

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/6/2018

Before :

THE HON. MR JUSTICE FRANCIS

Between :

NORTHANTS. COUNTY COUNCIL
A.W. (THE FATHER)

Applicants

- and -

THE LORD CHANCELLOR
(via THE LEGAL AID AGENCY)

Respondent

William Tyler QC & Ben Mansfield (instructed by **LGSS Law**) (for the Local Authority) and
Atherton Godfrey LLP (for AW)) for the **Applicants**
Malcolm Birdling (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 26 February 2018

Judgment Approved

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

Mr Justice Francis:

1. This Judgment addresses the circumstances in which damages recovered pursuant to the Human Rights Act in respect of breaches of duty by a Local Authority following care proceedings are subject to the Legal Aid Agency statutory charge in respect of the costs of those care proceedings. Appended to this Judgment, with the agreement of all parties, is a document entitled "Position of the Legal Aid Agency as to the application of the statutory charge in relation to care costs and Human Rights Act applications". This document should be read in the context of all HRA claims where a similar costs issue arises.

2. On 1 February 2017, I delivered judgment within what had commenced as care proceedings by an application dated 5 April 2016 brought by Northamptonshire County Council. An anonymised form of that Judgment can be found on the usual websites under the neutral Citation number [2017] EWHC 997 (Fam). As is usual in care proceedings, I made an order that nothing should be published which may identify the family the subject of those care proceedings. Similarly, although the instant Judgment relates to issues which have some public interest, the same restrictions in respect of identification of family members pertain.
3. In my February 2017 Judgment, I found Northamptonshire County Council to have been in serious breach of the rights of A, a child, as guaranteed by articles 6 and 8. A was born in the early summer of 2012 and is now approximately six years old. As I said in my Judgment within the care proceedings, no assessment of damages in respect of A could be made now since it is impossible to know, at this stage, the extent of the losses that he has suffered or may yet suffer as a consequence of the HRA breaches.
4. For reasons which I set out in some detail in my February 2017 Judgment, I also found that the rights of both the mother and father of A had been breached by Northamptonshire County Council. In paragraph 53 of my February 2017 Judgment, I set out eight significant failures for which Northamptonshire County Council were responsible. I made clear in that Judgment that I was not determining the HRA applications, but plainly my findings as to the extent of the breaches by the local authority led to the sensible compromise of the applications by the mother and the father. Given that the Judgment which I am now dealing with is in respect of matters of principle in relation to costs, rather than detailed facts, it is neither necessary nor appropriate for me to repeat here the substance of those breaches.
5. In the months following the February 2017 judgment, those acting for the mother, the father and the child made a number of enquires of the Legal Aid Agency in order to establish whether the statutory charge from the care proceedings would apply to Human Rights Act damages recovered in this case. The Legal Aid Agency confirmed its view that the statutory charge arising from the care proceedings would apply to Human Rights Act damages so recovered. In this case the Human Rights Act claims were brought under Section 7(1)(b) of the Human Rights Act, that is, within the care proceedings, but with freestanding pleadings.
6. By a claim pursuant to CPR Part 8 the Claimant, Northamptonshire County Council, sought (inter alia) a declaration that:
“For the purposes of section 25 of the Legal Aid and Sentencing of Offenders Act 2012; whether brought under section 7(1)(a) or 7(1)(b) of the Human Rights Act 1998, a claim for damages under the Human Rights Act 1998 does not constitute ‘proceedings.....in connection with which services are provided’, where those services comprise civil legal services provided to a parent or child in part IV Children Act 1989 care proceedings”.
During the course of the declaratory relief proceedings, and on his application, the father was joined as joint applicant, together with the local authority. A dispute arose between the parties as to the court’s jurisdiction to make a declaration in the terms sought. In the event, it has not been necessary for me to rule on that dispute.

