Neutral Citation Number: [2014] EWFC 31

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

Q v Q
Re B (A Child)
Re C (A Child)

Ms Judith Spooner (instructed by Hodge, Jones and Allen) for the mother in Q v Q
The father in Q v Q appeared in person
Ms Judi Evans (instructed by Kelcey and Hall) for the father in Re B
Ms Lucy Reed (instructed by Battrick Clark) for the mother in Re B
Mr Richard Ellis (of Withy King) for the child in Re B
Ms Janet Bazley QC and Mr Julien Foster (appearing pro bono instructed by the Bar Pro Bono Unit) for the father in Re C
Ms Lucy Reed (instructed by Battrick Clark) for the mother in Re C
Mr Stuart Fuller (instructed by local authority solicitor) for the local authority in Re C
Ms Donna Cummins (of Lyons Davidson) for the child in Re C

Hearing dates: 21 May 2014 (Q v Q); 7 July 2014 (Re B and Re C)

Approved Judgment
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in Open Court

Sir James Munby, President of the Family Division :

1. I have been dealing with three entirely unrelated cases in the Family Court which nonetheless raise sufficiently similar issues to make it convenient for me to deal with them in a single judgment. The first, which I shall refer to as *Q v Q*, was last before me in the Family Court in London on 21 May 2014: *Q v Q* [2014] EWFC 7. The second, which I shall refer to as *Re B*, was before me in the Family Court in Bristol on 7 July 2014. It was a case in which His Honour Judge Wildblood QC, sitting as a judge of the High Court, had earlier given a judgment on 27 January 2014: *Re B (A Child) (Private law fact finding – unrepresented father), D v K* [2014] EWHC 700 (Fam). The third, which I shall refer to as *Re C*, was before me in the Family Court in Bristol on the same day, 7 July 2014.

2. Each is a private law case in which a father is seeking to play a role in the life of his child, who lives with the mother. In each case the problems with which I am faced derive from the fact that whereas the mother has public funding the father does not. In part these are problems which pre-date the implementation in April 2013 of the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). They are, however, problems which most practitioners and judges with any practical experience of the family justice system would recognise as having been very considerably exacerbated by LASPO.

LASPO

3. Put very shortly, the effect of LASPO is that public funding is not, in general, available for private law children cases: section 9 and Schedule 1 of LASPO. So far as material for present purposes there are two exceptions.

4. First, public funding is available for those who have suffered or are at risk of suffering domestic abuse, or where the other party to proceedings is a risk to children: LASPO, Schedule 1, Part 1, paras 12 and 13 and regulations 33 and 34 of the Civil Legal Aid (Procedure) Regulations 2012.

5. Secondly, public funding is available in "exceptional" cases in accordance with section 10 of LASPO:

> "(1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.
>
> (2) This subsection is satisfied where the Director –
>
> (a) has made an exceptional case determination in relation to the individual and the services, and
>
> (b) has determined that the individual qualifies for the services in accordance with this Part,
>
> (and has not withdrawn either determination).
>
> (3) For the purposes of subsection (2), an exceptional case determination is 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 –
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> (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
>
> (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
>
> (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach."

6. Guidance issued by the Lord Chancellor in accordance with section 4 of LASPO indicates in paragraph 6 that section 10(3)(b) is "to be used in rare cases" where the risk of the breach of material rights "is such that it is appropriate to fund". Paragraph 7 provides that:

> "The purpose of section 10(3) of the Act is to enable compliance with ECHR and EU law obligations in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not therefore be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. Rather, section 10(3)(b) should be used in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section 10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case. This may be so, for example, where the case law is uncertain (owing, for example, to conflicting judgments)."

Paragraph 10 provides:

> "Caseworkers will need to consider, in particular, whether it is necessary to grant funding in order to avoid a breach of an applicant's rights under Article 6(1) ECHR. As set below, the threshold for such a breach is very high … will withholding of legal aid make assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings?"

7. The legality of this guidance was recently considered by Collins J in *Gudanaviciene and others v Director of Legal Aid Casework and another* [2014] EWHC 1840 (Admin). Having considered in great detail a mass of both Strasbourg and domestic case law, Collins J held (para 51) that the guidance "is defective in that it sets too high a threshold". He came to two further conclusions that are relevant for present purposes.

8. First, in relation to section 10(3)(a), he said this (para 44):

> "It is difficult to see that, if certainty is the appropriate test, s.10(3)(a) could ever apply. It does not seem to me that certainty is the appropriate test nor does the language used in s.10(3)(a) require it. In order to establish a breach of a human right, an individual has to establish on the balance of probabilities that such a breach has occurred. ECtHR jurisprudence suggests that a high level of probability is required. I see no reason why that should not be applied in s.10(3)(a) since Parliament must be taken to have appreciated that that was how breaches could be established. This seems to me to be the correct approach if s.10(3)(a) is to have any sensible application. Thus if the Director is satisfied that legal aid is in principle needed when its refusal would to a high level of probability result in a breach, s.10(3)(a) is met and means and merits will determine whether legal aid is to be granted and to what extent. It may for example not be necessary to grant legal aid for more than advice, particularly as the obtaining of advice from a competent solicitor may save further cost by persuading the individual that he has no case or enabling him to present his application in a way which enables the decision maker or court to deal with it expeditiously and without the cost incurred in seeing whether a litigant in person does have valid points."

