Neutral Citation Number: [2019] EWHC 2976 (Admin)

Case No: CO/2767/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2019

Before :

THE HONOURABLE MR JUSTICE MACDONALD
(Sitting in Public)

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Between:

The Queen on the application of TAFIDA RAQEEB (By her Litigation Friend XX)	**Claimant**
-and-	
BARTS HEALTH NHS TRUST	**Defendant**
-and-	
SHELINA BEGUM and MOHAMMED RAQEEB	**Interested Parties**

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Mr Vikram Sachdeva QC and Ms Nicola Kohn (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Miss Katie Gollop QC (instructed by **Kennedys LLP**) for the **Defendant**
Mr David Lock QC and Mr Bruno Quintavalle (instructed by **Sinclairs Law**) for the **Interested Parties**

Hearing dates: 5 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice MacDonald:

INTRODUCTION

1. I am concerned with a case management decision in linked matters in the Administrative Court and the Family Division concerning a young girl by the name of Tafida Raqeeb, born on 10 June 2014 and now aged five years old. The substantive applications with which the court is seised are an application by Tafida for judicial review of what is said to be the decision by the Barts Health NHS Trust (hereafter 'the Trust') to refuse to permit Tafida to travel to Italy for continued life-sustaining treatment and an application by the Trust under the Children Act 1989 and pursuant to the inherent jurisdiction of the High Court for declarations that it is in Tafida's best interests for her current life-sustaining treatment to be withdrawn, a course of action that will lead inevitably to her death.

2. Tafida is represented in the application for judicial review by Mr Vikram Sachdeva, Queen's Counsel, and Ms Nicola Kohn through her litigation friend, XX, a relative. The Trust is the defendant to the application for judicial review and is represented by Miss Katie Gollop, Queen's Counsel. Tafida's parents, Shelina Begum and Mohammed Abdul Raqeeb are interested parties in the application for judicial review, represented by Mr David Lock, Queen's Counsel and Mr Bruno Quintavalle.

3. Considerable effort was required on the part of the court to identify dates for a final hearing within the High Court vacation and to ensure that a judge was available who was authorised to hear both the application under the inherent jurisdiction in the Family Division and the application for judicial review in the Administrative Court. It goes without saying that, not least from a human perspective, applications of the type now before the court should be dealt with as expeditiously as possible.

4. By an application dated 2 September 2019 the Trust, only a matter of days before the commencement of the final hearing, now seeks the termination of XX's appointment as Tafida's litigation friend pursuant to FPR 2010 r 21.7(1)(b), inviting the court either to substitute the Official Solicitor for XX or to direct that the parents become the Claimants in the application for Judicial Review. The Trust has, as far as I can see, made no effort to contact the Official Solicitor to determine whether she would be willing to act in this case or the timescales for her involvement should she agree to do so. When asked, the parents did not wish to take over as Claimants in the proceedings for judicial review, the same having significant consequences for funding.

5. At the outset of the hearing Miss Gollop QC recognised the difficulties with the application advanced by the Trust, not the least of which is the point in the proceedings at which it has been made. In these circumstances, whilst not conceding the application, Miss Gollop and Mr Gold sought to articulate for the court the reasons the Trust considered that it was compelled to apply to remove XX as Tafida's litigation friend. In light of the Trust's concession as to the merits of the application (which accorded with the court's initial assessment of the same) it was not necessary to hear detailed submissions in opposition to the application on behalf of XX or the parents. However, in circumstances where the Trust did, albeit diffidently, pursue its application and where, on behalf of the parents, Mr Lock QC raised concerns regarding the particular basis on which the application was advanced by the Trust and

submitted that the court should award costs against the Trust on an indemnity basis, although I gave my decision at the conclusion of the hearing I made clear that I would in due course give a short judgment setting out my reasons for dismissing the application and I now do so (having first prioritised the preparation of the judgment in the substantive proceedings, which was handed down on 3 October 2019).

