

The Court held that the Tribunal's reasons were insufficient, lacked proper application of Sections 3 and 4 of the Children Law and Articles 6 and 8 ECHR, and therefore the decisions were not justified in all the circumstances.

**IN THE GUERNSEY  
JUVENILE COURT**

**[2017]GRC062**

**In respect of 3 Appeals from CYCT**

**Redacted and unreported judgment 2017  
(involving appeal of CYCT decision)**

**Counsel for the Appellant:** Advocate S Maindonald  
**Counsel for the First Respondent:** Advocate R B Eeles  
**Counsel for the Second Respondent:** Crown Advocate W Simmonds  
**Counsel for the Third Respondent:** Deputy Children's Convenor, James Ovenden

**Cases and Legislation referred to:-**

The Family Proceedings (Guernsey & Alderney) Rules 2009  
The Children (Guernsey and Alderney) Law, 2008  
The Children (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2009  
Human Rights (Bailiwick of Guernsey) Law 2000 as amended  
The Guernsey Bar (Bailiwick of Guernsey) Law, 2007 as amended  
Guernsey Judgment 42/2012 – In the matter of “C”, Juvenile Court 6<sup>th</sup> December 2012  
Guernsey Judgment 20/213 – In the matter of C Royal Court 3<sup>rd</sup> January 2013  
W v Schaffer 2001 S.L.T. (Sh Ct) 86  
Re X (A Child): Emergency Protection Orders [2006] EWHC 510 (Fam)

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**Introduction**

1. This judgment relates to three appeals in respect of three separate decisions made by the Child, Youth Community Tribunal ('the CYCT' or 'the Tribunal') on the 7<sup>th</sup> December 2016, 22<sup>nd</sup> December 2016 and 3<sup>rd</sup> January 2017 respectively. The appeal in each case was limited to the decision of the Tribunal to attach a condition to an interim care requirement ('ICR') on each of the dates that 'the child', "*shall reside in the care of the Committee for Health and Social Care*" ['the Committee'].

2. The appellant does not appeal the decision of the Tribunal to grant an interim care requirement ('ICR') or the other conditions attached by them to the ICR on the dates referred to. The crux of the appellant's appeals relate to the same condition attached to an ICR on each occasion
3. From the appellant's perspective, the Tribunal were in error in making such a condition ..
4. The appellant's appeals are opposed by the child's other parent and by the Committee for Health and Social Care and by the Children's Convenor who are respectively the First, Second and Third Respondents.

### **Preliminary Issue**

5. I am told that these were the first appeals in respect of a condition attached to an interim care requirement which was not heard within the period of time that the interim care requirement and the relevant condition were in existence for. I note, for example, in the Guernsey Juvenile Court judgment 42/2012 in respect of child C, that appeal was heard within the relevant 28-day period from when the date of the tribunal's decision. In the cases before me, the appeal relating to the 7<sup>th</sup> December 2016 decision was not lodged until the 22<sup>nd</sup> December 2016 (that being the date stamp on the court paperwork) – although the appeal itself is dated the 20<sup>th</sup> December 2016. In fact, the CYCT sat again in respect of this child on the 22<sup>nd</sup> December 2016 and a new ICR was granted on that date albeit attaching the same condition that is the subject of the appeal from the decision of the Tribunal on the 7<sup>th</sup> December 2016.
6. The ICR (with the same conditions attached) of the 22<sup>nd</sup> December 2016 was again granted until the 3<sup>rd</sup> January 2017, upon which date the ICR was again granted by the Tribunal with the same conditions albeit in what could be described as unusual circumstances and to which I will refer later in this judgment. That latter decision of 3<sup>rd</sup> January 2017 namely to attach the condition to the ICR is the subject of the third appeal before this Court.
7. When the appeal in respect of the Tribunal's decision of the 7<sup>th</sup> December 2016 came before this court for a directions and review hearing on the 4<sup>th</sup> January 2017, the appellant indicated an intention to appeal the decisions in respect of the decision made on 22<sup>nd</sup> December and 3<sup>rd</sup> January 2017. The appellant subsequently filed appeals against those two latter decisions, on or about the 9<sup>th</sup> January 2017 and in the appellant's skeleton argument, they stated, "*the same grounds of appeal are relied on in respect of all three decisions*". The three appeals were listed to be heard concurrently as urgently as the court could identify a listing and in any event before the 30<sup>th</sup> January 2017. The appeals were listed on 20<sup>th</sup> January 2017 and went part heard until the 25<sup>th</sup> January and then on the 27<sup>th</sup> January 2017 I indicated my decision to allow all three appeals whereupon I received submissions from the parties in regard to the Court's powers under S104 of the Law –and after some detailed representations and discussion the matter was resolved by consent and the order of 27<sup>th</sup> January refers- the Court making an ICR for a period of no more than 28 days and attaching the same conditions but providing for the appointment of a child's Advocate. The matter will continue to be heard by the Tribunal.
8. At the commencement of the hearing on the 20<sup>th</sup> January 2017, the three Respondents submitted that the court should not hear the mother's appeals in respect of the decisions made by the Tribunal on the 7<sup>th</sup> December 2016 and the 22<sup>nd</sup> December 2016 because both decisions were by the date of the appeal hearing on the 20<sup>th</sup> January 2017 legally 'defunct' and the only live 'order' of the Tribunal was the ICR (with attached conditions, including the condition which was the subject of the appeal) arising out of the decision of the Tribunal on the 3<sup>rd</sup> January 2017, and that further because that Tribunal decision (3<sup>rd</sup> January 2017) had been made with the consent of all parties then that appeal should not be allowed to proceed.

9. Those submissions were opposed by the appellant and for the brief reasons that I gave on 20<sup>th</sup> January 2017 I allowed all three appeals to proceed. I acknowledge the submissions of the three respondents that if, for example this Court had upheld the appeal of either the 7<sup>th</sup> December 2016 and/ or the appeal of the 22<sup>nd</sup> December 2016, but not the appeal relating to the 3<sup>rd</sup> January hearing then because of the condition attached to the ICR granted on the 3<sup>rd</sup> January 2017 the decisions of the two previous Tribunals no longer had any legal effect in any event. I was satisfied that it was right to hear all three appeals because I had to consider the context of each of the appeals and the process of the decision-making in each hearing.
10. In addition, all three appeals were lodged within the correct time limits for such appeals and the appellant was not prepared to withdraw the same. I made it clear to the parties that I would review my decision making to allow the first 2 appeals ( in respect of the 7<sup>th</sup> and 22<sup>nd</sup> December decisions ) to proceed during the course of the appeal(s) hearing and in the event after hearing all of the submissions I have decided to allow all the appeals to be proceed.
11. It was obvious the fact that there had been two tribunal hearings held (quite properly and in accordance with the law) since the Tribunal hearing on the 7<sup>th</sup> December 2016 had caused a complication in the proceedings before me. It was agreed by all the parties that the appellant had filed her appeal within the relevant timescales and was not out of time, but the fact that for example the court did not receive the mother’s appeal (dated 20<sup>th</sup> December 2016), until the 22<sup>nd</sup> December 2016, the very day that the Tribunal were due to sit again, raised an obvious issue in respect of that appeal – what was the purpose of that appeal when the decision had been overtaken by the new decision on 22<sup>nd</sup> December 2016, which in turn had been overtaken by the decision of the 3<sup>rd</sup> January 2017 respectively.
12. That preliminary issue could have been resolved if the appeal in respect of the hearing of 7<sup>th</sup> December 2016 decision had been lodged immediately, or at least within a very few days of the 7<sup>th</sup> December 2016 and the Juvenile Court would then have heard the appeal before the next Tribunal hearing (22<sup>nd</sup> December 2016). However, that did not happen. I heard from the appellant’s Advocate of what they submitted, were her ‘logistical difficulties’ (my words not theirs), in relation to the obtaining of legal aid to fund the appeals. I have not gone into that as an issue. However, the delay in filing the appeal from the decision of the 7<sup>th</sup> December 2016 has given rise to legal issues which had to be considered.
13. The sponsoring committee and/or the relevant personnel may wish to consider whether the current Rules and/or Ordinance should be amended to ensure that such appeals are lodged in time scales to facilitate the appeal being heard by the Juvenile Court prior to the date of the next Tribunal hearing.
14. In this case, I was presented with three appeals, all filed within time and the Appellant seeking a hearing in respect of all three and I considered that there was a real possibility that the outcome of the decision-making on the 7<sup>th</sup> and 22<sup>nd</sup> December 2016, was relevant to the circumstances of the Tribunal decision on the 3<sup>rd</sup> January 2017, and therefore as I have previously stated, for the brief reasons given at the time, I decided to allow all three appeals to proceed.

