# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 13 of 2018**

**B E T W E E N:**

**THE HUMAN RIGHTS COMMISSION**
**K F**
**OO (a minor) (by her next friend Tiffanne Thomas)**
**CHILDWATCH**
**CITIZENS UPROOTING RACISM IN BERMUDA**
**COALITION FOR THE PROTECTION OF CHILDREN**
**FAMILY CENTRE**
**SCARS**
**WOMEN'S RESOURCE CENTRE**

**Appellants**

**- v -**

**THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS**
**THE MINISTER OF SOCIAL DEVELOPMENT AND SPORTS**
**THE DIRECTOR OF THE DEPARTMENT OF CHILD AND FAMILY**

**Respondents**

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**Before:** **Clarke, President**
**Smellie, JA**
**Gloster, JA**

**Appearances:** Saul Dismont, Marshall Diel & Myers Ltd., for the Appellants; Wendy Greenidge, Attorney-General's Chambers, for the Respondents

**Date of Hearing:** **Monday, 11 March 2019**
**Date of Judgment:** **Friday, 21 June 2019**

**JUDGMENT**

**GLOSTER JA:**

**Introduction:**

1. This is the appeal of the 2nd to 8th Appellants[1] ("the Appellants") against the judgment of Mr. Justice Hellman ("the judge") dated 28 June 2018 ("the judgment") in which he made certain declaratory judgments in relation to the Family Court's duty to appoint a litigation guardian and counsel in specified proceedings under section 35 of the Children Act 1998 ("the 1998 Act"), and refused to make certain declarations relating to alleged obligations of the first respondent, the Attorney General and the Minister of Legal Affairs ("the Minister"), and the third respondent, the Director of the Department of Child and Family Services ("the Director")[2], sought by the appellants. The appellants ask for the judge's decision to be quashed, set aside and substituted with the declarations sought by the appellants in their various originating summonses.

2. I append to this judgment, as Annex 1, the declarations sought by the appellants as set out in the amended originating summons dated 22 November 2017, issued by certain of the appellants[3]. In short, they claim that a child has a right to be represented in court by a litigation guardian and a lawyer, pursuant to section 35 of the Act, and that the respondents have statutory duties to enforce and fund the appointment of a litigation guardian and counsel and to ensure that section 35 is enforced. They further contend that the respondents have failed to discharge these duties.

3. The appellants, who are children involved in Family Court proceedings and charities and organisations with an interest in the rights of children, claim that, due to the respondents' failure to do so, not a single child was provided with representation from 1998 to 2016, and that only a tiny proportion have been so protected from 2016 to today. This was not disputed in any substance by the respondents although they point out that the judge made no findings of fact in

[1] The 1st and 9th appellants discontinued their participation in the appeals shortly before the hearing.
[2] The court was informed that the second respondent, the Minister of Social Development and Sports, had merged with another department and that that Minister is no longer responsible for child and family services. Ministerial responsibility for the Department of Child and Family Services now rests with the Minister of Legal Affairs. Accordingly the second respondent played no part in the appeal.
[3] These were consolidated on 3 May 2018.

relation to certain practices of the Family Court as set out in the appellants' affidavits. The respondents contend that the court does not have authority to order funding in the absence of express statutory authority to do so.

4. On the appeal (as they had below) Mr Saul Dismont appeared on behalf of the appellants and Ms Wendy Greenidge appeared on behalf of the respondents.

**The relevant statutory provisions**

5. The 1998 Act defines its purposes and the responsibilities of the respondents respectively as follows:

> ***"Purposes of the Act***
>
> *5 The purposes of this Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children.*
>
> ***Welfare principle***
>
> *6 In the administration and interpretation of this Act the welfare of the child shall be the paramount consideration.*
>
> ***Delay***
>
> *7 In any proceedings under Part IV (care and supervision) or Part V (protection of children), the court shall have regard to the fact that any delay in determining any question with respect to the upbringing of a child is likely to prejudice the welfare of the child.*
>
> ***Responsibilities of Minister***
>
> *8 The Minister has responsibility for the general supervision of the administration of this Act and the regulations and may give such directions as he considers necessary in the public interest.*
>
> ***Responsibilities of Director***

*9 (1) The Director of Child and Family Services shall—*

*(a) arrange for the investigation of any allegation or report that a child may be in need of protection, care or supervision and, where necessary, arrange for the delivery of child care services for the benefit of the child;*

*(b) when a child is in the care of the Director—*

*(i) provide accommodation for him; and*
*(ii) maintain him,*

*[…]"*

6. Section 35 of the 1998 Act provides:

***"Representation of child and of his interests in certain proceedings***

*(1) For the purpose of any specified proceedings, the court shall appoint a litigation guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.*

*(2) The litigation guardian shall be under a duty to safeguard the interests of the child.*

*(3) Where—*

*(a) the child concerned is not represented by counsel; and*

*(b) any of the conditions mentioned in subsection (4) is satisfied, the court may appoint counsel to represent him.*

*(4) The conditions are that—*

*(a) no litigation guardian has been appointed for the child;*

*(b) the child has sufficient understanding to instruct counsel and wishes to do so;*

*(c) it appears to the court that it would be in the child's best interests for him to be represented by counsel.*

*(5) Counsel appointed under or by virtue of this section shall be appointed, and shall represent the child, in accordance with rules of court.*

*(6) In this section 'specified proceedings' means any proceedings—*

*(a) on an application for a care order or supervision order;*

*(b) in which the court has given a direction under section 30(1) and has made, or is considering whether to make, an interim care order;*

*(c) on an application for the discharge of a care order or the variation or discharge of a supervision order;*

*(d) on an application under section 33(4);*

*(e) in which the court is considering whether to make a custody order with respect to a child who is the subject of a care order;*

*(f) with respect to contact between a child who is the subject of a care order and any other person;*

*(ff) under Part IVA (custody jurisdiction and access);*

*(g) under Part V (protection of children);*

*(h) on an appeal against—*

*(i) the making of, or refusal to make, a care order, supervision order or any order under section 28;*

*(ii) the making of, or refusal to make, a custody order with respect to a*

*child who is the subject of a care order;*

*(iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in sub-paragraph (i) or (ii);*

*(iv) the refusal of an application under section 33(4); or*

*(v) the making of, or refusal to make, an order under Part V; or*

*(i) which are specified for the time being, for the purposes of this section, by rules of court.*

*(7) The Minister may establish panels of persons from whom litigation guardians appointed under this section must be selected."*

7. To date no rules of court have been made pursuant to section 35 and likewise no regulations have been made providing for the establishment of panels of persons from whom guardians ad litem must be selected.

8. It was common ground that section 35 was modelled on the "tandem model" as contained in section 41 of the UK Children Act 1989. This provides as follows:

***"Representation of child and of his interests in certain proceedings***

*(1) For the purpose of any specified proceedings, the court shall appoint guardian ad litem[4] for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.*

*(2) The guardian ad litem shall—*

[4] It has since been amended to 'an officer of the Service or a Welsh family proceedings officer', but the role is mostly referred to as the 'children's guardian', as provided by The Family Procedure Rules 2010, r16.3.

