Neutral Citation Number: [2015] EWCA Civ 543

Case No: B4/2015/0130

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT LEICESTER
HHJ BELLAMY SITTING AS A DEPUTY HIGH COURT JUDGE
[2015] EWFC 1

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2015

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE BLACK
and
LORD JUSTICE MCFARLANE

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Re K and H (CHILDREN)

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Phillipa Whipple QC, Sarah Hannett, and Matthew Donmall (instructed by **the Government Legal Department**) for the **Appellant, the Lord Chancellor**
Lorna Meyer QC and Kirsty Gallacher (instructed by **LDJ Solicitors**) for the **First Respondent Mother**
Deirdre Fottrell QC, Marlene Cayoun and Noel Arnold (instructed by **Coram Children's Legal Centre**) for the **Interveners: the Association of Lawyers for Children and Coram Children's Legal Centre**

Hearing dates : 29-30 April 2015

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Approved Judgment

Master of the Rolls:

1. The first respondent ("the mother") is the mother of Y (now aged 17), K (now aged 6) and H (now aged 4). K and H are full siblings. Y (their half sibling) is the mother's child of a previous relationship. In July 2013, Y made an allegation that when she was 15 years of age she was sexually abused by the father of K and H ("the father"). The father has always denied the allegation. The proceedings in the court below concerned in part the issue of what contact arrangements or orders should be made between K and H and the father.

2. HH Judge Bellamy decided (rightly) that, before the court could consider the father's future contact with K and H, it was important to establish whether Y's allegation was true. A fact finding hearing was listed to begin on 14 January 2015 at which he directed that Y should give oral evidence. The mother was legally aided. Although he had been legally represented from time to time, by the time of the decision with which this appeal is concerned, the father was a litigant in person. He did not apply for legal aid: he appeared not to be eligible for legal aid as he appeared not to satisfy the "means test" set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ("the Financial Resources Regulations").

3. In a judgment handed down on 5 January 2015, the judge decided that (i) it was not appropriate for the father to cross-examine Y (in fact he did not wish to do so); (ii) it was not appropriate for him (the judge) to put questions to Y to test her allegation against the father; (iii) the court should arrange for a legal representative to be appointed to cross-examine Y on behalf of the father; and (iv) the costs of the legal representative should be borne by Her Majesty's Court and Tribunal Service ("HMCTS").

4. The Lord Chancellor appeals against this decision with the permission of the judge. The proposition that the court has the power to order the Lord Chancellor to provide public funding for legal representation outside the legal aid scheme provided for in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") has the endorsement of the observations of Sir James Munby, President of the Family Division in *Q v Q* [2014] EWFC 31, [2015] 1 WLR 2040 and in *In re D* [2014] EWFC 39.

The relevant legislation

5. Section 1 of the Courts Act 2003 ("the 2003 Act") imposes a general duty on the Lord Chancellor to

> "ensure that there is an efficient and effective system to support the carrying on of the business of….the family court….and that appropriate services are provided for those courts."

6. Section 31G(6) of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act") provides:

> "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-
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> (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
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> (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."

7. Section 1 of LASPO provides that the Lord Chancellor "must secure that legal aid is made available in accordance with this Part". 'Legal aid' is defined as:

> "civil legal services required to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil aid)…."

8. Section 9 provides:

> "(1) Civil legal services are to be available to an individual under this Part if-
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> (a) they are legal services described in Part 1 of the Schedule 1, and
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> (b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination)."

9. Section 11 provides:

> "(1) The Director must determine whether an individual qualified under this Part for civil legal services in accordance with-
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> (a) section 21 (financial resources) and regulations under that section, and
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> (b) criteria set out in regulations made under this paragraph."

10. The financial eligibility for legal aid (or "means test") is now governed by the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ("Financial Resources Regulations"). The merits test for legal aid is now governed by the Civil Legal Aid (Merits Criteria) Regulations 2013.

11. Section 18 of LASPO authorises the Director of Legal Aid Casework to determine whether an individual qualifies for legal aid for representation for the purposes of *criminal* proceedings except where a court is authorised to make the determination under regulations under section 19. Section 19(1) provides that regulations may provide that:

> "a court before which criminal proceedings take place or are to take place, is authorised to determine whether an individual qualifies under this Part for representation for the purposes of criminal proceedings of a prescribed description."

