Neutral Citation Number: [2017] EWFC 11

Case No: LS15C00749

IN THE FAMILY COURT AT LEEDS
SITTING AT SHEFFIELD

Family Court
50 West Barr
Sheffield S3 8PH

Date: 16/02/2017

Before:

THE HONOURABLE MR JUSTICE COBB

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Between:

AZ (mother)	**Applicants**
BZ (father)	
CZ (child by his Children's Guardian)	
- and -	
KIRKLEES COUNCIL	**Respondent**

Re CZ (Human Rights Claim: Costs)

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Ms. Sara Anning (instructed by **Eaton Smith LLP**) for AZ, the mother, submitted a Skeleton Argument jointly with the father and Guardian but did not, with permission, attend the hearing
Mr. Alex Taylor (instructed by **Ridley & Hall**) for BZ, the father
Ms. Julia Nelson (instructed by **Jordans**) for CZ, the child
Ms. Gillian Irving QC and **Ms. Clare Garnham** (instructed by **Local Authority Solicitor**) for the Local Authority

Hearing date: 8 February 2017

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Approved Judgment

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr. Justice COBB:

Introduction and summary of the issues

1. Local authorities responsible for safeguarding children carry a heavy obligation to ensure that they perform their statutory duties at all times in a manner which is compatible with the rights of the individuals and their families who they are assigned to help, specifically the rights which individuals enjoy under the *European Convention on Human Rights (ECHR) – Article 6* and *Article 8*. Any violation of these *Convention* rights is of course unlawful (*section 6 Human Rights Act 1998 'HRA 1998'*); when such an alleged violation occurs, those affected are entitled to bring claims under *section 7* and *8* of the *HRA 1998* for relief, including declarations and/or damages.

2. These proceedings, brought under the *Children Act 1989* ('*CA 1989*') and *HRA 1998*, concern one child, CZ. He was born on 6 November 2015. His parents are AZ ("the mother") and BZ ("the father"). The mother and father are unmarried, but both have parental responsibility for him.

3. When CZ was exactly one week old (13 November 2015) and still at hospital following his birth, Kirklees Council issued an application under *Part IV* of the *CA 1989* seeking public law orders in relation to him; on the same day, after a court hearing at which the parents were neither present nor represented, an interim care order was made and CZ was removed from his parents' care at the hospital. He was placed with his paternal grandparents. On 29 January 2016, CZ was returned to his parents' care where he has lived successfully ever since.

4. On 11 April 2016 the father made an application for a declaration that his rights under *Article 6* and *Article 8* of the *ECHR* had been breached, and seeking an order for damages. The Children's Guardian (on behalf of CZ) and the mother followed suit with similar applications issued on 29 April 2016. These applications were brought within the *CA 1989* proceedings in accordance with the guidance offered by Munby J (as he then was) in *Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam) at [31]-[38], an approach which was endorsed in *Re V (Care Proceedings: Human Rights Claims)* [2004] EWCA Civ 54.

5. The *Part IV CA 1989* proceedings were formally dismissed at a hearing on 26 May 2016. The issue of the costs arising from those proceedings together with the claims

under, and costs of, the *HRA 1998* application were then directed to be listed before me.

6. I gave directions for trial in this case on 14 July 2016, three months after the launch of the *HRA 1998* claims, and I timetabled the case for a short final hearing in October; at that stage the Local Authority was conceding two significant violations of the family's rights, and were offering the Claimants modest compensation. I specifically invited the Claimants (and this was recorded on the face of my order) to take a critical view of their particulars of claim, to see what remained in issue. I encouraged them to consider carefully what outstanding relief they sought, and to provide to the Local Authority a detailed breakdown of their costs. I specifically encouraged the parties to negotiate realistically.

7. The hearing scheduled for October 2016 had to be vacated, and I gave further directions for it to be relisted at the next available date, which was in early-February 2017. In mid-January 2017, lawyers for the parties met at a round table conference, and settled the substantive issues, leaving only the issue of the costs of both sets of proceedings for determination. The issue of costs has particular significance because of the impact of *section 25 Legal Aid Sentencing and Punishment of Offenders Act 2012* ('*LASPO 2012*') on any award of damages.

8. Notwithstanding the limited nature of the dispute, the ordinary requirements of the *Family Procedure Rules 2010* and *Civil Procedure Rules 1998*, and my specific exhortation to the parties to take a realistic view of the case, bundles for the hearing exceeding in total 2,000 pages were filed (*Rule 27.6* of the *FPR 2010*, and the Bundle Practice Direction (*PD27A*) seem to have been totally ignored notwithstanding the mandate that they "must be followed"), together with an authorities' bundle containing over 30 authorities (even then omitting some of the key authorities). No reading list was provided, and only the sketchiest agreed note of the points of agreement. I was advised at the hearing on 8 February 2017 that the overall cost of the two associated claims was in excess of £120,000, all of which – one way or another – are to be paid from public funds, unless I make an order against the lawyers responsible. I am dismayed that the preparation of this case has been undertaken in a way which was not only contrary to my formal direction, but was wholly disproportionate to the issues. I deprecate the unwarranted expenditure.

9. There is no doubt in my mind, indeed it is admitted, that Kirklees Council breached the *ECHR* rights of a baby boy and his parents in purported fulfilment of its safeguarding duties, but in this case – as in all others of its kind – a careful and realistic eye has to be kept on proportionality of the process by which relief is sought, and on outcome. My experience of this case (and others like it) prompts me to give prominence in this judgment to the following important points:

   i) It is of course appropriate for *HRA 1998* claims which arise in, and on the same facts as, *CA 1989* proceedings to be considered by the court within the *CA 1989* proceedings. *Section 7(1)(b)* enables every tier of the Family Court, including the magistrates, to give effect to the parties' Convention rights (see *Re L(A Child) v. A Local Authority and MS* [2003] EWHC 665 (Fam) at [31]);

ii) While each case must be considered on its own facts, any award of damages for non-pecuniary loss made under *section 8(3)* of the *HRA Act 1998* is likely in this class of case to be reasonably modest;

iii) Where a public funded certificate is granted to a party to pursue a claim under the *HRA 1998* for declaration and damages arising within care proceedings, the statutory charge (*section 25(1)(a) LASPO Act 2012*) will apply (i.e. the damages will represent "property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, *in connection with* which the services were provided"), and the Legal Aid Agency has the ability to recoup its costs (or a proportion of them) from any damages award;

