Application by the Law Officers for an intermediary for a Complainant.

[2024]GRC084

"section 45 of ***The Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013*** *applies to this case so there must be no publication of any matter including but not limited to name address work/school or any photo likely to lead to the identity of the complainant in the complainant's lifetime. Any publication is an offence. Publication includes any speech, writing programme or communication addressed to the public or any section of the public. Social media is included."*

ANONYMISED FOR PUBLICATION

IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)

Between:

LAW OFFICERS OF THE CROWN **Prosecution**

and

J **Defendant**

Application by Prosecution for an Intermediary for the Complainant

Judgment handed down: 7th November 2023

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Applicant: **Advocate J McVeigh**
Counsel for the Respondent: **Advocate S J Maindonald**

Legislation, texts and cases referred to:

The Human Rights (Bailiwick of Guernsey) Law, 2000
The Sexual Offences (Bailiwick of Guernsey) Law, 2020
The Live-Link Ordinance 2008
Practice Direction 3 of 2013 (paragraphs 4, 6 and 7)
Pinto v Law Officers Judgment 12 of 2013
Youth Justice and Criminal Evidence Act 1999
The Criminal Procedure Rules 2020 Rule 18
Criminal Practice Direction 2023 (revised Oct 2023)
R v Dean Thomas [2020] EWCA Crim 117

Advocates' Toolkits 3 and 15

Crown Court Compendium chapters 3-7

Equal Treatment Bench Book (paragraphs 117 ff)

Blackstone's Criminal Practice 2023

Intermediaries, ground rules and Advocate's Gateway: improving the participation of vulnerable witnesses and defendants in the criminal justice system in Jersey (jerseylaw.je)

Introduction

1. This judgment is concerned with the Application ("the Application") by the Law Officers dated [date] for an intermediary for the Complainant in this matter ("C") which was first tabled at the Ground Rules Hearing ahead of the trial due to start the next day [date]. The Intermediary report had been received a few days prior to the filing of the Application and Advocate Maindonald had not had time to take instructions but she suggested that the Application proceed [the day before the trial was due to start] so I heard submissions from both counsel and received some input from the proposed Intermediary, Ms Siren, (not the author of the report) who was present on Island and who had met with C and independently concluded that she needed an intermediary but did not agree with all of the individual recommendations made in the Intermediary Report.

2. It was agreed that the hearing would continue the following day (necessitating a delay to the start of the trial) with particular emphasis on establishing the process for challenging the recommendation for an intermediary and particularly whether a second report could or should be ordered. Ultimately Advocate Maindonald applied to adjourn as she needed more time to consider the issues and to take advice from another intermediary. It was clear that there was simply not time to deal with the opposed application before the trial, so, in order to ensure a fair hearing and trial, I adjourned the trial for the reasons set out in my ex-tempore judgment [date]. I gave directions for the filing of any applications/materials ahead of the next hearing [date].

3. The hearing continued on [date] by which time Advocate Maindonald had been able to take instructions and indicated that she was not pursuing a second report. In preparation for that hearing I had, as requested by Advocate Maindonald, watched the second ABE and the extracts from the first ABE and at that hearing I asked to see the start of the first ABE so as to compare C's presentation at each. As also requested by Advocate Maindonald, when watching, I focussed on the issues of C's demeanour and then her alleged change in demeanour when the CCTV is introduced (page 35 of transcript and from 33:22 on ABE disk 2). Further submissions were made on [date] and later that day I announced my decision to grant the Application with reasons to follow as well and there was further discussion as to the individual recommendations. At a further hearing [date], we fixed the trial for 5 days from [dates] and set a further Ground Rules hearing for [date]. I gave indications of my views on the individual recommendations and Advocate Maindonald refined her objections to those recommendations to be (1) to the limitation on questioning, (2) any obligation that she should meet with the Intermediary in advance (though that position changed in the course of the hearing) and (3) to the white board. I have incorporated all the relevant points from the submissions made at the various hearings without distinguishing when they were made.

