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CO/979/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 7 May 2014

B e f o r e:

MRS JUSTICE ELISABETH LAING

Between:

THE QUEEN ON THE APPLICATION OF WB

First Claimant

W

Second Claimant

v

SECRETARY OF STATE FOR JUSTICE

Defendant

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(Official Shorthand Writers to the Court)

Ms M Sikand (instructed by Hodge, Jones and Allen) appeared on behalf of the **First Claimant**
Ms C Gallagher (appearing as Litigation Friend the Official Solicitor, instructed by Maxwell Gillott) appeared on behalf of the **Second Claimant**
Ms F Scolding (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T

1. MRS JUSTICE ELISABETH LAING: This is a rolled-up hearing of the Claimant's applications for permission to apply for Judicial Review, and, if permission is granted, for Judicial Review, of a decision of the prison Director, made on 5 December 2013 at HMP Bronzefield, to refuse the First Claimant's application for admission to the mother and baby unit at HMP Bronzefield, which I will refer to as "the prison". The First Claimant was at that stage heavily pregnant. The Defendant knew that the Claimant was pregnant at, or shortly after the time of her admission to the prison (see Ms Ellis' file note of 19 August 2013.)

The facts

2. The Claimant is a remand prisoner. She is 26. Her trial for the attempted murder and wounding with intent of her partner is due to start on 14 July 2014, or perhaps later. There have apparently been difficulties with the key witness. Her former partner is in a vegetative state and, it appears, is unlikely to recover. She was admitted to the prison as a remand prisoner on 14 August 2013. She has no previous convictions or cautions. This is her first experience of prison. She was then about four months' pregnant.

3. On 19 August 2013 an application was made for her to the admitted to the prison's mother and baby unit ("MBU"). It is important to note that, as the First Claimant is on remand, the application was for temporary admission to the MBU pending the outcome of her trial and sentence. Once that was known, if there were a conviction and sentence, it would, if the first application had succeeded, have been necessary for there to be a further Board to consider what should happen in the light of the First's Claimant sentence. The prison is a private prison, so it has a director instead of a governor.

4. The First Claimant and her partner have two children, P and W. W was born on 31 December 2013. P and W are, I understand, both the subject of care proceedings brought by the relevant local authority (which I will refer to as "the Authority") under section 31 of the Children Act 1989 ("the 1989 Act"). An Interim Care Order was made in relation to P when the First Claimant was imprisoned. He is now living with a cousin. P was, until the First Claimant was imprisoned, being raised by the First Claimant in the community.

5. The First Claimant is a Polish national. An undated report from her prison ESOL tutor describes her as "not a fluent speaker of English". She has been taking courses in prison. At the date of that note she could understand and write quite complex sentences and structures but sometimes misunderstood complex instructions and sentences and could not form very complex sentences. On remand, she has been assigned a pregnancy support officer, Ms Tracey Ellis. Her file notes record several meetings with the First Claimant between the date of her remand and today's date. Six of those took place before the hearing in front of the Board.

6. W is now represented by the Official Solicitor and he is the Second Claimant.

7. The purpose of an MBU is not to enable a prisoner's ability as a parent to be assessed (see the witness statement of Zoe Markham for the Defendant, paragraph 15.) Each prisoner has parental responsibility for her child (see section 3 of the 1989 Act.) Prison officers are not there to provide safeguarding but the statutory guidance "Working Together to Safeguard Children" provides at paragraph 24 that prison governors should ensure that there is at all times on duty in the MBU a member of staff who is proficient in child protection, health and safety, and first aid. Mothers are expected to care for their babies when not doing prison activities. It is therefore important, in my judgment, that the prison authorities should, in appropriate cases, gather timely information about the ability or otherwise of a person who applies for a place in an MBU to look after her baby in the environment of the MBU.

8. On 2 December 2013 Ms Ellis recorded that she told the First Claimant that an MBU Admissions Board would sit on 5 December 2013. The First Claimant's case is that after making her application to the MBU in August, it was her understanding that she would automatically be entitled to be admitted to it and it was not until 2 December 2013, when she had this meeting with Ms Ellis, that she realised that this might not be the case. She was at that stage given an opportunity to speak to a social worker from the Authority on the telephone, who told her that the Authority would be opposing her admission to the MBU.

9. Ms Ellis says in her recent witness statement that she is in regular contact with the Authority during the application process. She had a problem with the Authority as they wanted to wait until they had gone to court in the care proceedings to see if a judge would rule on the issue. Ms Ellis had to explain that this was a prison process, not a court process. An application had been made and a recommendation was needed so that the plan was in place before the baby was due. The delay in the Authority's report, according to Ms Ellis, meant that the Board had to take place much later than Ms Ellis had intended. It seems from the Authority's own document that its limited assessment did not even start until 21 November 2013 (see the Authority's report of 4 December 2013.)

10. The First Claimant's application was heard by an Admissions Board on 5 December 2013. The Board recommended to the Director of the prison that the application should be refused. I now summarise what happened, from the Board's minutes, and from the witness statement of the independent Chair of that Board, which are in the bundle. The minutes are dated 21 December 2013 and are signed by the Chair alone. That means that they were not before the Director of the prison when, later on 5 December, she made her decision to uphold the Board's recommendation.

11. The Chair was an independent person. Various representatives of the prison attended the Board and two officers from the Authority. The First Claimant was a present, with a Polish interpreter.

12. The Chair of the Board was an independent social worker with many years' experience. She estimates that she has chaired at least 400 meetings for admission to the prison's MBU. She had done so since 2005. Only 12 of those have resulted in a split decision.

13. She remembers that the Authority's report and recommendation were only available on the day of the hearing. In the Chair's view this was not ideal. It is better, she said, for the Local Authority report to be available sooner so that it can be explained in detail. This is especially true in this case, I interject, because the Local Authority very belatedly indicated that it opposed the placement in the MBU and this was the First Claimant's first opportunity to see why the Authority opposed her application.

14. The Chair remembers that the First Claimant spent time at the start of the meeting with the interpreter, going through the documents. The First Claimant's evidence - and this is not contradicted - was that she was allowed 15 minutes in which to do this. This is a very limited opportunity for a person whose first language is not English to read and get to grips with an entire dossier of documents. The dossier included information about the First Claimant's previous good record, that she had no adjudications, and the fact that she had been recommended for two enhancements while in custody. The wing report, which gave more detail about her polite demeanour and good behaviour, was not in the dossier.

15. The Chair of the Board said in her witness statement that if the First Claimant had asked for a personal officer to support her, the Chair would have allowed this. But there is no evidence that I have seen that anyone explained to the First Claimant that she could have had someone to support her at the hearing before the Board.

16. It was clear to the Chair at the Board that no parenting assessment by the Authority would be available before the date of the criminal trial.

17. The minutes record that the Chair met the First Claimant before the Board in order to ensure that she understood what was going on. The Chair reminded the Board at the outset that the best interests of the child (that is W) were their primary consideration. The First Claimant had had an opportunity to read the papers, said the Chair, and had told the Chair that she understood them. The Chair did her best to ensure that the hearing was fair. Paragraph 10 of her witness statement records that she corrected a passage in the Authority's report which appeared to suggest that the First Claimant had already been convicted.

18. The Chair explained the admission criteria to the First Claimant. According to the Chair, the First Claimant said that she understood the criteria. She was asked about antenatal care before her remand in custody. She had had none and had missed the 12-week scan. When asked why, the First Claimant said that she was convinced that she could look after the child herself. She knew that part of the purpose of antenatal care is to monitor the health of the unborn child. She had done this with P, her elder child, but this time her handbag, which contained important contact addresses, had been stolen. She had no permanent address and so no GP.

19. The First Claimant was asked about domestic violence. She said there was no violence, just arguments. There had been an incident when the First Claimant had been found intoxicated while caring for P. She did not remember it and was convinced that her drink had been spiked. She drank sporadically. She did not drink during the week, but just at weekends and not every weekend. She would drink a couple of beers

and a bottle of wine shared with her sister. She knew that alcohol could harm a baby but did not drink very much when she was pregnant.

