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Albion Chambers CHILD LAW NEWSLETTER

Human Rights claims on behalf of the child

There is an increasing awareness of human rights claims that may arise in association with care proceedings. The case of *Luton Borough Council v PW, MT, SW and TW* [2017] EWHC 450 (Fam) is essential reading for those representing children and advising Children's Guardians in such circumstances.

Munby J (as he then was) made it clear in *Re: L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam) that any such claim should normally be made under s7 (2) HRA 1998 and, therefore, dealt with within those care proceedings and by the court dealing with the proceedings.

Cobb J reviewed the question of how a child claimant should be represented in *Luton BC v PW et al*. The Children's Guardian had been appointed within the care proceedings. She subsequently assumed the role of litigation friend for the children in relation to their HRA 1998 claim, made within the same proceedings. Cobb J was clear that the Children's Guardian had made a fundamental mistake.

The starting point for Cobb J's analysis was whether the children's claim under HRA 1998 is governed by the Family Procedure Rules 2010 (FPR 2010) or the Civil Procedure Rules 1998 (CPR 1998). Perhaps not surprisingly, because he had expressed the same view in *CZ v Kirklees Council* [2017] EWFC 11, Cobb J concluded decisively that a HRA 1998 claim is governed by the CPR 1998 and not FPR 2010.

Thus, the children's claim for relief made under HRA 1998 should be issued as civil proceedings by way of a Part 8 CPR 1998 claim and not on a Form C2, as had been done in *Luton BC v PW et al*. This is the correct procedural approach even where the claim is made within existing family proceedings. Cobb J also emphasised the importance of issuing a formal claim.

If the children's HRA claim within care proceedings is governed by CPR 1998, what does this mean for the representation of a child claimant, and what is the role of Children's Guardians in those circumstances?

In care proceedings, a Children's Guardian is appointed to represent the children pursuant to s.41 CA 1989 and Rule 16.3 FPR 2010. The appointment is conventionally *"...for the purposes of specified proceedings"* (s.41 CA 1989). As Cobb J observes:

"That appointment… is not for representation of the children in civil or other (including HRA 1998) proceedings."

Nevertheless, a child claimant in HRA 1998 proceedings requires a litigation friend, appointed under Part 21 CPR 1998.

Can the Children's Guardian be appointed as the child's litigation friend for the purposes of an HRA claim made in care proceedings? The short answer is no.

As a matter of policy, Cafcass does not support Children's Guardians acting as litigation friends in HRA proceedings. The statutory functions of Cafcass are set out in s.12 of the Criminal Justice and Court Services Act 2000, which states that Cafcass shall act on behalf of a child in any matter "in which the child's welfare is in question".

In Guidance issued in April 2016 ('Guidance – the role of Cafcass in Human

Editorial

Welcome to the Albion Chambers child law winter newsletter. Firstly I would like to say, on behalf of the whole team, a very warm welcome to our new members: Tanya Zabihi, Hayley Griffiths, Libby Harris and (because there has been a rather lengthy gap since the last newsletter) Sorrel Dixon. They are all outstanding established practitioners and will further strengthen the expertise offered by the Albion child law team. We are also extremely pleased to welcome Yasmine El Nazer. Yasmine has just completed her third-six pupillage and is already in high demand. We wish her all the very best on what is sure to be a hugely successful career.

I would like now to take the opportunity to say on behalf of the whole team that we were all deeply saddened by the tragic news of the death of Julie Exton. Those present in the full-to-bursting court room for her Valedictory will have heard the incredibly moving speeches delivered by HHJ Wildblood QC, DJ Howell, Charles Hyde QC and Greg Moss. I could not match their words or even come close. All I can do is share the message I sent to DJ Exton before her death. I do so because, although it is personal to me, I suspect it conveys the thoughts of a huge number of people.

Dear Judge,

I'm sorry it has taken me so long to send you this.

Rights Claims' April 2016), Cafcass states that:

"…within the context of a Human Rights Claim, the court is not being asked to determine the claim on the basis of welfare, it is being asked to make a declaration that a public authority has acted unlawfully in the exercise of [its] powers. The enquiry is therefore factual rather than welfare based."