BACKGROUND

6. The sad circumstances that ground the proceedings do not need reciting in detail for the purposes of this case management judgment (and are now in any event set out in detail in my judgment in the substantive proceedings (see *Raqeeb v Barts Health NHS Trust* [2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam)). In summary, at 5.16am on the morning of 9 February 2019 Tafida woke complaining that her head was hurting and shortly thereafter she stopped breathing. Subsequent medical examination revealed that Tafida had an undiagnosed arteriovenous malformation, which had, unusually in a child, burst. Within this context, since February 2019 Tafida has required life-sustaining treatment. Tafida's parents and her doctors were not able reach a consensus as to whether Tafida's life-sustaining treatment should continue or be withdrawn, resulting in her death. Tafida's treating doctors considered the latter to be in her best interests. Tafida's parents disagreed and wished to take Tafida to Italy to continue life-sustaining treatment in the context of Tafida not meeting the criteria applicable in Italy for its withdrawal.

7. Within this context, Tafida, acting through her litigation friend XX, a family member, applied for judicial review of the decision of the Trust not to permit her to be transferred to a hospital in Italy for continued life-sustaining treatment, such a placement being available and privately funded. For its part, the Trust applied under the Children Act 1989 and the inherent jurisdiction of the High Court for a determination that it is Tafida's in best interests for life-sustaining treatment to be withdrawn given the preponderance of medical evidence that there is no prospect of a substantive recovery for Tafida.

8. It is important to note that XX was appointed by the court as Tafida's litigation friend over the objections of the Trust. At a hearing on 22 July 2019 the Trust set out detailed arguments as to why XX should not be appointed as Tafida's litigation friend. XX responded to those arguments by counsel. Having considered carefully those arguments, and having had my attention drawn to the relevant procedural rules and authorities, I ordered that XX be appointed as Tafida's litigation friend. There was no appeal of that case management decision.

9. It is also important to note for the purposes of the application to terminate the appointment of XX as Tafida's litigation friend in the judicial review proceedings that Tafida and her parents argue in those proceedings that, before any issue of best interests is considered in the Family Division pursuant to the proceedings under the Children Act 1989 and the inherent jurisdiction, Tafida is entitled to what has been termed an "anterior procedural ruling" in the claim for judicial review. They submit that the decision of the Trust should be quashed, a mandatory order made requiring the Trust to retake the decision or a mandatory order made requiring the Trust to permit the transfer of Tafida with a declaration that the Trust may not prevent that transfer, following which decision the court would be *functus* as to Tafida's wider best interests.

10. Finally, and within this context, it is important to note that for the purpose of the application to terminate XX's appointment as Tafida's litigation friend in the judicial review proceedings that I had decided at an earlier hearing that over the first two and a half days of the final hearing, I would hear the submissions in the application for judicial review and would then move to hear the oral evidence of the mother and submissions in the application under the Children Act 1989 and the inherent jurisdiction in respect of Tafida's best interests before delivering a composite judgment.

11. The basis for the application to terminate XX's appointment as Tafida's litigation friend in the judicial review proceedings (Tafida being represented through a Children's Guardian in the proceedings concerning the best interests decision) is set out in Miss Gollop's concisely expressed Skeleton Argument. Namely, that XX loves Tafida as a member of her family and holds, in the context of the tenets of her strong Islamic faith, a clear and settled view of where Tafida's best interests lie, those interests being for Tafida to be treated in accordance with the tenets of Islamic law, which demand that brainstem death is the criteria for the withdrawal of life-sustaining treatment. In circumstances where Tafida does not meet this criterion, she objects to the withdrawal of life-sustaining treatment for Tafida.

12. In the circumstances, the Trust argues that XX can only ever hold a settled view that proceeding with the claim for judicial review (in which it is argued that Tafida is entitled to an "anterior procedural ruling" that would render the court *functus* as to Tafida's wider best interests) is an approach that is in Tafida's interests. In the circumstances, the Trust submits that XX lacks the ability to take a balanced and even-handed approach and, to quote from Miss Gollop's Skeleton Argument, "to be open-minded about the fact that a best interests decision made by the Family Division is or may be in Tafida's best interests".