20. The Authority said that it planned to apply for an Interim Care Order once the baby was born.

21. The First Claimant was asked how she would reassure the Board that she would not be violent on the MBU. She said she was not an argumentative person. She avoided conflict and tried to be polite and kind.

22. This was not a planned pregnancy, she told the Board. She was happy about it but felt that her partner was not. She told the Board that she loved her children very dearly. They were the most important thing in her life. She would never consciously harm them.

23. The Board said that it regretted that there was no parenting assessment from the Authority. The Board needed to consider the short term and longer term needs of the baby and balance them. While the First Claimant might be able to care for her baby in the short term without a parenting assessment, there were the previous concerns and, given the nature of the alleged offence, the longer term outcome was unknown. If the Board were to recommend a place on the MBU, it would have to be temporary, as the First Claimant was on remand. If she were convicted, the length of the sentence would likely mean that the First Claimant and W would be separated because of the upper age limit for the MBU.

24. The Chair then explained what the Board's options were.

25. The Authority said that it would not be recommending a place on the MBU as it had serious concerns about the First Claimant's parenting capacity. There was an extensive history, there were ripples of domestic violence between the parties and there was alcohol misuse. There was concern about where the baby would go during the trial as this would be emotionally distressing for W. The Authority felt the best plan was for W to live with his paternal aunt. The First Claimant said that it was always best to be with a member of the family if she could not care for him.

26. The OMU representative did not recommend a place on the MBU as there was a clear plan in place for the stability of W with a relative and sibling. By the time of the First Claimant's appeal, which I shall come to in due course, it was clear that this plan had not worked out. W was, in the event, separated from the First Claimant shortly after his birth and placed with foster carers who were not members of his family.

27. Dave (the Head of Decency) felt there would be no risks with alcohol while the First Claimant was in custody and that any lack of parenting skills could be worked on in custody. There was no evidence that P was not cared for the community. He recommended a place in the MBU.

28. Sarah (the Safeguarding Midwife) said that the First Claimant had engaged well with maternity services in custody but that her attendance in the community was poor. P had been placed in a number of vulnerable situations. The First Claimant and her

partner did not protect him. The First Claimant then said that she always tried her best. Sarah thought that the First Claimant would be caring for W in the community, so she recommended a place in the MBU.

29. Janet (the manager of the MBU) said that mothers in the MBU had full maternal responsibility and officers were only there for good order and discipline. There was a gap in information about the First Claimant's parenting capacity. The MBU was not an assessment unit. The mother must be fit to care for the baby. The First Claimant should have sought help. The First Claimant then said that the only help the Authority would give was to take P into care. (At this point in the discussion she was referring to a third local authority in the area in which she had then lived.) Janet said she needed to be convinced that the First Claimant could look after the child and, looking at the previous history and the concerns of children's services, she was not able to recommend a place now. A parenting assessment needed to be done.

30. The Chair said that the process was for looking at the best interests of the child. She said that she did not have the full picture. She felt that the First Claimant was not sharing information about relationships and alcohol. It was regrettable that there was no parenting assessment as the First Claimant had been in custody for four months and there had been an ample opportunity for one to be done. The Authority assessment would have enabled the Board to be clearer about the First Claimant's parenting ability. But there could be no further delay, as the child was about to the born. She makes a similar point in her witness statement where she says that there was no pre-birth assessment by the Authority, which would have enabled the Board to be clearer about the First Claimant's parenting capacity and:

> "We could not delay the hearing because by then it was clear that this would not be forthcoming from the Local Authority prior to the outcome of the criminal trial."

31. The notes record that the criminal process continued. That left the Board with a gap in information about that. The Chair's view, on balance, because of the historic concerns and the unknown outcome of the trial, was that it was not in W's best interests to recommend a place on the MBU. These words are important as they are echoed later in the process.

32. The minutes continue that it was obvious how difficult the decision of the Board was: the Board was split. The majority would not recommend a place on the MBU.

33. The Director of the prison would have the final decision and the First Claimant would be told of her decision within two days. If the Director upheld the recommendation, the First Claimant would have a right of appeal. The Board's minutes record:

> "Best interests of the child: it was decided that in the best interest of the baby a place on the MBU would not be recommended to the Director."

34. The Director of the prison agreed with the Board's recommendation on the same day. She said that:

> "The Board felt that due to historical concerns raised by children's services, the alleged nature of the offence and the uncertainty this brought for the future of the baby in the long term that it would not be in the baby's best interests to recommend a place."

35. Ms Ellis says in her witness statement that she put all the documents which had been before the Board before the Director. Those could not have included the Board's minutes as those were not drawn up until later in December. Ms Scolding told me on instructions that the director was sent an email summarising the Chair's view, which may be the source of the words used in the director's decision. She also told me on instructions that "we can't find it" (that is, the email.)

36. The First Claimant appealed that decision to the Defendant with the help of Ms Ellis. The appeal form is not dated and it is not clear from other evidence when the appeal was sent to the Defendant. The appeal was dismissed on 9 January 2014 by Cathy James. The witness statement of Zoe Markham explains that Ms Markham read the papers and made a recommendation to Ms James.

37. The reasons are short. Ms James took into account the First Claimant's notice of appeal. She also took into account what she described as "the views expressed by the Authority":

> " . . . who have concerns about your previous history of parenting, the alleged nature of the offence and the uncertainty that this will bring for the future of your child in the long term."

She understood the First Claimant's desire to have her baby with her:

> " . . . but also have to take into account the concerns raised by the Local Authority."

She upheld the decision of the Director because she was satisfied that the PSI procedure had been followed and she supported the Board's view that it was not in the best interests of the child to be placed with the First Claimant in an MBU.

38. W has been in foster care since 2 January 2014 under section 20 of the 1989 Act.

39. The parties to the care proceedings have filed information about the role of the Family Court and a schedule of findings which the Authority will be asking the court to make in those proceedings.

40. The Authority, in applying for the care order, relies on the alleged offence and on other matters. The Authority considers that the test in section 31 of the 1989 Act is met, that is that P has suffered significant harm in the past and that P and W are likely to suffer such harm in the future. The Authority has not decided what arrangements should be made for the care of P and W should the Family Court hold that the tests in section 31 are met. The Authority's interim preference appears to be for a special guardianship order for P, which would not sever his ties with his parents, placing him with a member of his family. If this is not possible for W, the Authority's preference is for him to be adopted.

41. The guardian neither opposes nor agrees with the decision not to place the First Claimant in the MBU. On the one hand, W seems settled in his foster placement, but she can understand the First Claimant's position. The Authority has indicated that it would consider applying for an Interim Care Order were the First Claimant to be placed in the MBU. The Authority supports the decision of the Defendant in these proceedings but does not wish to be involved in them.

The legal framework

42. Section 47 of the Prison Act 1952 gives the Defendant power to make rules for the regulation and management of prisons. The relevant rules are the Prison Rules. Rule 12(2) enables the Defendant to permit a woman prisoner to have her baby in prison "subject to any conditions he thinks fit."

43. The Defendant has various policies which deals with women prisoners and with MBUs. PSO 4800 deals with women prisoners generally. Part P refers to pregnant women in prison and refers to PSI54/2011. Admission to an MBU is dealt with PSI 54/2011, which I am told is non-statutory guidance. The status of PSOs was considered by Court of Appeal in P and Q v Secretary of State for the Home Department [2001] 1 WLR 2002 at paragraph 35.

44. PSO 4800P states that women are assessed for suitability to enter MBUs. It and PSO 54/2011 state that the best interests of the child are the primary consideration, but that in the prison context it is not the only one. So, for example, PSO 4800 says that it must be balanced with the need for the safety of the woman's child and that of other children in the MBU. The mother retains parental responsibility for the child.

45. PSI 54/2011 starts by saying that MBUs have been set up by the Defendant to reflect society's normal assumption that the best place for a young child is with his or her parent. It goes on to say that the Prison Rules, the Children Act 2004 and International Conventions provide the legal foundations and principles for the operation of MBUs. The two Conventions referred to are the UN Convention on the Rights of the Child ("the UNCRC") and the European Convention on Human Rights ("the ECHR").