### **The Relevant Legislation**

15. Part XI of The Family Proceedings (Guernsey and Alderney) Rules, 2009, sets out the rules in respect of appeals from decisions of the Tribunal to the Juvenile Court. Rule 54 sets out those who have the right, as well as those who “*may appeal*”. Rule 55 deals with the “*manner and grounds of appeal*”. Rule 56 deals with the *Powers of the Juvenile Court* and R56 (1) refers to an appeal to which “*section 104(1) of the law applies*” – the relevant section which governs these appeals.
16. Section 104(1) states:

*“Where the Juvenile Court is seized of any matter sitting in an appellate capacity under section 99(1) or 102(1) it may by order confirm, reverse, vary or substitute the decision of the Tribunal against which an appeal has been made, and –*

- (a) remit the matter back to the tribunal, or*
- (b) Exercise any power that could have been exercised by the tribunal.”*

17. And rule 56 states:

*“56. (1) on an appeal to which section 104(1) of the law applies, the Juvenile Court –*

- (a) Where it is satisfied that the decision of the tribunal was justified in all the circumstances, shall confirm the decision of the tribunal, or*
- (b) Where it is satisfied that the decision of the tribunal was not justified in all the circumstances may –*
  - (1) remit the matter to the tribunal or*
  - (2) reverse, vary or substitute the decision of the Tribunal and exercise any power which could have been exercised by the tribunal.*

*(2) A decision of the Juvenile Court under paragraph (1)(b)(2) which varies or substitutes the decision of the tribunal, or exercises any power which could have been exercised by the tribunal, shall be deemed to be a decision of the tribunal.”*

18. I also refer to the Scottish case of W v Schaffer 2001 S.L.T. (Sh Ct) 86, dealing with a not dissimilar appeal. The learned Sheriff Principal stated:

*“In my opinion the foregoing ground of appeal does not permit a sheriff to substitute his own decision for that of the children’s hearing merely because he disagrees with the conclusion at which the hearing has arrived, or because he would have arrived at a different conclusion had he been dealing with the matter at the first instance. As it is said by Professor Norrie in his annotation to the sub-section in the Green’s annotated acts edition of the 1995 Act (revised edition, 1998), it is perfectly conceivable that two different, even opposing, disposals are justifiable in the circumstances of a single case. From that it follows, in my opinion that the task facing a Sheriff, to whom an appeal has been taken, is not to reconsider the evidence which was before the hearing with a view to making his own decision on that evidence. Instead, the Sheriff’s task is to see if there has been some procedural irregularity in the conduct of the case; to see whether the hearing has failed to give proper or any consideration to a relevant factor in the case; and in general to consider whether the decision reached by the hearing can be characterised as one which could not, upon any reasonable view, be regarded as being justified in all the circumstances of the case.”*

19. In order to come to the decision that I have in respect of each of the appeals, I have considered the following aspects (not in any order of import):

- (1) What information was before the Tribunal on each occasion?
- (2) Was I able to identify the decision of the Tribunal on each occasion?
- (3) Was I able to identify the reasoning for the decision made by the members of the Tribunal on each occasion, with particular reference to the grounds of appeal?

- (4) What was the process and procedure of the Tribunal on each occasion including and in particular, their application of the relevant law/legislation to the decisions they made and their reasoning for those decisions.
20. In addition I was satisfied that if I found there had been an irregularity in the process or procedure or application of law in any of the above considerations that in order to grant any of the appeals the irregularity had to be material, and further I am satisfied that even if I found that there had been either a material irregularity (or indeed more than one ) than I must still consider whether that material irregularity (or material irregularities) could lead me to conclude that each appeal (each appeal being individually considered) should be allowed because it was justifiable in all the circumstances of that case/ appeal. This meant that even if I found there had been a material irregularity that it did not automatically mean that the appeal would be granted - I still had to consider whether the material irregularity (or irregularities) was or were such that it was justifiable in all the circumstances to allow the appeal(s).
21. All of the parties were ad idem that in respect of the part heard hearing on the 20<sup>th</sup> January which then continued on the 25<sup>th</sup> January 2017, the Court should initially deal only with whether to grant the appeal(s) and not proceed to consider the ‘second phase’ ( in the words of the committee’s advocate) that Section 104 provides for, namely that if I did grant any of the appeals then the Court should only move then onto consideration of Section 104 of the Law, and each party would then have an opportunity to make further submissions on the import of S104 on any appeal that was granted.
22. The second phase was heard by me on the 27<sup>th</sup> January and with the Court’s approval a consensus was reached by the parties as to how the matter should proceed, and to which I will refer later in this judgment.
23. In addition to the relevant appeal provisions, I also take into account section 1 of The Children (Guernsey and Alderney) Law, 2008 (“the Law”) which states:
- “Section 1(1) *The principal purpose of this Law is to reform, in respect of Guernsey and Alderney, the law relating to children and their families, in order that suitable provision may be made –*
- (a) *to protect children from harm, and*  
 (b) *to promote their proper and adequate health, welfare and development.*
- (2) *Without limiting the generality of the principal purpose under subsection (1), this Law has the following specific objects -*
- (a) *the creation of obligations concerning the provision of services for children in need and for children who require care, protection, guidance or control,*  
 (b) *the prescription of the duties, powers and rights of parents and others caring for children,*  
 (c) *the establishment of a Child, Youth and Community Tribunal, and*  
 (d) *the setting of standards, and creation of conditions, which will enable there to be ratified on behalf of Guernsey and Alderney, such international agreements concerning children as the States or the States of Alderney, as the case may be, may resolve.”*

24. Further, I consider also Rule 1 of The Family Proceedings (Guernsey and Alderney) Rules ('the Rules') 2008 which sets out the statement and application of overriding objective of the Rules: -

*“Rule 1(1) The overriding objective of these rules is to enable the relevant court to deal with cases justly, having regard to –*

- (a) the overriding principle that the child’s welfare is the paramount consideration,*
- (b) the child welfare principles, and*
- (c) the child welfare checklist,*

*the whole is more particularly set out in section 3 and 4 of the Law.*

*(2) The parties are required to help the relevant court to further the overriding objective.”*

25. Whilst I accept that under section 2(3), the Tribunal is not within the definition of a relevant court, I am satisfied that Rule 1(1) applies directly to CYCT proceedings and the ethos of Rule 1(2) should also apply, taking into account that the paramount consideration is the welfare of the child.

26. The decisions made by the CYCT on the three relevant dates had to be made by each of the Tribunal members having taken into consideration firstly Sections 3 and 4 of the Law.

