Neutral Citation Number: [2017] EWHC 450 (Fam)

Case No: LU15C03851

IN THE HIGH COURT OF JUSTICE

**FAMILY DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 08/03/2017

**Before** :

THE HONOURABLE MR. JUSTICE COBB

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**Between :**

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|  | **LUTON BOROUGH COUNCIL** | Applicant |
|  | **- and –** |  |
|  | **PW****MT****SW & TW****(Children by their Children’s Guardian in the *Children Act 1989* proceedings)** | Respondents |
|  | **And Between** |  |
|  | **PW****SW & TW (Children, by their yet-to-be appointed litigation friend in the *Human Rights Act 1998* proceedings)** | Claimants |
|  | **-and-** |  |
|  | **LUTON BOROUGH COUNCIL** | Respondent |
|  | **Re SW & TW (Human Rights Claim: Procedure)(No.1)** |  |

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**Roger McCarthy QC and Mai-Ling Savage** (instructed by **Local Authority Solicitor**) for Luton Borough Council

**Andrew Bagchi QC and Sylvester McIlwain** (instructed by **Edward Hayes LLP**) for the Father (PW)

**Barbara Connolly QC and Samantha Reddington** (instructed by **Northants Family Law Group**) for the Maternal Grandmother (MT)

**Alison Grief QC and Michael Edwards** (27/28 February) **John Tughan QC** (2 March) (instructed by **Reeds solicitors**) for the Children (SW and TW)

