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The anonymous expert

Should expert witnesses always be named, asks Chris Pamplin

The tenets of open justice dictate that witnesses in court should give their evidence in the full glare of judicial and public scrutiny. In normal circumstances, this includes the naming and identifying of individual witnesses, and the risk of media attention in high-profile cases. There are, of course, some circumstances in which such publicity is undesirable. In such cases, the court has the power to make anonymity orders in respect of parties or witnesses, or else impose reporting restrictions on proceedings.

While the court will necessarily be circumspect in making such orders, they are by no means uncommon, eg cases involving the identity of minors, or security service personnel.

Against this, the court must balance the need for openness and transparency, freedom of speech and freedom of the press, as well as the requirements of the Human Rights Act 1998 (HRA 1998).

Experts as a class of witnesses would appear to present the court with a particular difficulty given the nature of the expert's duty to the court, the desirability of peer review of their opinion and the weight that might be given to their particular reputation and professional standing. All of these might be compromised if they were permitted to give their evidence anonymously. One might conclude, therefore, that there are no circumstances in which the court would make an anonymity order in respect of an expert witness. This, however, is not the case, and there has been at least one recent example of the court granting such an order

In *R on the application of AB v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin), [2013] All ER (D) 94 (Nov), Mr Justice Mostyn was called upon to review the decision of the lower court to grant an anonymity order that applied not only to the claimant but also to his expert witness and the country in which activities the subject of proceedings had taken place. Unusually, the order had been sought by both the claimant and the defendant, and this set alarm bells ringing immediately in the mind of the judge. As Lord Woolf reminded us in *R v Legal Aid Board ex p Kaim Todner* [1999] *QB* 966, [1998] 3 All ER 541: "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant."

The case involved an asylum seeker who had been detained in the UK pending consideration of his claim. While in detention, he had kept records and documents, some of which are said to relate to his alleged membership of a certain foreign organisation. The claimant's asylum claim failed and he was deported. The claimant's case was that the secretary of state caused confidential documents to be placed in his baggage prior to his removal. These related to his failed asylum claim and his participation in the activities of the organisation. It was alleged that, upon his arrival, the documents had come to the attention of government agents of the country to which he had been deported. He was detained and brutally tortured. The following day, by virtue of a bribe paid by his aunt to a colonel in the army, he was released and had gone into hiding. He had, however, been able to participate in the proceedings by video link from a United Nations building with the help of the British Embassy.

Expert evidence fell into two categories

First, there was medical evidence given by a specialist in accident and emergency medicine who had opined on the probable causes of the claimant's injuries from photographs provided. The secretary of state had also called evidence from a dermatologist in the foreign capital, who had given his evidence in French by video.

Second, there was non-medical expert evidence from a specialist who gave his opinion on the fate that might befall someone identified as a member of the organisation in the country in question, and whether it was reasonable that the secretary of state should have been aware of this.

There was no application to protect the identities of the medical experts, but both parties had agreed that there should be an application for a wide-ranging reporting restriction order seeking wholesale anonymisation. This would prevent the identification of not only the claimant, but also his non-medical expert witness, as well as the country to which the claimant was deported, any holders of public office there, and any political parties (particularly the opposition organisation of which the claimant claimed he was a member). This had been granted by the lower court, together with an order preventing any skeleton arguments being made available to anyone other than a party to the proceedings.

Mr Justice Mostyn confessed to being distinctly uneasy. He was mindful that any reporting restriction ordered, by definition, involves an encroachment on the freedom of expression of any journalist who wants to report the matter fully. In such circumstances, s 12 of HRA 1998 applied directly. He reluctantly agreed, however, to allow the anonymity order in respect of both the claimant and the expert, having regard to the danger that might result from their identification. However, he made it abundantly clear that if, on reading this judgment, the press wished to apply for the order to be revoked, then he would hear such an application, if necessary on short notice, at which the reporting restrictions would have to be justified anew and from first principles.

Conclusion

Notwithstanding the very unusual features of the case, it does provide authority to suggest that the court can permit expert evidence to be given anonymously if there are questions of witness safety or other compelling reasons. NLJ

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