27. S3 of The Children (Guernsey and Alderney) Law, 2008 as amended ('the Law') states:

*“3. (1) Subject to subsection (3), when a public authority carries out, in respect of a child, any function under this Law, that authority shall –*

- (a) take into consideration such of the child welfare principles set out in subsection (2) as may be relevant to the circumstances or matter in relation to which the function is being carried out, and*
- (b) having taken those principles into account, carry out the function, having regard to the overriding principle that the child’s welfare is the paramount consideration.*

*(2) The principles (the “child welfare principles”) for the purpose of subsection (1) are –*

- (a) that a child’s welfare is normally best served by being brought up within his own family and community,*
- (b) that, where it is not possible for a child to be brought up within his own family or community, his welfare is normally best served by maintenance of regular contact with his family and community,*
- (c) that no compulsive intervention shall be made in respect of a child, unless it is necessary for the effective provision to the child of care, protection, guidance or control,*
- (d) that any delay in determining a question about a child’s upbringing is likely to be prejudicial to the child’s welfare,*

- (e) *that irrespective of age, development or ability, a child should be given an opportunity to express his wishes, feelings and views on all matters affecting him,*
- (f) *that, except where it is shown to the contrary, it is presumed that a child is capable of forming a considered view from the age of 12 years,*
- (g) *That a child in the care of the States is entitled to be provided with, and may expect to be subject to, insofar as is practicable, similar levels of care, protection, guidance and control as would be expected to be provided or exercised in respect of a child by reasonable parents,*
- (h) *That in any case involving criminal activity, by a child, or the risk of criminal activity, by a child, the primary purpose of any compulsory intervention shall be the prevention of such activity in both the short and long terms,*
- (i) *that it is expected that parents and any others responsible for a child's welfare will consult and co-operate with one another, and where possible resolve matters by agreement, in an atmosphere of openness and non-confrontation, with recourse to formal proceedings (whether court or tribunal) only as a last resort,*
- (j) *that it is normally in the best interests of a child to have ongoing contact with both parents and it is the responsibility of the parents and any public authority to take reasonable steps to promote such contact, and*
- (k) *that in determining any issue under this Law there shall be no discrimination by any public authority on the grounds of gender, marital status, ethnic or cultural origin, religion, disability, age or sexual orientation."*

28. Section 4 of the Law states:

*"4. (1) When determining any issue concerning –*

*(a) the upbringing of a child under this Law, or  
 (b) the application of the child welfare principles,  
 a public authority shall, in particular, have regard to the matters set out in subsection (2) (the "**child welfare checklist**").*

*(2) The matters for the purposes of subsection (1) are -*

- (a) the child's wishes and feelings (in the context of his age and understanding),*
- (b) the age, gender, ethnicity, cultural background, language, religion and any other relevant characteristics of the child,*
- (c) any harm the child has suffered or is at risk of suffering,*
- (d) the child's physical, emotional and educational needs,*
- (e) how capable each of the parents (or any other person looking after or having parental responsibility for the child) is of meeting the child's needs,*
- (f) the importance and likely effect of contact between the child and his parents, siblings, relatives and any other people significant to the child, and*
- (g) the effect or likely effect of any change in the child's circumstances, including the effect of the child's removal from Guernsey or Alderney."*

29. In addition, the Tribunal must always consider the application of the Human Rights (Bailiwick of Guernsey) Law, 2000 to the decisions that they make and particularly with reference to, but not exclusively, Articles 6 and Article 8 of the ECHR ( as adopted by the Law) as follows:

***“Article 6 – Right to a fair trial***

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests or juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
- 2..... *(not relevant to this matter)*

***“ARTICLE 8 Right to respect for private and family life-***

- 1 *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2 *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

30. All of the above legislation is directly applicable to the decision-making of the Tribunal. Its import in every decision made by the Tribunal members should not be underestimated. Whilst I understand that it could be argued that the application of the legislation assumes even more importance as in these three appeals where the Article 8 rights of a child and parents are engaged by the decision of the Tribunal such decisions can be proportionate if the Tribunal consider that it is in the child’s welfare to make such a decision having taken into account and considered in detail the legislation referred to above.
31. However, the legislation has direct relevance and application to all of the decisions that the Tribunal members are being asked to make, because they are carrying out a function under the Law as per S3 of the Law, because they are a public authority as are the safeguarder service and the Committee and this Court.
32. Schedule 2 of The Children (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance 2009 sets out the oath of the tribunal members namely that they will discharge their functions: *“in accordance with the law ...”* Put simply the Tribunal members are bound by the Law and when they make decisions one of their mandatory considerations is the relevant Law, appertaining to the decisions they are being asked to make.
33. It has already been clearly established, both in Re C Guernsey judgment 20/2013 (Royal Court) and Guernsey judgment 42/2012 (Juvenile Court) that the Tribunal are bound by the relevant legislation and are bound to demonstrate that they have not only considered the Law when coming to a decision but they must also demonstrate how they have done so.

34. Further I am satisfied that in addition to the Tribunal members taking decisions in accordance with and in the context of the relevant legislation, that it is inevitable that from time to time they will also have to be given advice on relevant case law. I can see no argument that the tribunal is a 'case law free zone' (my words), which was implied to me was the position during the hearing of these appeals.
35. Interim care requirements and conditions have the same status as Orders and the Tribunal should not be left at a disadvantage without receiving advice in respect of relevant case law, where it applies.
36. There was discussion in the appeals before me as to whose responsibility was to provide the Tribunal with case law and /or legal advice or legal information. The Deputy Children's Convenor's view was that it was the role of the Children's Convenor, her Deputy and the Assistant Children Convenors to provide that advice in the Tribunal hearings. I agree, but in addition that where an Advocate is representing a party, I consider it is their role to ensure that the Tribunal members are aware of the legislation and the relevant case law that applies to their decision-making.
37. Again, I was told that in these hearings and indeed in other hearings before the Tribunal, that the Advocates did not have the opportunity to make any legal submissions. I know not whether that is correct or not. However, it seems obvious to me that the Tribunal members, identically to judges who sit in Courts in this and other jurisdictions, are entitled to expect to be addressed on the Law in respect of these very difficult and complex decisions which clearly engage the Article 8 Rights of the child and other family members. It is the role of Counsel to assist the Tribunal members as straight forwardly as they can. In this case the appellant's advocate complained that in effect the Tribunal members had not in terms applied the relevant legislation on the 7<sup>th</sup> December 2016 and likewise on the 22<sup>nd</sup> December and 3<sup>rd</sup> January 2017. She submitted that she did not believe she would have been allowed to address the Tribunal on the Law and yet if she had done so then these appeals may have not been necessary.
38. The Deputy Children's Convenor took issue with the appellant's advocate and submitted that there had been nothing either during the relevant hearings or indeed at any Tribunal hearing that would have prevented the appellant's Advocate addressing the tribunal on the relevant Law that they had to consider when making their decisions. There was an impasse between their perceptions of what could or could not happen in any Tribunal hearing.
39. I repeat it is the role of all counsel to assist the Tribunal on the Law and the role of the Tribunal that the Advocates are afforded the opportunity to do so.
40. The committee's advocate raised an interesting point, or issue, in respect of the Children's Convenor, the Deputy Children's Convenor and the Assistant Children's Convenors giving legal advice to the Tribunal members in their role within the Tribunal hearing. Crown Advocate Simmonds referred me to Section 15 of The Guernsey Bar (Bailiwick of Guernsey) Law, 2007 as Amended.

*At Section 15(2):*

*(2) Subject to subsection (3), a person -*

*(a) other than -*

*(i) an Advocate,*

*(ii) a consultant to an Advocate or firm of Advocates in the course of his consultancy, or*

*(iii) a person employed or otherwise supervised by an Advocate in the course of his employment or when under supervision (as the case may be), and*

- (b) who -
- (i) gives advice to another person on the law of the Bailiwick or one of the jurisdictions in the Bailiwick,
- or
- (ii) draws up a contract under the law of one of the jurisdictions of the Bailiwick for another person,
- is guilty of an offence.

(3) It shall be a defence for a person ("**person A**") to prove that when he gave advice, or drew up any contract, as the case may be -

- (a) person A represented to the other person, or
- (b) the other person knew or ought reasonably to have known, that person A did not fall within the list of persons in subsection (2)(a)."

