

Appendix 10

Withdrawal of Counsel: A Note on the Provisions of the Code of Conduct of the Bar of England and Wales

Background

10.1 The aim of this note is to consider the Code of Conduct of the Bar with reference to the circumstances in which counsel can withdraw from a case that is in progress, in the light of the decision of the European Court of Human Rights in the case of *Re P, C and S v United Kingdom* [2002] 2 FLR 631, a case in which Wall J refused a substantial adjournment of a complex care case listed for 20 days when, on the fourth day, leading and junior counsel for the mother withdrew from the case on the basis that the mother was requiring them to conduct the case unreasonably.

10.2 The European Court of Human Rights held that the lack of legal representation of P (the mother) during the care proceedings and of P and C (the father) during the freeing for adoption proceedings, together with the lack of any real time lapse between the two procedures, deprived the mother and father of a fair and effective hearing in court in breach of rights under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Having regard to the seriousness of what was at stake, the Court also found that it prevented them from being involved in the decision making process seen as a whole to a degree sufficient to provide them with the requisite protection of their interests under Article 8 of the Convention.

10.3 The Court found that:

‘The complexity of the case, along with the importance of what was at stake and the highly emotive subject matter lead the Court to conclude that the principles of effective access to court and fairness required that P receive the assistance of a lawyer.’ (para 95)

Furthermore the Court expressed the following view:

‘Nor is the Court convinced that the importance of proceeding with expedition, which attaches generally to childcare cases, necessitated the draconian action of proceeding to a full and complex hearing, followed within one week by the freeing for adoption application, both without legal assistance being provided to the applicants.’ (para 98)

The Code of Conduct of the Bar

10.4 The Code of Conduct of the Bar governs the circumstances in which counsel may withdraw from a case. Below are set out the relevant parts of the Code in the order in which it may be helpful to read them. Those parts of the Code which are likely to be relevant to the type of case with which Wall J. was dealing (the final hearing of care proceedings) are in bold.

To help the reader decipher the Code, the starting point is **Paragraph 610** which provides as follows:

‘610. A barrister must not:

- (a) cease to act or return instructions without having first explained to the client his reasons for doing so;
- (b) return instructions to another barrister without the consent of the client;
- (c) return a brief which he has accepted and for which a fixed date has been obtained or (except with the consent of the lay client and where appropriate the Court) break any other engagement to supply legal services in the course of his practice so as to enable him to attend or fulfil an engagement (including a social or non-professional engagement) of any other kind;
- (d) **except as provided in paragraph 608 return any instructions or withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.’**

10.5 Paragraph 608 of the Code provides that:

‘608. A barrister must cease to act and if he is a barrister in independent practice must return any instructions:

- (a) if continuing to act would cause him to be professionally embarrassed within the meaning of paragraph 603 provided that if he would be professionally embarrassed only because it appears to him that he is likely to be a witness on a material question of fact he may retire or withdraw only if he can do so without jeopardising the client’s interests;
- (b) **if having accepted instructions on behalf of more than one client there is or appears to be:**
 - (i) **a conflict or risk of conflict between the interests of any one or more of such clients; or**
 - (ii) **risk of a breach of confidence;**

and the clients do not all consent to him continuing to act;¹

¹ This did not arise in the case of *Re P, C and S v United Kingdom* but might arise in a care case where, for example, both parents are represented by the same counsel.

- (c) if in any case funded by the Legal Services Commission as part of the Community Legal Service or Criminal Defence Service it has become apparent to him that such funding has been wrongly obtained by false or inaccurate information and action to remedy the situation is not immediately taken by the client;
- (d) **if the client refuses to authorise him to make some disclosure to the Court which his duty to the Court requires him to make;**
- (e) **if having become aware during the course of a case of the existence of a document which should have been but has not been disclosed on discovery the client fails forthwith to disclose it;**
- (f) if having come into possession of a document belonging to another party by some means other than the normal and proper channels and having read it before he realises that it ought to have been returned unread to the person entitled to possession of it he would thereby be embarrassed in the discharge of his duties by his knowledge of the contents of the document provided that he may retire or withdraw only if he can do so without jeopardising the client's interests.'

10.6 The definition of being 'professionally embarrassed' is set out in **paragraph 603** which provides:

'603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose **a barrister will be professionally embarrassed:**

- (a) if he lacks sufficient experience or competence to handle the matter;
- (b) if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do;
- (c) **if the instructions seek to limit the ordinary authority or discretion of a barrister in the conduct of proceedings in Court or to require a barrister to act otherwise than in conformity with law or with the provisions of this Code;²**
- (d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced;

² As was the case in *Re P, C and S v United Kingdom*.

