



Neutral Citation Number: [2011] EWHC 413 (COP)

Case No: COP 1191258T

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/2/2011

Before:

THE HONOURABLE MR JUSTICE PETER JACKSON

Between :

THE LONDON BOROUGH OF HILLINGDON

Applicant

- and -

STEVEN NEARY

(by his litigation friend, the Official Solicitor)

First Respondent

- and -

MARK NEARY

Second Respondent

Mr Guy Vassall-Adams (instructed by the **Solicitors for Independent Newspapers**) for Independent Print Ltd, Guardian News and Media Ltd, Times Newspapers Ltd, the BBC and the Press Association

Mr Hilton Harrop-Griffiths (instructed by **Hillingdon Legal Services**) for the Applicant

Ms Aswini Weeraratne (instructed by **Miles & Partners** as agents for the Official Solicitor) for the First Respondent

Ms Amanda Weston instructed by **Conroys Solicitors**) for the Second Respondent

Hearing date: 28 February 2011

JUDGMENT

This judgment consists of 8 pages. Pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken and copies of this version as handed down may be treated as authentic.

Mr Justice Peter Jackson:

Introduction

1. This is an application for permission for designated journalists from five organisations to attend these Court of Protection proceedings and to report such information about them as the court may in due course permit. The organisations ("the media") are Independent Print Ltd (*The Independent, The Independent on Sunday*), Guardian News and Media Ltd (*The Guardian, The Observer*), Times Newspapers Ltd (*The Times, The Sunday Times*), the BBC and the Press Association.
2. Having heard submissions from the media and from the parties to the proceedings, I directed that
 - (1) The organisations named above shall be permitted to send designated representatives to attend these proceedings, the permission being granted subject to any different direction made at any subsequent hearing.
 - (2) The media shall be permitted to identify the parties to these proceedings by their names, i.e., Mark Neary, Steven Neary and the London Borough of Hillingdon.
 - (3) The media shall be permitted to report any information already in the public domain when reporting these proceedings.
 - (4) Any application by the media for permission to report information disclosed in the course of any private hearing in these proceedings shall be determined by the court at the conclusion of the relevant hearing.

I now give my reasons for having made these orders.

The Court of Protection proceedings

3. The proceedings themselves have been brought for the benefit of Steven Neary, a young man aged 20 with autistic spectrum disorder and severe learning disability. He has hitherto been known within the proceedings as SN. He lives with his father, Mark Neary, previously known as MN. The issues that arise have two aspects. The first concerns Steven's future care. It is now hoped that agreement will be reached about this, and I have given directions for a mediated solution to be attempted. The matter will only be litigated if these efforts fail. The other issue relates to the lawfulness or otherwise of events that occurred between 31 December 2009 and 24 December 2010. This was a period when Steven lived in residential accommodation provided by his local authority, the London Borough of Hillingdon. He was initially placed with his father's agreement for a period of a few days' respite. However, a difference of opinion then developed between the father and the local authority about Steven's return home, which the local

authority came to consider was not in his interests. The disagreement intensified and was not resolved until the matter came before the court on 21 December 2010, after which Steven returned to live with his father. It is said by the father and by the Official Solicitor, who now represents Steven, that the refusal to allow him to return home was unlawful in a number of respects, and they seek declarations to that effect. That matter is listed for further case management on 10 May 2011 and for final hearing on 23 May 2011.

The law

4. The media's application is made under the Court of Protection Rules 2007 ("COPR"), of which the following are relevant:
 - Rule 90(1), which provides the general rule that a hearing is to be held in private
 - Rule 90(3)(a), which allows the court to authorise any person, or class of persons, to attend the hearing or a part of it
 - Rule 91(2)(a), which allows the court to authorise the publication of such information relating to the proceedings as it may specify
 - Rule 91(3), which allows the court to impose restrictions on publication of information
 - Rule 92, which allows the court to order a hearing to be held in public, subject to any restrictions it may impose
 - Rule 93, which provides that an order under rules 90, 91 or 92, may only be made where there is good reason, and can be made at any time
5. This code was authoritatively considered by the Court of Appeal in *Independent News and Media v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262. The court upheld an order of Hedley J allowing the attendance of the media at a private hearing concerning the affairs of David Paravicini, the musical prodigy. I take guidance from paragraph 11 of the judgment of the Court of Appeal:

"Accordingly the reality is that provided good reason appears, the court will then assess all the relevant considerations and make a balanced, a fact-specific judgement whether the specific authorisation should be granted. In other words, before the court makes an order under rules 90 to 92, a two-stage process is required; the first involves deciding whether there is "good reason" to make an order under rule 90(2) [sc. 90(3)], 91(1) or 92; if there is, then the second stage is to decide whether the requisite balancing exercise justifies the making of the order."

The balancing exercise of course involves consideration of Article 8 (right of respect for private and family life) and Article 10 (right of freedom of expression).