iv) Costs of the care proceedings under the *CA 1989* must be considered by reference to *rule 28* of the *Family Procedure Rules 2010*, and with specific regard to the judgments of the Supreme Court in *Re T (Children: Care Proceedings: Serious Allegations Not Proved)* [2012] UKSC 36*)* [2013] 1 FLR 133 ("*Re T*") and *Re S* [2015] UKSC 20 ("*Re S*");

v) Costs of the declaration and/or damages claim under the *HRA 1998* claim are awarded under the *Civil Procedure Rules 1998*; these rules provide (per *CPR 44.2 (2) (a)*) that within the court's discretion, '*the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party'*, subject to the provisions set out elsewhere in that rule; the provisos within *Part 44* are important, and include consideration of litigation conduct;

vi) The decision of Keehan J in *P v A Local Authority* [2016] is particular on its facts and in my view provides little assistance to the majority of potential claimants in *HRA 1998* cases which arise in the context of family proceedings under the *CA 1989* or otherwise.

The facts

10. The connected claims under the *CA 1989* and the *HRA 1998* arise in this way.

11. The parents are both in their mid-20s; both have mild global learning difficulties. The mother is believed to suffer some minor mental ill-health, and she is hearing impaired. The father at times struggles to manage his frustrations at times, and has displayed controlling and aggressive behaviours to others. Both parents have received assistance from adult social care over the last 8 to 10 years, and during the mother's pregnancy local health services had been involved with the family during 2015 in planning for the birth of their first baby. In spite of these challenges, there was no pre-birth referral to children's services.

12. CZ was born by emergency caesarean section at X Hospital on 6 November. It was a traumatic birth and CZ was for a short time placed on the Special Care Baby Unit ('SCBU'). The baby was slow to feed, and showed temporary normal post-birth weight loss. That said, no child protection concerns were raised by the staff on SCBU nor on the ward to which he was discharged.

13. On 10 November 2015, the Local Authority received a referral from the X Hospital maternity ward; concerns were raised regarding the long-term parenting capacity of

this mother and father. It was suggested that the mother had no family support, and that the father was expressing unorthodox views about the need for sterilisation of bottles, and the benefits of formula milk. It was nonetheless noted, in the referral, that the paternal grandmother of the baby was being supportive to the couple and was planning to move in with them at least in the short-term after discharge from hospital.

14. On the following day, 12 November 2015, the maternity ward staff reported to the social worker that CZ had put on weight, but that they remained concerned about the feeding plan and wished to monitor him further. The social workers did not visit on this day.

15. On 13 November 2015, the social worker visited the hospital at about lunchtime and was advised by staff that CZ had again gained weight; the staff had no further concerns about the baby, who was reported to be well enough to be discharged. This was, indeed, planned for later that day. The social worker claims that she advised the mother that the Local Authority would be issuing care proceedings, and making an urgent application for an interim care order. The mother disputes that she was given this information. The father was not on the ward during the social work visit, and plainly did not receive (indeed could not have received) any such information. The mother was asked to sign a *section 20* agreement for the accommodation of the baby, and she apparently did so, notwithstanding that ward staff had some minor concerns about her capacity; the social worker was of the view that the mother understood what was being asked of her.

16. The Local Authority issued its application under *Part IV CA 1989* that very afternoon at the Family Court in Leeds, and it was listed for "urgent hearing by way of abridged notice" before District Judge Woodhead at the Family Court in Huddersfield; the case was called in for hearing at approximately 3pm. Early in the hearing, the District Judge was informed by the Local Authority's solicitor that the parents knew that the hearing was taking place. This assertion was repeated to the Judge during the hearing no fewer than three times. The solicitor further informed the Judge that the parents agreed with the plan for CZ to be removed from their care; this was not accurate, at least so far as the father was concerned. The order which was made at the conclusion of the hearing reflected, erroneously, that the application had been heard "on notice" to the respondent parents; separately it was recorded that the hearing was conducted "upon the parents having been informed of the hearing but not in attendance at court". The order further wrongly recorded that the mother and father are "in agreement for the baby to be discharged into the care of the paternal grandparents and wish for a full assessment to take place as a carer for baby".

17. It soon emerged that much of the recorded information about the parents' knowledge of the hearing on that order was in fact incorrect. The parents were, as it is now agreed, unaware that the Local Authority had been in court that afternoon seeking orders in relation to their baby. When the parents were visited later that day by the social workers, they were reported to be understandably very upset.

18. Within a few minutes of the conclusion of the hearing, the Local Authority solicitor sent an apologetic e-mail to Cafcass acknowledging that it "forgot to notify Cafcass" of the application or the hearing.

19. CZ remained in the care of the paternal grandparents for the next few weeks. There was a flexible arrangement for the parents to see him; they were able to visit the grandparents' home for extended periods, and for as long as they wished, each day, and could take CZ out into the community provided that they were in the company of the paternal grandmother to supervise them.

20. On 19 November 2015 the case was allocated to Ms. H a Cafcass-employed Children's Guardian.

21. A LAC review took place on 27 November 2015, at which both parents and grandparents were present as indeed was Ms. H; the Independent Reviewing Officer was reported (by Ms. H) to have "struggled to understand" why the Local Authority had applied for an Interim Care Order given that no concerns had been identified in the ante-natal period, and the health visitor had advised that the weight loss in hospital was not as a result of the parents inability to feed appropriately but due to the circumstances of the baby's emergency birth, and his early adjustment to life.

22. On 1 December 2015, Ms H prepared a report for the upcoming hearing recommending that CZ should remain the subject of an interim care order. The solicitors for the child wrote to the Local Authority solicitor on the same day proposing assessments of the parents' ability to meet CZ's basic care needs; it was further said that the Children's Guardian "would support the local authority's application for psychological assessment of both parents and would reiterate that ascertaining capacity is a starting point before any other assessments are undertaken". The solicitors for the child did not raise in this letter, and the Guardian herself did not raise in her report, any query or objection to the fact that a hearing took place in the parents' absence, and in the absence of Cafcass, on 13 November 2015, yet this was obviously known to Ms. H by this time.

