VIEW FROM THE PRESIDENT'S CHAMBERS

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CARE CASES – THE LOOMING CRISIS

In my last View (August 2016), I drew attention to the seemingly relentless rise in the number of new care cases. The fact is that we are approaching a crisis for which we are ill-prepared and where there is no clear strategy to manage the crisis. What is to be done?

I start with the figures. The most accessible and up-to-date figures (in each case for the year from April to March) are those published by CAFCASS:

2005-6	6613					
2006-7	6786					
2007-8	6241					
2008-9	6488					
2009-10	8832					
2010-11	9203					
2011-12	10255					
2012-13	11110					
2013-14	10620					
2014-15	11159					
2015-16	12781	Apr-Aug	5059	+	Sept-Mar	7722
2016-17	14713e		6219	+		8494 (10%)
	15485e		6219	+		9266 (20%)

During the four years from 2005-6 to 2008-9, the figures fluctuated by modest amounts. The average annual figure during that period was 6532. In 2009-10 there was a dramatic increase to 8832, an increase in a single year of some 35%, whether compared with the previous year's figure of 6488 or the average figure of 6532 for the preceding four years. It is generally agreed that this unprecedented increase was the consequence of the Baby Peter case. Since 2009-10 the figures have continued to increase significantly. Comparing the figures for 2009-10, 8832, and 2014-15, 11159, the overall increase over that five-year period was 26%. The figure of 12781 for 2015-16 was an increase of 14% over the previous year. The figure, 6219, for the first five months of the current year, April to August 2016, was an increase of almost 23% over the figure, 5059, for the corresponding period the previous year.

Projecting what the full year figure for 2016-17 will be depends on various assumptions. If, which may be an unduly optimistic assumption, monthly increases for the next seven months average 10%, down from the almost 23% thus far this year, the full year figure will be 14713, an increase of 15% over the previous year; if 20%, the full year figure will be 15485, an increase of 21% over the previous year. On either basis, the figure will have more than doubled in the ten years since 2006-7, when the figure was 6786. Assuming the lower figure of 14713 for the present year and an annual 10% increase over the next three years, by 2019-20 the figure will have almost trebled since 2006-7 and be nudging 20,000. If the figure of 14713 were to increase at only 5% annually for the next three

years (probably the best we can hope for given the rise of 26% between 2009-10 to 2014-15), by 2019/20 the figure will be a little over 17000. If, on the other hand, the current rate of increase of c20% were to continue for the next three years, by 2019-20 the figure would have climbed to over 25000.

Following implementation of the recommendations of the Family Justice Review, the average duration of care cases fell rapidly month by month – the graph, accordingly, showing a constantly falling line. Over the last year or so the graph has 'flat-lined'. That it has not, as yet, begun to climb must be a matter for congratulation to everyone involved in making the system work. To keep the line level as the caseload increased by 14% is an astonishing achievement. I hope I turn out to be wrong, but *I do not believe that this level of achievement can be maintained as caseloads continue to rise*. The fact is that, on the ground, the system is – the people who make the system work are – at full stretch. We cannot, and I have for some time now been making clear that I will not, ask people to work harder. Everyone – *everyone* – is working as hard as they can.

We must, accordingly, assume that the line on the graph will start to go up – to move in the wrong direction. We are facing a crisis and, truth be told, we have no very clear strategy for meeting the crisis.

The immediate implications of this crisis are twofold. First we have, at least in the short-term, to struggle to cope with our existing resources. The reality, as I remarked in my last View, is that we are unlikely to see any increase in resources, judicial or otherwise. Secondly, these very large increases in the number of care cases are, inevitably, driving up very significantly the cost of legal aid. That is why, as I explained, we need to scrutinise the practical operation of the tandem model.

As I remarked in my last View, the reasons for this increase are little understood. Investigations are under way, but much more research is needed, and as a matter of urgency.

There are, in principle, three possible causes for the increase: (1) that the amount of child abuse / neglect is increasing; (2) that local authorities are becoming more adept at identifying child abuse / neglect and taking action to deal with it; (3) that local authorities are setting more demanding standards – in other words, lowering the threshold for intervention. I do not believe that child abuse / neglect is rising by 14% let alone 20% a year. So this cannot be the sole explanation. It follows that changes in local authority behaviour must be playing a significant role.