7. As referred to in para 4 above the Human Rights Act claims brought respectively by the mother and the father against Northamptonshire County Council have now been compromised. As I have outlined above, prior to that compromise, a significant issue arose as to the extent to which, if at all, the statutory charge applied in respect of the costs incurred by the mother, the father and the child within the care proceedings. These were long and complicated care proceedings with a hearing lasting some 10 days. It is axiomatic that the costs that had been incurred within the care proceedings were so large that they would obliterate any damages recovered by the parents (and in due course the child A) within their Human Rights Act claims if the statutory charge was to apply. The moral injustice arising out of such a situation is palpable: claimants who have been appallingly let down by a local authority would find themselves recovering money from a public body with one hand only to give it back to another public body with the other hand. I am very pleased to see that this obvious injustice has now been corrected, provided that appropriate guidance is followed. I note that in *(A Minor) v Northamptonshire [2017] EWHC 282 (Fam)*, Keehan J issued an invitation to the Lord Chancellor at paragraph 123 when he said, “*I question whether the time has come to exclude a child’s and/or parents’ HRA claim for damages from the application of the statutory charge in relation to costs incurred in connected public law proceedings within the meaning of LASPO. This is of course solely a matter for the Lord Chancellor.*” I am pleased that the Legal Aid Agency, on behalf of the Lord Chancellor, has now answered this question and explained his position. The Legal Aid Agency has informed the Court when this Judgment was circulated in draft that it has undertaken a review of a number of other cases where this issue has arisen since April 2017 (‘legacy’ cases) in order to remedy any previous cases in which the statutory charge has wrongly been interpreted as applying in relation to damages awarded for breach of human rights. Obviously it would not be appropriate for me to make any comment in relation to those legacy cases other than to note that in cases which are similar to the instant case, obvious injustices should now be cured.
8. In the Lord Chancellor’s acknowledgement of service to these proceedings, dated 9 August 2017, it was stated that while it was “premature to reach a concluded view”, it was considered likely that the statutory charge would arise and would attach to any HRA damages recovered.
9. Since that time the Legal Aid Agency wrote to the three firms representing respectively the mother, father and child in the care proceedings, explaining that, if the damages under the HRA were obtained on a freestanding basis, the operation of the statutory charge would depend on what costs were being claimed from the Lord Chancellor in respect of the HRA proceedings or dispute. If the answer was nothing, there was nothing to protect by way of the statutory charge. On that basis, the Legal Aid Agency invited all three firms and counsel to provide an undertaking that they would not claim in respect of any costs incurred in connection with the HRA claim under their client’s legal aid certificate for the care proceedings. On the basis of the undertakings received, and the assumption that the recovery of the damages would take place outside the care proceedings, the Legal Aid Agency confirmed that the statutory charge would not arise in respect of the care costs. The Legal Aid Agency accordingly wrote to the claimants on 20 December 2017 to explain that, given the assurances provided, the cost of the care proceedings would not form part of the statutory charge, and that it is only the costs of the HRA proceedings or dispute to which the statutory charge will attach.

10. In the light of the number of cases where related issues have arisen, the Legal Aid Agency gave further and detailed consideration to the issue of when the statutory charge would arise in cases involving HRA damages claims arising out of care proceedings and has amended its approach in cases where damages were sought outside of the care proceedings, leading to the undertakings referred to above being sought. The outcome is that the parties are agreed that the claimant's application for declaratory relief should be withdrawn with no order as to costs. This is because the Legal Aid Agency has now finalised its review of issues relating to the application of the statutory charge to HRA damages arising out of care proceedings. As I set out at the commencement of this Judgment, the Legal Aid Agency will now publish a position statement relating to the application of the statutory charge and, by agreement of all parties, I append to this Judgment a copy of that position statement which will act as guidance to parties in future similar cases.
11. It is important that I underline the need to keep the HRA claim and the care proceedings entirely separate as set out in paragraph 2 of the Legal Aid Agency's position statement. I also refer to the judicial guidance given respectively by Keehan J and Cobb J as referred to in paragraph 5 of the position statement.