23. The application was next formally before the court on 7 December 2015, before Her Honour Judge Richardson sitting at the Family Court in Leeds. At that hearing all parties were represented by either solicitors or counsel. It is recorded that the mother was then in agreement for CZ to remain in the care of the paternal grandparents albeit that she wished for there to be a full assessment of her capacity to care for the baby. She further supported a cognitive assessment of herself. The father similarly agreed for CZ to remain in the care of his parents. The order reflects the judges dismay that the case remained unallocated to a named social worker and directed that a social worker be allocated that very day.

24. At the next hearing on 12 January 2016, again before Her Honour Judge Richardson, a direction was given that the Local Authority should file evidence explaining what, if any, notice had been given to the parents of the hearing on 13 November 2015. That statement was duly filed, and reveals unambiguously that the social worker did not inform the parents on 13 November of the imminent hearing.

25. At a further hearing on 20 January 2016, the parents informed the Judge, through their lawyers, that they wished to contest the interim care order so that CZ could return to their care. This contest was listed to take place on 29 January 2016; however, at court on the date listed for the contest, the Local Authority declared that it considered "that the statutory threshold criteria is not crossed therefore requesting that the court

discharge the interim care order.". The parties and the court formally agreed, and the order therefore recorded that:

i) "[T]he Local Authority cannot establish the threshold for intervention as currently pleaded by the Local Authority"; and

ii) CZ would return immediately to the care of his parents.

This outcome was supported by Ms. H who, by this time, had been able to undertake more complete enquiries. Ms. H confirmed that the hospital medical records had recorded that both parents had responded positively to advice from professionals and consistently displayed warm and affectionate interaction with CZ during a difficult time when on the SCBU and on the ward. Notwithstanding the concessions, further case management directions were given for assessment of the parents, and further progression of the case.

26. On 26 February 2016, the Deputy Head of Legal Services at Kirklees Council wrote to the court formally confirming that the Local Authority "accepts that the parents were not informed of the actual hearing on 13 November 2015, and it is conducting its own internal enquiry". At or about that time, the Claimants submitted their respective applications to the Legal Aid Agency (LAA) for public funds to bring *HRA 1998* claims.

27. It is reported that CZ has continued to thrive in his parents' care in the year since he was returned to them.

Human Rights Claims

28. The parents and child make common cause in their claims under the *HRA 1998*; they seek declarations and damages.

29. The case for the claimants can be summarised thus:

i) The Local Authority failed to take any or any adequate steps properly to investigate the quality of the care being offered by the mother and the father to CZ while CZ was on the ward at X Hospital, from 6 November to 13 November 2015;

ii) The Local Authority did not take proper account of the positive reports of the medical staff on the ward about the parents' ability to care for CZ, nor of the increase in weight which had been recorded in the days immediately prior to CZ's formal discharge from the ward;

iii) The Local Authority failed to involve the parents sufficiently or at all, in the period when CZ was in hospital, in the plan to secure CZ's welfare, whether by way of an interim care order or otherwise;

iv) The Local Authority obtained the mother's consent to *section 20* accommodation when there was an issue over her capacity to give such consent, and further failed to consult the father sufficiently (or at all) when planning *section 20* accommodation for the child;

v) The Local Authority caused or permitted the hearing of the interim care order application to take place in the absence of the parents, and/or without notifying Cafcass or arranging for the child to be represented; they then wrongly and repeatedly misrepresented to District Judge Woodhead that the mother and father had been given proper notice of the hearing on 13 November 2015, and proceeded to advance the case for an Interim Care Order in the parents' absence;

vi) The Local Authority, acting upon the interim care order made without effective notice to the parents, removed CZ from their care just at the point when he was about to be discharged from hospital home with them.

30. It is said that by reason of these failures, the Claimants have suffered 'loss'; they were not able to participate in the hearing at which the interim care order was made, and the parents were deprived of the chance to care for their son for a period of time thereafter.

31. The Local Authority responds to the case as follows:

i) The Health Services should have made proper referral of the family to the Local Authority under *Section 11* of the *Children Act 2004*, in the days or weeks prior to CZ's birth; they failed to do so and this disadvantaged the Local Authority in assessing CZ's situation in the hospital after 10 November;

ii) The referral from the hospital was only made on the evening of 10 November 2015 when CZ's discharge was imminent. It appeared to the Local Authority then that the issues surrounding the family were complex: there were concerns about the father's behaviour and his attitudes to baby-care, the baby had lost weight and was now gaining weight at a lower rate than had been expected; there was a concern that the grandmother's interventions were intrusive and potentially unhelpful. The mother was assessed to be vulnerable;

iii) The social worker maintains that she advised the mother that the Local Authority were planning to take proceedings; she nonetheless concedes that she did not advise the mother or father that they were seeking an interim care order on the afternoon of 13 November 2015;

iv) At no time prior to 7 December, and not at the hearing on 7 December itself, did the parents or the Children's Guardian argue for the immediate return of CZ to the care of the parents. All parties seemed to concede that expert assessment of the parents was indicated at that hearing on the basis that CZ would remain with the grandparents;

v) There was a prima facie case for statutory intervention and the making of an interim care order, and for interim removal of CZ.

What is not in issue

32. The Claimants formally concede that the Local Authority was entitled on the information available to them to bring these *Part IV* proceedings in November 2013; this concession is made notwithstanding the recorded agreement of the parties and the

court as at 29 January that the "Local Authority cannot establish the threshold for intervention" (see [25](i) above).

33. The Local Authority concedes that I should make the following declarations:

    i) It breached the parents and child's right to a fair trial, pursuant to *Article 6 ECHR* when it failed to inform them and/or Cafcass of the urgent hearing which was held at 3p.m. on Friday 13 November 2015; this breach is compounded by the fact that the Local Authority repeatedly informed the court that the parents had been so notified;

    ii) Between 13 November 2015, and, at the latest, 7 December 2015 (the next hearing date), the Local Authority breached the rights of those named above to a family life as enshrined in *Article 8 ECHR*. The parents did not live in the same household as their son for that period albeit they enjoyed extensive contact to one another. The child was placed with the paternal grandparents in their home.