46. Paragraph 2.1.4 of the PSI says that wherever possible all applications should be made not more than three months before the due date.

47. Paragraph 2.2.1 states that the Admissions Board must make a rigorous and balanced evaluation of the available evidence, especially the mother's dossier, and of her evidence. Paragraph 2.2.3 says who should take part in an Admissions Board. The list includes "the applicant plus friend or personal officer if desired." Paragraph 2.2.2 states that if the proposed arrangements are more favourable to the child's development than the MBU, then the Board must consider if it really is in the child's best interests to be admitted, especially if the length of the sentence precludes the mother from leaving with her baby. Paragraph 2.2.12 says that despite a long sentence, it may be considered to be in the child's best interests to allow admission for a short period.

Issues such as allowing the mother to form a relationship with the child and breastfeeding may be relevant.

48. Paragraph 2.2.2.5 contains the criteria which must be met before admission to an MBU. The first criterion is the best interests of the child. The recommendation of the Board must be accompanied by reasons. It must be submitted to the governor for him or her to decide whether a prisoner is to be admitted to the MBU.

49. Paragraph 2.2.12 lists the types of decision that can be made. The list includes temporary admission while a prisoner is on remand. This is subject to a further decision by the Board if the prisoner is convicted. There can also be an emergency admission and a conditional refusal, that is a refusal subject to the opportunity for the applicant to address the issues which have led to the refusal. The fact that the PSI provides for such a process suggests that the PSI envisages, where possible, that an Admissions Board is to be held well before the due date. Admission should be refused if the prisoner fails to meet any of the admission criteria.

50. Paragraph 3.1.1 states that the MBU exists first and foremost for the benefit of children who are not prisoners and have committed no offence. Their best interests are the primary concern in all matters. If it is considered to be in the child's best interests, he/she should be admitted to the unit. In normal circumstances, in the community it is in the best interests of the child to stay with its mother. But that is not so in prison. It is unrealistic to expect that it is in the best interests of all children to stay with their mother during her sentence.

51. Paragraph 3.1.9 says that mothers retain parental responsibility for their children in the MBU (and see paragraph 4.2.1.)

52. Paragraph 6.2.3 deals with separation. It says that expert advice is that babies' distress increases from two to four months of age onwards and is greatest at 18 months of age. If separation is necessary, the ideal time for it is when the baby is less than six months old.

53. F v Secretary of State for the Home Department [2004] EWHC 111 (Fam) was a challenge to a decision to separate a mother from her baby. They had been together in a prison MBU for some months. Mumby J, as he then was, held at paragraph 5 that the effect of these provisions is that it is for the Defendant, not the mother, or the Local Authority, or the court, to decide where the baby's best interests lie; and see paragraph 19, where he held that he was not exercising a Family Division "best interests" jurisdiction, but a reviewing function according to conventional public law principles (see also paragraphs 22 and 23 and 31.) So it is not for me to decide what W's best interests are.

54. Section 10 of the Children Act 2004 ("the 2004 Act") imposes a duty on Local Authorities to make arrangements for ensuring that they cooperate with their relevant partners, which are defined in section 11(4). Those arrangements are to be made with a view to improving the wellbeing of children. Neither the Defendant nor a prisoner governor is a relevant partner, but local authorities have a power to make such

arrangements with such other persons as they consider appropriate who exercise functions in the Local Authority's area in relation to children. A prison governor making admission decisions to a local MBU is plainly such a person. The Local Authority has chosen not to take part in these proceedings, so I say this without the benefit of argument from the Local Authority, but I find it difficult to see how a local authority could not consider it appropriate to make such arrangements with the prison governor in its area who is making such decisions.

55. Section 11 of the 2004 Act impose a duty on various public authorities, including the governor of a prison, to make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children. There is statutory guidance about the discharge of this duty which is issued under section 11(4), and I have already referred to it. The public bodies concerned must have regard to that guidance.

56. Section 6 of the Human Rights Act 1998 ("the HRA") requires a public authority to act compatibly with the Convention rights which are in Schedule 1 to the HRA. Article 8 is a right to respect for family and private life. It is a qualified right. An interference with it is lawful if it is in accordance with law, pursues a legitimate aim and is necessary in a democratic society for, among other things, the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

57. In the early days of the HRA there was some debate about the court's role when there is an issue about whether Article 8 rights (such as those, here, of the mother and of her baby) have been breached. The law now is as stated by the House of Lords in, for example, Denbigh High School [2006] UKHL 15; [2007] 1 AC 100. In short, the question whether there has been a breach of a qualified convention right is a question for the court. But in assessing the proportionality of any interferences with a qualified right, the court will pay particular attention (or deference) to the views of any expert decision-maker, at least on those issues where the decision-maker has expertise which the court lacks.

58. In paragraph 41 of F, Mumby J recognised that the Article 8 rights of a parent and child may sometimes conflict. He noted in paragraph 48 that the European Court of Human Rights has held that in such a conflict the rights of the child prevail (by reference to the decision of Yousef v Netherlands [2003] FLR 2010, paragraph 73.)

59. The cases recognise that the separation of a baby and its mother at birth is a very intrusive measure. It has been described as "draconian" or "terrible and drastic". It requires strong justification: P, C and S v UK [2002] FLR 631; X Council v B [2005] FLR 431, per Mumby J (as he then was.) Separation may be permitted by Article 8 and a prolonged prison sentence may provide such justification. But:

> " . . . it is for the State to establish that a careful assessment of the impact of the proposed measure on the applicants and children, as well as of the possible alternatives to taking the children into public care, was carried out prior to the implementation of such a measure . . . " (K and T v

Finland [2001] 2 FLR 79 at paragraph 166.)

The State must adopt the measure which is least restrictive of the rights at issue.

60. The European Court of Human Rights has recognised that Article 8 can impose procedural obligations: W v UK [1987] 10 EHRR at paragraphs 63 and 64, as Mumby J noted in F (at paragraph 157), following the decision of the Court of Appeal in P and Q v Secretary of State for the Home Department [2001] EWCA Civ 1151; [2002] 1 WLR 2001. Those obligations can be owed both to parent and child (F, paragraph 158.) In the case of the parent, the decision-making process must secure that the views of the parent are made known and taken into account and that the parent is able in due time to exercise any available remedies. The critical question is whether the parent has been involved in proceedings as a whole to a degree which is sufficient to provide her with the necessary protection of her interests (W v UK paragraph 64, F paragraph 160.)

61. The way in which these procedural obligations fit into the structure of Article 8 is explained in paragraph 65 of W v UK; if a measure is not fair, it is not "necessary in a democratic society".

62. In the case of the child, in a case like this, I accept Ms Gallagher's submission that Article 8 and the Governor's independent statutory obligation imposed by section 11 of the 2004 Act require the Governor to do two things, among others:

(1) to assess the best interests of the child and to treat them as a primary consideration when other interests are being considered; and
(2) to evaluate the possible impact of the decision on the child.

That submission is based on General Comment 14 by the United Nations Committee on the Rights of the Child on the right of the child to have his best interests taken into account as a primary consideration, a right which is conferred by Article 3 of the UNCRC.

63. Procedural safeguards against arbitrariness are especially important here, as a decision to separate a mother and baby at birth may have irreversible consequences for both: W v UK, paragraph 62. A body of research shows that early attachment between mother and child is vitally important. The effects of sudden or repeated separations can be very damaging for a child's developing personality (the Report of the Children's Commissioner on prison MBUs) Moreover, a baby placed with new carers may, in time, establish strong bonds with them, with the result that it might not in his best interests, later on, for those bonds to be broken and for him to be reunited with his mother (W v UK, paragraph 62.)