Facts of the case

4. The Defendant ("D") faces an indictment containing three counts of rape and one of assault. The facts of the case are relevant to the Application. They have been summarised in the Prosecution's ("P") Case Summary and applications for Special Measures and in Advocate McVeigh's oral submissions. In very brief summary:-

D met C on the night of [date] when both had been socialising in various venues. C left a venue at approximately 4am [on the following day] in the company of friends. Some time later C and D were left on their own. They walked towards D's house and on the way there, there was some consensual kissing and touching. C describes the touching becoming more intimate and she had concerns at going with him at that stage but continued as she was scared. Once at D's address (staff accommodation), they went to the room he occupied at the top of the house. Once there, C told D she did not want to "do it" however he pushed her onto the bed, before taking her clothes off. C asked D if he was going to use a condom and he replied he didn't want to. C said she was not comfortable with that. There then followed various sex acts which C describes in detail in the course of which C alleges that she was physically assaulted and forced into sex acts with D. C went home at 6.00 am or 7.00 am. C made her first complaint to her mother on the evening of [date] and she reported the matter to police on [date]. A forensic examination was conducted on [date], the results of which were inconclusive. D was arrested on [date] and forensically examined the same day. Results of his examination were also inconclusive. An item found in D's room was forensically confirmed to be C's. Various injuries were recorded on C. D was interviewed on three occasions and exercised his right to silence.

The Application

5. The Application is supported by written submissions and:

   (1) a report from Communicourt [date] – author Joanne Wilson ("the Report"); and
   (2) an assessment report from States of Guernsey Children and Family Community Services dated [date] by Dr A Oppong Consultant Community Paediatrician, Dr K Diment Clinical Psych and Ms Trow Head of Speech and Language Therapy ("the Assessment").

6. The Assessment concludes that C meets the Diagnostic and Statistical Manual Version 5 criteria for a diagnosis of Autism Spectrum Disorder. Of particular note and relevance for the trial are the communication difficulties – difficulty sustaining to and fro interactions, reduced eye contact and facial expressions, repetitive behaviours and sensory sensitivities.

7. Communicourt are accredited intermediaries regularly providing reports and intermediaries for English Courts. The Report recommends an intermediary to assist C to prepare to give evidence and while giving evidence based on the assessment of C by Ms Wilson, a trained intermediary. The findings are summarised at paragraph 2. It is said that C has considerable communication difficulties, which are likely exacerbated by her "self-reported" diagnosis of autism and anxiety. At paragraph 2.2 of the Report, C's difficulties are summarised and include difficulties with attention span, understanding low frequency vocabulary, understanding and responding to complex questions, understanding figurative and non-literal language, understanding and retaining verbal information coma forming narratives, expressing herself, literacy and sequencing. Specific recommendations for aids to communication are set out at paragraph 3.3 including frequent breaks, careful formulation of questions, use of communication aids like a whiteboard and use of fidget toy. Their assessments were based on their assessment of C from meeting with her and no account was taken of the Assessment as its existence was unknown at the time of preparation of the Report. Ms Siren was aware of it but did not rely on it.

8. I have also reviewed the [earlier] Application for Live link Evidence dated [date] to which was appended a statement from C in which she raises her autism and some of her communication issues and states that it has been suggested that she might benefit from an intermediary. She says that she is concerned about the emotional impact of giving evidence in open Court and in front of D and that presenting her evidence in front of D would be extremely stressful. In the Application it is stated that it is not considered at that stage that more than a witness supporter would be required. P's position has changed following receipt of the Report. It would be remis

of me not to comment that the delay with the report and the making of the Application are regrettable and that, for the future, such reports must be procured and such applications made in good time to enable any issues to be aired and decided well in advance of the trial.

Applicable Legal Principles

9. There is no specific legislation or caselaw in Guernsey applicable to intermediaries in Guernsey. They have been used in other cases. The Application is made under Court's inherent powers. Practice Direction 3 of 2013 deals with applications made under The Live-Link Ordinance 2008 and other Special Measures applications made under the Court's inherent jurisdiction with the example given of witness supporters and with screens mentioned specifically. Within that Practice Direction, the test is stated to be whether the measure sought is "in the interests of justice" i.e. the same test as under the Live-Link Ordinance and the procedure is contained in the Practice Direction paragraphs 4, 6 and 7.

