so) but wished to take the opportunity to make wider submissions to the court about the process by which additional disclosure had been ordered in this case, and in future cases.

6.

On the wider procedural issues referred to above, Ms Fiona Paterson filed detailed written submissions on behalf of the SSJ; she has proposed that it would be useful for the court to consider in general terms how third-party directions orders against HMPPS and similar bodies connected with the criminal justice system could in the future could be better managed. All parties to the Part IV proceedings have responded to those submissions. I am grateful to them all for their focused attention to this discrete issue.

7.

Context: In public law cases such as this, tensions often arise between the need to expedite proceedings in order to comply with the statutory requirements for completion within 26 weeks² (which itself underscores the need to achieve early decision making for vulnerable children), as against the protection of the public interest by only ordering appropriate levels of disclosure by third party agencies.

8.

There is a significant wealth of general and specific guidance on disclosure issues in linked family and criminal proceedings. General guidance is offered by Working Together to Safeguard Children (2018), and this is particularly apposite for those agencies which – by virtue of section 11 Children Act 2004 – are specifically charged with safeguarding responsibilities (which include, for instance, the local probation board, prison governors, and national crime agency). Arrangements for mutual disclosure between the Family Court and the police service is covered in the Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and in linked criminal and care directions hearings (October 2013).

9.

Ms Paterson helpfully referenced the guidance offered by Sir James Munby (then President of the Family Division) in relation to cases concerning suspected radicalisation/terrorism, namely “Radicalisation Cases in the Family Courts” (October 2015). Therein, importantly, the President:

i)

Alerted judges to the need to avoid inappropriately wide or inadequately defined requests for disclosure of information or documents by the police or other agencies (§7(d));

ii)

Further alerted judges to the need to avoid seeking disclosure from the police or other agencies of information or material which may be subject to PII, or the disclosure of which might compromise ongoing investigations, damage the public interest or put lives at risk, unless the judge is satisfied that such disclosure is “necessary to enable the court to resolve the proceedings justly” within the meaning given to those words when used in, for example, sections 32(5) and 38(7A) of the Children Act 1989 and section 13(6) of the Children and Families Act 2014 (§7(e));

iii)

Highlighted the importance of the family justice system working together in co-operation with the criminal justice system to achieve the proper administration of justice in both jurisdictions, for the interests of the child are not the sole consideration. So the family courts should extend all proper assistance to those involved in the criminal justice system, for example, by disclosing materials from the family court proceedings into the criminal process (§12);

iv)

Added to the point in (iii) above that, in the same way, the police and other agencies will wish to be alert to the need of the court for early access to information, for example, information derived from examination of seized electronic equipment, so far as such information is relevant to the issues in the family proceedings. Accordingly, the court should be careful to identify with as much precision as possible in any order directed to the police or other agencies: the issues which arise in the family proceedings; the types of information it seeks; and the timetable set by the court for the family proceedings (§13).

That guidance remains very much in place, and is of importance not only in this case, but in all similar cases.

10.

Once proceedings have been issued, third-party disclosure is governed by Part 21 of the Family Procedure Rules 2010 ('FPR 2010') Where r.21 is silent, the rules are supplemented by Part 31 of the Civil Procedure Rules 1998. The Family Courts' wide-ranging powers to make orders, including without notice orders, for disclosure against third parties are described in r.21.2; thus, it is to be noted that the court may make an order under this rule "only where disclosure is necessary in order to dispose fairly of the proceedings or to save costs" (r.21.2(3)) (emphasis by underlining added). An order for disclosure must "specify the documents all the classes of document which the respondent must disclose" (r.21.2(4)).

11.

Given Mr. K's conviction and the consequent potential risk to his children through radicalisation, the SSJ, through Ms Paterson, acknowledges that there is a "compelling argument for the Family Court, the expert and the parties, to receive disclosure of any material" which informs the question of Mr K's current religious/political ideology. However, she submits, that argument must be balanced against the practical challenges faced by HMPPS in this (or indeed any other similar) case in responding to a direction for the disclosure of relevant documents. In particular, she pointed up that:

i)

the collation of documents requested may take time, particularly if, as in the case of Mr K, the offender has served his sentence in more than one prison, appeared before a Parole Board on more than one occasion, and/or has remained under the supervision of the probation service for any length of time. In this particular case, the disclosure which the SSJ has made amounts to some 640 pages; this is a fraction of the total amount of material held by HMPPS concerning Mr K. Accordingly, specific rather than general requests for documents are encouraged;

ii)

there may be a need to redact some of the documents to remove information in order to protect the safety of individuals and/or the public at large, and/or for personal data protection reasons. Ms Paterson observes that the disclosure may contain (particularly in terrorism cases) security intelligence information which has not necessarily been disclosed to the offender and which the intelligence owner may want, or need, to protect. The process of redaction may be time-consuming and challenging;

iii)

some documents are generated by HMPPS on a rolling basis; for instance, the offenders OASys ³ report is based on a dynamic risk assessment which is subject to constant review. It follows that a direction for disclosure on a rolling basis may well be of more assistance to the expert instructed and to the court than merely an assessment prepared at a particular point in time;

iv)

the offender is likely to have been provided with copies of his/her Parole Dossier in advance of any Parole Hearing. Mr K had such a dossier. It is suggested that a significant amount of time could have been saved in the disclosure process had Mr K, in this case, alerted his legal team to the fact that he possessed some of the relevant documents and could then have written to the SSJ and the Parole Board seeking their views about the appropriateness of disclosure of these documents to the appointed expert and/or to the court and parties in the care proceedings (Mr K would not have had an automatic right to disclose the Parole Dossier or its contents directly to non-parties to the Parole Board proceedings).