*(a) be appointed in accordance with rules of court; and*

*(b) be under a duty to safeguard the interests of the child in the manner prescribed by such rules.*

*(3) Where—*

*(a) the child concerned is not represented by a solicitor; and*

*(b) any of the conditions mentioned in subsection (4) is satisfied,*

*the court may appoint a solicitor to represent him.*

*(4) The conditions are that—*

*(a) no guardian ad litem has been appointed for the child;*

*(b) the child has sufficient understanding to instruct a solicitor and wishes to do so;*

*(c) it appears to the court that it would be in the child's best interests for him to be represented by a solicitor."*

*(5) Any solicitor appointed under or by virtue of this section shall be appointed, and shall represent the child, in accordance with rules of court.*

*(6) In this section "specified proceedings" means any proceedings—*

*(a) on an application for a care order or supervision order;*

*(b) in which the court has given a direction under section 37(1) and has made, or is considering whether to make, an interim care order;*

*(c) on an application for the discharge of a care order or the variation or discharge of a supervision order;*

*(d) on an application under section 39(4);*

*(e) in which the court is considering whether to make a residence order with respect to a child who is the subject of a care order;*

*(f) with respect to contact between a child who is the subject of a care order and any other person;*

*(g) under Part V;*

*(h) on an appeal against—*

*(i) the making of, or refusal to make, a care order, supervision order or any order under section 34;*
*(ii) the making of, or refusal to make, a residence order with respect to a child who is the subject of a care order; or*

*(iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in sub-paragraph (i) or (ii);*

*(iv) the refusal of an application under section 39(4); or*

*(v) the making of, or refusal to make, an order under Part V; or*

*(vi) which are specified for the time being, for the purposes of this section, by rules of court.*

*(7) The Secretary of State may by regulations provide for the establishment of panels of persons from whom guardians ad litem appointed under this section must be selected.*
*[…]"*

9. Both sections provide a child with the representation of a 'guardian' and a lawyer. As Thorpe LJ described in *Mabon v Mabon* [2005] EWCA Civ 634; [2005] Fam 366:

> *"25 […] In our system we have traditionally adopted the tandem model for the representation of children who are parties to family proceedings, whether public or private. First the court appoints guardian ad litem who will almost invariably have a social work qualification and very wide experience of family proceedings. He then instructs a*

> *specialist family solicitor who, in turn, usually instructs a specialist family barrister. This is a Rolls Royce model and is the envy of many other jurisdictions. […] The guardian's first priority is to advocate the welfare of the child he represents. His second priority is to put before the court the child's wishes and feelings."*

10. Section 36(1) of the Bermuda Act[5] provides litigation guardians with the useful tool of unfettered access to the files of the Director of the Department of Child and Family Services, which the litigation guardian may use as evidence "regardless of any enactment or rule of law which would otherwise prevent the record in question being admissible in evidence".[6] If a litigation guardian is not appointed, it would appear that such access is not automatically available.

11. Section 2 (1) defines "the Minister" for the purposes of the 1998 Act as meaning "the Minister for the time being responsible for child and family services". That person currently is the first respondent.

12. In so far as material, the Bermuda Constitution, as set out in schedule 2 to the Bermuda Constitution Order 1968 ("the Constitution"), provides as follows:

> ***"PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL***
>
> ***Fundamental rights and freedoms of the individual***
> *1. Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:*
>
> > *(a) Life, liberty, security of the person and the protection of the law;*

[5] As does section 42 of the UK Act.
[6] See section 36(2) and (3).

*(b) freedom of conscience, of expression and of assembly and association; and*

*(c) protection for the privacy of his home and other property and from deprivation of property without compensation,*

*the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

*…..*

***Provisions to secure protection of law***

*6.(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

*(2) Every person who is charged with a criminal offence—*

*(a) shall be presumed to be innocent until he is proved or has pleaded guilty;*

*(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;*

*(c) shall be given adequate time and facilities for the preparation of his defence;*

*(d)* ***shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense;***

*(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;*

*(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge; and*

*(g) shall, when charged on information or indictment in the Supreme Court, have the right to trial by jury,*

*and, except with his own consent, the trial shall not take place in his absence, unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.*

*(3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.*

*(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.*

*(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.*

*(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.*

*(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.*

*(8)* ***Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial****; and* ***where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time." [Emphasis supplied.]***

**The evidence before the judge**

13. There was considerable evidence before the judge on behalf of the appellants which demonstrated that appointments of litigation guardians and counsel pursuant to section 35 were not taking place and that the purpose of section 35 was being frustrated. In the judge's procedural ruling in relation to the protective costs order dated 20 February 2018, he summarised the evidence as follows – and later referred to these passages in the substantive judgment:

> *"10. Sara Clifford, in an affidavit sworn on behalf of the First Plaintiff as Acting Executive Officer in support of the claim for declaratory relief states that it was not until 2014 that a litigation guardian was appointed under section 35, and that since then a litigation guardian or lawyer has only been appointed in some 14 cases. She adds that this is in the context of some 20 to 40 cases to which section 35 would apply coming before the Family Court each week.*
>
> *11. Ms Clifford states that the absence of the section 35 safeguards is of particular concern as the Family Court has extensive powers to remove children from their families and place them in the care of the Third Defendant. She further states this may then cause a child to be placed in foster care, police custody, a secure treatment facility or inside a prison.*
>
> *12. Ms Clifford draws the Court's attention to what she describes as a 'disturbing practice' in the Family Court whereby children are sent to secure facilities in the United States, where some have been forced to take medication and have been denied contact with family and friends. She states that none of the children visited with these very serious consequences had the benefit of a litigation guardian or counsel.*
>
> *13. Section 36 of the 1998 Act provides that a litigation guardian has the right to examine and make copies of records held by the Third Defendant with respect to the child concerned. Ms Clifford suggests that this is a valuable safeguard.*

……

*"14. Tiffanne Thomas, who acted as litigation guardian for the Second through Fourth Plaintiffs in the Family Court, has sworn an affidavit in support of the claim for declaratory relief expressing concern at what she sees as the Second and Third Defendants' lack of understanding of how section 35 is supposed to work and frustration at their refusal to fund litigation guardians or counsel appointed under section 35."*

14. The judge concluded in the substantive judgment that:

> *"6. I cite these passages to show that the decisions made by the Family Court in specified proceedings may have very serious consequences for the child concerned. I make no findings as to the alleged practice of the Family Court of sending children to secure facilities in the United States and express no views about it. The present proceedings would not have been an appropriate vehicle for a fact finding process in relation to those allegations and it is not necessary to resolve them in order to determine the matters in issue."*

**The Judgment**

15. At paragraphs 8 and 9 of the judgment, the judge agreed that the Bermuda Legislature intended section 35 to operate like section 41 of the UK Act:

> *8. The first aspect is that the Family Court has reportedly been unclear as to its duties under section 35. By way of context, Mr Dismont, who appeared for the Plaintiffs, cited a passage at page 742 of a legal textbook titled Children – The Modern Law[7] illustrating how, by analogy with the UK Act, the Legislature may reasonably be taken to have intended section 35 to operate:*
>
> > *"Section 41(6) of the Children Act 1989 and the accompanying rules of court specify a long list of proceedings in which the court must appoint a*

[7] *Fourth Edition, (2013) Andrew Bainham and Stephen Gilmore, Family Law*

*children's guardian for the child 'unless satisfied that it is not necessary to do so in order to safeguard his interests'. It was envisaged by the Lord Chancellor, during the passage of the Children Bill, that an appointment would need to be made in the vast majority of cases falling within the specified proceedings. The wording of the legislation is a reformulation of the former statutory language and was designed to remove the wide discretion which the courts previously had in deciding whether to appoint a children's guardian. The small minority of cases in which a children's guardian is not appointed are likely to be mainly those in which the child wishes to instruct his own solicitor and is found to be competent to do so. In 'specified proceedings' the child is automatically entitled to be a party and may instruct a solicitor where he has sufficient understanding and wishes to do so."*

*9. I agree that section 35 of the 1998 Act was intended to operate like section 41(6) of the UK Act. This conclusion is bolstered by section 6 of the 1998 Act, which provides that in the administration and interpretation of that Act, "the welfare of the child shall be the paramount consideration" ("the welfare principle"), and section 8 of the Interpretation Act 1951, which provides: "'shall', in relation to any statutory provision whereby a duty is imposed, shall be construed as imperative".*

16. However, he then went on to make the following declarations:

*"10. I therefore take this opportunity to clarify the Family Court's duty under section 35 by making the following declarations:*

*(1) For the purpose of any specified proceedings, the court shall:*

*(i) Consider whether to appoint a litigation guardian for the child concerned;*

*(ii) Appoint a litigation guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests;*

