



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

Secretary, Department of Family and Community Services v Smith
[2017] NSWCA 206

Macfarlan JA, Gleeson JA, Payne JA

The Court of Appeal has refused an application for leave to appeal brought by the Secretary, Department of Family and Community Services (the Secretary) against Allana Smith and a group described as Walking Warriors 4 Missing Children (the respondents). Brereton J had earlier made an order dismissing proceedings in which the Secretary sought to prevent the respondents from publishing information conveying that the child the subject of this proceeding was placed in foster care; was under the parental responsibility of the Minister for Family and Community Services (the Minister); and/or is a ward of the State; and requiring certain posts to be removed from the Walking Warriors 4 Missing Children Facebook page.

The child is identified in the proceeding by the pseudonym “Julian”. Julian and his sister (identified by the pseudonym “Sarah”) are both children in the care of the Minister. They were both placed with the same carers. Julian disappeared on 12 September 2014 and has not been seen since. A police investigation into Julian’s disappearance continues. There was, and continues to be, widespread publicity regarding Julian’s disappearance. However, the fact that Julian was in the Minister’s parental responsibility and placed with foster carers at the time of his disappearance is not widely known to the public. Coverage of his disappearance has generally, and inaccurately, referred to Julian’s carers as his parents.

Ms Smith wishes to promote a coronial inquest into Julian’s disappearance. She and the members of the group Walking Warriors 4 Missing Children wish to circulate a petition and other online statements including information to the effect that Julian was in foster care and a State ward at the time of his disappearance.

The primary judge found that the Court had power to make the orders sought by the Secretary in the exercise of the protective aspect of the court’s inherent parental jurisdiction. In the exercise of that jurisdiction, the child’s welfare is relevant but not paramount, and must be balanced against the competing rights and interests of others, including the public. Before the primary judge, the Secretary accepted that the court was engaged in such a balancing exercise.

The primary judge found that the proposed publications would deprive Julian of the ability to control who knew of his in care status, and could expose him to stigma.

However, the primary judge also found that: (1) The adverse effect on Julian’s welfare was diminished by (a) the tragic probability that he is dead; (b) if he is alive, the fact that Julian will face enormous challenges that substantially outweigh the stigma occasioned by publication; and (c) Julian’s status is already in the public domain to the extent that it is

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discoverable on the internet; (2) The effect on Julian's carers was only relevant to the extent that it may have implications for Julian or Sarah, and the effect on Sarah's welfare, while relevant, was insufficient by itself to justify the injunction sought by the Secretary; (3) The proposed publications would have a neutral impact on the police investigation and the prospects of Julian being found. (4) There was a substantial public interest in accountability and scrutiny of the out-of-home care system and the relevant public officials and agencies, as well as in accurate reporting of the circumstances of Julian's disappearance; (5) Ms Smith had a right of free expression in connection with that public interest.

The primary judge concluded that the balance of these interests favoured allowing the proposed publications and refused to grant the injunction.

The primary judge also rejected the Secretary's alternative argument that the proposed publication would involve the commission of an offence within the meaning of *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 105, which prohibits the publication of the name of a child or young person who is the subject of Children's Court proceedings; or is likely to appear or otherwise be mentioned or involved in such proceedings, or in any non-court proceedings; or to be the subject of a report under certain provisions of that Act. The primary judge held that s 105 does not prohibit disclosure of the mere fact that a child is in care without mentioning such a report or such proceedings.

The Secretary sought leave to appeal.

The application raised three main issues:

- (1) Whether the primary judge should have approached the matter on the basis that Julian's best interests were paramount;
- (2) Whether the primary judge should have found that the proposed publications would involve the commission of an offence within the meaning of *Care and Protection Act*, s 105;
- (3) Whether the primary judge's discretionary decision to refuse the injunction miscarried.

On issue (1), the Court held that the Secretary should not be permitted to raise a new argument on appeal that the child's interests were paramount, in circumstances where the Secretary had conceded before the primary judge that the court was engaged in a balancing exercise.

On issue (2), the Court held that the primary judge's construction of *Care and Protection Act*, s 105 as applied to the facts of this case was not arguably wrong.

On issue (3), the Court held that the findings made by his Honour concerning the other relevant interests were open to him, and his Honour's exercise of discretion was not arguably wrong.

Leave to appeal was refused.