10. The Guernsey Court of Appeal in Pinto v Law Officers Judgment 12 of 2013 considered the issue of screens in circumstances where the defendant would be unable to see the witness. It was said that the Judge when exercising discretion whether or not to allow screens had to consider the issue of risk prejudice to the defendant. The Court had to have regard to the reasonable interests of those giving evidence particularly those who would be forced to relive an ordeal.

> "It is the clear duty of any judge to do everything possible, consistent with giving the defendant a fair trial, to minimise the trauma suffered by other participants."

11. The principle which underpins the provision of Special Measures is that of ensuring, as far as possible, that a witness is able to give best evidence while ensuring D's right to a fair trial under Article 6, which is incorporated into Guernsey Law by virtue of The Human Rights (Bailiwick of Guernsey) Law 2000, is undiminished. That principle may be given effect by eg allowing evidence from being given from behind a screen or, as is sought here, by the use of an intermediary to assist with the witness' communication difficulties.

12. It is in the interests of justice and to the benefit of D as well as P if C's evidence is given in the best way possible as this limits confusion or guesswork. In respect of an application for Live Link and indeed any Special Measures Application, the other party must have an opportunity to make representations. In this case unfortunately the trial had to be adjourned as there was not time between service of the report and the trial to deal properly with the Application which is opposed and time was required for proper representations to be made. Those representations have now been made.

13. In the absence of any legislation or specific guidance in Guernsey on the appointment of intermediaries, the Guernsey Court tends to look to the English legislation and guidance, which is of course not binding. In England there are statutory provisions in the Youth Justice and Criminal Evidence Act 1999, the Criminal Procedure Rules 2020 Rule 18 and Criminal Practice Direction 2023 (revised Oct 2023), all which I have considered as well as the Advocates' Toolkits 3 and 15, Crown Court Compendium chapters 3-7 and paragraphs 117 ff of Equal Treatment Bench Book all of which are of assistance when considering such an application. There is also the commentary in Blackstone's Criminal Practice 2023.

14. CPD 2023 6.2.1 has this summary – "*Intermediaries facilitate communication with witnesses and defendants who have communication needs. Their primary function is to improve the*

quality of evidence and aid understanding between the court, the advocates and the witness or defendant. Intermediaries are independent of parties and owe their duty to the court."

15. I also found helpful the article by Bridget Shaw Jersey Magistrate Intermediaries, ground rules and the Advocate's Gateway: improving the participation of vulnerable witnesses and defendants in the criminal justice system in Jersey (jerseylaw.je) and the English case of R v Dean Thomas [2020] EWCA Crim 117. Advocate McVeigh had also filed a response from a counsel in England whom she had asked for any practical assistance in the approach to a contested application for an Intermediary as well as the standard form application used in England.

16. As always, care is required when looking at the English regime especially where there are legislative provisions not mirrored in Guernsey. In England eligibility for special measures in cases involving sexual offences is automatic (see section 17 YJCEA below) (though can be challenged) which is not the case in Guernsey though there is a presumption in favour of granting an application for Recorded Evidence and it is not an overstatement that it would be unusual for an application for Special Measures to be refused in such cases. Special Measures are commonplace and the Jurats completely familiar with them.

17. The test in Guernsey is whether a Special Measure, which includes an intermediary, is "in the interests of justice" as per the Practice Direction. The Special Measure must be necessary and proportionate. That is not to say that the principles applied by the English courts are not of assistance. Thus, it is useful to look for any disorder or condition which is relevant to the application and to consider whether the quality of the witness' evidence is likely to be diminished by fear or distress taking into account the factors in section 17 (2) YJCEA above.