12. Section 21 provides that there cannot be a determination that an individual qualifies for services unless their financial resources have been considered and it has been determined that they are eligible for legal aid. Regulation 8 of the Financial

Resources Regulations sets the level of disposable income under which an individual will be eligible for legal aid at £733 per calendar month.

The judgment

13. As I have said, the judge concluded that Y should give oral evidence and that the father should not cross-examine her. There is no challenge to either of these decisions. At para 16 of his judgment, the judge recorded the father's evidence that he was in full-time employment earning £1350 net per lunar month (approximately £1460 per calendar month) and that the only allowable deductions for the purposes of assessment of his financial eligibility for legal aid were rent (£400 per month) and child support (£100 per month). This left the father with a disposable income of £960 per month, which was greater than the sum of £733 per month specified in the Financial Resources Regulations. At para 17 he said that, although he had not undertaken the calculation with the sophistication and refinement required by the Financial Resources Regulations, he was satisfied that it was sufficiently reliable to indicate that the father was financially ineligible for legal aid. In these circumstances, the possibility of exceptional case funding under section 10 of LASPO did not arise.

14. At para 19, the judge stated that out of the disposable income of £960 per month, the father had to meet a number of necessary living expenses that were not allowable deductions. At para 20, he concluded: "For the purpose of the decisions I have to make I am satisfied that the father does not have the resources to pay privately for legal representation". At para 22, he noted that the father had been legally represented at an earlier stage of the proceedings and had said in a written statement:

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

15. The father said that he had spent £2800 on solicitors' fees. Having reiterated at para 23 that the father could not afford to pay for legal representation, the judge said:

> "….there are likely to be people in this country with disposable incomes of more than £733 per month who are genuinely unable to fund the cost of legal representation. For those who fall into that category, the application of the approach suggested by Miss Whipple [viz that if the father does not pay for representation then Y's evidence must go unchallenged] would appear likely to lead to a breach of an unrepresented litigant's article 6 rights."

16. The judge then considered the application of section 31G(6) of the 1984 Act. At para 41, he said that he was satisfied that it would be "wholly inappropriate" for him to question Y himself. He shared the "profound unease" expressed by Roderic Wood J in *H v L and R* [2006] EWFC 3099 (Fam), [2007] 2 FLR 162 at para 24. In so far as the judge explained why he considered it to be inappropriate for him to question Y, the explanation seems to be this:

> "42. Y's allegations against the father are pivotal to determining welfare issues in respect of K and H and in particular the issue of the nature and extent of their future contact (if any) with their father. In determining that issue K and H's welfare must be the court's paramount consideration. In arriving at a decision about the children's welfare interests the court must consider the factors set out in the welfare checklist in s.1(3) of the Children Act 1989. In this case a finding that the father has sexually abused Y would be relevant in assessing both risk of harm (s.1(3)(e)) and the father's capacity to meet the children's needs (s.1(3)(f)). In such circumstances, can it seriously be contended that it would be 'appropriate' for the judge, who must determine the facts, to cross-examine the key witness upon the reliability of whose evidence the fact-finding exercise so heavily depends? In answering that question I bear in mind that that question engages not only the father's Art 6 and Art 8 rights but also those of K and H and arguably those of Y, too.
>
> 43. I noted earlier the President's observation in *Q v Q*; *Re B*; *Re C* that 'in some – probably many – cases' it will be entirely unproblematic for the judge to question witnesses. I respectfully agree. As can be seen from the report *Litigants in person in private law family cases* published by the Ministry of Justice in 2014, this already happens on a daily basis in the Family Court. No-one is suggesting that that practice should stop or that it is inherently incompatible with the protection of Art 6 or Art 8 rights. However, I am in no doubt that there are cases – of which I am satisfied that this is one – where cross-examination by the judge is incompatible with the Art 6 and Art 8 rights of the respective participants and is not, therefore, appropriate."

17. It is also relevant to refer to para 74(c) where he said that the court itself would put questions to a witness if satisfied that it was "necessary and appropriate" to do so, but "it will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex".

18. At para 44 and following, he considered the meaning of the words "cause to be put" in section 31G(6) of the 1984 Act. At para 54, he noted that HMCTS already provides "aspects of 'representation' for litigants in person which would be covered by legal aid if the litigant had the benefit of legal aid". He referred to the definition of "representation" in section 42(1) of LASPO and said that it went wider than the mere provision of advocacy services in court. It included, for example, the preparation of cases for trial including the instruction of experts and the preparation of hearing bundles. The provision of an interpreter was properly to be regarded as an aspect of the "representation" of a litigant. He also made the point that HMCTS already funds the provision of interpreters in civil litigation for litigants in person outside the funding provided under LASPO.

