Neutral Citation Number: [2014] EWFC 39

Case No: SN14C00004

IN THE FAMILY COURT
AT SWINDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the Matter of D (A Child)

- -
- -

Ms Deirdre Fottrell and Ms Marlene Cayoun (instructed by Withy King) for the father (a protected party acting by the Official Solicitor as his litigation friend)
Ms Sarah Morgan QC and Ms Lucy Sprinz (instructed by Goodman Ray) for the mother
Ms Hayley Griffiths (instructed by the local authority) for Swindon Borough Council
Mr Kambiz Moradifar (instructed by Stone King LLP) for the child D

Hearing date: 8 October 2014

- -

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 handed down in open court

Sir James Munby, President of the Family Division :

1. The underlying issue in this case can be stated in a single sentence. Should a little boy, D, live with his parents, or, if they cannot adequately look after him, with other members of his wider family, or should he, as the local authority, Swindon Borough Council, argues, be adopted outside the family.

2. The issue could hardly be of more profound significance for both D and his parents. For the child, an adoption order, as I recently had occasion to remark (*Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), para 54) "has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences." For the parents it means the permanent loss of their child. Whatever the ultimate decision, D and his parents will have to live with the consequences for the remainder of their lives, in D's case, given his age, potentially into the 22nd century.

3. That, however, is not the issue currently before me. What I have to grapple with is the profoundly disturbing fact that the parents do not qualify for legal aid but lack the financial resources to pay for legal representation in circumstances where, to speak plainly, it is unthinkable that they should have to face the local authority's application without proper representation.

The facts

4. Before going any further I should set out such of the facts as are relevant to the issue currently before me. Previous judgments have been given by Baker J on 23 May 2014 (*A Father v SBC and ors* [2014] EWFC 6) and by Her Honour Judge Marshall on 9 June 2014 (*Re D (A Child)* [2014] EWFC B77). Both can be found on the BAILII website.

5. For the background I can do no better than to quote from Baker J's judgment (paras 2-6):

> "2 D was born on 11th December 2011 and is therefore now aged 2½. His mother was assessed in 2012 as being on the borderline of a mild learning disability. His father was found to have a more significant cognitive impairment, with an IQ of around 50. In the earlier proceedings described below, a psychological assessment concluded that he lacked capacity to conduct litigation. He has, however, managed to function successfully in his adult life, with some assistance from local authority adult social services. He has worked in the same job for over 12 years and has been contributed towards the financial support of the family.
>
> 3 When D was born, the local authority started care proceedings under s.31 of the Children Act 1989. After he was discharged from hospital, D and his parents underwent a 16-week residential placement in a local authority foster placement which was completed successfully. Afterwards, the family

> moved into a new home with a package of support from the local authority and other agencies. They have extended family on both sides to whom they are close, and a network of friends. They attend a local church. In the summer of 2012, the parents were married.
>
> 4 At the final hearing of the care proceedings, the local authority's care plan, dated [28 September 2012] recorded that D had been in his parents' care since birth and was settled, happy and developing. It recommended that D remain in their care under a full care order. That order would be subject to review after a year when it was thought it might be appropriate to move to a supervision order. The plan specified the level of professional support to be provided for the family. It further provided that, if the placement broke down, D would move initially to a foster placement. The local authority would then carry out a viability assessment of his maternal grandparents to see if they were able to look after him, although an assessment carried during the care proceedings had concluded that they were not.
>
> 5 The care plan was endorsed by the children's guardian. In her final report, she indicated that, while she supported what she described as the local authority's "courageous attempts" to try to enable D to be looked after his parents, she was "not yet entirely confident that they will be able to provide D with the safe, emotionally attentive care that he will need on a long term basis." She identified "a number of risk factors in D's care circumstances which can be monitored but not removed or effectively counteracted by the considerable support and monitoring resources that have been and are continuing to be provided." She thought that, as D becomes more mobile, these risk factors would be more difficult to manage.
>
> 6 On 7th November 2012, District Judge Cronin made a care order on the basis of the local authority's care plan. The order included an undertaking by the local authority not to remove D from the care of his parents without giving 7 days notice in advance, unless an emergency situation should arise."

I should add that the part of the care plan referred to by Baker J in para 4, went on to say that "if … the outcome of the ... assessment is that [the maternal grandparents] are still not viable carers for D, then the local authority will seek permanence for D through adoption."

