Neutral Citation Number: [2022] EWHC 1899 (Admin)

Case No: CO/4393/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 26/07/2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

THE QUEEN on the application of SARAH POLLOCK	**Claimant**
- and -	
CYSUR: MID AND WEST WALES SAFEGUARDING CHILDREN BOARD	**Defendant**
-and-	
PEMBROKESHIRE COUNTY COUNCIL	
Interested Party	

- -
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Mr Owain Rhys James (instructed by **Watkins & Gunn**) for the **claimant**
Ms Kate Hughes QC (instructed by **Carmarthenshire County Council**) for the **defendant**
Mr Christian Howells and Ms Laura Shepherd (instructed by **Pembrokeshire County Council) for the interested party**

Hearing dates: 7 July 2022
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Judgment Approved by the court

HHJ JARMAN QC :

1. The claimant seeks to challenge the decision of the local operational group of the defendant (CYSUR), dated 6 September 2021 and communicated on 6 October 2021, not to disclose to her the overview report (the report) of the serious case review (SCR) into the death in 2012 of a child who took her own life. That decision was communicated to her by the interested party (the Council), on the basis that it was required to treat the relevant records "as its own records". An anonymity order has been made in respect of the child, who is referred to in the papers as Child M. With respect to the memory of the child, I shall use the same reference.

2. There are 11 grounds of challenge, in all, ranging from unpublished or unlawful policy, inadequate reasons, irrationality, failure to apply guidance, and fettering of discretion, to breach of articles 2, 8 and 10 of the ECHR.

3. In its summary grounds of defence CYSUR states that the decision not to release the report was made by the Council having considered the recommendations from agencies who made up the previous Pembrokeshire Local Safeguarding Children Board and who currently sit on the Pembrokeshire Local Operational Group. It further states it does not have control of the report or any discretion to disclose it. The Council in its summary grounds of defence however states that the decision was made by a sub-group of CYSUR.

4. The claimant is thus faced with two public bodies each saying that the decision was made by the other, although her primary case is that the decision was made by CYSUR. Each of them also take the point that the challenge is

very substantially out of time. It is said that the decision under challenge is in reality a refusal to disclose the report dated 24 January 2014, and that the decision merely repeats that refusal, or alternatively that the grounds first arose in 2014.

5. The question of whether permission should be given to bring the challenge was considered on the papers in the usual way by His Honour Judge Ambrose sitting as a judge of the High Court. On 24 March 2022 he ordered that the issue of permission should be adjourned to a hearing on a rolled up basis, so that if permission were granted at that hearing, the court would proceed immediately to determine the substantive claim. In his observations, he stated that the order for a rolled-up hearing keeps open the issues as to date of decision and identity of decision-maker, and therefore whether the claim was brought within time and, if not, whether the court should grant an extension of time.

6. Although those issues are factual, to some extent at least, neither CYSUR nor the Council has filed any evidence, or disclosed documents. That is, until just before the rolled up hearing, when a document dated 6th September 2021 and headed "Pembrokeshire Local Operational Group (LOG) Head of Children's Services' Briefing Paper" (the briefing paper) was disclosed. The subject of the paper is the claimant's request for release of the report, and the author is David Mutter, the Council's head of children's services.

7. The briefing paper sets out the background to the death of Child M. It then goes on to set out the process and governance as follows:

> "The [report] was commissioned by Pembrokeshire Safeguarding Children's Board in accordance with the statutory framework and guidance at that time. Since then SCRs have been replaced by Child Practice Reviews (CPR). Local Safeguarding Children's Boards (LSCB) have been replaced by Regional Safeguarding Boards (CYSUR as the Mid and West Wales Safeguarding Board) with a Local Operational Group (LOG) set up as a sub-group within each local authority area to support MAWWSB in its core business.
>
> In the absence of any provisions for Regional Safeguarding Boards to attend to unfinished or further business of the now defunct Pembrokeshire LSCB, legal advice has suggested that the LOG should deal with any request for disclosure of information contained within an Overview and that the statutory framework and guidance applicable to the now defunct LSCBs should be the point of reference."

8. The briefing paper referred to the fact that children's services of the Council may be deemed to be the owner of the report, and then went onto to deal with the substance as follows:

> "This is not the first time such a request has been made by [the claimant]. This repeat request does not mean that we are absolved of a duty to consider the request in full and in light of the above considerations and indeed any new relevant considerations. Since Child M's passing it is certainly the case that we have moved into an era of increased transparency and this is referred to specifically in the current guidance on Child Practice Reviews. It is also the case that there has been no suggestion, regulation or legislation implemented by the Welsh Government to require publication or dissemination of SCR Overviews either to the public in general or to interested parties such as relatives of children. A call for transparency in my view therefore sits in the background *but not alongside* the factors that we must take into consideration in relation to this request for release of the Overview.
>
> Finally and just a reminder (as if you needed it) it is stated 'There are difficult interests to balance'. We are not required to rank them in order or weigh one in turn against each of the others: we are required instead to come to a decision *on balance* which I suggest means taking a holistic and reasoned approach to the decision that we need to make."