19. He expressed his conclusions at paras 73 to 75. He accepted that LASPO provides "a single, comprehensive, unitary code for the funding of litigation for those litigants whose case is within the scope of the scheme and who are able to satisfy the means and merits tests" adding:

> "However, I do not accept that the comprehensive nature of the legal aid scheme precludes the State from providing, or the courts from requiring the State to provide, aspects of 'representation' for those who are not able to benefit from the scheme set out in LASPO in circumstances where this is necessary, appropriate and proportionate to safeguard their Convention rights and to ensure compliance by the court with its own duty to act in a way which is compatible with Convention rights. The court's power to direct that the cost of certain activities should be borne by HMCTS is, as the President has said, 'an order of last resort'. However, that the power exists at all is in my judgment absolutely clear. "

20. At para 75, he concluded that since (i) it was not appropriate for the father to cross-examine Y and (ii) it was not appropriate for the questions to be put by the court, it followed that the court could and should appoint a legally qualified advocate to cross-examine Y on behalf of the father. The advocate's role in the finding of fact hearing should be limited to cross-examining Y. The costs should be borne by HMCTS and should be assessed on the same basis as if the work were being undertaken for a legally aided client.

The grounds of appeal

21. The Lord Chancellor advances the following grounds of appeal: (i) the court has no power to require the Lord Chancellor (via HMCTS or otherwise) to provide funding for legal representation outside the LASPO scheme, whether under section 31G(6) of the 1984 Act or under section 1 of the 2003 Act or otherwise; (ii) the imposition of a means test is lawful and does not breach Convention rights; (iii) the threshold for the means test is a matter for Parliament, not the courts, and the judge was in any event wrong to conclude that the father could not afford to pay for his legal representation; and (iv) the judge erred in his conclusion that, absent public funding for legal representation for the father, the rights of the father and of K and H under the European Convention on Human Rights ("the Convention") would be breached in the particular circumstances of this case.

THE FIRST GROUND OF APPEAL: THE COURT HAD NO POWER TO MAKE THE DECISION.

22. In *Q v Q,* Sir James Munby said:

> "75. Third…, 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."

23. It was this reasoning that the judge applied in the present case. His conclusion that the court has the power, in an appropriate case, to direct that legal representation be provided at the expense of the Lord Chancellor, is supported by Miss Meyer QC on behalf of the mother and Ms Fottrell QC on behalf of the interveners, but they do so by somewhat different routes.

24. At para 48 of her skeleton argument, Miss Meyer submitted:

> "It would appear, however, by reference to the Framework Document that the Chief Executive, under delegated authority, can on behalf of HMCTS commit resources or incur expenditure from money voted by Parliament without specific prior approval. If this understanding is correct then providing the order made by the Judge below does not require expenditure that strays outside the terms of the delegation, surely it is not necessary to point to a specific statutory provision authorising the precise payment he directed in order for this to be lawful."

25. In her oral argument, she submitted that the source of the power to require the Lord Chancellor to fund legal representation of the father for the limited purpose of cross-examining Y is section 1 of the 2003 Act. She contended that section 3 of the Human Rights Act 1998 ("the HRA") requires the court to interpret section 1 of the 2003 Act as obliging the Lord Chancellor to provide funding for legal representation where this is necessary to prevent a breach of the Convention.

26. Ms Fottrell submits that the source of the power to make the order that the judge made was section 31G(6) of the 1984 Act. She says that this provision should be construed compatibly with article 6 and article 8 of the Convention, also taking account of the paramountcy principle set out in section 1(3) of the Children Act 1989 and the primary consideration principle set out in article 3(1) of the United Nations Convention on the Rights of the Child.

27. I would reject these submissions substantially for the reasons given by Ms Whipple QC. So far as section 1 of the 2003 Act is concerned, the starting point is that it is a clear principle of statutory interpretation that a general power or duty cannot be used to circumvent a clear and detailed statutory code. Thus in *Credit Suisse v Waltham Forest LBC* [1997] QB 362, Neill LJ said at p 374:

> "where Parliament has made detailed provisions as to how certain statutory functions are to be carried out, there is no scope for implying the existence of additional powers which lie wholly outside the statutory code."