In relation to section 10(3)(b) he said (para 50):

> "in Articles from which derogation is possible the risk can properly be considered to be the risk of a flagrant breach which does apply a somewhat higher test than a real possibility or a risk that is more than fanciful. If legal aid is refused, there must be a substantial risk that there will be a breach of the procedural requirements because there will be an inability for the individual to have an effective and fair opportunity to establish his claim … It follows that I do not entirely accept Coulson J's conclusion in [*M v Director of Legal Aid and Casework* [2014] EWHC 1354 (Admin).] that the test whether the refusal would impair the very essence of the right leads to a conclusion that the grant of legal aid will only rarely be appropriate. The very essence is that in procedural terms it can be put forward in an effective manner and there is a fair process."

9. I understand that Collins J's judgment is subject to appeal.

<u>The state of affairs on the ground</u>

10. The effects of these changes have been dramatic.

11. There has been a drastic reduction in the number of represented litigants in private law cases. The number of cases where both parties are represented has fallen very significantly, the number of cases where one party is represented has also fallen

significantly and, correspondingly, the number of cases where neither party is represented has risen very significantly.

12. In relation to "exceptional funding", on 11 February 2014 the Minister of State at the Ministry of Justice, Lord Faulks, was asked by Lord Bach whether section 10 of LASPO "is working as intended." Lord Faulks responded (*Hansard*, Vol 752, col 529) that "the Government consider that the exceptional funding scheme is working effectively." He added:

> "It is true that the number of applications has been much lower than expected and it is also true that very few have been granted, but we are satisfied that the system is working in accordance with the section."

13. Published statistics show that the number of "exceptional" funding applications granted in family cases between April and December 2013 was 8 (Ministry of Justice, *Ad hoc Statistical Release, Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April to 31 December 2013*, published 13 March 2014, page 5, Table 1) and between April 2013 and March 2014 was 9 (Ministry of Justice, *Legal Aid Statistics in England and Wales, Legal Aid Agency, 2013-2014*, published 24 June 2014, page 27, Figure 22).[1]

14. Views may differ as to whether the "exceptional" funding scheme is working effectively, a matter on which I express no opinion. If the scheme is indeed working effectively, then it might be thought that the scheme is inadequate, for the proper demand is surely at a level very significantly greater than 8 or 9 cases a year.

15. All this has led to increased calls on the Bar Pro Bono Unit. In 2012 (I take the figures from a letter from the Unit dated 4 July 2014), it received 171 applications for assistance in family law children cases, in 2013, 291 applications and, in the first five months of 2014, 205 applications. The Unit, I am told, is usually unable to help in cases where the work involved extends beyond three days (*including* preparation time). It is unable to meet the demand. In the first five months of 2014, it was unable to place 49 family children cases.

16. The Bar's views, as to which I express no view of my own, are summarised in an article in the July 2014 issue of *Counsel* by Susan Jacklin QC, Chairman of the Family Law Bar Association, *Failing the vulnerable*.

17. The Public Law Project is a non-political legal charity with a particular focus on the disadvantaged and marginalised. Its current patron is Sir Henry Brooke. The Public Law Project has developed a casework project designed to monitor and mitigate access to justice concerns arising out of LASPO and, as part of that, it assists, pro bono, solicitors and other providers and individual applicants to make applications for "exceptional" funding under section 10 of LASPO. It has indeed been or become involved in all three of the cases before me. In a letter to the court dated 3 July 2014 it wrote (I quote without comment):

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[1] The figure is given as 8 in Ministry of Justice, *Ad hoc Statistical Release, Legal Aid Exceptional Case Funding Application and Determination Statistics*: 1 April to 31 March 2014, published 24 April 2014, Table 1.

> "PLP's consistent experience of the application process was that it was time-consuming, legally and evidentially involved, and that applications were almost inevitably bound to fail. The observations we drew from our work were that various systemic barriers meant that it was close to impossible for an applicant to satisfy the LAA that they qualified for funding … in those cases in which we were involved or have been given case details, the trend appears to be that funding has only been granted once litigation has been threatened".

The facts

18. Before proceeding any further I should summarise the relevant facts of each of the cases and identify the issues which arise. I can deal with the underlying facts very shortly because nothing of present importance turns on the detailed circumstances of any of these cases. They are, in fact, very typical cases of their type and, I fear, representative of many others. The wider forensic background is more complicated and requires more detailed treatment.

The facts: *Q v Q*

19. The child, a boy, was born in June 2007. The proceedings began in July 2010, with an application by the father for contact. The father is a convicted sex offender, having convictions for sexual offences with young male children, the second of which was committed during the currency of these proceedings. Reports were commissioned from Ray Wyre Associates dealing with the question of the risk which the father poses to his son. Reports commissioned by the father were provided by DS of Ray Wyre Associates on 28 March 2011 with a more recent addendum report dated 15 January 2014. On joint instructions, reports were commissioned from JD of Ray Wyre Associates, the original report by JD being dated 3 February 2012, with an addendum report dated 27 February 2014. Following receipt of those reports the father's public funding was terminated. An appeal against that decision was dismissed. The current applications before the court are by the father for contact to his son (now for a child arrangements order: see section 8(1) of the Children Act 1989) and by the mother for an order under section 91(14) of the Act.

20. The proceedings are now stalled: see *Q v Q* [2014] EWFC 7. There are three problems: first, that the father does not speak English and therefore needs an interpreter and, it may be, translations of some of the documents; second, that the mother's public funding will cover only one-half of the cost of bringing JD to court to give evidence and none of the cost of bringing DS to court to give evidence; third, that the father has to appear as a litigant in person.