64. Further, the prison governor, as a decision-maker governed by public law, is bound by the general public law principle stated by Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at 1065B:

> " . . . the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

Ms Gallagher also relies on an information-gathering obligation imposed by Article 8. She

draws my attention by analogy to the decision of the Supreme Court in HH [2013] 1 AC 338 and the observations by Baroness Hale at paragraphs 82 and following about the types of information the court considering an extradition request may want to get in order to inform its decision about the Article 8 rights which are in play.

Discussion

65. The legal framework, including the Defendant's policies and the Board in its deliberations, all recognise the central importance of W's best interests. But that does not mean that the Defendant has discharged his relevant duties. That recognition is a starting point, but no more.

66. A key, if not the key, question here is whether the First Claimant was fit to look after W. No assessment of this had been done, although the prison authorities had known since August that the First Claimant was in their care, was pregnant and wanted to be admitted to the MBU with her baby when it was born. Ms Ellis had tried get the Authority to provide an assessment but it became clear that they were not prepared to do a parenting assessment until after the First Claimant's trial, and the help which they did provide, in the shape of a report, was provided very late and did not sufficiently address that key issue in the view of two of the members of the Board.

67. It was not only in the First Claimant's interests that such an assessment should be carried out. It was also an essential step to discovering what W's best interests were. If the assessment showed that the First Claimant was a fit parent, then it might well also show that it was in W's best interests for the First Claimant to be admitted to the MBU, at least pending her trial. Conversely, if it showed that she was not, it would be likely also to show that it was not in W's best interests for the First Claimant to be admitted to the MBU with him, as the sooner he were placed elsewhere, the more likely he would be to establish bonds with a different carer.

68. The decision of the Board was a split decision, an extremely rare event in the Chair's considerable experience. Two members of the Board felt that it was in W's best interests for the First Claimant to be admitted to the MBU, despite the lack of a parenting assessment. Two, the manager of the MBU and the very experienced Chair, seemed to have considered that without this information, they could not be confident that placement in the MBU was in W's best interests. Because of the Authority's delay in providing the limited help which it did provide, a decision had to be made by the Board on 5 December and could not be postponed, as the First Claimant's due date was imminent. As Ms Gallagher put it, the reasons of the Board for interfering with the Article 8 rights of the First and Second Claimants have to be relevant and sufficient: the reasons were relevant but not sufficient, as a lack of information which the prison authorities should have gathered for making the decision is not a sufficient reason for interfering with the Article 8 rights of the First and Second Claimants.

69. Ms Scolding, for the Defendant, argues that it is not the Defendant's fault that no assessment was available, as this was the Authority's job and not that of the Defendant. I reject that argument. A similar argument was rejected by Mumby J in F at paragraph 172.

70. Section 11 of the 2004 Act requires the Defendant to make arrangements to promote and safeguard the welfare of children. In a case like this, and I doubt that this case is unique, an essential step in fulfilling that duty is to provide, or to make arrangements for the provision of, an assessment of the child's best interests: here, the most obvious facet of that, it seems to me, was a parenting assessment. It is for the Defendant to decide how best to do this, but in a case like this, where there is plenty of time between the arrival of a pregnant prisoner on remand in a prison and her due date, it should be done. Moreover, given section 10 of the 2004 Act, local authorities and prison authorities should have proper arrangements between them for cooperating in this sort of case.

71. There are three ways in which this duty arises, as Ms Gallagher submits: as a direct implication from section 11 of the 2004 Act, as a result of the decision in Tameside, and as a result of the procedural obligations imposed on the Defendant by Article 8. Moreover, it is difficult to see how, when faced with a request for a parenting assessment and given its own powers conferred by section 10, a Local Authority should properly refuse such a request.

72. This conclusion makes it unnecessary for me to decide whether, as Ms Gallagher argues, Article 8 or the UNCRC required that W's interests be separately represented at the Admissions Board by someone other than the Authority. But I do not consider, on the facts of this case, that the Authority did adequately represent the interests of W, for the reasons I have already given.

73. The Authority's report and recommendation were only available on the day of the hearing. This was not ideal, as the Chair recognised, with some understatement. Of itself that might not have made the decision of the Board unlawful but it increases my unease about the procedure which was adopted in this case.

74. That unease is compounded by two other factors:

(i) the very limited opportunities given to the First Claimant, whose first language was not English, to take on board all the documents which she was given, for the very first time, on 5 December, including the Authority's adverse report;

(ii) the fact that the First Claimant does not seem to have been told that she could have a friend or personal officer with her at the Board.

75. The impression created by this case is that the prison authorities allowed this case to drift. Ms Ellis seems to have been doing her best. Nevertheless, it seems that someone in the prison should have got to grips with this case as soon as the First Claimant made her application for admission to the MBU and worked out what information was needed to help the Board make its decision, in good time before the due date. Someone might then have realised sooner that the Authority did not understand what they were being asked to do, or why, and why, in particular, the provision of a parenting assessment mattered not only to the First Claimant, but was a vital part of informing the Board about W's best interests; and why that could not be put off until the date of the criminal trial, which was then, and is now, some months away. This case cannot be the only case in which an assessment of a prisoner's ability to care for her baby in an MBU is an important part of any Board's consideration.

76. It is true that apart from providing that an application must be made three months before the due date, the PSI does not expressly require things to be done in a particular schedule, or to be done quickly. But it is obvious that a Board must take place as soon as possible after a prisoner applies for a place on an MBU, and it is obvious that the prison authorities must be diligent and active in working out what information a Board is likely to need and then in providing the Board with that information. Otherwise, the provisions of the PSI cannot be effective; for example, the provisions about conditional refusal and any appeal from an adverse decision of a director or governor are likely to be pointless.

77. For these reasons, the procedure adopted by the prison authorities in this case did not comply with the procedural requirements imposed by Article 8, with the Tameside duty or with the duty imposed on the prison Director by section 11 of the 2004 Act. The reasonable steps which the Authority should have taken included gathering the information which was necessary to make an informed decision about the best interests of W, and a parenting assessment was a critical part of that information.

78. There is a further problem with the recommendation of the Board and the decision of the Governor. It is that, in the circumstances of this case, where an application for temporary admission was being made, the Board and the Governor misdirected themselves in taking into account the uncertainties about the outcome of the trial. It was that very uncertainty that the temporary admission process in the PSI is designed to mitigate. The Board's conclusions show that in the final analysis it seems to have approached the application as if it were an application for long term admission to the MBU, but it was not. This means that the decision is wrong as a matter of domestic public law and it also means that the decision was disproportionate. The Board appears not to have taken into account the fact that it could have decided on temporary admission as a less intrusive measure than no measure at all. Ms Gallagher relies, by analogy, on the decision of Court of Appeal in LA [2013] EWCA (Civ) 489 at paragraphs 57 and 59, per Black LJ.

79. In saying this, I am not casting any doubt on the expertise of the Board in the areas in which it is expert. I am, rather, deciding that the Board's recommendation was procedurally flawed and based on a misdirection of law.

80. I have heard submissions from the parties about the appeal. It falls, in my judgment, with the decision of the Governor, for similar reasons. But the fact that, as Ms Scolding conceded, the appeal, by the time it was decided, was academic, because W had been born, separated from the First Claimant and placed with foster carers, is a further illustration of the problems caused in this case by the fact that the Board was held so late in the pregnancy. Moreover, by the time of appeal, as the Defendant must have known, one of the factors which had swayed one of the votes against a recommendation by the Board had changed, because the familial placement had not taken place.

81. For these reasons I therefore grant permission to apply for Judicial Review of the decisions of the Director of 5 December 2013 and of the Defendant of 9 January 2014 and I grant this application for Judicial Review.

82. Yes, Ms Sikand.

83. MS SIKAND: I am grateful, my Lady. My Lady, issues arise as a result of your judgment and that, firstly, is the question of relief. The first claimant submits that, other than a quashing of the decision of the director of the prison, we would ask that this court make an order that a properly constituted temporary admissions board of the MBU reconsider the first claimant's application for a place in the MBU on an emergency basis and no later than three weeks from today. I will come back to what I understand to be the defendant's resistance to that order.

