Neutral Citation Number: [2006] EWHC 1645 (Admin)

Case No: CO/1087/2006

IN THE HIGH COURT OF JUSTICE
DIVISIONAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2006

Before :

LORD JUSTICE MAY
and
THE HON MR JUSTICE FORBES

- -

Between :

	THE QUEEN ON THE APPLICATION OF TB	**Claimant**
	- and -	
	THE COMBINED COURT AT STAFFORD **-and-** **THE CROWN PROSECUTION SERVICE(1)** **SOUTH STAFFORDSHIRE HEALTHCARE NHS TRUST (2)**	**Defendant** **Interested Parties**

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Michael Fordham (instructed by Bindmans) for the **Claimant**
David Lock for the **South Staffordshire NHS Trust**
Roderick Henderson for **The Crown Prosecution Service**

Hearing dates: 3rd July 2006

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Judgment

Lord Justice May:

Introduction

1. The Criminal Procedure Rule Committee is considering making amendments to Part 28 of the Criminal Procedure Rules 2005. This application for judicial review, for which McCombe J gave permission, illustrates the need to do so. I trust that our judgments in this case will be taken as our contribution to the Committee's consultation.

The facts

2. TB, the claimant, is a young girl now aged 15. She was aged 14 at the time of the events relevant to this application. Details of or leading to her identification must not be

published. She was to have been, and in the event was, the main prosecution witness in the trial of a man, W, charged in the Crown Court at Stafford with sexual offences in relation to her. He was in due course convicted of count 2 of an indictment, which alleged sexual activity with a child, contrary to section 9(1) and (2) of the Sexual Offences Act 2003.

3.From at least February 2005 and in the months leading up to W's trial, TB had been receiving psychiatric treatment from the South Staffordshire NHS Trust, the First Interested Party. She had taken overdoses of paracetamol and ibuprofen on three occasions between February and November 2005. On 16th November 2005, W's solicitors wrote to the Crown Court asking for a witness summons directed to the Director of the Child and Mental Health Services of the Trust requiring the production of TB's medical and hospital records. The grounds given refer to a history of self harm and mental illness which might undermine her credibility as a witness.

4.Section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965, as amended by the Criminal Procedure and Investigations Act 1996, provides that a witness summons may be issued where the Crown Court is satisfied that a person is likely to be able to give material evidence or produce any material documents for the purpose of Crown Court criminal proceedings, and it is in the interest of justice to issue a summons to secure the person's attendance. By section 2(7), an application for a witness summons has to be made in accordance with the Criminal Procedure Rules.

5.Rule 28 of the Criminal Procedure Rules 2005 stipulates the form and content of the application and provides that a copy of it and the supporting affidavit should be served on the person to whom it is directed at the same time as it is served on the court officer. The person to whom it is directed may indicate if he wishes to make representations at a hearing. If he does so, the court has to fix a hearing.

6.The application in the present case requested a summons directed to the NHS Trust to produce medical records. It is a fundamental principle that a person's medical records are confidential. Surprisingly the Rules do not require service of an application such as that in the present case on the very person whose confidence would be broken by their production – not least in the present case their production to a defendant who was alleged to have abused TB sexually.

7.The application did not comply with the rules in a number of particulars that are not centrally relevant to the present application. For instance, it was not supported by an affidavit. Nevertheless, on 17th November 2005, the Crown Court issued the summons to the Director of the Child and Mental Health Services of the Trust, directing him to attend and produce all records relating to TB at what was referred to as a Public Interest Immunity hearing on 28th November 2005.

8.The Trust took and expressed the view that confidentiality between doctor and patient, especially in psychiatric cases and above all when dealing with victims of child abuse, was essential; and that the confidentiality belonged to the patient, not the Trust.

9.At the hearing on 28th November 2005, W's counsel submitted that the defence case was that this was a school girl crush used as a basis for fantasy and to invent an allegation. The judge considered that evidence from the medical notes that TB had attempted suicide and that she was having difficulties was plainly relevant to her credibility and that any argument to the contrary was wasting his time. He said that he had a balancing exercise to perform, one side of which was to make sure that W had a fair trial. W was a 34 year old man of good character facing serious allegations which, if he were convicted, would result in a prison sentence. In the balancing exercise, that must take precedence over confidentiality issues. The judge ordered disclosure of 23 pages of TB's psychiatric records.