21. In my earlier judgment I said this (*Q v Q* [2014] EWFC 7, para 14):

> "Assuming that public funding in the form of legal aid is not going to be available to the father, because his public funding has been withdrawn and an appeal against that withdrawal has been dismissed, and on the footing that, although the father has recently gained employment, his income is not such as to enable him to fund the litigation, there is a pressing need to

> explore whether there is any other way in which the two problems I have identified can be overcome, the first problem being the funding of the attendance of the experts, the second being the funding of the father's representation."

I went on (para 18):

> "There may be a need in this kind of situation to explore whether there is some other pocket to which the court can have resort to avoid the problem, if it is necessary in the particular case – I emphasise the word "necessary" – in order to ensure a just and fair hearing. In a public law case where the proceedings are brought by a local authority, one can see a possible argument that failing all else the local authority should have to pay. In a case such as the present where one party is publicly funded, because the mother has public funding, but the father does not, it is, I suppose, arguable that, if this is the only way of achieving a just trial, the costs of the proceedings should be thrown on the party which is in receipt of public funds. It is arguable that, failing all else, and bearing in mind that the court is itself a public authority subject to the duty to act in a Convention compliant way, if there is no other way of achieving a just and fair hearing, then the court must itself assume the financial burden, as for example the court does in certain circumstances in funding the cost of interpreters."

22. I added this very important caveat (para 19):

> "May I be very clear? I am merely identifying possible arguments. None of these arguments may in the event withstand scrutiny. Each may dissolve as a mirage. But it seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here. I emphasise the interests of the son because, under our procedure in private law case like this where the child is not independently represented, fairness to the child can only be achieved if there is fairness to those who are litigating. There is the risk that, if one has a process which is not fair to one of the parents, that unfairness may in the final analysis rebound to the disadvantage of the child"

23. I decided to invite the Secretary of State for Justice (para 20) to:

> "intervene in the proceedings to make such submissions as are appropriate in relation, in particular, to the argument that in a situation such as this the expenditure which is not available from the Legal Aid Agency but which, in the view of the court, if it be the view of the court, is necessary to be incurred to ensure proceedings which are just and fair, can be met either

from the Legal Aid Agency by route of the other certificate, the mother's certificate, or directly at the expense of the court."

24. On 25 June 2014 I received a letter from Shailesh Vara MP, Parliamentary Under-Secretary of State for Justice in the Ministry of Justice. After an opening paragraph the letter reads as follows:

> "I am very grateful for the opportunity to intervene but the Ministry of Justice does not propose to do so in this case.
>
> Ministers have no right or power to intervene in individual legal aid funding decisions made by the Director of Legal Aid Casework. The independence of the Director is an important statutory measure, which ensures impartiality in decision making. From the information recorded in your judgment, it is clear that the father in this case failed to satisfy the statutory merits criteria required to access funding. The merits test is a fundamental and long established part of the legal aid system, and ensures that limited public money is focussed on sufficiently meritorious cases and is not available in cases lacking sufficient merit. It is clearly established that it is legitimate for the Government to focus limited public resources through applying a merits test.
>
> As you record in your judgment, there is expert evidence in the case (one report plus addenda commissioned by the father and one plus addendum commissioned jointly by the mother and the father) which set out unequivocally that the son would not be safe in his father's presence and that at the moment there should be no contact between the father and the son. There have always been litigants in person in family proceedings, whether because individuals do not qualify for legal aid or choose to represent themselves, and the Courts have been able to resolve such proceedings justly and fairly.
>
> I agree with you that further delay should be avoided in this case and, in the absence of a mechanism for funding the appearance of the experts or representation for the father, you will have to decide this issue in the absence of the cross examination you refer to in your judgment."

25. The father has now asked the Public Law Project to assist him in an application for "exceptional" funding under LASPO and has consented to the disclosure of the papers to the Public Law Project for that purpose. On 1 July 2014 the Public Law Project wrote to the mother's solicitor seeking the documents. On 22 July 2014 her solicitor responded, indicating that she was agreeable to the disclosure of certain specified documents and inviting me to make an order accordingly.

The facts: *Re B*

26. The child, a girl, was born in 2010. The proceedings began in June 2013, with an application by the father for contact. The mother alleges that she was raped by the father in 2010, an allegation he denies. There is accordingly a need for a fact-finding hearing. The mother had legal aid, the father did not, his application for legal aid having been rejected. Judge Wildblood, as I have said, gave judgment on 27 January 2014: *Re B (A Child) (Private law fact finding – unrepresented father), D v K* [2014] EWHC 700 (Fam). Unsurprisingly, he referred to the judgment of Roderic Wood J in *H v L and R* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162, a case in which an unrepresented father in private law proceedings was facing an allegation of having sexually abused a 9½ year old girl.

27. Roderic Wood J drew attention to the fact that if an issue of rape or other sexual offence was before a criminal court the alleged perpetrator would be prohibited by statute from cross-examining the alleged victim in person. Section 34 of the Youth Justice and Criminal Evidence Act 1999 provides that:

> "No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either –
>
> (a) in connection with that offence, or
>
> (b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings."

Section 38(3) provides that in certain circumstances "the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused." Section 38(4) provides that:

> "If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the accused."

28. Roderic Wood J was concerned to explore what solutions there might be to these problems in the case of private family law proceedings. One was questioning by the guardian's advocate, as to which he said this (para 16):

> "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."

