Neutral Citation Number: [2024] EWFC 22

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2024

Before :

The Rt Hon Sir Andrew McFarlane
President of the Family Division

- -

RE: Z (Prohibition on Cross-examination: No QLR)

Hearing dates: 25 & 26 October 2023

- -

Approved Judgment

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This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. 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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Sir Andrew McFarlane P:

1. This judgment, which follows a substantive judgment given at the conclusion of a fact-finding hearing, considers the approach that a judge or magistrates sitting in the Family Court should adopt when the court has directed that a Qualified Legal Representative ['QLR'] should be appointed for a party in accordance with Part 4B of the Matrimonial and Family Proceedings Act 1984 ['MFPA 1984'], yet, despite a diligent search by the court office, no QLR can be found.

2. In November 2023 I conducted a fact-finding hearing in private law proceedings under CA 1989, s 8 at the Family Court in Newcastle upon Tyne involving the parents of Z (randomly chosen letter), a girl aged 3 years. The principal factual issues related to alleged sexual abuse of Z by her father. Each party also raised allegations of coercive and controlling behaviour against the other. Before me each of the parents appeared as a litigant in person. The mother had the benefit of a legal aid certificate, but, having recently parted company with her solicitors, she was intent on representing herself and did not accept the court's invitation to apply for an adjournment.

3. By an order dated 28 September 2023 the court directed that the matter be listed for a two-day fact-finding hearing. In addition to other case management directions, the judge ordered the court to appoint and arrange for a QLR to cross examine the mother on the father's behalf in circumstances where there were contested allegations of domestic abuse. I was told that, thereafter, the court office in Newcastle had undertaken no fewer than 120 different communications by email or telephone in an attempt to find a QLR, yet none could be found who was willing or available to take on the case. At the commencement of the hearing, I considered whether to adjourn so that there might be a further attempt to engage a QLR. Following the mother's decision to proceed as a

litigant in person, there was also a potential role for a second QLR to be appointed to ask questions on her behalf of the father. In the event, both parties were keen for the factual issues to be resolved without a further adjournment and I took the view, having taken advice from the court staff, that it was unlikely that any further attempt to find a QLR would be successful. The hearing therefore proceeded, as I will describe, on the basis that I, as the judge, would ask all of the questions of each of the two parties. No other witnesses were called.

The appointment of Qualified Legal Representatives

4. Part 4B of the MFPA 1984 (inserted by Domestic Abuse Act 2021, s 65 [‘DAA 2021’]) establishes, by ss 31Q – 31Z, the statutory scheme for the appointment of QLR’s in Family proceedings. These provisions apply to proceedings commenced after 21 July 2022. They are supported by Family Procedure Rules 2010, PD3AB [‘FPR’] and Statutory Guidance issued by the Lord Chancellor pursuant to s 31Y of the MFPA 1984. The Statutory Guidance describes the role and duties of a court appointed QLR and is to be found at https://www.gov.uk/government/publications/qualified-legal-representative-appointed-by-the-court-statutory-guidance.

5. The formal preamble to the DAA 2021 states that it is an Act ‘to make provision .... to prohibit cross-examination in person in family or civil proceedings in certain circumstances’. MFPA 1984, Part 4B is headed ‘Family Proceedings: Prohibition of Cross-examination in Person’. The provisions apply to ‘family proceedings’, being proceedings in the Family Court, or the High Court Family Division or in the Court of Appeal Civil Division [MFPA 1984, s 31Q].

6. MFPA 1984, s 31R prohibits the cross examination in person between a person who is, or is alleged to be, the victim of an offence and the other party if they have been convicted, cautioned, or charged with that offence:

> **'31R Prohibition of cross-examination in person: victims of offences**
>
> (1) In family proceedings, no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence.
>
> (2) In family proceedings, no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.
>
> (3) Subsections (1) and (2) do not apply to a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974, unless evidence in relation to the conviction or caution is admissible in, or may be required in, the proceedings by virtue of section 7(2), (3) or (4) of that Act.
>
> (4) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the conviction, caution or charge when the cross-examination took place.'

