CASE No: LE13PO1029

Neutral Citation Number: [2015] EWFC 1

IN THE FAMILY COURT SITTING AT LEICESTER

Before

His Honour Judge Clifford Bellamy

sitting as a Deputy High Court Judge

(judgment handed down on 5th January 2015)

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Re K and H (Children: unrepresented father: cross-examination of child)

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Miss Katie Miller (instructed by LDJ Solicitors) on behalf of the mother

Miss Philippa Whipple QC (instructed by the Treasury Solicitor) on behalf of the Lord Chancellor

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JUDGMENTJUDGE BELLAMY:

1. These proceedings relate to two children, K, a girl aged 5, and H, a boy aged 4. Their parents are SD ('the mother') and JT ('the father'). In July 2013 the mother's older daughter, Y, made a disclosure to her teacher that she had been sexually abused by the father. The father denies that allegation. Before the court can consider the father's future contact with K and H it is important to establish whether Y's allegation is true.

A finding of fact hearing is listed to begin on 14th January at which Y will give oral evidence. Whereas the mother is legally aided, the father is a litigant in person. His status as a litigant in person raises two important questions. Firstly, who should cross-examine Y? Secondly, and more specifically, does the court have the power to order Her Majesty's Courts and Tribunals Service ('HMCTS') to pay for legal representation for the father limited to cross-examination of Y? This judgment addresses each of those issues.

2. On 10th December I gave leave to the Lord Chancellor to intervene. Miss Philippa Whipple QC appears on behalf of the Lord Chancellor. Miss Katie Miller appears on behalf of the mother. I have heard full argument on the relevant issues. I am grateful to both counsel for the assistance they have provided.

Background

3. The parents were in a relationship together for around five years. The relationship broke down in the summer of 2013.
4. The mother has two older daughters from a previous relationship, Y, now aged 17, and S, now aged 14. In July 2013, following her disclosure of abuse, Y was interviewed by the police in accordance with the guidance set out in *Achieving Best Evidence*. In her video-recorded interview Y spoke of occasions when the father had touched her breasts and her buttocks.
5. The father was arrested and interviewed. He denied the allegations. In August 2013 the police decided not to take any action against him.
6. On 12th September 2013, the mother issued an application for residence orders in respect of K and H. That same day, on a without notice basis, the court granted a prohibited steps order prohibiting the father from removing K and H from the care of the mother.
7. On 15th October 2013 case management directions were given by a circuit judge. In the interim, residence orders were granted to the mother together with an order permitting the father to have contact with the children at a contact centre. Those interim orders remain in force.

8. On 18th July 2014 further case management directions were given by a Recorder. Concern about two of the Recorder's directions prompted staff to refer the file to me. It is unnecessary for me to set out those concerns. It is sufficient to record that I have been responsible for the case management of this case since August 2014.

9. These proceedings have been ongoing for fifteen months. It is unnecessary for me to set out the litigation history. However, it is appropriate that I should acknowledge that the delay has been excessive and without obvious justification. Though not a subject child, the delay has been and continues to be unsettling for Y as she prepares to take her A-level examinations this summer.

Oral evidence from Y

10. The father's position has been that the court should require Y to give oral evidence at the finding of fact hearing to enable her account to be challenged. Guidance on the approach to the determination of that issue is to be found in *Re W (Children)(Abuse: Oral Evidence)[2010] UKSC 12*. To assist me to come to a decision I directed Cafcass to meet with Y and prepare a short report. This piece of work was undertaken by an experienced Cafcass officer, Jo Swaby. In her report, dated 1st September, Ms Swaby said that,

> 'Y does not want to give oral evidence at the finding of fact hearing…However, she is competent and able to give oral evidence if this is felt necessary. She has no special needs or learning difficulty and no discernable mental health issues… She declined the use of screens or video link if she is required to give evidence and would prefer to face the father in open court…She would struggle if she were to be cross examined by the father and would be anxious at the prospect of this…there is no compelling reason for why she should not give oral testimony…I recommend that the Court appoints an intermediary to cross examine Y if she is required to give oral evidence, as it will be extremely abusive for the father to do this and may cause Y emotional harm.'

I concluded that Y should give oral evidence at the finding of fact hearing.

Should the father be allowed to cross-examine Y?

11. In December 2011 the Family Justice Council published *Guidelines in relation to children giving evidence in family proceedings*. Those guidelines are the end result of the deliberations of a working party set up by the Family Justice Council as a result of a referral from the Court of Appeal in *Re W [2010] EWCA Civ 57*. The *Guidelines*

give detailed guidance on the pre-hearing preparation required when a decision has been made that a child should give evidence in court together with equally detailed guidance on the approach which should be followed in court in order to improve the quality of the child's evidence and minimise the risk of harm to the child.

12. It is unnecessary to refer to the guidelines extensively. However, two passages are of particular importance in the context of the issues I now have to determine: The guidelines state that,

> '17. A child should never be questioned directly by a litigant in person who is an alleged perpetrator…
> 21. All advocates have a responsibility to manage the questioning of a child witness fairly. However the ultimate responsibility for ensuring that the child gives the best possible evidence in order to inform the court's decision rests with the tribunal...'