This view was underlined in email correspondence sent to the parties in *Luton BC v PW et al* by Melanie Carew, Head of Legal, Cafcass:

"… A Cafcass officer acting in a professional capacity would… be acting ultra vires if they were acting as a litigation friend in civil proceedings."

In *Luton BC v PW et al,* the Children's Guardian had assumed the role of litigation friend and suggested that Cafcass had agreed that she should "front"' the HRA 1998 proceedings on behalf of the children. Cobb J was having none of this.

He stated that it was inappropriate for the Children's Guardian to act as an informal litigation friend for the children or "front" the claim as if she was the children's litigation friend. The status of litigation friend results from a formal process – either filing a certificate of suitability or pursuant to a court order (Part 21 CPR 1998). As explained above, Cafcass will not permit Children's Guardians taking either of those steps.

Cobb J observed that a person who acts as a litigation friend without a court order is required, inter alia, to offer an undertaking to pay any costs which the child may be ordered to pay in relation to the proceedings (Rule 21.4(3)(c) CPR 1998).

So, is there any role for the Children's Guardian and, returning to the central question, how should a child claimant be represented in a HRA claim associated with care proceedings?

The Guidance from Cafcass states that Children's Guardians can give advice about the appropriateness of a child making an HRA 1998 claim or accept advice from the child's solicitor that the child has a valid claim against the local authority.

Cafcass notes that this does not inevitably lead to an application to the court. The breach could be resolved by way of a complaint or by an agreed resolution without the need to appoint a litigation friend. Whilst not specifically addressing the point, the Guidance appears to accept that a Children's Guardian is able to raise the question of a potential claim with the local authority concerned or instruct the children's solicitor to do so on his/her behalf.

Such an approach is likely to have the approval of Cobb J who built on similar comments made in *CZ v Kirklees Council* by saying in *Luton BC v PW et al*:

"…This case illustrates once again that the cost of pursuing relief under the HRA 1998 can very swiftly dwarf or obliterate, the financial benefits sought. Many such cases are surely suitable for non-court dispute resolution (NCDR), and I enthusiastically recommend that parties divert away from the court to mediate their claims".

Nevertheless, it may be necessary for an HRA 1998 claim to be made. As Cobb J has explained so clearly, a child claimant will require a litigation friend. In the Guidance, Cafcass states that the role of the Children's Guardian is to seek advice on whether there is a valid claim and then to instruct the child's solicitor to identify a litigation friend.

If there is no suitable person who is willing to act as the child's litigation friend, the Official Solicitor has confirmed that he would be willing to act as a litigation friend, providing that there is no other person who can act in that capacity and where there is funding already in place.

In those circumstances, the Children's Guardian should instruct the child's solicitor to apply to the court for a direction that the relevant papers be disclosed to the Official Solicitor. This will enable the Official Solicitor to consider whether the claim is valid and that it is appropriate to issue a formal application on the child's behalf.

If the Official Solicitor requires confirmation that funding is in place, the child's solicitor will have to consider an application for public funding in relation to the HRA 1998 claim.

In any event, it is clear from *CZ v Kirklees Council* and other cases (*P v A Local Authority* [2016] EWHC 2779; *H v Northamptonshire County Council and The Legal Aid Agency* [2017] EWHC 282) that a publicly funded claimant in an HRA 1998 claim who is also publicly-funded in associated (care) proceedings is vulnerable to a claim for recoupment of costs of both sets of proceedings from any damages awarded. In *CZ v Kirklees Council*, this led to the high likelihood that the claimants in that case would receive none of the damages awarded to them. This is, however, a subject that is worthy of greater consideration than the limits of this article allows.

In summary, therefore, solicitors representing children and Children's Guardians within care proceedings must be clear about the limits of the role that a Children's Guardian can take in the event that an HRA 1998 claim arises in care proceedings and, returning to where we started, this should include reviewing the guidance given by Munby J in *Re L* and considering whether it is appropriate to make the HRA 1998 claim within the care proceedings.