S 31R(5) defines 'caution' and 'conviction'. Those terms include service disciplinary proceedings and a service offence under the Armed Services Act 2006.

7. MFPA 1984, s 31R(1)+(2) are two sides of the same coin. Where the circumstances of a case engage s 31R, neither party may cross examine the other in person.

8. MFPA 1984, s 31S prohibits the cross-examination of those who are protected by injunctions:

> **'31S Prohibition of cross-examination in person: persons protected by injunctions etc**
>
> (1) In family proceedings, no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction.
>
> (2) In family proceedings, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom the injunction is in force.

(3) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the protective injunction when the cross-examination took place.
(4) In this section "protective injunction" means an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.'

MFPA 1984, s 31S(5) defines the term 'on notice' in s 31S. Again, s 31S(1)+(2) apply both ways, so that neither party may cross examine the other in person.

9. MFPA 1984, s 31T prohibits cross-examination in person by either party where there is evidence (of a type specified in regulations) that the witness to be cross-examined by a party to the proceedings has been a victim of domestic abuse carried out by that party. Once more, ss 31T(1) and (2) apply both ways so that neither party may cross-examine the other in person.

10. MFPA 1984, ss 31Q-T establish a mandatory prohibition on cross-examination in the circumstances to which they relate. Section 31U goes further and affords discretion to the court to prohibit a party from cross-examining if it 'appears to the court that the 'quality condition' or the 'significant distress condition' are met and that it would not be contrary to the interests of justice to direct a prohibition. The 'quality condition' is met if the quality of the evidence to be given by the witness is likely to be diminished by direct cross-examination and it would be likely to be improved if the prohibition direction is given [s 31U(2)]. The 'significant distress condition' is met if the cross-examination is likely to cause significant distress to the witness and the distress is likely to be more significant than would be the case if the witness were cross-examined by someone other than the party [s 31U(3)].

11. The scheme established by MFPA 1984, ss 31Q-V thus provides for two separate categories of case where cross-examination either will, or may, be prohibited. Firstly,

if the circumstances of the case are such that either (a) a ‘specified offence’ as between two parties as perpetrator and victim has resulted in a conviction, caution, or charge, (b) where there is a protective injunction in force between them, or (c) if there is ‘specified evidence’ of domestic abuse between them, the (alleged) perpetrator ‘may not’ cross-examine the (alleged) victim [ss 31(R)-(T)].

12. The second category is where the court has discretion to make a direction prohibiting cross-examination when the mandatory prohibition does not apply, but either the quality condition or the significant distress condition do apply [s 31U].

13. It is right to stress that the no cross-examination provisions are not confined to hearings where express allegations of abusive behaviour are being determined; where the facts engage with ss 31Q-V and oral evidence is to be given by a party who is protected by these provisions then the prohibition on cross-examination applies whatever the subject matter of the evidence to be given may be. The need to consider the appointment of a QLR will thus arise in such cases where the substantive hearing is in the course of financial remedy proceedings, or when the court is focussed on determining the welfare arrangements for children.

14. Where a party is prevented from cross examining a witness in person by virtue of any of MFPA 1984, ss 31R to 31U, the provisions of s 31W apply [s 31W(1)]. By s 31W(2), the court must first consider whether (ignoring the provision for appointing a QLR in s 31W) there is a satisfactory alternative means:

   a) for the witness to be cross examined in the proceedings; or

   b) of obtaining evidence that the witness might have given under cross-examination in the proceedings.

It is to be noted that FPR 2010, PD3AB paragraph 5.3 plainly states that: 'a satisfactory alternative to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party'. Where the court considers that there is a satisfactory alternative means, it must identify the means in an order and its reasons for so deciding [PD3AB, para 5.4].

15. If the court decides that there is no satisfactory alternative to cross-examination in person, it must invite the relevant party to arrange for a QLR to act for them for the purpose of cross-examining the witness and give the party a time limit by which they must notify the court whether one has been appointed [MFPA 1984, s 31W(3)]. Where the party has either notified the court that no QLR is to act for them, or no such notification is received by the court and it appears that no QLR is to act for the party, then the court moves on, by s 31W(5), to consider

> 'whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.'

