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Case No: LE15P00456

Neutral Citation Number: [2016] EWHC 2779 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2016

Before :

THE HONOURABLE MR. JUSTICE KEEHAN

Between :

P
- and -
A LOCAL AUTHORITY

Applicant
Respondent

Sarah Morgan QC and Olivia Magennis (instructed by **Emery Johnson Astills**) for the
Applicant
Nicholas Stonor QC and Jacqueline Matthews-Stroud (instructed by **Local Authority**) for
the **Respondent**
Oliver Jones (instructed by **The Central Legal Team Legal Aid Agency**) for **The Lord**
Chancellor and The Legal Aid Agency

Hearing dates: 16 August 2016

Judgment

MR. JUSTICE KEEHAN:

1. This judgment should be read with the judgment I gave in this matter on 26 August 2015: [2016] EWHC 2600 (Fam).
2. I am concerned with one young person, P, who is 17 years of age. He was born female but in September 2014 he told his adoptive parents he wanted to change his identity to be male. He was referred to the Tavistock Gender Identity Clinic in respect of his gender dysphoria.
3. P's adoptive parents struggled to come to terms with his decision. Relations between parents and child, very sadly completely broke down. He moved to live with foster carers pursuant to a s.20 Children Act 1989 agreement with the local authority.
4. Matters continued to deteriorate to the extent that P did not want his adoptive parents to be involved in his life nor to receive any information about him including any medical treatment he may undergo.
5. The adoptive parents initially opposed the declaratory relief sought by P. At the hearing they amended their position to not oppose the application but to seek quarterly updates on P's life and welfare. They both hoped it would in due course be possible to effect a reconciliation with P.
6. So very firmly held were P's views that he opposed even this very limited disclosure of information to them.
7. The local authority simply sought clarity about the extent to which it was or was not relieved of its statutory obligations to consult with and give information to P's adoptive parents.
8. I granted the declaratory relief sought by P on the ground that the balance between P's Article 8 rights and the adoptive parents' Article 8 rights fell decisively in favour of P's very strongly held wishes and feelings. The order sought was manifestly in P's welfare best interests. The relevant parts of the order made on 26 August 2015 were:

“DECLARATION

1. Upon it being declared and affirmed that:

a. [The local authority] is absolved from any and all obligation to consult, refer to, and/or inform [P's] parents, [...] in relation to any aspect of his progress, development and/or well-being whilst he is a Looked After Child; the court being satisfied that [P's] welfare makes such a declaration necessary.

b. Further, or in the alternative, the declaration set out in (a) above shall absolve [the local authority] of all obligations to comply with any of the duties imposed on them by, or under, the Children Act 1989 in relation to any obligation to consult, refer to, and/or inform the parents. The Court being satisfied that in the exceptional circumstances of this case, such failure

would amount to a reasonable excuse pursuant to section 84 Children Act 1989.

IT IS ORDERED:-

2. [The local authority] shall not share with the Respondent Parents:

a. Any information regarding the Applicant's medical treatment in relation to gender dysphoria whatsoever, whether that information comes from the Tavistock Centre, the Applicant's General Practitioner, CAMHS or another source;

b. Any information regarding the Applicant's wellbeing without the express consent of the Applicant;

c. For the avoidance of doubt [the local authority] is not permitted to share information with the Respondent Parents in case of emergency unless the Applicant consents, and only on the basis that the Respondent Parents agree that they will not visit the Applicant without his express consent. If the applicant is unable to consent [the local authority] is not permitted to share information with the Respondent Parents."

Application

9. Subsequent to my judgment of August 2015, P sought to bring a Human Rights Act claim against the local authority in January 2016.
10. In response to a letter before action the local authority admitted liability.
11. There is an issue about the Legal Aid Agency's (the 'LAA') statutory charge to which I shall refer later in this judgment.

Law

12. It is unlawful for a public authority to act in a way which is incompatible with a Convention right: s. 6(1) Human Rights Act 1998 ('HRA'). A person who claims that a public authority has acted in a way which is made unlawful by s. 6(1) may (a) bring proceedings against the authority under this Act in the appropriate Court or Tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is a victim of the unlawful act: s. 7(1) HRA.
13. Article 8 of the Convention provides:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

14. The claim on behalf of P is formulated as follows:

P Seeks:

Declaration that his Article 8 rights have been unlawfully interfered with; and financial redress, the declaratory relief alone being insufficient as 'just satisfaction' (s8 HRA 1998). The unusual circumstances of this case make quantum difficult but by way of analogy the recent decision on wrongful use of s20 have fallen within the range £3000 - £20,000.

The pre-conditions to an award of damages by a domestic court under s 8, as set out in the case of *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWFC 38 are that: (1) a finding of unlawfulness should be made based on breach by a public authority of a Convention right; (2) the court should have the power to award damages in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate.