*(iii) Give reasons for its decision*

*(2) Where, in the case of any specified proceedings, the child concerned is not represented by counsel, the court shall:*

*(i) Consider whether any of the conditions mentioned in section 35(4) is satisfied;*

*(ii) If it finds that any of the said conditions is satisfied, consider whether to appoint counsel to represent the child concerned;*

*(iii) Give reasons for its decision.*

*(3) An order appointing a litigation guardian or counsel to represent the child concerned is made subject to sufficient funds being available to fund such appointment."*

17. The judge then went on to reject the appellants' argument that section 35 imposed an obligation on the respondents to ensure that a child's representation by a litigation guardian and a lawyer was publicly funded. In so far as relevant for the purposes of the appeal, he said:

*"11. The availability of sufficient funding is the rub and I shall address it shortly.*

*12. The Plaintiffs also sought declaratory relief that the Minister and the Director each have a duty to enforce section 35, which I took to mean ensuring that the Family Court is aware of its duties under that section. Section 8 of the 1998 Act provides that the Minister has responsibility "for the general supervision of the administration" of the Act "and may give such directions as he considers necessary in the public interest' and section 9 provides that the Director shall "arrange for the delivery of child-care services for the benefit of the child". Neither section, in my judgment, imposes a duty to enforce section 35 in this sense.*

*13. ……*

*14. ……*

***Funding***

*15. This was the real point of controversy. In the UK there are statutory mechanisms independent of the UK Act which provide for the funding of litigation guardians and counsel appointed under that Act. In Bermuda there are no such statutory mechanisms. As the Director stated in his Second Affidavit:*

> *"The Director is also bo[u]nd by Financial Instructions as an accounting officer and is not permitted to approve the payment of any funding if it is outside of the rules and regulations as outlined in Financial Instructions. Prior to the approval of any expenditure, the accounting officer must obtain three quotes from any service provider. That provider must be vetted by all Ministries responsible for collecting funds for the Government to ensure the vendor does not have outstanding debt with the Government. The vendor must then be entered into the Government accounting system (El) with all of the proper documentation related to that vendor. Every accounting officer must have a contractual agreement in place that is approved by the Attorney General before any services can be provided.*
>
> *The Act is silent on any kind of compensation related to section 35, and Parliament has not at any time approved funding in the budget of the Department of Child and Family Services related to this section. It would therefore be a violation of Financial Instructions for me to distribute any funding for payment of services related to section 35."*

18. The judge then turned to articulate (and subsequently reject) the appellants' arguments in relation to these issues:

> *"16. Mr Dismont advanced three main arguments to overcome these difficulties. In making them, he relied by way of statutory context upon the welfare principle in section 6 of the 1998 Act and the provisions in sections 8 and 9 mentioned above.*
>
> *17. First, Mr Dismont submitted that, having willed the end, the Legislature should be taken to have willed the means. Thus the 1998 Act impliedly authorised the*

*funding of litigation guardian and counsel appointments. Otherwise the legislative intent that they should be appointed would be defeated. This counter-intuitive result would offend against the statutory presumptions that a statute should not be construed so as to produce an absurd result and that an enactment should be given a purposive interpretation. See Bennion on Statutory Interpretation, Seventh Edition, sections 12.1 and 11.1.*

*18. Second, if there is a lacuna in section 35, then the Court should exercise its inherent jurisdiction to fill it. In so doing the Court would be affecting the procedural and not the substantive rights of the parties. Mr Dismont suggested a metaphor: The Legislature has built a house: The Court through the exercise of its inherent jurisdiction was merely being asked to provide the key to unlock the door to the house.*

*19. Third, fair hearing standards had evolved in Bermuda, as in England and Wales, to the point where representation by a litigation guardian and counsel was an essential ingredient to the child's right to a fair hearing under section 6(8) of the Constitution. As Sir James Munby, President of the Family Division, stated extra-judicially in the fifteenth View from the President's Chambers, 19th September 2016:*
*"Common law principles of fairness and justice demand, as do Articles 6 and 8 of the Convention, a process in which both parents and the child can fully participate with the assistance of representation by skilled and experienced lawyers.*
*The tandem model is fundamental to a fair and just care system. Only the tandem model can ensure that the child's interests, wishes and feelings are correctly identified and properly represented".*

*20. Recognising that the child has a constitutional right to representation would be consistent with Bermuda's international obligations, as expressed in the United Nations Convention on the Rights of the Child ("the UNCRC"), which the United Kingdom extended to Bermuda on 7th September 1994[8]. Article 12 of the UNCRC provides:*

[8] See http://treaties fco.gov.uk/treaties/treatyrecord, htm?tid=3398.

> *"I. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*
>
> *21. Mr Dismont submitted that if the child has a constitutional right to representation, then the Court should construe section 35 so as to comply with the Constitution and give effect to that right.*

19. The judge concluded that these arguments should be rejected because, as he said:

> *"22. These arguments were made with passion and eloquence. But Ms Greenidge has persuaded me that they are all fundamentally flawed.*
>
> *23. The courts will not construe a statute as authorising public expenditure merely by implication. As Lord Bridge stated when giving the leading judgment in Holden & Co v CPS (No 2), a case which concerned whether in the absence of express statutory authority the court in criminal proceedings had power to order the payment of solicitors' costs from central funds:*
>
> > *"But still more important, in the present context, is the special constitutional convention which jealously safeguards the exclusive control exercised by Parliament over both the levying and the expenditure of the public revenue. It is trite law that nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less stringent is the requirement of clear statutory authority for public expenditure. As it was put by Viscount*

*Haldane in Auckland Harbour Board v. The King [1924] A.C. 318, 326:*

> *'it has been a principle of the British Constitution now for more than two centuries . . . that no money can be taken out of the consolidated Fund into which the revenues of the state have been paid, excepting under a distinct authorisation from Parliament itself."'*

*24. This principle is of general application and therefore applies to family cases. E.g. see In re K (Children) [2015] 1 WLR 3801 EWCA per Lord Dyson MR at para 28 and HB v A Local Authority [2017] 1 WLR 4289 Fam D per MacDonald J at para 85.*

*25. In HB v A Local Authority, MacDonald J held that the High Court had no power under its inherent jurisdiction to make a costs funding order against a local authority requiring it to fund legal advice and representation for a parent in wardship proceedings brought by the local authority. He stated at para 112:*
*"Within this context, I am satisfied that the limits that are properly imposed on the exercise of the inherent jurisdiction for the sake of clarity and consistency, and of avoiding conflict between child welfare and other public advantages in this case are those that must be applied when considering the nature and extent of the court's jurisdiction to order a public authority to incur expenditure. As Lord Sumption JSC pointed out in Prest v Prest [2013] 2 AC 415, para 37, courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different."*

*26. I agree. It would be wrong in principle for this Court to use its inherent jurisdiction to authorise statutory expenditure where the Legislature has not expressly done so. Further, as Mr Dismont recognised, the Court's inherent jurisdiction relates to procedural not substantive matters, which must be governed by the general law and rules. See Wicks v Wicks [1999] Fam 65 EWCA per Ward LJ at 76H - 77F and Peter Gibson LJ at 88H. Requiring the Defendants to fund representation under section 35 would interfere with the Government's substantive right to allocate public monies as it sees fit and the substantive*

*rights of the Minister and the Director to do likewise within their budgetary constraints.*

*27. There is a further objection to the use of the inherent jurisdiction in relation to section 35. If the court appointing a litigation guardian or counsel had inherent jurisdiction to require the appointment to be publicly funded, then it would be for that court to so direct. The appointing court is the Family Court. Both the Family Court, and the Magistrates' Court of which it forms a part, are inferior courts (a technical, not a pejorative, term). They do not have an inherent jurisdiction, save possibly (indeed probably) to regulate their own procedures. See Bennion on Statutory Interpretation, Fifth Edition, at page 111. The possibility of the Family Court exercising an inherent jurisdiction in relation to section 35 therefore does not arise.*