6. So far as material for present purposes, subsequent events can be stated quite shortly. On 31 March 2014 the local authority gave the parents notice that they intended to remove D on 25 April 2014. The father consulted the solicitor, Rebecca Stevens of Messrs Withy King, who had acted for him in the care proceedings. Having applied unsuccessfully for public funding, Ms Stevens agreed to represent him pro bono. She

has done so ever since. On 11 April 2014 Ms Stevens filed an application on behalf of the father seeking the discharge of the care order in accordance with section 39 of the Children Act 1989. On 22 April 2014 the local authority filed an application for a recovery order pursuant to section 50 of the 1989 Act. Both applications came before District Judge Goddard on 24 April 2014. During the hearing an oral application was made for an injunction to restrain the local authority removing D. The District Judge refused the application for an injunction and made the recovery order. D was removed from his parents the following day, 25 April 2014.

7. On 29 April 2014 Ms Stevens filed a notice of appeal on behalf of the father. It had been settled by Ms Deirdre Fottrell, also acting pro bono, as she has ever since. The appeal came on before Baker J on 16 May 2014. For the reasons set out in his judgment, he remitted the application for an injunction for hearing by Judge Marshall, but declined to direct D's return to his parents in the interim. The hearing before Judge Marshall took place on 29-30 May 2014. For the reasons subsequently set out in her judgment, she declined to order D's return to his parents. On 17 July 2014 the Court of Appeal (Black LJ) refused the father's application for permission to appeal Judge Marshall's order.

8. A further case management hearing took place before Judge Marshall on 29 July 2014. The order made on that occasion recited that "This is a case where permanent placement outside the family must be considered as a possible outcome." In addition to making arrangements for interim contact, Judge Marshall directed that the local authority's application for a placement order in accordance with section 22 of the Adoption and Children Act 2002 was to be issued by 28 October 2014. She fixed the issues resolution hearing for 5 December 2014. She directed that expert evidence be obtained from an independent social worker, Helen Randall, in a report to be provided by 30 September 2014. On 23 September 2014 Judge Marshall directed that the matter was to be listed before me in London on 8 October 2014.

9. Ms Randall reported on 26 September 2014. Her report is unfavourable to the parents. Ms Randall said that she was unable to recommend that D be cared for by his parents, that there were no suitable family or friends able or willing to care for him and that her recommendation was that D be adopted.

10. The matter came on for hearing before me in London on 8 October 2014. The father was represented by Ms Deirdre Fottrell and Ms Marlene Cayoun, instructed by Rebecca Stevens of Withy King. As a protected party the father acted by the Official Solicitor as his litigation friend. The mother was represented by Ms Sarah Morgan QC and Ms Lucy Sprinz, instructed by Goodman Ray. Swindon Borough Council was represented by Ms Hayley Griffiths. D was represented by Mr Kambiz Moradifar. Ms Griffiths and Mr Moradifar were, I assume, being appropriately remunerated – D has legal aid. The others, in circumstances I must describe in more detail below, were all acting *pro bono*. At the end of the hearing I reserved judgment.

11. On 28 October 2014, the local authority filed a placement order application under section 22 of the 2002 Act.

The present state of the proceedings

12. The present position can therefore be summarised as follows. The proceedings under section 31 of the 1989 Act came to an end on 7 November 2012 when District Judge Cronin made a care order. The proceedings under section 50 of the 1989 Act came to an end on 24 April 2014 when District Judge Goddard made a recovery order. The injunction proceedings came to an end on 17 July 2014 when the Court of Appeal refused permission to appeal from the order made by Her Honour Judge Marshall on 9 June 2014. There are two extant sets of proceedings: the father's application under section 39 of the 1989 Act and the local authority's application under section 22 of the 2002 Act.

The legal aid regime

13. Before proceeding any further it is necessary to set out the relevant statutory provisions governing the availability (or otherwise) of legal aid to persons in the position of D's parents.

