

Covert Recordings

a practical summary of the law and practice concerning covert recordings within private law proceedings

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Recording court hearings.

- Prohibited
- His Majesty's Solicitor General v Jason-Steven: Wong [2023] EHC 2966 – 4 months prison sentence:

The findings of contempt are fully described in my earlier judgment. It will be noted that I rejected the Defendant's case that the hearing on 18 February 2022 was in a 'sham' court. I found the Applicant's case proved (see §1 and §63-67 of my earlier judgment). I repeat two important paragraphs from my conclusions:

[70] There is, arguably, no category of case within the wide range of our diverse jurisdictions (i.e., both within and outwith the family jurisdiction) which is more sensitive or private than those concerning the adoption of a young child. As I have earlier said, almost all hearings in the Family Court involving children are heard in private; the privacy law is designed for "the protection of the interests of the minor in question, not the adjudication without interference of the issues arising for decision" (see Pelling (citation above) at [40]). As Laws LJ further observed in Pelling at [43]: "... it is an affront to justice that a judgment or proceeding should be publicised which, in the interests of the child, the court has advisedly determined should be kept private". This principle is enshrined in both primary and secondary legislation.

What is a covert recording?

- *"Any recording made without express knowledge and permission of the people being recorded whether by video or audio"*
- There are 3 types:
 - Professionals
 - Children
 - Family members

Is there any guidance?

- Yes. FJC.

https://www.nagalro.com/_userfiles/pages/files/covert_recording_guidance_for_consultation_final_91122.pdf

Is it lawful?

- Recording by public bodies addressed briefly within FJC guidance, will not address here.
- Article 8 and recording family members – is it lawful?
- is GDPR relevant?
- M v F (covert recording of children) [2016] EWFC 29 (16 May 2016) [paragraph 26]

“I have not heard further argument about this, and it is unnecessary to determine whether the father's actions were illegal. That said, I believe that there may be good arguments for saying that the covert recording of individuals, and particularly children, for the purpose of evidence-gathering in family proceedings would not benefit from the domestic purposes exemption. Uneducated, I would assume that the exemption is intended to protect normal domestic use, which this is not”

Is it lawful?

- Criminal offence?
 - Coercive and controlling behaviour?
- Non-molestation

Why do individuals undertake covert recordings?

- Examples of reasons:
 - Lack of trust
 - Professionals
 - Another parent
 - Evidence gathering
 - Adducing material gathered pre-proceedings
 - Evidence gathering within proceedings
 - To prove/disprove allegations made by another party
 - To dispute the accounts/conclusions of professionals

Recording professionals

- Can a parent record a professional?
- "We should have nothing to fear from covert recording. Our attitude should be, 'I am doing my job and I have nothing to hide. I can explain why I said what I said or why I did what I did'. This is within the spirit of transparency in the family courts. We should always be transparent in our work, to meet contemporary expectations, including being able to defend whatever we say or write in a court under cross-examination, because we are working to a professional standard on behalf of a child. In this sense, we should expect that everything we say or write could become public knowledge"

Cafcass

Recording professionals

- Re B (A child) [2017] EWCA Civ 1579 para 12:
- *"It needs to be accepted, with honesty and candour, that there have been in recent years in the family courts shocking examples of professional malpractice which have been established only because of the covert recording of the relevant individual"*
- Re F (care proceedings: failures of expert) [2016] EWHC 2159
- Medway Council v A & Ors (Learning disability; Foster Placement) [2015] EWFC B66 (2 June 2015)
- British Psychological Society gave guidance – covert recordings is inappropriate and could affect validity of an assessment

Recording professionals

- What to advise

Recordings by parents of each other

- Why do they do it?

Recordings by parents of each other

- The fact of recordings, is relevant to welfare (and also relevant to court's assessment of the parents relationship): **HKS v HSM [2021] EWHC 3423 (Fam):**
 - Carried out over several months
 - 681 hours recordings
 - 'substantial invasion of mother's privacy, unsurprisingly causing her anxiety and distress'
 - *the court had dismissed the father's case that he had conducted surveillance because he was concerned about the mother's mental health and/or that he believed the mother to be plotting against him to deprive him of a relationship with the child .. 'that immediately begged the question of his true motivation'*
 - These recordings 'highly relevant to the welfare determination' and needed to be considered by trial judge

Covert recording of children

- FJC: profound consequences for the welfare of any child subjected by a parent to such a degree of invasion of privacy and breach of trust.
- Re M and F (covert Recording of Children) [2016] EWFC 29 (16 May 2016)
- Will recording children help the case?

What to do?

- Is inside/outside proceedings?
 - Outside proceedings: may be appropriate to listen. Advice should be given to potential implications before listening. Are there ethical considerations?
 - Inside proceedings: Case management.
- Cafcass – advice is not to listen to recordings until the court has addressed the issue.

Application of FPR

- Overriding objective
 - Proportionality
- Generally considered hearsay. Can a parent, for example, challenge the admissibility on grounds that it is hearsay?
- **Re B (A Child: Covert Recording) [2017] EWCA Civ 1579**

- FPR r 22.1: the court may control the evidence by giving directions as to (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court
- FPR r 22.1(2) court can exclude evidence that would otherwise be admissible.
- FPR r.22.1(3) the court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the procedural requirements

- *Re M (case management: intimate images [2022] EHC 986 (Fam) (29 April 2022)*
- There is a need to consider the emotional and psychological harm which may be caused to the parties, and particularly to an alleged victim of abuse, but the indiscriminate use of covert material involving intimate images and the importance of robust case management

What else do we need to consider if a recording is made of a child?

- If recording of child – does it amount to assessment as per section 13(3) of the Children and Families Act 2014?
- If so inadmissible until such time a court rules it is admissible s13(4)
- Irrespective of s13(3) – the key issue is the extent to which this hearsay evidence should be admitted or excluded.

Case management

- How was the recording made?
- What were the circumstances of the recording?
 - *Who made the recording? Client? Someone else?*
- Are they relevant?
 - *Substance of allegations*
 - *Parties' conduct generally*
- Are they authentic?
- Have they been edited?
- Is the original available?
- Is disclosure of all recordings necessary?
- Could other evidence be adduced to prove the same facts?
- Welfare of parties and child being subject to recordings
- Costs of any application?
- Is a further hearing necessary?
- Admissibility as it relates to the manner in which the recording was obtained?
- **Imerman v Tchenguiz & others [2011] 1 All ER 555**
- Does a Guardian need to be appointed?
- Should the child be told about the recording?
- Is the child required to give evidence to evaluate the weight?

What weight should be attached to a recording?

- Some things to consider:
 - Does the recording involve multiple hearsay?
 - What was the recorder's motive?
 - Did the recorder try to conceal or misrepresent matters?
 - Is there video and audio?
 - Was the original recording edited?

Possible consequences

- Increased costs
- Civil action – possible unlawful activity under Data Protection Act 2018
- Risk of injunctive proceedings – ***Re C (A child) [2015] EWCA Civ 1096***
- Breach of trust between parents
- Impact on relationship with child

Views of young people

- What did young people say?

Questions?

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