6. Reference was also made by the parties to another decision of Hedley J (*The Local Authority v TH, AH and the PCT* [2010] EWHC 3605 (Fam)), in which an appeal to the Court of Appeal against his decision to admit the media to the Court of Protection was dismissed on 1 February 2011, for reasons which are awaited.

Good reason

7. In this case, the media offer several observations which they urge as amounting to good reason for the orders they seek.

- (1) Firstly, there is a public interest in the work of the Court of Protection, and the way it uses its considerable powers to make orders which affect the lives of vulnerable citizens.
- (2) Secondly, in this case it is alleged that the rights of Steven and of his father were seriously infringed for a prolonged period by the decision of the local authority to prevent Steven returning home after the intended period of respite.
- (3) Thirdly, the issues now before the court have to some extent already been aired in the public domain, and the parties to the proceedings have been named. Steven's case was featured in his local newspaper, the *Uxbridge Gazette*, in July 2010. It was then covered by the BBC in August 2010 on Radio 4's "*You and Yours*" and on BBC London News. It has more than once been featured in *Private Eye*. An online petition for Steven's return, launched by Mr Neary, generated some 8000 signatures.

In consequence, the following information is already widely publicly available:

- Steven's name
 - the nature of his disability
 - photographs of Steven
 - Mark Neary's name
 - the address of the family home
 - the name of Steven's former school
 - the address of Steven's former residential home
 - the name of the local authority
 - the circumstances which led to Steven being placed in respite care in 2009
 - details of his subsequent conduct which eventually led to a deprivation of liberty authorisation
8. I am in no doubt that the cumulative effect of the three considerations advanced by the media is to establish that there is good reason to exercise the court's powers in relation to each of the orders sought. Indeed, the submissions of the parties to the proceedings did not really challenge this proposition, but focused on the second-stage balancing exercise.

Submissions on the balancing exercise

9. These encompassed familiar general considerations relating to Articles 8 and 10 of the European Convention on Human Rights, and specific considerations relating to this case.
10. The issues were canvassed by Mr Vassall-Adams, for the media, on the one hand and by Ms Weeraratne, for Steven, on the other. Ms Weston, for Mr Neary, supported Ms Weeraratne. Mr Harrop-Griffiths, for Hillingdon, stood aside from the argument.
11. Submissions for the media refer to the importance of freedom of expression, underpinned by s. 12 of the Human Rights Act 1998, which makes specific reference to the extent to which the material has become available to the public and the extent to which it is, or would be, in the public interest for it to be published. Mr Vassall-Adams relies on each of the matters raised as constituting good reason at the first stage.
12. In response, Ms Weeraratne argues that the court should take a cautious approach. She refers to the important right of respect for private and family life, which informs the regime under which hearings are held in private. She says that the Official Solicitor does not consider it open to him to make any concession because he cannot see it as being in Steven's best interests for there to be further publicity. She draws attention to the views of an independent social worker who has reported on Steven's current situation and who comments on possible positive and negative effects of further publicity. In summary, these are that (1) Steven enjoys the attention at a basic level, while lacking understanding of the issues involved; (2) greater likelihood of Steven and his father being recognised in the local area may foster better knowledge of his condition, leading to increased sympathy and support, and readiness to involve him in wider activities and social events; (3) media interest may place stress on Steven and his father, leading to a deterioration in Steven's equilibrium and a contraction of his social activities, particularly if any risks posed by Steven's behaviour were unduly accentuated in the reporting. Likewise, I am told that a consultant psychiatrist who is in the process of reporting has pointed to a possible increase in anxiety for Steven if the media intruded into his daily life, for example, by door-stepping.
13. The competing considerations might be described as conventional in cases involving the balancing of the right to respect for private life and the right of freedom of expression. The further application for permission to report the parties' names at this stage in the proceedings raises an issue that has not, so far as I am aware, previously arisen. It is accepted by all parties that an order permitting this is within the court's power under Rule 91(2)(a). The Official Solicitor however argues that the issue should be addressed at the end of the proceedings, when all relevant information is known.
14. In reply, Mr Vassall-Adams refers to the reality of journalism. If the media choose to follow the story by sending representatives to court, they want to report in an engaging manner in real-time, reflecting points of interest along the way. He says that the risks and disadvantages raised in response to the media's application are no more than speculative.