9. Mr James, for the claimant, submits that in the absence of any other disclosure the proper course for the court to take, whilst accepting that it may be an

unusual one, is to determine the following questions in order: who took the decision not to disclose; was the claim brought in time; should time be extended; and depending on the answers, should the claimant be allowed to amend her grounds.

10. He relies upon a decision of Andrews J, as she then was, in *R (Dalton) v CPS* [2020] EWHC 2013 (Admin), who said at [9]:

> "…this Court must be assiduous to avoid form taking precedence over substance in cases where this would inhibit its important function of holding public bodies to account for abuses of power or other serious public law errors affecting the rights of the citizen. However, that does not mean that the parties are free to disregard the rules of civil procedure that apply to public law claims."

11. He recognises that the determination of the questions as to timing set out above may be the end of the case, and submits that the court should give permission and make a substantive decision on those questions. If questions as to time are determined against the claimant, the claim will proceed no further. If they are determined in her favour, then depending on the identity of the correct defendant, the claimant may wish to amend her grounds and if so will apply to do so.

12. That is, as he recognises, an unusual course, and Ms Hughes QC for CYSUR and Mr Howells for the Council, expressed concerns about it. As I understood it, ultimately they had no objection to this course, but on the clear understanding that that should not be taken as an acceptance that any application made by the claimant would not be objected to. In light of the fact that neither public body has filed evidence, and late disclosure was made of

just one document, I am satisfied that that is the appropriate course to adopt on the particular facts of this case.

13. Mr James submits that the decision was a fresh decision, and that it did not have effect until it was communicated to the claimant. In *R (Anufrijeva v Secretary of State for the Home Department* [2003] UKHL 36, the House of Lords dealt with a refusal of an asylum claim. Lord Steyn gave the lead speech for the majority, and at [26,28] observed that it is a fundamental principle of the common law that notice of a decision is required before it can have the character of a determination with legal effect, because the citizen should be able to challenge the decision in the courts. Although he recognised at [21] that the issue was a rather technical issue, he said that the judgment "may have a more general bearing on the development of our public law."

14. Mr James submits that the decision is that of the 6 October 2021, and that the claim is brought promptly and in time.

15. It is common ground that the relevant statutory scheme in 2012 included sections 31 to 34 of the Children Act 2004 and the Local Safeguarding Children Boards (Wales) Regulations 2006. Those regulations were supplemented by the guidance published by the Welsh Government entitled "Safeguarding Children: Working Together under the Children Act 2004." That guidance dealt with the exercise of discretion when determining additional disclosure, and referred to the confidentiality of such reports.

16. Those regulations were revoked as from 1 January 2013 when the Local Safeguarding Children Boards (Wales) (Amendment) Regulations 2012 came into force. However, it is clear from the briefing paper that the subject request

was considered with the statutory framework and guidance in force at the time the report was compiled as the point of reference.

17. Regulation 4 of the 2006 regulations obliged boards to undertake a review, called a serious case review, when abuse or neglect of a child is known or suspected and a child has died. The purpose of such a review was stated to be the identification of steps that might be taken to prevent a similar death or harm occurring and to produce a written report. By paragraph 4(4)(c) boards had to produce an anonymised summary of such reports and make it available for inspection, and by paragraph 4(6) had to provide a copy of the summary to each representative body and, unless the board considers it inappropriate, a copy of the report.

18. That regulation was revoked by the 2012 regulations, and instead of serious case reviews, boards then had to produce in such circumstances a child practice review, the purpose of which was to identify any steps to achieve improvements in multi-agency child protection. Regulation 4A(l) provided, in contrast to the 2006 regulations, that the child practice review report must be made publicly available.

19. Regulation 7(2) of the 2006 regulations clarifies that the records of a board are to be treated as records of the children's services authority, and even though such boards no longer exist, the approach taken means that the report is so treated. Ms Hughes submits that the impact of CYSUR having powers of disclosure are far reaching but accepts that that may not be a relevant consideration for present purposes.