14. The starting point is Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which identifies the categories of case for which civil legal aid remains available. So far as material, the relevant categories are set out in paragraph 1:

> "(1) Civil legal services provided in relation to –
>
> …
>
> (b) orders under Part 4 of the 1989 Act (care and supervision);
>
> (c) orders under Part 5 of the 1989 Act (protection of children);
>
> …
>
> (i) placement orders, recovery orders or adoption orders under Chapter 3 of Part 1 of the 2002 Act (see sections 21, 41 and 46 of that Act);
>
> …
>
> (2) Civil legal services provided in relation to an order under an enactment made –
>
> (a) as an alternative to an order mentioned in sub-paragraph (1), or
>
> (b) in proceedings heard together with proceedings relating to such an order."

Sections 31 and 39 of the 1989 Act are in Part 4, and section 50 is in Part 5, of the 1989 Act.

15. Civil legal aid is generally both *means* and *merits* tested. Regulation 5 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, SI 480/2013, details those cases which are *not* means tested:

> "(1) The following forms of civil legal services may be provided without a determination in respect of an individual's financial resources –
>
> …
>
> (c) legal representation in a special Children Act 1989 case;
>
> (d) legal representation in proceedings related to any proceedings in sub-paragraph (c) to the extent that the individual to whom the legal representation may be provided is an individual to whom legal representation is being provided under sub-paragraph (c) and –
>
> (i) the proceedings are being heard together with those proceedings referred to in sub-paragraph (c); or
>
> (ii) an order is being sought in the proceedings as an alternative to an order in the proceedings referred to in sub-paragraph (c);
>
> …
>
> (2) In this regulation –
>
> …
>
> "special Children Act 1989 case" means any matter described in paragraph 1(1)(a), (b) or (c) (care, supervision and protection of children) of Part 1 of Schedule 1 to the Act, to the extent that it relates to any of the following provisions of the Children Act 1989 –
>
> (a) section 25 (use of accommodation for restricting liberty)(12), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order;
>
> (b) section 31, to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child;
>
> (c) section 43 (child assessment orders), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that

> child's parent or other person with parental responsibility for that child;
>
> (d) section 44 (orders for emergency protection of children), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child; or
>
> (e) section 45 (duration of emergency protection orders and other supplemental provisions)(13), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child,
>
> but does not include appeals from final orders made under any of those provisions of the Children Act 1989".

16. The normal merits test is set out in Regulations 39 and 66 of the Civil Legal Aid (Merits Criteria) Regulations 2013, SI 2013/104, as amended. The effect of Regulation 65 is to exempt a "special Children Act 1989 case" from the normal merits test. Regulation 2 defines "special Children Act 1989 case" in the same terms as in Regulation 5(2) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

17. So far as material for present purposes, the effect of all this is clear. Non-means-tested legal aid is available to parents for only two classes of case: first, for care proceedings under section 31 of the 1989 Act; secondly, for proceedings which are, within the meaning of Regulation 5(1)(d) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, "related to" care proceedings. Given the definition of "related to", neither the local authority's application under section 50 of the 1989 Act, nor the parents' application under section 39, nor the local authority's application under section 22 of the 2002 Act, is "related to" the previous care proceedings. So in none of them did, or do, the parents qualify for non-means-tested legal aid. Legal aid is, or as the case may be was, available in principle, in accordance with paragraph of Part 1 of Schedule 1 to LASPO, for the applications under sections 39, 50 and 22, but in each case means-tested.

Legal aid – the realities

18. The parents' capital amounts in all to a very modest £3,250 or thereabouts, an amount so small that they are not disqualified from legal aid on that ground. The father's disposable monthly income (his gross income *less* income tax, national insurance, employment expenses, dependants allowance and net rent) was assessed in May 2014 as amounting to £767.64 and in June 2014 as amounting to £806.94. The upper limit for disposable monthly income – the amount above which one is ineligible for legal aid – is £733.00. So, the father and the mother are disqualified from receiving legal aid because the father's disposable monthly income in May 2014 was £34.64 too much and in June 2014 was £73.94 too much.

19. The father's modest earnings disqualify him, and therefore the mother, from receiving legal aid. They cannot afford to fund private representation. They are, at present, wholly dependant on the good will of members of the legal profession who, to their enormous credit, and acting in the highest traditions of the profession, are acting *pro bono*, that is, for no fee and paying their travel and other expenses out of their own pockets.