15. The local authority agreed to pay the costs of P's HRA claim up to but not including the costs of the hearing on 26 August 2016, which was principally concerned with the issues concerning P and the LAA.

Background

16. In September 2015 P moved to a local authority unit for semi-independent living. Although there were concerns about his mental well being and general welfare, P settled in to this accommodation. He was and is a vulnerable young person with a history of repeated episodes of self harm, taking overdoses and extremely poor mental health.
17. On 11 January 2016 an employee of the local authority disclosed personal information about P, including his forename and transgender status, to third parties who are friends of P's adoptive parents. P was originally told that the address of the unit where he was living had also been disclosed: this later appears not to have been the case.
18. The impact of this wrongful disclosure on P was immediate and dramatic. He felt unsafe at the unit and left. He first stayed with his girlfriend and then at a number of residential units provided by the local authority. P's mental health was very severely compromised: he made a number of suicide attempts and there were several episodes of self harm.

19. In more recent months P's mental health has stabilised. I was very pleased that he was well enough to attend the last court hearing on 26 August 2016.
20. Although the local authority promptly told P of the disclosure of his personal information, I regret that it was slow in (a) giving P a full account of what had happened and (b) giving P a full and unreserved apology. In February the then Director of Children and Family Services wrote a letter of apology to P and offered to meet with him to answer any questions he may have had. P did not take up the offer of a meeting.
21. The member of staff who made the wrongful disclosure was suspended by the local authority and a formal investigation was undertaken pursuant to the council's disciplinary policy. I do not know the outcome of that process.
22. Regrettably, and notwithstanding that P is a ward of this court, the local authority did not bring this breach of P's privacy to the attention of this court. The matter was raised with the court by P's lawyers.
23. The local authority, very sensible and rightly, decided to concede it had, by the inexcusable actions of one of its employees, breached P's Article 8 rights to respect for his family and private life. They agreed to pay P damages in the sum of £4750. I am satisfied that in light of the very considerable distress suffered by P and the immediate adverse impact on his mental health, this appears to be an appropriate level of damages to be awarded to P.

Legal Aid Agency: Statutory Charge

24. The LAA contend that P's award of damages is subject to the Legal Aid Agency's ('LAA') statutory charge and that the entire award of damages will be clawed back by the LAA on account of the costs incurred by P's legal team in the wardship proceedings. If the LAA are right, most unfortunately P will receive not a penny of the damages awarded to him.
25. In light of this contention the Lord Chancellor and, at my request, the LAA were represented by counsel at the hearing in August last. I am extremely grateful to all counsel for their most helpful written and oral submissions, including from Mr. Oliver Jones, counsel for the Lord Chancellor and the LAA.
26. The proceedings under the inherent jurisdiction (the 'wardship proceedings') in which I granted the declaratory relief sought by P, as referred to in paragraph 8 above, concluded with an agreed order that there be no order as to costs as between the parties. This order, whilst in itself the usual order to be made in such proceedings, assumed considerable significance in light of events which were to follow.
27. When the HRA issue came before me in July 2016 the potential adverse impact of the LAA's statutory charge on any award of damages was raised by counsel. It was argued by counsel for P and counsel for the local authority that it would be wrong in principle and inappropriate for the court to re-visit the issue of the costs order made in respect of the wardship proceedings. I agreed.
28. Accordingly on 26 July 2016 I made the following order:

“IT IS ORDERED:-

1. The Applicant shall, by 4pm 29th July 2016, serve upon both the Lord Chancellor and the Legal Aid Agency:

- a. A copy of this order;
- b. Copies of the skeleton arguments prepared on behalf of the Applicant and Respondent for today’s hearing;
- c. A copy of the bundle prepared for today’s hearing.

These documents are being disclosed to the LAA and the Lord Chancellor for the purpose only of assisting them in responding to the court’s requests of them contained within this order.

2. The Lord Chancellor is invited to waive the statutory charge in the unusual circumstances of this case.

3. The Lord Chancellor is invited to respond regarding the question of waiver by 4pm, 12th August 2016 in writing.

4. The Legal Aid Agency is invited to confirm to the Court and the parties in writing by 4pm 19th August 2016 whether the LAA will seek to recover any damages or other financial recompense awarded to the subject Ward by way of statutory charge.

5. The matter is listed for further consideration on **26th August 2016 at 10am** before Keehan J, with a time estimate of 1 hour. Both the Lord Chancellor and the Legal Aid Agency is invited to attend that hearing. ”

29. The statutory charge has been a feature of legal aid since its creation by the Legal Aid and Advice Act 1949. Its current statutory basis is set out in s. 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) which provides:

“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.

(3) Regulations may make provision for exceptions from subsection (1).

(4) Regulations may make provision about the charge under subsection (1) including, in particular—

(a) provision as to whether the charge is in favour of the Lord Chancellor or a person by whom the services were made available,

(b) provision modifying the charge for the purposes of its application in prescribed cases or circumstances, and

(c) provision about the enforcement of the charge.