- (e) **if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions);³**
- (f) if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent;
- (g) if he is a barrister in independent practice where the instructions are delivered by a solicitor or firm of solicitors in respect of whom a Withdrawal of Credit Direction has been issued by the Chairman of the Bar pursuant to the Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988 as amended and in force from time to time (reproduced in Annex G1) unless his fees are to be paid directly by the Legal Services Commission or the instructions are accompanied by payment of an agreed fee or the barrister agrees in advance to accept no fee for such work or has obtained the consent of the Chairman of the Bar.⁷

10.7 There is one further point. The court is unlikely to get a full picture of the professional problems which have compelled counsel to take the unusual course of withdrawing during the currency of a case because counsel is likely to be bound by professional privilege.

Public Funding

10.8 Whilst public funding in care proceedings is granted to parents (and others with parental responsibility) without regard to merit, the Legal Services Commission reserves its right to withdraw funding where a client is requiring proceedings to be conducted unreasonably⁴. When, as in the case of *Re P, C and S v United Kingdom*, counsel withdraws and the solicitor also wishes to do so because the client is requiring proceedings to be conducted unreasonably, the solicitor must inform the Legal Services Commission. The Commission then serves a notice on the client to show cause why the public funding certificate should not be discharged. After the notice is served, no further work may be done or steps taken under that public funding certificate unless authorised by the Regional Director⁵. Following any response to the notice by the client, the Commission makes the decision as to whether or not the Certificate should be discharged. If it is discharged, the client then has a further 14 days to apply to the Commission for review of that decision⁶. It can be seen from this brief summary that these procedures in themselves create delay.

³ This is the same point as in footnote 1.

⁴ The Legal Services Commission Manual 3C - 136 para 1 (a)

⁵ The Legal Services Commission Manual 3B - 083

⁶ The Legal Services Commission Manual 3B - 085

Appointment of counsel by the Court

10.9 The question of the possibility of the appointment of a barrister by the court, it would seem, has two aspects, one being the possibility of the court appointing counsel to act for the parent and the other being the appointment of an advocate to the court (what used to be described as *amicus curiae*). There are a number of problems with either course.

Invitation by the court to counsel to act for a parent

- i) There is no mechanism by which counsel who was invited by the court to act for a parent could be paid. Public funding for a parent is only available through the Legal Services Commission. Counsel would therefore be being asked to take on an extremely complex case *pro bono*, which he/she is entitled to refuse to do under the Code of Conduct.⁷
- ii) In a case of the complexity of the instant one, it is extremely unlikely that the barrister would be able to work without a solicitor⁸. Once again there is no mechanism by which the solicitor can be paid. Public funding for the solicitor like the barrister is only available through the Legal Service Commission.
- iii) It is extremely difficult on a practical level to envisage how the court might go about such a task. Whom would the court invite to act? Would such an invitation not potentially appear to be invidious?
- iv) There must be a question as to whether counsel appointed in such circumstances (if anyone could be found to work on such a complex case *pro bono*) might encounter the same professional difficulties as counsel who had withdrawn.
- v) Appointment of new counsel in such a complex case would, in itself, cause delay whilst new counsel prepared the case.

The appointment of an advocate to the court

- i) The court might consider the appointment of an advocate to the court, for example the Official Solicitor. Such a course would overcome difficulties of funding, and of the problem of counsel appearing without instructions from a solicitor.
- ii) However, it may well not meet the gravamen of the problem identified of *Re P, C and S v United Kingdom*. The advocate so appointed would be the advocate to the court, not the representative of the parents.

⁷ Under paragraph 604 (b) of the Code a barrister in independent practice is not required to accept instructions other than at a fee which is proper having regard to the complexity, length and difficulty of the case, his ability, experience and seniority, and the expenses which he will incur.

⁸ Under paragraph 401 (a) of the Code, a barrister in independent practice may supply professional services if appointed by the Court. Such a barrister cannot, of course, conduct litigation or investigate or collect evidence for use in court (paragraph 401 (ii) and (iii)).

- iii) In a situation in which a parent was unrepresentable, there might be merit in giving consideration to this possibility. It would clearly not be the same as appointing a representative for the parent, and therefore could only go some way to meeting the problem. It would have to be considered on a case by case basis.
- iv) In reality, the appointment of an advocate to the court would also be likely to result in delay whilst the complexities of the case were mastered.

Conclusion

10.10 It is to be hoped that the difficulties of the kind experienced in the case of *Re P, C and S v United Kingdom* do not often recur. However, in the light of that decision, if similar circumstances arise, it would seem that the court must err on the side of caution in permitting the opportunity of alternative representation. It may, for example, be necessary to adjourn whilst the Legal Services Commission determine whether or not public funding will be withdrawn. Such cases will require vigorous case management. In an exceptional case, the court may want to explore the possibility of the appointment of the Official Solicitor as advocate to the court.