Hearing dates: 27 & 28 February, 2 March 2017

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Judgment Approved

THE HONOURABLE MR. JUSTICE COBB

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

**The Honourable Mr. Justice Cobb :**

1. These proceedings concern two siblings: SW, a boy who is soon to be 14 years old and his sister, TW, who is 9. They are at the centre of four related applications before the court. Specifically:
	1. They are the subjects of cross-applications issued under *Part II Children Act 1989* (*CA 1989*) separately by their father and maternal grandmother for ‘private law’ orders; these applications were issued in August 2015;
	2. They are subjects of, and respondents to, an application issued by Luton Borough Council on 29 September 2015 under *Part IV* of the *CA 1989*, for ‘public law’ (care or supervision) orders;
	3. They are co-claimants (with their father, PW) in applications brought under *section 7* of the *Human Rights Act 1998* (*HRA 1998*) for declarations and damages; the father’s application was brought formally (albeit on the wrong court form) on 8 March 2016. The children’s application was advanced in August 2016 within the body of a Skeleton Argument prepared for a court hearing at that time. The Claimants all seek relief against Luton Borough Council under *section 8(3) HRA 1998*.
2. This judgment is delivered at what was to be the conclusion of the final hearing of these applications. Regrettably, I have not been able to conclude the proceedings by which the children seek relief under the *HRA 1998* ([1](iii) above), given what is now acknowledged to be a fundamental procedural defect with their claim. That said, I consider it important to deliver this judgment on the matters on which I am able to reach a conclusion, and on which I have reached a clear view at this point.
3. In order to set a context for what follows, I consider that it may be helpful if I identify at the outset of this judgment some essential procedural points about claims of this kind. This is a case which in some respects has veered ‘off the rails’; in material respects it was never ‘on the rails’ in the first place. In doing so, I build on what I had said in *CZ v Kirklees Council* (“*CZ v Kirklees*”) [2017] EWFC 11 at [9]:
	1. It is of course appropriate for *HRA 1998* claims which arise in, and on the same facts as, *CA 1989* proceedings to be considered by the court within the *CA 1989* proceedings. *Section 7(1)(b)* enables every tier of the Family Court, including the magistrates, to give effect to the parties' Convention rights (see *Re L (A Child) v A Local Authority* *and* *MS* [2003] EWHC 665 (Fam) at [31]); (I made this point expressly in *CZ v Kirklees* at [9](i), but repeat it as it sets the context for the sub-paragraphs which follow);
	2. However, *HRA 1998* claims – whether they are made under *section 7(1)(a)* or *section 7(1)(b)* – are governed by the *Civil Procedure Rules 1998* (*CPR 1998*) and not the *Family Procedure Rules 2010* (*FPR 2010*);
	3. Applications for substantive relief (declarations and/or damages) under the *HRA 1998* should be issued as civil proceedings by way of a *Part 8 CPR 1998* claim, and should not be issued on a Form C2 (even if within existing *CA 1989* proceedings). While *rule 29.5(2) FPR 2010* requires the party who seeks to rely on a convention right under the *HRA 1998* to notify the court of this intention by way of “application or otherwise in writing”, it is, in my judgment, important that claims for substantive relief such as declarations and/or damages should be issued formally, even if made within existing proceedings; if the party is seeking to “rely on the Convention right or rights” (*section 7(1)(b)*) within the *CA 1989* proceedings to influence the manner in which the family court exercises its powers, a lesser degree of formality contemplated by *rule 29.5* may well be appropriate. In my judgment, an application for substantive and significant relief should not be ‘made’ by a party’s advocate merely introducing such a case (albeit “in writing”) in a Skeleton Argument for court, as happened here;
	4. A child claimant in *HRA 1998* proceedings requires a litigation friend appointed under *Part 21* of the *CPR 2010*; the appointment of a guardian or litigation friend for this type of claim is not effected under *rule 16 FPR 2010*. While Cafcass accepts that Children’s Guardians appointed in ‘specified proceedings’ may give advice about the appropriateness of a child making a *HRA 1998* claim, Cafcass cannot authorise its officers to act as litigation friends to children claimants, having regard to its functions, which are set out *inter alia* in *section 12* of the *Criminal Justice and Court Services Act 2000* (*CJCSA 2000*) moreover, Cafcass does not, as a matter of policy, support Children’s Guardians acting as litigation friends in *HRA 1998* proceedings;
	5. It is therefore not appropriate for a Children’s Guardian who has been appointed in specified *CA 1989* proceedings to act as an informal litigation friend, or ‘front’ the claim as if he/she is a litigation friend, in a related *HRA 1998* claim. The status of litigation friend can only be bestowed following one of two recognised formal processes – either the filing of a certificate of suitability under *Part 21.4(3)/Part 21.5(3)* or pursuant to court order (*Part 21.6*);
	6. Given that the *CPR 1998* applies to these claims, the regime of *Part 36 CPR 1998* (‘Offers to Settle’) applies to them;
	7. The full costs regime in *Part 44 CPR 1998* also applies, including (in contrast to the position in family proceedings) the general rule that ‘costs follow the event’ in *HRA 1998* claims (*CPR*, *Part 44.2(2)(a)*: "(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"; see also *CZ v Kirklees MBC* [2017] EWFC 11 at [61]));
	8. Insofar as not clear from *CZ v Kirklees*, from *P v A Local Authority* [2016] EWHC 2779 (Fam) (Keehan J), or from *H v Northamptonshire County Council & the Legal Aid Agency* [2017] EWHC 282 (Fam) (Keehan J) (“*H v Northamptonshire*”), the publicly funded claimant in a *HRA 1998* claim who is also publicly funded in associated (or ‘connected’: *section 25* *Legal Aid Sentencing and Punishment of Offenders Act 2012* (*LASPO 2012*)) proceedings, is vulnerable to a claim for recoupment of the costs of bothsets of proceedings by way of statutory charge from any award of *HRA 1998* damages;
	9. In *HRA 1998* proceedings, the Legal Aid Agency may issue a publicly funded certificate for a claimant to pursue declarations only, and not damages, as it did in this case, for the father; if this is so, this may have implications for (a) entitlement to any public funded remuneration for the lawyers for the work done on seeking a damages award, (b) the extent to which the successful claimant can recover any costs referable to pursuit of the claim for damages from the Local Authority if they have not been authorised to expend costs in pursuit of the same, and/or (c) the ability of the LAA to recoup funds from the damages (applying the statutory charge) for work done in respect of which there was no public funding certificate;
	10. This case illustrates once again that the cost of pursuing relief under the *HRA 1998* can very swiftly dwarf, or indeed obliterate, the financial benefits sought. Many such cases are surely suitable for non-court dispute resolution (NCDR), and I enthusiastically recommend that parties divert away from the court to mediate their claims; I am led to understand that many Court of Protection disputes with similar characteristics are resolved away from the court room. This is a case which could/should have been self-referred for NCDR. Parties in cases of this kind would do well to remind themselves of the comments of the Court of Appeal in *Anufrijeva v LB Southwark & others* [2003] EWCA Civ 1406 [2004] 1 FLR 8 at paras 79-80:

“… we were concerned that, even if the proceedings were conducted as economically as possible, the cost of the proceedings would be totally out of proportion to the damages likely to be awarded. This has proved to be the position… The costs at first instance of each party were totally disproportionate to the amount involved. When the total costs of both sides are looked at including the appeal, the figures are truly horrendous, and the situation is made even more worrying by the fact that all the parties are funded out of public funds.

**[80]**   The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded. Furthermore, as we have made plain, there will often be no certainty that an entitlement to damages will be established at all.”

1. In relation to these claims, I have further seen the guidance offered by Keehan J in *H v Northamptonshire* at [117] and respectfully agree with it.
2. By this judgment:
	1. I give my brief reasons for endorsing the final agreed orders reached in the *CA 1989* proceedings;
	2. I consider and give my reasons for approving the terms of settlement of the father’s claim under the *HRA 1998* and make the relevant award of costs;
	3. I give directions for the final hearing of the children’s applications for relief under the *HRA 1989*, with the Local Authority’s intended claims for wasted costs.

