Neutral Citation: [2019] EWHC 3320 (Admin) and [2019] EWHC 3322 (Fam)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
AND FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3/12/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD
(Sitting in Public)

- -

Case No: CO/2767/2019

Between:

TAFIDA RAQEEB **(By her Litigation Friend XX)**	**Claimant**
-and-	
BARTS HEALTH NHS TRUST	**Defendant**
-and-	
SHELINA BEGUM and MUHAMMED RAQEEB	**Interested Parties**

Case No: FD19P00378

Between:

BARTS HEALTH NHS TRUST	**Applicant**
- and -	
SHALINA BEGUM and MUHHAMED RAQEEB	**First and Second Respondents**
-and-	
TAFIDA RAQEEB **(By her Children's Guardian)**	**Third Respondent**
-and-	
XX	**Fourth Respondent**

Miss Katie Gollop QC and Mr Eliot Gold (instructed by **Kennedys LLP**) for the **Applicant in FD19P00378 and Defendant in CO/2767/2019**
Mr David Lock QC and Mr Bruno Quintavalle (instructed by **Sinclairs Law**) for the **First and Second Respondents in FD19P00378 and Interested Parties in CO/2767/2019**
Mr Vikram Sachdeva QC, Ms Nicola Kohn and Mr Alan Bates (instructed by **Irwin Mitchell LLP**) for the **Claimant in CO/2767/209 and the Interested Party in FD19P00378**
Mr Michael Gration (instructed by **CAFCASS Legal**) for the **Third Respondent in FD19P00378**

Hearing Dates: 9 to 13 September 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice MacDonald:

INTRODUCTION

1. I am concerned with an application for costs arising out of linked matters in the Administrative Court and the Family Division concerning Tafida Raqeeb, born on 10 June 2014 and now aged five years old. The applications with which the court has been seised are an application by Tafida for judicial review of the decision by the Barts Health NHS Trust (hereafter 'the Trust') to refuse to permit Tafida to travel to Italy for continued life-sustaining treatment and an application by the Trust under the Children Act 1989 for declarations that it is in Tafida's best interests for her current life-sustaining treatment to be withdrawn, a course of action that would have lead inevitably to her death. An application for costs is made by Tafida in the judicial review proceedings and by the parents within the proceedings under the Children Act 1989.

2. Tafida is represented in the application for judicial review by Mr Vikram Sachdeva, Queen's Counsel, and Ms Nicola Kohn through her litigation friend, XX, a relative. The Trust is the defendant to the application for judicial review and is represented by Miss Katie Gollop, Queen's Counsel and Mr Eliot Gold of counsel. Tafida's parents, Shelina Begum and Muhammed Abdul Raqeeb are interested parties in the application for judicial review, represented by Mr David Lock, Queen's Counsel and Mr Bruno Quintavalle. In the proceedings under the Children Act 1989 the Trust is the applicant and the parents and XX are respondents to those applications, each party with the same legal representation as set out above. Tafida is a party to the application under the Children Act 1989 and is represented by Mr Michael Gration of counsel through her Children's Guardian, Kay Demery.

3. It is not necessary once again to set out the background to this matter. That background is set out in *Raqeeb v Barts Health NHS Trust* [2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam)). At the conclusion of the final hearing in this matter I made the following decisions:

    i) In the proceedings for judicial review, I found that the decision of the Trust was unlawful but declined to grant relief to Tafida on her application for judicial review.

    ii) In the proceedings under the Children Act 1989 I dismissed the application of the applicant NHS Trust for an order under s 8 of the Children Act 1989.

4. Within this context, Tafida, as claimant in the judicial review proceedings contends that she succeeded in her claim for judicial review and that costs should follow the event. Tafida also appears to contend that she should recover the costs of the proceedings under the Children Act 1989, although the submissions of Mr Sachdeva QC and Ms Kohn on her behalf concentrate on the position in the judicial review proceedings. The parents do not seek to recover their costs in the judicial review proceedings but do seek an order for costs in the proceedings under the Children Act 1989. The Trust opposes the applications for costs in each set of proceedings and submits that in each set of proceedings the parties should bear their own costs.

5. At the conclusion of the substantive hearing I directed that the question of costs would be dealt with on paper. Within this context, I have received helpful written submissions on costs from each party, the last of those written submissions being received by the court on 29 October 2019.

SUBMISSIONS

Proceedings for Judicial Review

6. Within the foregoing context, Tafida as the claimant in the proceedings for judicial review contends through her litigation friend, that she was successful in her claim for judicial review and that, pursuant to the general rule in CPR 44.2(2) she is entitled, as the successful party, to her costs from the unsuccessful party, namely the Trust. Within this context of the matters the court is required to take into account when deciding the question of costs, Mr Sachdeva and Ms Kohn identify the key questions in this case as:

    i) Who is the successful party?

    ii) Should the normal rule that costs follow the event be followed or should an exception be made in the circumstances of this case?

7. Mr Sachdeva and Ms Kohn submit that Tafida is clearly the successful party in circumstances where:

    i) The real issue in the case was whether or not it was lawful for the Trust to deny Tafida's directly effective Art 56 right to receive services in an EU Member State;

    ii) The court clearly concluded that the decision of the Trust was amenable to judicial review;

    iii) The court concluded that the decision of the Trust was unlawful and not only substantially impeded but made impossible the exercise by Tafida of her Art 56 rights;

    iv) The claimant succeeded in establishing that Art 56 has "real significance" in cases where a protected party is seeking to be sent to an EU Member State for medical treatment.