    These concessions were made at an early stage of the process, and were shared with the court on 14 July 2016,

34. On the issue of damages, it is further agreed between the parties that if I consider it necessary to afford just satisfaction to the Claimants to make an award, the sum of £3,750 would be appropriate as compensation to each of the three affected Claimants. This sum was proposed by the Local Authority at a meeting of the advocates in January 2017, and reflects (so maintains the authority) a "pragmatic approach" to attempt to resolve these applications given that "the costs likely to be incurred are disproportionate to the amount likely to be recovered".

35. Finally, on the issue of costs, the Local Authority offers to pay:

    i) The Claimants' costs of the *CA 1989* proceedings from 13 November to 7 December 2015 (corresponding with the period in which it is agreed that the *ECHR* rights of the Claimants were infringed);

    ii) The costs of the *HRA 1998* applications from the date of issue (April 2016) to 14 July 2016 (the date of the Case Management hearing at which the Local Authority revealed its acceptance of declarations and made its open proposal to settle at £2,000 per Claimant).

What is in issue

36. First I must decide is whether an award of damages is appropriate in this case.

37. Secondly, I must consider whether I should make an award of costs in favour of the Claimants in respect of the *CA 1989* and/or the *HRA 1998* litigation to cover the whole period of the litigation (i.e. in excess of that agreed, above). This issue arises because if I grant the awards of damages, any such award is likely (though not bound) to be recouped by the Legal Aid Agency under the statutory charge, which will operate in this case under *Section 25 LASPO 2012.*

Should the Local Authority pay damages to the Claimants?

38. An award for damages for infringement of Convention Rights is warranted where the court concludes that it is "necessary to afford just satisfaction to the person in whose favour it is made" (*section 8(3) HRA 1998*). There is no specific formula or prescription for what amounts to "just satisfaction", but in considering the issue, statute requires me to consider "all the circumstances of the case" including any other relief or remedy granted (including the grant of a declaration, and I suggest a formal apology) and the consequences of any decision of the court.

39. In deciding (i) *whether* to award damages, and/or (ii) the *amount* of an award, I must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under *Article 41* of the Convention (*Article 41*, though not incorporated into English law, deals with 'just satisfaction'). It is not necessary for me to review the significant European or domestic case-law on this point, more than to identify the following extracts from speeches and judgments on the point which have guided my views:

    i) The Court of Appeal (Lord Woolf CJ, Lord Phillips MR and Auld LJ) in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124, [52-53], and [57-58]:

    > "The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages. … Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance" [52/53].
    >
    > "Our approach to awarding damages in this jurisdiction should be no less liberal than those applied at Strasbourg or one of the purposes of the HRA will be defeated and claimants will still be put to the expense of having to go to Strasbourg to obtain just satisfaction. The difficulty lies in identifying from the Strasbourg jurisprudence clear and coherent principles governing the award of damages…."

    And then quoting from the Law Commission:

    > "Perhaps the most striking feature of the Strasbourg case-law, … is the lack of clear principles as to when damages should be awarded and how they should be measured". [57/58]

    ii) Lord Bingham in *Regina v. Secretary of State for the Home Department (Respondent) ex parte Greenfield* [2005] UKHL 14, [2005] 1 WLR 673 at [9] and [19],

    > "The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the

> protection of human rights and not the award of compensation." [9]
>
> "The Court [in Strasbourg] routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them." [19]

iii) Lord Reed in *R (o.t.a. Faulkner) v. Secretary of State for Justice* [2013] UKSC 23 at [13](4)/(7):

> "(4) [T]he quantum of awards under *section 8* should broadly reflect the level of awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living
>
> (7) The appropriate amount to be awarded in such circumstances will be a matter of judgment, reflecting the facts of the individual case and taking into account such guidance as is available from awards made by the European court, or by domestic courts under *section 8* of the *1998 Act*, in comparable cases".

iv) And in a passage which directly chimes with the facts of this case, Wilson LJ in *Re C (Breach of Human Rights: Damages)* [2007] EWCA Civ 2, [2007] 1 FLR 1957 at [64]

> "… the European Court generally favours an award of damages in cases in which local authorities have infringed the right of parents under *Article 8* to respect for their family life by shortcomings in the procedures by which they have taken children into care or kept them in care, whether temporarily or permanently" [64]

40. I further take account of the Practice Direction issued by the President of the European Court of Human Rights (2007; re-issued September 2016) on 'just satisfaction':

> "The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as "punitive", "aggravated" or "exemplary"." [9]
>
> "It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on

> an equitable basis, having regard to the standards which emerge from its case-law." [14]
>
> "Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would be equitable. Applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation". [15]

It is convenient to cite here also what is said in the Practice Direction (at [17]) about costs and expenses (to which I make reference at [58(vi)] below):

> "The Court will uphold claims for costs and expenses only in so far as they are referable to the violations it has found. It will reject them in so far as they relate to complaints that have not led to the finding of a violation, or to complaints declared inadmissible".

41. In this case, I am satisfied that the breaches of the Claimants' *ECHR* rights were serious, a view which I expressed in the presence of the lay parties at the hearing. This was plainly not an exceptional case justifying a 'without notice' application for removal of a baby from the care of his parents (see *Re X (Emergency Protection Orders)* [2006] EWHC 510 (Fam), and it is questionable whether there was a proper case for asserting that CZ's immediate safety demanded separation from his parents at all: *Re LA (Children)* [2009] EWCA Civ 822. The failure of the Local Authority to notify the Claimants that the hearing was taking place on the afternoon of 13 November was particularly egregious; misleading the District Judge no fewer than three times that the parents knew of the hearing aggravates the culpability yet further. This infringement will rightly be subject of a declaration of unlawfulness (see above), and to a very great extent this represents the essential vindication of the right which they have asserted.

42. The separation of a baby from his parents represents a very substantial interference with family life, and requires significant justification. In this case, my assessment of the seriousness of the interference has been moderated by two facts: first, because the actual arrangement effected under the interim care order, with CZ living with the paternal grandmother for the period while the parents enjoyed virtually unrestricted contact, was a variation of a plan which the parents had formed with Health Professionals prior to and following the birth in any event, namely for the paternal grandmother to reside with them for that period, and secondly, because once the parents and Cafcass obtained legal representation and were able to consider the situation with legal advice, none of them sought to challenge the living arrangement immediately and did not in fact do so until 20 January 2016.