20. Indeed, in the case of Ms Stevens she has been prepared to go even further. The father has a learning disability. He is a "protected party" within the meaning of Rule 2.3 of the Family Procedure Rules 2010. As a matter of law he is not able, as a protected party, to act without a litigation friend. Quite apart from that, the father's learning disability in any event requires him to have considerable support and assistance to be able to participate effectively in the proceedings. The Official Solicitor has agreed to act as his litigation friend. The Official Solicitor cannot be compelled to act as anyone's litigation friend. His practice is to agree to act only if there is funding for the protected party's litigation costs, because his own budget – the monies voted to him by Parliament – is not sufficient to enable him to fund the costs of litigation of the type the father is involved in. The Official Solicitor was willing to act here only because the father's solicitor and counsel have agreed to act, thus far, *pro bono*. But without the protection against an adverse costs order which the father (and derivatively the Official Solicitor) would enjoy if the father had legal aid, the Official Solicitor has a possible exposure to an adverse costs order – for instance, if the local authority was to obtain an order for costs against him – which, understandably, he is unwilling to assume. The consequence is that the Official Solicitor was not willing to act as the father's litigation friend unless Ms Stevens agreed, as she has, to indemnify him against any adverse costs orders. And as if all this was not enough – indeed, far more than enough – I am told that Ms Stevens has spent in excess of 100 hours, all unremunerated, working to resolve, thus far without success, the issue of the father's entitlement to legal aid. This is devotion to the client far above and far beyond the call of duty.

21. The mother, although she has learning disabilities, is not a protected party and therefore does not need a litigation friend. But the considered view of her experienced counsel (I quote from the position statement dated 6 October 2014 prepared on her behalf by Ms Morgan and Ms Sprinz) is that

> "The personal characteristics, intellectual functioning and limitations arising from learning difficulties which affect each of them [the father and the mother] in different ways … impact profoundly on their ability to represent themselves in proceedings in relation to their son whether at Court hearings or in discussions with professionals associated with or ancillary to those court hearings … It is readily apparent from meeting with [the mother] that she would be wholly unable to represent herself in relation to any aspect of these proceedings."

The point is elaborated by reference to the difficulties facing the mother at the hearing before Judge Marshall on 29 July 2014, when she was unrepresented (she had been represented *pro bono* at the previous hearings before Baker J and Judge Marshall). Judge Marshall directed that the mother was to file any evidence she wished to rely on

by 19 August 2014. The mother was unable to manage that aspect of the case alone, and has not complied with the order. Because the father is a protected party, he and the mother as a matter of law require *separate* representation.

22. I add this. On 8 September 2014 pre-action protocol judicial review letters were sent on behalf of the father to the Legal Aid Agency and to the Lord Chancellor, challenging the decision of the Agency to refuse legal aid and raising issues in relation to the lawfulness of certain aspects of the funding scheme. Similar letters were sent on behalf of the mother on 19 September 2014. The Treasury Solicitor has responded, making clear that any claim will be resisted. The progress of these claims is stymied: the parents are financially ineligible for legal aid to pursue a claim for judicial review, and those who might otherwise be willing to act *pro bono* for them in judicial review proceedings are unwilling to run the risks of adverse costs orders.

Baker J's views

23. Baker J was understandably extremely concerned by fact that the parents did not qualify for legal aid in relation to the applications that were before him, that is the applications under section 39 of the 1989 Act and for an injunction. He said (*A Father v SBC and ors* [2014] EWFC 6, para 10):

> "The remedy available to parents in these circumstances is to apply under s.39 of the Children Act for the discharge of the care order. But this remedy is not straightforward. A parent whose child is subject to an application for a care order under s.31 is automatically entitled to legal aid, irrespective of means. Not so a parent whose child is living at home under a care order and who wishes to challenge a local authority's proposal to remove the child. Because the father works, and therefore has a small income, he and the mother are not entitled to legal aid. In the current case, these difficulties are compounded because the father lacks capacity, and it is therefore necessary to invite the Official Solicitor to represent him as litigation friend. The Official Solicitor's resources are under great pressure and as a result there are often delays in his responding to such invitations."