13. Paragraph 17 appears to assume that the court has the power to forbid a party who wishes to conduct his own case from examining or cross-examining a witness. Whether the court has that power is an open question. It is a question which does not fall to be determined in this case given that the father is very clear that he does not wish to cross-examine Y himself. He wishes to be legally represented either generally or, at least, limited to cross-examination of Y.

14. I approach the remainder of this judgment on the basis that the father should not cross-examine Y. What, then, are the alternatives?

Legal Aid

15. Parliament has provided a scheme for public funding of litigation. This is contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012 ('LASPO'). Section 9 and Part 1 of Schedule 1 set out the scope of civil legal aid. The father's case is out of scope. Although s.10 gives the Director of Legal Aid Casework discretion to make 'an exceptional case determination' granting legal aid to a litigant in circumstances which would otherwise be out of scope, it is clear from the recent decision of the Court of Appeal in *R (on the application of Gudanaviciene & ors) v The Director of Legal Aid Casework and The Lord Chancellor [2014] EWCA Civ 1622* that exceptional case funding can only be made available to those who are able to satisfy the usual means and merits tests:

> '56. It can therefore be seen that the critical question is whether an unrepresented

> litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case...Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services *(subject always to any reasonable merits and means test)*.' (emphasis supplied)

16. The rules governing the determination of a person's financial entitlement to legal aid are set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ('the Regulations'). The rules are complex. To be financially eligible for legal aid the father would need to have a disposable income of not more than £733 per month. The father is in full-time employment. He says that he earns £1350 net per lunar month (approximately £1460 net per calendar month). For assessment purposes it would appear that his only allowable deductions are rent (£400 per month) and child support (£100 per month). That leaves him with a disposable income of £960 per month, greater than the maximum permissible.
17. Whilst that calculation has not been undertaken with the sophistication and refinement required by the Regulations, I am satisfied that it is sufficiently reliable to indicate that the father is financially ineligible for legal aid. In those circumstances the possibility of exceptional case funding under s.10 of LASPO does not arise in this case.

<u>Should the father pay for his own representation?</u>

18. On behalf of the Lord Chancellor, Miss Whipple QC submits that as the father is financially ineligible for legal aid it follows that it is a matter of personal choice whether he chooses to pay for representation. I do not accept that proposition. Whereas inability to pay for legal representation is demonstrated by having a disposable income *below* the maximum allowed by the Regulations, it does not follow that ability to pay is demonstrated by having a disposable income *above* the maximum provided for by the Regulations. The person with a disposable income of £734 per month falls on the wrong side of the divide so far as financial eligibility for legal aid is concerned. However, it would be absurd to suggest that such a person is better able to meet his own legal fees than his neighbour with a disposable income of

£733 per month.

19. Out of his disposable income of £960 per month, the father has to meet a number of necessary living expenses that are not allowable deductions for the purpose of the Regulations. These include, for example, food, council tax, water rates, gas, electricity, telephone, clothing, and travel. He informs the court that he has no savings.
20. For the purpose of the decisions I have to make I am satisfied that the father does not have the resources to pay privately for legal representation.
21. Miss Whipple makes a second, related, point concerning the father's willingness to pay for representation. She draws attention to the fact that in July 2014, in a written statement, the father said,

> 'I am now self represented in this matter as both the unwillingness of my counsel to challenge the so called evidence and information filed in this case and the high financial impact of these proceedings'. (sic)

22. As that statement implies, at an earlier stage of these proceedings the father was legally represented. He says he spent £2,800 on solicitor's fees. Miss Whipple submits that the father can afford to pay for legal representation (because his disposable income exceeds £733 per month) but chooses not to. If that is so then the court should act robustly and make it plain to the father that if he does not pay for representation then Y's evidence must go unchallenged.
23. Having come to the conclusion that this father cannot afford to pay for representation, it is unnecessary for me to make a decision as to the merits of the robust approach suggested by Miss Whipple. However, I do make the point that there are likely to be many people in this country with disposable incomes of more than £733 per month who are genuinely unable to fund the cost of legal representation. For those who fall into that category the application of the approach suggested by Miss Whipple would appear likely to lead to a breach of an unrepresented litigant's Article 6 rights.

<u>The Bar Pro Bono Unit</u>

24. At my request, and with assistance from the mother's counsel, the father has approached the Bar Pro Bono Unit. Although the Bar Pro Bono Unit appears to have accepted the case in principle, thus far it has been unable to identify counsel available

to assist. I make that point as a statement of fact and not as a criticism. The Bar Pro Bono Unit performs an invaluable service for which both litigants and the judiciary are extremely grateful. It cannot provide assistance in every case in which assistance is needed. It would be unreasonable to expect it to do so.

A case management issue?

