

# SW & TW (Children : Human Rights Claim: Procedure) (Rev 1)

**[2017] EWHC 450 (Fam)**

08/03/2017

## **Barristers**

John Tughan KC

## **Court**

Family Division

## **Practice Areas**

Public Children Law

Judgment in proceedings concerning two siblings and involving cross-applications for private law orders, an application by the local authority for public law orders and applications brought under section 7 of the Human Rights Act 1998 for declarations and damages.

This case concerned two children, SW and TW. Their parents had separated in 2012 and, following private law proceedings, the mother made a number of allegations about the father's conduct towards the children which included allegations of sexual abuse. The resulting investigation led to a lengthy suspension of contact between the father and the children and invasive medical examinations which were later accepted to have been disproportionately intrusive. Subsequently, in a child protection conference, the decision was made by the police and social services to formally investigate the allegations. At no time was the father involved in, or able to contribute, to this decision-making or to the investigation. There was a lack of strategic planning of the investigation, and a further subsequent examination of TW under general anaesthetic which revealed no signs of sexual abuse. It was later acknowledged by the local authority that the mother, in her pursuit of the allegations, had caused the children significant harm. In July 2015, the children's mother died unexpectedly and the children were placed with the maternal grandmother. Their father was not informed of her death but learned of it some time later from a third party.

A number of applications had been made to the court in respect of the children. There were cross-applications for private law orders by the children's father and maternal grandmother, an application for a public law order by Luton Borough Council and applications by the children and the father under section 7 of the Human Rights Act for declarations and damages in respect of the way in which the local authority had dealt with the matter prior to proceedings being issued.

By the time of the final hearing, the children had been living with their father for a considerable period and it was agreed by all parties that they should remain in his care. The substantive welfare matters were resolved by consent. The judgment is significant, however, for the guidance provided by Cobb J on

the issue of claims under the Human Rights Act when they arise in the context of family proceedings.

A significant difference between the parties in this case centred on whether claims made under s.7 of the Human Rights Act are governed by the Family Procedure Rules (as initially argued by the representatives of the children and the father) or by the Civil Procedure Rules (as argued by the local authority). Following this judgment, it is clear that it is the latter. They should therefore be issued as civil proceedings by way of a Part 8 CPR 1998 claim, and should not be issued on a Form C2.

However, this led to a significant difficulty in finalising the claim at the final hearing because the Children's Guardian had taken on the role of litigation friend in the HRA claim. Although 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. Consequently, the HRA claim could not be resolved at this hearing and that matter (and any issue of wasted costs) was adjourned to a later date.

In summarising his conclusions (at para. 3), Cobb J also makes the following general procedural points about claims of this nature:

Given that the CPR 1998 applies to these claims, the regime of Part 36 CPR 1998 ('Offers to Settle') applies to them;

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]);

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), 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 both sets of proceedings by way of statutory charge from any award of HRA 1998 damages;

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; 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.

To read the judgment, please click [here](#).

**Permission**

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