8. In these circumstances, relying on the decision of the Supreme Court in *R (Hunt) v North Somerset Council* [2015] 1 WLR 3575, Mr Sachdeva and Ms Kohn submit that where a party who has been given leave to bring a claim for judicial review succeeds in establishing that the defendant acted unlawfully, some good reason will have to be shown why the claimant should not recover her reasonable costs. They submit that the Trust has advanced no good reason why it should not pay the costs in circumstances where the court has determined that its decision was unlawful.

9. Within this context, Mr Sachdeva and Ms Kohn submit that neither the fact that the court refused to quash the decision of the Trust having regard to the terms of s 31(2A) of the Senior Courts Act 1981 nor that the court limited its remedy to the judgment itself, amounts to a good reason for Tafida not to recover her reasonable costs, Mr

Sachdeva and Ms Kohn submitting that s 31(2A) contains no suggestion that the costs of the claim should be refused in those cases where s 31(2A) applies.

10. In addition, Mr Sachdeva and Ms Kohn rely in certain respects on what they contend was the inappropriate conduct by the Trust of the litigation. In particular, Mr Sachdeva and Ms Kohn submit that:

    i) Whilst the Trust refused on 7 July 2019 to agree the transfer of Tafida to Italy, it only issued proceedings to determine the question of Tafida's best interests once it was aware that a claim for judicial review was being made;

    ii) The Trust ran arguments that were unreasonable, namely (a) that it had not taken any decision and (b) that any decision it had made was not justiciable;

    iii) The Trust failed to file a proper pre-action response to the claim for judicial review providing an explanation for the decision made and including any relevant documents.

11. Within this context, Mr Sachdeva and Ms Kohn submit that an order should be made in favour of Tafida that the Trust pay her costs of both the judicial review proceedings and the proceedings under the Children Act 1989 and the inherent jurisdiction of the High Court on the standard basis. With respect to the claim for costs in the proceedings under the Children Act 1989 Mr Sachdeva and Ms Kohn do not address their submissions to the principles that ordinarily apply to the question of costs in such proceedings.

12. By their written submissions, Mr Lock QC and Mr Quintavalle make clear that the parents do not seek their costs in the claim for judicial review.

13. In response to the costs submissions made on behalf of Tafida in the proceedings for judicial review, the Trust seeks to resuscitate its assertion, which assertion formed a persistent theme at the final hearing, that Tafida (and those acting on her behalf) brought the claim for judicial review, and sought an anterior procedural ruling in those proceedings, in a calculated attempt to obviate the need for any decision by the Family Division as to her wider best interests or to defer such a decision until Tafida was a patient in the Gaslini Hospital, and in addition to obtain a mandatory order compelling her discharge to the Gaslini. The Trust submits that proving the unlawfulness of the Trust's decision was merely a step towards this ultimate, carefully calculated goal of avoiding a best interests decision for Tafida in the domestic courts.

14. Within this context, the Trust submits that it cannot be said that Tafida was successful in her claim for judicial review. First, the Trust contends that Tafida did not succeed in obviating the need for any decision by the Family Division as to her wider best interests or in deferring such a decision until Tafida was a patient in the Gaslini Hospital, which as I have noted the Trust contends was the motivation underlying the claim for judicial review. Second, the Trust reminds the court that Tafida was granted no remedy in the judicial review. Third, the Trust submits that the outcome of the judicial review was always going to lead to the court having to determine Tafida's best interests in proceedings under the Children Act 1989 and the Trust had already commenced the established, and correct procedure.

15. Finally, with respect to the litigation conduct, the Trust makes the following submissions which it submits bear on the question of costs in the proceedings for judicial review:

    i) In making her claim, Tafida did not follow the pre-action protocol for judicial review;

    ii) The protocol letter demanded a response from the Trust within a matter of hours and, accordingly, the Trust cannot be criticised for not preparing a comprehensive pre-action response to the claim for judicial review providing an explanation for the decision made and including any relevant documents.

    iii) In any event, the protocol letter explained that the Trust had declined to discharge Tafida so that the High Court could resolve the dispute as to her best interests.

    iv) The court made no finding that the Trust had breached its duty of candour and found that the court had acted in accordance with established procedure.

    v) The Trust submits that "attacks" were made on the Trust and its doctors in the form of allegations that they (a) were guilty of discrimination against the parents on the grounds of religion and nationality, (b) had breached the terms of the Equality Act 2010, (c) had disregarded the NHS Constitution and (d) deprived Tafida of her liberty. The points were unreasonable and unnecessary and gave rise to unnecessary cost.

16. In the circumstances, the Trust invites the court to make an order that the parties to the judicial review proceedings each bear their own costs.

Proceedings under the Children Act 1989

17. On behalf of the parents, Mr Lock and Mr Quintavalle submit that s 51(1)(b) of the Senior Courts Act 1981 and FPR r 28.1 confer a wide discretion on the court in respect of courts, with no statutory provision or rule of court that prevents the parents being awarded their costs in the proceedings under the Children Act 1989 and the inherent jurisdiction of the High Court.

18. Within this context, Mr Lock and Mr Quintavalle's first submission is that the strongest argument in favour of making a costs order against the Trust is that to refuse to do so, in circumstances where these proceedings engaged the core Art 8 rights of the parents, would result in an unacceptable inequality of arms as between the parents and the State. Within this context, the broad discretion conferred by s 51(1)(b) of the Senior Courts Act 1981 and FPR r 28.1 should be exercised to ensure there is no inequality of arms by making a costs order in favour of the parents.