13. The Trust contends that it did not press its objection to XX acting as Tafida's litigation friend before this point (although it had opposed her appointment and had later highlighted the concerns on which it now relies in a Position Statement at an earlier hearing) as it did not want to stand in the way of the arguments being advanced on Tafida's behalf in the judicial review proceedings being determined by the court given their potentially wider significance. However, the Trust contended that in light of the manner in which this case has developed, and specifically the fact that XX has lodged a Position Statement in the Children Act proceedings opposing the withdrawal of life-sustaining treatment, and in in light of a *fatwa* (being a ruling on Islamic law given by a recognised authority) from the Islamic Counsel of Europe, obtained and filed and served by the parents, the position had become pressing. In particular, the Trust was concerned that the indication in the *fatwa* that it would be a grave sin for any Muslim to consent to the withdrawal of life-sustaining treatment for Tafida rendered XX's position as Tafida's litigation friend even more untenable within the context outlined above. In the circumstances, and expressing itself as being deeply uncomfortable that Tafida is being "caused" to argue that she does not need, and is not entitled to a fully reasoned best interests decision, the Trust determined to pursue its application on what it contends amounts to a change of circumstances since the court appointed XX as litigation friend for Tafida.

14. The application to terminate XX's appointment as a litigation friend is resisted by XX and by the parents. They deployed a range of arguments but concentrated on the

contentions that the Trust's application misunderstands the role of the litigation friend, that XX's view that it is in Tafida's best interests for her life-sustaining treatment to be maintained does not justify her removal as a litigation friend for Tafida in the judicial proceedings notwithstanding the terms of the *fatwa* and, in any event, that the removal of XX (and barring all family members from that role) on the ground that she (and they) hold to the tenets of a major religion and therefore, as a result of her religious convictions, cannot be anticipated to act in a way that reflects Tafida's best interests would be discriminatory and unlawful, relying as it would without more on a protected characteristic to justify the removal.

THE LAW

15. Within the judicial review proceedings, Tafida is the Claimant and a minor. As she must, pursuant to CPR r 21.2 she acts through a litigation friend, XX, who has been appointed by the court. The relevant parts of CPR Part 21 provide as follows with respect to the appointment of, the duties of and the removal or substitution of a litigation friend in civil proceedings:

> **Requirement for a litigation friend in proceedings by or against children and protected parties**
>
> **21.2**
>
> (1) A protected party must have a litigation friend to conduct proceedings on his behalf.
>
> (2) A child must have a litigation friend to conduct proceedings on his behalf unless the court makes an order under paragraph (3).
>
> (3) The court may make an order permitting a child to conduct proceedings without a litigation friend.
>
> (4) An application for an order under paragraph (3) –
>
> (a) may be made by the child;
>
> (b) if the child already has a litigation friend, must be made on notice to the litigation friend; and
>
> (c) if the child has no litigation friend, may be made without notice.
>
> (5) Where –
>
> (a) the court has made an order under paragraph (3); and
>
> (b) it subsequently appears to the court that it is desirable for a litigation friend to conduct the proceedings on behalf of the child, the court may appoint a person to be the child's litigation friend.
>
> **Stage of proceedings at which a litigation friend becomes necessary**
>
> **21.3**
>
> (1) This rule does not apply where the court has made an order under rule 21.2(3).

(2) A person may not, without the permission of the court –

(a) make an application against a child or protected party before proceedings have started; or

(b) take any step in proceedings except –

(i) issuing and serving a claim form; or

(ii) applying for the appointment of a litigation friend under rule 21.6,

until the child or protected party has a litigation friend.

(3) If during proceedings a party lacks capacity to continue to conduct proceedings, no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend.

(4) Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise.

Who may be a litigation friend without a court order

21.4

(1) This rule does not apply if the court has appointed a person to be a litigation friend.

(2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which his power extends.

(3) If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if he –

(a) can fairly and competently conduct proceedings on behalf of the child or protected party;

(b) has no interest adverse to that of the child or protected party; and

(c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.