*Essential background*

1. For the purposes of this judgment, it is necessary only to give the briefest of outline histories.
2. SW and TW are the two children of PW (father) and RT (the mother); the parents were never married. Following parental separation in 2012, there followed highly contested private law proceedings concerning arrangements for the children.
3. Following those proceedings, in September 2013, the mother made a range of serious allegations about the father’s conduct towards TW. These were referred to a social worker from Luton Borough Council, and investigated by her, though in the opinion of the father wholly inadequately. Contact was suspended between the father and the children. This suspension, and hiatus in the relationship of the father and the children, continued for 2 years (through to September 2015), in circumstances which have feature centrally in the *HRA 1998* claims.
4. In September 2014, the mother reported that the children had made allegations about the father’s conduct towards them (he had not seen them for a year by now); the mother contended that both children had been sexually abused by the father. These allegations were investigated by the social services department using their investigative powers under *section 47 CA 1989*; the children were interviewed in accordance with the Achieving Best Evidence Guidance. The father was arrested and bailed while the police conducted a parallel investigation. The social worker reported the inherent improbability of the allegations, and acknowledged the risk that the children had been coached to make false allegations.
5. In November 2014, the children’s schools reported heightened concerns about neglect of the children by their mother, further extreme allegations being made by the children, and of the mother’s mental health. Later that month, SW and TW underwent full medical examinations in the investigation of sexual abuse. The mother had pressed for these examinations; the Local Authority and the police had ultimately supported them taking place, and a social worker was in attendance with the mother. It is now accepted by the local authority that these examinations were not necessary, they were disproportionately intrusive; the authority accepts that it failed to protect the children from this invasion of the children’s privacy. In December 2014 at a child protection conference, recommendations were made that there should be "formal investigations into the allegations” which had been made by the mother; these investigations were to be carried out by the police and children’s services. At no stage did the decision-making at this conference, or generally, include the father. At no time was he consulted about the investigation into the complaints, and was given no opportunity to contribute to the investigation or the decisions.
6. Although a “formal investigation” had been commissioned by the conference in December 2014 (see [10] above), there is no evidence that there was any formal planning of such an investigation, nor is there evidence of any coherent strategy for protecting the children; indeed, no real investigation took place at all. That said, in April 2015, TW underwent a further medical examination at the insistence of the mother, this time under general anaesthetic. The Local Authority now accepts that it should have taken steps to prevent the mother from presenting TW for further medical examination, particularly as the November 2014 examination had revealed no diagnostic signs of abuse. It is now acknowledged that the children’s mother was, by her actions, causing the children significant harm. The Local Authority accepts that each medical examination of the children was a serious invasion of the rights of each to respect for their privacy and unjustified.
7. At the next child protection review, in February 2015, the child protection plan was discharged and replaced with a Child in the Need plan without any exploration of why the earlier plan had not been implemented.
8. In July 2015, RT, the children’s mother suddenly and unexpectedly died. The children moved initially to live with MT, their maternal grandmother, where they remained for a few months. No one in the Local Authority’s social work department took steps to notify the father of this important event in the children’s lives, though inevitably – albeit after a delay – he discovered from another third party. In August 2015, MT issued proceedings under the *CA 1989* for a child arrangements order; the father made a cross-application. Within those private law proceedings, a *section 37* report was ordered. Social work and other expert opinion garnered in the case was to the effect that the children were being exposed to further harm in the care of the maternal grandmother who was expressing implacably hostile views about the father and was opposed to the father playing a role in the children’s lives, a stance which she was unable or unwilling to shield from the children. In late-September 2015, the Local Authority finally issued public law proceedings; these proceedings have been concluded at this hearing. In early 2016, the children were placed with a paternal uncle, before ultimately moving to live with the father himself.
9. Within the litigation, expert assessments have been ordered, and detailed and lengthy reports filed; an independent social worker has worked the case in view of the father’s understandable dissatisfaction with the work conducted by the Local Authority’s social work department.
10. As is apparent from the history outlined, the case has regrettably taken far longer than the 26 weeks expected by statute (*section 32(1)(a) CA 1989*) to reach its conclusion; this was in part purposeful to allow for detailed and extended assessment of the family as recommended by the jointly instructed expert. The delay has also at least in part been contributed to by the wholly unavoidable break in judicial continuity.
11. I strongly suspect that the automatic coupling of the *CA 1989* and *HRA 1998* claims has been an additional and significant factor in the delay in resolving the *CA 1989* aspect of the case; while it is important that due respect is paid to the guidance in *Re L*, the relief sought in the *HRA 1998* application did not bear to any material extent on the relief being claimed by any party in the *CA 1989* proceedings. I note that previous case management orders had referred to the issue of uncoupling the applications, but nothing was done about it. In my judgment, had more careful consideration been given to this, the prospect of a 10-day listing would never have been contemplated, and the attendant wait for an available slot of this length in the Court diary avoided.

