Neutral citation number: [2022] EWFC 107 (B)
Case No: WD21C00698

IN THE FAMILY COURT SITTING AT WATFORD

Date: 12/09/2022

Before:

HIS HONOUR JUDGE RICHARD CLARKE

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Between:

HERTFORDSHIRE COUNTY COUNCIL	**Applicant**
- and -	
(1) MOTHER	**Respondent**
(2) FATHER	
(3) and (4) OLDER SIBLING and CHILD, children represented by their Guardian, Claire Chambers	

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DECISION

His Honour Judge Richard Clarke :

INTRODUCTION

1. This is the decision of the Court, following further submissions upon behalf of the medical experts concerned, as to anonymisation of experts in the published decision of the court. It is intended that this decision will be added as a post-script to the original decision at the time of publication.

2. The background is set out in the full decision and does not need to be repeated. Both medical experts in the case were provided with time to "respond to the court and the parties with their written submissions on the issue of publication of the judgment with their names to be included, rather than anonymised, or requesting an oral hearing on the issue if sought."

3. Written submissions were provided upon behalf of both medical experts, having been given the opportunity to obtain legal advice. Both sought anonymisation of their names. Neither sought an oral hearing. The court has also seen communications from Professor Sellar seeking to blame his medico-legal agency for disclosing a provisional report, his instructing solicitors for not providing a review of his report before submitting it to the court and stating he was not informed that [Professor AM] had changed her evidence.

SUBMISSIONS

4. [Professor AM] set out her professional experience and identified that the decision did not make any findings relating to her conduct. She accepted it was for an expert seeking to be anonymised in a judgment to persuade the court to exercise restraint, and that the court would attach significant weight to the interest of open justice.

5. [Professor AM] proposed three options, in order of preference:
   5.1. Anonymisation;
   5.2. Revisiting of the wording of the decision, with a view to minor clarification of wording which may be pejorative and omission of the findings sought against her; and
   5.3. If publicly criticised, an entitlement to respond publicly should she choose and therefore to be released from her duty of confidentiality.

6. Upon behalf of Professor Sellar the court was referred to various cases, including the dicta of McFarlane P, President of the Family Division of the High Court, in **Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust [2021] EWHC 1699 (Fam)** confirming each case must be considered on its own particular facts and stating:
   "Standing back and looking at the issue as it is presented now, in 2021, the time has come to draw a line under A v Ward insofar as it purported to establish that anonymity is not to be afforded to a class of professionals unless there are compelling reasons for doing so. The approach in law is that set out by Lord Steyn in Re S and in respect of the requirement for 'compelling reasons' the judgment in A v Ward must be regarded as per incuriam and should not be followed. In accordance with Re S, there should be no default position, or requirement for 'compelling reasons', in such cases. Any such application should turn on its own facts, including the overall context, where that is made out, as to the significant negative impact that the unrestricted and general identification of treating clinicians and staff may generate"

7. The submissions stated there had been a mistaken filing of Professor Sellar's provisional report, that his evidence was within a reasonable range of opinion and he was entitled to reference [Dr N]'s earlier views, that he had not previously been the subject of any judicial criticism, the shortcomings in this case can be remedied with training and better instructions and there is a risk that naming him would expose him to the risk of being vilified, targeted and harassed.

THE LAW

8. **Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust** was about the jurisdiction of the High Court to grant Reporting Restriction Orders prohibiting the naming of any medical clinicians as being involved in the care and treatment of a child who had been subject of "end of life" proceedings. It confirmed the approach to the balancing exercise of competing rights under articles 8 and 10 ECHR, as incorporated into UK law by the Human Rights Act 1998, remains as stated by Lord Steyn in the House of Lords decision in **Re S (a child)(identification: Restrictions on publication*)* [2004] UKHL 47 [2005] 1 AC 593**, in which neither Art 8 or Art 10 right has precedence.

9. ECHR, Article 8 states:

    1. Everyone has the right to respect for his private and family life, his home and his correspondence.
    2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. ECHR, Art 10 states:

    "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
    2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

11. This Court accepts there is no presumption or starting point and compelling reasons do not have to be established before anonymity is granted. While there is an ongoing move towards more transparency in the Family Court, there is no starting point of transparency either.

12. The Court is balancing the parents' rights to exercise free speech against the medical experts' right to private life. There is also the wider interest of the public and other Courts in being aware of matters of legitimate concern and for the Press to be aware as part of its role as public watchdog.

DISCUSSION AND DECISION

13. The professional qualifications of the medical experts are not in doubt. They would not have been instructed if they were not suitably qualified. Those experts owed a duty to the Court, which included an obligation to inform … without delay of any change in the opinion and of the reason for the change. Experts attend Court to give evidence on a daily basis throughout the jurisdiction. There would be little point to their attendance if it were not for them to consider their evidence further and decide whether, based on what has been put, they should revise their opinion. The fact that an expert changes their opinion does not, of itself amount to be something for which they should be criticised.