.../

Court's power to change a litigation friend and to prevent person acting as a litigation friend

21.7

(1) The court may –

(a) direct that a person may not act as a litigation friend;

(b) terminate a litigation friend's appointment; or

> (c) appoint a new litigation friend in substitution for an existing one.
>
> (2) An application for an order under paragraph (1) must be supported by evidence.
>
> (3) The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3).

16. In applying these principles it is plain from the CPR that the court has a wide discretion to terminate a litigation friend's appointment. In considering the application of the Trust to remove XX as Tafida's litigation friend it is however, important to consider the nature of the duties of a person appointed to act as a litigation friend for a protected party, in this case a minor.

17. The duty of a litigation friend is no longer expressly defined as it was in the former Practice Direction supplementing Part 21 of the CPR. However, and as set out above, where no person has been appointed by the court to be a litigation friend, r 21.4(3)(a) provides that a person may act as a litigation friend if he or she:

    i) Can fairly and competently conduct proceedings on behalf of the child or protected party;

    ii) Has no interest adverse to that of the child or protected party; and

    iii) Where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.

18. Within this context, it is also the case that paragraph 3.3 of CPR PD 21A makes clear that the evidence required on an application for an *order* of the court appointing a litigation friend must include evidence that he or she can fairly and competently conduct proceedings and have no interest adverse to the child.

19. Thus, in discharging their role, it is tolerably clear that a litigation friend, including a litigation friend appointed by the court, must be able to fulfil two key requirements. First, they must be able fairly and competently to conduct proceedings and secondly they must have no interest adverse to that of the child. As I have recited, the Trust now contends that XX is not in a position to fairly conduct the proceedings on behalf of Tafida and/or has interests adverse to Tafida.

20. With respect to the first requirement to be fulfilled by a litigation friend, the meaning of the phrase "conduct proceedings on their behalf" is not elaborated in the rules. Such conduct will, however, no doubt include anything which, in the ordinary conduct of any proceedings, is required or authorised by a provision of the CPR to be done by a party to the proceedings. Further, the authorities make clear that, in fairly and competently conducting the proceedings, the litigation friend is required to act for the benefit of the child and to safeguard his or her interests. With respect to this particular aspect of the role of the litigation friend in current context, some assistance may be drawn from the authorities.

21. In *Rhodes v Swithenbank* (1889) 22 QBD 577 at 579 Bowen LJ described what was then termed the 'next friend' of an infant as "the officer of the court to take all measures for the benefit of the infant in the litigation". That articulation was cited by Brightman J *In re Whittall* [1973] 1 WLR 1027, a case concerning two persons who had agreed to act as what was then termed guardians ad litem for infant defendants to an application under the Variation of Trusts Act 1958. In articulating the duties of a guardian ad litem in light of the statement of Bowen LJ in *Rhodes v Swithenbank*, Brightman J stated that the function of the guardian ad litem "is to guard or safeguard the interests of the infant who becomes his ward or protégé for the purpose of the litigation." As to how this to be is achieved by the litigation friend, in *In re Whittall* Brightman J went on to observe, in the context of the child as defendant to litigation, that:

> "The discharge of this duty involves the assumption by the guardian ad litem of the obligation to acquaint himself of the nature of the action in which the infant features as a defendant, and the obligation to take all due steps to further the interests of the infant."

And later in the context of the particular application with which Brightman J was concerned in *In Re Whittall*:

> "...the guardian ad litem of the infant has the duty, under proper legal advice, to apprise himself fully of the nature of the application, of the existing beneficial interest of the infant, and of the manner in which that interest is proposed to be affected, and to inform the solicitor whom he has retained in the matter, of the course of which he, the guardian, considers, in light of the legal advice given to him, should be taken on behalf of the infant."