*28. Turning to the Constitution, I agree that fair hearing principles have evolved to the point where the child has a constitutional right to participate meaningfully in specified proceedings. The tandem model satisfies this constitutional requirement. However, where, pursuant to the right to a fair hearing, the Constitution confers a right to representation it does not also confer a right to have that representation publicly funded.*

*29. This is apparent from section 6(2)(d). This provides that every person who is charged with a criminal offence:*

> *"shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense".*

*30. The right of a person who is charged with a criminal offence to have legal representation is therefore guaranteed by the Constitution. It is so important that it is not merely implied as part of a more general right to a fair hearing, as is the case under section 6(8) with the right to legal representation regarding the determination of a civil right or obligation, but is expressly enumerated. Even so, section 6(2)(d) provides that a person charged with a criminal offence is only entitled to legal representation at the public expense "where so provided by any law". The*

> *Constitution does not require that any such law be enacted. By parity of reasoning, there is no constitutional requirement to enact a law providing for legal representation in any other area where the constitutional right to a fair hearing is engaged.*
>
> *31. The Plaintiffs' application for declarations regarding the funding of representation under section 35 is therefore dismissed. This leaves a deeply unsatisfactory situation where, pursuant to its statutory duty, the Family Court will make orders for the appointment of litigation guardians and counsel which will in many cases not be complied with for want of public funding. For the present at least, the legislative intent in enacting section 35 will continue to be frustrated and children's constitutional right to meaningful participation in decisions which may be of vital importance to their lives and wellbeing will often remain unrealized."*

20. Accordingly, the judge made the declarations referred to in paragraph 10 of his judgments but no further declarations in relation to any obligations of the respondents which the appellants had asserted. There does not appear to have been any order drawn up to reflect his disposition of the case. That is unsatisfactory. In future counsel should ensure that, irrespective of whether an appeal is anticipated, a formal order is drawn up and sealed to reflect the outcome of the hearing.

**The Notice of Appeal**

21. By a notice of appeal dated 9 August 2018 the appellants appealed the whole decision of the judge. The notice of appeal was in the following terms:

> *"(1) The Learned Judge having set out at paragraphs 8 and 9, the Legislature's intent in enacting section 35 of the Children Act 1998 (the 'Act'), erred in law:*
> *(i) at paragraph 10(1)(i) in declaring that the Family Court shall first "Consider whether to appoint a litigation guardian for the child concerned', and*

*(ii) at paragraph 10(3) in declaring that " An order appointing a litigation guardian or counsel to represent the child concerned is made subject to sufficient funds being available to fund such appointment.",*

*(2) The Learned Judge erred in determining at paragraph 12 that the Minister and the Director have no duty to ensure that the Family Court is aware of its duties to provide children with representation under section 35,*

*(3) The Learned Judge erred in law at paragraph 13:*

*i. in finding that the Act does not " impose any specific duties" on the litigation guardian or counsel to ensure that section 35(1) is enforced, and*

*ii. in failing to declare that in any of the proceedings defined at section 35(6) counsel must advise the Family Court of its duties to appoint children representation under section 35(1),*

*(5) The Learned Judge erred in law at paragraph 15 in accepting that that "It would therefore be a violation of Financial Instructions for [the Director] to distribute any funding for payment of services related to section 35", despite the Director's obligation to protect the welfare of children and his wide powers to provide services to do so,*

*(6) The Learned Judge erred in law in failing to properly consider the presumption of an interpretation against absurdity, and finding that it was not absurd to interpret the Act in such a way as to make the protection provided by section 35 unenforceable and unavailable,*

*(7) The Learned Judge erred in law at paragraph 23 and 24 in finding that section 35 did not impose a paramount obligation that amounted to an express statutory authority for the funding of representation,*

*(8) The Learned Judge erred in law at paragraph 25 - 27 in finding that despite the Legislature's intent in enacting the Act for the welfare of children and section 35 expressly providing children with the protection of representation, the inherent jurisdiction could not be relied on to fill any lacuna in its enforceability,*

*(9) The Learned Judge erred in law at paragraph 31 in identifying that "the legislative intent in enacting section 35 will continue to be frustrated and children's constitutional right to meaningful participation in decisions which may be of vital importance to their lives and wellbeing will often remain unrealized", yet providing such an interpretation of the law that invites a breach of the Constitution.*

***Relief Sought from the Court of Appeal***

*(i) That the Learned Judge's decision be quashed, set aside and substituted with an order in favour of the Appellant.*

*(ii) Costs."*

22. Again, it was perhaps unfortunate that the court was not provided by the appellants with a form of draft order which counsel was inviting the court to make and, in particular, the precise form of the declarations which the appellants were asking the court to make in light of certain of the judge's rulings.

**The parties' respective submissions**

23. Mr Dismont, for the appellants, basically repeated the submissions which he had made below. In his written and oral submissions, he supported the arguments set out in the notice of appeal and contended that the declarations which the judge had made were seriously flawed in various respects. In response to questions from the court, he submitted that the Minister had a current obligation to fund every litigation guardian and counsel appointed by the court pursuant to section 35 of the 1998 Act; if the Minister wished to put a cap on the fees or rates payable, he would need to put in place an appropriate scheme to do so. He reiterated that the appellants sought from the court the declarations previously sought in the amended originating summons.

24. He informed the court on instructions that the appellants are now further concerned that the judgment has caused more children to be deprived of representation; he informed us that it was understood that the Magistrates' Court had not appointed counsel for a child in a single case since the date of the

judgment, and a litigation guardian had been appointed in only one case, which had required legal argument so to persuade the court. In addition, apparently due to lack of remuneration, the only qualified litigation guardian in Bermuda had been forced to withdraw her services from all but one of her cases. In consequence, he submitted:

> *"where there was once the faintest of pulse, the provision of representation for children under section 35 is now entirely silent, and with it the voice of children in Family Court proceedings."*

25. Ms Greenidge, for the respondents, supported the judge's judgment, as amplified in her written and oral submissions. While she did not accept the factual position as stated by the appellants as to the precise numbers of children unrepresented by litigation guardians and counsel, the respondents adduced no evidence in rebuttal, and appeared to accept that, as stated by the judge in paragraph 31 of the judgment, the result of the judge's declarations was to leave:

> *"a deeply unsatisfactory situation where, pursuant to its statutory duty, the Family Court will make orders for the appointment of litigation guardians and counsel which will in many cases not be complied with for want of public funding. For the present at least, the legislative intent in enacting section 35 will continue to be frustrated and children's constitutional right to meaningful participation in decisions which may be of vital importance to their lives and wellbeing will often remain unrealized."*

26. She orally submitted that there was no evidence that the Minister would refuse to make regulations or put a scheme in place to provide funding for litigation guardians and counsel appointed under the 1998 Act. As a result of questioning from the court, she then (somewhat surprisingly, in view of later revelations) said that she did not know whether the Minister was prepared to make such regulations or whether he had any proposals to do so. The following day, having taken instructions, Ms Greenidge informed us that the Minister had in fact tabled

a Bill to the House of Assembly on 30 November 2018 entitled "Children Amendment Bill 2018" ("the Bill"). The Bill, she informed us, represented the general policy of the Minister. According to the Explanatory Memorandum to the Bill, it is designed to amend the 1998 Act, to provide for the regulatory oversight of litigation guardians under the Child Care Placement Board; to provide a regulatory framework for the licensing, regulation, and appointment of litigation guardians; and to make additional provision for purposes of litigation guardians. Although the Bill had a limited first reading in the House of Assembly in December 2018, the debate was postponed. As at the time of writing this judgment, we are informed that the Bill remains on the order paper for consideration by the legislature during this session of Parliament, which concludes in July 2019. Ms Greenidge submitted that it was not relevant for this court to have regard to, or comment upon, the Bill.

