IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH

B E T W E E N :

THE QUEEN Claimant

(on the application of Terrence White and Benjamin Garrett)

-and-

The Secretary of State for Justice Defendant

SECOND SUPPLEMETARY RESPONSE TO

DEFENDANT'S GROUNDS OF RESISTANCE

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1. This Supplement is submitted following the remarks of the head of the Family Division, Sir Andrew McFarlane to the Families Need Father's conference on 21 November 2020, and the Judiciary's publication of its Family Solutions Group ("FSG")'s report on 22 November 2020, such that:

    a) The Defendant's representation that the survey was not a public consultation cannot be relied upon and therefore our former acceptance of that position must be reversed; and

    b) The Defendant's Grounds of Resistance at his point [20] is further undermined in respect to his adherence to the Constitutional Reform Act 2005; and

    c) The question, subsequent to the 2-stage test in *Hillingdon* referred to by the Defendant at [15], of whether there is adequate opportunity within the policy process to "put right" alleged flaws, must be determined in the negative.

The Question of Public Consultation:

2. On 21 November 2020, Sir Andrew Macfarlane, president of the Family Division, referred to the Panel's survey as a "consultation" in his speech to Families Need Fathers regarding the implementation of these policies. This follows from the Judiciary's Private Law Working Group ("PrLWG") also considering the work to be consultation back in March 2020: "During the period of the PrLWG consultation, the Ministry of Justice ('MoJ') Panel on Domestic Abuse and Serious Harm in Private Law proceedings also ran a consultation."[1] It is therefore apparent

[1] Private Law Working Group, *Second Report to the President of the Family Division*, 12 March 2020 at [13]

that the survey undertaken by the Panel is continuing to be applied as if it were a public consultation and the Defendant has done nothing to disabuse senior policy-makers of error in this respect.

3. One can only assume from his conduct that the Defendant's representation to the court was incorrect: that it is his intention to carry forward applying the survey as if it were a public consultation. The Defendant appears to be acting in one way in front of the court and in another way in practice and to influence policy-makers. For these reasons the survey must be subject to Judicial Review on the basis that it was a public consultation.

4. Therefore, further to our *Supplementary Response to Defendant's Grounds of Resistance* (11 Nov) which at [62] accepted the Defendant's representation that they have not conducted a public consultation, we hereby withdrawal that acceptance of the Defendant's position and request that the issue of whether or not the public consultation was conducted properly continues to be considered a part of our petition for Judicial Review.

5. That matter is also tied to the statutory obligation of the Defendant have regard to properly inform the judiciary of the public interest pursuant to the Constitutional Reform Act.

The Question of Separation of Powers

6. Reference is made to the Judicary's PrLWG and in particular the report of the FSG sub-committee: *"What about me?" Reframing Support for Families following Parental Separation* (12 Nov 20). The FSG is chaired by Panel member Mr Justice Cobb, and an author of the Report, professor Liz Trinder, now also sits on the FSG. Like the Panel, membership of the PrLWG and the FSG are devoid of any technical competence in the relevant areas of child psychology or statistical analysis.

7. There are serious questions to be addressed about the sharing of individual members between the MoJ's Panel and the Judiciary's working groups, and whether the separation of powers embodied in the Constitutional Reform Act 2005 is being evaded by establishing these external policy-driving groups that operate outside either division of government but which attend to both.

8. Interdepartmental cooperation must occur, but the demarcation is never so critical to the function of our democracy than between the Ministry of Justice and the Judiciary, to the extent the legislature sought fit to make an Act of the Crown to ensure it. The question must be raised as to whether independence has been upheld by involving the same individuals in the group that created the report in one government division, as the group that was to assess

it in the other, where the demarcation between those government divisions is supposed to be protected in law.

9. The Defendants attempted "work around" of the legislative control is defeated by the generality of the 2005 Act, which says at s.3:

> "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary."

10. The Defendant did indeed seek to make the Panel "independent":

- Independent of any professional standards governing their conduct such as the Civil Service Code;
- Independent of the separation of powers indoctrinated in the 2005 Act that is supposed to apply between the MoJ and the Judiciary;
- Independent of controls or oversight, contrary viewpoints, scientific replication or public scrutiny.

11. But they are not "independent" in the ordinary sense that the British public should expect. We submit that the Panel represents a cabal of like-minded but technically-inept activists, working across governmental divisions to form policy intended to undermine children's rights. The structure of "independent working group" applied by the Defendant serves no other purpose than to free them of the established controls applicable to public servants working within the government divisions, with the effect that the independence of the judiciary is not being upheld.