18. CPR 2020 18.13 includes a specific timetable for those who wish to make representations in response to a special measures application including an application for an intermediary. Challenges include whether the witness is eligible for assistance or the whether the special measure would not be likely to maximise or would inhibit the effective testing of the evidence quality of evidence. There can be no doubt therefore that D can oppose an application for intermediary but it was not possible to find any caselaw or guidance on challenges.

Counsel's Submissions

19. Advocate McVeigh urges me to grant the Application in view of the obvious benefit in ensuring that there is a fair trial in permitting the intermediary to assist the Court as recommended. This includes assisting counsel in the formulation of questions to the benefit of D as much as the witness. It is submitted that granting the Application is in the interests of justice in the circumstances of this case, to ensure best evidence from C, effective putting of D's case by D's counsel and that the directions to the Jurats extinguish any risk of prejudice. Advocate McVeigh urges me not to displace the conclusion of the professionally prepared report in favour of my own assessment. Communicourt does not automatically recommend an intermediary though she accepts that the decision is one for me to make. Being questioned in ABE is not at all the same as being cross-examined.

20. The thrust of Advocate Maindonald's objection is that an intermediary is not necessary. It had not been raised before by C or her family. In her submission, there is no discernible issue with C's communications or presentation during ABE. The police did not notice any difficulty. D had no idea that C was autistic. She was working in a noisy bar. C gave two ABE interviews without an intermediary at which she was, in Advocate Maindonald's submission, perfectly able to give a long (2 page) narrative in response to just one open question "tell me from Friday night", answer questions, clarify what was being asked then and later and engage fully in viewing the CCTV even when that came as a surprise to her. Advocate Maindonald submits that there was a clear change in C's demeanour when the CCTV came on. She became animated

and was having a free-flow communication with the interviewer in contrast to the picture painted by the Report. She managed questions about time by explaining that she is not good with time. Advocate Maindonald urges me to refuse the Application. C should not have the benefit of an intermediary which will make her appear more vulnerable than she is, thus gaining her sympathy from the Jurats to the detriment of D. The presence of an intermediary may appear to support C's own assertion that she could not find a way out or communicate her lack of consent. There is also, in Advocate Maindonald's submissions, a risk that she will use her communication difficulties as a way of avoiding answering difficult questions. The prejudice to D cannot be addressed by directions to the Jurats.

21. Advocate Maindonald asserts that, on p41, when viewing the CCTV, C is challenged about the man on the bench and that she is seen to grab D's wrists rather than he hers and she provides answers. At no point does she say, "I can't do this". She manages to cope with the questions about the conversation which was going on between different people in the 4 person group. The questions were sometimes quite long questions and were in statement form but which seemed to pose no difficulty for C - see eg complex Q p 17 "was there any point that you…..?"

22. Advocate Maindonald agrees that C's evidence will be given via live link with restricted views for C and she can have a witness supporter and small fidget toy so the set-up is as per the ABE. Advocate Maindonald does accept that cross-examination is different from recounting events at ABE but, with the Special Measures already proposed, not so much as to justify an intermediary. Advocate Maindonald also considers that any restriction on her cross-examination will be prejudicial to the putting of her client's case. Advocate Maindonald also submitted that the intermediary's answers to questions at the hearing on [date] demonstrated that she was not as neutral as she asserted.

23. The position of P has at times been to go so far as to assert that the recommendation from Communicourt is sufficient and that there is no prejudice to a defendant by virtue of Special Measures generally and specifically the granting of an application for an intermediary as the Jurats will be directed not to hold any Special Measure against defendants. It cannot be said that there is no potential prejudice if one is permitted. The exhortation in the caselaw for Judges to scrutinise applications to ensure that Special Measures are needed and the requirement that there be an opportunity for representations exist for a purpose. A defendant's Article 6 rights must be kept clearly in mind. It was accepted that there is a range of cases between those witnesses who do not need an intermediary and those for example with profound learning difficulty who clearly do. There is a tipping point which Advocate McVeigh asserts is passed re C and Advocate Maindonald asserts is not. As the hearings have gone on Advocate McVeigh has accepted that a defendant must be allowed to challenge the need for an intermediary and that the Court has to satisfy itself that one is necessary in the interests of justice. The directions ensure that D's right to a fair trial is undiminished. Directions are in use in England and found to be an appropriate safeguard for D to have a fair trial. Advocate McVeigh's point is that the Jurats, compared with an English Jury, have a wealth of trial experience and are completely familiar with various Special Measures so directions have greater efficacy, as has been observed by the Guernsey Court of Appeal. Advocate Maindonald disagreed.

