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

STATEMENT OF GROUNDS

1. Judicial Review is being sought under 6 grounds:

Ground 1: ILLEGALITY: CONSTITUTIONAL REFORM ACT

2. By publishing and implementing a policy aimed to change the "outcomes" of family law proceedings for "victims and children"[1], the Defendant is seeking to affect the decisions of the judiciary in individual cases and overturn case-law precedent.

3. In formulating the policy, the Defendant undertook a sham process to misrepresent the public interest in "matters relating to the judiciary or otherwise to the administration of justice".

4. The Defendant's conduct violates s.3 of the Constitutional Reform Act 2005 which reads:

> **Guarantee of continued judicial independence**
>
> 3. (1) 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.
>
> ….
>
> (4) The following particular duties are imposed for the purpose of upholding that independence.
>
> (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

1 Letter of Lord Chancellor to Sir David Evennett, 11 August 2020

(6) The Lord Chancellor must have regard to—

(a) the need to defend that independence;

….

(c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

5. The Defendant has failed to ensure the Panel and Literature Review Author acted in accordance with the Civil Service Code whilst conducting a civil service function, yet the products of the Panel were published under the Ministerial insignia without qualification and so would be assumed to have been produced in accordance with those standards.

Ground 2: ILLEGALITY : BREACH OF EU LAW

6. The Defendant has refuted the "automatic right" of the child to contact with both parents, (which was affirmed at §24.3 of the Charter of Fundamental Rights and is UK domestic law pursuant to *R (on the application of) AB v Secretary of State for the Home Department* [2013] EWHC 3453).

7. The UK is obliged to implement EU directives that have required consistency with §24 of the Charter of Fundamental Rights, which includes that right to contact.

8. The Defendant's declaration refuting the rights of the child has caused the implementation of those directives to be ineffective, and therefore the UK is in violation of EU law.

9. Alternatively:

    a. the Defendant does not have the authority to renounce, repeal or rescind the rights of the child and therefore that declaration was itself ultra vires and illegal; or

    b. the Defendant did not conduct a fair and public hearing to determine civil rights as required by Article 6 of the Human Rights Act.

Ground 3: ILLEGALITY: SECTION 6(1) OF THE HUMAN RIGHTS ACT

10. Section 6(1) of the Human Rights Act reads:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

11. The State has a positive duty of "exceptional diligence" under Article 8 in matters relating to the relations between a parent and a child.[2]

12. The Defendant has unlawfully acted in a way that is incompatible with its Article 8 positive obligations to diligently undertake its policy formation and implementation in an area concerning a child's contact and relationship with her parents.

13. In the determination of civil rights, the Defendant failed to establish an "impartial tribunal established by law" as required by Article 6.

14. Both Claimants and in particular Mr Garrett, in both his own capacity and as representative for his child, would be victims of the policy.

Ground 4: SUBSTANTIVE REVIEW: SYSTEMIC UNFAIRNESS

15. The policy gives rise to an unacceptable risk of systemic unfairness.[3]

16. The Defendant has failed to validly substantiate its views in respect to highly contentious and complex issues before implementing the indoctrination of its own views in the family justice system:

> "The panel considers that existing training has been undermined or neutralised by the four barriers to the effective working of the current system: the pro-contact culture…"
>
> "The panel recommends that training in the family justice system should cover the following areas…
>
> • An in-depth understanding of domestic abuse, its gendered nature …
>
> • Accurate understanding of data on the incidence of false allegations of domestic abuse;

2 inter alia, Pisica v The Republic of Moldova [2019] ECHR 779

3 *R. (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 44 at [48]

> • Unconscious and confirmation bias arising from assumptions about gender roles, and how these intersect with race, disability, age, sexuality and class;
>
> • Diversity of court users, including … institutional barriers faced by, BAME women, disabled women and LGBT communities;
>
> • How perpetrators of domestic abuse may use child contact, the courts and other agencies to continue abuse;
>
> • What constitutes behaviour change in perpetrators of domestic abuse"[4]

17. The training is a "cultural change programme"[5] aimed to disrupt the "pro-contact culture", which is actually established law created by case precedent. The only means to disrupt laws of precedent, other than legislation, is to create new case-law precedents.

18. The above training foci are clearly aimed at creating biases in the minds of the judiciary and family court advisors in order to affect actual decisions in court. They are intended to change the assessed credibility of testimony based upon the gender and race of the accuser or sew distrust of evidence given by the accused in favour of the accuser. The training is intended to ensure the "effective and consistent implementation"[6] of these biases across all private proceedings in family court – that is to say, the unfairness will be inherent in the family justice system.

Ground 5: SUBSTANTIVE REVIEW: DEFECTIVE REASONING

19. There were defects in the Defendant's reasoning process through which the policy was made, as it failed properly to consider and balance relevant considerations and it rests on errors of fact, some of which were generated by the Defendant's panel.

4 Final Report, 11.11 pages 183-185

5 Final Report Executive Summary, at 11 on page 9

6 Final Report, 11.11 on page 149

20. The Defendant risks interfering with a fundamental right (per the Charter of Fundamental Rights) in the absence of compelling justification, so that its conduct should be subjected to an "anxious degree of scrutiny"[7].

21. The Defendant (who has a statistical department) failed to interrogate its own vast data resources, much of which is private and confidential, and instead sought only input from externals who do not have the same access to relevant data or the means to assess it.

22. The Defendant even failed to define or measure the problem it was seeking to address (being the incidence and severity of domestic abuse during and after family court proceedings), so to cripple any proportionality assessment against the competing rights such as respect for family life, parental contact or protection from the harm of imposed alienation of a child from her parent.

23. The Defendant treated unverified, self-reported claims from disaffected ex-spouses as if they were derived through an academically rigorous process, (most pointedly ignoring the 4:1 gendered response ratio), and used them to make findings.

24. The Defendant ignored academic literature and studies which did not align with its conclusions.

25. The Defendant has appointed a Panel and a Literature Review Author:

    a. that did not include the requisite technical skills to assess the issues at hand;

    b. that introduced a real possibility of bias; and

    c. who were insufficiently thorough or comprehensive in their coverage of the issues.

26. The Defendant's policy Report includes demonstrated examples of actual bias and misstatements of material facts.

Ground 6: PROCEDURAL FAIRNESS

27. The Panel was undertaking quasi-judicial duties in reference to determining fundamental civil rights.

7 *R (A) v Lord Saville of Newdigate* [2000] 1 W.L.R. 1855 at [37]

28. The Defendant was obliged to ensure the Panel operated with procedural fairness, but failed to do so:

    a. The constituency of the Panel members and choice of Literature Review Author created the real possibility of bias and were in many cases judging their own cause;

    b. The tribunal was not independent and impartial, as required by Article 6 of the Human Rights Act;

    c. The Defendant failed instil in the Panel, Authors and Chairs and their processes adequate controls to counteract confirmation bias and groupthink, with the result that the Report demonstrates examples of actual bias;

    d. In respect at least to establishing the risk of encountering domestic abuse in private proceedings, the public consultation ("call for evidence") was vitiated by bias, because the call for evidence asked particularly for such responses;

    e. The public consultation was not carried out properly;

    f. Foundational issues were pre-determined and the Panel and Authors were demonstrably immune to contrary argument.

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STATEMENT OF FACTS

INTRODUCTION - CORE FACTS

1. On the 25th of June 2020, the Ministry of Justice ("MoJ") published a document titled:

> **"Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report"**

(the "Final Report"), accompanied by a "Literature Review" and an "Implementation Plan" (together with the Final Report, the "Report"), prepared by the Ministry of Justice Expert Panel on Harm in the Family Courts (the "Panel") and published concurrent to a Press Release by the MoJ of the same date titled "Major overhaul of family courts to protect domestic abuse victims".

2. Neither the Report or Press Release contained a disclaimer regarding the reliance that readers could have on the views and information contained within it, nor any qualification to distinguish the Report from the views of the MoJ or of the State in general. The Report was published with MoJ insignia on the title banner and it was commissioned, paid for and publicly published by the MoJ.

