Re B (Children: Police Investigation)

Neutral Citation Number: [2022] EWCA Civ 982

The appeal concerned an injunction made in the High Court prohibiting any person serving with the Metropolitan Police from interviewing either of two specified teenage children ("A" and "B") without the "express order" of the judge, save for speaking to them "in order to determine whether they are at a real and immediate risk of being subjected to harm or ill-treatment and for the purpose of considering whether any immediate police or statutory powers should be exercised to avoid that risk". The order also had no end date.

The order was made in long running and complex private family law proceedings in the Family Division in which allegations had been made by the children and parents. The order was also against the relevant children's services who did not seek permission to appeal the order.

The Commissioner of the Police of the Metropolis ('MPS') sought permission to appeal to the Court of Appeal, challenging the High Court's powers to make an order of this nature.

Permission was granted for grounds 1-3 of 5 (the remaining 2 grounds being in respect of the Judge's welfare evaluation).

The issue for the appeal was whether the High Court:

1) had inherent jurisdiction to do so, and if so,
2) whether it should have exercised its powers to do so.

The MPS's case in essence was that the judge overreached his otherwise extensive inherent jurisdiction and usurped the common law and/or statutory duties of the police in the detection, prevention, and prosecution of crime, in making and continuing the order

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The MPS wished at all times to work with the Family Court.

There was no issue in the appeal that, regardless that the children were neither wards of court nor subject to care proceedings, the High Court has retained a *parens patriae* jurisdiction by which, theoretically at least, it may prohibit a police officer from questioning the children.

Current case law details 'beyond peradventure how vanishingly rare will be the circumstances in which a High Court should, in the exercise of its parens patriae jurisdiction, make a prohibitory order against a public authority exercising statutory powers…However the exercise of that jurisdiction must be approached by reference to a considerable body of jurisprudence which has endured more than 40 years, summarised by Sir James Munby, President in A Ward of Court [2017] EWHC 1022 (Fam)'. Macur LJ.

The Court observed that it was arguably the core duty of the MPS is to protect the public, including by detecting and preventing crime, although there is no duty to investigate every crime, there is no exhaustive definition of this duty. Furthermore, the police will interview many children, some younger than these, some emotionally damaged, relating to historical or more recent incidents disclosed. 'The authorised professional practice provided by the College of Policing: "Managing Investigations" last updated in November 2021 and specifically covering the "Investigation: Working with victims and witnesses" including those who are vulnerable and intimidated, and dealing with initial contact strategy to conclusion of prosecution (if applicable), makes clear that welfare considerations are not to be ignored, but they are not paramount when placed in the balance with other considerations. "Achieving Best Evidence in Criminal Proceedings," (last revised 2022) provides further guidance in relation to interviewing children and other vulnerable victims or witnesses.' Macur LJ

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The Court of Appeal found that the High Court did have inherent jurisdiction to make the Order 'but with a significant caveat' and 'unhesitatingly' stated that it should not have exercised its powers to do so here. Macur LJ

The appeal was accordingly allowed by Lady Justice Macur,

Lord Justice Jackson stated 'I therefore accept the argument of the MPS that the court overreached its proper powers in making and continuing the order and that in consequence the appeal must succeed.'

Lord Justice Jackson also commented that one practical consequence of the injunction was that the High Court was now about to resume its own investigation of the allegations made by the children and parents without the assistance that the police might have been able to give on that subject. Lord Justice Nugen was also in agreement.

The High Court injunction was set aside in respect of the MPS.

Additionally, the Court of Appeal commented on how the High Court *ex parte* order was obtained in the first place and discussed good practice. Nugee LJ:

'….As Macur LJ has explained, it was – and remains – unclear what evidence was put before the High Court on the ex parte application on 15 October 2021, or what took place at that hearing (the note of the hearing belatedly provided being hopelessly inadequate for that purpose); and the bundle included a number of orders headed "draft" and unsealed. Counsel for the MPS was, unsurprisingly, unable to confirm whether orders in that form had in fact been made, being only able to say that that was what the MPS had been served with. That was all obviously unsatisfactory..'

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'I add just a few words on the practice in relation to urgent applications for injunctive relief…. The Court has undoubted power to grant such ..and will not hesitate to do so when the circumstances are either of such urgency that proper notice cannot be given to the respondent, or that it is essential to proceed without tipping off the respondent because of the risk that he would frustrate the proposed order by pre-empting it.

But precisely because the respondent is not present at such a hearing, it is in general essential in the interests of fairness that he is fully and properly informed of what happened at the hearing including by a full and proper note of the ex parte hearing and that the proper order is drawn up, sealed and served as soon as possible… I do not doubt that the Court's order is effective as soon as pronounced, and in appropriate cases the respondent is informed of the effect of the order without waiting for the formal order to be drawn up and sealed. A respondent informed that the Court has made an order against him is obliged to comply with it even before sight of the sealed order and is in contempt of court if he does not do so. But this is no reason not to have the order properly drawn up, sealed and served as soon as that can be done…'

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