25. On behalf of the Lord Chancellor, Miss Whipple submits that the problems arising from the decision that Y should give oral evidence are essentially problems of case management. In particular, she suggests that the court 'or the guardian if there is one' could put questions on behalf of the father and/or that the court should make use of special measures such as the use of screens or live video-link.

Children's Guardian

26. K and H are not parties to these proceedings. They do not have the benefit of a children's guardian. Family Procedure Rules 2010 ('FPR') Practice Direction 16A sets out an indicative list of circumstances in which it may be appropriate for the court to make a child a party to private law proceedings. I am not persuaded that it would be appropriate to make K and H parties.

27. Even if K and H were made parties it does not necessarily follow that the guardian (or her legal representative) would consider it appropriate to cross-examine Y on the father's behalf. This same situation arose in *H v L and R [2007] 2 FLR 162*. Roderic Wood J records that (para 15),

> 'In this case, the child the subject of the proceedings (R) had a guardian appointed pursuant to the provisions of r 9.5 of the Family Proceedings Rules 1991, as amended. However, that guardian, for entirely understandable forensic reasons, regarded it as wholly inappropriate that the burden of cross-examining R's half-sister, B, with whom she lives, should fall to the child's advocate. For reasons particular to the facts of that case which I need not describe further, I agreed. It may be that in some cases such a guardian would feel able to conduct the cross-examination, although that cannot be a guaranteed outcome in any case.'

28. Roderic Wood J went on to consider and rule out other possibilities – CAFCASS Legal (para. 16), the Official Solicitor (para. 17) and the Attorney General (para. 19). I do not consider it necessary to revisit each of those options. For the reasons identified by Roderic Wood J, it is highly unlikely that the outcome in 2015 would be

any different from the outcome in 2006.

Special measures

29. Paragraphs 13 to 17 of the 2011 *Guidelines in relation to children giving evidence in family proceedings* are headed 'practical considerations pre-hearing'. The practical considerations suggested include arranging for special measures such as, for example, the use of video-link or screens and advance judicial approval of any questions proposed to be put to the child. The list ends with paragraph 17, to which I have already referred: 'A child should never be questioned directly by a litigant in person who is an alleged perpetrator'. That is clear, unequivocal and absolute. It is a 'special measure' in its own right. However, it is a special measure which begs a question: if a litigant in person who is an alleged perpetrator should never question directly the child concerned, how is that examination to take place?

Section 31G(6) Matrimonial and Family Proceedings Act 1984

30. In *Q v Q; Re B; Re C [2014] EWFC 31* Sir James Munby P, suggested that 31G(6) of the Matrimonial and Family Proceedings Act 1984 may provide the answer to the problem with which I am faced in this case. He said,

> '33. Some of these problems have been addressed in section 31G(6) of the Matrimonial and Family Proceedings Act 1984, set out in Schedule 10 of the Crime and Courts Act 2013, which came into effect on 22 April 2014:
>
> > "Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to –
> > (a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and
> > (b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper."
>
> It can be seen that this falls far short of what would be required in a criminal trial…'

31. Miss Whipple points out that this is not a new provision. It has been on the Statute Book for more than sixty years. It first appeared as s.61 of the Magistrates' Court Act 1952, headed 'Examination of witnesses by court'. It applied only to domestic proceedings heard before magistrates. The same provision was re-enacted as s.73 of the Magistrates' Court Act 1980, again under the same heading and again applying only to family proceedings heard by magistrates.

32. Miss Whipple refers to two authorities concerning s.61 of the 1952 Act: *Fox v Fox [1954] WLR 1472* and *Marjoram v Marjoram [1955] WLR 520*. In both cases Justices were criticised for failing to provide assistance to an unrepresented husband. Neither case concerned the cross-examination of a vulnerable witness. Neither provides an analysis of the scope of s.61 of the 1952 Act. More particularly, neither considers the meaning and scope of the expressions 'unable effectively to examine or cross-examine a witness' or 'put, or cause to be put, to the witness'. Both of those expressions first appeared in the 1952 Act, were repeated verbatim in the 1980 Act and have again been repeated verbatim in the recent amendment to the Matrimonial and Family Proceedings Act 1984 which came into force on 22nd April 2014.

33. Schedule 10 of the Crime and Courts Act 2013 is headed 'The Family Court'. Part 1 is headed 'Establishment of the Family Court'. There follows a comprehensive blueprint for the new Family Court, a blueprint which takes wing by means of amendment to the Matrimonial and Family Proceedings Act 1984. It does not follow that because the draftsman may have borrowed expressions – whole sections, even – from previous statutes, the interpretation of those expressions in their new context is in some way limited to the meaning which they had in their original context.

34. In my judgment, notwithstanding the relative antiquity of the expressions 'unable to examine or cross-examine a witness effectively' and 'put, or cause to be put, to the witness', those expressions fall to be considered and interpreted in their new context. Since 22nd April 2014 that context has been the Family Court, a public authority charged with conducting its business in a way which is compatible with the Convention rights of those who appear before it, both litigants and witnesses.