3. The Report included the material elements that a government policy would be expected to include, such as an Implementation Plan. The MoJ's press release for the Report, also made on 25th June 2020, said:

> "the government today (25 June 2020) announced an overhaul of how the family courts deal with the horrific crime [of domestic abuse]…
>
> "The move comes after an expert-led review into how the family courts handle domestic abuse and other serious offences raised concerns that victims and children were being put at unnecessary risk …"

4. In a letter response to Sir David Evennett MP on 11 August 2020, the Lord Chancellor admitted the intent of the MOJ is to influence the decisions in family court cases:

> "…only the first steps we are taking to …embed change within the system, with the aim of improving the experience and outcomes for those who go through private law children proceedings"

5. The MoJ, Secretary of State for Justice and Lord Chancellor are uniquely empowered within the Family Court system, such as through control of the policies of Cafcass and the appointment of judges.

6. Due to the confidential nature of children's proceedings, the MoJ also has entirely unique access to court records and data. This means that no body, expert or person outside the MoJ possesses the capacity to undertake significant empirical research on private law cases, nor is able to meaningfully challenge the assertions made by the MoJ in the public arena. The MoJ is also responsible for multiple agencies and has the capacity to draw data from parallel sources such as the probation service.

7. The MoJ appointed the Panel Members who then appointed the author of the Literature Review. The Panel was co-chaired by two staff members of the MoJ, but otherwise the membership was external.

8. The Report's findings were based primarily on two pieces of work performed by the Panel: a public "call for evidence" and a Literature Review. It seems no data from the MoJ's statistical office was requested or considered.

The Claimants

9. The Claimants are both litigants in person.

10. The first claimant, Mr Terrence White is a father of three children who live in his sole care following 7 ½ years of private proceedings which eventually concluded in public proceedings. For reasons of confidentiality he can't disclose more detail to this court but suffice to say he has encountered many of the issues considered in this matter in his personal capacity and has experience of the impact that these matters have on children. He now performs as a McKenzie Friend for both mothers and fathers litigating in person, primarily in private children's proceedings and mostly for free due to the dire straits of the people seeking his help. He has a sufficient interest in the

issues in this matter by means of this role. Very often he works with parents who have been accused by the other parent of domestic abuse, sometimes truthfully and sometimes falsely. He requires certainty and clarity from the Ministry of Justice so that he may perform his tasks competently to the best of his ability.

11. The second claimant, Mr Benjamin Garrett is currently within private proceedings concerning contact with his daughter that have been ongoing for nearly 4 years now and are continuing. For confidentiality reasons he cannot disclose details to this court beyond saying that he is encountering many of the issues considered in this matter in his personal capacity and he will be impacted, if he has not already been, by the publication of this Report. He is a parent who is directly affected by the recommendations of Cafcass officers and judicial judgement that would be influenced by the implementation of the MoJ policy and as such is (or would be) a victim of an unlawful act of the MoJ pursuant to 6(1) of the Human Rights Act in this matter.

The Defendant

12. In this matter, the special position of the Lord Chancellor and Secretary of State for Justice ("SoSJ") and the MoJ must be considered – this is no ordinary government department making this publication. The MoJ describes itself as "at the heart of the justice system" working to "protect and advance the principles of justice."[8]

13. The Lord Chancellor exercises disciplinary authority over judges (jointly with the Lord Chief Justice) and can choose whether to accept or reject the recommendations of the Judicial Appointments Commission.

14. The MoJ administers HMCTS and "sponsors" the Children and Family Court Advisory and Support Service (Cafcass). Despite Cafcass's ostensible status as a "an executive Non departmental Public Body", the 2014 "Framework Document" between the MoJ and Cafcass gives the SoSJ and the MoJ significant strategic control over Cafcass, including the appointments of the Chair and Board members, budget, "determining the policy and resources framework within which Cafcass should operate", and ensuring Cafcass has "an appropriate framework of objectives and targets in the light of wider Department strategic aims and objectives".

JUSTICIABILITY ISSUES:

8 https://www.gov.uk/government/organisations/ministry-of-justice

The Panel's judicial function

15. The Defendant's Panel was assigned to do more than merely gather information. It refers to the information it gathered as "evidence"; it assessed and qualified, judged and weighed the information; and drew conclusions from it that it purported to be "findings" of fact[9]. Upon these findings it formed policy aimed to influence the outcomes of private law proceedings, which the Defendant has commenced implementing.

16. In short, the Panel was performing a judicial function within the meaning of Lord Atkin:

> "I think that in deciding upon the scheme, and in holding the inquiry, [the Electrical Commission] are acting judicially in the sense of the authorities I have cited" [10]

which Lord Reid said "inferred the judicial character of the duty from the nature of the duty itself," so ruling that the duty to act in conformity with natural justice "may also be had in cases where the body concerned can properly be described as administrative"[11]

17. Furthermore, "…the courts are increasingly recognising, that an investigation preceding a discretionary administrative decision be concluded in accordance with the requirements of procedural fairness {whether or not the function may be characterised as "judicial"}"[12]

The Report's eligibility for judicial review: Decisions without direct legal effect

18. The Report is effectively a policy statement.

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9 E. g. Final Report, Executive Summary [3] on page 3 "It makes findings in relation to both the processes and the outcomes for parties and children involved in such proceedings"

10 *Rex v. Electricity Commissioners. Ex parte London Electricity Joint Committee Company (1920), Limited, and Others* [1924] 1 K.B. 171, quoted by Lord Reid in *Ridge v Baldwin* [1964] A.C. 40

11 *Ridge v Baldwin* [1964] A.C. 40

12 De Smith's at 8-047 citing *Re Pergamon Presse Ltd* [1971] and others

19. The court does have the capacity to examine the process and veracity of assertions within policy (per DeSmith's[13] at [1-038- 1-039]):

> "The constitutional status of the judiciary should not, however, excuse the courts from any scrutiny of policy decisions. Courts are able, and indeed obliged, to require that decisions even with in the realm of "high policy" are within the scope of the relevant legal power or duty, and arrived at by the legal standards of procedural fairness…
>
> "Even where the courts recognise their lack of constitutional capacity to make the primary decision of policy, they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified."

20. There is some precedence for hearing "Decisions Without Direct Legal Effect" (per De Smith's at [3-026]):

> "In some cases the court has been invited to decline to exercise its power of review because the public authority's action is characterised as being without legal effect. The courts now take a broad view and it is no longer necessary for a claimant to demonstrate that a decision or action has direct legal consequences upon the claimant. Thus the court have reviewed: statements contained in a press release, policy guidance issued by public authorities, and statements of national policy on airports by a minister to Parliament, though their "high level" character and preliminary nature of the decision limited the scope of review."

21. Further guidance may be found in *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626:

> "69. It is not simply the "high-level" character of some of the policy judgments which limits the scope for review. I would also emphasise the preliminary nature of the decision. As I have said, any grounds of challenge at this stage need to seen in the context, not of an individual decision or act, but of a continuing process towards the eventual goal of statutory authorisation. A flaw in the consultation process should not be fatal if it can be put right at a

13 De Smith's Principles of Judicial Review[CITATION DeSmiths \l 2057]

later stage. There must be something not just "clearly and radically wrong", but also such as to require the intervention of the court at this stage. Similarly, failure to take account of material considerations is unlikely to justify intervention by the court if it can be remedied at a later stage. It would be different if the failure related to what I described in argument as a "show-stopper": that is a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado."

22. The Claimant submits that justiciability of a policy publication within a chain of events proceeding to 'a formal act having "... substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests"' (per §48 of *Hillingdon,* ibid), is a two-stage test whether the alleged flaws are:

a) so obviously unacceptable that the only rational course would be to abort the policy altogether without further ado (a "show stopper"); or where there is no such "show-stopper":

b) cannot be remedied at a later stage in the process until the formal act.