27. Again, in circumstances where critical issues in the case include whether the respondents, and in particular the Minister, have an obligation under the 1998 Act to put in place a scheme to provide for funding for litigation guardians and counsel for children, and, if so, whether they are in breach of that obligation, it would have been helpful to the court if the respondents had informed the court (and indeed their own counsel) of the position prior to the hearing. The court would then have had an opportunity to consider the relevant materials and the parties' written submissions as part of the court's pre-reading. To the limited extent that it is appropriate for this court to refer to the Bill, I return to the subject below.

**Discussion and determination**

**The declarations made by the judge purporting "to clarify" the Family Court's duty under section 35 – ground (1) of the notice of appeal**

28. The first issue which arises for determination is whether it was appropriate for the judge to make any declaration "clarifying" the meaning of the Family Court's duty

under section 35, and, if so, whether he was correct in the conclusions which he reached.

29. In my judgment, in this case, where the statute clearly sets out the circumstances in which, and the conditions upon which, the Family Court's duty under section 35 arises, it was inappropriate for the judge to have made any declaration as to the meaning of the relevant provisions so far as they related to the powers or duties of the Family Court. His attempt to do so amounted to an unjustified gloss on the words of the statute itself. Although, obviously, it was legitimate for him to express his judicial views as to its correct interpretation, any declaration by the court could not actually change the correct interpretation as a matter of law, or the wording, of the statute, and therefore served no purpose.

30. In any event, his attempt at clarification, in my judgment, at best only served to obfuscate the correct approach by the Family Court to the appointment of a litigation guardian and counsel under section 35 and, at worst, wrongly superimposed additional conditions not found in the statute itself. I deal with each of the declarations in turn.

31. First, the declaration at paragraph 10(1)(i) that "the court shall: Consider whether to appoint a litigation guardian", may be thought to imply that the court has some sort of discretion to exercise, even if the statutory exclusion ("unless satisfied that it is not necessary to do so in order to safeguard his interests") does not apply, because the making of an order can be ruled out at the "consideration" stage. That would be wrong. Unless the judge is satisfied that it is not necessary to do so in order to safeguard the child's interest, the court *is obliged* to appoint a litigation guardian. There is no "may" or "whether" about the function of the court under section 35(1). If all the judge was meaning to say by this declaration was that the relevant judge had to consider whether the statutory exclusion applied, paragraph 10 (1) (i) was an unnecessary gloss. Obviously discharge of the court's function under section 35(1) involves consideration by the judge as to whether the

exclusion applied, as part of the judicial process - but there was no need to make a declaration saying so. The declaration in paragraph 10(1)(ii) does no more than repeat certain of the words in section 35(1) - with the omission of the word "shall", although that is to be found in the opening words of the paragraph. Likewise, there was no need to make a declaration in paragraph 10(1)(iii) that reasons had to be given. It is trite law that judges are required to give reasons for decisions which they make; see e.g. *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 *per* Lord Phillips MR, at paragraphs 7 and 13, which the judge himself cited at paragraph 14 of the judgment. The length and extent of such reasons will depend on the nature of the case.

32. Second, although his declaration under paragraph 10(2) as to the judicial decision-making process to be carried out under section 35(3) and (4) is not actually wrong, it nonetheless may give rise to confusion, since the use of the word "shall" in the opening words "the court shall" might suggest some sort of mandatory obligation imposed on the judge, whereas in fact his discretion as to whether to appoint counsel or not is unconstrained, even in circumstances where any or all of the conditions mentioned in subsection (4) are satisfied. Indeed, in a theoretical given case it might not even be necessary for the judge to consider whether any of the conditions apply, since, even on the assumption that they did, a rational exercise of the discretion might suggest no appointment of counsel at all.

33. Third, the declaration at paragraph 10(3) of the judgment, in my view wrongly, states that an order *of the court* under section 35 is "subject to sufficient funds being available to fund such appointment". In my judgment, there is no warrant in the wording of section 35 to justify the imposition of such a condition. First of all, it is not clear what the judge means by his gloss on the statutory wording. Does he mean that the *appointment* by the court (perhaps of specified individuals as litigation guardian and counsel) does not take effect unless and until the court is satisfied that "sufficient funds" are available? Or does he mean that the

litigation counsel so appointed is *not to act* until such funds are available? Or does he perhaps mean that, even where otherwise the court would be *obliged* under the statutory provisions to appoint a litigation guardian, the court should not do so unless satisfied as to the availability of funds? And, so far as the appointment of counsel is concerned, does the declaration have the effect that one of the considerations - indeed the overriding consideration - which the court is to take into account in the exercise of its discretion as to whether to appoint counsel is the availability of funds to pay counsel's fees?

34. I agree with Mr Dismont's submissions that this declaration is contrary to the express wording of section 35(1) and is inconsistent with the judge's own conclusion in the preceding paragraphs that the section is intended to operate in the same way as section 41 of the English Act. It also introduces - apparently as an overriding condition - a consideration which clearly conflicts with the court's statutory obligation under section 6 of the 1998 Act to administer the Act with the welfare of child as the paramount consideration.

35. I accept that the Family Court, whether under its inherent jurisdiction or otherwise, cannot itself, in the absence of express statutory authorisation authorising the application of public funds for legal representation of individuals, order the payment of the fees for litigation guardians, or counsel, to be made out of public funds or require the Minister so to provide, irrespective of the impact of human rights legislation; see the English case of *Re K and H (Children)* [2015] EWCA Civ 543, [2015] 1 WLR 380 which I examine more fully below under later grounds of appeal relating to the Minister's duties.

36. But these principles, and indeed the lack of funding itself, provide no grounds allowing the Family Court to refuse to exercise *its* powers under section 35 of the 1998 Act, or to refuse to comply with its statutory obligation thereunder to appoint a litigation guardian where the statutory exclusion in section 35(1) does not apply. Thus, unless the court is satisfied that it is not necessary to do so in

order to safeguard the child's interests, it *is bound to appoint a litigation* guardian, irrespective of the fact that funding is not available. Likewise, although the court's power to appoint counsel under section 35(3)-(5) is discretionary, if any of the statutory conditions are satisfied, and the nature of the case and the interest of the child requires it, the court would almost inevitably be obliged to exercise its discretion to appoint counsel. Again, that would, or at least might well, be despite an absence of funding which, in my view, would not be a legitimate factor to take into account, if the paramount consideration of the child's welfare required such representation. Appointment in such terms would not amount to the court exercising an illegitimate power to direct the Minister to fund such representation. The court would not be ordering the Minister to do anything, nor would it be directing the payment of legal fees out of public funds – although the Minister's refusal to do so might give rise to other remedies or steps taken by parties or interest groups thereafter, as to which see below.

37. Accordingly, I would allow the appellants' appeal under their first ground of appeal. I would set aside the declarations made by the judge in paragraph 10 of his judgment. There is no need to make any substitute declarations since, as I have said, the statutory provisions are clear.

38. It is worthy of comment that clause 6 of the Bill, which is intended to amend section 35, replaces the mandatory obligation on the court to appoint a litigation guardian for the purpose of specified proceedings in all cases "unless satisfied that it is not necessary to do so in order to safeguard his interests", with a discretionary power in terms that "the court may determine as to whether a litigation guardian should be appointed for a child for the purpose of specified proceedings".

**The judge's determination that the Minister and the Director have no duty to ensure that the Family Court is aware of its duties to provide children with representation under section 35 – ground (2)**

39. I have already cited paragraph 12 of the judgment above. The judge appears at this stage of his judgment to have interpreted the appellant's contention that the Minister and the Director had a duty to enforce section 35 as "a duty to ensure that the Family Court is aware of its duties to provide children with representation under that section 35". Mr Dismont did not address any substantive argument under this particular ground of appeal. I would not allow an appeal on this ground in any event. It is not for the Minister "to ensure that the Family Court is aware of its duties to provide children with representation under section 35". The statute is clear as to what the Family Court is obliged to do as I have described above. It is not for the Minister to direct the judges of the court as to what their duties are – let alone how to discharge them.