<u>'unable to examine or cross-examine a witness effectively'</u>

35. The duty imposed by s.31G(6) arises when the court is satisfied that a party who is not legally represented is 'unable to examine or cross-examine a witness effectively'. In *Q v Q; Re B; Re C* the President was not required to determine the meaning of this expression as in each of the three cases he was concerned with the father wished to be represented. I find myself in the same position. The father in this case wishes to be represented. It is therefore unnecessary for me to determine how the words 'unable' and 'effectively' should be interpreted in this context.

‘put…to the witness’

36. The expression ‘put…to the witness’ clearly envisages the possibility of the judge undertaking the cross-examination of a witness.

37. Miss Whipple implies that that is an option which should be considered in this case. She refers to FPR 2010 Practice Direction 12J. The Practice Direction is headed *Child Arrangements and Contact Orders: Domestic Violence and Harm*. It includes guidance on how a fact-finding hearing should be conducted (para. 28):

> ‘While ensuring that the allegations are properly put and responded to, the fact-finding hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing –
>
> - Each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts.
> - The judge or lay justices should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case.
>
> Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating, and thus it may be particularly appropriate for the judge or lay justices to conduct the questioning on behalf of the other party in these circumstances, in order to ensure both parties are able to give their best evidence.’

38. PD 12J para. 28 is carefully worded. It identifies a problem – ‘Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating’. It suggests, but does not mandate, a means of addressing the problem ‘The judge or lay justices should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties’. The key words are ‘necessary and appropriate’.

39. In *H v L and R*, faced with a similar problem to that with which I am concerned, Roderic Wood J acknowledged the possibility that the judge may assist in such cases by taking over the questioning. By reference to the decision of the Court of Appeal Criminal Division in *R v Milton Brown RV [1998] EWCA Crim. 1486*, he noted that prior to the coming into force of the Youth Justice and Criminal Evidence Act 1999 such a practice was followed in the criminal jurisdiction. However, he went on to say that,

> ‘24. These observations on past practice in criminal trials have been significantly overtaken by the passing of the 1999 Act. There will or may be cases where such

a practice is still the appropriate one, but they are more likely than not to be rare. For my part, I feel a profound unease at the thought of conducting such an exercise in the family jurisdiction, whilst not regarding it as impossible. If it falls to a judge to conduct the exercise it should only do so in exceptional circumstances.'

40. In *Q v Q; Re B; Re C*, Sir James Munby P made the point that (para 76),

> 'The second thing which is unclear is this: what, in contrast to the word "put" in section 31G(6), do the words "cause to be put" mean? When section 31G(6) provides that in certain circumstances "the court is to…put" questions, that must mean questioning by the judge or magistrate. In some – probably many – cases that will be entirely unproblematic. But in cases where the issues are…grave and forensically challenging…questioning by the judge may not be appropriate or, indeed, sufficient to ensure compliance with Articles 6 and 8. There is, in my judgment, very considerable force in what Roderic Wood J…said in [his] judgment [in *H v L and R* at para 24.]'

41. In this case the father does not seek to cross-examine Y himself. He accepts that it is necessary that someone else should undertake that cross-examination on his behalf. However, it does not necessarily follow that the judge should be the cross-examiner. Whether that is appropriate will depend on all the circumstances of the case. In this case I am not persuaded that it would be appropriate. On the contrary, I am satisfied that it would be wholly inappropriate. I share the profound unease expressed by Roderic Wood J in *H v L and R*.

42. Y's allegations against the father are pivotal to determining welfare issues in respect of K and H and in particular the issue of the nature and extent of their future contact (if any) with their father. In determining that issue K and H's welfare must be the court's paramount consideration. In arriving at a decision about the children's welfare interests the court must consider the factors set out in the welfare checklist in s.1(3) of the Children Act 1989. In this case a finding that the father has sexually abused Y would be relevant in assessing both risk of harm (s.1(3)(e)) and the father's capacity to meet the children's needs (s.1(3)(f)). In such circumstances, can it seriously be contended that it would be 'appropriate' for the judge, who must determine the facts, to cross-examine the key witness upon the reliability of whose evidence the fact-finding exercise so heavily depends? In answering that question I bear in mind that that question engages not only the father's Art 6 and Art 8 rights but also those of K

and H and arguably those of Y, too.

43. I noted earlier the President's observation in *Q v Q; Re B; Re C* that 'in some – probably many – cases' it will be entirely unproblematic for the judge to question witnesses. I respectfully agree. As can be seen from the report *Litigants in person in private law family cases* published by the Ministry of Justice in 2014, this already happens on a daily basis in the Family Court. No-one is suggesting that that practice should stop or that it is inherently incompatible with the protection of Art 6 and Art 8 rights. However, I am in no doubt that there are cases – of which I am satisfied that this is one – where cross-examination by the judge is incompatible with the Art 6 and Art 8 rights of the respective participants and is not, therefore, appropriate.