43. These breaches are nonetheless sufficiently serious, particularly when taken together, to sound in an award of damages. As earlier mentioned, the parties have agreed that if damages are to be awarded, the appropriate sum would be £3,750 per Claimant. The quantum of any award must be determined by reference to what is "equitable" (*Greenfield* above). I have considered comparable awards made by the English Court reflected *inter alia* in the table set out at [90] in the *Medway Council v M & T* [2015]

EWFC B164 judgment, and in the table recently published by Association of Lawyers for Children; I have brought into my reckoning the recent award which I made in *GD & BD v. Wakefield MBC & Others* [2016] EWHC 3312 (Fam), and consider that the figure agreed between the parties does represent an appropriate sum to give "just and fair satisfaction" to each of the Claimants.

What order for costs should be made?

44. It is agreed that I should make an award of costs against the Local Authority in favour of the Claimants, in respect of the two periods described above (see [35] above). The issue is whether I should make any more significant award, as contended for by the Claimants and opposed by the Local Authority.

45. Before turning to the legal arguments, it is instructive to review aspects of the litigation history as I now know it to be:

i) On 22 February 2016, the Local Authority sent a without prejudice letter asking the solicitors for both parents to indicate a 'settlement amount' in relation to any prospective *HRA 1998* claim; the Local Authority invited the solicitors to attend a round table meeting in early March 2016 "to see if an early resolution can be brought without the need to issue proceedings … we are mindful of the statutory charge that would apply";

ii) On 11 March, Ms. Irving QC (counsel for the Local Authority) contacted Ms. Anning (counsel for the mother) directly, encouraging her solicitors/client not to issue a *HRA 1998* claim "so as to avoid the statutory charge applying to any settlement achieved";

iii) A round table meeting was held on 17 March 2016 at the instigation of the Local Authority. The Local Authority had invited each party to bring a schedule of costs, but in the event only the solicitors for the father did so; it is said, without demur at this hearing, that at the round table meeting the Local Authority made an apology to the parents. In a 'without prejudice' letter which followed the meeting (23 March 2016) the Local Authority offered the sum of £2,500 per Claimant on the basis of no order as to costs (schedules still not having been produced on behalf of the mother or the child);

iv) On 13 July 2016, the Local Authority made a further without prejudice offer to settle the HRA 1998 claims for £2,000 together with the costs of the HRA claim; the letter contains an apology about the failure of the Local Authority representatives to notify the parents of the hearing on 13 November;

v) On 14 July 2016, at a hearing before me, this offer was repeated as an open offer; the Local Authority confirmed that it conceded declarations.

vi) On 15 July 2016, the offer was increased to £2,500 on an open basis, together with the costs of the *HRA 1998* proceedings; the Local Authority proposed a further 'round table' discussion ("the Local Authority feel that this was very much the steer given by [the Judge] this morning");

vii) So far as I can tell, there was no response to that offer;

viii) An advocates meeting took place on 13 December 2016, but the agenda focused on arrangements for preparation for trial;

ix) On 6 January 2017, the Local Authority made further open proposals for settlement;

x) A further advocates meeting took place on 16 January 2017, at which the figure of £3750 was agreed;

xi) On the information available to me, the Claimants have not complied with the direction which I made (on 14 July and again on 5 October 2016) to make open proposals for settlement in a timely way, or indeed at all.

46. I am advised that the total costs incurred in the *CA 1989* and *HRA 1998* proceedings by the parties are as follows:

1.	Father's costs	£20,908.34
2.	Mother's costs	£25,151.91
3.	Children's Guardian's costs	£32,885.89
	Total [Claimants' costs]	**£78,946.14**
4.	Local Authority costs	c.£40,000
	Grand Total	**c.£120,000**

47. Each of the Claimants has been granted a publicly funded certificate to seek both declarations and damages under the *HRA 1998*. They have pursued their claim for costs vigorously because unless I make a significant (indeed a total) costs award, the damages awarded in this litigation will be absorbed by the statutory charge under *section 25 LASPO 2012*; this statutory provision reads:

> "**25 Charges on property in connection with civil legal services**
>
> (1) Where civil legal services are made available to an individual under this Part, the amounts described in subsection (2) are to constitute a first charge on—
>
> (a) any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided (whether the property is recovered or preserved for the individual or another person), and
>
> (b) any costs payable to the individual by another person in connection with such proceedings or such a dispute.
>
> (2) Those amounts are—
>
> (a) amounts expended by the Lord Chancellor in securing the provision of the services (except to

> the extent that they are recovered by other means), and
>
> (b) other amounts payable by the individual in connection with the services under section 23 or 24".

48. While there are exceptions to the application of the statutory charge (which are set out in *regulation 5* of the *Civil Legal Aid (Statutory Charge) Regulations 2013*: "*the Statutory Charge Regulations"*) I am satisfied that these exceptions do not apply here. *Regulation 7* of the *Statutory Charge Regulations* confirms that the statutory charge is, in these circumstances, applied in favour of the Lord Chancellor. *Regulation 9* provides a discretion to the Lord Chancellor to waive all or part of the statutory charge:

> "… if the following conditions are satisfied, (a) the Director was satisfied, in determining that a legally aided party qualified for legal representation, that the proceedings had a significant wider public interest; and (b) the Director in making the determination took into account that there were other claimants or potential claimants who might benefit from the proceedings."

The discretion under *regulation 9* can only be exercised in cases where the Director has funded the individual's representation in accordance with that regulation. This does not apply here.

49. Para 2.1 of the Legal Aid Agency's statutory Charge Manual (April 2014) is relevant in its description of the statutory charge as being designed to place legally aided individuals as far as possible in the same position as successful non-legally aided individuals (who are responsible at the end of their cases to pay their own legal costs if their opponent in the litigation does not, or is unable, to pay them). The statutory charge converts legal aid from a grant into a loan. The charge is designed to ensure that legally aided individuals contribute towards the cost of funding their cases so far as they are able;

50. The statutory charge is calculated by reference to the costs incurred under the legal aid certificate by which the claim for declaration and/or damages is sought, and any certificates issued "in connection with" (*section 25(1)(b)*) the proceedings in which the recovery was made.

51. Given the likely incidence of the statutory charge on any damages recovered in this case, the parties were encouraged to provide schedules of costs to the Local Authority as early as March 2016 so that an attempt could be made to resolve any costs dispute at an advocates meeting; the father's legal team provided such a document, but those acting for the mother and for the child did not provide such documents in a timely or complete way. I directed costs schedules in July 2016, but there was a low level of compliance with this order (I am advised that the father's lawyers provided a schedule but not the mother's). Accordingly, costs have been incurred simply in identifying the scale of the likely financial implication of the argument.