84. There is also the question of costs, but before that also we seek declaratory relief, as it were, within your order that the Article 8 rights of both claimants have been breached.

85. On the question of damages, before I come to the question of costs, the first claimant proposes that that claim be stayed for negotiation between the parties until 1 September 2014. We propose that if the question of damages and/or quantum cannot be agreed by that date, the parties are to inform the court and the matter is to be listed before you as soon as possible after that date, with a time estimate of half a day.

86. As far as the first claimant's costs are concerned, my Lady, the order we seek is that the defendant is to pay the costs of the first claimant, to be assessed on a standard basis if not agreed, and we seek further detailed assessment of our costs pursuant to paragraph 4 of the Community Legal Service (Funding) Order 2000. I do have this in draft written form.

87. MRS JUSTICE ELISABETH LAING: That is probably going to help the associate a great deal. Once I have decided the contested issues, I will ask the three of you, between you, to agree on a draft and submit that because it will help the associate enormously.

88. MS SIKAND: My Lady, can I just deal with the question of a mandatory order in relation to when the board sits. My learned friend for the defendant had indicated to me before we sat that the local authority have carried out an assessment of the first claimant. She told me that it was some kind of psychological assessment, but she took the view that it constituted a parenting assessment. In fact, that is not correct. The first claimant has been psychiatrically or psychologically assessed -- I'm not sure about the expertise and I can get that information in a moment -- in relation to, as we understand it, whether or not the current carer of P is able to take on W and has nothing to do with her parenting capacity. It may well be that that parenting assessment has to be carried out as a matter of urgency but, given the delay the local authority has already caused, we seek the shortest possible timeframe.

89. MRS JUSTICE ELISABETH LAING: Does the local authority have to carry out the parenting assessment or can it be carried out by an independent social worker appointed by the Secretary of State?

90. MS SIKAND: We would have to get funding for an independent social worker.

91. MRS JUSTICE ELISABETH LAING: Well, it's the Secretary of State's job, not yours.

92. MS SIKAND: The Secretary of State can get an independent social worker to carry out the assessment. Perhaps my learned friend can respond as to what the proposal is.

93. MRS JUSTICE ELISABETH LAING: Yes, that would be helpful.

94. MS SCOLDING: We spoke to the London Borough of Ealing this morning. I understand that counsel for the mother in the family proceedings may be here and may well be able to give you more detailed or up-to-date information about what the timetable is for the care proceedings in terms of service of evidence. We were told by the London Borough of Ealing, and I can say no more than that, that there had been some form of psychological assessment for the mother with both W and P and that that report was due on 16 May 2014.

95. We were further informed that all the evidence in the care proceedings is due to be filed by 3 June 2014. Now, I am not sure whether or not that is just from the London Borough of Ealing's perspective or whether or not that's also the guardian's report.

96. Obviously, the most obvious people to carry out this parenting assessment, because they would, firstly, already have undertaken some form of assessment for the purposes of the care proceedings and, secondly, because they would have access to all the relevant people and information to do so, would be a representative of the London Borough of Ealing. It would be somewhat surprising if, given that there is meant to be a final hearing which deals with, as I understand it, both fact-finding and best interests, for some form of assessment not to have been carried out at that date. But I can see counsel for the mother shaking her head. I simply don't know. It would be usual practice, if there's going to be an oral hearing, for all that evidence and information to be there.

97. As to the proposal that an independent social worker be instructed, I have no direct instructions on that point. However, I would make two practical points, which is: 1) how quick would it be to be able to identify somebody; 2) what would be the nature of the work that an independent social worker would feel necessary to carry out; and 3) the timescales in which such an independent social worker could report and access to relevant information, because let's not forget, my Lady, the vast majority of information that's going to be gathered in this case is going to have been gathered by the care proceedings and therefore permission will be required of the family judge before any disclosure of any information can be made in respect of those proceedings. That's pretty much going to be all the information which the independent social worker would need.

98. It seems to me that there is an inherent tension between wanting to do things quickly in this case -- and I well understand my learned friend's submission and suggestion as to a particular date, but also making sure that the information before the board does not fall into the same trap as the previous board fell into. I consider that it is likely to be impracticable to secure the services of an independent social worker, to have that

independent social worker gain access to all the relevant information, for the independent social worker to see W on her own, B on his own, B with the carers, W and B together and possibly P as well and P and his carers together within any timeframe of less than six to eight weeks. If I think about the steps which an independent social worker would have to take in order to reach a rational and informed conclusion, that would be the absolute minimum information that the independent social worker would need. It is likely to be much quicker if the London Borough of Ealing does so, just from a purely practical perspective, although we have been told by them that having anything much before a week after they have received the psychological report of 16 May 2014 is likely to be impracticable and they have given us no promises about any dates whatsoever.

99. So that's the point I make. The only other alternative that I would suggest is to have the guardian for the children, who has already been appointed in the care proceedings, to carry out this particular parenting assessment. That solves the problem -- no.

100. MS SIKAND: My Lady, the guardian is not in a position and could not carry out that role. May I just clarify that at the moment it is not clear at all what is going to happen in the family proceedings on the 30th and whether, in fact, they are even going to get to a fact-finding hearing because that date clashes with the criminal pre-trial review. So the judge has listed it for hearing that day, but they will decide on that day what to do next.

101. MRS JUSTICE ELISABETH LAING: Does the first claimant need to be present at the pre-trial review in the criminal proceedings?

102. MS SIKAND: As I understand it, there is an order for her to attend. Certainly the Crown Court hasn't excused her attendance. I don't know enough about that and I can find out, but the most important point is that the local authority will not carry out the kinds of assessment that we're talking about until the fact-finding aspect, the threshold hearing, is completed because it is a split hearing. So, first of all, we don't know when the first part of the split will be completed and then the kinds of assessments that we're talking about will follow thereafter. So that's the first point.

103. There is no reason in principle why an independent social worker couldn't get on with carrying out a parenting assessment, as opposed to any other kind of assessment, if the Secretary of State is prepared to pay for it and give us an undertaking.

104. MRS JUSTICE ELISABETH LAING: Well, Ms Scolding has just listed some of the practical obstacles which she says will mean that it's going to take, she estimates, a further six to eight weeks for an independent social worker to provide a report.

105. MS SCOLDING: I'm sure the official solicitor, who has more experience than I do in these matters, can provide us with some practical experience of how long it takes. I suspect anything less than a month would be practically impossible on a realistic basis, given the work that needs to take place, bearing in mind the fact that W is in one place, the mother in another place and P is in another place, neither of which are

geographically that near to each other. I'm not saying the geographic reasons, for obvious reasons, as I understand --

106. MRS JUSTICE ELISABETH LAING: It's not immediately obvious to me why P would need to be involved.

107. MS SCOLDING: My limited experience in these matters is that the independent social worker may well wish to see P in order to be able to comment upon whether or not P is demonstrating obvious signs of difficulty, attachment problems, et cetera, which can only have resulted from the care of WB in the circumstances of this case. Although I'm not saying it would always be necessary, I suspect an independent social worker would be likely to say --

108. MRS JUSTICE ELISABETH LAING: Because P has already been separated from her for several months.

109. MS SCOLDING: Yes, and I accept that but I accept that there's an inherent tension here in terms of how long it's going to take to do it. I have no instructions that we will pay for it; however, you can always make a direction along those lines if you consider that that is the only practical solution to that problem. I would indicate, however, that the Secretary of State would be firm in stating that this would be on the exceptional facts of this case and not in order to encourage applications for independent social workers and parenting assessments in all cases before the MBU.

110. MRS JUSTICE ELISABETH LAING: No, I understand that.

111. MS SCOLDING: It may well be that the official solicitor can provide us with some assistance as to a) whether or not they have a relevant pool of people, and b) the timescale within which that relevant pool of people could be instructed and could report. There would then obviously need to be a period of time whereby, given the comments that you've made, my Lady, that W in particular has an opportunity to reflect upon what the conclusions of that report would be.