22. In the context of cases in which the child is the claimant, these statements of principle were adopted with approval in *OH v Craven* [2016] EWHC 3146 (QB) by Norris J with respect to the duties of litigation friends in two cases where the mothers of a young adult who lacked capacity (A) and a child (O) acted as their litigation friends in proceedings concerning funds settled as a result personal injury claims. Within that context, with respect to the manner in which the litigation friend should discharge his or her obligations Norris J observed at [15]:

> "I sensed from the conduct of the applications that there was some surprise that the Court should think it had any real part to play. A, a capable adult, was simply asking the Court to give him his money. O's litigation friend was simply asking the Court to do what she had been advised was in the best interests of O. But the Court is not there simply to apply a rubber stamp. If its orders are sought then the Court must be satisfied that they are sought by those who have been able to weigh things up and to decide freely what to do."

23. Within the foregoing context, two matters emerge with respect to the duty of the litigation friend to fairly and competently conduct proceedings. The first is the central role of legal advice in the discharge of the duties of the litigation friend has been emphasised by the courts. As noted above, in *In Re Whitall* Brightman J emphasised the need for the guardian ad litem to act "under proper legal advice". In *OH v Craven*

Norris J also emphasised the central role played by the legal advice received by the litigation friend in the discharge of his or her duties.

24. The second is that whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice she receives (*Nottinghamshire CC v Bottomley* [2010] EWCA Civ 756). In doing this, the litigation friend must approach the litigation with objectivity. In *In Re Barbour's Settlement Trusts* [1974] 1 WLR 1198 Megarry J observed as follows, albeit in the context of the court being asked to approve a compromise of a dispute involving the interests of a minor, as follows regarding the interrelationship between the minors' interests and the role of the litigation friend:

> "Second, there is the important matter of the minors' benefit. When the court is asked to give its approval on behalf of minors to a compromise of a dispute, the court has long been accustomed to rely heavily on those advising the minors for assistance in deciding whether the compromise is for the benefit of the minors. Counsel, solicitors, and guardians ad litem or next friends have opportunities which the court lacks for prolonged and detailed consideration of the proposals and possible variations of them in relation to F the attitudes of the other parties and the apparent strength and weakness of their respective claims. When the matter comes before the court, the terms of settlement are in final form and the time for consideration is of necessity less ample. The court accordingly must rely to a considerable extent on the views of those whose opportunities of weighing the matter have been so much greater. Expressing a view on whether the terms of a proposed compromise are in the interests of a minor is a matter of great responsibility for all concerned. The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages."

25. Within this context, there is longstanding authority that a litigation friend who does not act on proper advice may (not must) be removed (see *Re Birchall* (1880) 16 ChD 41 at 42 per Sir George Jessel MR) The corollary of this latter position is articulated in the White Book at 21.7.1 which makes clear that:

> "If a solicitor is acting for child or protected party, it is thought that they would be under an obligation to inform the court of any concern that the litigation friend was not acting properly."

Thus, to adopt the words of Brightman J in a further passage in *In Re Whittall*, the litigation friend is not "a mere cypher".

26. The issues in this application for judicial review are, of course, a long way from those cases concerning the compromise and administration of court settlements for minors. However, I am satisfied that the principles articulated in those cases regarding the

conduct of the litigation friend are applicable to these judicial review proceedings. Thus, in conducting these proceedings fairly and competently XX is required to take all measures she sees fit for the benefit of Tafida, supplementing the want of capacity and judgement of Tafida, her function being to guard or safeguard the interests of the Tafida for the purposes of the litigation. The discharge of that duty involves the assumption by XX of the obligation to acquaint herself with the nature of the action and, under proper legal advice and with the necessary objectivity, to take all due steps to further the interests of Tafida.

27. With respect to the second requirement to be fulfilled by the litigation friend, and in part following on from the need for the litigation friend to be able to exercise some independent judgment on the legal advice he or she receives and in doing so approach the litigation with objectivity, the litigation friend must have no interest adverse to the child.

28. The authorities give a number of examples of interests of adverse interests that may be considered to disqualify a person from acting as a litigation friend. Obvious examples include a social worker acting who is acting as a litigation friend in a claim relating to the provision of services by the local authority employing that social worker or a relative acting as a litigation friend who has a financial interest in the outcome of the case.