52. The Claimants raise three main arguments in their claim to recover full awards of costs:

    i) That I should make the award under *section 8(1)* of the *HRA 1998* because if I do not do so, the Claimants do not obtain "just satisfaction" in relation to the award of damages (*section 8(3)*);

    ii) That the conduct of the Local Authority was sufficiently unreasonable and/or reprehensible that it should sound in an adverse award of costs (reference *Re T* and *Re S* above);

    iii) That although *Article 13 ECHR* is not incorporated into English law by the *HRA 1998*, I should nonetheless have regard to *Article 13 ECHR* when considering *section 8(1)* to ensure that the Claimants' remedy is truly an "effective" one.

53. *The first argument*: The Claimants' primary argument is that I should use the discretion afforded to me in *section 8(1)* in order to ensure that Claimants receive "just satisfaction" under *section 8(3). Section 8(1)* provides:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate".

The Claimants accept that while *section 8(1)* offers the court a very wide discretion, in this case I "must" (they argue) exercise my discretion in the only way contended for, otherwise I will not be offering the Claimants "meaningful recompense" for the violations under *section 8(3)*.

54. Mr. Taylor adds that this is the only "just" way of affording proper relief to the Claimants, given that the care proceedings were not instigated by the Claimants (even though they accept that the Local Authority was not wrong to bring the case under *Part IV*), they had no choice but to participate in them, and have incurred a costs liability thereby.

55. Mr. Taylor's arguments echo the arguments of Mr Southey QC (counsel for the claimant) in the case of *R (o.t.a. Faulkner) v Director of Legal Aid Casework* [2016] EWHC 717 (Admin) (the same case which I referred to at [39](iii) above, when it returned to the Administrative Court on the costs issue; Mr. Southey's argument was reproduced in the judgment thus (at [6]):

> "It would be plainly unfair for Mr Faulkner to obtain no real remedy from these proceedings due to the operation of the '*statutory charge*' in circumstances in which (a) the court has recognised that he should receive £6,500 in damages as a result of breach of Article 5 (4) that led to a loss of conditional liberty and (b) a large number of other litigants will now be able to fully litigate their claims as a result of Mr Faulkner's conduct of this appeal."

56. Mostyn J rejected that argument, and the associated arguments, and held as follows – [32] / [34] / [37]:

> "If it was so obviously a violation of the human rights of Mr Faulkner for his award of damages to be encroached by the statutory charge then one would have thought that it would have been listed as an exemption from the statutory charge within *Regulation 44* of the *2000 Regulations* [i.e. predecessor regulations to those currently in force], but it is not. The fact that something is not mentioned there does not necessarily answer the question. But it does demonstrate to me that Parliament must have decided not to expand the list of exempt items beyond those which have been in existence for many years" [32]
>
> "It is a feature of our costs regime, particularly so in civil proceedings but perhaps less so in family proceedings, that an award of costs is never in the full amount. The reason for this is to provide a deterrent to litigation, so it is said. That is why an assessment of costs on a standard basis rarely achieves more than 70 pence in the pound. The consequence of that is of course that even where there is an award of costs in favour of a successful party, the consequence of the assessment process may see a large part - perhaps even all - of a modest award of damages eliminated" [34]
>
> "I do not accept that because [the damages] are awarded to Mr Faulkner as a victim of human rights violation that they should be subjected to a process of immunisation in the way that perhaps damages for personal injury or an award of damages for, say, the loss of an eye or a leg would not" [37].

57. The Local Authority contends that it would be wrong in principle to treat *section 8(1)* as mandating the court to make a full award of costs just so that the Claimants actually benefit from any award of damages.

58. I reject the Claimants' arguments on this first basis for the following reasons:

    i) I do not accept that the very wide discretion afforded to me under *section 8(1)* <u>has</u> to be condensed to one option only (i.e. to make a substantive award of costs) simply in order to achieve a 'just' outcome under *section 8(3)*;

    ii) If it had been the intention of Parliament that damages awarded under the *HRA 1998* would be exempt from the statutory charge, it would have provided for this in the revised *Statutory Charge Regulations* (2013); it did not;

    iii) Most awards of damages would be likely to be reduced to some extent by the incidence of assessment/taxation of the litigant's own bill. While this may not apply so harshly to publicly funded litigants, it seems to me that the Claimants could not be insulated against the eventuality that the shortfall in any

assessment would in itself lead to the obliteration of a modest award of damages;

iv) The award of non-pecuniary damages under *section 8(3)* is intended to reflect the Court's disapproval of infringement of the claimants' rights, in providing "just satisfaction" to the claimant; it is not intended to be, of itself, a costs award. I would regard it as unprincipled to increase the award of damages by a significant sum (which on the instant facts could be approximately seven-fold) to reflect the costs of the proceedings. Parliament has devised a legitimate mechanism for the recovery of the costs incurred from those who benefit from state-funded support to pursue their litigation, and however unfairly it may operate in an individual case, it must be respected;

v) In any evaluation of costs whether under the *CPR 1998* or the *FPR 2010*, I am obliged to have regard to the parties' litigation conduct, and whether costs are reasonably or not reasonably incurred. The Claimants' approach would require me to ignore or forgive any reckless, wasteful or profligate manufacture of costs in order to ensure that the Claimants receive their award; this cannot be right. In this case, as will be apparent from my comments below, the Claimants did not conscientiously attempt to settle their claims, whereas I am satisfied that the Local Authority did make genuine efforts to do so, and this influenced my approach to the second argument below;

vi) The Practice Direction of the European Court of Human Rights (see [40] above) specifically refers to costs awards being upheld "only in so far as they are referable to the violations it has found". If I am to cast an eye across to Strasbourg for guidance under *section 8(4)*, then this is the answer I receive; this guidance would steer me towards an award of costs referable to the period 13.11.15-7.12.15 but not otherwise;

59. *The second argument*: By their second argument, the Claimants' assert that if I apply the ordinary costs principles, the Claimants would be entitled to recovery of the majority, or indeed all, of their costs of the *CA 1989* and *HRA 1998* proceedings. Both Mr. Taylor and Ms Nelson acknowledged that this is very much the Claimants' subordinate point, for they recognise that if I approach the case on ordinary costs principles there is a chance that I would not award the full amount of the costs, and if that were so, any unmet costs liability would be likely to wipe out the relatively modest damages award.