If the court decides that it is, the court, by s 31W(6), 'must' appoint a QLR chosen by the court to conduct the cross-examination. A QLR appointed by the court under s 31W(6) is not responsible to the party on whose behalf questions are to be asked [s 31W(7)].

16. By MFPA 1984, s 31X, the Lord Chancellor may make regulations to provide for payment of fees and costs incurred by a court appointed QLR. The relevant regulations are The Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022 [SI 2022/567]. By reg 2, the fees to be paid to a court appointed QLR are set out in the Schedule to the regulations. Where a QLR attends a preliminary hearing in a case, the rate of remuneration is, in part,

determined by the length of hearing and, in part, by the level of judiciary conducting the hearing. Thus, for a preliminary hearing that lasts for less than 1 hour, the fee paid ranges from £62.69 in a private law children case before lay justices or a legal adviser to £82.76 before a High Court judge. Different rates apply to other forms of family proceedings: domestic abuse, financial remedy and public law children cases. If the preliminary hearing lasts between 1 hour and 2½ hours, the fee for a preliminary hearing in a private law children case ranges from £156.74 to £206.87. For a hearing in such a case where cross-examination takes place the range is from £496.30 to £655.09 for the first day and £397.04 to £524.07 for any subsequent day. No separate fee is payable for preparation or time spent meeting the party on whose behalf the QLR is asking questions, but, where the bundle of papers provided to the QLR exceeds 350 pages, a 'bolt-on' fee is paid once per cross-examination hearing; if 351-700 pages it is £159.30, for 701-1,400 pages it is £239.40 and for over 1,400 pages it is £318.60.

17. Crucially, when the scheme was first introduced no travel expenses were payable, and this was the position at the time of the hearing before me in Newcastle in November 2023. Given the rates of remuneration provided for in the scheme, it is easy to understand that the inability to claim travel expenses has been a significant disincentive to those who might otherwise have accepted appointment as a QLR. By The Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) (Amendment) Regulations 2023 [SI 2023/1319], with effect from 2 January 2024, travel and overnight expenses are now payable to a QLR, subject to statutory limitations set out in the regulations. It is to be hoped that this development will lead to a greater willingness amongst QLR's to take up appointment by the court.

18. A QLR is defined by MFPA 1984, s 31W(8)(b) as "a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) in family proceedings".

19. For a QLR to be a 'qualified' legal representative, they must be a barrister, a solicitor or a 'CILEX Practitioner' (a CILEX Litigator and Advocate) [CILEX is the Chartered Institute of Legal Executives]. In addition, the statutory guidance requires that:

> 'All court-appointed qualified legal representatives must have a current practising certificate and have undertaken advocacy and vulnerable witness training (or have made a commitment to attend such training within six months of having registered on the court list of qualified legal representatives) that is provided or approved by their professional body. They must also have the necessary skills and experience in cross-examining vulnerable witnesses in contested hearings. Qualified legal representatives with additional specialist domestic abuse training on matters such as coercive and controlling behaviour, economic abuse, psychological abuse and post-separation abuse are also eligible to undertake this work.'

20. It is understood that, currently, formal training in advocacy and vulnerable witnesses has only been provided to Family practitioners by the Family Law Bar Association and that, thus far, around 450 barristers have undertaken the training. Completion of the FLBA training does not automatically lead to registration as a QLR. The system operated by HMCTS [His Majesty's Courts and Tribunals Service] is based upon QLRs registering with a local court. The guidance allows for those who are committed to attending a training course within six months to be registered as a QLR with HMCTS. The latest published figures from HMCTS are now of some age. They show that, as at July 2023, 428 lawyers had registered for the scheme and, of these, 258 had completed the necessary training. Currently no separate training has been provided for solicitors or legal executives, but it is understood that the Law Society and/or Resolution (the

solicitors Family law association) are contemplating setting up a training scheme for QLRs.