28. Another important relevant principle is that "nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less important is the requirement of clear statutory authority for public expenditure": see per Lord Bridge in *Holden & Co v CPS* (No 2) [1994] 1 AC at p.22 at p 33C. And at p 40D, he said:

> "I will not multiply examples, but I hope I have said enough to explain why I cannot attribute to the legislature any general

> willingness to provide the kind of publicly funded safety net which the judiciary would like to see in respect of costs necessarily and properly incurred by a litigant and not otherwise recoverable. It is for this reason that I find it impossible to say that whenever the legislature gives a right of appeal, whether in civil or criminal proceedings, in circumstances where a successful appellant may be unable to recover his costs from any other party, that affords a sufficient ground to imply a term enabling the court to order the costs to be paid out of public funds. The strictly limited range of the legislation expressly authorising payment of costs out of central funds in criminal proceedings no more lends itself to extension by judicial implication than does the equally limited range of legislation authorising payment of costs out of the legal aid fund in civil proceedings. Some general legislative provision authorising public funding of otherwise irrecoverable costs, either in all proceedings or in all appellate proceedings, would no doubt be an admirable step in the right direction which the judiciary would heartily applaud. But this does not, in my opinion, justify the courts in attempting to achieve some similar result by the piecemeal implication of terms giving a power to order payment of costs out of central funds in particular statutes, which can only lead to anomalies."

29. I accept the submission of Ms Whipple that these principles hold good despite the passing of the HRA. The limits of the interpretative obligation imposed on the courts by section 3 of the HRA are now well established. It is sufficient to refer to two authorities. In *In re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, it was held that the HRA reserved the amendment of primary legislation to Parliament. Any purported use of section 3 of the HRA producing a result which departed substantially from a fundamental feature of an Act of Parliament was likely to have crossed the boundary between interpretation and amendment.

30. The same approach was adopted in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. At para 33, Lord Nicholls said:

> "Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be

> several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

31. As the judge acknowledged, LASPO provides a comprehensive code for the funding of litigants whose case is within the scope of the scheme. It is a detailed scheme. I do not consider that it is possible to interpret either section 1 of the 2003 Act or section 31G(6) of the 1984 Act as giving the court the power to require the Lord Chancellor to provide funding for legal representation in circumstances where such funding is not available under a scheme as detailed and comprehensive as that which has been set up under LASPO. The court must respect the boundaries drawn by Parliament for public funding of legal representation. In my view, the interpretation adopted by the judge is impermissible: it amounts to judicial legislation.

32. I reject the mother's attempt to counter this by reference to the HMCTS Framework Document and the fact that the Chief Executive of HMCTS can, under delegated authority, commit resources without prior specific approval. The fact that HMCTS is responsible for the allocation of its own resources is clear from the Framework Document. It includes the following:

> "**1.6** The Lord Chancellor and Lord Chief Justice will not intervene (whether directly or indirectly) in the day to day operations of the agency and have placed the responsibility for overseeing the leadership and direction of HM Courts and Tribunals Service in the hands of its Board. The Chief Executive is responsible for the day-to-day operations and administration of the agency.
>
> …….
>
> **7.8** Subject to standard government supply procedures and the financial delegation authority the Chief Executive has authority to approve all expenditure within the Departmental Expenditure Limit and the delegated authority which is consistent with the strategic and business plans for HM Courts and Tribunals Service."

33. These provisions set out the Chief Executive's power to administer HMCTS resources and to approve the incurring of expenditure. But it does not follow that the court has the same power. For this, in my view the court needs explicit statutory authorisation.

34. Section 19 of the Prosecution of Offenders Act 1985 is a further obstacle in the path of the arguments advanced by the mother and the interveners. This provides:

> "(3) The Lord Chancellor may by regulations make provision for payment out of central funds, in such circumstances and in relation to such *criminal* proceedings as may be specified, of such sums as appear to the court to be reasonably necessary—
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> …….
>
> (e) to cover the proper fee or costs of a legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (defence representation for purposes of cross-examination)….." (emphasis added).