(5) Regulations under subsection (4)(c) may, in particular, include—

(a) provision requiring amounts recovered by the individual in proceedings or as part of a compromise or settlement of a dispute, and costs payable to the individual, to be paid to the Lord Chancellor or a person by whom the services were made available,

(b) provision about the time and manner in which the amounts must be paid,

(c) provision about what the Lord Chancellor or the person by whom the services were made available must do with the amounts,

(d) provision for the payment of interest on all or part of the amounts,

(e) provision for the payment to the individual concerned of any amount in excess of the amounts described in subsection (2), and

(f) provision for the enforcement of requirements described in paragraph (a).

(6) Regulations under this section may include provision requiring information and documents to be provided.”

30. The policy reasons for the statutory charge are set out in the LAA’s Statutory Charge Manual, namely to:

- (a) put 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 litigation does not, or is unable, to pay them). The statutory charge converts legal aid from a grant into a loan. (See *Davies v. Eli Lilly & Co* [1987] 3 All ER 94 at 97 to 98);
- (b) ensure that legally aided individuals contribute towards the cost of funding their cases so far as they are able; and
- (c) deter legally aided individuals from running up costs unreasonably by giving them a financial interest in how much money is being spent.

31. There are exceptions to the application of the statutory charge. These are set out in regulation 5 of the Civil Legal Aid (Statutory Charge) Regulations 2013 (the ‘CLA(SC)R 2013’) which provides that:

Exceptions to the statutory charge

— (1) The statutory charge does not apply to the following property recovered or preserved by a legally aided party in relevant proceedings, or in any compromise or settlement of a relevant dispute,—

- (a) any periodical payment of maintenance;
- (b) any sum or sums ordered to be paid under—
 - (i) section 25B(4) (pensions) or 25C (pensions: lump sums) of the Matrimonial Causes Act 1973(11);
 - (ii) section 5 of the Inheritance (Provision for Family and Dependants) Act 1975(12) (interim orders);
 - (iii) Part 4 of the Family Law Act 1996(13) (family homes and domestic violence); or

(iv) paragraph 25(2) or 26 of Schedule 5 to the Civil Partnership Act 2004(14) (financial relief in the High Court or a County Court etc.);

(c) half of any redundancy payment within the meaning of Part 11 of the Employment Rights Act 1996(15) (redundancy payments etc.); or

(d) any sum, payment or benefit which by virtue of any provision of, or made under, an Act of Parliament cannot be assigned or charged.

(2) The statutory charge does not apply to—

(a) legally aided party's trade,

(b) the implements of a legally aided party's trade,

except where the Lord Chancellor considers that there are exceptional circumstances, having regard in particular to the value or quantity of the items concerned.

(3) Where, by virtue of regulation 7, the statutory charge is in favour of a provider, it does not apply to a legally aided party's main or only dwelling.

(4) Paragraphs (2) and (3) do not apply where the legally aided party is a legal person.

32. It will be noted that damages awarded in respect of a claim under the HRA are not within the limited exceptions contained within regulation 5 of the CLA(SC)R 2013.

33. The Lord Chancellor has authority to waive the statutory charge, in whole or in part, where she considers it equitable to do so and two conditions are met.

Those conditions are:

(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:

see regulation 9 of the CLA(SC)R 2013.

34. The phrase 'significant wider public interest' is defined as being a case where the Director of the LAA is satisfied that the case is an appropriate case to realise real benefits to the public at large, other than those which normally flow from cases of the type in question, and benefits to an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that

individual's family: see regulation 6 of the Civil Legal Aid (Merits Criteria) Regulation 2013 (the 'LA(MC)R 2013').

35. The LAA asserts that the two conditions set out in regulation 9 of the CLA(SC)R 2013 must be satisfied at the time the application for funding is made and the Director makes the determination that the application qualifies for funding. The purpose of the waiver is to allow legal aid to be granted for a single test case without disadvantaging the applicant should he or she fail to secure damages and/or all of their costs.
36. I note that the predecessor regulations to the regulation 9 CLA(SC)R 2013 did not limit the grant of a waiver of the statutory charge to the time when the application for funding was made and the Director makes his determination in favour of granting funding to the applicant. Counsel for the LAA was not able to assist me on the reason for the imposition of this time limitation in the 2013 regulations (for the avoidance of doubt in making that observation I intend no criticism of counsel).
37. The LAA rely on the decision of Mostyn J in *R(Faulkner) v. Director of Legal Aid Casework* [2016] EWHC 717 as authority for the proposition that damages awarded for breach of an applicant's human rights by an organ of the state are not ringfenced or protected from the clawback of the statutory charge. At paragraphs 37 and 38 of his judgment Mostyn J said:

"I accept that an award of damages made under Article 5 (5) of the European Convention on Human Rights is a serious matter. Detention by the State is, on any view, a very bad business. The award of damages — although they are customarily modest — should reflect the fact that it is only in Article 5 (5) of the Convention that compensation is mentioned. However I do not accept that awards of damages for State detention pursuant to the Convention are a class apart from all other types of damages. I do not accept that because they 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. Naturally, State detention is a bad business but the consequences of many personal injuries are far more long-enduring than temporary State detention as happened in this case by virtue of delay in convening a Parole Board hearing.