29. Recognising, as he put it (para 23), "the possibility that the judge may assist in such cases by taking over the questioning", Roderic Wood J referred to what Lord Bingham of Cornhill CJ had said in *R v Brown (Milton)* [1998] 2 Cr App Rep 364, 370:

> "The trial judge's duty is to ensure to the utmost of his ability that the defendant, even if unrepresented, or perhaps particularly if unrepresented, has a fair trial. Every defendant is not guilty until proved to be so. Where, for example, a defendant is accused of rape, the trial cannot be conducted on the assumption that he is a rapist and the complainant a victim, since the whole purpose of the proceeding is to establish whether that is so or not. In the context of section 34A [of the Criminal Justice Act 1988], guidance was given by this Court in *De Oliveira* [1997] Crim LR 600 where Rose LJ said:
>
> > "When the situation arises in which an unrepresented defendant is statutorily prohibited from cross-examining, it will generally be desirable that the trial judge should ask such questions as he sees fit, to test the accuracy and reliability and the possibility of collusion between the prosecution witnesses."
>
> Without either descending into the arena on behalf of the defence or, generally speaking, putting any sort of positive case on behalf of the defence, this is a difficult tight-rope for the trial judge to walk. However, he must do his best according to the circumstances of the particular case.
>
> It is also open to the judge in an appropriate case to ask a defendant whether there are matters which he wishes to have put to a witness. However, it would be for the judge to decide whether and how to put questions in relation to those matters. In the present case, the judge, in the course of submissions before the trial, correctly characterised himself as a transmission channel rather than a defence advocate so far as the questioning of witnesses was concerned.
>
> If a judge follows these necessarily general precepts, this Court will be very slow to interfere. It should of course also be borne in mind that there is a heavy duty on prosecuting counsel, which particularly arises where a defendant is unrepresented, to be scrupulously careful in the way in which the case is presented, so that no unfair prejudice against the defendant can arise from the manner in which the trial is conducted."

30. Roderic Wood J continued (paras 24-25):

> "24 … 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 do so only in exceptional circumstances.
>
> The desirable solution
>
> 25 I would invite urgent attention as to creating a new statutory provision which provides for representation in such circumstances, analogous to the existing statutory framework governing criminal proceedings as set out in the 1999 Act. Such a statutory provision should also provide that the costs of making available to the court an advocate should fall on public funds. I can see no distinction in policy terms between the criminal and the civil process. Logic strongly suggests that such a service should be made available to the family jurisdiction. If it is inappropriate for a litigant in person to cross-examine such a witness in the criminal jurisdiction, why not in the family jurisdiction?"

31. Indeed! And that was over seven years ago.

32. Judge Wildblood returned to the problem in *Re B*, expressing (para 8) his respectful agreement with Roderic Wood J.

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 and far short of what Roderic Wood J had called for.

34. Although it was not yet in force, Judge Wildbood considered the effect of section 31G(6). He said this (para 6):

> "If ever there was exceptional private law litigation then this must be it. I say that for these reasons:
>
> (i) The seriousness of the allegations involved.

(ii) The fact that if these issues were before a criminal court the Father would be prohibited by statute from cross examining the Mother in person. That is as a result of s34 of the Youth Justice and Criminal Evidence Act 1999.

(iii) The allegation of rape is one of a number of serious allegations that are made. Any analysis of that allegation would have to be placed in context. I find it very difficult indeed to envisage how a judge asking questions on behalf of Father would be able to do so in a way that he felt was sufficient.

(iv) Fourthly and notwithstanding the provisions of Schedule 10 of the Crime and Courts Act 2013 (which I have considered, although they are not yet in force) taking into account the point that I have made in iii) above and the fact that the judge could not take instructions, I have difficulty in seeing how that statutory provision in Schedule 10 would be perceived as sufficiently meeting the justice of the case.

(v) Where allegations of this seriousness arise it is very important that the respondent to the allegation is given advice. That advice cannot be given to him by the judge and could not be given to him by the representative of the guardian.

(vi) The issue that arises is of very real importance to the two adults but also to this child. If the Mother's allegations are substantiated there is a very real prospect that they may prove to be definitive of the relationship between this child and her Father.

(vii) In fact finding cases of complexity a judge is expected to give himself full and correct legal directions. It is vital that those legal directions are correct and take account of the positions of both of the parties immediately involved.

(viii) Although enquiry might be made of the Bar Pro Bono Unit or indeed of the Attorney General to see whether arrangements might be made for D to have free representation or the Attorney General to act as amicus curiae neither of those solutions presents itself as likely to be available and neither is anywhere near as satisfactory as D having his own representation. I regard it as highly unlikely that either avenue of enquiry would produce representation in any event. In March this issue was being investigated further.

(ix) As to the position of the Guardian's representative everything that I have said about the position of the judge applies in at least equal measure to the guardian's solicitor if not more so. The guardian's statutory role is to promote the welfare of the child. It is no part of the roles of the Guardian or of the children's solicitor to adopt the case of one party in cross

> examination or argument. After the fact finding case is resolved it is essential that both parties retain confidence in the guardian and in the institution of CAFCASS. I therefore cannot see that the Guardian or the child's solicitor could be expected to conduct cross examination on behalf of this Father."

35. Judge Wildblood's judgment was given on 27 January 2014, avowedly with the intention that it be referred to the Legal Aid Agency (LAA), following the earlier rejection of the father's application for legal aid. He records (para 2) that at a hearing on 12 March 2014 he was told that the father's application had again been rejected. Following this he released his judgment for publication. It will be recalled that in his judgment he had observed that "If ever there was exceptional private law litigation then this must be it."