35. This provision is clear as to its scope and application. There is no corresponding provision in section 31G(6) of the 1985 Act or anywhere else in relation to *civil* proceedings. Section 19(3)(e) is an example of the kind of provision expressly authorising payment of public funds which Lord Bridge had in mind in the passage that I have cited from *Holden & Co.* A yet further point is the fact that section 19(1) of LASPO provides that regulations may provide that a court in *criminal* proceedings may determine whether an individual qualifies for legal representation at public expense. There is no corresponding provision in relation to *civil* proceedings.

36. Thus Parliament has not given the court the same power in relation to legal representation in civil proceedings as it has given in relation to criminal proceedings. Section 3 of the HRA cannot be invoked to make the provision that Parliament has not made.

37. For these reasons, I consider that section 1 of the 2003 Act does not give the court the power to require the Lord Chancellor to incur public expenditure in payment for legal representation in civil and family proceedings. The provision of legal services cannot be described as coming within the scope of the duty to ensure that there is an efficient and effective system to support the carrying on of the business of a court.

38. As we have seen, in reaching his conclusion, the judge was influenced by the fact that HMCTS meets the cost of interpreters, intermediaries and the preparation of court bundles under the Financial Resources Regulations. He said that these are "aspects" of "representation" within the meaning of section 42 of LASPO. Section 42 defines "representation" as meaning "representation for the purposes of proceedings" and includes "the advice and assistance which is usually given by a representative in the steps preliminary or incidental to proceedings". He considered that by analogy, HMCTS has the power to meet the cost of legal representation.

39. I do not accept that interpreters or intermediaries are "representatives" within the meaning of section 42, still less that they provide the services of a legal representative. In *In the Matter of D (a child) (No 2)* [2015] EWFC 2, Sir James Munby said at para 17:

> "The cost of funding an intermediary *in court* properly falls on Her Majesty's Courts and Tribunals Service because, as the LAA has correctly pointed out, an intermediary is not a form of 'representation' but a mechanism to enable the litigant to communicate effectively with the court, and thus analogous to translation, so should therefore be funded by the court: see *Re X*, para 37 and *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), [2010] 1 All ER 735, paras 26-27."

40. I agree with this. Nor do I see how the fact that HMCTS funds the preparation of court bundles from time to time sheds any light on whether the court has power to require HMCTS to fund the cost of legal representation.

41. The fact that costs associated with court hearings are on occasion met by HMCTS pursuant to the Lord Chancellor's general duty under section 1 of the 2003 Act (to ensure that there is an effective and efficient system for the carrying on of the business of the family court) is not material to the funding of legal representation.

42. Most (if not all) of the considerations which I have mentioned above in relation to section 1 of the 2003 Act also lead me to conclude that section 31G(6) of the 1984 Act cannot be invoked to require the Lord Chancellor to fund legal representation to a litigant who does not qualify for legal aid because he does not satisfy the means test. Ms Whipple makes these further points which I accept. First, section 31G(6) derives from section 73 of the Magistrates' Courts Act 1980 which itself derives from the identical provision in the Magistrates' Court Act 1952. It enables the court to put questions to a witness on behalf of a party in the absence of legal representation, or to take steps itself to cause those questions to be put to enable effective examination of the witness. It cannot, on any plain reading, be interpreted as giving the court power to order funding of legal representation for a party.

43. Secondly, on a plain and natural interpretation of the language of section 31G(6), it is predicated on the party *not* being represented. If the party were to become legally represented, section 31G(6) would fall away.

44. Thirdly, the way in which "cause to be put" has historically been applied in practice is that the justices' clerks in the magistrates' courts could be asked to put questions to a witness on behalf of a party, where it was not possible for the party themselves to do so. Following the reorganisation of the Family Court, the justices' clerks are now available to perform this function in *any* part of the Family Court and not only when magistrates are hearing the matter.

45. It follows that I respectfully disagree with what the President said at para 79 of his judgment in *Q v Q*. It would seem that he did not have the benefit of the detailed submissions which have been made to this court.

46. I conclude, therefore, that the judge had no power to make the order that he made and I would allow the appeal on the first ground. It is not therefore necessary to deal with the other grounds of appeal. But I should say in relation to the second ground that I did not understand it to be contended by anyone that the imposition of a means test is of itself contrary to the Convention (it plainly is not). I propose to say nothing on the question whether the judge was wrong to conclude that the father could not afford to pay for his legal representation (the third ground). We heard a good deal of argument on the fourth ground of appeal, viz that, unless the judge's order were to stand, there would be a violation of the article 6 rights of the father and the article 6 and 8 rights of K and H. In deference to counsel's submissions and in view of the importance of the issues raised, I propose to say something about this ground of appeal.