112. MRS JUSTICE ELISABETH LAING: W?

113. MS SCOLDING: The other question that my instructing solicitor puts before me is if it's going to be, in effect, a joint instruction, what the position is in respect of whether or not it should be solely the Secretary of State who bears responsibility for those costs or whether or not some of the other parties should bear such responsibility as well.

114. MRS JUSTICE ELISABETH LAING: Well, I think it should be clear from what I've said already that my view is that it's the Secretary of State's responsibility to obtain this information.

115. MS SCOLDING: I accept and understand that.

116. MRS JUSTICE ELISABETH LAING: So that's the answer to that point. Ms Sikand, do you want to add something?

117. MS SIKAND: My Lady, just to say I do have counsel sitting to my left from the family proceedings. One of the directions that was made at the last hearing was in relation to an expert, unfortunately named as Mr Tricky, who is carrying out the assessment of P. There would be no need for there to be a further assessment by the independent social worker in relation to P. The independent social worker would need to see W but not P and as long as funding is not an issue, which it always is for those of us constrained by public funding restraints, then I am told that it is possible to get an independent social worker quite quickly and able to complete a report within a period of a maximum of four weeks.

118. MRS JUSTICE ELISABETH LAING: I do take Ms Scolding's point.

119. MS SIKAND: And we would have to make an application in the family proceedings for disclosure of the documents.

120. MRS JUSTICE ELISABETH LAING: That's one of the points I was going to make because Ms Scolding rightly says that that would need to happen, and how long is that going to take?

121. MS SIKAND: That's right but to date, my Lady, the Family Court knows full well about these proceedings and the judge has been extremely helpful with giving us permission as quickly as possible.

122. MRS JUSTICE ELISABETH LAING: That doesn't sound as though it's going to be --

123. MS SCOLDING: I suspect that won't be an obstacle in terms of some of the proceedings, but there is the practical matter of having to make the application, et cetera, et cetera. I suspect that that problem can probably be resolved by Monday at the latest in terms of disclosure, but that obviously would depend on the judge's plan because I assume that there's a judge who is judicially case managing it and it would have to be him who made that decision, rather than any judge.

124. MS SIKAND: Well, it's a her and she has already been put on notice by my learned friend and if we were successful in these proceedings, that she would be returning on an urgent basis to seek disclosure. So the judge is already alerted.

125. MRS JUSTICE ELISABETH LAING: So that aspect of things is not going to cause such a problem.

126. MS SCOLDING: No.

127. MRS JUSTICE ELISABETH LAING: So the first issue in terms of timing is it seems to me that you are likely to want the board to have a parenting assessment before it makes another decision.

128. MS SIKAND: My Lady, yes.

129. MRS JUSTICE ELISABETH LAING: Exactly. So the board can't sit before that parenting assessment is available, can it?

130. MS SIKAND: No.

131. MRS JUSTICE ELISABETH LAING: So that's, as it were, the first issue about the timing of the board's sitting.

132. The second question is -- and I think this is a question for you, Ms Scolding -- what constraints, if any, are there on a board being assembled to sit?

133. MS SCOLDING: Other than the social services representative and Ms Rogers, everybody else is based in and around the prison, so unless they are on leave -- but my instructions are that the individuals from the prison and the reports from the prison can be collated very quickly. So that isn't going to be a problem and even if Ms Rogers isn't available, there are four other chairs who sit for admissions committees on the MBUs who can be called upon if necessary.

134. MRS JUSTICE ELISABETH LAING: That's extremely helpful. So it sounds as though the main timing issue is how quickly a parenting assessment can be available and any order I make needs to take into account the fact that that is going to take -- it sounds as though the consensus is it's going to take about four weeks.

135. MS SCOLDING: I don't know whether Ms Gallagher can assist us in her role as official solicitor's representative, who are used to, as a matter of routine, instructing independent social workers.

136. MS GALLAGHER: My Lady, yes. We are supportive of the first claimant's position regarding timing and, indeed, we were going to suggest the ISW route, the independent social worker route, given that there has been repeated foot-dragging, as is evident from the judgment, in respect of Ealing. So if there continue to be problems in relation to Ealing, an ISW is obviously the way to cut through that.

137. Whilst the official solicitor wouldn't necessarily have a continued role in that regard, in relation to the assessment -- our role is in these Judicial Review proceedings -- we are very able today, immediately after the hearing, to provide a list of ISWs who may be able to assist. In our experience, whilst it sometimes can take a number of weeks for an independent social worker to produce a report and, indeed, in some cases even longer, it's very context-specific and also a number of the delays which we tend to experience are in the context of the Legal Aid Agency-funded cases where there are particular issues about restrictions on their costs and a delay in getting a response from the LAA. If the defendant, not faced with quite the same constraints as publicly-funded claimants have in these cases, if they didn't have those restrictions we think it could potentially be turned around quite quickly. We can certainly provide names, my Lady, later. But we do have some other submissions in relation to timing. I'm not sure if it would be helpful to deal with it.

138. MRS JUSTICE ELISABETH LAING: It would be very helpful to hear from everybody.

139. MS GALLAGHER: We have submissions on five issues, my Lady. I'm not sure if you want to hear them all now, or just on timing.

140. MRS JUSTICE ELISABETH LAING: Let's just hear what you have to say on timing, please.

141. MS GALLAGHER: Certainly. In relation to timing, my Lady, we support the suggestion of the first claimant that there be in the order a long stop period within which the board should take place. One way of addressing the concerns raised by Ms Scolding is to couple that with liberty to apply, given that this case is going to have an ongoing element anyway in relation to the question of damages, and we suggest that that could address it.

142. We have three central concerns regarding the approach of the defendant. Firstly, this is a temporary admission application. The entire point is to ensure that there's a holding position pending the outcome of the criminal proceedings, so we are obviously quite concerned with the suggestion that, despite the background to this and the very long period of separation already of mother and baby, we would be dealing with another two-month period, which would take us towards the criminal trial.

143. The second issue is, as my learned friend for the first claimant has pointed out, the family proceedings are in a state of flux; there's no certainty that there will be a result of the next hearing. But also, as you'll see from the witness statement of Mr Studdert for the official solicitor, the criminal proceedings are also in a state of flux and it's not clear when they will end, although I understand from Ms Scolding's submissions that she is no longer standing by the suggestion that everything should await the outcome of the family and criminal proceedings. The position has, at least, shifted from that.

144. The third issue, my Lady, which the official solicitor is particularly concerned about, relates to that critical period identified in the Children's Commissioner's report, which we took you to yesterday, regarding the severe impact of separation between six months and four years. We are very conscious that W is now five months and that, apart from the first two days which he spent with his mother in hospital, over that period he has been developing bonds with a foster family, who are highly unlikely to be his long-term primary caregivers, regardless of the outcome of the criminal proceedings. If you look at all of those factors, we consider it essential that this decision take place as quickly as possible and we think it may focus the mind to have a long stop date in the order, albeit a realistic one. So we would like a realistic but tight timetable. We certainly don't agree with the six to eight-week timetable which is suggested.

145. As regards a number of the difficulties which were raised in respect of the parenting assessment, the first issue -- and, we agree, the critical issue -- it's quite difficult to give a realistic assessment without making enquiries of independent social workers and, indeed, without making enquiries of Ealing in light of a judgment which is critical of their foot-dragging to date and in circumstances where they have had an obligation under section of the Children Act and, indeed, under the statutory guidance which we took you to yesterday in relation to producing assessments in respect of children as promptly as possible. There used to be, my Lady, specific time frames in place. There aren't any longer but, under the Working Together to Safeguard Children

guidance, it makes it very clear that for children who need additional help, every day matters and time is of the essence.

146. MRS JUSTICE ELISABETH LAING: Sure.

147. MS GALLAGHER: And there are statutory obligations on Ealing, which mean that if they are told, "You need to get your finger out, get on with it," to use your phrase, my Lady, during the judgment, "and produce a parenting assessment," we really struggle to see how they could justify a six to eight-week timeframe in that context.