60. *Section 51(1)* of the *Senior Courts Act 1981* applies to the costs arising here; it provides that (subject to rules of court – see below), costs shall be in the discretion of the court.

61. Although the case was not argued in this way, I am of the view that the costs incurred in the *CA 1989* proceedings must be determined by reference to the *FPR 1998*, whereas the costs incurred in the *HRA 1998* proceedings – even though brought on a C2 within the existing *CA 1989* proceedings – must be decided under the *CPR 1998*. The tests under the FPR and CPR are in one material respect different. Specifically, and notably, under the *CPR*, *Part 44.2(2)(a)* applies so that if the court decides to make an order about costs "(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"; this is subject to the proviso under

(b) that "the court may make a different order". This rule does not apply in family proceedings.

62. Most of the remaining provisions of *CPR Part 44* apply in family proceedings; therefore, with reference to *CPR 44.2(4)* in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including, (a) the conduct of all the parties; (b) (though this may have limited application in family proceedings given the disapplication of *CPR Part 44.2(2)(a)*: see *Re T* at [11]) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under *Part 36* apply. As to relevant conduct, this includes: (a) conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim. *Part 44.2(6)* specifically provides that the court may make any one of a range of orders including an order that a party must pay (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) …; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs from or until a certain date, including a date before judgment.

63. The *CA 1989* costs: In family proceedings, the relevant rule governing the award of costs is *rule 28.1* of the *Family Procedure Rules 2010* ('FPR 2010') which provides a wide discretion, viz:

> "The court may at any time make such order as to costs as it thinks just".

64. As indicated above, *Rule 28.2* of the *FPR 2010* imports the majority of the *CPR 1998* to costs in family proceedings, though it specifically disapplies *Rule 44.2(2)*. The general discretion in *rule 28.1* of the *FPR 2010* is shaped by the provisions of *CPR 44.2(4) & (5)* (again see above).

65. The principles which apply when the court exercises its costs discretion in family proceedings under the *CA 1989* as between parties has been reviewed in a number of recent cases, from which I draw the essential principles as follows:

   i) It is relatively rare to make an order for costs in children cases: *London Borough of Sutton v Davis (Costs)(No.2)* [1994] 2 FLR 569 – per Wilson J (as he then was):

   > "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his

> costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties. But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable" (emphasis by underlining added).

ii) Local Authorities have a duty to investigate allegations of child harm, and should be protected from orders on costs if on investigation the allegations prove to be without foundation: see *Re T* (above) at [42]:

> "The Children Act 1989 imposes duties on the local authority in respect of the care of children. If the local authority receives information that a child has been subjected to or is likely to be subjected to serious harm it has a duty to investigate the report and, where there are reasonable grounds for believing that it may be well founded, to instigate care proceedings. In this respect the role of a local authority has much in common with the role of a prosecuting authority in criminal proceedings. It is for the court, and not the local authority, to decide whether the allegations are well founded. It is a serious misfortune to be the subject of unjustified allegations in relation to misconduct to a child, but where it is reasonable that these should be investigated by a court, justice does not demand that the local authority responsible for placing the allegations before the court should ultimately be responsible for the legal costs of the person against whom the allegations are made". (emphasis by underlining added).

iii) Every party has their part to play in assisting the Court to reach the right conclusion in the interests of the child: see Baroness Hale in *Re S* at [20]/[21]:

> "… there are no adult winners and losers – the only winner should be the child. …
>
> Furthermore, it can generally be taken for granted that each of the persons appearing before the court has a role to play in helping the court to achieve the best outcome for the child."

iv) There is a public policy element to this approach: see Cazalet J in *Re M (Local Authority's Costs)* [1995] 1 FLR 533:

> "As a matter of public policy it seems to me that where there is the exercise of [a] nicely balanced judgment to be made by a local authority carrying out its statutory duties, the local

> authority should not feel that it is liable to be condemned in costs if, despite acting within the band of reasonableness (to adopt the words of Wilson J), it may form a different view to that which a court may ultimately adopt." (emphasis added)

v) Where a local authority has caused costs to be incurred by acting in a way which is unreasonable or reprehensible, justice may well require that the local authority pay the costs in question: see *London Borough of Sutton v Davis (Costs)(No.2)* (above), *Re T* (above) at [44], and *Re L (Costs of Children Proceedings)* [2014] EWCA Civ 1437 ([38]-[41]); examples of such cases include: *Re R (Care: Disclosure: Nature of Proceedings)* [2002] 1 FLR 755; *Re X (Emergency Protection Orders)* [2006] EWHC 510 (Fam), [2006] 2 FLR 701; *Coventry City Council v X, Y and Z (Care Proceedings: Costs)* [2011] 1 FLR 1045;

> "the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings" [44]

vi) There is no fixed or defined category of case within which costs could or should be awarded. Baroness Hale in *Re S* expressed the view at [31] that:

> "I do not understand that Lord Phillips, giving the judgment of the court in *Re T*, was necessarily intending to rule out the possibility that there might be other circumstances in which an award of costs in care proceedings might be appropriate and just."

vii) If the family proceedings had been essentially *adversarial* in nature (i.e. appeal against refusal of day nursery registration), costs may well follow the event: see again Wilson J in *London Borough of Sutton v Davis (Costs)(No.2)*:

> "The proceedings were adversarial and the local authority lost the argument. Such were circumstances for application of the principle that costs should follow the event."

viii) If "real hardship" would be caused to a party in achieving an outcome in the best interests of the child, that may provide a proper basis for a costs order – per Baroness Hale in *Re S* (above) at [33]:

> "The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer

> parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk. (It may be that this is one of the reasons why parents are automatically entitled to public funding in care cases.)" (emphasis by underlining added).