The decision: cross-examination to be conducted by the court

21. Much of this judgment is taken up with a description of the QLR process and, in due course, guidance. It is, however, necessary to focus on the decision that I faced in the case before me, and many judges and magistrates are currently facing on a daily basis, when a QLR is required but none is available.

22. In a '*View from the President's Chambers*' in June 2023, when addressing this problem, I suggested that 'if no QLR is found within 28 days, the court should list the case for directions and direct that some summary information is provided by HMCTS about the difficulties that have been encountered'. Cases should not be permitted to drift whilst an open-ended search for a QLR is undertaken. When directing the appointment of a QLR, a requirement should be included in the court's order directing that the case be returned to the judge/justices for further directions if, after 28 days (or whatever reasonable period is chosen), the court has not succeeded in appointing the QLR.

23. The principal options facing a court at that stage are likely to be:

    a) A further adjournment in the hope that a QLR may be found;

    b) An adjournment to allow one or both parties to engage their own advocate;

    c) Reviewing the need for the vulnerable party to give oral evidence and be cross-examined. This will include reviewing the need for there to be a fact-finding hearing in the proceedings;

d) Considering any other alternative means of avoiding in person cross-examination between the relevant parties;

e) The court itself taking on the task of asking questions in place of the in person party.

This is not an exhaustive list. The circumstances in each case will differ and, if other options are available, they should be considered. Equally, depending on the local circumstances, and those of the parties, different options will no doubt be chosen on a case-by-case basis. It does not follow that, if no QLR is available, the court is automatically required to conduct the questioning itself. It is important that all possible alternative options are reviewed at that point in the proceedings.

24. When considering the options, and whether the court should take on the questioning, the court will take account of PD3AB paragraph 5.3 which states that: 'a satisfactory alternative to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party'. The validity of that statement is unlikely to be controversial in the eyes of judges and magistrates. Indeed, the negative aspects of questioning by the court must have been prominent in the thinking in Parliament when the QLR process was brought into law by the 2021 Act. At a time when it was still comparatively rare for litigants to act in person in Family cases, Roderic Wood J contemplated the option of the judge asking questions on behalf of an unrepresented party and expressed 'a profound sense of unease at the thought' [*H v L and R* [2006] EWHC 3099 (Fam); [2007] 2 FLR 162].

25. PD3AB, paragraph 5.3 is not, however, black-letter law. The fact that the PD does not include questioning by the court as a satisfactory alternative, does not, as a matter of law, prevent the court undertaking the task if it considers that, in the interests of justice,

it must nevertheless do so. When a QLR is appointed by the court the focus is on whether it is 'necessary in the interests of justice' to do so [s 31W(5)]. The need for the court to deal 'justly' with cases is not, of course, confined simply to the need to act in the interests of justice when appointing a QLR; it is a requirement that pervades every step that the court may take throughout any proceedings in order to meet the 'overriding objective' of the FPR 2010, as set out in r 1.1 and 1.2:

> **'The overriding objective**
>
> **1.1**
>
> (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> > (a) ensuring that it is dealt with expeditiously and fairly;
> >
> > (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
> >
> > (c) ensuring that the parties are on an equal footing;
> >
> > (d) saving expense; and
> >
> > (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> **Application by the court of the overriding objective**
>
> **1.2**
>
> (1) The court must seek to give effect to the overriding objective when it –
>
> > (a) exercises any power given to it by these rules; or
> >
> > (b) interprets any rule.'

26. In the context of a decision on how to proceed in the absence of a QLR, r 1.1(2)(a), (b) and (c) are likely to be of particular relevance. Where there is no other alternative, and oral evidence that engages MFPA 1984, Part 4B is required, the need to ensure that the

parties are on an equal footing, with the other party's case being 'put' and the vulnerable witness' evidence being appropriately challenged, coupled with the need to bring the proceedings to an expeditious and fair conclusion in a proportionate manner, are likely to lead a court to conclude that there is no other alternative but for it to ask the necessary questions.