20. Mr Howells submits that the real substance of this challenge is that the report was not provided under the 2006 regulations when first requested in 2014 and repeated requests have been made for its disclosure but nothing has changed. He relies on *R v Secretary of State for Trade and Industry Ex p Greenpeace Limited* [1998] Env LR 415, in which Laws J, as he then was, at page 424, said that a claimant must move against the substantive act or decision which is the real basis of his complaint and cannot wait until something consequential and dependant upon it takes place. He also refers to *R (Badmus) v Secretary of State for the Home Department* [2020] EWCA Civ 657, where in the judgment of the Court of Appeal at [82] after a review of the authorities, this was said:

> "Importantly, they all show a consistent pattern over decades in which it has been assumed that the grounds to make a claim for judicial review first arise, not when there was a conscious decision to apply a particular measure to the claimant in question, but rather when the claimant first became affected by the measure and so acquired standing to make the claim."

21. Mr James, in response, submits that even though the report may be treated as a record of children's services, that does not mean that ownership or control of its disclosure is solely vested in the Council. He accepts that there is no statutory power to disclose, and that the guidance refers to disclosure being a matter of discretion, but the subject matter of the report and its confidential nature are important factors in the exercise of discretion. It is clear from the briefing paper that the decision was considered afresh. Although the framework within which the decision was made was that applicable in 2014, that the framework is not determinative of the exercise of discretion.

22. I shall deal with the four questions posed as set out above in turn. On the limited documentation before me, in my judgment, it was CYSUR who made

the decision. Although the local safeguarding children's boards were by then defunct, it is clear from the briefing paper that in the absence of any provision for CYSUR to attend to further business, legal advice suggested that it was CYSUR's subgroup which should make a decision on the claimant's request. It is also clear from the briefing paper that this was recognised and accepted by the subgroup in saying that "we are required…to come to a decision" and in suggesting the approach to the "decision that we need to make."

23. The next question is when the decision challenged was made. It would have been a very simple matter for CYSUR and/or the Council to refuse to deal with the request on the basis that previous requests had been made, albeit some by way of freedom of information requests, and had been refused. However, it is clear from the briefing paper that that is not what CYSUR decided to do. It is clear that such previous requests were recognised, but that it was considered that that did not absolve CYSUR of a duty to consider the request in full in light of any new relevant considerations. Moreover, it is also clear that it was considered that there were such considerations, which were then spelt out. That is, that there is now an era of increased transparency, which is referred to in the current guidance on child practice reviews.

24. In my judgment, this was a fresh decision. The issues considered in *Greenpeace* and *Badmus* were somewhat different, namely that a claimant cannot wait to challenge a decision until something consequential happens and that grounds of challenge for a decision first arise a claimant is first affected by it. These principles apply to the decision in the present case, but, as I have found, to the decision as a fresh decision. In my judgment the grounds first

arose when the decision was communicated on 6 October 2021 and the claim is made promptly and in time.

25. In case I am wrong about that, I shall deal with the application to extend time. In *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5I, guidance was given as to the factors to be weighed up in the exercise of discretion. These include the importance of the issues, the prospect of success, the presence of prejudice or detriment to good administration, and the public interest.

26. Mr Howells submits that there are no issues of public interest, but I do not accept that. In my judgment the death of a child and whether lessons can be learnt are matters of public interest. He also submits that the prospects of success are poor. I accept that in the absence of further documents or evidence as to the reasons why the decision was made, only a limited view can be taken as to these. Nevertheless, the reliance on confidentiality when a child has died and when it is acknowledged that there is a new era of transparency gives arguable grounds. In my judgment these are important issues.

27. Furthermore, there is little if any prejudice to good administration. Although the board dealing with the original request is now defunct, and the statutory framework has now changed, on the facts of this particular case, CYSUR took the view that in the new era of transparency the disclosure should be reconsidered and was able to do so. I am not persuaded that this would open the floodgates to claims relating to the refusal of disclosing reports under the previous framework. On the particular facts of this case, repeated requests

were made from time to time and CYSUR choose to consider the present request in full.

28. I would exercise my discretion for time to be extended. I recognise that this may be seen as an exceptional course. Nevertheless, given the importance of the issue of disclosure of the report, and the recognition by CYSUR and the current guidance of the new era of transparency, in my judgment the matter should proceed to a full review by the court.

29. It follows from the above that I grant permission to bring the claim. Although some of the grounds appear weaker than others, I do not consider it appropriate to limit permission to particular grounds. However, consideration should be given to a more focused approach at the substantive hearing.

30. I decide the substantive issues on whose decision it was and as to timing as set out above. Further directions should take into account the claimant's decision on whether to apply for permission to amend the grounds for challenge and the outcome of any such applications. I direct that within 14 days of hand down of this judgment the parties should file proposed directions, agreed if possible. If these can be agreed, or substantially agreed, then the directions can be decided on the papers. Otherwise directions and any application can be decided at a further hearing, which so far as I am concerned may be by CVP. It would be helpful if the parties when filing their proposed directions could indicate if that is agreed and as to the time estimate of the further hearing.

31. I am grateful to all counsel for their helpful and focussed submissions.