40. I deal later in this judgment with what I regard as the duties of the Minister under the 1998 Act.

**Whether the learned Judge erred in law in finding that the Act does not impose any specific duties on the litigation Guardian or Counsel to ensure that section 35(1) is enforced – ground (3)**

41. Again, this ground was rightly not pursued by Mr Dismont in oral argument. The judge dealt with this issue at paragraph 13 of his judgment as follows:

> *"The Plaintiffs also sought declarations in relation to the duties of counsel and the litigation guardian to ensure that section 35 was enforced. As the 1998 Act does not impose any specific duties on them in this regard, I do not propose to make any declarations on the subject. Counsel always has a duty to advise the court of any relevant statutory provisions, including section 35, but that duty is so well*

*established that it does not require clarification by a declaration from this Court."*

I agree and accordingly would not allow an appeal on this ground.

**Grounds 5-9**

42. I take these grounds of appeal together as they all essentially relate to the appellants' contention that the judge was wrong in failing:

i) to declare that the Minister was obliged under section 35 of the 1998 Act and section 6(8) of the Constitution to provide funding for the representation of children by litigation guardians and counsel; and

ii) to order that the Minister should provide such funding to children in section 35 cases.

43. Mr Dismont realistically accepted that in Bermuda there were no express statutory mechanisms providing for public funding of litigation guardians or counsel under section 35. He also accepted that Parliament had not at any time approved funding in the budget of the Department of Child and Family Services related to section 35. But he nonetheless attacked the judge's conclusion on the following grounds:

i) that it was not a violation of Financial Instructions (as referred to in paragraph 15 of the judgment) for the Director to distribute any funding for payment of services related to section 35;

ii) that the presumption of an interpretation against absurdity – i.e. an interpretation of section 35 of the 1998 Act that resulted in its protection being unenforceable and unavailable – meant that section 35 should be

construed as empowering the Minister to allocate public funds for section 35 purposes;

iii) that the presumption of constitutionality required that section 35 should be construed as enabling the court to order that the Minister should provide funding to children in section 35 cases; as otherwise there would be a breach of such children's constitutional rights under section 6(8) of the Bermuda Constitution Order 1968 to meaningful participation in decisions which might be of vital importance to their lives and wellbeing and the legislative intent of section 35 would continue to be frustrated;

iv) that, as a matter of construction, section 35 imposed a paramount obligation that amounted to an express statutory authority for the funding of representation;

v) that, given that the enactment of the 1998 Act was for the welfare of children and that section 35 expressly provided children with the protection of representation, the inherent jurisdiction of the court could be relied on to fill any lacuna in its enforceability so as to enable it to order the Minister to provide funding.

44. In this context Mr Dismont relied upon the principles expounded in English cases such as *Attorney General of the Gambia v. Jobe* [1984] AC 689, PC, at page 702 A to F; *Regina v Lambert* [2002] 2 AC 545 at [85] to [86], per Lord Hope; and *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* (2003) 14 BHRC 626; on appeal to the House of Lords, reported as *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2006] 1 All ER 487. He also relied upon the decision of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v JG* [1999] 3 SCR 46. That case held that, in family proceedings, there were circumstances in which an

indigent parent was entitled, as part of the principles of "fundamental justice", equivalent to Bermuda's fair hearing rights, to state funded counsel. That was in circumstances where (as in the present case under the Bermuda Constitution) there was, in addition, a specific right to counsel in criminal proceedings. He submitted that the same sort of analysis had, by parity of reasoning, to apply with equal, if not greater, force to a child involved in family proceedings under section 35 of the 1998 Act. Such a child therefore had a right, as part of his or her fair hearing and access to justice rights under section 6(8) of the Constitution, to counsel funded by the Minister, and despite any constitutional conventions as to public money.

45. Before turning to consider Mr Dismont's submissions, I should refer to the general lack of availability of legal aid for the representation of children under the 1998 Act. It was common ground that legal aid under the Bermuda Legal Aid Act 1980 did not provide a satisfactory solution that would enable the adequate representation of children under section 35. This was for the following reasons:

i) the Legal Aid Act does not provide for the funding required for the services of the litigation guardian;

ii) legal aid is only available in family proceedings if those proceedings involve questions of custody, access adoption, maintenance or support of a child under 18; legal aid is therefore not available for those specified proceedings referred to in subsections 35(6)(a),(b), (c),(d), (g) and any appeals against such orders; that leaves many important specified proceedings affecting the rights of a child not within the scope of legal aid;

iii) section 3B provides that legal aid *"*may only be granted if the Committee is satisfied, after making inquiries under section 9, that the applicant appears to have a reasonable prospect of succeeding on the merits of the case*";* but often "the merits of the case" are immeasurable for a child party in the

Family Court, who is neither an applicant nor the respondent and therefore the condition cannot be satisfied;

iv) the provision is further limited by the means test contained in section 10; this limits aid to only those applicants with a disposable income of less than $18,000 a year; the third Schedule to the Legal Aid Act defines 'disposable income' as being "the aggregate annual gross income of the household of which [the applicant] is a member"; because a child is ordinarily a member of his household, it is unlikely that he will be eligible for legal aid save in circumstances where both his parents are unemployed; this means that a child's right to a fair trial is subject to the financial status of their entire household with the likely consequential breach of the child's right to a fair trial;

v) a further difficulty arises from the question as to who is to apply for aid for a child; the parents are parties to the proceedings, who are often in court due to allegations of negligence in their care for the child; it is unrealistic to expect them to make the application.

46. I accept Mr Dismont's submission that it is probable that the intent of the Legislature under the 1998 Act was to provide children with representation without concern for a means test.

47. Nor is the possibility of a costs award an adequate safeguard. For example, section 12(11) of the Magistrates Act 1948 provides:

> *"(11) A Special Court, upon determining any cause or matter, may make such order as to the payment of costs as appears to the court to be just, and any such order may be enforced as though it were an order made by a court of summary jurisdiction under Part III"*

48. But, as Mr Dismont submitted, that provision is unhelpful for securing funds as (i) children commonly do not have a lawyer who could make such an application; and (ii) the section only permits a party to apply for costs. There is no guarantee they will be successful and ordinarily they are limited by the Court Fees and Expenses Act 1971 which would leave the remainder to be paid by the child. If children are only permitted to have lawyers who are prepared to come to represent them on the off chance that they may get paid via costs, then children will remain as unrepresented as they are now. It does not resolve the issue of funding.

49. In my judgment, the correct analysis is somewhat different from that adopted by the judge but, contrary to the submissions of the appellants, it does not lead to the conclusion that the court can *directly* order the Minister, or the Director, to provide funding for section 35 purposes.

50. The starting point is article 12 of The United Nations Convention on the Rights of the Child. This provides, so far as material, as follows:

> *"Article 12*
> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

51. It is clear that the provisions of section 35 were intended (as were the comparative provisions of section 41 the English Children Act 1989) to give effect to the rights of a child under Article 12 of The United Nations Convention and to his rights to a fair trial under section 6(8) of the Constitution; see e.g. *In P-S (Children)* [2005]

EWCA Civ 634, [2005] Fam 366 and more generally as to the purposes per Sir Thomas Bingham MR in *In re S (A Minor) (Independent Representation)* [1993] Fam 263.

52. However, that fact, on its own, does not, in my judgment, entitle the court to require the Minister or the Director to fund a litigation guardian or legal representation for a child, either in specific individual cases or more generally. In the absence of express statutory authorisation, or possibly clear implication that public funds are to be applied for legal representation, Re *K and H (Children) supra* is strongly persuasive authority that the court does not have power to order the relevant Minister to provide public funding for legal representation in the absence of statutory authorisation and mechanisms, even taking into account human rights considerations.