36. On 31 March 2014 the Public Law Project, on behalf of the father, sent a judicial review pre-action protocol letter to the LAA detailing his proposed claim against the LAA for judicial review. On 15 April 2014 the LAA responded to the letter before claim and agreed to retake the decisions under challenge. However its further decisions of 13 May 2014 and 9 June 2014 maintained the refusal of funding. On 24 June 2014 the father's application for judicial review was delivered to the Administrative Court. The grounds were signed by Leading and Junior Counsel. On 26 June 2014 the LAA wrote, having re-considered the father's application in the light of *Gudanaviciene and others v Director of Legal Aid Casework and another* [2014] EWHC 1840 (Admin), decided on 13 June 2014, to confirm that the application had been granted with effect from 13 December 2013, the date of his original application. The judicial review proceedings have been withdrawn by consent.

37. By the time the matter came before me on 7 July 2014, I was able to give further case management directions enabling the case to proceed to a pre-hearing review on 15 September 2014 and a fact-finding hearing on 22 September 2014, both before Judge Wildblood.

<u>The facts: *Re C*</u>

38. The child, a boy, was born in 2013. The proceedings began in October 2013, with the father's application for contact and for a parental responsibility order. The mother, whose relationship with the father was brief, alleges that she was raped by him. He denies the allegation. In March 2014 he was charged with rape and attempted rape. Having pleaded not guilty the father is awaiting trial in the Crown Court. Following previous directions hearings the matter was listed before me for further directions on 7 July 2014 in accordance with an order Judge Wildblood had made on 18 June 2014.

39. On 1 July 2014 an application for "exceptional" funding under section 10 of LASPO had been made on behalf of the father. A decision is still awaited.

40. Two of the three issues Judge Wildblood had identified for my consideration were quickly resolved at the outset of the hearing and need no discussion here. The third issue was the need for further directions in respect of fact-finding in light of the father's lack of representation. In relation to that I had the benefit of submissions from Ms Janet Bazley QC, who together with Mr Julien Foster appeared, though for this hearing only, on behalf of the father pro bono through the offices of the Bar Pro Bono

Unit, and from Ms Lucy Reed, who appeared on behalf of the mother. I am grateful to all of them for their assistance, in particular to Ms Bazley and Mr Foster in relation to the issues around section 98 of the 1989 Act and Ms Reed in relation to section 31G(6) of the 1984 Act. A special word of thanks and commendation is due to Ms Bazley and Mr Foster who, in the highest traditions of the Bar, agreed to appear pro bono, which meant that they not merely appeared without fee but had to pay out of their own pockets the not insignificant costs of travelling from London to Bristol and back. I am immensely grateful, as no doubt is their client.

41. Put in a sentence, Ms Bazley's submission was that this is a case in which it is "necessary" for the father to have legal representation, and accordingly that the absence of legal aid is in breach of his rights under Articles 6 and 8. The mother's position is, as Ms Reed put it, that she cannot contemplate the prospect of being cross-examined directly by the father, and that the court has a responsibility to ensure that the best evidence is given, that it is fairly challenged and that the findings made are robust and correct for the benefit of the child. She submits that it is difficult to see how the mother can be enabled to give her best evidence without the father being represented, either through a grant of legal aid or in one of the ways referred to in *Q v Q*.

The issues

42. Between them these three cases raise a number of common and overlapping issues.

43. The absence of public funding for those too impoverished to pay for their own representation potentially creates at least three major problems: first, the denial of legal advice and of assistance in drafting documents; second, and most obvious, the denial of professional advocacy in the court room; third, the denial of the ability to bring to court a professional witness whose fees for attending are beyond the ability of the litigant to pay. Each of these problems is, of course, exacerbated if the litigant needs a translator to translate documents and an interpreter to interpret what is going on in court.

44. I shall address these in turn. First, however, I must go back to basics.

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."

47. It is necessary also to have regard to Article 47 of the European Charter of Fundamental Rights:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

I do not take up time considering whether this is applicable in cases such as those before me. In any event, it is not clear that it creates any greater right than arises under Articles 6 and 8 of the Convention: see *Gudanaviciene and others v Director of Legal Aid Casework and another* [2014] EWHC 1840 (Admin), paras 36-37.

48. Article 6 guarantees the right of "practical" and "effective" access to the court. In the case of a litigant in person, the question is whether, without the assistance of a lawyer, the litigant will be "able to present her case properly and satisfactorily": *Airey v Ireland (Application no 6289/73)* (1979) 2 EHRR 305, para 24. In that particular case, the court held that Ireland was in breach of Mrs Airey's Article 6 rights because it was not realistic in the court's opinion to suppose that, in litigation of the type in which she was involved, she could effectively conduct her own case, despite the assistance which the judge would afford to parties acting in person. In *DEB v Germany* [2011] 2 CMLR 529, para 46, the CJEU summarised the Strasbourg jurisprudence in this way:

> "Ruling on legal aid in the form of assistance by a lawyer, the ECtHR has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and

> will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively."

49. *Mantovanelli v France (Application no 21497/93)* (1997) 24 EHRR 370, indicates the significance of the right to an adversarial hearing guaranteed by Article 6 specifically in the context of an expert's report which is "likely to have a preponderant influence on the assessment of the facts by [the] court."

50. I must return in due course to examine how these principles apply to the specific issues these cases raise. Here I am merely setting the scene.

Interpreters

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.

52. Where an 'intermediary' is required in court, I understand that HMCTS likewise funds the cost: see *Wiltshire Council v N* [2013] EWHC 3502 (Fam), [2014] Fam Law 418, para 79, and *In re C (A Child) (Care Proceedings: Deaf Parent)* [2014] EWCA Civ 128, [2014] 1 WLR 2495, para 27.