19. Developing this primary submission, Mr Lock and Mr Quintavalle remind the court that, unlike parents involved in public law children proceedings under the Children Act 1989 responding to an application by a State authority concerning the best interests of their child and the ECHR rights of their child and themselves, the parents in this case are *not* entitled to non-means, non-merits tested legal aid to meet the costs of responding to an action brought by a different State authority under the Children

Act 1989 concerning the welfare of their child and the rights of their child and of themselves. In the circumstances, Mr Lock and Mr Quintavalle contrast the position of the Trust, as a substantial State authority with considerable resources, with that of the parents, as individuals who were *required* to respond to proceedings brought by that State authority concerning the best interests of their child and in defence of their ECHR rights but who have no access to public funding, which proceedings are ordinarily urgent and fast moving and require the instruction of specialist counsel in order to ensure effective participation.

20. Within the foregoing context, Mr Lock and Mr Quintavalle submit that an important component of the parents' rights under Art 6 in an action brought by a State authority that engages the parents' core ECHR rights is that of 'equality of arms'. Mr Lock and Mr Quintavalle submit that, in circumstances where the State has accepted that the Art 6 right to 'equality of arms' requires parents who face the removal of their child through public law children proceedings taken by a State authority under the Part IV of the Children Act 1989, parents who face proceedings brought by a State authority that may lead to the loss of their child through the death of the child must have an equal Art 6 right to funding to enable them to defend their Art 8 rights.

21. In the circumstances, Mr Lock and Mr Quintavalle submit that where there is no legal aid available, it would be a breach of the parents' rights under Art 6 for their ability to participate in these proceedings to be contingent on being able to afford the considerable financial resources necessary to be able to do so. Within this context, Mr Lock and Mr Quintavalle further submit that, absent public funding being available from the Legal Aid Agency or HMCTS, the only candidate for public funding is the Trust, as there is no other public body who can reimburse the costs of the parents' exercise of the Art 6 rights within proceedings brought by the State concerning the welfare of their child and their Art 8 rights, in which proceedings the rules provide that the parents are named as respondents and in which they are, accordingly, required to participate and in which it is essential that they do so.

22. By their second submission, Mr Lock and Mr Quintavalle acknowledge within their submissions that there are policy reasons for the disapplication by FPR r 28.2(1) of the rule in CPR r 44.2(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party. By reference to the decision of the Supreme Court in *Re T (Children)* [2012] UKSC 36 and the decision of Cobb J in *E-R (Child Arrangements)* [2016] EWHC 805 (Fam), Mr Lock and Mr Quintavalle extract the following reasons underlying the general practice of not awarding costs in public law cases brought by local authorities involving children:

    i) Awarding costs to successful non-legally aided parties places grave burdens on public authorities. An order for costs may diminish the funds available to meet the needs of the family or other families;

    ii) Awarding costs against public authorities that have a duty to bring cases before the court may discourage such authorities from properly fulfilling their duties;

    iii) The spectre of costs should not be allowed discourage those with a proper interest in the child from participating in proceedings concerning children;

iv) Stigmatising one party as the loser and adding to that the burden of having to pay the other parties costs will likely jeopardise future co-operation between the parties in the child's best interests.

23. Mr Lock and Mr Quintavalle submit however, that none of the policy reasons identified in the authorities as militating against the making of a costs order in proceedings relating to children apply in this case. In particular:

i) Whilst the award of costs to a successful non-legally aided party will place a burden on the Trust and is a factor, given the size of the Trust's overall budget and the small number of cases of this nature, this factor cannot outweigh the 'equality of arms' consideration;

ii) It is not credible to suggest that losing a case of this nature and being made subject to an order for costs would act to inhibit the Trust from discharging to children where necessary to do so. Mr Lock and Mr Quintavalle submit that the duty under s 11(2)(a) of the Children Act 2004 is not the equivalent of the express statutory duties that exist under the Children Act 1989 as such Trusts rarely make applications concerning the welfare of children. This, coupled with rare nature of costs order argued for, will mean there is no risk of a chilling effect;

iii) A costs order in favour of the parents will not, in this case, have an impact on future co-operation between the parents and the Trust. Parents are unlikely to consider that a costs order means 'winning' and are unlikely to appreciate the distinction between an adversarial and quasi-inquisitorial process;

iv) Any costs order made in this case will be made on the facts and is unlikely to have general implications for other NHS Trust. If this not correct, any general implications will be limited to a very small number of cases in which the parents opposition to the Trust's application is reasonable and the parents are not in receipt of legal aid.

24. By their third submission, Mr Lock and Mr Quintavalle submit that the manner in which the Trust conducted the proceedings also supports the making of a costs order against the Trust. The parents rely on four matters in this regard:

i) First, Mr Lock and Mr Quintavalle submit that the actions of the Trust in asserting the parents consented to the withdrawal of treatment but changed their minds resulted in the litigation of an issue that could and should have been avoided. Within this context, Mr Lock and Mr Quintavalle submit that Trust should never have suggested that the parents had given consent to the withdrawal of treatment when, as the Trust ultimately accepted, they had not done so. Further, they submit that by treating the assertion of the parents that they had never given their consent to the withdrawal of life-sustaining treatment from Tafida as a serious allegation of professional misconduct on the part of the treating clinicians rather than what it was, namely a simple assertion that the parents had never given their consent a wholly unnecessary dispute was created by the Trust;

ii) Second, Mr Lock and Mr Quintavalle submit that the contention of the Trust that the parents were not consistent in their religious objection to the withdrawal of life-sustaining treatment and that this would not offend against their religious views were a major issue for the parents, took up a significant amount of court time and were made without any evidential foundation and should not have been advanced during the hearing and, again, resulted in the litigation of an issue that could and should have been avoided;

iii) Third, the application to remove XX as Tafida's litigation friend in the judicial review proceedings was misconceived and should never have been made (the Trust has now agreed to pay the parents costs of this application and I have, in any event, made an order to that effect in *Raqeeb v Barts Health NHS Trust (Litigation Friend)* [2019] EWHC 2976 (Admin));

iv) Fourth, the Trust abandoned a hearing listed to consider any application for permission to appeal less than an hour before it was due to come on before the court. The Trust should therefore pay the costs of that abandoned hearing.