24. In terms of the specifics, Advocate Maindonald was concerned particularly about the white board and the impression that might have on the Jurats. C had not needed one at ABE. Ms Siren showed us the board which could be used as a communication tool (C to write on it if she could not answer) and in place of a fidget toy (C could doodle on it). Both intermediaries had used it and considered it necessary though Ms Siren offered to explore alternative fidget toys. Ms Siren thought that having a meeting between Advocate Maindonald and C with the Intermediary would be helpful.

25. There was considerable discussion about questioning style with Ms Siren reiterating the need to adhere to the recommendations in the Report, for example, what where when questions,

signposting, chronological order, giving the witness time, simple language, no multiple part questions, avoiding tag questions, no double negatives, no phrasing questions as statements, prompt questions. Ms Siren said that the giving of questions in advance usually significantly reduced the input of the intermediary. Advocate Maindonald was clearly opposed to this last suggestion and submitted that the proposed restrictions on cross-examination would prevent the effective putting of D's case. Her questions would invite yes/no responses not a discussion. She would want, for example, to ask C about her change in demeanour. Ms S indicated that "demeanour" might not be a word C understands. Advocate Maindonald might want to replay certain sections of the ABE. She did not object to phrasing her questions so that they were short.

26. Advocate Maindonald had no difficulty with the breaks and a breaks card if required. Ms Siren recommended directions to the Jurats on limited eye contact and facial reactions, low voice and slowness of response. We discussed how, if the Application were granted, we would deal with the oath/affirmation, the sketch which is an exhibit and with Jurats' questions and questions from me.

27. At the later hearing, Advocate Maindonald refined her case into 2 challenges:-

    (1) an intermediary is not necessary;
    (2) a suggestion (not fully asserted) that C was manipulating the situation to have intermediary to garner sympathy.

Discussion

28. The test I am to apply to this application is whether it is in the interests of justice. In all my deliberations I have kept at the forefront of my mind that D's right to a fair trial under Article 6 is engaged and that that right must be undiminished. The granting of Special Measures applications cannot be said either to be an automatic source of prejudice or automatically the source of no prejudice. I am required to identify and consider any specific source of prejudice and add that to the balance when exercising my discretion.

29. It must be necessary to appoint an intermediary; "just in case" is not a sound basis for having one. The decision is fact-sensitive so must be considered in the context of the actual case taking into account its nature, complexity and how controversial the evidence is likely to be. The recommendation of the intermediary is not determinative. The Judge is best placed to understand what is required to ensure that the defendant is fairly tried.

30. This is a case where the P allegation is withdrawal of consent during sexual activity. The Defence response has not been disclosed but it is reasonable to assume will be around consent or reasonable belief. It is clear from Advocate Maindonald's submissions on the application and at the subsequent hearing that she is planning a thorough cross-examination of C and wants to be able to put her case fully. In this case there are allegations of violence and there is evidence of injuries to C which will be the subject of argument as to the application of the presumption of lack of consent under The Sexual Offences (Bailiwick of Guernsey) Law, 2020. I am satisfied that the nature of the allegations and the likely questioning on such sensitive issues not only clearly justified the live link special measure (which was not opposed) but are relevant to my consideration of the Application.