*Children Act applications*:

1. The children have been living with their father now for the last year. They have settled well with him, and they are said to be thriving; both are making good academic progress. The Local Authority has made it clear at this hearing that it does not seek a *Part IV CA 1989* order in relation to the children. As it happens, the children and father actually now live in the geographic area of another authority; that other authority has also made it clear that it will support the father if required, but does not seek a statutory order or designation of the same. It is agreed that a private law order should be made that the children live with their father, and given the disruption which they have experienced in their short lives, I am satisfied that it is better to make that order than to make no order (*section 1(5) CA 1989*).
2. The father and maternal grandmother, both ably represented before me, have over the last few weeks, engaged in constructive dialogue about the children’s futures which has resulted in an agreement for her contact with the children; the Guardian has expressed her support for the arrangement and I am happy to endorse it. The details will be spelled out in the order, but the essential framework is:
	1. Contact between the children and their grandmother shall be supervised by the father or another member of the family as arranged by the father. Such contact shall be for a period of no less than 4 hours on each occasion and unless presented otherwise by the father, shall take place in his home town, or in that of the maternal grandmother;
	2. The need for ongoing supervision by the father or another member of his family shall be kept under review and determined by the father;
	3. Such additional direct contact both in terms of frequency and/or duration as shall be determined by the father;
	4. Indirect contact (cards and/or presents to the children on or around their birthdays, Easter and Christmas).
3. Therefore, against a very bleak and oppositional picture painted when the applications were first issued, particularly against the tragic background of the death of the children’s mother, the *CA 1989* proceedings have now been resolved with considerable consensus, and the minimum of judicial intervention.

*Human Rights Act claims: Procedural Regime*

1. *Section 7* of the *HRA 1998* provides as follows:

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by *section 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 (or would be) a victim of the unlawful act.

….

(5) Proceedings under *subsection (1)(a)* must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) “legal proceedings” includes —

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

1. *Section 7(9)* of the *HRA 1998* makes provision for the Lord Chancellor (Secretary of State for Justice) to make procedural rules to support the primary legislation (see also *section 20 HRA 1998* which provide for these to be made by statutory instrument). At the outset of the final hearing, there was division at the Bar as to whether the claim under the *HRA 1998* is governed by the *Family Procedure Rules 2010* (*FPR 2010*) or the *Civil Procedure Rules 1998* (*CPR 1998*). This is relevant to the following issues:
	1. The role and/or or status of the Children’s Guardian (appointed under *rule 16* of the *FPR 2010* in the public law “specified” proceedings), and her ability to act for the children as litigation friend for the children in the *HRA 1998* claim; or whether *Part 21* of the *CPR 1998* is engaged;
	2. The status of the *Part 36* offer (*Part 36 CPR 1998*) made in this case in the *HRA 1998* claim in November 2016, and the costs implications of the same.
2. I suggested in *CZ v Kirklees* (although I had not heard argument on the point) that a claim under the *HRA 1998* is governed by the *CPR 1998* (see [61]). In *H v Northamptonshire CC* (a judgment which was coincidentally handed down on the day after *CZ v Kirklees*) Keehan J appears to have taken the same view. However, in this case, Mr. Bagchi QC and Mr. McIlwain for the father, making common cause with Ms. Grief QC and Mr. Edwards for the children, initially argued that a *HRA 1998* claim brought within care proceedings was governed by the *FPR 2010*. Their argument was presented on the following basis:
	1. That the claim was being considered under *section 7(1)(b) HRA 1998* in the context of ‘family’ (*CA 1989*) proceedings;
	2. That Munby J (as he then was) in *Re L* had emphasised the importance of *HRA 1998* claims being heard with the *CA 1989* claims, which are undoubtedly governed by the *FPR 2010*;
	3. That no free-standing *HRA 1998* application had been issued by the children.
3. Mr. McCarthy QC (who has been recently instructed in the case) and Ms. Savage for the Local Authority contended that the *CPR 1998* apply. They argued that *HRA 1998* proceedings are proceedings included within the genus of “civil rights and obligations” (see the opening words of *Article 6(1) ECHR*). The whole of the framework of the *HRA 1998* supports this view, they argued; it follows, they further contended, that the only option is that they are civil proceedings. This construction gives the court the broadest range of options as to what order it should make in the event that it finds a breach of Convention rights.
4. By the conclusion of the exchanges in oral argument, Mr. Bagchi QC and Mr. Tughan QC who had stepped in to represent the children in circumstances I allude to below (see [37]), conceded that the relevant procedure rules for determination of a *HRA 1998* application even in these circumstances were probably the *CPR 1998*.
5. Having now heard argument on this point, I feel able to affirm the conclusion which I had reached and expressed in *CZ v Kirklees*, that the *HRA 1998* claim is governed by the *CPR 2010*. My reasoning is as follows:
	1. Unless the context otherwise appears, the *FPR 2010* apply only to “family proceedings” (*rule 2.1 FPR 2010*);
	2. The *CPR 1998* apply to all proceedings in the High Court, County Court and Civil Division of the Court of Appeal but not (per *part 2.1(2)* *CPR 1998*) *inter alia* to ‘family proceedings’;
	3. Therefore, while there are many similarities (and indeed there is a degree of overlap) between the *CPR 1998* and the *FPR 2010* (including most obviously the key features of the ‘overriding objective’ in their respective *rule 1*) they actually operate a mutually exclusive regime;
	4. The *FPR 2010* govern “the practice and procedure to be followed in family proceedings” (*section 75(1) Courts Act 2003*); “Family proceedings” means (a) proceedings in the family court, and (b) proceedings in the Family Division of the High Court which are business assigned by or under *section 61* of (and *Schedule 1* to) the *Senior Courts Act 1981*, to that Division of the High Court and no other (see *section 75* ibid.); this does not refer to *HRA 1998* claims;
	5. “Family Proceedings” are defined in *section 32* of the *Matrimonial and Family Proceedings Act 1984* as “family business”, which itself is defined (ibid.) as “business of any description which in the High Court is for the time being assigned to the Family Division” under *section 61* and *Schedule 1, para.3* of the *Senior Courts Act 1981*; *Schedule 1, para.3* provides a long list of family proceedings assigned to the Family Division, but these do not include *HRA 1998* claims;
	6. “Family proceedings” for the purposes of the *CA 1989*, are those conducted under the inherent jurisdiction of the High Court, or as set out in the long list of enactments in *section 8(4) CA 1989*; the *HRA 1998* is not included on that list;
	7. It is clear that a free-standing application under the *HRA 1998* (*section 7(1)(a)*) which has no connection with family proceedings should be brought by a *Part 8* *CPR 1998* claim, and be governed by the *CPR 1998*; it would be procedurally disruptive, not to mention illogical, if a claim brought “in any [existing family] legal proceedings” (*section 7(1)(b)*) followed a different set of procedural rules.
6. I note that Keehan J in *H v Northamptonshire* also contemplated that the *CPR 1998* apply to these cases (see [117](c) and (d) for example).
7. I do not believe that Munby J intended his comments in *Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam) [2003] 2 FLR 160 to have the effect of substituting a different regime of procedural rules, as contended for in this case. *Re L* was a case in which a mother sought an order that the local authority should be compelled to change its care plan, on the basis that the plan before the court (for adoption) was unlawful and violated her ECHR rights. Munby J referred at [25] of *Re L* (see below) to the appropriateness of the court, while exercising its *CA 1989* jurisdiction, being in a position to offer an “appropriate remedy within the care proceedings themselves” under *section 7(1)(b)*; I particularly draw attention to the following paragraphs:

“**[21]** Quite apart from the freestanding jurisdiction under s 7(1)(a), rights arising under the European Convention can also be relied on under s 7(1)(b) of the Human Rights Act 1998, by way of defence or otherwise, ‘in any legal proceedings'. That, in my judgment, must extend to cases – such as care cases – proceeding in the FPC. …

**[23]**   There is, however, in my judgment, … an important distinction to be drawn between: (a) those cases in which a European Convention issue arises whilst care proceedings are still on foot; and (b) those cases in which a European Convention issue arises after a final care order has been made and when the care proceedings have accordingly come to an end.

**[24]**   In the latter class of case – that is, where the care proceedings have come to an end – the appropriate remedy may well be a freestanding application under s 7(1)(a) of the Human Rights Act 1998. Such an application can be made either on its own or in conjunction with some other application, for example (as in Re M (Care: Challenging Decisions by Local Authority) [2001] 2 FLR 1300, C v Bury Metropolitan Borough Council [2002] EWHC 1438 (Fam), [2002] 2 FLR 868 and Re G (Care: Challenge to Local Authority Decision) [2003] EWHC 551 (Fam), [2003] 2 FLR 42 an application under *s 39* of the *Children Act 1989* for discharge of the care order. In such a case, as the President emphasised in C v Bury, the application should be heard in the Family Division and, if possible, by a judge with experience of sitting in the Administrative Court. C v Bury, it should be noted, was a case where the care proceedings had come to an end.

**[25]**   In the other class of case – that is, where the care proceedings are still on foot – the position, in my judgment, is quite different. Here there is no need for any freestanding application under s 7(1)(a). Section 7(1)(b) will provide an appropriate remedy within the care proceedings themselves. Accordingly, Human Rights Act complaints arising before the making of a final care order can, and in my judgment normally should, be dealt with within the context of the care proceedings and by the court which is dealing with the care proceedings. I might point out that Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam), [2002] 2 FLR 730 is an example, albeit in the Family Division, showing just that procedure being adopted. In that case, the mother's complaints of numerous breaches of *Art 8* were litigated within the care proceedings and without any separate application being issued under the *Human Rights Act 1998.*”

1. Munby J in the passage underlined above ([2003] EWHC 665 (Fam) [2003] 2 FLR 160 [25]) advises that a *HRA 1998* claim arising in the context of ongoing family proceedings can and should ordinarily be dealt with “by the court” dealing with the care proceedings and “within the context” of those proceedings. This is apposite where the relief to be awarded under *section 8* *HRA 1998* coincides in large measure with the relief or orders which the court may wish to make in the *CA 1989* proceedings. But where declarations of unlawfulness and damages are sought which do not have an impact on the outcome of the *CA 1989* proceedings, there is much less justification for uniting them. There is a real risk that in doing so, the *CA 1989* proceedings become bogged down. A *HRA 1998* claim should never be permitted (as it has in this case, I believe) to prolong the *CA 1989* litigation.
2. Keehan J analyses *Re L* in *H v Northamptonshire* at [115] in a way with which I entirely associate myself, thus:

“I respectfully agree with Munby J's general proposition that a court hearing public law proceedings should deal with any associated *HRA* claim brought by one of the parties to the care proceedings. His concern was to prevent the proliferation of satellite litigation in respect of *HRA* claims. The judgment should not be read, and was plainly not intended to be read, as requiring a party seeking *HRA* damages to issue his or her claim within the existing public law care proceedings. On this basis the decision in *Re L*, and the decision in *Re V*, may be distinguished from proceedings in which a *HRA* claim is pursued and damages are sought. Therefore, where the remedy sought in the *HRA* claim is not limited to injunctive or declaratory relief but includes a claim for damages, it is almost inevitable that those representing the Claimant will be well advised to issue separate proceedings and to seek the issue of a separate public funding certificate because of the potential applicability of the statutory charge in respect of any HRA damages awarded” (emphasis by underlining added).