148. There's also a practical issue about obtaining papers not just in respect of family proceedings, but also in respect of the Children Act files, in essence, some of which seem to rest with Hackney rather than Ealing. Again, in our experience, although sometimes authorities can be difficult, that should be a relative speedy process. There's no reason why they can't be provided quickly if the first and second claimant consent to any files in relation to them being provided quickly to an independent social worker.

149. So our suggestion, my Lady, is that we go for a three to four-week timeframe in the order with a long stop date, probably a specific date rather than just three weeks from today, as is phrased in paragraph 5 of the draft order provided by the first claimant.

150. MRS JUSTICE ELISABETH LAING: I'm not sure I've seen that, actually.

151. MS SIKAND: Can I pass a copy up? **(Handed)**.

152. MRS JUSTICE ELISABETH LAING: Has Ms Scolding been given a copy?

153. MS SCOLDING: No, I haven't.

154. MS GALLAGHER: I'm sorry, it was just passed to me. I assumed it had been passed up, my Lady.

155. MRS JUSTICE ELISABETH LAING: It would be helpful if everybody could have a copy, please.

156. MS GALLAGHER: So, my Lady, we would suggest in paragraph 5 a specific date be added but there be liberty to apply to protect the position if there are, indeed, insuperable difficulties, but a lot of the difficulties which are raised are not insuperable and if Ealing does place those restrictions in place of getting a parenting assessment quickly, we suggest that that isn't in compliance with their statutory obligations under section 17 and the relevant guidance and section 11 of the Children Act 2004, which of course applies to them.

157. My Lady, I am sorry about the confusion about this draft order, it was plainly a draft order which was prepared by the first claimant prior to hearing the judgment, so there are a number of likely tweaks and you've heard submissions on that.

158. We did have a number of issues on which we wanted to address you. I am happy to take that now or later.

159. MRS JUSTICE ELISABETH LAING: I'm just having a quick look at this. Does the second claimant have CLS funding as well as the first claimant?

160. MS GALLAGHER: Sorry, my Lady, I didn't hear.

161. MRS JUSTICE ELISABETH LAING: I'm just looking at paragraph 7. Both the first and second claimants have funding.

162. MS GALLAGHER: Yes, we do have public funding. My Lady, if it assists, on this draft, in broad terms, the second claimant agrees with paragraphs 1, 2, 7 and 8 and then we had five points to make, one of which was timing. Should I address you now on the other matters?

163. MRS JUSTICE ELISABETH LAING: Shall we just focus on the timing issue first, which is the issue about the drafting of paragraph 5 of the first claimant's draft? I've heard submissions now from everybody on that. Does anybody want to add anything to what I've heard already on the drafting of paragraph 5?

164. MS SCOLDING: No, the only thing I would say is that all that says is that, as far as paragraph 5, the first point I want to make is a drafting point, which is if we are going to be saying that there needs to be a further parenting assessment, it would seem to me to be sensible to include the requirement for such within the express nature of the order, so that there can be no doubt that that is a necessary prerequisite in order to avoid difficulties with that information not being provided.

165. Secondly, if, as the official solicitor is suggesting, which was my original suggestion, the easiest mechanism is that of Ealing, whether or not some words or some recital should be put at the beginning in order to provide, at the very least, encouragement, if not, or the appropriate imprecations for them to undertake --

166. MRS JUSTICE ELISABETH LAING: The problem is that Ealing aren't a party to these proceedings.

167. MS SCOLDING: No, so I can't ask you to make an order. I'm simply saying that there might be something that would be put within a recital which I'm sure could be agreed between the parties in that respect.

168. MRS JUSTICE ELISABETH LAING: I'm not really sure about that. If you can come up with a suggestion I'll consider it, but I think the difficulty is Ealing, perhaps advisedly, are not a party to the proceedings.

169. MS GALLAGHER: My Lady, we wouldn't agree to a reference to Ealing going into the order in circumstances where they haven't been represented and also in circumstances where it's quite apparent that the delays have come about because of the Secretary of State pointing to delays by Ealing. It's quite clear that the obligation is on the defendant to obtain the relevant information -- that's clear from your

judgment -- and we think it would be cleaner for the order just to make explicit reference to the necessity of (inaudible) in the order. We can see the value of that. Then it's a matter for the Secretary of State as to how they obtain that, and if they do reach insuperable difficulties, as we say, then they would be at liberty to apply to protect their position.

170. MRS JUSTICE ELISABETH LAING: All right. I must say I am inclined to agree with Ms Scolding that there does need to be a separate paragraph in the order dealing with the need for a parenting assessment. What I'm going to suggest is a new paragraph 5 that says: "The defendant procure a parenting assessment by an independent social worker or otherwise in sufficient time for it to be considered by the board at the hearing referred to in paragraph 6 below." So what's now paragraph 5 will be paragraph 6.

171. MS SCOLDING: Yes. I'm grateful.

172. MRS JUSTICE ELISABETH LAING: So it's up to the defendant whether he uses an independent social worker or whatever, but it has to be put in in enough time for the hearing by the board. What I am going to say for paragraph 6 is that, "A properly constituted admissions board of the MBU at HMP Bronzefield reconsider the first claimant's application for a place at the MBU." Can somebody tell me what the date is -- well, we'll say, "As soon as possible and in any event no later than -- " If somebody could tell me what the date is four weeks from today, please.

173. MS SCOLDING: 4 June.

174. MRS JUSTICE ELISABETH LAING: Thank you. So the primary obligation is for the board to hold the hearing as soon as possible and then there's a long stop date of 4 June. I'm going to add at the end of the order, whatever paragraph number that is, "There be liberty to apply to the parties on giving 24 hours' written notice to the other parties." So if something goes badly wrong with this timetable, then there can be a further hearing. But I am not going to be hugely sympathetic unless there is a very good excuse for the hearing not having taken place as soon as possible and, in any event, by the long stop date.

175. So I think we need to add to paragraph 4: "The decisions of the director to refuse the first claimant's place and the decision of the defendant of 9 January 2014 to dismiss the claimant's appeal are quashed," and I think we need to add to paragraph 1: "Permission to apply for Judicial Review is granted." Then add to paragraph 2: "The claim for Judicial Review of the decisions of 5 December 2013 and 9 January 2014 is allowed."

176. Are there other points arising from other bits of the order that people want to raise with me?

177. MS GALLAGHER: My Lady, I indicated that there would be five issues. You have dealt with the specifics about the timing and also we wish to seek the quashing of both decisions, which you have also dealt with. So there are three remaining issues: the specifics in relation to declaratory relief and just the phrasing of item 3. We are

relatively neutral as to whether you say, "It is ordered that the court finds," or whether "the court declares," but we would suggest that however it's phrased --

178. MRS JUSTICE ELISABETH LAING: Yes, I think "declares" is better.

179. MS GALLAGHER: We would suggest that however it's phrased, my Lady, either here or in a separate paragraph, it should also reflect that, in the finding of the judgment, there has also been a breach of section 11 of the Children Act 2004 and the domestic public law obligations in addition to Article 8. It just reflects what you've said today, my Lady, so I doesn't anticipate that being controversial.

180. MRS JUSTICE ELISABETH LAING: You can, no doubt, come up with a formula to reflect that.

181. MS GALLAGHER: However we phrase it, it's quite clear that it's Article 8, plus section 11 of the 2004 Act, plus domestic public law duties obligations.

182. My Lady, in relation to paragraph 9 on damages -- damages is dealt with in paragraphs 8 and 9 -- we entirely agree that the matter should be stayed for negotiation until 1 September 2014. The reason for that is that ultimately the quantum of any damages may be affected by the ultimate outcome and you've made reference in your judgment to the fact that sometimes these decisions can be irreversible and the quantum in a number of these cases reflects that if the decision has been irreversible or if the mother and baby are returned, it can impact on the ultimate quantum. It's not an urgent matter, so ourselves and the first claimant are agreed in relation to that.