Position of the Legal Aid Agency as to the Application of the Statutory Charge in Relation to Care Costs and Human Rights Act Applications

1. This Position Statement is made by the Legal Aid Agency ('LAA') as part of its operational legal aid functions on behalf of the Lord Chancellor to clarify the circumstances in which the costs of care and 'other family law proceedings'¹ will constitute a first charge on Human Rights Act ('HRA') damages by operation of statute ('the statutory charge').
2. In summary, the application of the statutory charge in respect of the legally aided costs of care or other family law proceedings to HRA damages can be avoided by ensuring damages are not awarded within the care and other family proceedings and by keeping the costs of pursuing the damages claim separate. For the avoidance of doubt, where the HRA claim is completed outside of the care or other family law proceedings the costs of the HRA claim itself, if sought to be claimed from the LAA, will constitute a statutory charge.
3. The statutory charge arises as a matter of law by section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') which provides:
 - (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.*
4. The statutory charge operates to recover legal aid expenditure where property or money is recovered or preserved by a legally aided individual, but a claim for legally aided costs is maintained in relation to the proceedings or dispute. Such a claim will arise where the individual has not fully recovered costs from another party to the proceedings or dispute. Particular difficulties have arisen where claims for HRA damages have been made within care or other family law proceedings as to whether all of the care costs should be included in the statutory charge. The costs of care or other family law proceedings will generally not be recovered in full

¹ 'Other family law proceedings' in this context means proceedings under Part IV of the Children Act 1989 and Chapter 3 of the Adoption and Children Act 2002.

from the local authority and they are likely to be so high in comparison with the HRA damages that a statutory charge would absorb most or all of those damages.

5. Judicial Guidance has been provided by the Honourable Mr Justice Keehan in the case of *H v NCC and LAA* [2017] EWHC 282 as to the procedure to be followed where a HRA claim for damages arises during the course of care proceedings (see paragraphs 115- 117). As part of that guidance, Keehan J advised practitioners to issue separate proceedings and to seek the issue of a separate legal aid certificate. His Lordship further advised practitioners to invite the LAA well in advance of the final hearing of the HRA claim to decide on whether it asserts that the statutory charge will apply to any such award. Further relevant guidance to which parties should have regard has been provided by the Honourable Mr Justice Cobb in *Re W (Children) (Convention Rights Claim: Procedure): Practice Note* [2017] 1 WLR 3451, in particular at paragraph 3 where Cobb J confirmed that applications for substantive relief under the HRA (including damages claims) should be brought as civil proceedings by way of Part 8 claim. (It should be noted that the guidance in these cases represents a modification of the guidance given by Munby J in *Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam), [2003] 2 FLR 160.)
6. The application of section 25(1) LASPO contains two components: identification of the proceedings or dispute in which the damages are recovered and establishing the legal aid expenditure provided in connection with those proceedings or dispute.
 - a) Where damages are recovered within the care or other family law proceedings themselves, the full legally aided costs of the care or other family law proceedings will form a statutory charge on the damages awarded. Costs may of course be sought against the local authority in these circumstances in order to reduce or eliminate the effect of the statutory charge.
 - b) By way of contrast, if the judicial guidance referred to above is followed, and HRA damages are obtained outside of the care or other family law proceedings (e.g. within separate civil proceedings, or by means of a settlement outside of the care or other family law proceedings), only the legal aid expenditure incurred in respect of pursuing an HRA claim will be treated by the LAA as provided in connection with it. If the LAA is asked to give an early indication as to whether the statutory charge will apply to any HRA damages in these circumstances, it will request undertakings from the provider and counsel in the care proceedings that they will not make a claim for costs in respect of any HRA work carried out as part of the care or other family law proceedings. Once the undertakings have been received, the LAA will be able to confirm that the statutory charge will not extend to the legally aided care costs. Note that, unless a certificate or amendment to a certificate specifically authorising an HRA claim has been granted, there could be no valid claim for such costs in any event.
7. For the avoidance of doubt, legal aid expenditure in relation to the HRA claim will form a statutory charge in respect of any damages or costs recovered in the settlement of that claim, to the extent that a claim is made for costs from the LAA.