41. The Children's Convenor is not a Guernsey qualified Advocate and likewise neither are her Deputy or Assistants. HSC advocate posited the possibility that any time any of them gave legal advice to the Tribunal members they could place themselves at risk of committing a criminal offence and therefore having on every occasion to rely on the statutory defence in S15(3).
42. This was not an issue for this appeal and I have merely included it to highlight the provisions and again to indicate that if there is a lack of clarity as to the capacity of any of those who fulfil the role of Children's Convenor and/or her Deputy and Assistants, in giving legal advice to the Tribunal in their professional capacity, that they may not wish on each occasion to be forced to rely upon the statutory defence and again consideration should be given to this issue. I stress this judgment should not be read that I agree or do not agree with the HSC advocate on this issue and neither did it inform any part of my decision making in respect of the three appeals.
43. It seems logical to me that the person fulfilling the role of Children's Convenor/Deputy Children's Convenor/Assistant Children's Convenor, should be able to give legal advice to the Tribunal members and that in each case it should either be given in front of all of the parties or that it should be clearly documented in any decision-making record what that legal advice was.

### **Grounds of Appeal**

44. The appellant filed identical the grounds of appeal (as per the appellant's advocate's skeleton argument of the 9<sup>th</sup> January 2017) in respect of each of the three hearings (7<sup>th</sup> December 2016, 22<sup>nd</sup> December 2016 and 3<sup>rd</sup> January 2017) and they are as follows:
- 1. *Ground 1: That the Children's Convenor failed to adhere to proper procedure (pursuant to Section 9 of the first schedule of The Children (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance 2009, by ensuring that all relevant documentation was disclosed to the appellant at least 7 days prior to the hearing.*
  - 2. *Ground 2: That, in the light of the alleged breach of correct procedure, there were no emergency grounds or evidence of escalation of risk presented to the tribunal members such that it was justified to remove the child] from the mother's care.*
  - 3. *Ground 3: That the tribunal members incorrectly took into consideration the findings of a report that had been prepared by Dr X but was not being considered by the tribunal members at (the 7<sup>th</sup> December 2016) hearing.*

4. *Ground 4: That the tribunal members incorrectly took into consideration the Committee's decision for permanence, notwithstanding that care plans had not been filed into the proceedings.*
5. *Ground 5: That the tribunal members incorrectly took into consideration the Committee's concerns that the appellant was in a relationship notwithstanding that the appellant had previously informed the tribunal members that her relationship had come to an end.*
6. *Ground 6: That the tribunal members incorrectly took into consideration the Committee's concerns about the child's development, notwithstanding that there was no evidence before the tribunal members to support the concerns and the health visitor did not appear before the tribunal members.*
7. *Ground 7: That in all the circumstances the tribunal members placed too much weight on the Committee's recommendations and failed to consider them objectively."*

45. In respect of all seven grounds, in respect of each decision, I found it somewhat difficult to align the oral submissions with the specific grounds of appeal and it would have been of more assistance to the court for the appellant to set out grounds of appeal arising out of the criteria set out in Rule 56 as referred to above and in the context of any other relevant legislation.

46. I will consider the Rule 56 criteria and in parallel the specific grounds of appeal.

#### **Relevant Chronology prior to the Hearing of the 7<sup>th</sup> December 2016**

47. ...

48. ...

49. The child first came before the CYCT on the 7<sup>th</sup> June 2016, when the child was made the subject of interim care requirements with conditions and a safeguarder was appointed. Legal representation was approved for the father and the mother was not legally represented at that time.

50. ...

51. ....

52. Due to the parents not being in full agreement with the Statements of Conditions of Referral and Facts ..... the Convenor referred the matter to the Juvenile Court on the 27<sup>th</sup> July 2016.

53. A third Tribunal hearing was held on the 28<sup>th</sup> July 2016 ...

54. ....

55. The referral by the Children's Convenor to the Juvenile Court was considered at a first directions and review hearing on the 23<sup>rd</sup> August 2016 and the Convenor was given leave to file an amended Statement of Conditions of Referral and Facts.

56. The fourth Tribunal hearing. was held on the 24<sup>th</sup> August 2016 and an ICR was granted in respect of the child (R) ..... and by the 13<sup>th</sup> September 2016, both parents had agreed the Convenor's amended Conditions of Referral and Statements of Facts dated the 9<sup>th</sup> September 2016 , in respect of the child ... and on the 13<sup>th</sup> September 2016 the Juvenile Court referred

the children's cases back to the Children's Convenor under Rule 53 of the Family Proceedings (Guernsey and Alderney) Rules, 2009, for referral to the CYCT for consideration and determination under Section 32(1) of the Law.

57. The agreed Convenor's statement of conditions and facts in respect of the child was dated the 9<sup>th</sup> September 2016 (and approved by the court on the 13<sup>th</sup> September 2016) .....
58. The fifth Tribunal hearing was held on the 20<sup>th</sup> September 2016 and subsequently again to the Committee's recommendation, a condition was attached to an ICR .
59. On the 19<sup>th</sup> October 2016, the sixth Tribunal hearing was held. The ICR in respect of the child was granted on that occasion for only 7 days as issues had arisen in respect of concerns held by the Committee in respect of the appellant's association with another individual.
60. The seventh Tribunal hearing occurred on the 26<sup>th</sup> October 2016 ..... The Tribunal granted an ICR with conditions
61. On the 4<sup>th</sup> November 2016, there was a meeting attended by representatives of the Committee, the appellant and her Advocate, to consider various issues as set out in the chronology. ....
62. The eighth Tribunal hearing was held on the 11<sup>th</sup> November 2016.
63. By the eighth Tribunal hearing the Committee had not yet filed the child plan and the Tribunal members and attendees were informed that the Assistant Convenor had granted an extension to the Committee to enable them to file the child's plan on or by the 18<sup>th</sup> November 2016.
64. Section 9 of the first schedule of the Children (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2009 sets out the documents that are to be provided for the tribunal. Section 9:

*“(1) Subject to paragraph 6, so far as may be practicable, the Children's Convenor shall, at least 7 days before the date of any hearing before the tribunal, send to –*

- (a) the members of the tribunal,*
- (b) the parties to the proceedings, and*
- (c) any safeguarder appointed in respect of the proceedings, the documents, or copies of the documents, referred to in sub-paragraph (2) that are relevant to the hearing.*

*(2) The documents for the purposes of sub-paragraph (1) are -*

- (a) the record of the Children's Convenor meeting referred to in paragraph 7(2)*
- (b) the statement of any condition for referral of the matter to the tribunal and facts in support,*
- (c) where any matter has been referred for determination by the Juvenile Court, notice of the court's decision,*
- (d) any application for review of the care requirement,*
- (e) any report prepared by a safeguarder appointed in respect of the proceedings,*
- (f) any chronology of events provided by the Department,*
- (g) the child's plan,*
- (h) any record of decision of the tribunal and at section 79(2) of the Law,*
- (i) any prior or current requirement,*
- (j) any statement or other information contained in a document received from, or on behalf of, the child and,*

(k) *any other document that the Children’s Convenor considers would assist the tribunal in its determination of the matter.*”

65. It is my understanding that the earliest the child’s plan became available to the appellant was likely the 22<sup>nd</sup> November 2016, but not to the appellant’s Advocate until, I believe, the 22<sup>nd</sup> December 2016 for reasons which I will set out in this judgment. It is my understanding that the child’s plan was therefore not available for the eighth hearing, (11<sup>th</sup> November 2016 and for reasons which I will refer to later, neither was it before the Tribunal members on the 7<sup>th</sup> December 2016.

66. I am told that on the 22<sup>nd</sup> November 2016, the appellant met with representatives of the Committee and was told on that occasion that the Committee would be making a recommendation to the Tribunal (at the hearing on the 7<sup>th</sup> December 2016) that the child should be removed from her care. The Committee and the appellant agree that the appellant was at that meeting given a copy of the child’s plan.