25. In the circumstances, on behalf of the parents, Mr Lock and Mr Quintavalle invite the court to make an order that the Trust pay the parents' costs of the proceedings under the Children Act 1989 on the standard basis.

26. As I have noted, in their submissions on costs, Mr Sachdeva and Ms Kohn conflate the proceedings for judicial review and the proceedings under the Children Act 1989 and seek the global costs of the same.

27. Against these submissions, the Trust contends that the appropriate order in the proceedings under the Children Act 1989 is no order as to costs, in line with the conventional approach in proceedings relating to children. Within this context, the Trust submits that the established and conventional costs order on a medical treatment application brought by an NHS Trust is that the Trust and the parents each bear their own costs. The Trust submits that there is no precedent for an NHS Trust being ordered to pay the parents' costs in a case of this nature and that there is no reason to depart from that approach in this case.

28. In support of this submission, the Trust submits that the Trust had no choice but to make an application for a determination of Tafida's best interests in circumstances where there was a disagreement between the parents and the treating clinicians as to those best interests. Within this context, the Trust submits that, as the court found, it was required to make the application in the fulfilment of the Trust's duty of care to Tafida and pursuant to its obligations under s 11(2)(a) of the Children Act 2004, absent which application a void would have existed in respect of consent.

29. The Trust further submits that the application for an order under s 8 of the Children Act 1989 was a reasonable course of action in circumstances where the unanimous views of Tafida's treating team, Dr Smith, Dr Playfor and the treating team at the Gaslini Hospital that further treatment would not provide any benefit. Within this context, the Trust relies on the fact that the question of whether, in these circumstances, it is in the best interests of a child to have life-sustaining treatment withdrawn is for the court and not the Trust. The Trust reminds the court that it found that decision to be a very finely balanced one.

30. The Trust also submits that the policy reasons that underpin the conventional rule that the appropriate order for costs in cases concerning children is no order apply not only to welfare proceedings brought by local authorities but also to welfare proceedings brought by NHS Trusts:

    i) The Trust submits that if NHS Trusts are at risk of a costs order on 'losing' an application under s 8 of the Children Act 1989 and/or under the inherent jurisdiction of the High Court, Trusts will inevitably be deterred from making applications of this nature by the inevitable tension that will arise (in already difficult circumstances) between their safeguarding obligations in relation children who are not deriving benefit from life sustaining treatment and the duty to fund the treatment needs of all patients. Where, as in this case, the parents have secured private funding for all treatment, the Trust submits that the risk of costs will tempt Trusts to depart from medical opinion and to prefer the fully funded position of the parents, which preference avoids the costs risk;

    ii) The Trust submits further that these issues would in particular have a chilling effect were Trusts to be penalised in costs for bringing, and 'losing' finely balanced cases before the court in what is already a complex, difficult and contentious area of law. The effect of this, submits the Trust, is that those children most in need of a judicial determination of their finely balanced best interests will be the children in respect of whom a Trust will be reticent about risking the cost consequences of a best interests application before the court.

    iii) The Trust submits that these deterrent factors to the bringing of proceedings must be looked at through the prism of scarce resources in the NHS (noting that a key contention of the mother during the final hearing was that the Trust had a financial deficit), which prism highlights even further the potential for costs orders in proceedings of this nature under the Children Act 1989 to deter Trusts from bringing appropriate cases to court.

    iv) The Trust also submits that an order for costs increases the likelihood that the paradigm for cases of this nature will move from a quasi-inquisitorial process to an adversarial process. The Trust submits that this would be particularly problematic in circumstances where, in many cases, following a decision by the court that will be traumatic for the parents the relationship between those parents and the doctors will be ongoing for a period of time.

    v) The Trust repeats its submission that the determination of the child's best interests in the context of a dispute between the child's parents and the child's treating doctors is a matter for the court and not for the NHS Trust. Within this context, the Trust submits that it would be wrong, particularly in a finely balanced case, to penalise an NHS Trust financially for making an application in respect of a child's welfare that it is obliged, in the exercise of its duty of care and statutory duty, to make.

    vi) Finally, the Trust submits that for the parents to characterise the application of the Trust as having been made "against" them is misconceived. The Trust submits applications of this nature are not made "against" the parents but rather made "about" the child. Within this context, the Trust submits that applications of this nature are not a battle in which rights are defended but

rather an inquiry to understand all the rights and interests engaged and determine the best interests of the child accordingly.

31. With respect to the submissions made by the parents pursuant to Art 6 of the ECHR in the absence of non-means, non-merits tested legal aid for cases of this nature, the Trust submits that in circumstances where the final hearing has already taken place in which the parents were more extensively represented than the Trust, and in which they participated fully with the benefit of that representation, there was no inequality of arms as a matter of fact.