23. The Claimant submits that in the first instance the Report contains several "show stoppers", some of which are discussed in detail later:

a) the Final Report's assertion at [3.1.3] that there is no "automatic right" for contact between a child and their parent is a refutation of such a foundational tenet of the entire family justice system, the body of ECHR case history, and the tradition of English jurisprudence, that no further policy initiative can be rightly undertaken until that assertion has been determined; and furthermore the MoJ's position causes the UK to violate EU law from at least the time of the publication in June 2020. The starting point for this determination is the Charter of Fundamental Rights, which was determined to be English Law in a Judicial Review (see §62). It is therefore most applicable that this element is determined by Judicial Review.

b) The Report, published under the banner of the MoJ without qualification, undermines public confidence in the competence the judiciary, the justice of

existing law and the integrity of the Family Court. It identifies with certainty but without any valid evidence that the judiciary has a "pro contact culture" (which is actually established law), with the implication that family division (and Court of Appeal and ECHR) decisions have been wrong, even reckless and endangering, and have failed to properly determine the facts of the cases they hear:

> "However, these insights were not always shared by the Court of Appeal, which allowed a number of appeals by downgrading and minimising anything other than severe, recent physical violence."[14]

All these things may even be true, but the Defendant fails to support its assertions with rigorously determined facts based on verified data, and fails to determine whether the best interests of the child have actually been met by the court's actions. The Defendant's findings are based on the unverified, self-reported anecdotes of disaffected ex-spouses, and this promotion of "mob rule" is so antithetical to the English concept of justice that the entire exercise should be abandoned without further ado and redone properly with real data.

c) The Report failed to address the title of its review: there was no "Assessing risk of harm", as there has been no academically-robust risk assessment at all. The Report is predicated on a presupposition that domestic abuse is being perpetrated in intra-court or post-court scenarios but provides no statistically valid data to support the assertion, no evaluation of the extent of the problem (if it exists at all) and no comparison to any control group. It is obviously unacceptable to continue to re-shape the practice of family law to address a risk of harm, in such a way as to affect the civil rights of children, without determining whether there is an actual risk of harm or its extent.

d) The procedural unfairness of the MoJ's process to produce the Report was of such an extent that it fatally undermines any further policy implementation. The process had the elements of a sham or a ritual or a mere exercise in "symbolic reassurance", which could call into question public confidence in the legitimacy of further MoJ initiatives and amendments to Family Court Practice Directions arising therefrom. It is particularly problematic that the

14 Final report 9.3 on page 89

unscientific survey/consultation of disaffected ex-spouses was applied to mute or undermine the voices of experts and the judiciary in the Final Report (see 40.d. The Report goes on to make unsubstantiated statements of critical facts such as:

i) "A period of 'successful' supervised contact does not eliminate concerns or reduce the risk posed by an abuser, it merely puts their abusive behaviour on pause." (at 9.3.3 on page [140] of the Final Report - a reference is made to a research document that does not in fact support this statement), and

ii) "research suggests that the proportion of 'false' allegations of domestic abuse is very small." (at [5.2] of the Final Report - this is referenced ultimately to a single piece of foreign research that does not actually support this assertion)

iii) "There is no automatic right to contact between a child and parent." (At [3.1.3] of the Final Report - ignoring the right under §24.3 of the Charter of Fundamental Rights)

24. The Claimant submits that in the second instance the flaws in the Report will not be able to be remedied later in the process:

a) Given the central role of the MoJ in the administration of justice in the UK, the impact of publishing the Report under the banner and insignia of the MoJ without any qualification or disclaimer, has already instantly created a potential for legitimate expectations amongst court participants and practical effect as government guidance for Cafcass officers, magistrates, social workers and legal advisors which impacts the care of children within private proceedings. The court is reminded that the Report asserts that there is no right of contact between children and parents, false allegations are rare and that 'abusers' regress after supervised contact. As the effect of publication is instant and on-going, there is no space for it to be remedied before it impacts substantial formal actions (such as interim orders on the basis of social worker recommendations). It was a practical effect on the conduct of third parties that meant the press release in *R. (on the Application of Baby Products Association & Anor) v Liverpool City Council* [1999] EWHC 832 was judiciable, although

that case was decided on the basis of legality. Nonetheless, the State's duty for "exceptional diligence" in this matter and the instant impact of its publication means that the process leading to the policy recommendations must be subjected to Judicial Review at this stage.

b) The Secretary of State for Justice has said on 11 August 2020 that he considers that the analysis and recommendations of the Report "do present a robust picture of how the family courts deal with domestic abuse cases" and "the Implementation Plan points to the recommendations that we have already committed to taking forward".

c) The policy and recommendations look to change the "pro-contact culture" of multiple organisations, to tackle "the systematic minimisation or disbelief of abuse"[15] (more commonly known as a requirement for evidence) through measures such as "training" the judiciary and family court advisors.

> "The panel considers that existing training has been undermined or neutralised by the four barriers to the effective working of the current system: the pro-contact culture…"
> "The panel recommends that training in the family justice system should cover the following areas…
>
> "• An in-depth understanding of domestic abuse, its gendered nature …
> • Accurate understanding of data on the incidence of false allegations of domestic abuse;
> • Unconscious and confirmation bias arising from assumptions about gender roles, and how these intersect with race, disability, age, sexuality and class;
> • Diversity of court users, including … institutional barriers faced by, BAME women, disabled women and LGBT communities;
> • How perpetrators of domestic abuse may use child contact, the courts and other agencies to continue abuse
> • What constitutes behaviour change in perpetrators of domestic abuse"[16]

15 at [9] on pg4 of the Final Report

16 Final Report, 11.11 pages 183-185

There are very serious, fatal flaws in the Panel's assessment of these elements (see 43) which are now being pumped into the judiciary as "education" in order to effect real outcomes in court:

> "The Judicial College welcomes the recommendations relating to training of the judiciary identified in the Panel's report and remains committed to continually reviewing and improving the impact of training delivered to the judiciary, including magistrates, as wider initiatives are taken forward and cultural change is embedded…
> New materials for family judges addressing domestic abuse issues are also being piloted as part of training…
> "We support the proposals for further training that address beliefs and cultural issues."[17]

Therefore the impact of the policy will be embedded within professional judgements in discrete private law cases - if the judge or family court advisor has been trained to "believe women", or that supervised contact is only delaying inevitable recidivism, or that paternal contact is irrelevant to the welfare of children when there are allegations of domestic abuse, then the judgment will fall against father's contact on the same evidence; and without grounds for appeal or opportunity to appeal only to those indoctrinated in the same, false belief system intended to affect their judgements.

There is no opportunity for the affected individual litigant to change the judgement "culture" of those deciding his own particular case, and therefore this Policy need to be addressed now.

The MoJ has simply not undertaken the work to determine whether the training objectives are supported by real UK data. It is at this stage, before any implementation commences, that the Judicial Review must occur.

d) As mentioned earlier (at, the MoJ has such exclusive control over the essential data that it is not possible for an external party to challenge the policy at a later stage until and even after it has taken a substantive effect, whilst the flawed survey / consultation process and Literature Review immunises the MoJ against challenge of policies it was already undertaking.

17 Implementation Plan, page 12

ART 8 OF THE HUMAN RIGHTS ACT 1998 IN RESPECT TO THIS MATTER

25. The Report is concerned about and will impact upon how the State will manage the rights of the child for contact with their parents where allegations of domestic abuse have been made.

26. In this respect, it addresses the Article 8 rights of the parents and the children, and in particular the positive obligation of the State to exercise "exceptional diligence" in matters concerning a person's relationship with his or her child.

27. Relevant elements of the law in respect to the Article 8 were recently summarised in *Pisica v The Republic of Moldova*[18]:

> "63. The Court reiterates that although the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, amongst other authorities, *Glaser v. the United Kingdom*, no. 32346/96, § 63). The Court has repeatedly held that in cases concerning parental contact rights, the State has in principle an obligation to take measures with a view to reuniting parents with their children, and an obligation to facilitate such reunions, in so far as the interests of the child dictate that everything must be done to preserve personal relations.
>
> …
>
> "66. In cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence, in view of the risk that the passage of time may result in a de facto determination of the matter.
>
> …
>
> "68. In deciding whether the authorities complied with their positive obligations under Article 8, the Court will take into account all relevant elements, such as … the authorities'actions throughout the proceedings"

28. Additionally, the State is responsible for all its authorities: not just the judicial organs, but all public institutions (*Martins Moreira v. Portugal*, § 60).