In *Luton BC v PW et al*, Cobb J noted that the introduction of the HRA 1998 claims had caused considerable and significant delay in the conclusion of the children proceedings. Whilst giving "due respect" to the guidance in Re L, he observed that more careful consideration should have been given to the question of whether the two proceedings should be heard together or separately, including consideration of the likely delay in concluding the family proceedings.

Jonathan Wilkinson

I have always had the utmost respect and admiration for you, it is impossible to convey in writing just how much I mean this. More than once I have sat in your Court in absolute awe at your ability to offer such compassion to the parties whilst never wavering from delivering the most impeccable judgment.

Your intellect is inspiring, if a little frightening, and your clarity of thought is something I always strive to replicate (coming nowhere near I'm afraid). But what most impresses me is your courage - I have seen parties try to manipulate (perhaps misreading your compassion for weakness) only to suddenly realise that this is certainly not a tribunal that will, in any way, yield to intimidation! That fearlessness, and all your qualities, has made you a deserved inspiration for all lawyers. Many a time I have discussed cases with others to be asked, 'who is hearing it?' 'Exton', I reply. 'Oh, she'll sort that out, no problem', was always the reply. Your reputation is phenomenal and you are deeply missed. Universally, without exception, everyone thinks you are utterly wonderful.

I suppose what I really want to say is thank you. I joined Albion in 2005 when I was only 22 and if I practice until I'm a hundred I don't suppose for a second I will ever appear before a judge that matches you for your empathy, your common sense, your humour and your valour. I hope these qualities serve you now as well as they have served every person that was fortunate enough to walk into your Court.

With very best wishes.

The response I received on 14 July 2017 was simply this, *'Thanks, Ben, for your lovely email. I miss court!'*

She was, as you would expect of District Judge Exton, thinking of others even at this unimaginably difficult time for her. We will all miss her terribly, her presence will be felt always and she will never be forgotten.

Benjamin Jenkins

The pit and the pendulum (and the tectonic plates)

Some musings on permanence

I declare an interest. I was counsel for the unsuccessful appellant local authority in *Re S-F (a child)* [2017] EWCA Civ 964. There. I've said it. But it hasn't made me feel any better about it. There's nothing like a good "shoeing" (as James Cranfield very unkindly referred to it in his entertaining romp through recent case law at the end of our Child Law Conference last year) from Lord Justice Ryder to make one think.

In my case, for example, I thought about applying for a job stacking shelves. More constructively, I thought about the adoption pendulum and how it has swung to and fro during my thirty-odd (OK, thirty-seven) years in the law. But the pendulum analogy brought to mind The Pit and the Pendulum, and I then began having nightmares in which Court 72 at the RCJ was the pit and Lord Justice Ryder was in control of the sharpened pendulum that was swinging ever closer to yours truly...

Returning to "more constructively" I re-read Lord Justice McFarlane's Bridget Lindley OBE Memorial Lecture, given early in 2017 (I turned to McFarlane LJ in part because it was he who granted permission to appeal in re *S-F* and I hoped (in vain, as it predictably turned out) to find some words of solace. The lecture, which is freely available online, is entitled "Holding the risk: the balance between child protection and the right to family life" and it is a thoughtful and thought-provoking look at the philosophy behind a number of aspects of what we sometimes rather glibly call "permanence" (though we also sometimes call it "a draconian interference in the right to private and family life"). I'm tempted to suggest that you read the lecture and to end my musings at this point; I suspect, however, that the editor would tell me I haven't written enough words.

In his wide-ranging lecture, McFarlane LJ raises a number of questions. The two that have provoked this article are "Is adoption still the best option?" and "How do we know it has worked out alright?".