67. . Whatever the circumstances, in any event, the child’s plan was given to the appellant on the 22<sup>nd</sup> November 2016 but their Advocate did not receive a copy of it and was not able to go through it with the appellant in advance of either of the tribunals of the 7<sup>th</sup> December 2016 or 22<sup>nd</sup> December 2016.

68. In addition, throughout the progress of the previous Tribunal hearings, the Committee had advised the parties and the Tribunal that they had bespoken a psychological assessment of the mother undertaken by Dr X (at B47 to B55 in the bundle), a Clinical Psychologist employed by the Committee. That report is in the bundle but unfortunately not dated but appears to have been received by the Assistant Convenor on the 6<sup>th</sup> December 2016 because in an e-mail on that date addressed to the parents’ Advocates, she wrote: *“Please see attached report from Dr X. This will not be before the tribunal tomorrow as it was received too late for inclusion, but it will form a part of the papers next time”*.

69. Dr X’s report is of importance because I consider it likely to have contributed to the recommendations made by the Committee that the Tribunal attach a condition to the ICR which enabled the removal of the child into the care of the Committee at the hearing on the 7<sup>th</sup> December 2016.

70. ...

71. ...

72. ...

73. ....As referred to above because of a decision made by the Assistant Children’s Convenor’s the written form of that report was not before the Tribunal members on 7<sup>th</sup> December 2016.

74. On the 2<sup>nd</sup> December 2016, the appellant’s Advocate had received from the Assistant Convenor an updated report written by a representative of the Committee in anticipation of the Tribunal hearing on the 7<sup>th</sup> December 2016 ..... *the recommendation was in accordance was:*

(1) *[the child] shall reside in the care of the Committee;*

(2) ...

(3) ...

75. ....

76. In the bundle I have been provided with *“an inventory of hearing documents and reports for R”* that were before the Tribunal members on the 7<sup>th</sup> December 2016. I note that the inventory

states that the original Convenor's Statement of the 20<sup>th</sup> May 2016 was before the Tribunal on that date. I query why that is so when they had before them the agreed Convenor's Statement of Condition of Referral and Facts dated the 9<sup>th</sup> September 2016 which was established and remitted by the Juvenile Court on the 13<sup>th</sup> September 2016. There is a risk in the original Convenor's Statement of Condition of Referral and Facts being before the Tribunal in that the Tribunal members may take into account matters that had not been agreed. I was not addressed on this matter and have ignored it in my deliberations. I merely raise it as an issue for the Children's Convenor to consider. Once the Children's Convenor Statement of Conditions of Referral and Facts has been agreed by the parties, or established by the Juvenile Court, it could give easily rise to a perceived unfairness if any previous versions of the Convenor's Statement which had not been agreed by all the parties were before any subsequent tribunal hearing. I also accept that it may be that the inventory of documents which were before the Tribunal that I was given in the bundle was in error.

77. In any event, it was agreed that what was not before the Tribunal members on the relevant date was either Dr X's report or the child's plan. It appears to be agreed that both were available to the Assistant Children's Convenor before the hearing on the 7<sup>th</sup> December 2016 but that she had taken a deliberate decision to withhold the same from the Tribunal members for specific reasons. .... However, the social worker's report was before the Tribunal.
78. There was one further document of note before the Tribunal members on the 7<sup>th</sup> December 2016 and that was an e-mail received from the safeguarder dated the 29<sup>th</sup> November 2016. (B38 in the bundle.)
79. As an aside, the Safeguarder Service has, in the last 12 months, rebranded themselves as the Family Proceedings Advisory Service. I accept that they have done so for perfectly proper reasons. I have previously been told that they have received legal advice that they could do so. The Court has generally taken the stance that they would call those professionals, Family Proceeding Advisors or refer to the Family Proceedings Advisory Service whilst acknowledging that the relevant legislation which has not been amended still refers to them as Safeguarders. I was told by the Deputy Children's Convenor that it was thought, for whatever reason, that the Tribunal members may have some difficulties in translating the role of the safeguarder into the role of Family Proceedings Adviser and so they have remained as Safeguarders before the Tribunal whilst being FPA's before the Court.
80. I think it more likely that there will be difficulty in understanding the role of a professional if they have one title in one legal jurisdiction (the Court) and another title in another legal jurisdiction (the Tribunal), yet whilst still undertaking the same role and I would ask that the Family Proceedings Advisory Service/Safeguarder Service liaise urgently with the relevant personnel to try and achieve uniformity between the two legal frameworks and/or seek amendment to the relevant legislation again to assist them in presenting uniformly to both the Court and the Tribunal as Family Proceeding Advisors or the Family Proceedings Advisory Service if that is their wish. These comments should not be seen as a criticism of any person – I understand that there is logic to calling the Safeguarders and/or the Safeguarder service by those exact titles because after all, that is what the current legislation says is their title. However, to have those professionals called by two different titles in the two different legal jurisdictions must be utterly confusing for all concerned including the lay parties.
81. The safeguarder GW e-mailed the Assistant Children's Convenor on the 29<sup>th</sup> November 2016....

### **The decision of the Tribunal**

82. On each occasion in respect of which there is an appeal, the Tribunal made an ICR in respect of the child with conditions as sought by the HSC: ...
83. As I have previously stated the appellant has appealed only the first condition (where the child is to live) on each occasion and not the ICR itself.

7th December 2016

84. I have received two documents in respect of what occurred at or set out the outcome of the Tribunal on the 7<sup>th</sup> December 2016, namely firstly the Record of decisions and reasons of a hearing of the CYCT as prepared by the Chair of the Tribunal (such document dated 8<sup>th</sup> December 2016) and secondly, a record of hearing of the CYCT prepared by the Assistant Children's Convenor (such document dated the 9<sup>th</sup> December 2016). That latter document was not included in the original bundle but was provided to me (along with the ACC's records of the other relevant 2 dates) during the course of the appeal.
85. In addition, in the appellant's skeleton argument on behalf of the appellant, there are references to her recollection of the events of the 7<sup>th</sup> December 2016 tribunal hearing in that document.
86. Not all of the versions are the same and I am left having to identify what was said, or what happened on the 7<sup>th</sup> December and likewise on the other 2 dates.
87. Sections 11 and 12 of the Third Schedule of the Ordinance states:

*"11.(1) Subject to sub-paragraph (2), each member of the tribunal before him a matter is heard shall give a decision before all those attending the hearing and the decision of the hearing shall be taken by simple majority.*

*(2) When giving a decision on any matter heard before the tribunal, each member of the tribunal before whom the matter is heard shall declare orally the reasons for his decision.*

*(3) ...*

*12. As soon as reasonably practicable after a decision has been made by the tribunal and any proceedings, disposing of the case of a child under this Ordinance, the chair person shall make or cause to be made, a written record of the decision and the reasons for the decision."*

88. HSC advocate submitted on behalf of the Committee, that where section 12 referred to the chairperson making "*a written record for the decision and the reasons for the decision*" that he interpreted that as meaning the written-up version of the decisions given by each Tribunal member at the Tribunal itself, in front of the parties.
89. I agree with that interpretation of sections 11 and 12. I am satisfied that the intention of those two sections was that the members of the Tribunal give both their decision and then the reasons for their decision (with reference to the Law) and that subsequently that information is written-up/provided identically to the decision and reasons given by the Tribunal members in the hearing.
90. From information that I have been given in relation to the hearing on the 7<sup>th</sup> December 2016, that does not appear to have been the process. The appellant, their Advocate and at least one of the Committee representatives who were all present on the 7<sup>th</sup> December recall that when the Tribunal members individually gave their decision and reasons for their decisions, one of the Tribunal members referred to their (own) "*conscience*" as a reason for coming to the

decision that they had made to attach the condition (number 1) as recommended by the Committee.