27. If the court decides to abandon further attempts to appoint a QLR, the previous direction appointing one must be discharged and, as a matter of good practice, the reasons for discharge should be very shortly recorded on the face of the order and/or in a short judgment.

Questioning by the court

28. It may, at least in one sense, be reassuring to those judges, magistrates and legal advisers who regularly have to do so, to record that, in the case before me, I found the task of asking the questions to be a particularly burdensome, unnatural and tricky one. As neither party was represented, as the judge I found myself first of all asking questions to tease out further details 'in chief', as it were, from the first of the parties to give evidence before then putting to them most of the questions that the other party wished to have put. The process was then reversed when the other party entered the witness box. Over the course of a full court day, I therefore ended up asking all of the questions.

29. I have used the word 'tricky' to describe the process as, when undertaking questioning, the court has to tread a narrow path between, on the one side, ensuring the witness' evidence is adequately tested by the points that the other party wishes to raise, but, on the other, ensuring that the judge does not enter the arena or be seen in any way to be promoting the case of one side or the other.

30. The leading case on the question of judges entering into the arena remains *Serafin v Malkiewicz* [2020] UKSC 23. Although *Serafin* relates to defamation proceedings, the judgment of Lord Wilson SCJ, with whom the other members of the court agreed, is of general application. The point of particular relevance in the present context relates to the default position in ordinary litigation which is that judicial intervention during cross-examination should normally be infrequent (*Jones v National Coal Board* [1957] 2 QB 55) [*Serafin* paragraph 40+41] with the judge remaining 'aloof from the fray and neutral during the elicitation of the evidence' (*Michel v The Queen* [2009] UKPC 41) [*Serafin* paragraph 42].

31. The risk arising from the judge becoming too involved in challenging a witness was identified in the well-known passage in the judgment of Lord Greene MR in *Yuill v Yuill* [1945] P 15 at page 20:

> 'A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.'

32. An example of a judge descending into the arena to a degree that was unfair is found in *K and L (Children: Fairness of Hearing)* [2023] EWCA Civ 686 where, during the cross-examination of a party by the opposing advocate, the judge asked over 200 questions and (in the judgment of the Court of Appeal) 'in effect took over the cross-examination'. The consequence for the overall fairness of the hearing was described by Baker LJ (at paragraph 54):

> 'By intervening on such a scale, and in such a challenging manner, the judge ran the risk (in Jonathan Parker LJ's phrase in *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu* [2006] EWCA Civ 281 at paragraph 146) of so hampering her ability properly to evaluate and weigh the evidence before her as to impair her judgment and thereby render the trial unfair.'

33. Where, because there is no other means of doing so, a judge is required to ask questions on behalf of one or both parties, he or she necessarily vacates the detached position, described by Lord Greene, and must therefore guard all the more against being drawn into the arena so as to lose objectivity and diminishing their ability properly to evaluate and weigh the evidence, having lost, at least to a degree, the position of calm and dispassionate observation.

34. A further need for caution may arise from the need for the judge to avoid taking an important point on behalf of one party which that party has not, themselves, raised (see *Villiers v Villiers* [2022] EWCA Civ 722 at paragraph 212). The case of *Villiers*, however, related to the judge taking a fresh point of law, as opposed to raising a new factual issue. During a fact-finding hearing, it must be expected that a judge may spot a point that has not been raised by either party, but requires clarification. In such circumstances, provided that the manner in which the judge raises the point and questions the party or parties about it is fair, judges should not feel that they are prevented from doing so.

35. The lodestar for a judge, magistrate or legal adviser who takes on the task of asking questions on behalf of an unrepresented litigant in these circumstances must be fairness. In every case a fairness should require the court to be very open with the parties as to the process that is going to be adopted by explaining what is to happen, step by step, at the start in short straight forward terms. The court should explain that it is taking on the role of asking questions in order for the hearing to proceed in the absence of a QLR, and where there is no other satisfactory alternative. In this judgment I have deliberately avoided describing the process of the court asking questions as ‘cross-examination’, and I suggest that courts should also refer to it as the court ‘asking questions that the

other party wishes to have asked', or a similar phrase (rather than using the phrase 'cross-examination').