24. Baker J concluded his judgment with these general observations (para 51-53):

> "51 Finally, this case has highlighted a further major problem. These parents face the prospect of losing their son permanently. If this prospect had arisen in the context of care proceedings, they would be entitled as of right to non-means tested legal aid. It is difficult to see why similar automatic public funding should not be available where the local authority proposes the removal of a child living at home under a care order and the parents apply to discharge that order and for an interim injunction under s.8 HRA. The justification for automatic public funding in care proceedings is the draconian nature of the order being claimed by the local authority. Where

> a local authority seeks to remove a child placed at home under a care order, the outcome of the discharge application may be equally draconian. Because this father is working, and earns a very low wage from which he has contributed to the support of his family, he, and possibly the mother, are disqualified from legal aid. Miss Fottrell and Miss Sprinz and their solicitors are at present acting pro bono. It is unfair that legal representation in these vital cases is only available if the lawyers agree to work for nothing.
>
> 52 This problem is compounded in this case because of the learning difficulties of the parties and in particular the father … A parent with learning difficulties who is not entitled to legal aid is at a very great disadvantage when seeking to stop a local authority removing his child.
>
> 53 On the basis of evidence at present available, it seems plain that the father lacks capacity to conduct litigation and therefore needs to be represented by a litigation friend. Such are the demands on the Official Solicitor's time and resources that there is inevitably a delay in his deciding whether or not to accept instructions, and the fact that the father is not entitled to public funding adds to the complications. In this case, I hope that the Official Solicitor will give urgent consideration to accepting the invitation to act as litigation friend. The current system in which so much of the responsibility for representing parents who lack capacity falls on the shoulders and inadequate resources of the Official Solicitor is nearing breaking point."

I respectfully agree with every word of that. And everything he said surely applies with equal, if not in fact even greater, force to the predicament of the parents as they now face the local authority's application for a placement order.

25. As Ms Griffiths pointed out in her submissions to me, the parents were entitled to non-means, non-merits, tested legal aid when facing the proceedings under section 31, at a time when removal of their child was *not* the plan. Yet when they are now facing an application for the permanent removal of their child and his adoption they are denied legal aid. That, to use no stronger expression, is a decidedly curious consequence of the scheme embodied in Regulation 5 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. Some might suggest that it is irrational. No doubt it is some imperfection on my part, but I confess that I struggle to understand the policy or rationale underlying this part of the scheme.

The role of the court

26. It is no part of the function of the Family Court or the Family Division to pass judgment on the appropriateness and wisdom of the arrangements that Parliament (or Ministers acting in accordance with powers conferred by Parliament) choose to make in relation to legal aid. The legality, rationality and, where relevant, the proportionality of the scheme, if properly the subject of judicial scrutiny, are primarily

the responsibility of the Administrative Court. It is, however, the responsibility – indeed, the duty – of the judges in the Family Court and the Family Division to ensure that proceedings before them are conducted justly and in a manner compliant with the requirements of Articles 6 and 8 of the Convention. That, after all, is what Parliament determined when it enacted section 6 of the Human Rights Act 1998, declaring, subject only to section 6(2), that it is "unlawful" for a court to act in a way which is incompatible with Articles 6 and 8.

27. In *Q v Q* [2014] EWFC 7, paras 12, 15-16, I pointed out that Rule 1.1 of the Family Procedure Rules 2010 requires the court to deal with matters such as those with which I am here concerned "justly" and ensuring "so far as is practicable" that the case is dealt with "fairly" and also "that the parties are on an equal footing." That, as I observed, is the obligation of the court under domestic law, but it is also the obligation of the court under Articles 6 and 8 of the Convention. I went on to make the point that as long ago as 1979, in the well-known case of *Airey v Ireland (Application No 6289/73)* (1979) 2 EHRR 305, the European Court of Human Rights had held that there could be circumstances in which, without the assistance of a legally qualified representative, a litigant might be denied her Article 6 right to be able to present her case properly and satisfactorily. I referred to *Mantovanelli v France (Application No 21497/93)* (1997) 24 EHRR 370 as indicating the significance of the right to an adversarial hearing guaranteed by Article 6 specifically in the context of an expert's report which (as here with Ms Randall's report) is "likely to have a preponderant influence on the assessment of the facts by [the] court." See further *Q v Q, Re B (A Child), Re C (A Child)* [2014] EWFC 31, paras 45-49.