53. Where appropriate, and if no-one else can pay, HMCTS will also, I imagine, pay for the translation of documents needed in court. Indeed, in *Q v Q* the order I made on 21 May 2014 included a provision that the transcript of my judgment be translated at public expense. I made a similar order in relation to my judgment in *Re J and S (Children)* [2014] EWFC 4.

Attendance of experts at court

54. No expert can now be instructed in a children case unless the court is satisfied, in accordance with section 13(6) of the Children and Families Act 2014, that the expert is "necessary" to assist the court to resolve the proceedings "justly". The absence of proper funding for such experts in cases where the parties are unable to afford the cost is therefore a matter of very considerable concern: consider, for instance, the recent decision of the Court of Appeal in *JG v The Lord Chancellor and others* [2014] EWCA Civ 656 and, for concrete examples of very real problems on the ground, the judgments of Holman J in *Kinderis v Kineriene* [2013] EWHC 4139 (Fam) and of His Honour Judge Bellamy in *Re R (Children: temporary leave to remove from jurisdiction)* [2014] EWHC 643 (Fam). The issue is very simple: How can the court deal with a case justly if, having determined that the instruction of an expert is "necessary" to achieve that objective, the absence of funding makes what is necessary impossible?

55. In the present cases I am not concerned with that wider issue, but only (in *Q v Q*) with the narrower issue of funding the cost of bringing to court an expert who has already provided a report.

56. In principle, the first question in that situation must be, is it, in the view of the court, "necessary", if the proceedings are to be resolved "justly", to have the expert in court to answer questions, or will it suffice for the court to be able to read the expert's report? If the proceedings can be resolved "justly" without requiring the expert's attendance, then there is no reason why public funds should be spent on something which is, on this hypothesis, unnecessary. If, on the other hand, it *is* necessary for the expert to attend court to enable the proceedings to be resolved justly – and that must always be a question for determination by the case management judge, not for mere agreement between the parties – then it follows, in my judgment, that the obligation on the State is to provide the necessary funding if a litigant through poverty is unable to pay the cost.

57. In the final analysis, if there is no other properly available public purse, that cost has, in my judgment to be borne by the court, by HMCTS. It is, after all, the court which, in accordance with FPR 1.1, has imposed on it the duty of dealing with the case justly. And, in the final analysis, it is the court which has the duty of ensuring compliance with Articles 6 and 8 in relation to the proceedings before it.

Legal advice

58. The problems which can arise if a litigant does not have access to competent legal advice are obvious.

59. Both *Re B* and to an even greater extent *Re C* raise a particularly difficult problem, arising out of the fact that in each case the father is accused of rape and that in *Re C* the father is also being prosecuted for that offence in the Crown Court. Put shortly, there is in each case a pressing need for the father to have access to legal advice on three related questions of no little complexity and difficulty: Is the father a compellable witness in the Family Court? Can the father take advantage in the Family Court of the privilege against self-incrimination? Can any evidence he gives in the Family Court be used in support of any criminal proceedings? And, what advice should he be given as to whether or not to give evidence (assuming he is not compellable) and as to whether or not to plead privilege (assuming it is open to him to do so)?

60. If these were *public* law proceedings, the answers to the first three questions would be reasonably clear. He would be compellable: *Re Y and K (Split Hearing: Evidence)* [2003] EWCA Civ 669, [2003] 2 FLR 273. He would not be able to plead the privilege against self-incrimination: section 98(1) of the 1989 Act. His evidence would not be "admissible in evidence against" him in any criminal proceedings other than for perjury: section 98(2). There is authority as to the meaning and effect of section 98(2): see, for example, *Re X Children* [2007] EWHC 1719 (Fam), [2008] 1 FLR 589, paras 47-52, *Re M (Care Disclosure to Police)* [2008] 2 FLR 390, para 29, and *Re X (Disclosure for Purposes of Criminal Proceedings)* [2008] EWHC 242 (Fam), [2008] 2 FLR 944, paras 33-35, 65. And there is recent authority addressing some of the practical implications of this: *A Local Authority v DG & Ors* [2014] EWHC 63 (Fam), paras 41-42.

61. Section 98 applies only to proceedings under Parts IV and V of the 1989 Act. So it does not apply to *private* law proceedings.

62. What then is the position in private law proceedings? *Re Y and K (Split Hearing: Evidence)* [2003] EWCA Civ 669, [2003] 2 FLR 273, is clear authority that the father is compellable: see, in particular, Hale LJ (paras 31-32). But can he refuse to answer a question on the ground that it might incriminate him?

63. Absent any equivalent to section 98 (or, for another example, section 13 of the Fraud Act 2006), it might be thought that the answer is that he can refuse. Ms Bazley, on behalf of the father in *Re C*, points however to the decision of the Criminal Division of the Court of Appeal in *R v K(A)* [2009] EWCA Crim 1640, [2010] QB 343, and to a very interesting article by Sarah Lucy Cooper, *Pleading the Fifth Amendment – the privilege against self-incrimination*, published on-line in Family Law Week on 22 June 2010. Referring to *R v K(A)*, to section 1(3) of the 1989 Act, and to what are now paragraphs 6 and 8 of PD12J, Ms Cooper says it is a moot point as to whether the combined effect of these provisions is to impose a duty on the court analogous to that under section 25 of the Matrimonial Causes Act 1973 which underpinned the analysis in *R v K(A)*. She suggests that arguably there is such a duty, in which case there is, she says, no right to privilege against self-incrimination in private law children proceedings, though the corollary would seem to be (see *R v K(A)*, para 43) that any

admissions that might be made in the family proceedings could not be used in the criminal proceedings.