29. Where it is asserted, as it is in this case, that the fact that the litigation friend is related to, and has a deep affection for the claimant, in *Re UF* [2013] EWHC 4289 (COP) Charles J confirmed at [23] that there is no principle that a family member cannot act as a litigation friend provided that, as a litigation friend, he or she can take a balanced and even-handed approach to the relevant issues (the issue that rendered the family member in *Re UF* inappropriate to act as a litigation friend being grounded in the fact of a pervasive family dispute, not in the fact that she was a family member *per se*).

30. Finally, where it is asserted, again as it is in this case, that the religious beliefs of the litigation friend may prevent him or her from taking an objective view of the litigation, I was referred to no authority that suggested that religious beliefs *per se* disqualify a person acting as a litigation friend. In this case, of course, the Trust relies on what it submits are the inevitable *consequences* of XX's religious beliefs as disqualifying her as an appropriate litigation friend for Tafida in circumstances where the Trust contends that XX can, by virtue of her religious convictions and the terms of the *fatwa*, only ever take one view of what is in Tafida's best interests.

DISCUSSION

31. As I announced at the conclusion of the directions hearing at which this application was dealt with, I am not satisfied that the Trust has made out a case for the termination of XX's appointment as Tafida's litigation friend. My reasons for so deciding are as follows.

32. At the outset, it is important to again note that XX is Tafida's litigation friend in the judicial review proceedings only, and to identify the issue in that first set of proceedings. That issue is whether the decision of the Trust not to permit Tafida to be transferred to the Gaslini hospital was unlawful by reference to Tafida's rights under directly effective EU law. The question of whether such a transfer, or in default of

such a transfer the withdrawal of life-sustaining treatment, is in Tafida's best interests is one that falls for consideration in the proceedings under the Children Act 1989, depending on the outcome of the application for judicial review.

33. Within this context, the reasoning adopted by the Trust for the termination of XX's appointment as the litigation friend for Tafida is, or at least appears to be, (a) that if successful, the application for judicial review will mean there is, or may be no best interests evaluation under the Children Act 1989 of the question of withdrawal of life-sustaining treatment, (b) that any person acting appropriately as a litigation friend for Tafida in the application for judicial review must be able to weigh the impact on Tafida's interests of such an outcome when deciding whether pursuing the judicial review is consistent with those interests, (c) given XX's religious beliefs and the contents of the *fatwa* she will always and inevitably prefer that there is no wider best interests evaluation under the Children Act 1989 of the question of withdrawal of life-sustaining treatment, (d) XX is therefore incapable of weighing up whether pursuing the application for judicial review is consistent with Tafida's interests in circumstances where the success of the same will, or may lead to her preferred outcome and (e) XX is therefore unsuitable as a litigation friend for Tafida because she has an interest adverse to that of Tafida.

34. Turning to the factors relevant to the question of termination as set out above, I am satisfied that there is no evidence before the court that XX has failed to date to, or will not in the future fairly and competently conduct proceedings. XX is required, on the basis of legal advice given to her by a highly experienced legal team, to take decisions as to the conduct of the case on behalf of Tafida. There is no suggestion of incompetence on her part in the conduct of the application for judicial review, of any conduct by her that could be characterised as unfair or that XX has failed to acquaint herself with the nature of the action and, under proper legal advice to take all due steps to further the interests of Tafida in that litigation. Within this context, the Trust, in seeking to explain its rationale for the application to remove XX as litigation friend to Tafida, asserts that XX does however lack the necessary objectivity to fulfil that role and concentrates in those circumstances on the submission that XX has interests adverse to that of Tafida.

35. As noted above, the Trust contends that interests held by XX that are adverse to the interests of Tafida are her familial love for Tafida and her religious belief as a Muslim that it would be a sin to withdraw life-sustaining treatment from Tafida, which familial love and religious belief render her unable to question whether succeeding in a judicial review that will or may prevent a best interests decision being taken in the Family Division would be in Tafida's interests and, hence, unable to assess impartially and dispassionately whether pursuing that litigation is in Tafida's interests. There are a number of problems with this submission.