The Question of Amenability and the opportunity to make right alleged flaws

12. The sharing of significant members between "independent" working groups established by the Judiciary and the MoJ (the PrLWG and the Panel) so that the Report is examined by its authors, and in any event the absence of any technical competence in the PrLWG, means that any expectation that the Report would come under any professional scrutiny to rectify flaws before legal effect is unreasonable.

13. As a case in point, as late as March 2020 the PrLWG was willing to at least acknowledge, after consulting with experts, that extended non-contact with a parent was harmful to the child:

> "The PrLWG is clear that, when considering the issue of domestic abuse, it is necessary to distinguish between short term heightened conflict which is a common feature of

separation but is not necessarily or always harmful; persistent/chronic, unresolved conflict which is much more likely to result in emotional harm for the child with long-term consequences, and which will need to be taken into account when making a plan for child arrangements; and domestic abuse (in all its forms) which is undoubtedly harmful. In each case it is important for the court, the parties, and the professionals to focus on the impact on the child as part of a wider assessment of family/parental dynamics which will not be confined to domestic abuse (as Cafcass/Cymru have commented, reference needs to be made to 'alienating behaviours' or similar as part of these wider dynamics)." …

"There is superficial attraction in the proposal that the services to support child contact arrangements in private law should mirror those available in public law; many children lose out because of the lack of affordable contact provision. However, there is currently no obvious source of funding for such a provision."….

"Delay is felt to be particularly problematic where there is no current/ongoing contact between the child and one of the parents…. Some consultees spoke of the self-fulfilling component to the difficulties with contact; a lengthy period without contact between parent and child may change (i.e. harden) a child's attitude and a parent's attitude to contact." [2]

14. However, after receiving the Report, the FSG has now made an extraordinary volte-face and leapt to recommend excluding parents altogether merely on the accusation of domestic abuse by one parent:

> "Where there is any allegation ... of harm by domestic abuse to … a parent … then the presumption [of parental involvement] should not apply"[3]

15. This should be considered in the context of amendments to Practice Direction 12J, that have previously been executed without public consultation or legislative oversight but which undoubtedly have legal effect, which currently says at [7]:

> "The court must in every case consider carefully whether the statutory presumption [of parental involvement] applies"

[2] Private Law Working Group, *Second Report to the President of the Family Division*, 12 March 2020 at [27]. [30] and [32].

[3] At [35]

16. The FSG directly referenced the Report in making this recommendation, and there is no indication that, in formulating this view, the FSG has taken any further evidence or submissions into account other than the Report. Gone is any nuanced understanding of pressures at separation and the human condition; Gone is any "focus on the impact on the child".

17. Regardless it would seem of credibility, likelihood, severity, pattern or proximity in time or to the child or any existing and observed relationship between parent and child, they recommend that ***any allegation*** should result in the complete and immediate cauterisation of the child's parental bond. Period. No new professional expert views, no consideration or even curiosity about how such measures would affect the children. This is not a child-welfare measure, but a parent-sanction measure achieved by exploiting the child.

18. The Report's unscientific collection of unverified anecdotes and unprofessional Literature Review are being applied (by Panel members) to silence the views of experts consulted by the Judiciary, as well as those who were consulted by the MoJ, and to annihilate the rights of the child. There is no capacity in the process until an amendment of PD12J for any technical examination of the Report.

19. This underscores the imperative importance of ensuring the work of the Panel was diligent, forthright and honest and the need for a Judicial Review to determine whether it was, because whatever protestation made by the Defendant, there is no function within the process until legal effect on judicial outcomes that will examine and rectify flaws, and the Report will affect the relationships between a child and their parents in the real world.

Prior permission requested to amend relief sought

20. For the sake of tidiness, we hereby repeat the permission sought in respect to the substantive application that was included in our correspondence to the court of 19 November 2020 regarding financial matters:

"8. Finally, in our response to the Defendant's Grounds for Resistance and in light of the Defendant's insistence that there is no automatic right to contact between a parent and child, at point 42 [of our 'Supplementary Response to Defendant's Grounds of Resistance'] we requested permission to amend the relief sought to a "declaration of incompatibility". This was a rushed response and we now ask permission of the court to amend our submission to include the relief of a declaration of the law in respect to:

a) whether or not parents or their children have an automatic right of contact with each-other; and

b) whether a child has a right to contact with his or her parents which is equal to or in excess of the right as set out in s.24.3 of the Charter of Fundamental Rights."

Apology

21. We are sorry about making this further submission, and hope the court may appreciate that the issue is "live" and the facts on the ground are evolving in a relevant way during the course of this application.

TERRENCE WHITE AND BENJAMIN GARRETT

05 DECEMBER 2020