36. One way of enhancing the overall fairness of the process, is for the judge to retain a hold on the 'detached position' described by Lord Greene at all times and to avoid descending into the arena at any stage. This is the tricky path that must be trodden to which I have already made reference. Judges who were, or, if fee-paid judges, still are, practising advocates are likely to feel a temptation to move into full cross-examination mode if, as may be the case, they get the sense that the witness may not be telling the truth. That temptation must be resisted, not only because to do so is likely to increase the prospect of the process being unfair, but also because, in doing so, the judge is likely to become partisan and potentially blind to other factors in the case at a premature stage, and thereby hamper their ability properly to evaluate all of the evidence in the manner described by Baker LJ in *K and L*. The essential difference between the court asking questions and a lawyer instructed by the party doing so is that the court is merely acting as a channel of communication and not as an advocate seeking a particular answer to a question or, more generally, a particular outcome to the case.

37. In *Re J (Children)* [2018] EWCA Civ 115, on the topic of the court asking questions on behalf of a litigant in person, I drew attention to the relevant passages within PD12J:

> '71. The guidance in PD12J as to the conduct of a fact-finding hearing is extensive and requires consideration in full in every case to which it applies. For the purposes of concentrating upon the cross examination process alone, I would draw attention to the following extracts. Paragraph 19 lists various matters which a court should consider when making case management directions prior to a fact-finding hearing:
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> > **Paragraph 19(j)**: 'what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;'
> >
> > **Paragraph 19(l)**: 'what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence;'.

72. **Paragraph 28** deals with the fact-finding hearing itself:

> '28. While ensuring that the allegations are properly put and responded to, the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing or other hearing:
>
> - each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts; and
> - the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case.'

Despite the introduction of MFPA 1984, Part 4B and PD3AB, it is of note that PD12J has yet to be updated.

38. Later in 2018, Hayden J gave judgment in *PS v BP* [2018] EWHC 1987 (Fam), which was an appeal in which the first instance judge had asked questions on behalf of a litigant in person of a complainant who was alleging rape. Hayden J upheld the appellant's core criticism of the judge, which was that, in honing and refining down his detailed questions, they were rendered superficial and over-simplified to a degree that minimised their potential value. Hayden J described the approach that the judge should have taken [paragraph 16]:

> 'Whilst I am extremely sympathetic to the situation [the judge] found himself in it must be emphasised that, having decided to put F's case, he was required to do so fully, properly and fairly. A litigant in person is far more exposed than a represented party. The content, focus and style of the questions often reveal the personality of the litigant, long before he enters the witness box. It is clear to me that the Judge formed a very adverse impression of F, he considered him to be arrogant to the point that he regarded himself as "god like". The disagreeable and the arrogant are of course as entitled to a fair trial as the polite and amenable.'

The phrase in that passage that requires particular focus is the requirement for the court to put the party's case 'fully, properly and fairly'. This requirement, alongside the countervailing one for the court to avoid entering the arena, is what makes the judicial task a tricky one. In contrast to the first instance judge in *PS v BP*, the court must not

edit, neutralise, or otherwise defuse the questions that a party seeks to have asked so as to minimise their potential value. The task that the court undertakes by asking questions is intended to be an alternative to cross-examination, so that the case of the prohibited party is fairly and properly put to the other party.

39. At the conclusion of his judgment Hayden J offered a few 'observations' on the following basis:

> 'I propose to make a few observations intending to assist Judges and the profession where this kind of situation arises in future. I emphasise I do not intend what I say below to be elevated to the status of guidance. There can be no guidance where the situation is, as here, untenable. Until Parliament addresses these circumstances the best I can offer is a forensic life belt until a rescue craft arrives.'