18 23641/17 (Judgment : Article 8 - Right to respect for private and family life : Second Section) [2019] ECHR 779

29. It is therefore submitted that the State's duty of "exceptional diligence" extends not just to the decisions of the judiciary in the court-room, but to all organs of government and to "all relevant elements", including the policies governing the administration of proceedings and therefore to the determination, publication and implementation of such policies.

30. Furthermore, section 6(1) of the Human Rights Act 1998 states that: "it is unlawful for a public authority to act in a way that is incompatible with a Convention right." It is submitted that "to act in a way" is intentionally different and broader than, say, "to commit an act", and includes the methodology applied.

31. It is further submitted that this duty of "exceptional diligence" required of the MoJ would properly associate the matter with a judicial review for unreasonableness under an "anxious degree of scrutiny" of the MoJ's conduct. As described by Lord Hoffman:

> "*it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification"*[19]

32. The impact of such anxious scrutiny was summarised by Lord Sumption:

> *"In practice, the main impact of anxious scrutiny was on the court's approach to the factual basis of the decision under review. The burden of justifying the decision was placed firmly on the decision-maker instead of the applicant. A more comprehensive review of the facts and a higher standard of proof were expected of him before he could claim to have discharged it … it enabled the court to treat his fact-finding process as deficient if it was insufficiently thorough or comprehensive in its coverage.*"[20]

33. The MoJ is uniquely able to access the private-law family court records, as well as public law family records, the probation services and criminal data sources. It has no excuse not to use this position to scientifically assess the probability and drivers of domestic abuse recidivism and ensuing risks of harm in the separated family environment and in private law proceedings in the UK. External experts simply do

19 *R (A) v Lord Saville of Newdigate* [2000] 1 W.L.R. 1855 at [37]

20 'Anxious Scrutiny', Lord Sumption, Administrative Law Bar Association Annual Lecture, 4 November 2014

not have the data which the MoJ possesses. It is incumbent on the MoJ, (and, practically, only the MoJ), to define and quantify the problem it is seeking to address before publishing and implementing policy that undermines the fundamental rights of parents and children.

34. The decision to instead develop policy by means of unverified public submissions and a Literature Review of external sources was an abdication of the Ministry's positive obligation for exceptional diligence in matters concerning a child's rights to parental contact under Article 8 of the HRA. This was further exacerbated by diligence failures in the policy-development process itself.

35. The MoJ's Report openly refutes the child's and parent's Article 8 rights, de-prioritises that right against, and frames it opposition to a new, invented priority to "address" domestic abuse "effectively" in family court:

> "The second barrier to the courts addressing domestic abuse effectively is the priority placed by the family justice system on ensuring that contact between the child and non-resident parent will occur."[21]

36. There is no valid evidence in the Report whatsoever that domestic abuse is not already being addressed "effectively" (whatever that may mean) in the family justice system, nor any valid link established between parental contact and domestic abuse recidivism, nor any statistical, longitudinal assessment of net disbenefit to children from ensuring contact occurs. There are criminal and civil remedies to address domestic abuse – children's proceedings in the family court is not a "second-chance saloon" for domestic abuse allegations on a lower threshold of evidence and to access the exploitative removal of a child from their parent as an unlawful sanction against a perpetrator. The child's rights and welfare is not a "barrier" to anything, but rather the overriding objective.

37. The mere publication of the Report, as well as its recommendations if finally implemented, will impact on the separation of parents and children during proceedings, often before any facts are found, and the length of time it may take to reunite them and normalise their relationship, if at all.

<u>Deficient diligence in the public call for evidence</u>

21 Final Report 4.2.2 on page 42

38. The public call for evidence generated an evidence base for the Panel that was misleading. The public responses were applied in the Report as if they were a statically valid representative sample that could be relied on, but they cannot be, and thereby the recommendations and ensuing implementation are based on an "incorrect basis of fact"[22]

39. The Panel even admits that the survey evidence lacks scientific credibility:

> *"qualitative evidence alone is not designed to tell us how common or frequent those experiences are… The panel was well aware that submissions can be based on misunderstandings, misapprehensions or deliberate distortion as well as wishful thinking*"

and it acknowledged that experts had also raised this problem.

40. However, the Panel continued anyway to make impactful recommendations regarding the contact between a child and their parent because there were, in its view, many responses to its survey that were aligned. This is invalid reasoning because:

a) The alignment of views would be expected because the cohort was intrinsically biased:

i) the Panel specifically sought out to bias their cohort in their call for evidence:

"The panel are particularly keen to receive evidence of any harm caused to children and/or parents during or following private law children proceedings"

And hence minimising responses where there was not any harm during or following proceedings, even despite harm occurring before proceedings;

ii) There are 4 times as many female respondents to the survey as male respondents, despite almost every private law case involving one male and one female protagonist and there being of course, two sides to every story;

22 Per Lord Wilberforce in Secretary of State for Education v Thameside MBC [1977] A.C 1014 per DeSmith's at 11-044

b) there is no verification whether responses were complete fabrications or whether the responder had even been to court (which must be considered in light of the gendered response ratio and uncertainty about how that ratio may have arisen); and

c) without basic statistical controls a cohort size of circa 1,200 is actually insignificant compared to the multi-year data-set of circa half-a-million cases, and wholly insufficient to surmount the presumption of outliers (although with a statistically valid process such a cohort size can be sufficient to indicate a statistically reliable trend, that is the very purpose of the statistical controls that are missing in this case).

d) Close examination reveals that there was considerable misalignment between the expert and judiciary views and the survey results. The survey is applied by the Panel authors to quash or undermine the views that are contrary to its overriding narrative:

i) "Although some professionals supported the presumption of parental involvement in section 1(2A) of the Children Act 1989, the panel received sufficient evidence to conclude that <u>in the cohort of cases</u> described in submissions the presumption further reinforces the pro-contact culture and detracts from the court's focus on the child's individual welfare and safety"

ii) "When noting that domestic abuse is not a bar to contact, participants in the judicial roundtable observed that this appears to come as a surprise to some parties. <u>Our submissions</u> suggested that what parties experience on the ground is a disconcerting disparity between the findings of abuse and/or the established risk assessment and the orders made."

iii) "Some participants in the judicial roundtable expressed concerns that DAPPs [Domestic Abuse Perpetrator Programs] are "too monolithic, it's a 26 week programme or nothing at all", suggesting that there is an inflexible, 'one size fits all' approach to behaviour change. Nevertheless, shifting the mind-set and entrenched behaviour patterns of an abusive parent can take a considerable time. [this is an

unsupported statement from the Authors] Submissions expressed concern that the pro-contact culture may lead courts to minimise the seriousness of abuse and search for shortcuts to restoring contact which are not validated or effective in reducing risk."

(This last point from the judiciary is actually quite significant and it was a shame it was beaten down by the Panel authors. Statistical evidence indicates that indeed, misapplied interventions can be counter-productive in preventing IPV recidivism in certain scenarios.)

41. The public call for evidence may also create the impression that a public consultation has occurred. However, it is not sufficient for that purpose either, because whether or not consultation is a legal requirement, if it is embarked upon it must be carried out properly (De Smith's at [7-051]):

a) The consultation must be in response to proposals, rather than merely a bland generality;

b) Proper consultation requires "candid disclosure of the reasons for what is proposed" and

c) Where the authority has access to important documents which are material to its determination, those documents ought to be disclosed;

And none of these were met in this case.

Deficient diligence in the Literature Review

42. The Literature Review refers to no technical paper that is contrary to the Report's conclusions, despite addressing highly complex, contested issues that are subject to significant debate in multiple jurisdictions. Studies referred to in the Literature Review are mostly qualitative research based on unverified, self-reporting claims only of victim mothers - the sources cite each-other but there is no actual technical foundation to the assertions held. In the few cases where quantitative data has been applied, there are such fatal flaws in basic scientific technique (such as sample selection) that they are statistically invalid or they were grossly misrepresented in the Report.