Taking the second question first, McFarlane LJ refers to judges and magistrates up and down the country "making these highly intrusive and draconian orders" every day on the basis that to do so is better for the child and that "nothing else will do". He then asks "How do we know this is so?". His point here is not about research; it is the more basic one that judges receive no feedback as to the outcome of their orders, even when an adoptive placement breaks down. He likens the position to that of somebody who is learning to become a proficient darts player but who has to face away from the board and is never told "whether he had even hit the wall, let alone the board or the bull's eye". His view is that decision-makers can have little confidence in their own decisions when they receive no information as to the outcome. I'm not sure he's entirely right about this. The decisions of any one judge are a small statistical sample. It seems to me that any judge could have a couple of failed placement orders in a single year simply as a matter of bad luck, not bad practise or bad decision-making, and that a "short report of the outcome" of a formal break-down review (which is McFarlane LJ's suggested remedy for judicial ignorance of outcomes) might well be, to coin a phrase, of prejudicial rather than probative value.

Lord Justice McFarlane spends a lot more time on consideration of his first question – is adoption still the best option? He takes, as his starting point, that the current balance between child protection and human rights is "largely sound", but that this is only tenable if adoption is, in fact, "the most beneficial arrangement for the young people for whom it is chosen by the courts". In passing, I can't help but wonder whether "the most beneficial arrangement" is really the same as "nothing else will do" – answers on a postcard, but not addressed to me!

McFarlane LJ points out that adoption has changed over the last two decades or so (rather longer, I suspect) and that the assumptions on which it has been based have shifted. Since the Adoption Act 1926 we have moved from the adoption of babies with maternal consent to the "forced adoption" (that term is used in the lecture) of much older children (especially since the publication in 1973 of "Children Who Wait" and then again as a result of the Blair initiative at the beginning of the 21st century). But is the pendulum now swinging back the other way and, if so, how far should it swing?

Among the changes identified by McFarlane LJ, other than the mere age range of adopted children, are the following. The age range itself means that many more adopted children carry with them knowledge of their birth families and their lives before placement for adoption. Almost by definition, children adopted via the child protection route will have suffered significant harm and will bear the scars, whether physical, emotional or, as is so often the case, both. Their early experiences will, as McFarlane LJ puts it, "be played out as they come to terms with the sense of their own identity whilst traversing the choppy waters of adolescence in the adoptive home". Children and their adoptive parents do not always (some would say "hardly ever") receive the specialist therapeutic support that they require. Most recently, issues arise through the development of social media and the resultant "erosion of the impermeable seal around the adoptive placement". (This, in turn, alerts one to the complex question of post-adoption contact, in which regard McFarlane LJ gently questions whether we are too easily swayed by the wishes of the adopter, as opposed to the needs of the children).

These changes all tend to make adoption a more complex long-term proposition than it perhaps was some 20 or 30 years ago, and McFarlane LJ suggests that "substantial research... is sorely needed" into the question of whether adoption really is the best solution for children who have suffered abuse and dysfunctional family life. He reminds us that we need to be looking at the welfare of the child "throughout his life", and that what might be seen as the best option for a four-year old might well turn out not to be so when s/he reaches adolescence or young adulthood.

The lecture also raises an interesting question about proportionality. An adoption order "radically shifts the tectonic plates of an individual's legal identity (and those of others) for life", and he wonders aloud whether it is possible to say "particularly in the middle to low range of abuse cases" whether the right balance is being struck between child protection and the right to family life. Does this mean that a relatively low level of harm, albeit still significant harm, should not result in adoption even when the plan is for permanence? What is the link between proportionality and welfare?

Is there such a link at all? Proportionate to what? To the needs of the child, to the harm suffered, to the culpability of the parents...? And how do we measure proportionality anyway?

My take on all this is that there is, at large, a feeling, and at this stage that's probably all it is, that maybe "forced adoption" is (a) too easily achieved and (b) not necessarily the right outcome. That might account for what appears to be something of a change in the weather, though consideration of two recent cases makes it still seem a little variable.