10.On 30th November 2005, the Trust notified the Official Solicitor, who immediately notified the Crown Court, the Crown Prosecution Service and W's solicitors that she now represented TB in connection with a possible infringement of her rights under Article 8 of the European Convention on Human Rights. The Trust, supported by the Official Solicitor, asked the judge to state a case for the consideration of the High Court. The judge was unhappy with this, because it would delay the trial which was fixed for 12th December 2005. After two more hearings, the judge decided to invite TB herself to attend court the following morning. The judge wanted to know what her view would be on the disclosure (which had already taken place) and also to know whether she understood the implications of the trial being delayed. TB did attend court on 6th December, missing school to do so. There was no arrangement or opportunity for her to be represented. The Official Solicitor, who was only informed of the hearing at 4p.m. on 5th December, sent a very urgent fax to the judge protesting that it was not appropriate for TB to be put in this situation. TB telephoned the Official Solicitor from court. It was apparent that she was under considerable pressure. She agreed reluctantly to disclosure, although she did not want her medical records disclosed, because she could not face the prospect of the trial being delayed. It was already causing her considerable distress and anxiety.

11.I strongly deprecate was happened on 6th December 2005. It seems to me to be quite unacceptable for a vulnerable 14 year old school girl known to have attempted suicide, the victim of alleged sexual abuse and a prosecution witness in the impending trial, to be brought to court at short notice, without representation or support, to be faced personally with an apparent choice between agreeing to the disclosure of her psychiatric records or delaying a trial which was bound to cause her concern and stress.

The claim for judicial review

12.The judicial review claim form seeks a declaration that the claimant was entitled to service of the application of 17th November 2005 and the right to make representations as to what order should be made; a declaration that the Crown Court acted unlawfully in not securing those entitlements and proceeding without having done so; and just satisfaction. The claim for just satisfaction is no longer pursued.

13.The Crown Court filed an acknowledgement of service but is not represented before the court

today. The South Staffordshire National Health Trust and the Crown Prosecution Service are represented as Interested Parties. The NHS Trust broadly supports the claimant. The CPS takes a neutral position.

Section 29(3) of the Supreme Court Act 1981

14. No party before the court suggests that the application is incompetent by virtue of section 29(3) of the Supreme Court Act 1981. This provides for the powers of the High Court to make mandatory, prohibiting and quashing orders in relation to the jurisdiction of the Crown Court, "other than its jurisdiction in matters relating to trial on indictment". Speaking generally, this limitation is designed to prevent trials on indictment being delayed by challenges in the nature of interlocutory appeals. If the Crown Court makes an error and the defendant is convicted, he can appeal after conviction to the Court of Appeal Criminal Division. The present claim will have no such effect. It is not brought by a party to the Crown Court proceedings. It is not seeking a mandatory, prohibiting or quashing order, but declarations as to the claimant's rights. Nor is the claim academic in the sense that it asks questions in the absence of actual relevant facts. The facts happened, and the claimant and the interested parties have a keen interest in the court reaching a decision about whether what happened was lawful or not. I am satisfied that the court has jurisdiction.

15. It is not necessary to deal with Mr Fordham's alternative submissions (1) that this court has jurisdiction to quash an order of the Crown Court where it is made without jurisdiction and there is no alternative remedy – see *R v Maidstone Crown Court, ex parte Harrow London Borough Council* [2000] QB 719 at 742A-743C; and *R (Kenneally) v Crown Court at Snaresbrook* [2001] EWHC Admin 968; [2002] QB 1169 at paragraphs 40, 43, 46; and (2) that, to put it shortly, section 29(3) of the 1981 Act and section 9(2) of the Human Rights Act 1998 should be interpreted as not permitting an unsatisfactory Human Rights lacuna.

Article 8 of the European Convention on Human Rights

16. Medical records, in particular perhaps psychiatric records, are confidential between the medical practitioner and the patient. The patient undoubtedly has a right of privacy within Article 8 of the Convention, which provides:

> "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 wellbeing 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."

The Crown Court is a public authority, and it is unlawful for a public authority to act in a

way which is incompatible with a Convention right – section 6(1) of the 1998 Act.

17. As Baroness Hale of Richmond said in *Campbell v MGN Limited* [2004] 2 AC 457 at paragraph 145:

> "It has always been accepted that information about a person's health and treatment for ill health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself. As the European Court of Human Rights put it in *Z v Finland* (1997) 25 EHRR 371, para 95: "Respecting the confidentiality of health data is a vital principle in the legal system of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community.""

18. In *R (Axon) v Secretary of State for Health* [2006] 2 WLR 1130, Silber J, having quoted this passage from *Campbell*, pointed out in paragraph 64 that the ratification by the United Kingdom of the United Nations Convention on the Rights of the Child (Cm 1976) in November 1989 was significant in showing a desire to give children greater rights. This and the Human Rights Convention show why the duty of confidence owed by a medical professional to a competent young person is a high one which should not be overridden except for a very powerful reason. This was said in the context of a contention by the mother of teenage daughters that guidance that such persons could properly be given confidential advice and treatment about sexual matters such as contraception, sexually transmitted infections and abortion without their parents being notified or consulted was unlawful.