This conclusion is supported by two striking features of the statistics. One is that there have been very wide variations between Designated Family Judge areas, and thus between local authorities, in the scale of the recent increases. If the 'average' DFJ is struggling to manage an increase this year of 20% or thereabouts, some DFJs are facing much smaller increases, and others much, in some cases very much, larger increases. The other striking feature of the statistics are the figures which CAFCASS has published, showing, for every local authority for each year from 2008-9 to 2015-16, the number of care cases per 10,000 child population, the wide range of figures as between different local authorities and the significant fluctuations within individual local authorities of the figures from year to year. In neither case are there obvious demographic explanations.

One thing has emerged from such investigations as have so far taken place: there are many factors at play and none has a preponderating impact. The drivers are complex, with multiple drivers that have moderate or small impact creating a cumulative impact, rather than a small number of key drivers with high impact.

Further research is desperately needed if we are to have any chance of coming up with accurate predictions for the future.

Topics which might merit study (though whether the data exists is likely to be problematic in some instances) include:

- Whether there have been changes over time in the breakdown of care cases as between cases of physical abuse, sexual abuse, neglect and emotional harm.
- Whether there have been changes over time in the numbers of children involved in each care case.
- Whether there have been changes over time in the age profile or gender of the children involved in care cases.
- Whether there have been changes over time in the number of care cases involving 'repeat mothers' – that is, mothers returning through the system with further children.
- Whether there have been changes over time in the number of care cases involving 'repeat children' – that is, children returning through the system following placement breakdown, for example where an SGO has been made.
- Whether there have been changes over time in the number of care cases involving an emergency application, for example for an EPO or ICO.
- Whether any of these changes have been particularly marked in the last three years.

There is also a need to explore the extent to which short-term drivers affect the figures – for example, the extent to which local authority behaviour is in response to the actual or perceived effect of judicial rulings, as recently in relation to local authority use of section 20.

Finally, of course, all this has to be evaluated in the light of population and other demographic changes and trends.

The next topic where detailed research and analysis is urgently required is in relation to judicial deployment in care cases.

- What is the breakdown, nationally and for each DFJ area, of final hearings in care cases as between Magistrates, District Judges, Circuit Judges (and Recorders) and High Court Judges (and Section 9 Judges)?
- If there are significant differences between DFJ areas, is this because the workload is different or because of the nature and size of the available judicial complement?
- Is the available judicial complement adequate and properly reflective of *current* requirements? The perpetuation of established sitting patterns can have the consequence, and is seen in some places as actually having the consequence, that courts with roughly similar caseloads of care cases have significantly different complements.

At least in the short-term it is unlikely that we will see any increase in judicial resources, so it is all the more important to ensure that the burden is spread evenly and that judicial deployment is optimised.

The kind of analysis which is needed, when linked with the data coming out of all the other research, ought to enable us to come up with much more robust estimates than are currently to hand of (1) the total number of sitting days required nationally to handle the future estimated caseloads, (2) how those sitting days should be allocated as between Magistrates, District Judges, Circuit Judges (and Recorders) and High Court Judges (and Section 9 Judges), (3) how those sitting days should be allocated between DFJ areas and, *crucially* (4) whether those sitting days can in fact be found from the existing judicial complement.

This will inevitably take time. For the immediate future steps *must* be taken (1) to maximise the use wherever possible (though without prejudicing judicial continuity and case management) of

Recorders and Section 9 Judges) and (2) to speed up the processes of judicial recruitment following the retirement, resignation or death of sitting judges – far too much time passes while the business case supporting the need for a replacement judge is prepared and considered and then, if the business case is agreed, while the process of advertising and conducting the selection process for a successor goes on.

A third area where more research and analysis is required relates to court process:

- Why does the number of hearings in care cases vary as between different cases and different courts?
- Why is the number of expert reports continuing to increase and *crucially* in which disciplines? Why are the increases greater in some courts than others? Is this in any way linked to the level of judge making the order?

In the meantime – *today* – we face a clear and imminent crisis. What steps can be taken now?