Despite the fact that Parliament has purported to launch a rescue craft (to use Hayden J's phrase) by enacting the DAA 2021, it is regrettable that the unavailability of QLRs will still require resort to these observations when the court has no option but to conduct the questioning itself. I therefore set them out in full with the exception of (v) and (vi) which have been superseded by MFPA 1984, Part 4B. Like Hayden J, I regard these observations as sound advice, rather than more formal guidance which must be followed in every case. The formal guidance given in this judgment is that the court must at all times follow the overarching lodestar of achieving fairness:

> '(i) Once it becomes clear to the court that it is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser, a "Ground Rules Hearing" (GRH) will always be necessary;
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> (ii) The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;
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> (iii) Judicial continuity between the GRH and the substantive hearing is to be regarded as essential;
>
> (iv) It must be borne in mind throughout that the accuser bears the burden of establishing the truth of the allegations. The investigative process in the court room, however painful, must ensure fairness to both sides. The Judge must remind

himself, at all stages, that this obligation may not be compromised in response to a witnesses' distress;

(v)+(vi) [overtaken by MFPA 1984, Part 4B];

(vii) Where the factual conclusions are likely to have an impact on the arrangements for and welfare of a child or children, the court should consider joining the child as a party and securing representation. Where that is achieved, the child's advocate may be best placed to undertake the cross-examination. (see *M and F & Ors*. [2018] EWHC 1720 Fam; *Re: S (wardship) (Guidance in cases of stranded spouses)* [2011] 1 FLR 319);

(viii) If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if 'Grounds of Cross-Examination' are identified under specific headings;

(ix) A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;

(x) Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;

(xi) It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate.'

40. I agree with all that Hayden J says in that passage, and I commend his wise advice in all cases where a court is driven to take on the task of asking questions in these circumstances. The reference made in (i), (ii) and (iii) to a ground rules hearing is of particular importance. FPR, PD3AA, which makes provision for 'vulnerable persons: participation in proceedings and giving evidence' is plainly of relevance and must be adhered to where it applies. FPR, r 3A.2A sets out the assumption that where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, relative of a party, or witness in the proceedings, they are vulnerable. Where the court has decided that a vulnerable party or witness should give evidence, PD3AA,

para 5.2 requires that there must be a ground rules hearing prior to any hearing where the evidence is to be heard. Paragraphs 5.3-5.7 make detailed provision for ground rules hearings in cases of this nature and paragraph 5.5 deals with the conduct of cross-examination:

> '**5.5** In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider whether to make participation directions, including prescribing the manner in which the person is to be cross-examined. The court must consider whether to direct that-
>
> a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;
>
> b) questions or topics to be put in cross-examination should be agreed prior to the hearing;
>
> c) questions to be put in cross-examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and
>
> d) the taking of evidence should be managed in any other way.'

41. Finally, I would offer the following practical points for courts to consider either when appointing a QLR or when preparing to put questions itself:

a) Whilst there is value in the QLR attending court for the ground rules hearing so that they may meet the party on whose behalf they will be asking questions, where this is impractical, and where holding the hearing remotely means that a QLR who could not otherwise act can be appointed, it should be acceptable for the QLR to attend the ground rules hearing remotely;

b) The default position for the full hearing should be for the QLR to be in attendance at court, rather than joining remotely, as the overall effectiveness and fairness of the process is likely to be diminished if they are not in the courtroom;

c) In all cases (whether there is a QLR or not) at the ground rules hearing, or earlier, the court should direct that the prohibited party should submit a clear statement shortly stating the allegations, facts or findings that they seek to establish;

d) In all cases, the prohibited party should be required to file a written list of the questions that they wish to have asked prior to the main hearing. The list should go to the QLR, or to the court if there is no QLR, but not to the witness or other parties. This process should not prevent the prohibited party from identifying additional questions that may arise during the hearing;

42. In conclusion, whilst it is to be hoped that, in time, the continued training programme and the ability to claim travel expenses will increase the availability of QLRs, there will inevitably remain some cases where there is no alternative but for the court to ask the questions itself. Unsatisfactory though that process plainly is, in such cases it will be necessary in order to deliver a just, fair and timely conclusion to proceedings. Where that is the case, the advice in this judgment is intended to assist the court in navigating the tricky path between ensuring that the opposing case is put fully, fairly and properly, but doing so without entering the arena.