'cause to be put, to the witness'

The issue

44. That leads on to consideration of what is meant by the words 'cause to be put, to the witness' as they appear in s.31G(6) of the Matrimonial and Family Proceedings Act 1984 (as amended). The starting point for the consideration of this question is the decision of the President in *Q v Q; Re B; Re C*. He began his analysis by setting out some general principles:

> '45. The starting point is simple and clear. FPR 1.1(1) sets out the "overriding objective" that the court is to "deal with cases justly, having regard to any welfare issues involved." Rule 1.1(2) provides that:
>
> "Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that it is dealt with expeditiously and fairly;
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
> (c) ensuring that the parties are on an equal footing;
> (d) saving expense; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."
>
> 46. The court is a public authority for the purposes of the Human Rights Act 1998 and is therefore required, subject only to section 6(2), to act in a way which is compatible with Articles 6 and 8 of the Convention. So far as is material for present purposes Article 6(1) provides that "In the determination of his civil rights and obligations…, everyone is entitled to a fair…hearing within a reasonable time". Article 8, which guarantees "the right to respect for…private and family life", also affords significant procedural safeguards in relation to the court process. As the Strasbourg court said in *McMichael v UK (1995) 20 EHRR 205*, para 87, "the decision-

making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8."'

45. At paragraphs 65 to 79 the President goes on to consider the scope of s.31G(6). He arrives at the following conclusions:

'76. The second thing which is unclear is this: what, in contrast to the word "put" in section 31G(6), do the words "cause to be put" mean? When section 31G(6) provides that in certain circumstances "the court is to … put" questions, that must mean questioning by the judge or magistrate. In some – probably many – cases that will be entirely unproblematic. But in cases where the issues are as grave and forensically challenging as in *Re B* and *Re C*, questioning by the judge may not be appropriate or, indeed, sufficient to ensure compliance with Articles 6 and 8...

77. The words "cause to be put" must, in contrast, contemplate questioning by someone other than the judge. Now that someone else might be an advocate whom the court has managed to persuade to act pro bono. It might be the guardian, if there is one, or the guardian's advocate. But there are…great difficulties in expecting the guardian or the guardian's advocate to undertake this role...

78. What then is the court to do if the father is unable to pay for his own representation and "exceptional" legal aid is not available?

79. In the ultimate analysis, if the criteria in section 31G(6) are satisfied, and if the judge is satisfied that the essential requirements of a fair trial as required by FPR 1.1 and Articles 6 and 8 cannot otherwise be met, the effect of the words "cause to be put" in section 31G(6) is, in my judgment, to enable the judge to direct that appropriate representation is to be provided by – at the expense of – the court, that is, at the expense of HMCTS.'

46. The President went on to make the point that if s.31G(6) does give the court power to order HMCTS to meet the cost of representation of an otherwise unrepresented litigant, it is a power which should be used sparingly. He said,

'90. I have concluded that there may be circumstances in which the court can properly direct that the cost of certain activities should be borne by HMCTS. I emphasise that (the provision of interpreters and translators apart) this is an order of last resort. No order of this sort should be made except by or having first consulted a High Court Judge or a Designated Family Judge.'

47. In *Q v Q [2014] EWFC 7,* Sir James Munby P invited the Secretary of State for Justice to intervene in the proceedings to make submissions in relation to these issues. The invitation was declined. On 10th December I gave leave to the Lord Chancellor

to intervene in this case and he has done so.

The Lord Chancellor's response

48. Miss Whipple's principal submission is disarmingly simple. Parliament has provided a scheme for public funding of litigation. The scheme is now contained within LASPO, augmented by relevant secondary legislation. Section 1(1) of LASPO provides that the Lord Chancellor 'must' secure that legal aid is available 'in accordance with this Part'. The scheme set out in the following sections provides a single, comprehensive, unitary statutory code. The court has no power, whether under s.31G(6) or otherwise, to require HMCTS to meet the cost of legal representation which is not available under the statutory scheme (LASPO). An order requiring HMCTS to provide funding for litigants would be *ultra vires*

49. In so far as it may be argued that s.31G(6) provides a safety net for litigants such as this father, Miss Whipple makes the point that there is already a statutory safety net contained in s.10 of LASPO which permits the Director of Legal Aid Casework to make an exceptional case determination, defined as

> '(3) …a determination –
>
> (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of –
>
> (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998)…'

50. Miss Whipple goes on to submit that LASPO is a paradigm example of Parliament making detailed and comprehensive provision for certain functions to be carried out, which leaves no space for other powers to co-exist. It follows, therefore, that constitutionally the court has no power to circumvent the statutory code (LASPO) to require funding in some other way.

51. In support of that submission Miss Whipple relies on the judgment of Neill LJ in *Crédit Suisse v Waltham Forest L.B.C. [1997] 362 at p.374:*

> 'I am afraid that I have come to the conclusion, as I did in the *Allerdale* case, that where Parliament has made detailed provisions as to how certain statutory functions are to be carried out there is no scope for implying the existence of additional powers which lie wholly outside the statutory code.'