28. Given the parents' difficulties in the present case, I need to refer to the more recent decision of the Strasbourg court in *RP and others v United Kingdom (Application No 38245/08)* [2013] 1 FLR 744, the aftermath of proceedings in the Court of Appeal, reported as *RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent)* [2008] EWCA Civ 462, [2008] 2 FLR 1516, in which a mother with learning difficulties, who lacked capacity to litigate, failed in her endeavour to have a placement order in relation to her child set aside.

29. I draw attention to what the Strasbourg court said in paras 65-67 (citations omitted):

> "65 In cases involving those with disabilities the court has permitted the domestic courts a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned. This is in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings. However, the court has held that such measures should not affect the very essence of an applicant's right to a fair trial as guaranteed by Art 6(1) of the European Convention. In assessing whether or not a particular measure was necessary, the court will take into account all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant.

> 66 It is clear that in the present case the proceedings were of the utmost importance to RP, who stood to lose both custody of and access to her only child. Moreover, while the issue at stake was relatively straightforward – whether or not RP had the skills necessary to enable her successfully to parent KP – the evidence which would have to be considered before the issue could be addressed was not. In particular, the court notes the significant quantity of expert reports, including expert medical and psychiatric reports, parenting assessment reports, and reports from contact sessions and observes the obvious difficulty an applicant with a learning disability would have in understanding both the content of these reports and the implications of the experts' findings.
>
> 67 In light of the above, and bearing in mind the requirement in the UN Convention that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, *the court considers that it was* not only appropriate but also *necessary for the United Kingdom to take measures to ensure that RP's best interests were represented in the childcare proceedings*. Indeed, in view of its existing case-law the court considers that *a failure to take measures to protect RP's interests might in itself have amounted to a violation of Art 6(1)* of the European Convention (emphasis added)."

I draw attention in particular to the words I have emphasised.

The parents' predicament

30. In the circumstances as I have described them, the parents' predicament is stark, indeed shocking, a word which I use advisedly but without hesitation.

31. Stripping all this down to essentials, what do the circumstances reveal?

    i) The parents are facing, and facing because of a decision taken by an agent of the State, the local authority, the permanent loss of their child. What can be worse for a parent?

    ii) The parents, because of their own problems, are quite unable to represent themselves: the mother as a matter of fact, the father both as a matter of fact and as a matter of law.

    iii) The parents lack the financial resources to pay for legal representation.

    iv) In these circumstances it is unthinkable that the parents should have to face the local authority's application without proper representation. To require them to do so would be unconscionable; it would be unjust; it would involve a breach of their rights under Articles 6 and 8 of the Convention; it would be a denial of justice.

v) If his parents are not properly represented, D will also be prejudiced. He is entitled to a fair trial; he will not have a fair trial if his parents do not, for any distortion of the process may distort the outcome. Moreover, he is entitled to an appropriately speedy trial, for section 1(2) of the 1989 Act and section 1(3) of the 2002 Act both enjoin the court to bear in mind that in general any delay in coming to a decision is likely to prejudice the child's welfare. So delay in arranging for the parents' representation is likely to prejudice the child. Putting the point more generally, the court in a case such as this is faced with an inescapable, and in truth insoluble, tension between having to do justice to both the parents and the child, when at best it can do justice only to one and not the other and, at worst, and more probably, end up doing justice to neither.

vi) Thus far the State has simply washed its hands of the problem, leaving the solution to the problem which the State itself has created – for the State has brought the proceedings but declined all responsibility for ensuring that the parents are able to participate effectively in the proceedings it has brought – to the goodwill, the charity, of the legal profession. This is, it might be thought, both unprincipled and unconscionable. Why should the State leave it to private individuals to ensure that the State is not in breach of the State's – the United Kingdom's – obligations under the Convention? As Baker J said in the passage I have already quoted, "It is unfair that legal representation in these vital cases is only available if the lawyers agree to work for nothing."

32. In addition to these fundamental problems there are a number of more practical but very important points:

i) I have already noted that those working *pro bono* for the parents are not merely working for no fee but also having to pay their travel and other expenses out of their own pockets and, in the case of Ms Stevens, agreeing in addition to indemnify the Official Solicitor.

ii) There is also the problem that the parents do not have the money to travel to court unless it is very close to home. The very practical question of how the parents were to pay the cost of coming to court in London for the hearing on 8 October 2014 was resolved only because the local authority agreed, but explicitly without any future commitment, to make an *ex gratia* payment.

iii) The mother and the father may require the use of an intermediary, not merely in the court setting but also, for example, when meeting professionals out of court. An intermediary at court is paid for by Her Majesty's Courts and Tribunals Service: see *Q v Q, Re B (A Child), Re C (A Child)* [2014] EWFC 31, para 52. But who is to pay the costs of any intermediary whose use is necessary for the purposes of meetings with professionals out of court?