64. These are deep waters. I record the argument without coming to a conclusion on a difficult point of real complexity on which, quite understandably, I have not had the benefit as yet of full adversarial argument.

Representation in court

65. The absence of assistance in the court room by a professional advocate causes obvious problems: most litigants lack the skills to represent themselves to best advantage, for example in examining and cross-examining witnesses or making submissions. But there is a further and even more serious problem: the acute tensions that may arise when an alleged perpetrator cross-examines the alleged victim.

66. As already noted, the problem was highlighted as long ago as December 2006 in the judgment of Roderic Wood J to which I have already referred. And, as we have seen, Judge Wildblood returned to it earlier this year.

67. What is the solution? Two can be dismissed at the outset. As explained by Roderic Wood J, this is not a role that can usually be undertaken by an advocate to the court (whether appointed by the Attorney-General, by the Official Solicitor or by CAFCASS). The *Attorney-General's Memorandum* of 19 December 2001 (see [2002] Fam Law 229 and The Family Court Practice 2014, p 2869) is clear (paras 3 and 4):

> "3 A court may properly seek the assistance of an advocate to the court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. In those circumstances the Attorney-General may decide to appoint an advocate to the court.
>
> 4 It is important to bear in mind that an advocate to the court represents no one. His or her function is to give to the court such assistance as he or she is able on the relevant law and its application to the facts of the case. An advocate to the court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts. In particular, it is not appropriate for the court to seek assistance from an advocate to the court simply because a defendant in criminal proceedings refuses representation."

Nor is this a situation for the appointment of a special advocate: compare *Re T (Wardship: Impact of Police Intelligence)* [2009] EWHC 2440 (Fam), [2010] 1 FLR 1048, and *BCC v FZ, AZ, HZ and TVP* [2012] EWHC 1154 (Fam), [2013] 1 FLR 974.

68. What of section 31G(6) of the 1984 Act?

69. That section 31G(6) imposes a *duty* on the court – "the court is to" – where a party who is not legally represented is "unable" to examine or cross-examine a witness "effectively", is clear enough. Two things, however, are much less clear.

70. First, what is meant by an unrepresented party being "unable" to examine or cross-examine "effectively"? In many cases there will be no difficulty. A party, through lack of skill or inarticulacy, is, taking a common sense view, unable to examine or cross-examine effectively, and welcomes judicial or other assistance. Section 31G(6) applies. But what if the party, though unable to examine or cross-examine effectively, insists upon doing so himself? And what if the party is the alleged perpetrator, is "able" to cross-examine his alleged victim all too "effectively" and demands what he says is his 'right' to do so?

71. This gives rise to legal questions of some complexity on which I have not heard full adversarial argument, the answers to which are not entirely clear and which do not in fact arise, at least at present, in any of the cases before me, for in each case the unrepresented father wishes to be represented. It is, however, an issue which the Children and Vulnerable Witnesses Working Group, chaired by Hayden J and Russell J (see [2014] Fam Law 978, 981), will no doubt wish to consider. I merely identify some questions, without presuming to suggest any answers.

72. I can take as the starting point the long-established common law principle that "no person charged with a criminal offence can have counsel forced upon him against his will": *R v Woodward* [1944] KB 118, 119, *Re Haughey and Another's Application* [1990] NI 93. In the United States of America that principle has been held by the Supreme Court to be protected by the Sixth Amendment, though deriving from English jurisprudence, including *R v Woodward*: see *Faretta v California* (1975) 422 US 806. Stewart J's reasoning for the majority is striking:

> "This Court's past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature form a consensus not easily ignored … We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.
>
> This consensus is soundly premised. The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged.
>
> … In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber."

73. A number of questions arise. First, is this principle confined to *criminal* cases or does it extend to civil and family cases? On this I have heard no argument and express no opinion, though noting that in *R v Brown (Milton)* [1998] 2 Cr App Rep 364, 369, Lord Bingham of Cornhill CJ said this:

> "In many legal systems parties are obliged to be represented by professional lawyers. That is not the British tradition, which

has permitted individuals to represent themselves in both civil and criminal proceedings."

74. Second, if the latter, and assuming that the principle is not to be whittled away by the judges – unless the Family Court is to adopt the mantle of the Star Chamber –, is the rule amenable to change by statutory instrument, for example, an amendment to the Family Procedure Rules 2010, or is the fundamental nature of the principle such that it can be changed only by primary legislation? On this, again, I have heard no argument and express no opinion, though noting that in *General Mediterranean Holdings SA v Patel and Another* [2000] 1 WLR 272 a provision of the CPR was held ultra vires as purportedly abrogating legal professional privilege.

75. Third, if the latter, does section 31G(6) operate to confer on a judge of the Family Court power to forbid a party who wishes to conduct his own case from examining or cross-examining a witness? Again I have heard no sustained argument, but my inclination is to think that the answer is, no it does not, for principle suggests that such an important right is only to be cut down by express words or necessary implication, and neither is very obviously to be found in section 31G(6): see again *General Mediterranean Holdings SA v Patel and Another* [2000] 1 WLR 272. As against that, I can see the argument that there may be cases where to expose the alleged victim to cross-examination by the alleged perpetrator might engage the alleged victim's rights, whether under Article 8 or Article 3, in such a way as to impose on the court an obligation under the 1998 Act to prevent it, so that in such a case section 31G(6) has to be read as giving the court the appropriate power to do so.

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. There is, in my judgment, very considerable force in what Roderic Wood J and Judge Wildblood said in the passages in their judgments (respectively, para 24 and paras 6(iii)-(v)) which I have already quoted.