52. Miss Whipple does not accept the analysis undertaken by the President at paragraphs 65 to 79 of his judgment in *Q v Q; Re B; Re C*. She submits that the conclusion he

arrives at in paragraph 79 is plainly wrong. It is not possible to read section 31G(6) in such a way as to create a power to grant funding, when it is clear that neither the thrust of the provision, nor its plain words, are intended to effect that outcome. Furthermore, establishing criteria by which civil legal aid should be provided at public expense is a paradigm example of an issue for Parliament to determine by legislation, and not for the Courts. If the President is of the view that the LASPO scheme is insufficient or defective (which the Lord Chancellor does not accept), then the answer is to amend that scheme. As she puts it, 'no power exists to conjure a different power to plug the perceived gap from a different statute'. In support of that last proposition, Miss Whipple relies upon an observation made by the Lord Chief Justice in *R v Liverpool City Council ex p Baby Products Association [2000] LGR 171*, a case concerning a 'detailed and carefully-crafted' statutory scheme, where he held that:

> 'A power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions…The remedy for a defective statutory procedure is not, however, to ignore or circumvent it but to amend it.'

Discussion

53. With respect to the submission that the President's conclusion at para. 79 of his judgment in *Q v Q; Re B; Re C* is an attempt to circumvent the will of Parliament, I do not accept that to be the case. In *Re D (A Child) [2014] EWFC 39* the President made his position very clear:

> '26. It is no part of the function of the Family Court or the Family Division to pass judgment on the appropriateness and wisdom of the arrangements that Parliament (or Ministers acting in accordance with powers conferred by Parliament) choose to make in relation to legal aid. The legality, rationality and, where relevant, the proportionality of the scheme, if properly the subject of judicial scrutiny, are primarily the responsibility of the Administrative Court. It is, however, the responsibility – indeed, the duty – of the judges in the Family Court and the Family Division to ensure that proceedings before them are conducted justly and in a manner compliant with the requirements of Articles 6 and 8 of the Convention. That, after all, is what Parliament determined when it enacted section 6 of the Human Rights Act 1998, declaring, subject only to section 6(2), that it is "unlawful" for a court to act in a way which is incompatible with Articles 6 and 8.'

54. I also do not accept the proposition that LASPO provides an exclusive unitary code for the funding of legal representation. As I shall demonstrate in a moment, HMCTS is already providing aspects of 'representation' for litigants in person which would be covered by legal aid if that litigant had the benefit of legal aid.

55. Section 42(1) of LASPO defines the meaning of 'representation':

> '"representation" means representation for the purposes of proceedings and includes –
>
> > (a) The advice and assistance which is usually given by a representative in the steps preliminary or incidental to proceedings, and
> > (b) subject to any time limits which may be prescribed, advice and assistance as to any appeal…'

It is clear from that definition that 'representation' has several aspects. Representation is much wider than the mere provision of advocacy services in court. It also includes, for example, the preparation of cases for trial including the instruction of experts and the preparation of hearing bundles.

56. Two, and arguably three, illustrations can be given of circumstances in which HMCTS already provides aspects of 'representation' for litigants in person which would be covered by legal aid if that litigant were legally aided.

57. The first illustration relates to the funding of interpreters. In *Q v Q; Re B; Re C* the President highlighted this as an area of funding for 'representation' which is made available by HMCTS and which is separate from (and as will become apparent, additional to) funding provided under LASPO. He said,

> '51. Her Majesty's Courts & Tribunals Service (HMCTS) provides and pays for interpreters in court. The relevant HMCTS Guidance, *Court interpreters* (available on www.justice.gov.uk/courts/interpreter-guidance), is as follows:
>
> > "Interpreters in Civil and Family Proceedings
> > Deaf and Hearing impaired Litigants
> > Her Majesty's Courts & Tribunals Service will meet the reasonable costs of interpreters for deaf and hearing-impaired litigants for hearings in civil and family proceedings. If an interpreter is needed, the court will make arrangements for an interpreter to attend.
> > …
> > Foreign language interpreters
> > Court staff will also arrange for language interpreters needed for civil and family hearings in certain circumstances where cases involve:
> > …
> > Domestic Violence and cases involving Children

> Because of the sensitivity of these cases, we will provide an interpreter if required. This is irrespective of whether solicitors are involved or public funding is available.
> …
> All Courts
> For foreign language interpreters in any court proceedings we arrange and pay for interpreters in accordance with a standard set of terms and conditions."
>
> Those terms and conditions are available on the same website.'

58. That guidance, which appears on a public website, is supplemented by internal guidance for court staff – *Guidance for the criminal, civil and family courts for booking interpreters through Capita Translation and Interpreting (Capita TI)*. After identifying a list of types of cases in which court staff can arrange for language interpreters, the guidance continues:

> **'2.3 Other cases where an interpreter might be provided**
> In addition to the above HMCTS will provide an interpreter if that is the only way that a litigant can take part in a hearing. The relevant circumstances are:
> - When the individual/s cannot speak or understand the language of the court well enough to take part in the hearing; and
> - Cannot get public funding; and
> - Cannot afford to fund an interpreter privately and;
> - Has no family member, or friend, who can attend to interpret for them and/or is acceptable to the court.
>
> OR
> - Where the Judge directs that an interpreter must be booked as the case cannot proceed without HMCTS funding one.
>
> For all cases there is **no** legal obligation to provide interpreters to interested parties. Satisfy yourself of the situation and find out if the person has legal representation.'