It is for these reasons that I reject the argument that there is some kind of special status or numinous quality to be attached to these damages. These damages are to be treated under the costs regime, in my judgment, in exactly the same way as any other damages. It is therefore for these reasons that the claim for judicial review is dismissed."

I agree and accept this submission.

The LAA's Submissions

38. The LAA's account of the circumstances in which funding was granted for P's HRA claim and the reasons why the statutory charge apply to his award of damages are set out in a letter to the court of 18 August 2016 on behalf of the Lord Chancellor and the LAA. It asserts

“In this case the certificate for wardship proceedings was granted on 5 May 2015. The issue as to whether the statutory charge should apply was only raised at a later stage. On the information available, on 8 February 2016 the scope of the existing certificate was extended to cover an application for a declaration for breach of an injunction regarding disclosure of information. By letter dated 9 June 2016 funding to bring a claim for HRA breaches in the wardship proceedings was refused. The determination also stated that the conditions relating to waiver had not been satisfied because no specific individuals or group of individuals had been identified who would benefit from the proceedings and no clear indication of the number who might potentially benefit had been given, accordingly the case was determined not to meet the significant wider public interest test. No appeal has been received against his determination.

The present position is that the applicant does not presently have legal aid funding to bring a claim for damages under the Human Rights Act, although the certificate for wardship is still live. The LAA confirms that nevertheless, should P recover damages for breach of his Human Rights within the wardship proceedings, then section 25 of LAPSO will mean that the statutory charge (calculated by reference to the costs incurred under the certificate) would attach to those damages as a matter of law. In the absence of a waiver, that would mean that the only practical way of ensuring P receives any money would be for the court to order that the Local Authority pay the costs of the wardship proceedings (or for P's lawyers to make a claim under his certificate for their costs for those proceedings).

The submissions of the parties do not seek to argue that the statutory charge does not apply in this case but that it should be waived. Regulation 9 has been quoted in the Applicant's skeleton argument but surprisingly no reference is made to the fact that on 9 June 2016 the Director determined that the pre-conditions set out in that regulation do not apply. That decision has not been appealed and in the circumstances the discretion to waive the charge cannot apply on the facts of P's case.

The LAA notes that the present position has arisen due to the decision of RA's advisers to pursue this matter within these wardship proceedings. It is possible that if the alternative routes had been chosen (for example a maladministration claim or a

claim in separate proceedings) this issue may well not have arisen as the wardship proceedings had concluded prior to the events giving rise to the HRA claim in this case.”

39. In all of the premises counsel on behalf of the LAA submitted that
- (a) the decision of the LAA in this case is lawful, rational and fair;
 - (b) the conditions for a waiver of the statutory charge are not satisfied; and
 - (c) the applicant did not appeal the determination and decisions of the director.

Submissions of the Local Authority

40. In taking a broad and pragmatic approach leading counsel for the local authority submits that the adverse consequence of the statutory charge, that P will receive not a penny in damages, is unfair and makes no sense. I have a very considerable degree of sympathy with those sentiments.
41. In this context I deprecate the stance taken by the LAA that the issue of P receiving any of the awarded HRA damages would be alleviated if his leading counsel, junior counsel and solicitor simply waived their professional fees for acting in this matter.

Submissions on behalf of P

42. Ms Morgan QC and Ms Magennis, for P, sought to counter the assertions and submissions made on behalf of the Lord Chancellor and the LAA.
43. In the letter of 18 August 2016 the LAA asserted:

“The LAA notes that the present position has arisen due to the decision of P’s advisers to pursue this matter within these wardship proceedings. It is possible that if the alternative routes had been chosen (for example a maladministration claim or a claim in separate proceedings) this issue may well not have arisen as the wardship proceedings had concluded prior to the events giving rise to the HRA claim in this case.”

In marked contrast, in an email sent to P’s solicitors on 21 July 2016 the LAA said:

“The statutory charge would attach to all of the work under the certificate and not just the proceedings relating to the breach.”

In a second email sent later that day the LAA said:

“The relevant sections of the statutory charge manual are sections 5.6, 5.7 and 5.9. The Access to Justice Act and Legal Aid, Sentencing and Punishment of Offenders Act refer to the provision of legal services and the statutory charge is calculated by reference to the cost of funded services. Even if we had issued a fresh certificate, we would have calculated the statutory charge by taking the costs of both certificates.”