19. The confidentiality of a patient's medical records belongs to the patient. For the particular importance of confidentiality in psychiatric medical notes, see *Ashworth Hospital Authority v MGN* [2002] UKHL 29 at paragraph 63.

20. If, therefore, the court was to consider ordering disclosure in breach of confidentiality of TB's medical records, it could only do so if this was proportionate, in accordance with the law and necessary, I suppose, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In simple terms, it required a balance between TB's rights of privacy and confidentiality and W's right to have his defence informed of the content of her medical records.

21. For reasons which follow, I do not need to address submissions, made in this court by Mr Lock for the NHS Trust, that the medical records would not have been admissible at W's trial, intended as they were only to challenge TB's credibility in cross-examination. That may or may not be correct, but the antecedent procedural deficiencies, to which I

now turn, and which in Article 8 terms were substantive considerations, make a decision on this point unnecessary. I do however accept Mr Lock's general submission that it would be wrong to have the mind set which supposes that applications for disclosure of medical records of a prosecution witness will usually succeed even in the face of Article 8 objections.

"In accordance with the law"

22. So far as the particular law is concerned, rule 1.1 of the Criminal Procedure Rules provides that the overriding objective of the new code is that criminal cases are dealt with justly. This includes respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case. By rule 1.3, the court must further the overriding objective when it exercises any power given to it by legislation, including the rules, and when it applies any practice direction or interprets any rule or practice direction. Although the existing legislation and rules do not expressly oblige the court to give notice of an application for a witness summons to a person in TB's position in this case, in my view the overriding objective required it. The court was being invited to trample on TB's rights of privacy and confidentiality. TB was both a witness and a victim of the then alleged crime. The court was obliged to respect her interests and these were some of them.

23. More generally, although Article 8 contains no explicit procedural requirements, the court will have regard to the decision making process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8. The process must be such as to secure that the views of those whose rights are in issue are made known and duly taken account of. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the person whose rights are in issue has been involved in the decision making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will be a failure to respect their family life and privacy and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8. This comes with minor transpositions from paragraphs 62-64 of the decision of the European Court of Human Rights in *W. v United Kingdom* (1987) 10 EHRR 29. As Munby J said in *Re G (Care: Challenge to Local Authority's Decision)* [2003] 2 FLR 42; [2003] EWHC 551 (Fam) at paragraph 34:

> "So procedural fairness is something mandated not merely by Article 6, but also by Article 8."

24. Paragraph 62 of *W v United Kingdom* indicates in the context of care proceedings that public authorities may not be required to follow inflexible procedures. But court procedures often require rules, and rules are generally there to be followed.

25. In my judgment, procedural fairness in the light of Article 8 undoubtedly required in the present case that TB should have been given notice of the application for the witness summons, and given the opportunity to make representations before the order was made. Since the rules did not require this of the person applying for the summons, the requirement was on the court as a public authority, not on W, the defendant. TB was not

given due notice or that opportunity, so the interference with her rights was not capable of being necessary within Article 8(2). Her rights were infringed and the court acted unlawfully in a way which was incompatible with her Convention Rights. This in substance is what the requested declarations seek and I would grant them.

26. Mr Fordham, TB's counsel, explains that the first draft declaration was framed with a view to a right to make oral representations; for that is what the person to whom the summons will be directed, if he seeks to be heard, is entitled to under the present rules. In the light of the present rules, that seems to me to be correct in the present case.

27. I would firmly reject the suggestion that it would have been sufficient for the interest of TB to be represented only by the NHS Trust. The confidence is hers, not theirs. Their interests are different. They have a wider public interest in patient confidentiality generally and may have particular interests relating to her care which could conflict with hers. Mr Lock submits that the Trust should be able to advance these wider public interest submissions against disclosure without having the role cast on it of acting also as an advocate for the patient's confidentiality. I agree. I agree also that the Trust should not be saddled with the heavy burden of making enquiries of the patient, finding reasons why he or she might object and putting those reasons before the court. Further, there may be material in the notes which the Trust can legitimately withhold from the patient under Section 7 of the Data Protection Act 1998 as modified by the Data Protection (Subject Access Modifications) (Health) Order 2000.

28. In my view, the burden of protecting TB's privacy should not be placed on the Trust. The burden resides with the court and she herself was entitled to notice and proper opportunity for representation.

Amendment to the Rules

29. I would cautiously confine my decision to the facts of the present case. It is evident that the Rule Committee is likely to amend Rule 28. It is presently consulting to that end. The court should not within a decision about a single case adopt the mantle of the Rule Committee. But it is evident that a number of quite difficult problems may arise. This is clear from the terms of the Committee's consultative draft rule and the Invitation to Comment which has accompanied it.