<u>The way forward</u>

33. I am conscious that, in expressing myself as I have, I have not thus far had the benefit of argument from anyone other than the parties. In particular, I have had no argument from any emanation of the State other than the local authority. My conclusions must to that extent be provisional. If the State wishes to challenge my conclusions, especially as I have set them out in paragraph 31 above, then let the State do so. I

shall of course be willing to hear further submissions from any interested State party, or indeed any other interested party.

34. What then is the appropriate way forward?

35. If legal aid is not available for the parents then I need to explore whether there is some other public pocket to which the court can have resort to avoid the problem. There are, in theory, three other possible sources of public funding. As I said in *Q v Q* [2014] EWFC 7, para 18:

> "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 … where one party is publicly funded … 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."

I continued (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".

The need for such investigation in the present case is, if anything, even more pressing than in *Q v Q*.

36. I have accordingly directed that there be a further hearing at which, assuming that the parents still do not have legal aid, I shall decide whether or not their costs are to be funded by one, or some, or all of (listing them in no particular order) the local authority, as the public authority bringing the proceedings, the legal aid fund, on the basis that D's own interests require an end to the delay and a process which is just and Convention compliant, or Her Majesty's Courts and Tribunals Service, on the basis that the court is a public authority required to act in a Convention compliant manner.

37. Copies of this judgment, and of the order I made following the hearing on 8 October 2014, will accordingly be sent to the Lord Chancellor, the Legal Aid Agency, Her Majesty's Courts and Tribunals Service and the Association of Directors of Children's Services, inviting each of them to intervene in the proceedings to make such submissions as they may think appropriate. If they choose not to intervene, I shall proceed on the basis of the conclusions expressed in this judgment, in particular as I have set them out in paragraph 31.

A final observation

38. There is one other aspect of the problem which I ought to mention. As Ms Griffiths pointed out to Baker J (*A Father v SBC and ors* [2014] EWFC 6, para 48), and she made the same point to me, the result of the reduction in the time taken to complete care proceedings following the family justice reforms, has been an increase in the numbers of care cases being concluded with a final care order on the basis of the child remaining at home. If that is so, then, as Baker J commented, there will inevitably be an increase in the number of cases where the local authority concludes that a child should subsequently be removed. But as Ms Griffiths also pointed out, there are two further problems.

39. The effect of sections 21 and 22 of the 2002 Act is that a local authority which already has a *care order* can, indeed in certain circumstances must, apply for a placement order. If the local authority has only a *supervision order* it cannot. It will need to apply for both a care order and a placement order, in which case the parents will be entitled to non-means-tested legal aid in accordance with Regulation 5 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. In other words, the effect of the legal aid scheme may be to distort the process in cases where the plan is for return of the children to their parents, because of the incentive for the parents to press for a supervision order rather than a care order.

40. That is a potentially perverse incentive operating on the parents. But there may also, as Ms Griffiths points out, be a potentially perverse incentive operating on local authorities, who may be reluctant to agree to a final *care* order in such a case, and prefer a *supervision* order, if there is a risk that the cost of the parents' representation in subsequent proceedings under section 39 of the 1989 Act or section 22 of the 2002 Act will fall on the local authority rather than the legal aid fund.

Postscript

41. The preceding part of this judgment was sent to the parties in draft on 28 October 2014. I was subsequently informed that the situation in relation to legal aid has moved on since the last hearing but has not been resolved. The Legal Aid Agency has reassessed the father's means and has granted an emergency certificate, limited at this stage to the hearings in May and July 2014 and subject to agreement to pay a contribution of £133.77 from capital and £96.38 each month from income. That offer has been accepted and the first instalment has been paid to the Agency. The issue of legal aid in relation to the proceedings with which I am concerned has not yet been resolved. It needs to be, before the next hearing, which is listed before me on 13 November 2014.