44. Counsel for the LAA submits there is no contradiction between those email assertions and those set out in the letter referred to above. Ms Morgan and Ms Magennis submit that the two cannot be reconciled. Either separate proceedings and certificates would have resulted in a different approach by the LAA or they would not.
45. They submit that the issue of separate proceedings to pursue P's HRA claim appears to ignore and to be in conflict with the then President's decision in *Re L(A Child) v. A Local Authority and MS* [2003] EWHC 665 (Fam) when, at paragraph 31, he said

*“Human rights arguments based on the convention can, **and should**, be dealt with within the context of the pending care proceedings. They can, **and should**, be dealt with by the court which is dealing with the care proceedings. Where there are care proceedings on foot there is, in my judgment, no need for any separate, let alone free-standing, application. Section 7(1)(b) enables every court- including the FPC- to give effect to the parties' Convention rights.”*

46. The public funding certificate in respect of the proceedings for a declaration under the inherent jurisdiction was granted on 5 May 2015. On 8 February 2016 the scope of that certificate was extended to cover “an application for a declaration for breach of an injunction regarding disclosure of information.” (I interpolate to observe that this wording taken from the first paragraph of the LAA's letter of 18 August 2016 – see paragraph 37 above – betrays a fundamental misunderstanding of the order I made in the wardship proceedings in August 2015. I made a declaration that the local authority did not have to disclose information about P to his adoptive parents. I did not make an injunction prohibiting disclosure of information, save against the local authority disclosing any information to P's adoptive parents. The disclosure made by an employee of the local authority in January 2016 was not in breach of any order made by me nor of any injunction.) On 9 June 2016, however, LAA funding to bring a HRA claim for damages was refused. In the letter of refusal the LAA said

“I note the detailed discussion of the statutory charge. The applicability and extent of the charge is to be determined at conclusion of any case but in principle the Agency's position is as noted by counsel that the statutory charge will extend to the whole of the costs incurred under this certificate.”

47. The same letter determined that the waiver preconditions of regulation 9 of the CLA(SC)R 2013 were not met because the LAA was not satisfied that ‘the wider public interest’ test in regulation 6 of the CLA(MC)R 2013 was met.
48. The applicant did not appeal the refusal of funding of a HRA claim for damages. Firstly, because it was likely that an appeal would not be determined before the final hearing and would inevitably have led to that hearing being adjourned. P's legal team did not consider a further delay in the final hearing was conducive to their client's welfare. Second, because the court was seized of the claim for a declaration and could deal with the issue of damages at the final hearing.
49. Nevertheless Ms Morgan QC and Ms Magennis took issue with the LAA's decision that the facts of this did not meet the ‘significant wider public interest’ of regulation 6

CLA(MC)R 2013. I understand their reasons for doing so but this court is not an alternative forum to hear an appeal against the LAA's decision on funding. In those circumstances and with all due respect to counsel's helpful written submissions of this issue, I limit myself to three observations.

50. First, in its letter of 9 June 2016 refusing funding the LAA said "It does not appear to me from the information provided that [the disclosure of details about P's personal life] was deliberate and cannot be considered a serious abuse of power." I confess I do not understand that sentence. I cannot conceive how it could be considered that this disclosure was other than intentional if that is what the word 'deliberate' was intended to convey. Moreover, (a) I do not understand why a test of a 'serious abuse of power' was applied to this funding application and (b) this was evidently a serious breach of P's Article 8 rights which had very significant adverse consequences for P. In my judgment this reason for refusing funding was plainly wrong.

51. Second, in the same email it is asserted that

"it does not appear to me that the level of damages falls so short of the costs that the private paying individual test is not met."

The only reason the costs on the certificate were so high was because it included the costs of the wardship proceedings. I am told and accept that there was a delay in P's solicitor submitting a final bill in those proceedings. If that bill had been resolved expeditiously, a new certificate would have been issued in respect of funding for an HRA claim rather than, as happened, extending the cover of the certificate originally issued in May 2015. On the LAA's case, however, the issue of a new certificate would not have made any material difference to its submissions on the applicability of the statutory charge.

52. Third, in the same letter the LAA said,

"In order to meet Regulation 6, the Director must be satisfied that the case is an appropriate case to realise benefits for an identifiable class of individuals. You have not identified any specific individuals or group of individuals (such as a number of adjourned cases awaiting the decision in this case). Accordingly, there is at present no clearly identifiable class of individuals for whom this case would realise benefits and no clear indication of the number, who might potentially benefit. This is a damages claim, which is to be determined on its own, presently isolated, facts. For those reasons, I am not satisfied that this case is of significant wider public interest."

This decision appears to ignore the fact that there is no reported authority on the issue of the breach of a ward of court's human rights.

53. In relation to the decision of Mostyn J in *R(Faulkner)* referred in paragraph 36 above, counsel for P submit that the facts of that case can be distinguished from the facts of this case on the basis that the judge was not considering a case involving a young

person who was a ward of court. I accept that is a clear arguable ground upon which to distinguish the case of *Faulkner* from this case.