36. First, the Trust's submissions concern the potential *consequences* of a successful application for judicial review and not the merits of the application itself. As to the merits of the application, the question for the court in the judicial review is whether the decision of the Trust not to permit Tafida to be transferred to a hospital in Italy was unlawful for want of consideration of Tafida's EU rights. That is a question of law and fact. Within this context, XX's views about the religious probity of withdrawing treatment from Tafida are not relevant in the context of the substantive administrative law issues before the court. Further, and again in circumstances where

the question for the court in the judicial review is whether the decision of the Trust not to permit Tafida to be transferred to a hospital Italy was unlawful for want of consideration of Tafida's EU rights, Tafida is not being "caused" to argue that there should be no best interests decision taken in the proceedings under the Children Act 1989, although this is a *potential* outcome of the application for judicial review being successful.

37. Second, XX has taken legal advice from Tafida's highly experienced specialist legal team regarding the merits of the application on judicial review. Whilst I am of course not privy to that advice, there is no suggestion by her legal team that XX has acted inappropriately in the context of that advice and, in particular, no suggestion that she is seeking to pursue a course of action in the litigation for an improper motive. As noted above, a solicitor who is acting for child or protected party is likely under an obligation to inform the court of any concern that the litigation friend is not acting properly. In such circumstances, the court must be entitled to rely on the assessment of the legal team when considering the extent to which it can be established that the litigation friend has or is pursuing an interest adverse to that of the child. Within this context, there is no evidence before the court to demonstrate that XX has decided to pursue this application with the specific purposes of avoiding a best interests decision in the Family Division for Tafida and not because she has been advised by Tafida's specialist legal team that the application for judicial review has merit. In the latter context, I remind myself that the Trust conceded, and the court granted permission for judicial review in this case.

38. Third, and in any event, even were the court to accept that it is XX's familial love for Tafida and her religious belief regarding the withdrawal of life-sustaining treatment, rather than legal advice, that is leading XX to seek to pursue the application for judicial review on behalf of Tafida, and although I accept that a *potential* outcome of a successful application for judicial review is that no best interests evaluation will follow in proceedings under the Children Act 1989, it is not inevitable that the course of litigation thereby pursued is or will be adverse to Tafida's interests.

39. If the application for judicial review is successful, and the court determines that decision of the Trust is unlawful, this would not *automatically* render the proceedings under the Children Act 1989 for a best interests decision otiose. The question would remain as to whether a successful application for judicial review negated a requirement for a best interests decision to be taken in relation to the dispute between the parents and the treating clinicians. This is a question of law in respect of which, again, familial affection and the religious beliefs of XX are not relevant. Were the court to conclude that the Trust's decision was unlawful but that it would in any event have been required to bring the dispute as to best interests before the Family Division then, the court retaining a discretion to withhold a public law remedy where that remedy would serve no practical purpose, this outcome would not negate the need for a best interests decision to be taken in the proceedings under the Children Act 1989, in accordance with well-established principles, in which proceedings Tafida acts not through XX but her Children's Guardian and in which XX's views are merely one factor to be taken into account. Were the court to conclude that a successful application for judicial review does render the proceedings under the Children Act 1989 otiose as a matter of law, then the position that resulted for Tafida would simply be the position demanded by the law. Finally, if the application for judicial review is

not successful, then the court would go on to undertake a best interests analysis in the proceedings under the Children Act 1989 as above.

40. Accordingly, even were the court persuaded on evidence that XX's motivation for pursuing the proceedings is familial love and the tenets of her religious belief, it is simply not possible in this case, as the Trust seeks to do, to draw a straight line between XX's familial love for Tafida and her religious belief regarding the withdrawal of life-sustaining treatment and an outcome to the application for judicial review that is inevitably adverse to Tafida's interests.