91. At paragraph 46 of her skeleton argument the appellant's advocate stated that: "*One CYCT member, in announcing her decision, said she had considered everything said, and recognized there had been failings in the procedure, but her 'conscience' would not allow her to ignore the concerns of the Department*". That reference to the Tribunal members' conscience does not appear in either the record of decision and reasons of a hearing of the CYCT of the 7<sup>th</sup> December 2016, as written by the Chair of the Panel Hearing (and dated the 8<sup>th</sup> December 2016) or in the Assistant Children's Convenor's notes of what occurred on the 7<sup>th</sup> December 2016 (and dated 9<sup>th</sup> December 2016).
92. The appellant's advocate told me that another Tribunal member has stated, again whilst giving their reasons that: "*There were sufficient concerns about the child to evidence a potential risk and the child welfare was important*".
93. The committee's advocate addressed me on the difficulties that the Court had in determining what had been said by the Tribunal members when they had given their decision and the reasons for their decision. He suggested that digital recording of the Tribunal hearings would resolve the uncertainty that this Court was faced with and will likely be faced with again in any future similar appeals. I am told the issue of digital recording of Tribunal hearings has been already been considered and rejected. I would encourage the President and Board of the CYCT and Children's Convenor to re-visit that decision, but I stress that it is not the jurisdiction of this Court to indicate whether this should occur or not.
94. The Committee's advocate also raised the possibility/issue of the Tribunal members being able to retire to consider their decision and their reasons before they delivered the same in the hearing before the parties. I can see nothing in the Ordinance or the Rules or the Law that would prevent them from doing this. I was informed during the appeal that in some manner such procedure is thought or considered to be contrary to the ethos of the Tribunal process. Again, this may be something the President, the Board and the CC may wish to re visit. If the Tribunal members had had an opportunity to retire on each of the occasions which are the subject of these appeals this may have prevented the appeals being lodged because the Tribunal members would have been able to consider and formulate in more detail the legal and factual reasons for their decisions.
95. Another procedural issue raised by the appellant in respect of the hearing on 7<sup>th</sup> December 2016 and that was that neither the child's plan nor Dr X's report was before the Tribunal. Further, neither the safe guarder's e-mail (referred to above) or the social worker's report (again referred to above), had been received by the mother "*at least 7 days before the date of the hearing*" as anticipated ("*so far as may be practicable*") by S9 of the First Schedule of the Ordinance, although they were placed before the Tribunal.
96. The appellant's Advocate confirmed that whilst some additional time had been given to the Appellant before the commencement of the hearing on the 7<sup>th</sup> December 2016 to enable her to read through the social worker's report and safeguarder's e-mail, a period of approximately 20 minutes, which the appellant's Advocate said was "*insufficient*" to enable the appellant to consider the documents and give instructions to her Advocate.
97. The appellant's advocate urged upon me the fact that the appellant should have been regarded and treated as vulnerable and that such a timescale was just not sufficient for her client to be able to read, take on board what was said in those documents and then give instructions to her advocate particularly when the Committee were making a recommendation for a condition to be attached to the ICR which would lead to the immediate removal of the child from the

mother's care at that time when the child had been primarily if not solely cared for by the mother since the child's birth.

98. One further procedural issue was raised by the appellant's advocate in the grounds of appeal namely that whilst the Assistant Child Convenor had taken the decision not to place the child's plan or Dr X's report before the members of the Tribunal when coming to their decision, the Tribunal were allowed to know Dr X's conclusions in respect of his assessment of the appellant and that he had found that the appellant "*was unable to provide safe care the child*"

99. The report itself was withheld because of time issues (as it had not been filed in time) but the Tribunal members were in any event allowed to know the conclusions. In being told of the information that was in it, the Tribunal members were allowed to know what he had purportedly said without being able to read it. The appellant relied upon that as a material breach of the process giving rise to unfairness to them. Bearing in mind the report appears to have only been received by the Children's Convenor perhaps a day before the Tribunal hearing it could be argued that it could not have previously been disclosed because it had not been practicable for the ACC to disclose it as she did not have it in her possession.

### **The decision made by the Tribunal**

100. I am satisfied that there is clarity in the paperwork before me as to what decision was made by the Tribunal on the 7<sup>th</sup> December 2016. The decision to make an interim care requirement with the conditions is clearly set out at page 2/3 of the record of 7<sup>th</sup> December 2016 and was also clearly recorded on the other dates.

### **Reasons for decision**

101. I have attempted to identify the reasons for the decisions made by the Tribunal members (on 7<sup>th</sup> December 2016) as to why they came to the decision that they did specifically in respect of the condition to be attached to the ICR ....

102. If (as appears to be accepted), one of the Tribunal members mentioned utilising their '*conscience*' when determining the reasons for the relevant decision then that completely undermines the approach of that Tribunal member in respect of the decision they had to make. The role of the Tribunal members was to hear the issues in accordance with the facts that had been agreed and to consider and apply the law in the context of those facts. If a judicial figure makes a decision by utilising their conscience and not the law then that decision can only be flawed.

103. Within the written record of the Tribunal, I could only identify the following as being the reasons for the decisions made by them at B155:

*"The Tribunal considered very carefully the opposing views given by the attendees. They were mindful of the gravity of any decision to remove a child from its parents, the clear views of [the appellant] given by their lawyer and the level of concern from the safeguarder and Committee that had led them to recommend that this be done today. Having balanced the information provided today, the Tribunal decided by majority that the child should reside in the care of Y until the 22<sup>nd</sup> December which is the earliest date that the case can be reviewed. In spite of hearing the views of [the appellant] the Tribunal members did not feel that the concerns of the safeguarder and the Committee could be set aside."*

104. And they then continued to repeat the views of the Committee:

*“The Committee did not believe that the child would be safe if left in the care of her the appellant]. This necessitated the change in condition 1.”*

105. And finally, they stated that in reaching this decision that the Tribunal *“was mindful throughout of the child welfare principles and child welfare checklist, most of which were clearly appropriate in this case”*.

106. All parties who appeared before me accepted that the reasons given by the Tribunal in in respect of the decision they had made on that day were insufficient. Crown Advocate Simmonds submitted that in the light of the decision-making in Re C, (both Juvenile and Royal Court), it was *“disappointing”* to read the reasoning for the decisions of the 7<sup>th</sup> December 2016 as set out in the record of the 8<sup>th</sup> December 2016 because it was below the standard expected for the making of such decisions.

107. I concur with that.

108. At paragraph 57(2) of my judgment of the 6<sup>th</sup> December 2012 (RE C), I stated:

*“(2) I am not satisfied the CYCT addressed their minds to the Law at all or to the rights of the child, Y, or the appellant under Articles 6 or 8 of the ECHR. There is no reference in the paperwork. I found myself trying to second-guess whether a particular reference in the reference of decision of the 19<sup>th</sup> November was relevant to any part of section 3 or 4 of the Law. I should not have to do that. It should be obvious and transparent that the Tribunal have taken into account the provisions of sections 3 and 4 of the Law and Article 6 and 8 into account ...*

*(3) I cannot identify anywhere in the reasons where the Tribunal considered the impact of a removal on a child, save where it referred to the safeguarder’s view on this issue. This is not recorded. That was, in my view, a failing. To remove a child is so grave. The reasons for it and consideration of law, including the impact on the child should be included in the reasons.*

*(4) ...”*

109. There is no reference in the paperwork relating to the 7<sup>th</sup> December 2016 where I can identify that the Tribunal members proactively considered the child’s’s welfare as being the paramount consideration and specifically which of the child welfare principles were relevant, rather than ‘appropriate’ (as stated in this matter) and I could not identify any analysis of the child welfare checklist on the individual facts of this case. There is no reference, from what I could see, to Article 8 or acknowledgement that the decision to grant a condition to, in effect, remove a child from her parent’s care was a breach her and the mother’s Article 8 rights and whether the Tribunal members considered that such a decision was proportionate and in the welfare of the child, and the reasons as to why that was.