In *Re S-F* Lord Justice Ryder, giving the lead judgment, was not only determined to get across that the child permanence report and the ADM's minutes should always be lodged and that they are "susceptible of cross-examination" [para 11], but also that "the proportionality of interference in family life that adoption represents must be justified by evidence not assumptions that read as stereotypical slogans" [para 8]. He went on to say in the same paragraph "a conclusion that adoption is better for a child than long-term fostering may well be correct but an assumption as to that conclusion is not evidence even if described by the legend as something that concerns identity, permanence, security and stability". My attempt to pray in aid the words of Lady Justice Black (as she then was) in *Re V (long-term fostering or adoption)* [2013] EWCA Civ 913 at [96] (in which, on my reading of it, Her Ladyship recites with approval the "assumptions" referred to by Lord Justice Ryder) fell flat. Ryder LJ couldn't have been clearer that there is a need in every case (though query whether this applies to babies and quite where the line is to be drawn in terms of age) for "social work opinion derived from a welfare analysis relating to the child", supported if necessary by "the conclusions of empirically validated research" [para 9]. In other words, it's not enough to rely on the "received wisdom" about why adoption is preferable to long-term or permanent fostering; there has to be evidence relating to the specific child or children.

Thirteen days after the judgment in *Re S-F* was handed down, a differently-constituted Court of Appeal (headed by the President) gave judgment in *Re N-S (children)* [2017] EWCA Civ 1121. The judgment was given by Lord Justice McFarlane, with whom the President and Lewison LJ agreed. This appeal was a "reasons" challenge, the appellants conceding that the first instance decision would stand but arguing that proper reasons had not been given by the trial judge. What interested me, after the "shoeing" referred to at the beginning of this article, was that (as in *Re S-F*) nobody had argued for long-term fostering (in *Re S-F* long-term fostering was raised by the judge immediately before he heard submissions). The perceived gap in the judgment was raised in emails on behalf of the local authority. The gap not having been filled, it was then raised again by counsel for the father. The judge's response was, "I have accepted the analysis of the guardian and the other experts that the children's welfare requires that they be placed in a permanent placement and that, given their ages, the best placement for them will be in an adopted placement". At [34] McFarlane LJ says "...the reality for the three younger children was that, if rehabilitation to their parents was ruled out, the only tenable care plan to meet their respective welfare needs was adoption". The three younger children were four, three and 15 months. The adoption plan in this case, approved by the court and upheld by the Court of Appeal, seems to have been based on their ages simpliciter.

There appear, albeit to my jaundiced eye, to be differences of approach between *Re S-F* and *Re N-S*, both at first instance and on appeal. Where do we go from here? I suggest three lessons can be drawn which, if followed, will at least avoid appeals even if they don't answer the questions raised in the Bridget Lindley lecture.

1. The local authority on issuing a placement order application should always file the CPR and the ADM's minutes. The CPR is now usually included in the Annex B report in any event. Parents' lawyers should always seek disclosure, which it appears should always be granted (though some redaction may be required).

2. The local authority and the Children's Guardian should be very careful to provide evidence that at the very least links the general principles about permanence (recognised in *Re V*) to the specific child or children, and consideration should be given to backing up this evidence with research (even though McFarlane LJ says in his lecture there needs to be much more research).

3. Derived from *Re N-S* at [36] is the idea that the advocates identify each issue "great or small" to be considered at the hearing, in effect producing an "agenda" that can be "reviewed at the close of the case so that it may form a list of issues for the judge to address in the judgment". In a placement order application, that list should include the questions of whether long-term fostering is an option and, if not, why not. The *Re S-F* situation (long-term fostering being raised by the judge just before submissions but not to any great extent in evidence) and the *N-S* situation (long-term fostering not being raised until after the judgment) can in this way be avoided.

As to quite where the pendulum now is I haven't got a clue, but my ducking reflexes are much improved.

Stuart Fuller

Litigants who lack litigation capacity in Care proceedings

In July 2017, a research paper into the experiences of parents who lack capacity in care proceedings was published. The researchers were provided a grant of £30,000 and unprecedented access to care proceedings in an effort at addressing what was considered to be a paucity of research in this area. This paper is all the more prescient given that, in recent years, there has been an upward trend and obvious increase in the amount of parents in care proceedings requiring the assistance of the Official Solicitor.