31. The fact that C was able to give two ABE interviews without an intermediary and that the need for one was not flagged by her or her mother or the police is not determinative of whether she needs an intermediary for cross-examination at the trial. In the ABEs, she was giving her narrative. The questions posed were not complex or challenging. It can be seen from the Report that she struggles with certain questions but not others. Advocate Maindonald was concerned that having an intermediary might enable C to avoid answering difficult questions. I tend to

the opposite view that having the intermediary, and especially the work done ahead of the trial to identify the best way to phrase questions, should diminish the scope for comprehension issues and promote focus on the substance of the questions. As I said at the hearing, the Jurats are experienced enough to be alert to the possibility of any witness becoming distressed or asking for a break just at the point when the questions become more taxing.

32. In the ABE 2 there was no real challenge and I do not accept that there was a significant change in C's demeanour when the CCTV was played. C was engaged with the CCTV perhaps, as P submitted, because she was relieved to be on safer ground and off the topic of the intimacy which had occurred. My assessment is that in both ABEs (note I have only seen the start and clips from ABE 1) she starts off very quietly and carefully but gradually grows in confidence – which is consistent with her presentation when assessed by Ms Wilson. C is hesitant, as one might expect, about the description of intimate events. Advocate Maindonald submitted that there is a difference between the first and second ABEs in that C is more upright and confident. A second ABE is bound to be different. C is visibly tired during the second ABE and at times distressed. She does speak fluently but occasionally her choice of word is unusual – p4 "violent" re D opening her shirt. P23 he made her feel "inferior".

33. C is the main witness in a rape case where the issue is one of withdrawn consent. What was and was not said and done at particular point will be the focus of questioning and challenge. In that fine detail, based on the Report, there is a significant risk of confusion or misunderstanding or guesswork – to the detriment of D as well as C. In my judgment cross examination of C, the key witness in a rape case, is not be equated with C giving an ABE interview. The similarity between the ABE suites and the witness suites are superficial only. C will know that she is at Court and that she is being watched and will be challenged. Even professional and confident witnesses can be seen to brace themselves for cross-examination. The idea of live link is to make the witness more comfortable but cross-examination is a challenge wherever the witness is and for a C in a rape case goes to the key question whether C will be believed. The stress of that cannot be underestimated.

34. The risk of incorrect answers has the potential to cause unfairness to D too. It is important that D's case can be put, not in the old-fashioned "I put it to you" sense but in a modern way cutting through in simple terms to the real issues in language the Court can be sure the witness understands. In this case it is not suggested that there can be no challenge as to inconsistency or an accusation of lying depending on how clearly those questions are phrased but points can also be made in submissions as to C's demeanour when questioned.

35. Advocate Maindonald has suggested that C is manipulating the process by the application to increase the appearance of her vulnerability. This assertion was challenged as "bold" by P and it has to be conceded that it is unsupported by evidence beyond Advocate Maindonald's own conclusions about C drawn from ABEs. I do not consider it likely that C has been able to dupe not one but two experienced intermediaries. Advocate McVeigh did suggest that Ms Wilson be asked. I see no need. She and Ms Siren are professionals who know they owe duties to the Court and their professional judgement is that C needs an intermediary. I must scrutinise that decision and make my own decision but I reject the unsubstantiated allegation of manipulation.

36. It is part of the Court's consideration whether an intermediary is necessary or whether with experienced counsel and other special measures the witness' needs can be met. In England it is assumed that counsel will be fully familiar with and trained in the approved methods of questioning vulnerable witnesses contained for example in the Advocates' Gateway toolkits. The guidance and toolkits have been referenced by me in a recent case involving young witnesses and this Court has held ground rules hearings in other matters but it is fair to say that there has been no wide-spread training in Guernsey on these topics. In early discussion about questioning style, Advocate Maindonald expressed significant concern at any limitations on her style of questioning. She submitted that the recommendation to rephrase tag questions will

make them open questions thereby inviting discussion which is not the purpose of cross-examination. There was a dispute between her and Ms Siren about the definition of open and closed questions. I was concerned at the earlier hearings that Advocate Maindonald was resistant to the idea of even discussing her proposed questions with the intermediary but that situation has moved on (see below).

37. It is worth re-iterating that, whether or not a witness has an intermediary, it is the role of the Judge to intervene to prevent confusion or oppressive questioning. What matters is that the witness gives the best evidence which presupposes that s/he has properly understood the questions.