110. There was no analysis of the likely impact upon a child when severing the bond with the person who had been caring for her since her birth. There was no evidence of a balancing exercise that was necessary in this and every similar case. What were the factors for removal and what were the factors against removal, taking into account the agreed facts and the law.

111. I acknowledge the Tribunal members are not lawyers. However, if they are asked to hear these matters which clearly engage Article 8 and also involve potential breaches of Article 6, then the Tribunal members have to be prepared to consider those issues in their hopefully detailed analysis when delivering their reasons.

112. I am told that after the handing down the judgments of Re C (Juvenile Court and shortly thereafter, the judgment of the Royal Court in the same matter) and upon receipt of the learned Deputy Bailiff's guidance at the conclusion of his judgment, that the President and the Board of the CYCT, the Children's Convenor and her colleagues and the CYCT members all worked together to provide and engage in extensive training for the Tribunal members – indeed I was told that all members of the CYCT received a full weekend (February 2013) of specific training in relation to the issues raised and guidance given in the Re C cases. Further, in addition, I was informed that the members of the Tribunal have been provided with laminated documents in the tribunal room as follows:

(1) Decision-making check-list

And in that document, they are referred to:

- (i) Legal basis for decision:  
Is it clear that the correct legal test has been applied? (See legal test check-list)
- (ii) Is it clear why the tribunal is satisfied that the legal test is met?
- (iii) If conditions have been made:
  - (a) is clear whether the condition is necessary?
  - (b) are there sufficient reasons given for each condition made?
- (iv) Is it clear that the child welfare principles and child welfare check-list have been considered and that the relevant factors have been identified?
- (v) Is it clear that the child welfare has been the paramount consideration?
- (vi) If the procedure set out in law has not been followed (e.g. the hearing has proceeded in the absence of a party or a document or report has been received with less than 7 days' notice) is it clear why the tribunal decided to proceed to make a decision rather than adjourn the hearing?
- (vii) Is there evidence that the child has been given his/her views, wishes and feelings?

(2) Facts and Circumstances

- (i) Do the reasons state the relevant facts that form the basis of the decision?
- (ii) Do the reasons state the relevant and substantial considerations that have been made, taking into account and reaching each part of the decision made?
- (iii) Is there evidence for the options considered by the tribunal and is it clear why the particular option was chosen?
- (iv) If the tribunal has departed from a professional recommendation, is it clear why?

(3) Intended outcome

- (i) Is the intended outcome of the decision in any decision made clear?
- (ii) Do the written reasons clearly communicate the decision to all of those to whom it is addressed?

(4) An aide memoire of the S3 and S4 legal principles

113. Taking the "Decision-making check-list" alone, I cannot identify at all in the record of reasons made either by the Tribunal members, or as documented by the ACC, relating to their decision making where the Tribunal members applied the principles which are set out in section 3 and 4

of the Law or where they considered particularly Article 8, and Article 6 (the latter taking into account submissions on the issues of disclosure of papers etc.).

114. It is just not sufficient for the Tribunal members to state that they have considered the welfare checklist and the child welfare principles, without demonstrating how they have considered them, they must state what weight they have given to some of the principles and/or welfare checklist and not to others and how they have factored in the child's welfare and the human rights issues given the agreed facts. These are hard and legally complex issues. Professional Judges do not find such decisions easy and have the advantage of having time to consider the papers, and the notes of the hearing before giving their reasoned decision and as will be seen from re C (Juvenile Court supra) that we (me specifically) do not always get it right even in those circumstances.
115. However unfortunately the paucity of the reasons given for the decision on the 7<sup>th</sup> December 2016 along with an evident failure to consider and apply the legislation to their reasons leads me to contemplate the possibility that little if any progress had been made since the delivery of the fundamentally flawed reasons of the Tribunal which had been the subject of the appeal to the Juvenile Court in Re C in 2012.
116. I have great sympathy for the Tribunal members. They are in effect being asked to give an ex tempore judgment without the ability to retire and reflect upon their decision and the reasons for it. When there is an application by the Committee to the Juvenile Court for an order which would allow the removal of a child, the Court will ensure that there are a number of safeguards, including inter alia, firstly the appointment of a safeguarder (an independent professional who will be able to assess the decision making and views of all and make a recommendation as to what is in the welfare of a child), secondly the appointment of an Advocate for the child who takes their instructions from the safeguarder and who will advise the safeguarder on the Law and ensure that all relevant legal and factual issues appertaining to the child's welfare are at the forefront of everyone's mind and thirdly if there are any matters whether factual or opinion based which are in dispute then they are properly tested by sworn evidence being heard and fourthly if the dispute is in the case of the law then those matters are determined by the Judge having heard all parties submissions.
117. I am told that the Tribunal does not provide for the testing of disputed information because it only "*receives information*" and does not hear evidence. I remain at a loss then how the Tribunal members can assess the difference between the views of the different attendees and parties before it when there are disputes on fact and opinion. In some manner the Tribunal members have to be able to demonstrate how they decided to prefer one person's opinion over that of another if that is what they decide. It is just insufficient to prefer the opinion of a professional over that of lay person without being able to demonstrate a factual or legal basis as to why they came to that view. A parent is entitled to dispute the view of the professional including when (as in this case) that professional also relied on the opinion of another professional which is not accepted by the parent/party.
118. In Court I have the capacity to hear evidence from the professionals and the parties Advocates can examine their evidence in the detail required and I can then come to a reasoned decision as to why I may prefer one witness's evidence to another.
119. I refer to the grounds of appeal.
120. I have considered Ground 1 of the Grounds of Appeal and whilst there was an irregularity I was not satisfied that it was so material that by itself or in combination with the other grounds would lead me to consider that I should allow the appeal on the R56 test.

121. I have considered Ground 2 and do not consider that the Ground is made out because it refers to the wrong legal test, although I am also of the view that the Tribunal members also applied the wrong test as referred to above in failing to apply the Law. It is of course of import in this case as to why the Committee were making recommendation for removal of the child from the care of the appellant on that date but that was only one of a number of factors that had to be considered.
122. I have considered Ground 3 and consider that it was an irregularity that Dr X's recommendations were before the Tribunal members without them seeing the report. It was not in my view however a material irregularity. It would have been better and in the child's welfare that the Tribunal members and the appellant had access to Dr X's report before and during the hearing and also that the records do not record if and what consideration was given to the possibility of an adjournment to allow the mother time to consider the report in detail with her Advocate and as to whether that was regarded in the child's welfare, bearing in mind the importance of the consequences of the Committee's recommendation.
123. I have considered Grounds 4 - 7 and the difficulty that I have with them is they do not appear to correlate to the records of what I have received as to the events of the hearing on the 7<sup>th</sup> December 2016. I am unable to identify where those matters in Grounds 4 – 7 were considered as the appellant's Advocate says they were.
124. I am satisfied however that on the 7<sup>th</sup> December 2016 the Tribunal members gave insufficient reasoning as to why they considered that it was proportionate and in the child's welfare to make the condition attached to the ICR as they did on 7<sup>th</sup> December 2016. In addition, and as importantly I have been unable to identify where they properly applied the relevant legislation to the decision they made.
125. The appellant's advocate in her oral and in part her written submissions as to what happened at the Tribunal did not cross reference at all with the documents which I have been provided with which set out the reasons given by the Tribunal for the decision they made (in respect of the condition appealed). From the Record of decisions and reasons for making the decisions (dated 8<sup>th</sup> December 2016) I am not able to identify which parts of the information that they had received which led the Tribunal members to conclude that removal was in the welfare of this child and a proportionate decision on that date.
126. Equally I am not able to consider what weight if any the Tribunal members gave to those matters raised by the appellant's advocate in Grounds 4 – 7. It is the lack of clarity that gives rise for concern.
127. I am satisfied that in the absence of the provision of detailed reasons or evidence that the Tribunal members properly applied the relevant legislation to their decision making on 7<sup>th</sup> December, that that was a material irregularity and so profound was that irregularity that in all the circumstances the appeal has been allowed and is justifiable in all the circumstances because I am unable to identify the factual and legal basis and/or reasons for the decision made by the Tribunal members on that day and that in addition on this occasion there is reason to believe that at least one Tribunal member applied the wrong test, legal or otherwise to their decision (the reference to their conscience).
128. In general terms I grant the appeal on grounds 4 – 7 for the specific reasons given in paragraph 127 and above including where relevant to those matters raised in grounds 4 – 7.