1. Having concluded that the *CPR 1998* apply to this type of application, it is necessary to assess the implications for this case.

*Representation of the Children in the HRA 1998 claims*

1. The Children’s Guardian, Ms. O, was appointed to represent the children in the *Part IV* *CA 1989* proceedings in September 2015 in accordance with the provisions of *section 41 CA 1989* and *rule 16.3 FPR 2010*. Her appointment was in conventional terms “for the purposes of [the] specified proceedings” (*section 41*). That appointment was not, and is not, for representation of the children in civil or other (including *HRA 1998*) proceedings.
2. Regrettably, Ms. O assumed the role of litigation friend in the *HRA 1998* proceedings without – as I understand it – explicit authority from Cafcass for her to act under *Part 21*, or proper consideration of the children’s true status in these civil proceedings; I have been advised (though have seen no formal confirmation of this) that Cafcass had originally agreed (or it was thought that Cafcass had agreed) that the Children’s Guardian could “front” the *HRA 1998* proceedings on behalf of the children, though this agreement may have been given without any real thought as to the technicalities; it was on this basis that the Guardian and her legal team operated. I suspect, but do not know for sure, that many Children’s Guardians in *CA 1989* proceedings, and their legal teams, may have strayed into roles in *HRA 1998* proceedings for which they have no formal status under the rules. The fact is that Ms. O could not be appointed as litigation friend, as she and her legal team had thought, under *rule 16.5 FPR 2010* (“requirement for a litigation friend”) given that, as I have made clear above, the *FPR 2010* do not apply to the *HRA 1998* claim at all. It is necessary for the children’s status as litigants in the *HRA 1998* proceedings to be provided for under the *CPR 1998*, namely *Part 21*. This defect was only exposed on the first day of the hearing.
3. *Part 21* of the *CPR 1998* sets out the “special provisions” which apply in relation to civil proceedings involving children and protected parties; it specifically provides that a child “must” have a litigation friend (*rule 21.2(2) CPR 1998*), unless the court (in defined circumstances, not relevant here) orders otherwise (*rule 21.2(3) CPR 1998*). The rules are clear that it is essential that the formalities are observed from the very earliest stage, as (per *rule 21.3 CPR 1998*) no step can or should be taken in the proceedings until the child has a litigation friend appointed in accordance with *rule 21.6*. A person may act as a litigation friend without court order provided that he/she can fulfil certain requirements, including the offering of an undertaking to pay any costs which the child may be ordered to pay in relation to the proceedings (*rule 21.4(3)(c)*). The Local Authority made a formal offer not to seek costs against the children here, but this was not of itself sufficient to overcome other insuperable obstacles to the appointment of Ms. O as litigation friend.
4. Contrary to the impression which the Children’s Guardian appears to have received in this case, Cafcass is clear that it cannot, and will not, permit its own officers (children’s guardians) to become litigation friends in *HRA 1998* proceedings. In a helpful e-mail communication from Ms. Melanie Carew (Head of Legal, Cafcass) sent to the parties when this problem came to light on the first day of the hearing (1 March) she said that:

“… the legal advice given to Cafcass is that it is outside its statutory functions to act outside of family proceedings… A Cafcass officer acting in a professional capacity would therefore be acting *ultra vires* if they were acting as a litigation friend in civil proceedings”.

1. That advice is more fully laid out and explained in a document, publicly available, entitled “Guidance – the role of Cafcass in Human Rights Claims” (April 2016) which was considered at this hearing by the parties and the court. This document emphasises that the statutory functions of Cafcass (i.e. those covered by *section 12* of the *CJCSA 2000*) are confined to enabling Cafcass to act on behalf of a child in any “family proceedings” in which “the welfare of children … is or may be in question”. Quite apart from the fact that a *HRA 1998* application is not ‘family proceedings’ (see above), Cafcass takes the view that a claim brought under the *HRA 1998* is not one in which the court is being asked to consider issues of welfare; a *HRA 1998* claim is concerned with declarations (and/or awards of damages) on the basis that a public authority has acted unlawfully in the exercise of their powers. The Guidance document goes on:

“Cafcass cannot act as Litigation Friend in proceedings in which the welfare of the child is not in question, although it is within the scope of the guardian’s role to advise on pursuing a claim and if this is not resolved without making an application it must be the Official Solicitor (if there is no alternative) who should act for the child”.