32. Further, the Trust submits that in circumstances where the parents' case and that of Tafida were coterminous, the parents were able to benefit from the independent medical report prepared by Dr Playfor.

33. Finally, the Trust points out that the parents in any event had access to private funding for their legal costs by virtues of the 'Go Fund Me' campaign that they launched online (and which was supported by the Sun newspaper). The Trust reminds the court that that campaign was expressly characterised by the parents as being to raise funds to meet their legal costs (I note that by an email to the court dated 29 October 2019, informing the court of the parents' decision to appeal the decision of the court in the claim for judicial review, the solicitor for the parents confirmed that the parents have funds in place to lodge an appeal).

34. With respect to the conduct of the litigation under the Children Act 1989 the Trust responds as follows to the criticisms levelled by the parents:

    i) The submissions concerning the question of whether the parents had given their consent and the *bona fides* of the parents' religious convictions took up relatively little court time. Given the courts finding in respect of those issues it was not unreasonable for the Trust to posit that the parents had agreed to the withdrawal of care and, accordingly, that there beliefs were not an absolute bar to this course of action;

    ii) The submission that the Trust wasted costs by indicating shortly before the hearing listed to consider any application for permission to appeal is unfair in circumstances where the Trust sought to expedite its decision making in this regard to relieve pressure on the parents and the Trust indicated its decision as soon as it reasonably could to this end;

    iii) In any event, the parents' own litigation conduct must be called into question in circumstances where they did not accept the agreed medical position between the treating clinicians and the team at the Gaslini Hospital, necessitating the reports of Dr Smith and Dr Playfor.

35. In the circumstances, the Trust invites the court to conclude that the appropriate order in the proceedings under the Children Act 1989 is no order as to costs.

THE LAW

36. Whilst CPR Part 44 remains (in part) applicable to costs in proceedings under the Children Act 1989, the principles that govern costs in proceedings for judicial review,

and those that govern costs in proceedings under the Children Act 1989 are different, and fall to be considered individually.

Proceedings for Judicial Review

37. Costs in cases of judicial review are governed by Part 44 of the CPR. CPR r 44.2 provides as follows with respect to the governing principles:

> **"Court's discretion as to costs**
>
> **44.2**
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> (3) The general rule does not apply to the following proceedings –
>
> (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
>
> (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –

> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
>
> (6) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.
>
> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

38. In identifying the successful party, the court may be assisted by considering which party, on the particular facts of the case, has as matter of substance and reality won (see *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 161). However, in circumstances where the court must take into account all the circumstances of the case when exercising its discretion as to costs, the question of who is the successful party for the purposes of exercising that discretion will likewise depend on all the circumstances, and hence on the facts of the particular case.

39. Where a party is identified as the successful party it is important that proper weight be attached to that conclusion and that the starting point for the exercise of the courts discretion is the general rule that the unsuccessful party pays the costs of the

successful party. The general rule does not cease to apply simply because the successful party also raises issues or makes allegations that fail (particularly where unsuccessful arguments raise fundamental human rights issues of public interest beyond the parties), although where these issues or allegations result in a significant increase in the length or costs of the hearing, the successful party may be deprived of the whole or part of the costs (see *A.E.I. Redfern Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1207) the court having regard pursuant to CPR r 44.2(4)(b) and 44.2(5)(b) whether it was reasonable for the party to pursue or contest a particular allegation or issue.

40. With respect to the question of 'successful party' in an application for judicial review, in *R (Hunt) v North Somerset Council* [2015] UKSC 51 the Supreme Court was concerned with an appeal from a decision of the Court of Appeal in which that court decided the substantive issues in a judicial review in favour of the appellant declined to grant any relief, following which the appeal was dismissed and the appellant ordered to pay half the respondent's costs. Allowing the appeal, Lord Toulson observed as follows at [12] to [17] in relation to costs:

> "[12] The judgment of the Court of Appeal itself ruled that the respondent acted unlawfully, and the authority of the judgment would be no greater or less by making or not making a declaration in the form of the order to the same effect. However, in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no "must" about making a declaratory order, and if a party who has the benefit of experienced legal representation does not seek a declaratory order, the court is under no obligation to make or suggest it.
>
> [13] The appellant is on much stronger ground in relation to costs. The submissions to the Court of Appeal on his behalf made no reference to the costs at first instance, and it was remiss to agree to an order that the appeal should be dismissed, when there were obvious grounds for arguing that in relation to costs the judge's order should be set aside and replaced by an order in the appellant's favour. However, in relation to the costs in the Court of Appeal, the points were properly made that the appellant had succeeded on both the issues as to the respondent's statutory duty; that there were wider lessons for local authorities to learn from the case about their duties under each of the relevant sections; that the lapse of time, as a result of which the relevant financial year had now passed, was not the fault of the appellant; and that to deny the appellant his costs would be likely in practice to dissuade claimants from pursuing legitimate public law challenges. The respondent submitted that the appellant had not in substance been successful; that he had not obtained any result of any practical utility; and that he had known about the practical problems which

would be involved in attempting to unwind the budget from evidence submitted by the respondent before the original hearing.

[14] Delivering the reasons for the court's judgment on costs, ([2013] EWCA Civ 1483) Rimer LJ said that by the time that the appeal came on for hearing, it was far too late to consider granting any relief (by which he must have had in mind a quashing order), even if – as to which the court had doubts – it might have been appropriate for relief to be granted a year earlier when the matter was before Wyn Williams J. He continued:

> "5. In these circumstances, the court considers that it would be wrong in principle to award any costs to Mr Hunt. The appeal proved to be of no practical value to him; and, in the court's view it was always one which was destined to fail.
>
> 6. As the council was the successful party in the appeal, the court considers that it is in principle entitled to its costs. On the other hand, the court has regard to the fact that the council resisted the appeal not only on the basis that this was not a case for relief, but also on the two substantive grounds on which it lost. Its resistance on those two grounds increased the costs of the appeal. We regard that consideration as pointing away from an order awarding the council all of its costs."