54. P's case is especially significant and important for two principal reasons, first because the breach resulted from the acts of a person in the employ of a local authority into whom P's accommodation, and day to day care, had been entrusted. Second, because local authorities hold a very significant amount of personal, private and sensitive information about the children and young people with whom they are involved. In my judgment the LAA's decision on the issue of the 'significant wider public interest test' was plainly wrong and/or unreasonable.

Analysis

55. In a later email sent to P's solicitors on 5 July 2016 the LAA said

“The scope of the certificate does not cover an application for damages for breach of the HRA. The CIVAPP8 dated 30/5/16 was treated as a request to amend the scope and my letter of 9th June was formal notice of refusal to amend the scope.”

56. It follows that the LAA appears to have drawn a distinction between a claim for a declaration and a HRA claim for damages. Funding was granted for the former but not the latter. The LAA's approach, however, raises an interesting question, namely if public funding was not granted to cover a HRA claim for damages but such damages were sought and awarded to P, why does the statutory charge apply to those damages?
57. When contemplating this question I reminded myself of the relevant provisions of the Civil Procedure Rules 2010 in respect of claims brought by, on behalf of or against children which are compromised before the issue of a claim form.
58. Part 21 of the Civil Procedure Rules (the 'CPR') provides for the courts' approval of the settlement, compromise or payment of a claim made by, on behalf on or against a child. Rule 21.10 states:

(1) Where a claim is made –

(a) by or on behalf of a child or protected party; or

(b) against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

(2) Where –

(a) before proceedings in which a claim is made by or on behalf of, or against, a child or protected party (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim; and

(b) the sole purpose of proceedings is to obtain the approval of the court to a settlement or compromise of the claim,

the claim must –

(i) be made using the procedure set out in Part 8 (alternative procedure for claims); and

(ii) include a request to the court for approval of the settlement or compromise.

59. Part 8 of the CPR sets out the procedures to be followed and in particular r. 8.2 which provides:

Where the claimant uses the Part 8 procedure the claim form must state –

(a) that this Part applies;

(b)

(i) the question which the claimant wants the court to decide; or

(ii) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;

(c) if the claim is being made under an enactment, what that enactment is;

(d) if the claimant is claiming in a representative capacity, what that capacity is; and

(e) if the defendant is sued in a representative capacity, what that capacity is.

(Part 22 provides for the claim form to be verified by a statement of truth)

(Rule 7.5 provides for service of the claim form)

60. I note the overriding objective of the CPR is to deal with cases justly and at a proportionate cost: r. 1.1(1) of the CPR. Further the court's general powers of management include that the court may:

“(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

61. When reflecting on the rival submissions and the approach taken by the LAA, it occurred to me that there was an alternative analysis of the applicability of the statutory charge to any damages awarded to P. In light of the fact that this alternative approach had not been raised in the course of oral submissions, for which I take full responsibility, I thought it only right to afford the parties the opportunity to respond to the same. Accordingly the following email setting out a list of propositions and questions was sent to leading and junior counsel:

“1. The LAA made a determination to grant public funding for RA to issue a claim seeking a declaration that the local authority had acted in breach of an injunction regarding the disclosure of information by extending the legal aid certificate granted for the inherent jurisdiction proceedings (8 February 2016).

2. The LAA made a determination not to grant public funding for RA to issue a HRA claim seeking damages for the alleged breach of his Art 8 rights by the local authority (9 June 2016).

3. The LAA plainly drew a distinction between the two potential claims.

4. Accordingly, RA was not provided with ‘civil legal services’ to mount a claim for damages.

5. If the damages were not awarded within the wardship proceedings but in a freestanding HRA claim, not funded by the LAA, would it follow that the provisions of s.25 of LASPO and thus the statutory charge would not apply to the award of damages?

6. If not, why not?

7. No proceedings were issued by RA for a HRA claim for a declaration or for damages.

8. Instead a letter before action, in accordance with the CPR, was sent to the local authority stating that a formal claim would be issued if a settlement could not be negotiated.

9. A settlement was negotiated.

10. Neither RA’s letter to the local authority nor the latter’s response made any reference to the proceedings under the inherent jurisdiction, other than to assert the fact that RA was a ward of court.

11. The subject matter of the HRA claim was wholly unconnected to the subject matter of the previously made application for a declaration under the inherent jurisdiction.

12. In the premises, on what basis, if any, is it contended that the potential HRA claim for damages, or any freestanding claim which would have followed the letter before action if a settlement had not been achieved, was made within the proceedings under the inherent jurisdiction?

13. Is the court not entitled to conclude that the claim for damages, set out in the letter before action, and not the subject of a public funding certificate viz not the subject of the provision of 'civil legal services', is outwith the scope of s.25 LASPO and the statutory charge does not apply?