Interestingly, although *section 15* of the *CJCSA 2000*, permits Cafcass to authorise “an officer of the Service” to “conduct litigation” in relation to “any proceedings” in “any court”, this can only be done “in the exercise of his functions” (i.e. as defined in *sections 12-14*) and do not capture this type of claim.

1. This approach is not entirely new or unexpected. It was foreshadowed some time ago in *C v Bury Metropolitan BC* [2002] EWHC 1438 (Fam) [2002] 2 FLR 868 at [2] by the then President of the Family Division (Dame Elizabeth Butler-Sloss P):

“There is a jurisdictional difficulty for the guardian in making the human rights application for K, in that such an application does not appear to come within the duties of a guardian.” (emphasis added)

1. Once it became apparent that the *HRA 1998* claim on behalf of the children had been conducted on a procedurally defective basis (namely with the Children’s Guardian appointed within the *Part IV* proceedings purporting to be a *Part 21* litigation friend), Ms Grief QC and Mr. Edwards, who had been advising and representing the guardian throughout, withdrew from the case, and Mr. Tughan QC appeared on the next hearing date, *pro bono*, on behalf of the children to try to salvage the application, and steer it in the direction of a satisfactory conclusion. In spite of his best efforts, I considered that I could not take any further step in the case without the children being properly represented by a litigation friend other than a Cafcass guardian, and in spite of a helpful suggestion that I could appoint a panel solicitor local to the children (who had indicated his willingness so to act), I felt it right to issue an invitation to the Official Solicitor (who had been forewarned) to be litigation friend the children in this case pursuant to *Part 21.6*. I did so primarily because it seemed to me that not only would the Official Solicitor be able to assist these young people in this litigation, but it would also give him the opportunity to address – if so advised – some of the issues which have arisen in this case, in an attempt to ensure that the problems are not repeated.
2. This procedural difficulty has delayed the conclusion of the proceedings, a frustration aggravated by the fact that the Children’s Guardian and legal team appointed in the *CA 1989* proceedings had *bona fide* (albeit without proper authority under the rules) purported to agree with the Local Authority the quantum of damages in the *HRA 1998* proceedings, and this awaits my approval. There is also agreement as to the issue of *inter partes* costs.
3. I am hopeful that at that next hearing, subject to the arguments then advanced, I will be able to regularise the defects in the steps taken in the proceedings thus far. *Part 21.3(4) CPR 1998* provides that:

“"Any step taken before a child or patient has a litigation friend shall be of no effect, unless the court otherwise orders." (emphasis added).

Given the large measure of apparent agreement as to substantive outcome for the children in this case, it is surely right that I should endeavour to salvage the proposed settlement in order to save the considerable expense of a rerun of the proceedings, provided only that this can be done “justly” (*Part 1 CPR 1998*), and that such an outcome is supported by the children’s yet-to-be appointed litigation friend. Such an approach was recognised in *Masterman-Lister v Brutton & Co.* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, in which the Court of Appeal (Kennedy LJ giving the lead judgment) noted that *rule 21.3(4)* is capable of delivering a solution to a problem similar to that which arises here:

“… a court can regularise the position retrospectively, and that was also possible under the Rules of the Supreme Court (see *Kirby v Leather* [1965] 2 QB 367). Provided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position. To do otherwise would be unjust and contrary to the overriding objective of the Civil Procedure Rules, but in any given case the ultimate decision must depend on the particular facts … finality in litigation is also important, and the Rules as to capacity are not designed to provide a vehicle for re-opening litigation which having apparently been properly conducted (whatever the wisdom of the individual decisions in relation to it) has for long been understood to be at an end”.

1. I will receive further submissions on this aspect at a hearing which I have listed for five weeks’ hence. It seems overwhelmingly likely that any award of damages which I make will be swallowed up by the statutory charge, but it is important that the children receive a fair and properly considered determination of their legitimate claim. In all the circumstances, I have invited Cafcass and the Legal Aid Agency to make representations at that hearing, if either choose to do so.
2. The litigation will not apparently or necessarily end there, for Mr. McCarthy QC has intimated a potential application on behalf of the Local Authority for wasted costs against the lawyers (solicitors and counsel) acting for the children and now also the father. He suggests that the Local Authority has been financially prejudiced by the unjustifiable conduct of litigation by the legal representatives of the Claimants. Such an application, if issued, will be determined in accordance with the principles laid out in *section 51(6)* of the *Senior Courts Act l981* and *rule 46.8 CPR 1998*, read with *Ridehalgh v Horsfield* [1994] Ch 205 [1994] 2 FLR 194. Such an order would be warranted if, of course, I was to be satisfied that the conduct of the legal teams could be legitimately characterised as ‘improper, unreasonable or negligent', and if so, whether that directly caused any wasted costs complained of.
3. I propose to impose a tight-timeframe within which the Local Authority must declare its position on this. If such claims are to be made, they need to be properly pleaded in a timely way; I emphasise the point that:

“Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided” (*Ridehalgh* [1994] 2 FLR 194 at 211).