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, as both Roderic Wood J and Judge Wildblood understandably pointed out, great difficulties in expecting the guardian or the guardian's advocate to undertake this role – difficulties which were expounded also in the argument before me. I agree with what Judge Wildblood said (para 6(ix) quoted above). The point applies with equal force in the circumstances of both *Re B* and *Re C*.

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.

Discussion

80. I need say nothing more about *Re B*. The issues of immediate concern have now been resolved. The other two cases each require further consideration.

Discussion: *Q v Q*

81. I express no views as to the merits of the father's proposed application for "exceptional" funding, except to say that, plainly, the court should take whatever steps are appropriate to facilitate the making of that application. Accordingly on 31 July 2014 I made an order, in the terms proposed by the mother's solicitor, that is, providing for permission to be granted to the mother's solicitor to disclose the following documents to the Public Law Project for the purpose of submitting an application for public funding on behalf of the father: (a) the mother's case summary for the hearing on 21 May 2014; (b) the order dated 21 May 2014; (c) the parties' statements; and (d) the expert reports of DS and JD. My judgment is, of course, a public document which is already in the public domain. If the Public Law Project requires any further information they should notify the mother's solicitor and bring the matter to my attention.

82. If the father's application for public funding under LASPO is successful, then all well and good. If it is not, then I will have to consider what, if any, further order to make. In the circumstances explained in my earlier judgment (*Q v Q* [2014] EWFC 7) I am satisfied that the attendance at court of both DS and JD is "necessary". It follows that, if there is no other properly available public purse, the cost will, in my judgment, have to be borne by HMCTS. HMCTS will also have to pay the cost of providing the father with an interpreter in court. If the father is still unable to obtain representation, I will have to consider whether the cost of that should also be borne by HMCTS. That, however, is a matter for a future day.

Discussion: *Re C*

83. I have referred at some length to the difficulties and complexities of the issues arising in relation to section 98 of the 1989 Act and section 31G(6) of the 1984 Act, most of which must remain for future decision.

84. I am very conscious of the fact that we are awaiting a decision in relation to the father's application for "exceptional" funding and that I must not embark, as it were, upon a proleptic judicial review of a decision which the LAA has not yet made. During the course of argument there was discussion as to whether it might assist if my order were to include certain recitals, and a draft helpfully provided by counsel included a number of suggested recitals in relation to the possible application of section 10 of LASPO. In the event that exercise has been useful in persuading me that the attempt would be both inappropriate and, indeed, ultimately unhelpful.

85. I have however come to two conclusions which I can and ought to set out. The first is that the matters to which I have referred above (in particular those relating to the issues of privilege and related issues) are matters on which the father in *Re B*, and even more so the father in *Re C*, desperately needs access to skilled legal advice, both before and during the fact-finding hearing. These are not matters which the judge conducting the fact-finding hearing can determine without the benefit of legal argument on both sides. If the judge is deprived of adversarial argument, and if the father is denied access to legal advice both before and during the hearing, there must, in my judgment, be a very real risk of the father's rights under Articles 6 and 8 being breached both in the family proceedings and possibly also, in the case of the father in *Re C*, in the criminal proceedings. I bear in mind, of course, that, as I explained in *Re X Children* [2007] EWHC 1719 (Fam), [2008] 1 FLR 589, para 51, the admissibility in the criminal proceedings of any admissions made in the family proceedings is in the final analysis a matter for the criminal, not the family, judge. But this does not, in my judgment, meet the difficulty.

86. Linked to this there is, in the case of the father in *Re C*, a related point made by Ms Bazley. The proper – the fair and just – management of the case requires, in my judgment, that I give directions inter alia requiring the father to respond to the mother's allegations and to file all the evidence upon which he intends to rely. Ms Bazley submits with some force, and I am inclined to agree, that to require the father to comply with that part of the order without access to proper legal advice is to imperil his rights under Articles 6 and 8.

87. I add only this. If, on the merits, the circumstances in *Re B* were such as to bring the father's application within section 10(2)(a) of LASPO, and the LAA has conceded the point, then it might be thought that the father's claim in *Re C* is a fortiori.

88. If the father's application for public funding under LASPO is successful, then all well and good. If it is not, then I will have to consider what, if any, further order to make. I am inclined to think that, for all the reasons already indicated, the father in *Re C* requires access to legal advice beforehand and representation at the fact-finding hearing to avoid the very real risk of the court being unable to deal with the matter justly and fairly and of his rights under Articles 6 and 8 being breached. I am inclined to think, therefore, that, if he is unable to afford representation and pro bono representation is not available, and if there is no other properly available public purse, the cost will have to be borne by HMCTS.

Three caveats

89. In this judgment I have been concerned only to consider the problems that may arise in *private* law cases. I have therefore not had occasion to consider any further the point I made in *Q v Q* (para 18), where I suggested that "In a public law case where the proceedings are brought by a local authority, one can see a possible argument that failing all else the local authority should have to pay." That is a matter for another day.

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.

91. I emphasise also that the allegation in each case is one of sexual assault, in two of the cases an allegation of rape. It may be that a similar approach is appropriate in cases of serious non-sexual assault. It may be that it will not be appropriate in less serious cases. I express no concluded views, beyond drawing attention to the trite observation that everything will, in the final analysis, depend upon the particular facts of the specific case.

Concluding observations

92. The Ministry of Justice, the LAA and HMCTS may wish to consider the implications. That is a matter for them. For my part I would urge the early attention of both the Children and Vulnerable Witnesses Working Group and the Family Procedure Rules Committee to those aspects of the various matters I have canvassed that fall within their respective remits.