Discussion and Conclusion

15. In weighing up the question of whether representatives of the media should be permitted to attend future hearings in this case I have kept the following considerations in mind:

- (1) Hearings before the Court of Protection should be held in private unless there is good reason why they should not be. The statutory arrangements reflect a long-standing exception to the principle that justice must be done in open court. The affairs of those who are not incapacitated are normally handled privately. People should not routinely have their lives exposed to public gaze simply because their affairs come before the court as a result of their incapacity. See *Independent News and Media Limited v A* (above) at paragraphs 18 and 19.
- (2) On the other hand, the scheme of the rules explicitly contemplates cases where hearings will not be conducted in private, even to the extent that it specifically permits the court to sit in public, something that has not been suggested in this case. The rules allow for exercise of the court's powers to be calibrated to the needs of the particular case.
- (3) Publicity can have a strong effect on individuals, particularly if they are not used to it, or if, like Steven, they are vulnerable to anxiety and to changes in their environment. Any evidence that suggests a real possibility of a detrimental effect from publicity must weigh heavily. On the other hand, there must be some proper factual basis for such concerns.
- (4) There is a genuine public interest in the work of this court being understood. Not only is this healthy in itself – the presence of the media in appropriate cases has a bracing effect on all public servants, whether in the field of social services or the law – but it may also help to dispel misunderstandings. It is not in the interests of individual litigants, or of society at large, for a court that is by definition devoted to the *protection* of the welfare of disadvantaged people to be characterised (including in a report about this case, published as I write this judgment) as "secretive". It is part of our natural curiosity to want to know other people's secrets, and using pejorative descriptions of this kind may stimulate interest. The opportunity, in appropriate cases, to follow a process that has welfare, not secrecy, at its heart can only help the media to produce balanced reporting, and not fall back on clichés.
- (5) The ability of the media to participate need not be limited to cases involving extraordinary individuals such as Mr Paravicini. Interesting and potentially important examples can arise wherever decisions have to be taken about people whose lives mirror those of large numbers of others in the same position. In considering whether good reason has been shown, the question is not whether the individual is exceptional, but whether the issue is one of genuine public interest.

(6) A distinction can be drawn between cases which have not been in the public eye and those which have, to a greater or lesser extent. In the former case, if the proceedings are conducted in private, there may very well be no story. In the latter case, the proceedings do not create the story, and the question is whether the media should be allowed to follow its continuation in court.

16. In considering whether it is appropriate for the parties to the proceedings to be named at this stage, I bear in mind the following further considerations:

(1) Stories about particular individuals are much more attractive to readers than stories about unidentified people: *In re Guardian News and Media Limited* [2010] 2 WLR 325 per Lord Rodger at [63]. The potential for advantage or disadvantage from publication is therefore somewhat magnified by the personalisation of the proceedings.

(2) Once the parties' names are publicly attached to the proceedings, the court's ability to control that information is lost. Accordingly, parties should not be named at the outset where any real possibility can be foreseen of the balance falling the other way at the end of the proceedings.

(3) On the other hand, it is in no one's interests for proceedings to be stultified by the withholding of information that is already in the public domain.

(4) As stated above, there does not appear to be a precedent for parties to be named at the outset in the manner that has been proposed in this case. As the Official Solicitor points out, the usual practice in this relatively young jurisdiction is to refer to parties by initials. This indeed is what was ordered at an earlier stage of these proceedings.

17. In the present case, my conclusions are that:

(1) Steven's circumstances are already in the public domain to a considerable extent. If the claims made by Mr Neary and the Official Solicitor are made out, the facts deserve to be known to the public. If they are not made out, it may be right for the record to be corrected.

(2) I would unhesitatingly exclude the media if the evidence showed a real possibility of detriment or distress to Steven of anything other than a trivial nature. However, I do not find the evidence for such detriment. In particular,

(a) There is no evidence whatever that Steven has suffered from the publicity that has already been generated. His life has not been destabilised and he has not been made anxious by the coverage so far.

(b) I entirely reject the possibility that the media would exploit its presence at future hearings by irresponsible journalistic practices, such as door-stepping an autistic man. It certainly has not done this to Steven in the past.

(c) Any possibility of Steven being disadvantaged by a much less positive portrayal of his behaviour is unlikely, and the court can control what information from the proceedings is reported. For what it is worth, the reaction to the information that has so far been released, which includes descriptions of his sometimes difficult behaviour, has been sympathetic.

(d) While it is impossible to rule out some detriment to Steven if isolated members of the public were to take a hostile view of him or his activities, there is again no evidence that this has happened in the past or that it is likely to happen in future. One does not have to wear rose tinted spectacles to believe that a far more natural reaction to knowing more about the situation of Steven and his father is likely to be a desire to help and support them.

(3) I do not foresee any possibility of the court preventing the media from reporting the parties' names at the end of the proceedings, even if everything else that takes place in court were to remain unreported. Given the extent of the information already publicly available, it is frankly unreal for the proceedings to continue under initials, as if that offered any meaningful protection.

18. These considerations persuade me that the order sought by the media is a proper one in this case, even though in one respect it goes further than previous examples. Each application of this kind depends upon its individual facts, and my conclusion here is not intended to represent a precedent, nor a change in practice. I have done no more than apply the law as I understand it to Steven's particular circumstances.