12.

I agree with all the points made above, save that, in relation to §11(iv), I would observe that a court may generally not be comfortable in relying solely upon the co-operation of the offender in providing the relevant and/or complete disclosure. So, while it may be a good first step to explore with the offender/party what documents he/she has, that is likely to lead to a second step – namely the formal request for disclosure from the third party.

13.

Proposals for future applications for third party disclosure from HMPPS and similar bodies: Ms Paterson has proposed, on behalf of the SSJ, that in future, parties seeking disclosure from HMPPS in public law proceedings, whether they give rise to potential national security issues (as this case does) or not, should proceed in the following way:

i)

the party applying for third-party disclosure should serve the application (and order if any) on the SSJ by the Government Legal Department (“GLD”). The GLD has expressed itself willing to accept service of court orders and applications for such orders in the GLD ‘new proceedings’ inbox; the address of this inbox is NewProceedings@governmentlegal.gov.uk ;

ii)

the application should in the ordinary way also be served on the intended recipient (in this case HMPPS); which would still be the primary and obligatory point of service;

iii)

any request for disclosure on a “rolling basis” should be made explicitly clear in the application and/or order;

iv)

any correspondence (i.e., not court orders or applications for court orders), should continue to be addressed exclusively to the intended recipient (i.e., HMPPS);

v)

any requests for third-party disclosure which are not accompanied by any third-party disclosure order or application should, as now, be sent to the person or body believed to hold the material in question (i.e., HMPPS here), and not to the GLD.

14.

Ms Paterson explains the proposals in this way. HMPPS is an arm of the Ministry of Justice, for which the SSJ has responsibility. CPR 1998, r.66.3(1)(d)/(e) makes provision for an appropriate officer acting on behalf of the Crown to make a disclosure statement and/or discharge any other procedural

obligation. The accompanying Practice Direction (§2.1) provides, in effect, that in issued proceedings this is the Treasury Solicitor's Office (i.e., GLD). The principal advantage of service of an order on the GLD, submits Ms Paterson, is that the request for disclosure can be considered by someone who is legally qualified, and who will be in a good position to appreciate not only the significance of the request but also the potential urgency. He/she may also anticipate what classes of documents could be available and whether redaction is likely to be necessary.

15.

The SSJ proposes that any request for third-party disclosure against HMPPS or similar body would be made materially easier if it were accompanied by a short summary of the issues with which the court is seised. This may enable the SSJ to suggest the potential relevance of documents which have not been identified by the parties – for example, in the present proceedings, Mr K's updated OASys report. In my judgment, the parties should obtain explicit permission of the court to provide the summary of relevant information given the provisions of r.12.72-75 FPR 2010 / PD12G FPR 2010; it may be necessary/appropriate to accompany the proposed summary with an application for a reporting restriction order to prohibit further publication of the summary information provided.

16.

It is suggested by Ms Paterson that the following information would be of value to the recipient(s) of the third-party disclosure order (i.e., GLD/HMPPS):

i)

the case name and number;

ii)

the court centre where the proceedings are being heard;

iii)

the name of the allocated judge;

iv)

the next hearing date;

v)

what orders are sought by the applicant in the proceedings and/or under which provision of the Children Act 1989 proceedings have been issued;

vi)

a brief factual summary, including the age of the child/children and his/her/their relationship with the offender (ideally in a form approved by the court), together with a reporting restriction order if deemed necessary;

vii)

the date of the conviction of the offender, together with the offence, or type of offence if more specific details are not known;

viii)

the approximate dates of the custodial sentence;

ix)

the approximate date of release (on licence);

x)

whether the offender is still under the supervision of the Probation Service (if known);

xi)

the date by which it is anticipated that the Family Court will make a determination of the principal application;

xii)

a list of the documents requested; this may well include:

a)

a Pre-Sentence Report for the offender;

b)

a list of the offender's previous convictions;

c)

a transcript of the sentencing remarks made by the judge who passed the custodial sentence (if available);

d)

an OASys report for the offender (it is always helpful to specify the date of the last OASys report if known);

e)

a Parole Dossier for the offender;

f)

any other reports concerned with the offender's rehabilitation;

g)

the date by which disclosure is required and (in general terms) why.

17.

In my judgement, the proposals set out at §13-16 above can and should usefully be adopted by those making third-party disclosure applications in circumstances similar to those which obtain on these facts.

18.

The SSJ further submits that without notice applications for third-party disclosure (contemplated by r. 21.2 FPR 2010) are best avoided, save in cases of genuine emergency. This point requires no elaboration; I agree with the submission.

19.

Conclusion: It is well known that some of the most difficult cases with which the courts must deal span both the criminal and family courts often at the same time; the children involved, and their families need consistent treatment within the justice system - consistency, liaison and, where possible, co-operation across the two systems are essential. All parties submit, and I agree, that this case underscores the importance of co-operation and co-ordination between all the safeguarding agencies involved with children in order to achieve good and informed decision-making in their best interests.

20.

That is my judgment.

¹ L was 16 years old at the time of the launch of proceedings but has recently turned 17. It is acknowledged that no care or supervision order can be made in relation to her now: section 31(3) Children Act 1989.

² Section 32 (1)(a)(ii) Children Act 1989

³ OASys is the abbreviated term for the Offender Assessment System used in England and Wales by HMPPS from 2002 to measure the risks and needs of criminal offenders under their supervision.