66. On the facts of this case, the Claimants have succeeded in their *HRA 1998* claim, and ordinarily therefore they could look to the "unsuccessful" party (Local Authority) to pay their costs under *Part 44.2(2)(a)*; however, I consider that the Claimants' litigation conduct is such that they have forfeited this entitlement. In particular:

    i) They failed to respond constructively to the Local Authority's efforts to achieve a negotiated settlement; from an early stage (i.e. February 2016: see [45](i) above), through until July and beyond, the Local Authority was making appropriate overtures to sort out this dispute, but the Claimants were ostensibly unreceptive;

    ii) The Claimants were invited from 22 February 2016 to indicate a 'settlement amount' in relation to any prospective *HRA 1998* claim, but they did not apparently (i.e. from the correspondence – including that marked 'without prejudice' – which I have now seen) do so;

    iii) The mother and Children's Guardian did not respond positively to the request to provide costs schedules at an early stage or an order to the same effect, and none of the Claimants complied with my direction for the provision of open offers of settlement;

    iv) Further 'without prejudice' offers were made on the days either side of the Case Management hearing on 14 July, without any meaningful response. On the 14 July itself, at court, Ms. Irving QC made an open offer. On 15 July 2016, the offer was increased to £2,500 on an open basis, together with the *HRA 1998* costs; the Local Authority proposed a further 'round table' discussion but this fell on deaf ears;

    v) So far as I can tell, there was no response to the offer made on 15 July 2016;

    vi) On the information available to me, the Claimants have not complied with the direction which I made (on 5 October 2016) to make open proposals for settlement in a timely way, or at all.

    On ordinary costs principles, I am of the view that the Claimants should be entitled to recovery of their costs of the *HRA 1998* proceedings from the grant of certificates up to and including 14 July, but no further.

67. In relation to the costs of the *CA 1989* proceedings, the Claimants have failed to demonstrate in my judgment that the Local Authority behaved "reprehensibly" or "unreasonably" otherwise than in the circumstances in which it launched the proceedings and conducted the hearing on 13 November. This had ramifications (i.e. the placement of CZ away from the parents' care) until 7 December. In my judgment,

applying ordinary costs principles, the Claimants would be entitled to the costs of the CA 1989 proceedings for the limited period from 13 November to 7 December 2015.

68. These conclusions correspond with the European Court's Practice Direction (see [40] above) which directs the Court to uphold claims for costs and expenses only in so far as they are referable to the violations it has found.

69. *The third argument*: Mr. Taylor's third argument is a variation of the first, namely that the Claimants will be denied an 'effective' remedy unless I make a comprehensive award of costs against the Local Authority. He maintains that *rule 28.1 FPR 2010* and *section 8(1)* should be read in the light of the provisions of *Article 13* of the *ECHR*, which of course is one of the *ECHR* rights which is *not* incorporated into English law by the *1998 Act*. *Article 13* provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (emphasis by underlining added).

70. Mr. Taylor draws my attention (with nodding reference only to *Pepper v Hart* [1993] AC 593) to the debate in Parliament on the Human Rights Bill in November 1997, and the comment of the then Lord Chancellor that the courts may "wish to" have regard to *Article 13* when considering the "very ample" provisions of *section 8(1)*. Mr. Taylor says that for a remedy to be 'effective' it must be adequate and accessible. He contends that the Claimants are denied an 'effective' award unless they recover their costs.

71. First, I do not consider that *Pepper v Hart* has been appropriately deployed here. *Section 8(1)* and *section 8(3)* are not ambiguous or obscure; while the adult Claimants may feel that the outcome is not fair, it is not absurd. In any event, I am wholly satisfied that the Claimants have been able to access a court effectively, and have a remedy in the form of a declaration and an award of damages. The fact that the damages award is vulnerable to recoupment by operation of a statutory charge for costs arises because Parliament, in devising a scheme for assisting litigants to bring legal claims, has also devised a method of recoupment; the significant benefits of public funding to enable litigants to prosecute legitimate claims do not come without some trade-off. It seems to me that I should not interpret the provisions of the *HRA 1998* (particularly by reference to a Convention right which has not found its way into English law), in such a way as to create what would swiftly become a dual-carriageway by-pass around the provisions of *LASPO 2012*.

72. Two further points were raised in argument which it may be sensible to raise here only to dispose of them.

73. Reference was made at the hearing to *P v A Local Authority* [2016] EWHC 2779 (Fam), a case in which Keehan J found a way of facilitating the grant of the award of damages to the Claimant in such a way that it was unaffected by the LAA's statutory charge. On the facts of that case, the applications under the *HRA 1998* and under the wardship were quite separate and unconnected; he said this:

> "P's claim is and was always based upon his Art. 8 Convention right to respect for his private and family life. The claim had nothing to do with the declaratory relief granted to P in the wardship proceedings" [71] (emphasis added).

On the facts, *P v A Local Authority* is materially different from the situation which obtains here.

74. Secondly, Mr. Taylor further submitted that I could award an aggregate damages award of £11,250 (£3750 x 3) to the child, and order the Local Authority to pay all of the costs of the Children's Guardian; in that way, (i) this would reduce the financial outlay for the Local Authority than the alternative route contended for by the Claimants, and (ii) at least one of the parties would actually benefit from a damages award. Ms. Irving QC indicated that if the Court approved it, the Local Authority would not contest this approach. The LAA was, sensibly, consulted about this proposal, and rejected it for the contrivance which it undoubtedly is. I could not in any circumstances sanction this approach. I have awarded damages to *each* of the three Claimants; the figure awarded is what I regard as "necessary" to give "just satisfaction" to *each* of them. The proposal outlined undermines the principles on which I have resolved the claims.

Conclusions and decisions

75. I shall make the declarations proposed and conceded, set out in [33] above.

76. I shall award each of the three Claimants £3,750 by way of damages, to be paid by the Local Authority, under *section 8(3) HRA 1998.* It is, I acknowledge, regrettable that because of the costs order I propose to make, the Claimants are unlikely to receive these sums.

77. I shall make an order that the Local Authority makes a contribution to the publicly funded costs of the Claimants, limited to the following periods:

   a) 13.11.15-7.12.15 (all Claimants: *CA 1989* proceedings);

   b) From the date on which the LAA granted extensions to the Claimants' existing certificates (issued for the *CA 1989* proceedings) for them to pursue *HRA 1998* claims to 14.7.16, excluding the costs incurred by those who attended on behalf of the mother and the child at the meeting arranged by the Local Authority on 17 March 2016 (save as provided for herein, all Claimants: *HRA 1998* proceedings).

78. That is my judgment.