38. Having considered the Assessment, the Report and C's statement and having heard from Advocate McVeigh for P and Advocate Maindonald for D, I am satisfied that the Court has all the relevant information in the Assessment and the Report as to C's condition and communication difficulties, the impact on her of giving evidence and what is suggested to alleviate/minimise that impact. Specifically I am satisfied that C has a diagnosis of Autism Spectrum Disorder which is likely to diminish the quality of C's evidence by reason of her communication difficulties. It is in the interests of justice for her to have an intermediary to ensure that she can give her best evidence to benefit of both sides.

39. The granting of the Application does not diminish D's right to a fair trial. Appropriate directions will be given to the Jurats to ensure that they fully understand the role of the intermediary and, as far as necessary, with the wording to be agreed with counsel if possible, the reasons for the intermediary. It is important to be alert here to the fact that C's assertion is that her vulnerability meant that she could not work out how to get away which means that presence of intermediary could add weight when it should not. This is not a reason not to grant the Application as is it necessary in interests of justice but is something to bear in mind when crafting directions.

40. The intermediary can assist both counsel and me in terms of the formulation of questions and with her expertise alert us to any difficulties when C gives her evidence as well as assisting C in preparing to give evidence in Court.

41. I am hoping that the decision to have the intermediary will focus the minds of all on what needs to be done and that in the end there will be little or no need for the intermediary to intervene.

Ground Rules Directions

42. There should be a ground rules hearing to determine finally what measures are appropriate including those items listed in 6.3.34 of CPD such as the duration and form of questioning (relevance of toolkits) as well as breaks and other Special Measures to accommodate the particular needs of the witness and also how the presence of the intermediary will be presented to the Jurats in terms of role and why an intermediary is needed.

43. At the most recent hearing on [date], there was discussion about the individual recommendations in the Report at 3.3 (issues to be considered at the ground rules hearing) and 4 (recommendations). In the end, Advocate Maindonald took little issue with the individual points. The familiarisation visit has already been undertaken, a RED direction has been given and arrangements will be made for C to refresh her memory by watching the ABE to which there were no objections. C will give her live evidence by video-link. Breaks will be taken as required (Ms Siren favoured a more flexible approach than Ms Wilson). In terms of the Intermediary signalling for a break or seeking to alert the Court to any issues, again no objection was raised and I expect the Intermediary to attract my attention visually or verbally as necessary. I indicated that I was not convinced that the white board was strictly necessary as a communication aid. It was suggested that C would benefit from being able to doodle on it as

she speaks. I raised with Ms Siren the need to direct the Jurats on C's possible lack of eye contact which she agreed. It seems to me that having a board to doodle on will impact further on C making eye contact or even if she is looking away, the assessment of her expressions (noting that her facial reactions may be limited though that was not evident to me when watching the ABE) and that it could be an unwelcome distraction to all. Advocate Maindonald had previously indicated no objection to a fidget toy such as C had at ABE.

44. By the time of the [most recent] hearing on [date], the main objection was to the potential for any limitation on questioning and specifically the recommendation that questioners should be prompting C for detail which Advocate Maindonald said was inconsistent with cross-examination. Advocate Maindonald also questioned the Court's power to require her to provide her questions in advance to the intermediary. Advocate McVeigh had properly conceded that this C's issues are not as acute as some. She was not asking me to require the questions to be produced in advance or to limit the questions that could be put. What is required here is a discussion between Advocate Maindonald and the Intermediary, not, in this case, with a view to there being a prescribed list of questions from which Advocate Maindonald could not deviate, but to discuss the phrasing of questions with the Intermediary to avoid unnecessary distress to C and to avoid interruptions to cross-examination while points are argued. Advocate Maindonald had no objection to that and agreed to have that conversation without the need for me to order it.

Decision

45. For all the above reasons, the Application is granted.

Catherine Maureen Fooks
Judge of the Royal Court

7th November, 2023