THE FOURTH GROUND OF APPEAL: BREACH OF THE CONVENTION?

47. I shall start with article 6 of the Convention. It is not in dispute that the father has the right under article 6 to a fair hearing. Moreover, since the date of the hearing, the judge has joined K and H as parties and has appointed a children's guardian. The children also have rights under article 6. Nor is it disputed that the father and the children have rights under article 8 of the Convention which can only be vindicated by their having an effective and correct determination of the issue of whether Y's allegations are true. This is because, as the judge recognised, a finding that the father abused Y would be relevant, inter alia, in assessing the risk of harm that he poses to K and H and his capacity to meet their needs.

48. The ECtHR has made it clear that the right to a fair trial under article 6 of the Convention does not generally require the provision of public funding for legal representation in civil proceedings. Specifically, it has affirmed that the application of a means test to public funding is compatible with article 6. In *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, it said:

> "62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate (see Ashingdane v. the United Kingdom, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings (see Munro, cited above). Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary (see De Haes and Gijsels, p. 238, § 53, and also McVicar, §§ 51 and 62, both cited above)."

49. The relevant Strasbourg jurisprudence on the general requirements of article 6 was summarised by this court in *Gudanaviciene v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622 at para 46:

> "The general principles established by the ECtHR are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of article 6(1) in proceedings which had already taken place. We accept the following summary of the relevant case-law given by Mr Drabble: (i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts (*Airey* para 24, *Steel and Morris* para 59); (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily (*Airey* para 24, *McVicar* para 48 and *Steel and Morris* para 59); (iii) it is relevant whether the proceedings taken as a whole were fair (*McVicar* para 50, *P,C and S* para 91); (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through "in the teeth of all the difficulties" does not necessarily mean that the procedure was fair (*P,C and S* para 91); and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent (*Steel and Morris* para 62)."

50. The position in relation to what is referred to as "the procedural aspect" of article 8 was summarised in *Gudanaviciene* at para 70.

> "It is true that the test for article 8 as it is stated in the Strasbourg jurisprudence (whether those affected have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests) differs from the test for article 6(1) (whether there has been effective access to court). The article 8 test is broader than the article 6(1) test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned. There is nothing in the Strasbourg jurisprudence to which our attention has been drawn which suggests that the ECtHR considers that there is any such difference. In practice, the ECtHR's analysis of the facts in the case-law does not seem to differ as between article 6(1) and article 8(1). This is not surprising. The focus of article 6(1) is to ensure a fair determination of civil rights and obligations by an independent and impartial tribunal. Article 8 does not dictate the form of the decision-making process that the state must put in place. But the focus of the procedural aspect of article 8 is to ensure the effective protection of an individual's article 8 rights. To summarise, in determining what constitutes sufficient involvement in a decision-making process (article 8), for the present purposes the standards are in practice the same"

51. It is submitted on behalf of the mother and the interveners that the only way in which the article 6 and 8 rights of the father and K and H can be protected and the only way in which the court can comply with its own duty to act in a way which is compatible with the Convention is by appointing a legal representative to cross-examine Y on behalf of the father.

52. I do not accept that the only way in which Y can be questioned effectively is by being cross-examined by a legally qualified advocate appointed to represent the father. The court has at its disposal a number of other possible case management options. These include: (i) a direction that the order that Y should give oral evidence is made subject to the condition that the father questions her through a legal representative (this may not be a viable option if the judge's finding about the father's inability to pay stands); alternatively (ii) Y should be questioned by the judge himself; (iii) Y should be questioned by a justices' clerk; or (iv) a guardian should be appointed to conduct proceedings on behalf of K and H. The judge considered that it would not be appropriate for K and H to be joined to the proceedings and a children's guardian to be appointed for the same reasons as he thought it inappropriate for the questioning of Y to be conducted by himself: see para 27 of the judgment.

53. In my view, all of these options should be considered by a judge who is faced with the problem which confronted the judge in this case. In some cases, the first option will be the most appropriate. But in others it will be inappropriate, for example, where the court considers that it is essential to have oral evidence from the witness and to have it tested by questioning. Take the present case where the evidence of Y is of central

importance to the article 8 rights and welfare interests of K and H. If the court considers that it is necessary to receive oral evidence from Y and have it tested orally by questioning, then the first option may not satisfy the Convention rights of the children.