53. *Re K and H (Children)* raised the issue whether the English court had the power to order the Lord Chancellor to provide public funding for legal representation outside the legal aid scheme provided for in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The proposition that the court did have such power had the endorsement of the observations of Sir James Munby, President of the Family Division in *Q v Q* [2014] EWFC 31, [2015] 1 WLR 2040 and in *In re D* [2014] EWFC 39. Applying that reasoning, the judge at first instance had concluded that the court had the power, in an appropriate case, to direct that legal representation be provided at the expense of the Lord Chancellor. However, the Court of Appeal took a different view. It rejected the submission that the relevant statutory legislation could be construed as affording any such power to the court – even with the assistance of the interpretative provisions of the Human Rights Act 1988. At paragraph 27, Lord Dyson, Master of the Rolls, said as follows:

> *"27. …… So far as section 1 of the 2003 Act is concerned, the starting point is that it is a clear principle of*

*statutory interpretation that a general power or duty cannot be used to circumvent a clear and detailed statutory code. Thus in Credit Suisse v Waltham Forest LBC [1997] QB 362, Neill LJ said at p 374:*

> *"**where Parliament has made detailed provisions as to how certain statutory functions are to be carried out, there is no scope for implying the existence of additional powers which lie wholly outside the statutory code."***

***28. Another important relevant principle is that "nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less important is the requirement of clear statutory authority for public expenditure**": see per Lord Bridge in Holden & Co v CPS (No 2) [1994] 1 AC 22 at 33C. And at 40D, he said:*

> *"I will not multiply examples, but I hope I have said enough to explain why I cannot attribute to the legislature any general willingness to provide the kind of publicly funded safety net which the judiciary would like to see in respect of costs necessarily and properly incurred by a litigant and not otherwise recoverable**. It is for this reason that I find it impossible to say that whenever the legislature gives a right of appeal, whether in civil or criminal proceedings, in circumstances where a successful appellant may be unable to recover his costs from any other party, that affords a sufficient ground to imply a term enabling the court to order the costs to be paid out of public funds. The strictly limited range of the legislation expressly authorising payment of costs out of central funds in criminal proceedings no more lends itself to extension by judicial implication than does the equally limited range of legislation authorising payment of costs out of the legal aid fund in civil proceedings. Some general legislative provision authorising public funding of otherwise irrecoverable costs, either in all proceedings or in all appellate proceedings, would no doubt be an admirable***

***step in the right direction which the judiciary would heartily applaud. But this does not, in my opinion, justify the courts in attempting to achieve some similar result by the piecemeal implication of terms giving a power to order payment of costs out of central funds in particular statutes, which can only lead to anomalies."***

*29. I accept the submission of Ms Whipple that these principles hold good despite the passing of the HRA. The limits of the interpretative obligation imposed on the courts by section 3 of the HRA are now well established. It is sufficient to refer to two authorities. In In re S (Care Order: Implementation of Care Plan) [2002] UKHL 10, [2002] 2 AC 291, it was held that the HRA reserved the amendment of primary legislation to Parliament. Any purported use of section 3 of the HRA producing a result which departed substantially from a fundamental feature of an Act of Parliament was likely to have crossed the boundary between interpretation and amendment.*

*30. The same approach was adopted in Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557. At para 33, Lord Nicholls said:*

> *"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."*

> *31. As the judge acknowledged, LASPO provides a comprehensive code for the funding of litigants whose case is within the scope of the scheme.* ***It is a detailed scheme. I do not consider that it is possible to interpret either section 1 of the 2003 Act or section 31G(6) of the 1984 Act as giving the court the power to require the Lord Chancellor to provide funding for legal representation in circumstances where such funding is not available under a scheme as detailed and comprehensive as that which has been set up under LASPO. The court must respect the boundaries drawn by Parliament for public funding of legal representation.*** *In my view, the interpretation adopted by the judge is impermissible: it amounts to judicial legislation." [Emphasis supplied.]*

The other two members of the Court, Black and McFarlane LJJ, agreed with him.

54. Similarly, in the present case I do not consider that there is any justification which would permit this court to construe the relevant sections of the 1998 Act (viz. sections 5, 6, 8 and 9) as providing authorisation for payment for the representation of children out of public funds for section 35 purposes. For example, the statutory responsibility which the Minister has under section 8 for the general supervision of the administration of the Act and the regulations, and the power conferred upon him to "give such directions as he considers necessary in the public interest" cannot, in my view, be purposively construed as implying that the Minister thereby has express authority to apply public funds in payment for representation of children under section 35. That is so even when coupled with the requirement under sections 5 and 6, that the 1998 Act is to be administered and construed with the welfare of children being the paramount consideration. To do so would breach the fundamental principle articulated in *Holden & Co v CPS (No 2),* and be directly contrary to the provisions of sections 94-96 *ff* of the Constitution which effectively state that expenditure of public funds requires express statutory authorisation, the warrant of the Minister of Finance and compliance with budgetary requirements.

55. Nor, in my judgment, was Mr Dismont entitled to distinguish *Re K and H (Children)* on the grounds that in that case there existed a comprehensive legal aid scheme under the provisions of LASPO. The fact is that, as the judge in the present case pointed out, section 6 of the Bermuda Constitution only guarantees the right to legal representation in criminal cases, not civil cases, and only where "so provided by any law". Moreover, legal aid is theoretically available for legal representation for children for section 35 purposes, notwithstanding the very real practical difficulties enumerated above. As Ms Greenidge submitted, whilst the European Convention on Human Rights requires that an individual should have access to the courts, the implementation of the legal aid scheme is left to the state. Thus in *In Airey v Ireland* (1979) 2 EHRR 305 at page 12 the European Court of Human Rights court stated:

> "*In addition, whilst Article 6 para 1 (art.6-1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to use towards this end. The institution of legal aid scheme – which Ireland now envisages in family law matters (see Paragraph 11 above) – constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken;* ***all that the Convention requires is that an individual should enjoy his effective right of access to courts*** *in conditions not at variance with Article 6 para 1. (art. 6-1)….." [Emphasis supplied.]*

56. Nor, for similar reasons, do the principles of construction referred to by Mr Dismont (namely the absurdity principle and the constitutionality principle) assist him. Given the wording of the Constitution and the limited nature of its guarantee of legal representation funded by the state, there is no basis for concluding that such principles justify an interpretation requiring the interpolation of words authorising, and indeed *requiring*, at public expense the funding of litigation guardians and legal representation for children in every case where the court duly

appoints such representatives. Likewise, in my judgment, there is no room for an appeal to the so-called inherent jurisdiction of the court. To do so would not only be contrary to the principles articulated in *Holden & Co v CPS (No 2)* but would also offend the principle that the inherent jurisdiction "cannot be invoked by the court to arrogate to itself the power to give substantive relief, particularly so in an area so much controlled by statute."; see per Peter Gibson LJ in *Wicks v Wicks* [1999] Fam 65 EWCA at 88; and per Macdonald J in *HB v A Local Authority (Local Government Association)* [2017] 1WLR 4289 at paragraphs 50 ff and 112 where he held:

> *"Within this context, I am satisfied that the limits that are properly imposed on the exercise of the inherent jurisdiction for the sake of clarity and consistency, and of avoiding conflict between child welfare and other public advantages in this case are those that must be applied when considering the nature and extent of the court's jurisdiction to order a public authority to incur expenditure. As Lord Sumption pointed out in Prest v Petrodel Resources Ltd [2013] 2 AC 415 at [37], courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. Imposing the limits that I am satisfied must apply, I regret that I cannot accept the submission of Mr Hale and Mr Barnes that the inherent jurisdiction of this court is wide enough to encompass a power to order a public authority to incur expenditure in order to fund legal representation in wardship proceedings for a parent who does not qualify for legal aid because that parent does not satisfy the criteria for a grant of legal aid laid down by Parliament, notwithstanding the considerable benefits that would accrue to the parent, and to the child, from such funding."*

57. In this context, the decision of the Canadian Supreme Court relied upon by Mr Dismont does not assist. Apart from the fact that the decision was dealing with a specific individual case, under section 24 of the Canadian Charter of Rights and Freedoms, any individual whose rights or freedoms, as guaranteed by the Charter, had been infringed or denied, had the right to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in

the circumstances". It was against that very different statutory background that the Canadian Supreme Court made an order that the government should provide the parent with state-funded counsel.