The court concluded that the respondent should be entitled to recover half of its costs of the appeal.

[15] The discretion of a court in a matter of costs is wide and it is highly unusual for this court to entertain an appeal on an issue of costs alone. But the Court of Appeal said that it reached its decision as a matter of principle, treating the respondent as the "successful party". In adopting that approach, I consider that the court fell into error. The rejection of the respondent's case on the two issues on which the appellant was given leave to appeal was of greater significance than merely that the respondent had increased the costs of the appeal by its unsuccessful resistance. The respondent was "successful" only in the limited sense that the findings of failure came too late to do anything about what had happened in the past, not because the appellant had been slow to raise them but because the respondent had resisted them successfully until the Court of Appeal gave its judgment. The respondent was unsuccessful on the substantive issues regarding its statutory responsibilities.

[16] There are also wider public factors to consider. Public law is not about private rights but about public wrongs, as Sedley J said in *R v Somerset County Council, Ex p Dixon* [1998] Env LR 111 when considering a question of standing. A court may refuse permission to bring a judicial review claim if it considers the claimant to be a mere meddler or if it considers that the proceedings are unlikely to be of sufficient significance to merit the time and costs involved. But in this case the court considered that the issues were of sufficient significance to give permission. And the ruling of the court, particularly under section 149, contained a lesson of general

> application for local authorities regarding the discharge by committee members of the council's equality duty. If a party who has been given leave to bring a judicial review claim succeeds in establishing after fully contested proceedings that the defendant acted unlawfully, some good reason would have to be shown why he should not recover his reasonable costs.
>
> [17] I cannot see that the fact that in this case the determination of illegality came after it was too late to consider reopening the 2012/13 budget provided a principled reason for making the appellant pay any part of the respondent's costs. On the contrary, for the reasons stated the appellant was in principle entitled to some form of costs order in his favour. The issues raised by the appellant at first instance were considerably wider than the issues on which he was given permission to appeal. They included, for example, a far-reaching challenge to the adequacy of the respondent's EIAs. This challenge required detailed rebuttal by the respondent. The appellant also persisted in seeking an order to quash the decision approving the budget when that was unrealistic. Those are reasons for limiting the order for costs in his favour. Logically it might be said that a distinction should be drawn between the costs at first instance and in the Court of Appeal to reflect the different issues, but each hearing occupied the court for one day and the assessment can only be broad brush."

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41. Pursuant to FPR r 28.1 the court may make such order as to costs in proceedings under the Children Act 1989 as it thinks just. Pursuant to FPR r 28.2, CPR Part 44 applies to costs in proceedings under the Children Act 1989 save for CPR r 44.2(2) (the general rule that the unsuccessful party will pay the costs of the successful party) and (3) and r 44.10(2). Accordingly, the rule that costs ordinarily follow the event does not apply to proceedings under the Children Act 1989. Within this context, in *Re T (Costs: Care Proceedings: Serious Allegations Not Proved)* [2013] FLR 133 the Supreme Court noted the rarity of costs orders being made in children's cases save where the conduct of the party has been reprehensible or where the party's stance has been beyond the band of that which is reasonable.

42. With respect to 'equality of arms' under Art 6 of the ECHR, I note that in *R v Gudanaviciene v Director of Legal Aid Case Worker* [2015] 1 WLR 2247 Lord Dyson MR summarised the relevant principles to be drawn from the European case law as follows at [46]:

    i) The Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts;

    ii) The question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily;

    iii) It is relevant whether the proceedings taken as a whole were fair;

iv) The importance of the appearance of fairness is also relevant: simply because an applicant can struggle through "in the teeth of all the difficulties" does not necessarily mean that the procedure was fair;

v) Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.

43. With respect to the procedural aspects of Art 8 and the principle of 'equality of arms', in *W v United Kingdom* (1987) 10 EHRR 29 at [64] the ECtHR observed as follows:

> "In the court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of article 8."

DISCUSSION

Proceedings for Judicial Review

44. In *R v Croydon London Borough Council* at [1] Lord Neuberger observed that the issue of costs is highly fact sensitive and very much a matter for the first instance tribunal. This principle will apply to the question of who is the successful party for the purposes of the exercise of the discretion as to costs. Within this context, the decision of this court on Tafida's application for judicial review can be summarised as follows:

i) On or around 8 July 2019 the Trust determined not to agree to Tafida's transfer to Italy pending an application to the High Court for a determination of the dispute as to Tafida's best interests;

ii) The decision made by the Trust, on or around 8 July 2019 was (contrary to the submission of the Trust) amenable to judicial review;

iii) From a functional point of view, the ability for Tafida to benefit from her directly effective EU rights under Art 56 to receive medical treatment in another Member State was not only substantially impeded but made impossible by the decision of the Trust not to agree to her parent's request that she be transferred to the Gaslini Hospital. Accordingly the decision of the Trust constituted a plain interference with Tafida's directly effective EU rights under Art 56 of TFEU;

iv) The Trust's decision was unlawful by reason of the failure by the Trust to consider sufficiently or at all Tafida's directly effective rights under Art 56 of TFEU;

v) Had the Trust, properly advised, considered Tafida's directly effective rights under Art 56 of TFEU it would likely still have determined not to agree transfer pending an application to the High Court for a determination of the dispute as to Tafida's best interests in circumstances where the jurisdictional foundation for that national procedure was provided by EU law *and* constituted an interference in Tafida's Art 56 rights that was justified on the grounds of public policy;

vi) In the future, when faced with a request by parents of an EU citizen child for transfer for medical treatment in another Member State, in deciding whether or not to agree to that course of action an NHS Trust will need to consider the directly effective EU rights of the child.