14. The court is conscious of the potential impact of publication of its judgment without anonymisation. As a starting point the court must be satisfied there has been proper engagement of Article 6 rights to a fair hearing. The matters were put to the experts at the original hearing and the experts have then been given the opportunity to make submissions on anonymisation. Neither expert seeks to argue their Article 6 rights have not been respected and neither expert sought a further hearing on the matter. The court is satisfied their Article 6 rights have been complied with.

15. There are fundamental difficulties with the submissions on behalf of Professor Sellar. They start with his report being signed, although it is a digital signature. It contained no indication it was provisional. Next, he undertook an experts discussion with [Professor AM] based upon their respective reports. Finally, he entered the witness box, stated the evidence he was going to give "shall be the truth, the whole truth and nothing but the truth", and then confirmed the contents of his report were true to the best of his knowledge and belief, without qualification. His evidence was given over more than one day. At no point did he indicate his report was "provisional", despite being specifically asked about access to the medical records.

16. The letter of instruction included the following excerpts which are of particular note:

    "The current bundle of papers will be sent with this letter of instruction. Those documents are listed in the enclosed index from the proceedings. If, having considered the documents enclosed, you consider that you require any further documents, please contact me and I will consult the other legal advisors. I will also send to you copies of any relevant documents received after the date of this letter that have not already been sent to you."

    "I am under a duty to disclose your report to the Court and to all parties and I will circulate your report on receipt. If you believe, as a rare exception to the general, that it should not be disclosed to any party, please let me know and I will seek the Court's direction."

17. There is no suggestion he reverted to the instructing solicitors seeking an accessible copy of the hospital notes if he could not access them. If he had any issues with his instructions he was also entitled to ask the Court for directions under FPR r25.17, and did not do so.

18. [Dr N]'s report was based on incomplete information at an earlier stage of proceedings. [Dr N] was not the expert who appeared before the Court. His report was not final and he has not had a chance to answer questions on it. The court is satisfied in any reported decision he will be anonymised.

19. Professor Sellar did not seek to reference [Dr N]'s report, he deferred to it. Under pressure from counsel he sought to hide behind it. It is a mis-characterisation to say he referenced it.

20. The court is unable to comment on whether Professor Sellar has previously been the subject of judicial criticism, but has no reason to disbelieve what is stated. Presumably his submission, summarised as, "it will not happen again" would reduce the public interest in the decision. However, that does not minimise the criticism itself or negate any public right to know.

21. Professor Sellar states the solicitors should have reviewed the report and sought change before it was disclosed. Professor Sellar was a single joint expert. He was therefore instructed by all the parties. It is not open to the lead solicitor to review his report and provide feedback prior to disclosure. The report is supposed to be provided to all parties at the same time, or, failing that, as sent out by the expert.

22. Notification of [Professor AM]'s change of evidence was provided to Professor Sellar following the conclusion of her evidence on 22 March 2022. The 15th question to Professor Sellar, during his evidence-in-chief on 23 March 2022, addressed the consequences of her change of evidence. At no point did he express surprise or request an opportunity to consider how that change may impact his evidence.

23. The experts were not provided with an opportunity to respond to the draft decision before it was circulated. Decisions are not works of art and can always be improved upon with time. Almost inevitably, following the cut and thrust of cross-examination, the decision will end up providing only part of what occurred. What is important is that it is a fair reflection of what occurred and sets out the reasoning for the decision made. The Court agrees the wording at part of the decision can be made clearer and is circulating separately a proposed change to the advocates for all parties to that end.

24. [Professor AM] seeks for findings sought in relation to an expert's evidence to be omitted from a decision if they were not upheld. A decision provided by a court is a balance of the arguments and information. It cannot contain everything, but must contain enough to make sense of what was being argued. The Local authority relied upon the expert evidence to make their case and the parents challenged the expert evidence, as was their right to do. Omitting relevant submissions would potentially detract from the weight of what occurred and skew any understanding of the reasoning. Context is key, and it is very hard for the Court to say somebody did not do something they were accused of without saying what they were accused of. The Court is entitled to assume some level of understanding of any readership, particularly any professional readership, and an acceptance that they will not approach the matter on a "no smoke without fire" basis.

25. Nobody deserves to be vilified, targeted or harassed just for doing their job. Sadly, it seems to be commonplace in modern society, where information can spread around the world in seconds and commentators can mis-report information simply to increase readership. However, the public interest in a 'right to life' and the polar views that may apply (the **Abbasi** case) are likely to be far different to a case about whether a child has sustained accidental injury. Criticism of an expert in a decision of the Court does not automatically lead to vilification.

26. The Court is asked to consider whether the experts should be treated differently. The Court has considered the position of both experts individually, as well as jointly. The Court accepts that the criticism put by the parents, as upheld by the Court, was of Professor Sellar. There is a risk, even with an informed and knowledgeable readership, that [Professor AM] will be "tarred with the same brush". The Court is therefore satisfied that Professor Sellar should be named, but [Professor AM] not.

27. Professor Sellar argues the parents' rights to free speech should be curtailed. As a medical expert in a public law case he could not have approached the matter with any expectation of anonymity. He is asking for their right to free speech to be curtailed to avoid the consequences of his own performance in this case. It is the decision of this Court that this would be an unfair restriction on the parents' right to free speech and anonymity of his name is refused.