The first thing is to do everything we properly can *without sacrificing what is fundamental or prejudicing standards* to improve the way in which we handle care cases:

- Too many documents are still too long. Following the consultation earlier this year I will be amending PD27A, the Bundles Practice Direction, to impose page limits for certain categories of documents.
- Local authority threshold statements need to be shorter, more focused and *Re A* [2015] EWFC 11 compliant.
- Every effort must be made to ensure the effectiveness of the CMH, so as to avoid or at least minimise the need for further directions hearings.
- More stringent scrutiny needs to be applied when applications for experts are being considered.
- Every effort must be made to ensure the effectiveness of the IRH, so that the final hearing, if still required, focuses on what is really, and appropriately, in issue.

The other thing is to continue to look for new, innovative and better ways of handling these cases, for example, by piloting and then rolling out the settlement conferences which I described in my last View.

This is going to be uncomfortable and difficult for all of us.

I have said before but I repeat, because the point is so important, that I will never countenance any departure from the fundamentals:

- *Care cases, with their potential for life-long separation between children and their parents, are of unique gravity and importance.*
- *It is for the local authority to establish its case.*
- *Common-law principles of fairness and justice demand, as do Articles 6 and 8 of the Convention, a process in which both the parents and the child can fully participate with the assistance of representation by skilled and experienced lawyers.*
- *The tandem model is fundamental to a fair and just care system. Only the tandem model can ensure that the child's interests, wishes and feelings are correctly identified and properly represented. Without the tandem model the potential for injustice is much increased. I would*

therefore be strongly opposed to any watering down of this vital component of care proceedings.

On the fundamentals there can be and will be neither compromise nor retreat. *But this does not mean that there is no scope for improving, streamlining and speeding up our processes*. We can, and we must, if the system is not to buckle under the pressure of ever-increasing caseloads.

I have left until last the single most important thing that can and must be done, *urgently and with unremitting vigour*, to manage the crisis.

I have said this before, but I repeat, because it is so important, we have to address what I believe is the pressing need for a radical rebalancing of the very functions and purpose of the family courts. It is a truism that the fundamental difference between the civil courts and the family courts is that the civil courts focus on what has happened in the past, whilst the family courts look to the past only to identify the problem before focusing on what needs to happen in the future. But as we presently understand it, this forward looking aspect is usually confined to providing a solution rather than solving the underlying problem – or, typically, the concatenation of underlying problems. The family court must become, in much of what it does, a problem-solving court. We are all familiar with the excellent and immensely fruitful work being done in ever increasing numbers of cases in the ever expanding network of FDACs. Another similar project – Pause – is now in rapid development, focusing on addressing the underlying problems of the all too many women who find themselves losing successive children in repeat care proceedings. Other projects are being considered. This is vitally important work. It improves the outcomes for children. It improves the lives of parents. And it saves money – large sums of money – for a variety of public purses.

There must be no slowing down, no pulling back. FDAC and Pause – both of them, for they are complementary – must be nurtured and supported. The FDAC National Unit plays a vital role as midwife and health visitor to new FDACs as they prepare and then implement their plans. Without the FDAC National Unit the continuing roll-out of new FDACS is likely to falter. We cannot, we must not allow this to happen. I trust that government, both national and local, will heed the call.

How does this relate to the crisis? The point is very simple. Our objective in everything we do is, of course, the welfare of the child. But the child is not the problem. Insofar as there is a 'problem', it lies with the parent. And mothers with problems can have many children, too many of them in due course becoming the subject of care proceedings. As the recently published research by Professor Karen Broadhurst has demonstrated, the statistics are very striking. A mother with problems can generate 5, 10 or even more care cases down the years, as her successive children are taken into care. If we can only solve, as FDAC and Pause so successfully solve, the 'problem', then the consequence is a reduction in the number of new cases coming into the system.

FDAC, Pause and similar projects are, at present, the best hope, indeed, in truth, the only hope, we have of bringing the system, the ever increasing numbers of care cases, under control. If anyone knows any better I shall be delighted to hear what it is. But until they do I shall remain, as hitherto, an ardent, committed and enthusiastic supporter of FDAC and Pause.