30. Potential difficulties include:

(a) Which persons or class of person with Article 8 rights in respect of documents should be given notice? It is evident from the present case that a child victim of alleged sexual abuse who is to be a prosecution witness should be given notice of an application for disclosure of her medical and psychiatric records. Does this extend to all medical records, including those of adults? I cannot at the moment see why not. And to education records and social services documents? And to tax documents in the hands of an accountant? And so forth.

(b) If a line is not clearly drawn by a rule, who should decide whether a person is to be

given notice. Such decisions should not, I think, be left to the applicant or to court officers. I think that the answer may have to be a judge.

(c) By what mechanism and at what time should the decision to give notice be made? Before the witness summons is served or later? If later, by what mechanism is the disclosure to be sufficiently delayed to enable the recipient to act upon the notice?

(d) Should the person with Article 8 rights be entitled to make oral representations? I have supposed that they would under the present rules, since the person to whom the summons is directed now has that opportunity.

31. The Rule Committee's consultative draft for Rule 28.3 is as follows:

> "(1) The court must not issue a witness summons or order that requires the production of a document or thing unless –
>
> (a) the proposed witness has had at least 7 days within which to make representations; and
>
> (b) the court is satisfied that it has been able to take adequate account of the rights (including rights of confidentiality) of any person to whom the document or thing relates –
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> (i) by means of representations by the proposed witness, or
>
> (ii) by any other means."

This does not require a person with Article 8 rights of privacy, such as TB in the present case, to be given notice – see also paragraph 24 of the Invitation to Comment. I do not think that this draft would have been adequate in this respect for the present case. It does not apparently give a right to make oral representations, thereby retreating from the existing rule. Mr Fordham submits that it should. I discuss this further below. Its first expectation is that the proposed witness can make the necessary representations – see also paragraph 28 of the Invitation to Comment. I do not think that this would have been adequate in this respect in the present case for reasons which I have given earlier in this judgment. As to oral representations, the consultative rule 28.6 gives the court the power to allow an application to be made orally. Thus apparently in the present case under these consultative rules, W could have asked for an oral hearing, but TB had no right to receive notice, let alone to ask for an oral hearing. This would, I think, be unacceptable inequality.

32. In *Z v Finland* (1997) 25 EHRR 371, X was discovered to be HIV positive and was charged on several counts of attempted manslaughter. On a question whether he had knowledge of his medical condition, Z, his wife, had invoked her right not to give evidence. Orders were issued obliging her medical advisors to give evidence and the police seized medical records concerning her and added them to the investigation file. She complained of violation of her Article 8 rights. The Commission in its opinion stated that the applicant's doctors, including her psychiatrist, were required to testify as to matters of the utmost sensitivity concerning the applicant's health and intimate private

life. The Commission, citing *W v United Kingdom*, stated that certain procedural requirements were implicit in Article 8 to the extent that a party or someone in a similar position must have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide requisite protection of his or her interests. The Commission concluded that there had been a violation of Article 8.

33. I have already quoted from paragraph 95 of the court's judgment within the quotation of *Campbell* in paragraph 17 above. The court said that the domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8. The court however held, in paragraph 101 of its judgment, that there had been no breach of Article 8. Although the applicant may not have had an opportunity to be heard directly by the competent authorities before they took the measures, they had been made aware of her views and interests. Her medical advisors had objected and actively sought to protect her interests. Her letter to a senior doctor urging him not to testify had been read out in court. Her lawyer had done all he could to draw the public prosecutor's attention to her objections. The procedure followed did not give rise to any breach of the Article.

34. In my view, *Z v Finland* was a decision on its facts, which cannot be used to support a general position either that a person whose Article 8 rights are in issue need not be notified; or that representations by medical advisors alone are sufficient; or that oral representation is unnecessary. It may indeed have been material in *Z v Finland*, that, under the Finnish Code of Judicial Procedure, whereas a doctor of medicine might not, without his or her patient's consent, give confidential medical information as a witness, the doctor could be ordered to do so in connection with a charge relating to an offence for which at least 6 years imprisonment was prescribed – see paragraph 46 of the judgment. It was a strong combination of factors, not present in TB's case, which contributed to the result. It is one thing to find that, in a combination of particular circumstances, there has been no breach of Article 8; quite another to frame rules on an assumption that those circumstances will always arise in combination in every case. I note that the Commission came to the opposite conclusion in *Z v Finland* upon an application of the same principles as those applied by the court. Its facts may perhaps be seen as borderline.

Conclusion

35. I end by reiterating that my decision is limited to the facts of this case. It would not be right to pre-empt the more general decisions that the Rule Committee may make. I am quite clear, however, that in the present case TB should have been given notice of the application and given the opportunity to make representations, orally if she had wished. It was not sufficient for the court to delegate her representation to the NHS Trust alone. In fact, her independent views were not received in any form before the order was made. There was an oral hearing, but she was not given the opportunity to attend it.

36. For these reasons, I would make the declarations asked for.

Mr Justice Forbes: I agree.