183. We would suggest in respect of paragraph 9, my Lady, two things. Firstly, the indication in the phrasing is that if there is agreement -- because it says, "If the question of damages and/or quantum cannot be agreed by that date, the parties are to inform the court," and so on, there will need to be a settlement hearing in any event because W is a minor, but we don't suggest that the order refers to that. What we do suggest, and this is the second point, is that there should no reference to listing now or time estimate. We suggest instead, my Lady, that paragraph 9 reflect that the matter be reserved to you and that you review on the papers after 1 September, when we inform you as where we've got up to. And if there is agreement, there is still going to need to be an infant settlement hearing, and if there isn't agreement, we'll obviously have a clearer picture on the time estimate because we'll know whether the principle of damages is an issue, whether the quantum of damages for both claimants is in issue and just the extent of the material. There are obviously three parties and we are conscious that yesterday we did manage to get through it in a day, but we can see potentially half a day, although that's the norm in cases with the two parties on Article 8 damages that go to the Queen's Bench Division will be hived off from JRs. We can see here there are three parties and it may not be realistic, but we don't know at the moment.

184. MRS JUSTICE ELISABETH LAING: I agree, I think it's undesirable to tie things down at this stage when we don't know what the issues might be, so, subject to anything Ms Scolding or Ms Sikand have to say about paragraph 10, I'm inclined to agree with that approach. Do either of you disagree with it? Ms Scolding?

185. MS SCOLDING: I don't disagree, I agree in principle that the issue of damages needs to be hived off. Secondly, that there needs to be some kind of period of reflection, shall we say, and discussion between the parties and, thirdly, that the matter then needs to come before you if it's not to be determined. I'm not sure what the proposal is from the first and second claimant, whether they are suggesting that the first open date after 1 September would be the final hearing of the matter or whether it would just be a case management.

186. MS SIKAND: Or we would have to have some sort of directions at the first hearing.

187. MS SCOLDING: It seems to me that it should be listed for a case management conference, in which case half a day is not going to be necessary.

188. MS GALLAGHER: My Lady, we are just suggesting that you review it on the papers as soon as possible after 1 September. We update you, you review on the papers. We don't think it's necessary to bring the parties to an oral hearing on directions on a matter like this.

189. MS SCOLDING: Sorry, I'm afraid I was taking instructions at the same time, so I might have missed out on exactly what Ms Gallagher said.

190. MRS JUSTICE ELISABETH LAING: I think that seems sensible because it's a proportionate way of dealing with it and if there doesn't need to be a hearing --

191. MS SCOLDING: And it also seems appropriate that it's you, my Lady, who deals with the question as you've heard all the facts of the matter, so you can make that decision.

192. MRS JUSTICE ELISABETH LAING: Absolutely.

193. MS SCOLDING: So that's fine. I am quite happy for there simply to be a review on the papers and the parties set their positions out as to what might need to happen at that point.

194. The only other issue is that of costs. I am instructed that we don't oppose paying the first claimant's costs and we also, on the particular circumstances of this case, don't oppose paying the second claimant's costs.

195. MRS JUSTICE ELISABETH LAING: That's very helpful and, I think, very realistic because the court has been significantly assisted by submissions of the official solicitor on behalf of W and, in any event, I think it would have been reasonable for him to be separately represented because his interests and those of the first claimant don't coincide necessarily.

196. MS SCOLDING: Yes. In order to be absolutely clear, I examined what happened in the previous cases and in the previous cases, where there was discussion about costs, there was agreement that both the official solicitor's costs and the claimant's costs should be paid in other mother and baby unit cases because of the nature of the issues which are at stake.

197. MRS JUSTICE ELISABETH LAING: Absolutely. It's both the nature of the issues which are at stake and the fact that the interests of the two --

198. MS SCOLDING: The interests of the two are not necessarily ad idem, I accept that.

199. MRS JUSTICE ELISABETH LAING: Good. Is there anything else that --

200. MS SIKAND: My Lady, there is one other matter. We need a transcript of your judgment as soon as possible for a number of reasons.

201. MRS JUSTICE ELISABETH LAING: I had made a mental note to raise that with you and I had forgotten. So, yes, I will ask for there to be an expedited transcript.

202. MS SIKAND: Thank you, my Lady.

203. MS GALLAGHER: My Lady, the final issue which we had intended to address on you was costs but that has now been addressed and I am very grateful to the defendant. I am just asked to raise: there are three minor typos or very minor issues that I am asked to address. The first is there was a reference to maternal aunt rather than paternal aunt. It may have been a mishearing but we thought there was a reference to maternal rather than paternal aunt.

204. MRS JUSTICE ELISABETH LAING: Can you remind me roughly where that was?

205. MS GALLAGHER: Seven or eight minutes, I'm told, my Lady.

206. MRS JUSTICE ELISABETH LAING: Unfortunately my draft is paginated, but --

207. MS GALLAGHER: It was when you were going through the minutes of the MBU, there was reference to maternal aunt.

208. There are two more, my Lady, shall I tell you them now while you're reading through it, in case they catch your eye?

209. MRS JUSTICE ELISABETH LAING: Are they later?

210. MS GALLAGHER: One of them was earlier. The date of birth given, at the beginning, of W we think was given as 31 September 2013 rather than 31 December 2013. It may have been when it was read rather than in writing, but we thought we should flag it.

211. MS SCOLDING: I have it as December in my note but that might be because --

212. MRS JUSTICE ELISABETH LAING: You heard what you expected to hear.

213. MS GALLAGHER: On all of these at least two of us heard it, so we thought we should raise it.

214. MRS JUSTICE ELISABETH LAING: Quite right too.

215. MS GALLAGHER: The final one, my lady, is when you were referring to procedural obligations in respect of W v UK, you made reference to procedural obligations under Article 6 rather than Article 8.

216. MRS JUSTICE ELISABETH LAING: I think I must have misread it.

217. MS GALLAGHER: It was quite plain in the context it was Article 8, but we thought for the transcript --

218. MRS JUSTICE ELISABETH LAING: Let me make a note of those.

219. MS GALLAGHER: So the first one is maternal rather than paternal aunt, the second one is the date of birth, September rather than December and the third one is a reference to Article 6 when you referred to W v UK.

220. MS SCOLDING: And I agree with my learned friend that there was a reference to Article 6 rather than Article 8.

221. MRS JUSTICE ELISABETH LAING: Goodness me. Well, I certainly didn't intend it. Thank you for listening so carefully and when in due course I get the transcript I will correct those.

222. MS GALLAGHER: I am asked to raise two more matters. The first is that we are extremely grateful for you dealing with this matter so expeditiously and providing the judgment today. We are very conscious that there must have been an element of burning the candle at both ends overnight and we are extremely grateful.

223. The second issue is we note that there are a number of reporters in court. There plainly is an anonymity order in place in respect of identifying the parties. So we thought it sensible just to raise that, given that there are reporters in court.

224. MRS JUSTICE ELISABETH LAING: All right. Those of you who are members of the press and those of you who are members of the public, I have been asked to remind you that there is an anonymity order in place in relation to both claimants in this case, so nothing must be published about this case which might lead somebody to identify either of the claimants and if it is done it will be a contempt of court.

225. MS SIKAND: My Lady, we don't actually have your clerk's email address, so I'm hoping that the associate will give us the correct email address for the order.

226. MS SCOLDING: I have it, because I had to send an email to the clerk this morning, exculpating myself from --

227. MS SIKAND: You sent us a different one yesterday.

228. MS SCOLDING: I sent a different one yesterday but then I thought my clerk should have it, so I have it.

229. MRS JUSTICE ELISABETH LAING: I have sent an email to those who are responsible for your course. I haven't yet had a reply.

230. MS SCOLDING: I am grateful and can I say, my Lady, how grateful I am that you were willing to do that for me.

231. MRS JUSTICE ELISABETH LAING: Not at all.

232. Just a very small pedantic point on the draft. The Elisabeth in my name is spelt with a S, not a Z, and the QC needs to be deleted, please.

233. I think that's everything. Can I thank you all very much indeed for making such clear and helpful submissions in a very tight timescale and for giving me so much help with the draft order. If you email it in due course, I will then be able to approve it. Thank you very much.