58. But the fact that I have concluded that the court itself has no power under the Bermudian statutory regime to order the Minister to provide state funding for litigation guardians or counsel appointed pursuant to section 35 is not the end of the story. It is clear from the statutory and constitutional context of sections 8 and 35 of the 1998 Act and section 6(8) of the Constitution that the Minister indeed has a duty to ensure that children have an *effective right of access to, and participation and representation in,* the courts in specified proceedings as defined under the 1998 Act. It is also clear from the evidential findings made by the judge that, given the current absence of state funding for guardians and counsel, children are in fact being denied (and have for some considerable time been denied) effective access to, and participation and representation in, court proceedings that critically affect their lives. That, in my judgment, on the facts as found by the judge amounts to a clear and serious continuing breach, on the part of the Minister, of her obligations to supervise the administration of the 1998 Act and to put an appropriate scheme in place to ensure that the human rights of children to be represented by litigation guardians and counsel in specified proceedings are honoured. The current position is unacceptable and amounts to a flagrant disregard for the human rights of children in the relevant family proceedings.

59. As the ECHR emphasised in *Airey v Ireland* (for example at paragraphs 24 and 26), although a state is not obliged to provide free legal aid for every civil dispute, there may be situations where state funded representation is indeed necessary to ensure that an individual has effective access to a court. It is instructive to cite the following extracts:

*"24. The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer.* ***The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*** *(see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 31, paras. 3 in fine and 4; the above-mentioned Golder judgment, p. 18, para. 35 in fine; the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, pp. 17-18; para. 42; and the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25).* ***It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.***

*Contradictory views on this question were expressed by the Government and the Commission during the oral hearings. It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.*

*……*

*Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.*

*For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position (see paragraph 8 above) can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer (see paragraph 11 above).*

***The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access*** *and, hence, that it also does not constitute a domestic remedy whose use is demanded by Article 26 (art. 26) (see paragraph 19 (b) above).*
*……*

*26. The Government's principal argument rests on what they see as the consequence of the Commission's opinion, namely that, in all cases concerning the determination of a "civil right", the State would have to provide free legal aid. In fact, the Convention's only express provision on free legal aid is Article 6 para. 3 (c) (art. 6-3-c) which relates to criminal proceedings and is itself subject to limitations; what is more, according to the Commission's established case law, Article 6 para. 1 (art. 6-1) does not guarantee any right to free legal aid as such. The Government add that since Ireland when ratifying the Convention, made a reservation to Article 6 para. 3 (c) (art. 6-3-c) with the intention of limiting its obligations in the realm of criminal legal aid, a fortiori it cannot be said to have implicitly agreed to provide unlimited civil legal aid. Finally, in their submission, the Convention should not be interpreted so as to achieve social and economic developments in a Contracting State; such developments can only be progressive.*

*The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (above-mentioned Marckx judgment, p. 19, para. 41) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (see paragraph 24 above). Whilst*

*the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.*

*The Court does not, moreover, share the Government's view as to the consequence of the Commission's opinion.*

*It would be erroneous to generalize the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access;* ***that conclusion does not hold good for all cases concerning "civil rights and obligations" or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6 para. 1 (art. 6-1); there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances.***

*In addition, whilst Article 6 para. 1 (art. 6-1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme - which Ireland now envisages in family law matters (see paragraph 11 above) - constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1 (art. 6-1) (see, mutatis mutandis, the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 18, para. 39, and the above-mentioned Marckx judgment, p. 15, para. 31).*

> *The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".*
>
> *To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings.* ***However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."*** *[Emphasis supplied.]*

60. Accordingly, I would allow the appellants' appeal under Grounds 5-9 to the extent of granting declarations to the effect that:

i) the Minister is currently, and has for some time been, in breach of her obligations under 8 and 35 of the 1998 Act and section 6(8) of the Constitution, to ensure that children have an effective right of access to, and participation and representation in, the courts in specified proceedings (as defined in the 1998 Act), because of her failure to introduce an appropriate scheme that provides for the funding of litigation guardians and counsel to represent children under section 35 of the 1998 Act; and

ii) because of such breach, children involved in specified proceedings are being, and have been denied, effective access to, and participation and representation in, court proceedings in breach of their human rights under section 6(8) of the Constitution.

61. I am fortified in this conclusion by the fact that, in the course of argument, Ms Greenidge accepted (i) that the Minister had a duty to oversee the 1998 Act; (ii)

that, although she did not have a duty to fund , she was responsible for setting up some form of scheme that would provide funding for guardians and counsel; (iii) that no scheme had been promulgated since 1998; and (iv) that the Minister had not complied with her duties (as the judge should have found).

62. I do not consider that it is appropriate for this court to comment on the extent to which (if at all) the proposed Bill will remedy the situation.

**Disposition**

63. To the above extent, I would allow this appeal.

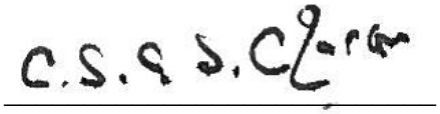
**Smellie JA:**

64. I agree.

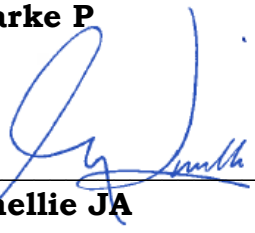
**Clarke P:**

65. I also agree.

**Gloster JA**



**Clarke P**



**Smellie JA**

**ANNEX 1**

1. An Order declaring that the court has a duty pursuant to section 35 of the Children Act 1998 ("the Act") to appoint a litigation guardian for a child in the case of all the specified proceedings referred to in section 35(6) (the "specified proceedings"), subject only to the court being satisfied under section 35(1) that it is not necessary to do so in order to safeguard the child's interests.

2. An Order declaring that under section 35(1) of the Act, in order to safeguard a child's interests, there is a presumption that it is necessary to appoint a litigation guardian for the child in the case of al specified proceedings and further declaring that where the court finds the presumption has been rebutted, it must provide reasons.

3. An Order declaring that there is a presumption that a litigation guardian's duty to safeguard the interest of a child under subsection 35(2) of the Act includes a duty to obtain legal representation for the child as soon as is practicable.

4. An Order declaring that, where a litigation guardian has not obtained legal representation for the child, there is a presumption that it will always be in the child's best interests for the court to appoint counsel for the child under section 35(3) of the Act, and further declaring that where the court finds the presumption has been rebutted and does not appoint counsel, it must provide reasons.

5. An order declaring that in any specified proceedings, the courts, the Minister responsible for the administration of the Act and the Director of Child and Family Services have a duty to ensure that section 35 of the Act is enforced, and that a failure to do so is a breach of their duty under the Act to protect the welfare of children.

6. An Order declaring that counsel representing any party in any specified proceedings has a duty to ensure that the court is made aware of its duty to enforce section 35 of the Act, and that counsel's failure to do so is a breach of rule 44 of the Barristers' Code of Conduct 1981.

7. An Order declaring that the Minister responsible for the administration of the Act and the Director of Child and Family Services have a duty to ensure that section 35 is effective and enforceable, which includes a duty to fund the provision of litigation guardians and counsel to represent children, and that a failure to do so is a breach of their duty under the Act to protect the welfare of children.

8. An Order declaring that in establishing a panel of litigation guardians under section 35(7) of the Act, the Minister responsible for the administration of the Act

must exercise his powers with the welfare of the child as the paramount consideration, which requires the empanelled litigation guardians to be appropriately qualified social workers and entirely independent from the Department of Child and Family Services.