14. If not, why not?

15. Subject to the answers to the foregoing questions, is there any reason why the court could not permit RA to make a freestanding claim under the HRA for damages (or deem RA to have done so) and to dispense with compliance with the rules and formalities (eg service of a statement of case) and to make the agreed award of damages and order for costs against the local authority in those proceedings in order to ensure the former are concluded justly, fairly and equitably. If so, the question posed at paragraph 14 above applies mutatis mutandis."

62. Counsel for P and for the local authority agreed with each of the propositions and agreed that the questions posed at paragraphs 5 and 13 above should be answered in the affirmative and that question posed at paragraph 15 above should be answered in the negative.
63. Counsel for the LAA submitted detailed supplementary submissions. In broad terms the LAA takes issue with propositions set out in the email of 20 October 2016 and answers the questions posed in paragraphs 5 and 13 in the negative and the question posed at paragraph 15 in the positive.
64. The principal supplementary submissions of the LAA may be distilled into the following 10 points:
- (a) it was common ground between the parties at the hearing on 26 August 2016 that any damages recovered in relation to the breach of P's Article 8 rights (the 'HRA claim') would be damages recovered in the wardship proceedings;
 - (b) the creation of new proceedings avowedly for the purpose of avoiding the statutory charge would not be an appropriate use of the court's powers. It would be wrong to seek to bring about the disapplication of the statutory charge by changing the previously contemplated approach to the scope of this judgment or disapplying certain rules of civil procedure.
 - (c) The issues raised by the court about the application of the statutory charge cannot be resolved in a factual vacuum.

- (d) Even if P's damages were awarded in freestanding proceedings which were not funded by the LAA, the statutory charge would still apply to those damages if they were recovered in "proceedings in connection with which the [civil legal] services were provided." The language of 'in connection with' is obviously very wide. I was referred to the case of *Cassidy v. Stephenson* [2009] EWHC 1562 (QB) where Holman J. held that money recovered from the settlement of professional negligence proceedings brought as a result of a failed clinical negligence (which was funded) was not property recovered in a dispute "in connection with which" the legal services for the clinical negligence claims were provided.
- (e) The propositions set out in paragraphs 7 to 10 of the email of 20 October 2016 are correct, save that the LAA is not privy to the full background to this case (eg the local authority's response to P's letter before action).
- (f) The HRA claim cannot be said to be 'wholly unconnected' to the subject matter of the wardship proceedings. The LAA asserts that:

"As the LAA understands the position, the Court considered P's circumstances and the extent to which information about him and his whereabouts should be disclosed in the inherent jurisdiction proceedings. The HRA Claim arose, as the LAA understands it, as a result of conduct by the LCC that was not consistent with the way in which that issue was resolved, with the Court's assistance, in these proceedings. It was therefore reliant on matters determined in RA's favour in the wardship proceedings, for which funding for civil legal services was provided.

...

Civil legal services were provided for the wardship proceedings, in which RA was made a ward of the Court, and restrictions were imposed on disclosure of information in relation to RA. It was the fact that LCC acted contrary to the resolved position that has given rise to the HRA Claim. The LAA funded the wardship proceedings, including for a declaration that there had been a breach of the injunction imposed by the Court. "

- (g) It would be artificial to say that any recovery of damages was not made in the wardship proceedings.
- (h) Even if the award of damages was made or approved outwith the wardship proceedings, the damages were still recovered in proceedings in connection with which "legal services were provided" (i.e. the wardship proceedings). The LAA relies on the assertion by P's counsel that the authorities state that HRA claims should be brought within wardship proceedings viz. *Re L(Care Proceedings: Human Rights Claims)* [2003] 2 FLR 160.
- (i) The answer to the question posed in paragraph 15 of the email of 20 October 2016 is "yes" there are reasons why the court should not permit the issue of a

freestanding HRA claim. Such a device would be inappropriate and would not result in the disapplication of the statutory charge because, as asserted above, the damages would be recovered in (unfunded) proceedings which were “in connection with” the (funded) wardship proceedings.