41. Fourth, whatever XX's motivation for pursuing it, in the foregoing context whether a successful application for judicial review by XX renders otiose a best interests decision under the Children Act 1989 is not in XX's gift but rather is solely a question for the court. In determining that question the court will hear in full competing arguments. The Trust will advance a clear and strenuous argument that a best interests decision in the Family Division is mandated by clear authority whatever the outcome of the judicial review. The obverse will be argued by XX. But it is the court that will ultimately decide the question on the basis of those competing submissions. In these circumstances, in my judgment it cannot be said that the mere fact that XX seeks to put her side of the argument before the court means that she is acting in a manner adverse to the interests of Tafida.

42. Fifth, and very importantly, I am satisfied that the delay caused by granting the application of the Trust one business day prior to the commencement of the final hearing would certainly be antithetic to Tafida's interests. In circumstances where there is no indication that the Official Solicitor has been approached to act as a litigation friend for Tafida, the removal of XX as litigation friend of Tafida will inevitably derail the final hearing, which hearing has been arranged with considerable difficulty in the vacation and will prolong the agony of this family unjustifiably in circumstances where it may be a number of months before the matter can be relisted.

43. In addition to the points set out above, I am also not persuaded that there has been a change of circumstances since the court appointed XX as litigation friend for Tafida over the objections of the Trust, which decision, as I have said, was not the subject of an appeal to the Court of Appeal. Whilst the Trust contends that the manner in which the case has developed, in particular the submission by XX of a detailed Position Statement in the proceedings under the Children Act 1989 making clear her contention that the maintenance of life-sustaining treatment is in Tafida's best interests, and the receipt of the *fatwa* means that the position in respect of XX has changed, I am not persuaded that this is the case. As I have already noted, not only did the Trust oppose the appointment of XX as litigation friend for Tafida but it continued to highlight its concerns regarding the suitability of XX for that role thereafter. Those concerns reflected those now advanced in support of this application. In the circumstances, I am not in any event satisfied that the matters prayed in aid by the Trust constitute a material change in circumstances such as to justify the court revisiting its decision to appoint XX to act as litigation friend for Tafida.

44. Finally, during the course of the hearing I heard some submissions regarding the extent to which religious beliefs *per se* could disqualify a person from acting as an appropriate litigation friend and, in particular, that a decision that they could would be

unlawful in circumstances where religion is a protected characteristic under the equality legislation. However, whilst it is perhaps difficult to conceive of circumstances in which a person's religion could, without more, act to disqualify them from acting as a litigation friend, in circumstances where the application of the Trust was not pursued with full vigour, where in consequence I did not hear full argument on the point and in circumstances where it is not necessary to determine the point to dispose of the application before me, I say no more about those submissions.

CONCLUSION

45. For the reasons given above, I am not persuaded that, at this very late stage one business day before the commencement of a final hearing listed in the vacation, XX should be discharged as litigation friend for Tafida. In the circumstances, I dismiss the Trust's application.

46. Whilst I consider that it is appropriate for the Trust to pay the costs of and occasioned by this application, I am not satisfied that it is appropriate to order that those costs be paid on an indemnity basis. Whilst there are plainly difficulties with the Trust's application, as recounted above, I am not satisfied that it can be said that the application was outside the ordinary and reasonable conduct of proceedings (*Whaleys (Bradford) Ltd v Bennett and Cubitt* [2017] EWCA Civ 2143). The Trust had opposed the appointment of XX as litigation friend to Tafida, had continued to entertain and raise concerns about that appointment and made its application on what it considered, albeit wrongly, to be a change of circumstances. Whilst, for the reasons set out above, the application was not successful, and indeed might be characterised as misconceived, I am not satisfied that the making of the application amounted to unreasonable conduct of the proceedings.

47. In the circumstances, I am not satisfied that the criteria for an indemnity costs order are met. In the circumstances, the order will be for the Trust to bear the costs of XX and the interested parties of and occasioned by its application to remove XX as litigation friend for Tafida to be assessed on the standard basis if not agreed.

48. That is my judgment.