59. It is clear, therefore, that HMCTS is willing to fund the cost of an interpreter upon the direction of a judge both to litigants who do not qualify for legal aid and for those who have the benefit of legal aid.
60. As Miss Whipple points out, LASPO is augmented by relevant secondary legislation. It is clear from the secondary legislation that the funding of representation under LASPO includes not only payment for solicitors and counsel but also payment of disbursements including experts' fees. The secondary legislation makes it clear that interpreters (and also lip readers and signers) are 'experts' who can be funded under

the legal aid scheme. When I made this point during argument there was vigorous shaking of heads by the two officials who attended Miss Whipple. However, that that is the case is clear from regulation 10 of the Civil Legal Aid (General) Regulations 2013 and from the table of 'Experts' fees and rates' which appears in Schedule 5 to those regulations.

61. I am satisfied that the provision of an interpreter is properly to be regarded as an aspect of the 'representation' (within the definition set out in LASPO) of the litigant concerned. There is a well-established practice of HMCTS providing this aspect of 'representation' for litigants in person.

62. I pause for a moment to reflect on why it should be that HMCTS is willing to fund the cost of an interpreter for someone who is not entitled to legal aid and who, following the logic of Miss Whipple's earlier argument in this case, must, therefore, be considered able to afford to pay for representation (including the cost of an interpreter). The answer is plain. A litigant whose first language is not English and whose ability to speak, read and understand English is inadequate is likely to be denied a fair trial (i.e. suffer a breach of her Article 6 rights) and the court is likely to be in breach of s.6(1) of the Human Rights Act 1998 if an interpreter is not provided. That is so irrespective of the litigant's ability to pay.

63. The second illustration relates to the preparation of hearing bundles. In any case in which the parties are litigants in person, HMCTS has agreed to respond to a judicial direction that HMCTS staff should prepare a hearing bundle.

64. For those who have the benefit of legal aid or who are able to pay for legal representation, the responsibility for preparing a hearing bundle falls to that party's solicitor – it is part of the 'assistance which is usually given by a representative in the steps preliminary or incidental to proceedings'. As recent research has shown (*Litigant in person in private law family cases*, published by the Ministry of Justice in 2014) the task of preparation of bundles is 'beyond the capacity of most LIPs unless they had considerable help'.

65. In March 2014 HMCTS published to staff, *Files and bundles in the single Family Court – Guidance for administrative staff*. Paragraph 2 of the guidance states that:

> 'The implementation of the single Family Court does not in itself change the way files and bundles are used. But we need to make changes for two reasons:-

- the President of the Family Division has issued a revised Bundles Practice Direction (27A) which makes changes to some of the current arrangements. In particular, it will apply across all levels of judiciary and to public and private law;
- the courts are seeing an increase in the number of Litigants in Person (LiPs), where no bundle is produced by the parties. HMCTS has agreed with the judiciary that court staff will prepare a 'LiP File' in these circumstances, as directed by local judiciary.'

This is reflected in FPR 2010 PD12B (*The Child Arrangements Programme*) which provides that,

> 'Where both parties are Litigants in Person, the court may direct HMCTS to produce a Litigant in Person bundle'.

66. The reason why it has been agreed that the judge may direct court staff to prepare a Litigant in Person bundle is not simply to assist the judge in the efficient conduct of future hearings. It is also because the availability of a properly prepared hearing bundle is regarded as necessary in order to ensure that all relevant documents are before the judge and thus to enable him or her to conduct a hearing that is fair.
67. I am in no doubt that this, too, amounts to the provision of an aspect of 'representation' (within the definition set out in LASPO) for litigants in person.
68. There is arguably a third illustration. Paragraph 14(a) of the 2011 *Guidelines in relation to children giving evidence in family proceedings* refers to the use of intermediaries:

> 'if "live" cross examination is appropriate, the need for and use of a registered intermediary…or other communication specialist to facilitate the communication of others with the child or relay questions directly, if indicated by the needs of the child.'

The Family Court Practice 2014, notes that (p. 701),

> 'Intermediaries are a "special measure", but a relatively new one. The use of intermediaries in England and Wales came about as a result of the Youth Justice and Criminal Evidence Act 1999, s 29. They operate in the criminal courts and are recruited and regulated by the MoJ…There is currently no intermediary scheme for the Family Court and no obvious source of funding in place to provide a RI for family cases, even on an ad hoc basis.'