43. The Product of the Literature Review is incompatible with a thorough QA process

a) Example 1: The Literature Review states that:

> "Hunter and Barnett (2013) noted that whenever objective efforts are made at quantifying 'false allegations' of domestic abuse, the proportion of unfounded allegations turns out to be very small. Allen and Brinig (2011) found not only that 'false' allegations in divorce proceedings (including in applications for protective injunctions) constituted only a very small proportion of domestic violence claims, but that the ratio of men to women making false claims was 4:1."[23]

This view pervades the Report and is based entirely on the Author's misreading of a single study from the USA (Allen and Brinig). As the second source of this assertion, the Literature Review cites the author's own prior work (Hunter and Barnett), which has as its only source exactly the same research paper misread in exactly the same way. The A&B study actually found 3% of all divorce cases had false claims, rather than that false claims were small proportion of domestic violence claims as the Literature Review erroneously says.

That study also found that false claims doubled after a change in law that provided benefit to domestic abuse cases and a concurrent decrease to mothers achieving sole custody and increase to fathers being awarded sole custody. The study problematically defines "false claims" as allegations that did not result in a protective order, whereas other studies indicate that up to 81% of such orders granted in the USA are themselves "unnecessary or false", with the focus of the orders being to prevent the possibility of future abuse.

This definition of "false claim" explains the extraordinary assertion that "the ratio of men to women making false claims was 4:1", which really only means that applications for protective injunctions in the USA are refused four times more often when the complainant is male, which is likely due to other factors such as the perceived necessity for protection. It is not clear how the Literature Review author determined that USA court judgements are superior to English judgements, or whether the Author contends that the absence of a protective injunction should also be the definition of "false claims" for

23 Literature Review, 7.2 on page 60

analysing UK private proceedings, so that "false claims" in UK private law cases would constitute well over 95% of allegations.

It was in this particular respect, the "proportion of unfounded allegations", where the MoJ's unique access to significant real UK court data from private and public law sources should have been drawn upon. Instead, the MoJ relies entirely on questionable inferences from a single study of a foreign jurisdiction which they don't understand.

b) Example 2: In contesting the high levels of male victimisation of domestic abuse in the Crime Surveys for England and Wales, the Literature Review states that

> "Research suggests that when coercive and controlling behaviour is taken into account, the differences between the experiences of male and female victims become more apparent. (ONS, 2018, p8)." [24]

Although that was the stated expectation of the ONS's Domestic Abuse Statistics Steering Group (DASSG) *before* the ONS conducted its research, that same ONS research report later states: "Our findings are not consistent with this expectation". The Literature Review makes no mention that the actual UK data refutes the Review's assertion.

Such conduct by the Author must surely elicit the exclamation of "my goodness, that is certainly wrong" (per Lord Donaldson in *R v Devon CC Ex p George* [1998]).

c) Example 3: The Literature Review includes the statement,

> "no empirical research studies undertaken in England and Wales focusing on parental alienation and domestic abuse were found"; [25]

yet the Final Report contains 45 mentions of parental alienation (PA), all of them in the context of allegations of PA being used as counter-claims to allegations of domestic abuse, for example (emphasis added):

24 Literature Review, 4.2 on page 18

25 Literature Review, 3.2 on page 15

> "While the panel accepts that some resident parents may be opposed to their children's contact with the non-resident parent, the strong association between claims of alienation and domestic abuse allegations, and the weight of the research evidence and submissions suggest that accusations of parental alienation are often used to threaten and blame victims of domestic abuse who are attempting to protect their children and achieve safer contact arrangements."

One is therefore led to believe that the Panel published certain and emphatic statements on this issue without "empirical research studies".

It is submitted that there is significant research focussing on parental alienation and domestic abuse, that the Author has ignored because it does not accord with her presuppositions.

d) Example 4: Both the Final Report and the Literature Review repeatedly refer to a Women's Aid 'report' called 'Nineteen Child Homicides' (seven times between them). This 'report' is an advocate's political submission that has not undergone a robust peer review process – it lacks statistical validity (especially selective sampling) and academic rigour. (Please note that credible research on SCRs involving filicide in the UK demonstrates that in the post-separation environment, biological mothers are twice as likely to kill their children than biological fathers, and a child in the mother's household is four times at risk of filicide. In two-thirds of these cases, the killing mother has claimed to be the victim of domestic abuse – but the Literature Review makes no mention of studies that may challenge the author's presuppositions).

e) Example 5: Nowhere has the Author addressed the seminal research evidence on recidivism of domestic violence by Henning and Holdford[26], which found that:

> *"Although high levels of minimization, denial, victim blaming, and socially desirable responding were found within the sample of 2,824 convicted DV offenders, analysis of new DV police reports for the*

26 *Minimization, Denial, and Victim Blaming by Batterers: How Much Does the Truth Matter?,* 2006

sample found little evidence linking these variables to increased DV recidivism."

This absence of a link between "appreciation" and recidivism is supported by a raft of high-quality studies[27]. It is not for the Judicial Review to assess these works, only to note that they are ignored and that the Author has presented no countervailing evidence of similar quality to support the foundational tenet of DAPP accreditation and Cafcass policy: that an admission of guilt actually matters in some way in respect to the ongoing risk of harm to the parent or child.

Deficient diligence in the conduct of the process overall

44. There seems to be inadequate due diligence processes surrounding the undertaking of the panel or its task. The obligation for due diligence arises from Article 8 "exceptional diligence", proper representation of the public interest pursuant to s.3 (6) (c) of the Constitutional Reform Act 2005, and from the Civil Service Code.

45. It is unclear whether the external panel members were contracted to conform with the Civil Service Code, but the publication under the banner and insignia of the MoJ without qualification provides a legitimate expectation that they were. The Civil Service Code creates obligations for each individual (and thereby for the group as a whole) for: Integrity, Honesty, Objectivity and Impartiality.

46. Violations of the diligence duty include:

a) Changing the name of established law to "the 'pro-contact' culture of the family courts", eg:

> "Powerful statements of the family courts' pro-contact culture can be found in judgments of the Court of Appeal."

b) Intentionally conflating allegations of abuse with findings of abuse:

27 E.g: *Male perpetrators of intimate partner violence and implicit attitudes toward violence: Associations with treatment outcomes* (Eckhardt and Crane, 2014); *Treatment impact on recidivism of family only vs. generally violent partner violence perpetrators* (Cantos, Kosson, Goldstein et al, 2019), *Characteristics and recidivism in relation to arrest: differentiating between partner violent perpetrator subtypes* (Peterson, 2019) and *Personality Disorder Traits, Trauma, and Risk in Perpetrators of Domestic Violence* (Green and Brown, 2019

The terms 'victims' and 'perpetrators' of domestic abuse or 'abuser' ... are also intended to include people who are alleged to be victims, perpetrators or abusers in the context of court proceedings. [28]

thereby misleading the public, undermining the role of the judiciary in determining matters of domestic abuse, and rendering assertions of the Report functionally meaningless but critically misleading, such as:

"*some form of direct contact between children and perpetrators of domestic abuse was ordered in the great majority of all private law cases"*[29];

c) Asserting (directly or a priori) without valid, sufficient or balanced evidence that, inter alia:

i) precedent decisions of the judiciary (including the Court of Appeal and the ECHR) have been wrong (in violation of (s.3 (6) (a) of the 2005 Act)

ii) decisions of the judiciary to allow contact are commonly endangering parents and children (and thereby the best interests of the child lie in court decisions to alienate them from their fathers):

> "On the contrary, the courts' pro-contact culture results in orders in many private law children's cases which put children and their protective parents at risk of often severe harm." ;

iii) domestic abuse is commonly occurring during and after proceedings of the family court;

iv) domestic abusers are commonly using family court applications for the purposes of continuing abuse of the other parent;

v) domestic abusers are commonly using contact with their children for the purposes of continuing abuse of the other parent;

vi) allegations of domestic abuse made by women in family proceedings are almost always true;