vii) Where an NHS Trust, having properly considered those directly effective EU rights, considers that a transfer would not be in the best interests of the child and that an application to the Family Division of the High Court is required to determine the resulting dispute as to the child's best interests, it is highly likely that that decision will constitute a justified derogation from the EU rights engaged on public policy grounds;

viii) The court rejected the submissions of the Claimant that that the decision of the Trust had deprived her of her liberty pursuant to Art 5 and that the decision of the Trust was discriminatory.

45. In the circumstances, the Claimant succeeded, in the face of opposition by the Trust, in establishing (a) the fact of the Trust's decision, (b) that that decision was amenable to judicial review, (c) that the Trust had acted unlawfully when taking its decision, and (d) that the Trust had made the exercise by Tafida of her Art 56 rights impossible. Further, as a result of the claim for judicial review, clarification was provided as to the proper course of action for NHS Trusts in the future with respect to children's directly effective EU rights in this context. Within this context, I regard the Claimant as plainly falling within the category of a successful party to the proceedings for judicial review. Tafida established the public law ground contended for, namely illegality.

46. I accept that Tafida did not obtain a remedy for the illegality she established in circumstances where the court was satisfied that the case had reached the same point that it would have done had the Trust properly taken its decision. However, having regard to the decision of the Supreme Court in *R (Hunt) v North Somerset Council* I am not satisfied that this is a proper reason for depriving Tafida of a costs order in her favour, particularly in circumstances where the court did not mark the illegality on the part of the Trust by way of a declaration. Within the context of judicial review, the question of whether the ground or grounds pleaded by the claimant is or are established is a binary one. However, when considering any relief consequent on that established ground the court has a wide discretion. Within this context, and consistent with the decision in *R (Hunt) v North Somerset Council*, I am of the view establishing the public law ground contended for is a more reliable indicator of success in the context of the question of costs than is the nature and extent of any discretionary relief subsequently granted for that default. In addition, I have taken account of the fact that the application resulted in lessons of general application beyond this case for NHS

Trusts regarding their treatment of the directly effective EU rights of children in the context with which this case was concerned.

47. Finally, I must also recognise that the Claimant was not successful in her submission that the decision of the Trust had deprived her of her liberty pursuant to Art 5. With respect to the argument regarding the contended for deprivation of liberty, that argument was advanced notwithstanding that the Court of Appeal has twice expressed the view that a person is not being deprived of their liberty where they are receiving treatment and are restricted physically by their infirmities and by the treatment they are receiving (see *Evans v Alder Hey Children's NHS Trust* [2018] 4 WLUK 624 at [12] and *Gard* [2017] 4 WLR 131). Within this context, that argument was always bound to fail and time should not have been taken up with it, requiring as it did the respondent to respond orally and in writing.

48. Within the foregoing context, satisfied as I am that Tafida was the successful party in the claim for judicial review, I can find no reason for disapplying ordinary rule in proceedings of this nature that the unsuccessful party should pay the successful parties costs. I am not satisfied that, however many times the Trust chooses to advance the submission, that there is any basis for concluding that the application for judicial review was some species of calculated campaign to deprive Tafida of a best interests decision and hence any basis to deprive Tafida of her costs of the judicial review on that reasoning. I reach the same conclusion with respect to the other aspects of alleged 'conduct' raised by the Trust. However, given my observations above regarding the submissions concerning deprivation of liberty, I *am* satisfied that the Claimant should not recover that part of her costs relating to the submissions concerning Art 5 of the ECHR. Adopting a broad approach and having regard to the amount of time taken on that point, I am satisfied that an order for costs should be made in favour of the Claimant that she should recover 80% of her costs of the *application for judicial review* from the Respondent Trust, to be assessed on the standard basis if not agreed.

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49. I am not however persuaded, in the different context constituted by proceedings under the Children Act 1989, that it is appropriate to make a costs order in favour of the parents in those proceedings. The latter proceedings concerned a best interests decision under Part II of the Children Act 1989. Whilst it is the case that within those proceedings the parents persuaded the court to reach a conclusion consistent with their articulation of what was in Tafida's best interests, and to that extent have been successful, in my judgment there are powerful arguments against making a costs order in favour of the parents in the proceedings under the Children Act 1989.

50. I am not at all persuaded by the primary costs submission made by the parents that to refuse to make a costs order against the Trust, in circumstances where these proceedings engaged the core Art 8 rights of the parents, would result in an unacceptable inequality of arms as between the parents and the State in breach of Art 6 of the ECHR.

51. Most obviously, there was, as a matter of fact, no inequality of arms in the proceedings. The parents had the benefit of a highly experienced team of solicitors and were represented by specialist leading and junior counsel throughout the hearing.