54. We heard much argument as to whether questioning by the judge would be compatible with the Convention. For those of us who have been schooled in an adversarial system, questioning by a judge of a key witness on controversial and centrally important issues may cause unease. I have already referred to the "profound unease" expressed by Roderic Wood J in *H v L and R* at the thought of a judge having to question a witness in the family jurisdiction. He said that it should not be regarded as impossible, but should be done only in "exceptional circumstances". I have set out at para 22 above what Sir James Munby said on the subject in *Q v Q*. Sir James was, however, careful to say no more than that questioning by a judge where the issues are "grave and forensically challenging" may not be sufficient to ensure compliance with the Convention.

55. I have no doubt that questioning by a judge of a witness in any circumstances *can* be a difficult task. It always calls for sensitive handling. But as Lord Bingham CJ said in *R v Brown (Milton)* (1998) 2 Cr App R 364:

> "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."

56. The fact that this was said in the context of criminal proceedings does not detract from its relevance in the present context.

57. In *In re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, the Supreme Court had to consider the lawfulness of the presumption against a child giving evidence in family proceedings. The court rejected the presumption and gave detailed guidance as to how a judge should decide whether a child should be called to give evidence. At para 28 of her judgment, Baroness Hale said:

> "The family court will have to be realistic in evaluating how effective it can be in maximising the advantage while minimising the harm. There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures or to applying the special measures by analogy. The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video-recorded cross-examination as proposed by Pigot. Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in

> continental Europe and used to be much more common than it is now in the courts of this country."

58. The judge in the present case said at para 41 of his judgment that it would not be appropriate for him to be the "cross-examiner". He did not say why. It may be that he thought that it was inevitable that he would be perceived to be descending into the arena and siding with the father. The use of the term "cross-examination" itself lends support to that idea. But questioning by a judge need not be conducted as if by a cross-examiner acting for one of the parties. That is implicit in what Baroness Hale said at para 28 in *Re W.* It is also recognised in *Practice Direction 12J—Child Arrangements and Contact Orders: Domestic Violence and Harm.* Para 28 provides:

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

59. It is significant that the practice direction contemplates questioning on the "key issues in the case" by a judge "on behalf of the parties" in cases of alleged child abuse. In my respectful opinion, the approach expressed by Roderic Wood J is unnecessarily cautious. I accept, of course, that the questioning must always be conducted sensitively and fairly. If it is not so conducted, then this of itself may give rise to a breach of article 6 and 8.

60. In a simple straightforward case, questioning by the judge is likely to be the preferred option and it should present no difficulties. The judge will know what the unrepresented party's case is. It may be helpful for the judge to ask him or her to prepare written questions for the court to consider in advance. Sometimes, unexpected answers may be given to the judge. These may require the judge to ask the unrepresented party to comment on the unexpected answers and to suggest supplementary questions for the judge's consideration.

61. In my view, in the present case, which is fairly straightforward, the judge should probably have decided to conduct the questioning himself. I am in no doubt that the

nature of this case is such that there were options available to the judge which would have ensured a fair hearing and vindicated the article 6 and 8 rights of the father and K and H.

62. I acknowledge that there may be cases where the position is different. I have in mind, for example, a case where the oral evidence which needs to be tested by questioning is complicated. It may be complex medical or other expert evidence. Or it may be complex and/or confused factual evidence, say, from a vulnerable witness. It may be that in such cases, none of the options to which I have referred can make up for the absence of a legal representative able to conduct the cross-examination. If this occurs, it may mean that the lack of legal representation results in the proceedings not being conducted in compliance with article 6 or 8 of the Convention. This is the concern expressed by Sir James Munby at para 76 in *Q v Q*. In order to avoid the risk of a breach of the Convention, consideration should be given to the enactment of a statutory provision for (i) the appointment of a legal representative to conduct the cross-examination and (ii) the payment out of central funds of such sums as appear to be reasonably necessary to cover the cost of the legal representative, i.e. a provision in civil proceedings analogous to section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and section 19(3)(e) of the Prosecution of Offenders Act 1985.

CONCLUSION

63. For the reasons that I have given, I would allow this appeal on the first ground of appeal.

Lady Justice Black:

64. I agree.

Lord Justice McFarlane:

65. I also agree.