28 Final Report, 2.6 on page 23

29 Final Report, 1.5 on page 9

vii) domestic abuse, in particular coercion and control, is gendered, with men primarily the perpetrators and women the victims;

viii) parental alienation is primarily a cynical tool to counter allegations of domestic abuse between parents rather than being the psychological abuse of the child;

ix) supervised contact merely delays an inevitable recidivism of domestic abuse;

x) Domestic Abuse Perpetrator Programs (that require admissions of guilt) are effective in reducing domestic abuse recidivism.

d) Failure to quantitively scope and determine the incidence and effect of domestic abuse during and after private law proceedings before making recommendations and implementation plans that would affect the relationship between parents and children; There is a noteable failure to reference any longitudinal, multivariate analysis of the issues at hand (ie there was no "Assessing risk of harm" as the Report title promises and so the public should expect);

e) Failure to undertake a quantitative review of the efficacy (or otherwise) of existing Respect-accredited DAPP courses (and the appropriateness of the accreditation) before recommending expansion of the applications of those courses;

f) conduct its original research processes (survey and Literature Review) without due regard to academically recognised standards in terms of representative, unbiased sampling, and statistical significance, and accord with the Civil Service Code;

g) conduct a Literature Review in a biased manner: including material error or misrepresentation, and failing to take due consideration of evidence or arguments contrary to its conclusions;

h) form its Panel and appoint authors and Chairs with insufficient skills / without skills appropriate for the tasks;

i) form its panel with an overwhelming gender imbalance and inclusion of 2 single-gendered advocacy groups (Women's Aid and Women's Aid Wales) without appropriate countervailing balance and panelists who would "judge their own cause", creating a real possibility of bias[30];

j) fail to instil in the Panel, Authors and Chairs and their processes adequate controls to counteract bias and groupthink, or to adequately vet nominations for roles for their presuppositions of the subject matter and balance them, with the result that the Panel was demonstrably "immune to contrary argument";

k) fail to reasonably consider the harm to children from non-contact with a parent during and after proceedings and weigh this against the risk of harm to a parent from domestic abuse[31];

l) fail to grapple with the complex and relevant issue of parental alienation other than to regard it as a defence against abuse claims[32], despite its recognition at the ECHR[33];

m) assume, based on inadequate or irrelevant evidence, and ignoring the plain evidence before it from multitudinous examinations by the family court, that false allegations or misrepresentations of domestic abuse in private family proceedings in England and Wales are statistically remote:

i) so as to not be considered the most plain and obvious rationale for judgements after the court has examined allegations and ruled against the accuser, instead assuming a "pro-contact culture" without reliable corroborating evidence;

30 There is a real possibility of 'tainted advice' if there was apparent bias on the part of an advisory steering group - R(on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint committee of Primary Care Trusts [2012] EWCA Civ 472 at [123

31 Eg Final Report Section 9.3

32 Eg Final Report 5.5 and 5.6 and 7.5.2

33 eg Pisica v Moldova, ibid

ii) so to treat as reliable evidence the submissions of persons in its survey whose allegations seem to have been examined by the court and found wanting in some respect;

n) assert the existence of a "pro-contact culture" as a phenomenon that is something other than recognised and established English and international law;

o) fail to establish whether such a "pro-contact culture" is harmful to children before recommending that it is dismantled[34];

p) fail to define or assess the alternative to a "pro contact culture" which the MoJ is aiming to implement: whether it means that allegations of domestic abuse are treated as if they are true until they are positively proved wrong, and/or whether Cafcass and the judiciary are to ignore the potential harm to children from non-contact with a parent, and/or whether such a change in "culture" would dramatically increase the risk of false allegations and ensuing harm to children[35];

q) call into question the incidence rate for no-contact orders[36] yet fail to substantiate whether this is wrong or what the "correct" incidence rate should be or how it should be derived (and thereby targeting 100%);

r) fail to assess whether Non-Molestation orders, appeals and other devices already available to the justice system are adequate or adequately applied, or justify why eliminating parental involvement should be preferred to those other methods of addressing the concerns of its cohort;

s) fail to provide technical validation of its judicial re-education policy in controversial areas such as ""the gendered nature of violence" in regards to

34 See Final Report 11.1 and Implementation Plan, 'Design Principles for Private Law Children's Proceedings' on page 4 wherein the Defendant committed to "design a statement of practice … to ensure that this is effectively implemented and drives cultural change across the system as a whole."

35 Final Report 11.1

36 E.g Use of the term 'only' in "indirect contact and no-contact orders were made in only around 10% of cases involving allegations of domestic abuse" Final Report 9.2 on page 133

domestic abuse, "data on the incidence of false allegations of domestic abuse", and "what constitutes behaviour change in perpetrators of domestic abuse";

t) repeat and affirm "articles of faith" such as that perpetrator denial or minimisation are related to DV recidivism[37], which do not have valid statistical support and which available statistical analysis demonstrates are actually wrong;

u) inadequately inform the public and practicing professionals of the standing of the Report and whether it represents the views and policy of the MoJ, and thereby the State and the extent to which the Literature Review author and panel members were obliged to conform with the Civil Service Code.

Deficient diligence in populating the roles of the Panel and introduction of 'real possibility' of bias:

47. Lord Chancellor has asserted that "there was careful consideration given when inviting members to join the panel"[38], so that the diligence failings were not accidental.

Panel membership:

48. There is no indication of the selection criteria or due diligence processes applied in the appointment of the Panel members.

49. It seems that no Panel member had a scientific or technical qualification and all were drawn from just two disciplines: social work and law. There was no expertise in the relevant areas of adult-psychology, child-developmental psychology or criminal psychology / criminology, or specialist expertise in mathematical statistical analysis, so there was no technical capacity on the Panel to assess the technical veracity of the submissions it received or determine what information/data it required in order to make its technical assertions.

37 E.g Final Report 9.9 on pages 101/102.

38 Letter to Rt Hon Sir David Evennett MP, 11 August 2020, from Rt Hon Robert Buckland QC MP, page 2

50. It is not clear why the MoJ would seek to have representation from across the industry on the panel when it was already intent on making a broad call for public evidence. The broad representation should have been in technical skills and expertise.

51. Membership of the panel included representatives of groups with vested interests in the outcomes, such as women's advocacy groups Women's Aid (x 2) and Respect -the DAPP provider accreditator, who should have been automatically excluded. Such groups could have been called upon to give evidence, but not be held in a position to judge their own cause.

52. The panel selection demonstrated an ideological weighting towards feminism and women's advocacy that was not balanced by any men's advocacy group.

53. The panel consisted of 10 women and only 2 men, and both of those men should have been excluded because they were asked to judge their own cause. The gentleman representing Respect was their 'business development director' and the Panel recommendation was to expand the use of DAPP courses which Respect is paid to accredit (with the starkly noticeable absence of any determination, or even curiosity by the Panel, of whether DAPP courses have ever been effective at all); Mr Justice Stephen Cobb has been central to amending and promoting Practice Direction 12J and so the efficacy (or otherwise) of his professional work conducted outside the court-room was in question or at least it would be if the Panel were to fully address the issues at hand.

54. Respect and the Women's advocacy groups were further recommended by themselves to sit on the panel for the DAPP review[39] – further entrenching them and furthering their "regulatory capture".

<u>Literature Review author:</u>

55. There is no indication of the process by which a Literature Review author was selected by the Panel, not what criteria were used or which other candidates may have been considered. However, the selection of such a critical role is such a sensitive area should have been highly selective to ensure a dedication to objective reasoning and an absence of gender bias. It is submitted that this decision was made without reasonable controls against bias and groupthink.

39 Final Report 11.10

56. The author of the Literature Review, Dr Adrienne Barnett has been described as "teaching … research methods (with a focus on feminist theory and research methodology)"[40], she teaches "Gender and the Law" at Brunel and is currently a member of the Advisory Group of Rights of Women and of Women's Aid's Expert Advisory Group to the Child First campaign. It is submitted that this would give at least the appearance of a strong gender bias that is unsuitable for a role that requires dedication to gender-neutrality if the interests of the children are to remain paramount.