69. The final sentence of that editorial comment may not be accurate. In *Wiltshire County Council v N [2013] EWHC 3502* the services of an intermediary were used to assist a

learning-disabled father to participate in a finding of fact hearing. Baker J explains how that was achieved:

> '79. So far as funding is concerned, there is a distinction between, on the one hand, the cost of obtaining a report from an expert as to capacity and competence and, on the other, the cost of providing services from an intermediary. The former will, subject to the approval of the legal aid agency, fall under the public funding certificate, whereas the latter, as a type of interpretation service, will, as far as I understand the rules, be borne by the Court Service. It is important that those representing the relevant party address these funding issues at the earliest opportunity. They should obtain prior approval from the legal aid agency for the instruction of the expert and, as soon as possible, give notice to Her Majesty's Courts and Tribunal Service that the services of an intermediary are likely to be required.'

70. I am satisfied that as is the case with interpreters, lip-readers and signers, an intermediary is properly to be regarded as an 'expert'. Regulation 10 of the *Civil Legal Aid (Remuneration) Regulations 2013* provides that

> 'The Lord Chancellor must pay remuneration to a provider in relation to expert services incurred as a disbursement by the provider in accordance with—
>
> (a) the relevant contract; and
>
> (b) the provisions of Schedule 5.'

It is clear from Schedule 5 paragraph 3 that the table of experts set out in that Schedule is not exhaustive:

> 'Where the expert service is of a type not listed in the Table after paragraph 1, in considering the rate at which to fund the expert service the Lord Chancellor—
>
> (a) must have regard to the rates set out in the Table after paragraph 1; and
>
> (b) may require a number of quotes for provision of the service to be submitted to the Lord Chancellor.'

In *Wiltshire County Council v N [2013] EWHC 3502* Baker J described an intermediary as 'a type of interpretation service'. I agree.

71. In light of the definition of 'representation' set out at s.42 of LASPO, I am satisfied that the instruction of an intermediary is properly to be regarded as being an aspect of 'representation'.

72. These three illustrations clearly demonstrate that HMCTS already meets the cost of some aspects of 'representation' (within the meaning of s.42 of LASPO) both for litigants in person and (with respect to interpreters and intermediaries) for legally

aided litigants.

Conclusions

73. I agree with Miss Whipple that LASPO provides a single, comprehensive, unitary code for the funding of litigation for those litigants whose case is within the scope of the scheme and who are able to satisfy the means and merits tests. I agree that s.10 of LASPO provides a safety net for those who are eligible for legal aid in terms of means and merits but whose case is outside the normal scope of the scheme. However, I do not accept that the comprehensive nature of the legal aid scheme precludes the State from providing, or the courts from requiring the State to provide, aspects of 'representation' for those who are not able to benefit from the scheme set out by LASPO in circumstances where this is necessary, appropriate and proportionate in order to safeguard their Convention rights and to ensure compliance by the court with its own duty to act in a way which is compatible with Convention rights. The court's power to direct that the cost of certain activities should be borne by HMCTS is, as the President has said, 'an order of last resort'. However, that the power exists at all is in my judgment absolutely clear.

74. The following principles of approach emerge from the discussion above:

    (a) It is the first duty of judges sitting in the Family Court to ensure that proceedings are conducted fairly (FPR 2010 rule 1.1). Failure to do so may lead to the court itself acting unlawfully (s.6(1) of the Human Rights Act 1998).

    (b) Where a party is unrepresented (whether because legal aid is not available or by choice) and is 'unable to examine or cross-examine a witness effectively' the court has a duty to assist that party (s.31G(6) of the Matrimonial and Family Proceedings Act 1984). This requires the court 'to put, or cause to be put' questions to a witness.

    (c) The court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex.

    (d) Where the court is satisfied that it is not 'appropriate' for the judge to put questions to an alleged victim, the court must arrange for (cause) a legal representative to be appointed to put those questions.

(e) The court may direct that the costs of the legal representative be borne by HMCTS.

(f) The court may nominate the legal representative who is to be appointed to undertake that task.

(g) The extent of the work to be undertaken by a legal representative so appointed should be made clear at the outset and should be proportionate.

(h) In those limited cases where legal aid is still available in private law Children Act proceedings there is a detailed regulatory framework governing the calculation of costs payable to (claimable by) a solicitor for undertaking such work. The fees payable by the Legal Aid Agency are less than a solicitor might charge a privately paying client for doing the same work. That has always been so. I can see no cogent argument for suggesting that a legal representative appointed by the court should be entitled to a higher rate of remuneration than if that work were undertaken under the legal aid scheme.

75. In the circumstances of the case with which I am concerned I am satisfied that it is not appropriate for the father to be permitted to cross-examine Y (and neither does he wish to do so). For the reasons set out above it is not appropriate for those questions to be put by the judge. It follows, therefore, that the court can and should appoint a legally qualified advocate to cross-examine Y on the father's behalf. The representative's role in the finding of fact hearing should be limited to cross-examining Y. The legal representative's costs (which shall include the cost of reading the hearing bundle, watching Y's video-recorded ABE interview, taking instructions from the father, preparing for cross-examination of Y and attending that part of the hearing at which Y gives her evidence) must be paid by HMCTS and shall be assessed on the same basis as if the work were being undertaken for a legally aided client.