The unavoidable consequence of such applications being issued will, I fear, be the dedication of yet more court time and cost in examining the litigation conduct of all of the parties (including, inevitably, the Local Authority itself) to this case over a prolonged period. That said, and if time permits, I hope to be able to deal with any wasted costs application at the hearing which I have fixed to resolve the *HRA 1998* claims of the children.

*Human Rights Act: the father’s claim*

1. The father seeks declarations and damages under the *HRA 1998*. The Local Authority has formally apologised to the father. It conceded that he was entitled to a number of declarations some months ago (September 2016); the father had hoped to achieve wider formal recognition of the ways in which he considers the Local Authority infringed his rights. However, the parties have come to an agreement that the following declarations sufficiently record the failures of the Local Authority to observe and/or respect to the *ECHR* rights of the father:
	1. there was no communication with the father in respect of the Child Protection Conference process, and he was not enabled to take any part in the Child Protection Conference on 1 December 2014. Luton Borough Council’s failure to engage with the father was in breach of his rights;
	2. the Child Protection Conference on 1st December 2014 recommended the appropriate and necessary step of “formal investigation” and Luton Borough Council failed to put in place any detailed and time-limited plan as to how that investigation was to be conducted. The absence of any such plan gave rise to a breach of the rights of the father;
	3. it is accepted that the breaches occurring at the time of the Child Protection Conference on 1.12.14 were continuing breaches that continued to be operative until the issue of proceedings on 28.9.15. The issue of proceedings marked an end to the breaches.
2. On the issue of damages, in September 2016, the father’s then-instructed counsel filed a lengthy skeleton argument setting out the father’s aspiration to recover from the Local Authority damages in the region of £100,000-£140,000, or more. These figures were advanced on the basis of admitted (and further) breaches of *Article 6* and *8 ECHR*, and of an alleged breach, subsequently added but no longer pursued, of the father’s rights under *Article 3* ibid. (i.e. prohibition of torture, inhuman or degrading treatment). It is unfortunate that at the stage at which the father’s ambitious objective was made known to the parties and the court, there was no meaningful opportunity for some careful judicial investigation of the merits of such an exceptional claim, and/or for some steps to be taken to moderate or even judicially mediate the claim, in fulfilment of the ‘overriding objective’ (note in particular *rule 1.1(2)* and *1.4(2) CPR 1998*). Some of that award was intended to reflect an element of recovery of costs disguised as damages; as I indicated in *CZ v Kirklees*,that is an unprincipled approach (see [2017] EWFC 11 at [58(iv)]). However, positive steps were then taken towards settlement of the claim in November 2016 following the *Part 36* offer, and the *Article 3* point was withdrawn; in the event, the father’s claim has now been appropriately settled in my judgment at a realistic and proportionate level, for a fraction of the earlier pleaded sums. An unwarranted cost to the public purse of an expensive trial has, in the main, mercifully but narrowly been avoided.
3. The parties have agreed that an award of damages to the father in the sum of £15,000 would represent “just satisfaction” under *section 8(3) HRA 1998* for the infringements of his *ECHR* rights. I agree with them. It should be noted that this is an agreed compromise figure, and as such it may be said to have limited precedential value.
4. In its *Part 36* letter, the Local Authority offered to pay the father’s costs of the *HRA 1998* claim; the father did not accept that offer within the allotted time. Both parties submitted detailed argument on costs at this hearing, ranging across the full gamut of issues – of principle, quantum, the *Part 36* process (including the fact that the *Part 36* offer was in respect of only part of the claim), litigation conduct generally (both sides), the complication of apportionment where the lawyers have been paid on an ‘events’ basis (i.e. by which fixed fees are paid on the happening of certain ‘events’ in the litigation), non-compliance with orders for the delivery of costs schedules, and the period for which costs would potentially be recoverable. Overshadowing those arguments was the identifiable likelihood that the Legal Aid Agency will successfully recoup from the award of damages the sums which it has expended on the father’s public funding certificate for the *CA 1989* and/or the *HRA 1989* proceedings. On the second day of the hearing, the Local Authority proposed a pragmatic solution, which was that the Local Authority would contribute the sum of £1,000 towards the father’s *HRA 1998* costs; Mr. Bagchi QC did not argue vigorously against that proposal. Given that the father is unlikely to benefit either from the damages or the costs, I am persuaded that a very considerable amount of costs would be saved by not spending more court time with the parties debating the issue and I am content to adopt the pragmatic course proposed. I formally assess the costs award in the sum of £1,000.

*Conclusion*

1. I made the point in *CZ v Kirklees* at [9] that in cases of this kind:

“… a careful and realistic eye has to be kept on proportionality of the process by which relief is sought, and on outcome.”

As I alluded to above, I am concerned that a realistic eye was not maintained on the proportionality of the claim or its process throughout this litigation. At the hearing before me, I am satisfied that the advocates took a realistic, economical and proportionate stance in relation to the outcome, with the consequence that the case has been completed in three days, with a considerable saving of additional cost.

1. The case will now be adjourned for resolution of the children’s *HRA 1998* claims, and determination of any applications for wasted costs.
2. That is my judgment.