57. Her written work indicates that she has a low regard for objective science which is unhelpful in this role:

> "quantitative research is based on and validates the 'masculinist' values of neutrality and 'objective detachment'"
>
> "in order to regain a valid and authoritative voice for women in current family law we need to expose and disrupt law's construction of the 'scientific truth' about children's welfare"; and
>
> "concepts such as 'the welfare of the child' have been selectively constructed by the reductive operations of law. By deconstructing the notion of 'the welfare of the child' and locating it within its historical, social, political and ideological context, it can be seen to operate as a mechanism of power that serves particular interests."
>
> *Barnett, A. (2014). Contact at all costs?: Domestic violence child contact and the practices of the family courts and professionals*

58. Dr Barnett (a doctor in law) had also already publicly expressed strong views on parental alienation, a highly contentious matter central to the issues being considered, stating without technical expertise that:

> "*Arguably today, there continues to be no credible scientific backing for the theory of PA….it has become part of the discursive repertoire of current family*

40 https://www.ahlia.edu.bh/equal-opportunity-in-business-and-society-conference/dr-adrienne-barnett/

law, with increasingly harsh consequences for survivors of domestic abuse and children."[41]

This would be despite that:

"Untreated induced parental alienation can lead to long-term traumatic psychological and physical effects in the children concerned. This fact is still not given sufficient attention in family court cases… the international specialist literature contains more than one thousand three hundred publications of scientific relevance from over 45 countries on parental alienation, the parental alienation syndrome and related subjects." [42]

Dr Barnett's pre-determination of this issue was demonstrably such that she was immune to contrary argument.

Evidence of Actual Bias in the Report

59. Actual bias can be seen in some of the outcomes of the Panel Report:

a) Example 1. The Report observes that

"Mosac reported that its most recent annual advocacy statistics showed that 7% of its cases involving child sexual abuse allegations resulted in a 'live with' order in favour of the alleged abusive parent; 92% resulted in orders for unsupervised staying contact and fewer than 1% resulted in no contact".[43]

Given the critical sensitivities about such allegations, and that these statistics were the result of examination of the allegations by a court of law with the assistance of social workers, the obvious and plain inferences from such data are that 99% of such allegations are not true and it is 7 times more likely that such allegations arise from the emotional abuse of the children by the accuser than the conduct of the accused. But the Panel did not even consider false allegations as even a *possible* reason for the departure from their expectations, instead stating:

41 'Parental alienation and the family courts' (Barnett) *Magistrate*, Jun-Jul 2020

42 'Parental Alienation (Syndrome)-A serious form of psychological child abuse' (Boch-Galhau) *Mental Health and Family Medicine* , 2018 *13: 725-739*

43 Final Report 9.2 on page 134

> *"The literature suggests that there is a perception amongst some professionals that mothers in child arrangements cases make false allegations of domestic abuse as part of a 'game playing' exercise to delay or frustrate contact…. Allegations of child sexual abuse raised particular issues relating to suspicion and perceptions of disbelief."*[44]

And rightly so, it seems. The Panel never disclose what the "right" percentages "should" be for findings in relation to sexual abuse allegations, nor how they have derived their "right" outcomes, nor examined on what basis they have decided the decisions of the court are wrong and should accord instead with their own pre-supposed "right" outcomes.

b) Example 2 An example of the Panel's immunity to contrary views and gross misrepresentation of technical data is the Panel's statement that:

> *"A period of 'successful' supervised contact does not eliminate concerns or reduce the risk posed by an abuser, it merely puts their abusive behaviour on pause. Abusers who have been able to control their victims may be able to behave well while being watched, but upon 'progression' to unsupervised contact can resume the abuse unhindered.*[158]
>
> *"158: See also Perry and Rainey (2007) 'Supervised, supported and indirect contact orders: Research findings', International Journal of Law, Policy and the Family 21: 21–47, whose follow-up interviews with parents who had accessed some form of supervised contact found low levels of satisfaction and problems putting the post-supervision contact into practice."*

But the Perry and Rainey study never associates abuse recidivism with supervised contact or contact progression, and domestic abuse recidivism is not even listed as a feature of reduced post-court contact. The technical paper even seems to contradict the assertion made in the Report:

44 Final Report 5.2 on page 49

> "*Despite lower levels of satisfaction with the outcome and more difficulties putting the arrangements into practice in these cases, at the time of follow-up, contact was taking place according to the terms of the order or agreement in a far higher proportion of those cases which had involved previous supervision than in those cases which had not"*

Most importantly, that study actually undermines the Panel's overall conclusions with the finding (our emphasis):

> "*Somewhat contrary to what might be expected, the parents in those cases in which physical violence had featured were more likely than those in which it had not to report that contact was taking place according to the terms of the court order or agreement. ...**The fact that allegations of violence or harassment were made in a case did not have a negative impact on the post-court developments in contact."***

However the Panel Authors simply refused to disclose the critical implications of these findings even though they read this study, and it seems they have ignored any other work that doesn't fit the MoJ's pre-determined biased narrative.

c) Example 3: Similarly, countervailing views expressed in the father-"perpetrators" focus group were dismissed as "*a limited appreciation of the impact of the abuse on the mother or the children*."[45]. (It must be recalled that the Panel conflates allegations and findings of abuse so that "perpetrators" includes perfectly innocent men who have been wrongfully accused.)

Without the detailed knowledge of the individual cases, the report Authors had no means to determine whether the expressions demonstrated limited appreciation or indeed an accurate account.

By contrast, there was no such "second-guessing" of the mother-"victims" focus group's expressions of how much they were affected, which could easily have been exaggerated or even wholly invented, particularly in a closed group

45 Final Report at 5.6 on page 63

environment that would encourage social conforming, confirmation bias and group-think.

d) Example 4: This bias of the Panel Authors is further exposed on page 7:

> "*The courts almost always ordered some form of contact, frequently unrestricted, and usually without requiring an alleged abuser to address their behaviour.*" [46]

If this is alleged abuse - that is: there are no findings - on what basis do the Panel Authors expect the accused to "address their behaviour"? To the Panel Authors, men are guilty simply upon a woman's allegation.

Furthermore, any denial by a man is merely proof of abuse:

> "*As the literature review shows, perpetrators will often minimise abuse, justify it to themselves by blaming the victim, and blame the child's reluctance to have contact on the mother's influence rather than seeing it as a consequence of their own behaviour.*"[47]

By contrast, the panel considered that women's denials should be taken at their word even in defiance of court findings:

> "*In some cases, mothers said that residence had been transferred to the abusive father due to their perceived alienation of the children, leaving them unable to offer either protection or support*
>
> *…*
>
> *The evidence also suggests that within the pro-contact culture, courts are too ready to minimise or disregard domestic abuse and accept the stereotype of the 'implacably hostile' or 'alienating' mother."*[48]

e) Example 5: The concept of domestic abuse is expanded to include neglect of the children only when it is adverse to male fathers and excluded as "outside

46 Final Report, Executive Summary at [19] on page 7

47 Final Report at 5.6 on page 63

48 Final Report at 10.3.2 on pages 159 and 160

the remit" if it was performed by mothers. In section 10.2, footnote 166 explains:

> "*Several fathers described harm to their children resulting from contact with mothers who were mentally unwell or who misused alcohol or drugs. While these are undoubtedly serious safeguarding issues, and may co-exist with domestic abuse, they are not directly within the remit of this report*."

But neglect is front-and-centre in the same section (pg 151) if it provides an opportunity for unfounded and speculative father-bashing:

> "*Children are neglected, teeth not brushed, not bathed, not fed or improperly fed, have their sleep routines disrupted (during contact with an abusive parent) and then come home, tired, upset, manipulated, abused (including physically), frustrated and lash out at mother. Father blames mother for being inadequate, though he is the hidden cause*."

(Remembering that for the purpose of the Report, 'abuser' includes any perfectly innocent person who is accused of abuse -see d

Refutation of the child's right to contact with both their parents

60. At 3.1.3 of the Final Report, the MoJ declares that:

> "*There is no automatic right to contact between a child and parent*."