It appears that at least in part, via the introduction, the report acknowledges the impact of 26 weeks and the time limits under which we all practice, and the potential impact of the fact that some parents in this category need more time than most people to learn and consolidate new skills and knowledge and that, "All are, for a time at least, experiencing impaired ability to absorb information, consider it and make a coherent and reasonably stable judgment based on that information, to a degree that renders them unable (lacking capacity) to instruct a solicitor". The research looks at the role of the Official Solicitor in protecting rights, including rights under the Human Rights Act 1998, the ECHR and the Equality Act 2010. It also considers how courts accommodate the needs of parents who are subject to Official Solicitor's protection.

Permission was granted for the authors to observe court hearings in 18 sets of care proceedings and for them to speak

to members of the judiciary as well as permission for a review of files held by the Office of the Official Solicitor and for them to speak to their staff. The authors spoke to a wide range of court users from Judges through lawyers to caseworkers in order to consider:

- the reasons for the incapacity decision;
- what happened to the children at the end of the proceedings; and
- whether there were any indicators that the 26-week limit for proceedings might have specific implications for parents who lack litigation capacity.

The study determined that a lack of litigation capacity may be due to many reasons, including; mental-health problems, intellectual disability or some other cause, or a combination of factors and that "capacity is issue specific, so some people may have capacity to make some decisions but not others within one set of proceedings. It can also fluctuate, especially when the underlying issue is a mental-health problem". It also found that, "Parents could start care proceedings having capacity and lose it, or vice versa, and some parents move in and out of capacity throughout proceedings. An instability in capacity might be exacerbated by the stress of proceedings for some parents, but some parents recovered capacity as their mental state improved during proceedings".

The paper considered the issue that in a number of cases, section 20 voluntary accommodation had been used for the accommodation of children, something which flies in the face of a conclusion that a parent lacks capacity. This gave rise to serious questions about how rigorously local authorities assess capacity and how they seek consent to accommodation, something which has been considered in various cases before the Court of Appeal.

The study also raised serious doubts about the propriety of the 26 week time limit in care proceedings for parents who lack capacity. The report states that, "It appears from our data that it is difficult for parents who lack litigation capacity to 'turn things around' within the duration of care proceedings. Very few parents ended proceedings with the care of their children, and although there were challenges to local authority care plans, it appears it is rare for this to lead to the child returning to the parent." This makes for alarming reading. On the one hand, it might be expected that a parent with sufficient difficulties to lack capacity might have similar difficulties with parenting, but on the other hand, at a time when courts are urging more and more by way of help and support for vulnerable parents, it would appear this help and support is neither available nor forthcoming.

Key recommendations based on the findings of the study include:

- The physical resources available to support parents who lack litigation capacity as participants in the legal process varies between courts and regions. A review is said to be required of the ability of courts to provide the technology and space needed to give all parents who have specialist communication and participation needs the opportunity to observe, understand and participate in hearings to the best of their ability.
- Without an intermediary to support the parent in understanding what is being asked or said in court, resources spent on interpreters may be underused. While intermediaries were universally seen as very useful, and lay advocates were valued in supporting parents, some interpreters need the support of an intermediary to help them communicate with a parent who lacks litigation capacity.
- There appears to be variation in the extent to which local authorities fund advocates to help parents attend meetings, including with their solicitor, child protection conferences, and other key decision making meetings. Article 6 of the European Convention on Human Rights / Human Rights Act 1998 and the Public Sector Equality Duty protect the right to procedural justice. Article 20 of the Equality Act 2010 relates to the duty to make adjustments to avoid disadvantage, among other things through the provision of auxiliary aid. It is recommended that local authorities, and solicitors representing protected parties, consider the implications of this duty for meetings outside the court setting as well as in the court process itself.
- Contact after removal into care or adoption, including 'letter box' indirect contact between a parent and their child, is a right of the child, once it has been decided by the court that this should happen in the interests of the child, unless further developments lead to a re-evaluation of that decision. Supporting contact unless there are reasons to end it safeguards the child's Article 8 right to family life under the European Convention on Human Rights/Human Rights Act 1998. It is also the right of the parent to have contact with child as determined by the court, unless the child's welfare contraindicates this. Support for letterbox and other indirect contact should be universally available for parents who lose the care of their children to adoption, and that support should take account of their specific needs.

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