Within this context, it is entirely artificial (and indeed illogical) to argue that were a costs order not now to be made the parents Art 6 rights would be breached for lack of equality of arms. If the parents had wished to argue that they would suffer from an inequality of arms in breach of Art 6 unless, in the absence of legal aid, the Trust funded their legal costs then this argument fell to be run *before* the final hearing, supported by evidence that the parents would not have the benefit of legal representation unless a species of costs funding order was to be made. Such an application for a public body to make up the deficit in legal funding resulting from an absence of provision under the legal aid legislation would have faced significant difficulties for the reasons I articulated in *HB v A Local Authority and Anor (Wardship: Costs Funding Order)* [2017] EWHC 524 (Fam).

52. Further, and within this context, absent any inequality of arms for the purposes of Art 6, whilst I acknowledge there is an apparent inconsistency in the approach to public funding as between a parent who is facing care proceedings concerning the welfare of their child brought by the State, in the guise of the local authority, and a parent who is facing proceedings of the instant nature brought by the State, in the guise of an NHS Trust, that is a matter for Parliament and not for the court. In considering whether to grant an order for costs, the court assesses that question against well settled criteria and well settled principles that have specific application in proceedings relating to children and on the facts of the individual case. To make an order for costs against a public body simply to remedy the fact that Parliament has not provided for public funding in the circumstances in question would be impermissible unless such a costs order is justified on ordinary principles in the particular circumstances of the case. It is not for the court to fill a lacuna by making a costs order against an NHS Trust where there is otherwise no principled basis for such an order on ordinary principles.

53. In the foregoing context, whether a costs order should be made in favour of the parents in the proceedings under the Children Act 1989 falls to be determined on the principles that ordinarily apply to the making of costs in proceedings concerning the welfare of children under the 1989 Act, and in particular proceedings concerning the welfare of children that are brought by public bodies that are under a duty to do so.

54. I am not persuaded that there is a distinction to be drawn between a local authority that brings care proceedings in respect of a child about whom there are welfare concerns and an NHS Trust which brings proceedings in respect of a child about whom there are differences of opinion between the parents and the treating doctors over what is in that child's medical best interests. Both are bodies of the State, both are under a duty to place the welfare issue before the court where there is a dispute to be resolved and in both cases there is a public interest grounded in the welfare of the child in ensuring that neither local authorities nor NHS Trusts are deterred from discharging that duty by the prospect of costs orders.

55. Within this context, the Trust had no choice but to make an application for a determination of Tafida's best interests in circumstances where there was a disagreement between the parents and the treating clinicians as to those best interests. The Trust was obliged to make such an application in the fulfilment of the Trust's duty of care to Tafida and pursuant to its obligations under s 11(2)(a) of the Children Act 2004 otherwise a void would have existed in respect of consent. More fundamentally, the Trust had to make the application because, as I found, that is the

procedure that is mandated where there is an unresolvable disagreement between doctors and parents as to a child's best interests.

56. Within this context, I accept that the consequences of making a costs order against a Trust in the foregoing circumstances is likely to risk a chilling effect were Trust to be penalised in costs for bringing, and 'losing' a finely balanced case which it is was its duty to bring before the court. More generally, if NHS Trusts are at risk of a costs order on 'losing' an application under s 8 of the Children Act 1989 in a case of this nature, in what is already a complex, difficult and contentious area of law, I am satisfied that there is a risk that Trusts will be deterred from making such applications by the tension between their safeguarding obligations in relation children who are not deriving benefit from life sustaining treatment and the duty to fund the treatment needs of all patients. Further, I accept that there is a risk that where the parents have secured private funding for all treatment the risk of costs will tempt Trusts to depart from medical opinion and to prefer the fully funded position of the parents, which preference avoids the costs risk. I am satisfied that each of these risks is not fanciful when the submissions of the Trust are considered through the prism of the widely acknowledged pressure on resources in the NHS. Within this context, I further accept the submission of the Trust that such an outcome would affect the children most in need of a judicial determination of their best interests, namely those where the decision is a finely balanced one and therefore where the 'litigation risk' presented by proceedings that put the Trust at risk of costs concomitantly higher.

57. In the foregoing context, I am persuaded that the ordinary approach to the making of of costs orders in proceedings concerning the welfare of children under the Children Act 1989 should apply in these proceedings, namely that such an order should be the exception and not the rule. In these proceedings, I am further satisfied that this principle is given even greater focus by the finely balanced nature of the decision in this case. Within this context, I am not satisfied that the arguments concerning equality of arms or matters of 'conduct' that the parents seek to raise amount to reasons to make, exceptionally, a costs order in the proceedings under the Children Act 1989. Finally, I have also had regard to the fact that the parents have in this case raised a significant sum of money that was expressly stated to be for the funding of legal costs. In those circumstances, I am still less inclined to risk the disadvantages of departing from the ordinarily approach.

58. Finally, in so far as it is suggested by Mr Sachdeva and Ms Kohn that Tafida should also recover her costs in the proceedings under the Children Act 1989 there are two difficulties with that submission. Firstly, Mr Sachdeva and Ms Kohn do not represent Tafida in the proceedings under the Children Act 1989, that role being fulfilled by CAFCASS and Mr Gration. The latter make no application for costs in the proceedings under the 1989 Act. Second, and in any event, the principles I have set out above that render costs orders in proceedings under the 1989 Act the exception and not the rule apply with equal force to the costs incurred in those proceedings by Tafida.

59. In these circumstances, I am satisfied that the appropriate order for costs in the proceedings under the Children Act 1989 is no order as to costs.

CONCLUSION

60. For the reasons given above, I shall order the Trust to pay 80% of Tafida's costs of the proceedings for judicial review to be assessed on the standard basis if not agreed. I shall make no order as to costs in the proceedings under the Children Act 1989.

61. That is my judgment.