61. Regular direct contact is specifically recognised as right of the child under the Charter of Fundamental Rights ("CFR"), forming part of the Lisbon Treaty and which says at §24 (3):

"Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

62. The CFR rights were affirmed as domestic law in the UK by Mostyn J in *R (on the application of) AB v Secretary of State for the Home Department* [2013] EWHC 3453, which considered the charter rights in respect to personal data:

"[13] However, my view that the effect of the seventh protocol is to prevent any new justiciable rights from being created is not one shared by the Court of Justice of the

European Union in Luxembourg. In *Secretary of State for the Home Department v ME and others* (21 December 2011) it was held in paragraph 120 that:

> "Article 1(1) of [the seventh] protocol explains article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligations to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions".

"[14] The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.

"[15] …So it can be seen that even if the Human Rights Act were to be repealed, with the result that article 8 of the European Convention on Human Rights was no longer directly incorporated into domestic law, an identical right would continue to exist under the Charter of Fundamental Rights of the European Union, and this right is, according to the Court in Luxembourg, enforceable domestically.

"[16] … This right to protection of personal data is not part of the European Convention on Human Rights, and has therefore not been incorporated into our domestic law by the Human Rights Act. But by virtue of the decision of the court in Luxembourg, and notwithstanding the terms of the opt-out, the claimant is entitled, as Mr Westgate QC correctly says, surprising though it may seem, to assert a violation of it in these domestic proceedings before me."

63. The CFR allows for deprivation of a child's direct contact with her parent only if that contact "is contrary to the child's best interests". That is, the right is "automatic" and only disapplies subject to conditions. Furthermore:

a) It uses the term "contrary to", which is a stronger and more difficult test than merely deciding which of indirect or direct contact might be preferred – those seeking to deprive a child of this right must go further and prove that direct contact would be positively detrimental to the child;

b) It refers to "the child's interests" (rather than saying, say "unless there is a risk to the child's safety"), and therefore requires a holistic view of the entire situation of the child including the harm done by prohibiting direct contact;

c) It uses the present term "it is", which is a statement of fact (rather than, say "it is possible that"), and therefore requires a determination of the matter before all direct contact should be suspended.

64. Notwithstanding the impact of Brexit, the CFR was law at the time of the Report's publication and remains UK law at least until the conclusion the 2020 transition period.

65. The Commons debate on 5 February 2008 concerning the Lisbon Treaty and Protocol 30 thereto (often referred to as the "opt-out"), made clear that parliament's view was that the CFR merely affirmed existing rights already in English law. Per the then-Lord Chancellor and Secretary of State, Jack Straw:

> "We have made it clear that the charter does not create new rights, but simply records existing rights. It is an amalgamation of existing rights from different sources …
>
> …the protocol does not operate like an opt-out, but the broad purpose is similar: opt-outs and protocols are there to provide safeguards for the UK. It does not disapply rights to UK citizens; given that the United Kingdom fully accepts the rights reaffirmed in the charter, there would be no need to do so. However, it ensures that what is in the charter is not additionally justiciable, as it might have been had it not been for the charter"

66. This right must exist in order for the UK to represent to the EU that it has implemented EU directives that require compliance with §24 of the Charter, including without limitation:

- 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
- 2011/92 on combating the sexual abuse and sexual exploitation of children and child pornography
- REGULATION (EU) No 656/2014 establishing rules for the surveillance of the external sea borders
- 2011/36 on preventing and combating trafficking in human beings and protecting its victims
- 2013/32/EU on common procedures for granting and withdrawing international protection
- 2012/29 establishing minimum standards on the rights, support and protection of victims of crime
- 2003/9/EC laying down minimum standards for the reception of asylum seekers
- 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
- 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals
- Regulation No 343/2003 (Dublin II) – Determining the Member State responsible for examining asylum applications lodged by unaccompanied minors who are third-country nationals
- 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

67. As affirmed in *Stefano Melloni v Ministerio Fiscal [2013] EUECJ C-399/11*:

"[60] It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level

of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised"

68. That the UK government has indeed made these representations to the EU (but without enacting legislation to separately create the §24.3 right in respect to these narrow circumstances) means that the UK government acknowledges that *as a minimum*, the right must already exist under UK law generally.

SUPPLEMENTARY COMMENT

69. The Report further calls for urgent and radical revision of current law regarding the presumption of parental involvement, preventing parties from returning to court, and the elimination of any threat of sanction for the non-performance of court orders for contact. The overall effect is a recipe for parental removal, with little if any regard to the psychological effects on the children of such removal.

70. Previous experience of Women's Aid's effort to use to effect changes in the judicial treatment of fathers their publication "Twenty-Nine Child Homicides" in 2004. In his consequent evidence to the Constitutional Affairs Committee in 2004, Lord Justice Wall said:

> "I think this needs to be slightly more than anecdotal. I think it should be investigated properly."

71. One may note, in the Report that is subject to this application, the continuing heavy reliance by the Panel on anecdotes and that this application also seeks for such claims to be investigated properly.

72. Consequently, that report was reviewed by Lord Justice Wall in his 2006 report looking into the 5 cases with judicial involvement[49]. LJ Wall found that "no criticism can be made of the judges who made the respective contact orders" in 3 of the 5 cases and in the remaining 2, "it was arguable that the court should have taken a more proactive stance". So the issue was reduced from a headline of "29 homicides" to just

49 'A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled Twenty-Nine Child Homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'.

2 cases, incurred over the course of 10 years. LJ Wall's assessment unfortunately did not look at the statistical or scientific validity of the report but did comment:

> "These cases, therefore, tragic as they are, represent a tiny proportion of the many thousands of contact orders which are made each year."

73. Practice Direction 12J was nonetheless developed "in response" to the report.[50]

74. Women's Aid created a second report, 'Nineteen Child Homicides' in 2016 which was similarly devoid of merit, but this was submitted instead into the All Parties Parliamentary Group, where it seems the combination of absent technical skills and motivated reasoning led to it being adopted without sufficient (perhaps any) critical scrutiny. Having so achieved a badge of respectability without any technical review, the AAPG's report (co-bannered by Women's Aid) then led to the Hon Mr Justice Cobb undertaking a reconstruction of PD12J in 2017, which it seems from this current Report has done nothing at all to alleviate the incidence of domestic abuse, but has certainly unnecessarily torn many children from their fathers and wreaked untold emotional damage.

75. Significantly, the 2017 revision altered PD12J to be what the court is "required to do" in any case in which domestic abuse is alleged or admitted, rather than what it "should do". This fundamentally altered the nature of the Practice Direction from guidance to, effectively, law.

76. In none of the 16-year history has the Defendant ever sought to gather the data necessary to support the foundational assertions of the PD12J initiative or determine its degree of success or failure. There has been a relentless onward march to remove fathers from their children upon the limpest assertions of their former spouses, contrary to the long-term negative trend in police reports of domestic abuse generally, to the extent that this Panel is now recommending that even the meek and contingent presumption in the Children's Act 1989 that parental "involvement" (not even contact) will further a child's welfare is to be deleted for no sound rationale.

77. Even though the elimination of any risk to safety for the resident-parent is a factor that should be properly taken into account, it has been elevated in the Report policy

50 Per Hon. Mr Justice Cobb, 'Review of Practice Direction 12J FPR 2010 Child Arrangement and Contact Orders: Domestic Violence and Harm - Report to the President of the Family Division'

"to the status of a general rule that distorts the statutory scheme by pursuing that one factor in preference to others or by creating rigidity where flexibility is intended". [51]

78. There is little if any consideration of the emotional needs of the child for a relationship with their parent, especially where the allegations of abuse are false, irrelevant, trivial or exaggerated. The 396-page Report spends all of 2 paragraphs considering this bedrock of the existing law, and dismisses it with no technical input as only a means to secure a child's identity.[52]

79. In most of the report, the Panel are concerned with the emotional needs of the victim-parent, which it ties (without evidence) to the emotional needs of the child, but has not undertaken the longitudinal assessment (or referenced studies) that would inform of the holistic welfare of the child in continuing or discontinuing contact.

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51 De Smiths at 9-009 referencing R (Barrett) v Flintshire CC County Licensing (Stage Plays) Committee [1957] QB 350, relating to the fettering of discretion which is not argued here as a ground for review.

52 Final Report at 10.4