

Court service required to fund litigation in family proceedings

A landmark case supporting the logic of Article 6 rights in the absence of legal aid.

Re K and H (children : Unrepresented father : Cross-Examination of a Child) 2015 (HHJ Bellamy Sitting as a Deputy High Court Judge)

<http://www.bailii.org/ew/cases/EWFC/HCI/2015/1.html>

In private law children's proceedings it was alleged the father had sexually abused his daughter. A fact finding hearing was listed to determine the truth of those allegations. The court determined the daughter (who was 17) was a capable witness and could be subject to cross examination. (Applying principles of *Re W (Children)(Abuse: Oral Evidence)[2010] UKSC 12*). The CAFCASS officer considered that to be cross-examined by her father would be significantly emotionally abusive for her.

The father was a litigant in person- he did not qualify for legal aid, as a result of his means (The current threshold being £733, father's disposable income being £1,460 pm- the "exceptional case funding" provision would not help). The father wanted to be represented, said he could not afford representation but did not wish to cross-examine his daughter himself.

The Court accepted the Family Justice council's guidance relating to children giving evidence, and specifically

"17. A child should never be questioned directly by a litigant in person who is an alleged perpetrator"

The Court invited the Lord Chancellor to intervene and he did so, ably represented by Ms Whipple QC.

"48. Miss Whipple's principal submission is disarmingly simple. Parliament has provided a scheme for public funding of litigation. The scheme is now contained within LASPO, augmented by relevant secondary legislation. Section 1(1) of LASPO provides that the Lord Chancellor 'must' secure that legal aid is available 'in accordance with this Part'. The scheme set out in the following sections provides a single, comprehensive, unitary statutory code. The court has no power, whether under s.31G(6) or otherwise, to require HMCTS to meet the cost of legal representation which is not available under the statutory scheme (LASPO). An order requiring HMCTS to provide funding for litigants would be ultra vires"

"Ms Whipple argued that the father should fund his own representation as the father is financially ineligible for legal aid it follows that it is a matter of personal choice whether he chooses to pay for representation. I do not accept that proposition."

However, it is an argument soundly supported by other legal commentators:

<http://suesspiciousminds.com/2015/01/05/court-service-to-pay-fathers-legal-costs-k-h>

The second argument:

“Miss Whipple submits that the problems arising from the decision that Y should give oral evidence are essentially problems of case management. In particular, she suggests that the court or the guardian if there is one' could put questions on behalf of the father and/or that the court should make use of special measures such as the use of screens or live video-link.”

This was similarly rejected- there was no guardian appointed in this case, and in any event it was not the guardian's role to represent the views of the father. Any “special measure” would not overcome the fact the father would be conducting the cross-examination.

The third argument on behalf of the Lord Chancellor, was that the Judge could “put” the father's case, Bellamy J agreed with The President in **Q v Q [2014] EWFC 31:**

“In some – probably many – cases that will be entirely unproblematic. But in cases where the issues are...grave and forensically challenging...questioning by the judge may not be appropriate or, indeed, sufficient to ensure compliance with Articles 6 and 8. “

To comply with a right to a fair trial, he again relied on The President in Q v Q:

“90. I have concluded that there may be circumstances in which the court can properly direct that the cost of certain activities should be borne by HMCTS. I emphasise that (the provision of interpreters and translators apart) this is an order of last resort. No order of this sort should be made except by or having first consulted a High Court Judge or a Designated Family Judge.’ “

Ms Whipple argued that the President was wrong to propose such a funding process- it would be for Parliament to create a power of legal funding.

Judge Bellamy dealt with that argument as follows:

“In Re D (A Child) [2014] EWFC 39 the President made his position very clear:

'26. It is no part of the function of the Family Court or the Family Division to pass judgment on the appropriateness and wisdom of the arrangements that Parliament (or Ministers acting in accordance with powers conferred by Parliament) choose to make in relation to legal aid. The legality, rationality and, where relevant, the proportionality of the scheme, if properly the subject of judicial scrutiny, are primarily the responsibility of the Administrative Court. It is, however, the responsibility – indeed, the duty – of the judges in the Family Court and the Family Division to ensure that proceedings before them are conducted justly and in a manner compliant with the requirements of Articles 6 and 8 of the Convention. That, after all, is what Parliament determined when it enacted section 6 of the Human Rights Act 1998, declaring, subject only to section 6(2), that it is "unlawful" for a court to act in a way which is incompatible with Articles 6 and 8.’ “

The Judgement points out that HMCTS already fund the cost of interpreters:

“62.I pause for a moment to reflect on why it should be that HMCTS is willing to fund the cost of an interpreter for someone who is not entitled to legal aid and who, following the logic of Miss Whipple's earlier argument in this case, must, therefore, be considered able to afford to pay for representation (including the cost of an interpreter). The answer is plain. A litigant whose first language is not English and whose ability to speak, read and understand English is inadequate is likely to be denied a fair trial (i.e. suffer a breach of her Article 6 rights) and the court is likely to be in

breach of s.6(1) of the Human Rights Act 1998 if an interpreter is not provided. That is so irrespective of the litigant's ability to pay."

Judge Bellamy concludes with the following principles;

(a) It is the first duty of judges sitting in the Family Court to ensure that proceedings are conducted fairly (FPR 2010 rule 1.1). Failure to do so may lead to the court itself acting unlawfully (s.6(1) of the Human Rights Act 1998).

(b) Where a party is unrepresented (whether because legal aid is not available or by choice) and is 'unable to examine or cross-examine a witness effectively' the court has a duty to assist that party (s.31G(6) of the Matrimonial and Family Proceedings Act 1984). This requires the court 'to put, or cause to be put' questions to a witness.

(c) The court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex.

(d) Where the court is satisfied that it is not 'appropriate' for the judge to put questions to an alleged victim, the court must arrange for (cause) a legal representative to be appointed to put those questions.

(e) The court may direct that the costs of the legal representative be borne by HMCTS.

(f) The court may nominate the legal representative who is to be appointed to undertake that task.

(g) The extent of the work to be undertaken by a legal representative so appointed should be made clear at the outset and should be proportionate.

(h) In those limited cases where legal aid is still available in private law Children Act proceedings there is a detailed regulatory framework governing the calculation of costs payable to (claimable by) a solicitor for undertaking such work. The fees payable by the Legal Aid Agency are less than a solicitor might charge a privately paying client for doing the same work. That has always been so. I can see no cogent argument for suggesting that a legal representative appointed by the court should be entitled to a higher rate of remuneration than if that work were undertaken under the legal aid scheme.

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