65. It is appropriate for me to deal with each of those points in turn. First, the court is neither bound nor fettered in its determination of the legal issues or the factual matrix of a case by the submission of counsel. In any event counsel were afforded the opportunity to agree or disagree with the alternative analysis proposed by the court and to make submissions. P and the local authority have decided to agree with my propositions and questions. The LAA have had a full opportunity to respond and I can discern no procedural or substantive unfairness in the course I have adopted.
66. Second, to characterise the alternative analysis the court has suggested is ‘avowedly for the purpose of avoiding the statutory charge’ is quite wrong. Rather my objective is to secure, if at all possible, by any legitimate and lawful route P’s receipt of the damages he maybe awarded for the breach of his Article 8 Rights by an organ of the state.
67. Third the factual matrix of this case should be well known to all parties including the LAA. The same is comprehensively set out in the parties’ written submissions and in a detailed chronology prepared on behalf of P. I do not accept the court is considering the legal issues in this case in a factual vacuum.
68. Fourth, with reference to paragraph 64(d) above, I accept the phrase “in connection with which the [civil legal] services were provided” can be given a very wide interpretation. I was not referred to any authority to support a submission that I must give it a very wide interpretation.
69. Fifth, with reference to paragraph 64(e) above, I do not understand the submission that the “LAA is not privy to the full background to this case.” For the purposes of this judgment I have not taken account of nor have I been furnished with material not available to all counsel, save perhaps for one matter which I refer to in the next paragraph.
70. Sixth, with reference to paragraphs 64(f) and (g) above, the LAA appears to have proceeded and proceeds on the basis of a fundamental misunderstanding of the order I made in August 2015: see paragraph 46 above. I did not make an injunction or other order prohibiting the local authority from disclosing personal or private details about P to other persons, save against the local authority disclosing information to P’s adoptive parents: see paragraph 8 above. I made a declaratory order that the local authority was relieved of its statutory duty to give information about P to or to consult with P’s adoptive parents about P or his welfare. The LAA has proceeded and proceeds on the following assumptions:
 - (a) that I made an injunctive order against the local authority;
 - (b) that the employee of the local authority breached the terms of that injunction;
 - (c) and that P’s claim against the local authority was based on a breach of that injunction.

None of the foregoing assumptions are factually correct. The LAA's mistake does explain the funding decision of 8 February 2016, set out at paragraph 38 above, to permit P to bring a claim for a declaration for breach of an injunction.

71. 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. This court was not notified of that alleged breach (now admitted) by an employee of the local authority which it should have been because P is a ward of this court and because of the adverse consequences of the wrongful disclosure on P. Furthermore the wrongful disclosure, insofar as it is relevant, was made to third parties and not to P's adoptive parents. The local authority asserts that the third parties did not, in fact, pass on the disclosed information to P's adoptive parents.
72. Seventh, with reference to paragraphs 64(h) and (i) above, in light of the correct factual matrix set out above I am not satisfied that the (unfunded) HRA claim in which damages are sought could be said to be "recovered in proceedings in connection with which legal services were provided" (i.e. the funded wardship proceedings). I go further, I am wholly satisfied that the damages resulting from the HRA claim are not "recovered in proceedings in connection with which legal services were provided". There is no legal or factual connection between the wardship proceedings and P's HRA claim.
73. The mere fact that P's counsel in submission referred to the case of *Re L(Care Proceedings: Human Rights Claims)* [2003] 2 FLR 160 which advises that HRA claims may or should be made in existing proceedings, does not require this court to conclude that P must or may only make a HRA claim in ongoing wardship proceedings. No claim form was issued. The HRA claim and the quantum of damages were settled before a claim was issued. As referred to in paragraphs 58 and 59 above, rr. 21.10 and 8 of the CPR set out the appropriate procedure when a settlement is reached concerning a child or young person prior to the issue of proceedings.
74. I can discern no legal impediment or other reason why I should not permit P by his solicitor to issue a claim form as required by r. 8.2 of the CPR and upon that basis, in due course, proceed to approve the agreed award of damages to P in respect of his HRA claim in those proceedings. The approval of damages can be submitted by email and be dealt on the papers without the need for a hearing. I am confident that the local authority would agree to pay the costs of that process incurred by P's legal team.

Conclusions

75. I am bound to find that the Lord Chancellor, by the director of the LAA, has no discretion or power to waive the statutory charge, if applicable, in this case. The preconditions set out in regulation 9 of the CLA(SC)R 2013 must be satisfied at the time the determination of funding is made and a decision to waive the statutory charge must be made at the same time. That did not happen in this case and thus the preconditions are not satisfied.
76. I do not understand why the CLA(SC)R 2013 regulations placed that limitation on the time when a decision whether to waive the statutory charge must be made. I am not

aware of any public interest or policy reasons for the same. It is regrettable that the discretion to waive the statutory charge is so fettered.

77. The manner in which the LAA has made determinations on public funding in these proceedings is extremely unfortunate. In some aspects the decisions are plainly wrong and/or unreasonable and in others the reasoning of the LAA is difficult to understand, if not incomprehensible.
78. In my view it would be extremely regrettable if P were to be denied the benefit of the damages awarded to him as a result of the considerable emotional distress and harm to his mental well being he has suffered as a result of the wrongful conduct of an organ of the state.
79. In light of the fact, however, that the LAA refused to fund a HRA claim for damages it appears me that the damages to be awarded to P under the Part 8 procedure were recovered in a claim that did not have the benefit of a public funding certificate. Further I am wholly satisfied that any damages awarded to P in Part 8 proceedings were not recovered “in proceedings in connection with which [civil legal] services were provided.” Accordingly, however erroneous or muddled the LAA’s decision making was on this issue, in my view, for the reasons I have given above the statutory charge is not and cannot be applicable to P’s award of damages.

Source: <http://www.bailii.org/ew/cases/EWHC/Fam/2016/2779.html>