#### **The hearing of the 22<sup>nd</sup> December 2016**

129. The Appellant's grounds of appeal are identical in respect of this hearing as the grounds for the hearing on 7<sup>th</sup> December 2016.

130. To some extent, the issues raised by the Appellant in respect of the provision of paperwork in advance of the hearing of the 7<sup>th</sup> December 2016 were remedied by the 22<sup>nd</sup> December 2016. I am satisfied that Dr X'S report was received by the mother in advance of this hearing. Unfortunately, however, there was an issue between the Children's Convenor and the mother's Advocate in respect of receipt of the child's plan – which I was told was sent by e-mail by the ACC to the appellant's Advocate on the 13<sup>th</sup> December, but not actually received by the appellant's Advocate due to an unidentifiable reason (possibly difficulties with the appellant's advocate's IT – I am not certain), but in any event the appellant's Advocate told me that she only received the child's plan during the Tribunal hearing on the 22<sup>nd</sup> December 2016 – although as I have referred to above the Committee and the mother accept that the mother had been given a copy of it herself on the 22<sup>nd</sup> November 2016 in a meeting with the Committee, although it had got lost somewhere between the mother and her Advocate.
131. In addition, there was an issue in respect of the safeguarder's report (a different document to her e-mail that I have previously referred to). The safeguarder had prepared a report for the 3<sup>rd</sup> January hearing and she filed her report well in time for that hearing but not in time for the 22<sup>nd</sup> December 2016 hearing, for which the safeguarder cannot be criticised as she had not been asked to file a report before that date. However, if the report had been admitted before them it would have assisted the Tribunal members because that report referred to the relevant law that was applicable to these decisions.
132. At page 2 of the record of decisions and reasons of a hearing of the CYCT in respect of the hearing on the 22<sup>nd</sup> December 2016 (the documentation being dated the 23<sup>rd</sup> December 2016), the Tribunal stated that they had:

*“Decided to adjourn the hearing until the 3<sup>rd</sup> January 2017 for the purpose of*

- (a) Enabling proper consideration of the safeguarder's report which was not submitted in time for inclusion of the papers and*
- (b) .....*

133. That decision was made because the Tribunal –

*“Considered the safeguarder's report to be vital as it would give us an independent insight into what was in the child's best interests. We also wanted to ensure that all parties had the proper opportunity to review the report and come prepared to discuss its findings at the next hearing.*

*The appellant's advocate also reported not having received the child's plan, despite this being sent to her in the post at the same time it was sent to the other parties. [The appellant] was also unsure whether she had received a copy of this report so it was clear that she had been unable to instruct her advocate in respect of its contents.”*

134. The Tribunal then proceeded to make an ICR with the same conditions that had been made on the 7<sup>th</sup> December namely: ...

135. ....

136. The appellant submitted that she was not in “total agreement with the content of Dr X's report and that some of the comments attributed to the mother were inaccurate”. Dr X was not in attendance at that Tribunal hearing. I am therefore uncertain as to how or why the members of the Tribunal accepted Dr X's report/opinion, when it was disputed by the appellant without further consideration as to how to deal with that dispute. There may, for example, have been

other reasons, in addition to the recommendations of Dr X's report, namely in the chronology of the case, that may have assisted them in considering this issue. However, when there is an outright dispute as to whether the Tribunal members should accept the recommendations of a professional where they are not accepted by a parent, the Tribunal members have to then document why they prefer the opinion of the professional in contrast to the view of the appellant. In this case Dr X's conclusions are referred to as findings by the Tribunal chair in relevant record. They are in fact his (professional) opinion.

137. I cannot identify in this record as to the reasons as to why the Tribunal members accepted Dr X's report without equivocation when they were aware that the appellant did not. If the matter had been, for example, dealt with by the Juvenile Court, there would have been safeguards such that Dr X evidence would have been tested so as the decision-maker (the judge in the Juvenile Court) could consider the evidence in the light of the agreed factual chronology, and in the context of the relevant law. All witnesses are equal both before the Tribunal and the court. A professional witness does not start out with an advantage that they will be believed over a lay party or that their opinion will be accepted or believed over the view of a lay party, or indeed vice versa.

138. The Tribunal members have to identify why they appeared, at least implicitly, if not expressly, to accept Dr X recommendations (which they referred to as findings) and should have considered whether it was fair that they should do so without hearing in more detail, particularly in the absence of Dr X himself.

139. ....

140. I am satisfied that there is a difference between the reasons given by the Tribunal members on the 7<sup>th</sup> December 2016 than those given by the Tribunal members on the 22<sup>nd</sup> December in that there is more clarity as to the decision-making pathway of the Tribunal members. They are not full reasons by any means but they are clearer as to why the Tribunal members made the decision that they did. However, there was no apparent balancing exercise as to the impact on the child's welfare in the recommendation that she be continue to reside separately from her mother, which surely must be an issue which would be at the forefront of the Tribunal members' considerations when taking into account the paramount consideration of the child's welfare.

141. Further what is completely missing from the record is any reference whatsoever to the Law, including reference to Sections 3 and 4 of the Law and Articles 6 and 8. I was told by those who were present at the hearing on the 22<sup>nd</sup> December 2016 that the Chair of the Tribunal said that they had taken into account "*Section 3 and Section 4 of the Law*". However, that is missing from the Record of the reasons implying somewhat it didn't feature as of sufficient note save only to pay lip service, when the Tribunal members considered their reasons for their decisions and in any event, there was no detailed analysis of the facts in the context of the application of Sections 3 and 4 of the Law along with consideration of Articles 6 and 8 of ECHR.

142. The ACC's record of those issues which had been considered during the course of the appeal also does not refer to consideration by the Tribunal members of the legislation when coming to their decision. There is reference to the child's "*wellbeing ... front and centre*". Again, I remind the Children's Convenor and the tribunal members of paragraph 64 of the learned Deputy Bailiff's judgment in Re C:

*"I certainly believe it would be helpful to provide some means of reminding the CYCT members that removing a child from the family environment, even after a hearing with all parties present, is such an important decision that it requires exceptional justification. Such a reminder would serve to focus minds and emphasize the*

*importance of giving appropriately detailed reasoning in a case where a CYCT reaches this type of decision.”*

143. I now turn to Rule 56 and consider whether the decision on 22<sup>nd</sup> December 2016 was justifiable in all the circumstances. I clearly have to take into account what I know of the documents that were before the Tribunal. I am able, in the reasoning of the 22<sup>nd</sup> December 2016, to identify a more expanded although still limited record of the reasons as to why the members of the Tribunal decided to attach a condition to the ICR that the child reside in the care of the Committee, but what I am not able to do is identify where and how they applied the Law when they came to that decision and therefore cannot be satisfied that they took into account all of the issues that the Law requires them to do so - in Sections 3 and 4 of the Law and Articles 6 and Article 8 of the ECHR.
144. If the Tribunal members do not document the legal and factual pathway for their decision-making, and there is no evidence that they considered the decision that they had to make in the context of the relevant legislation when considering that decision, their decision is unlikely to be justifiable in all the circumstances because it appears to have been made in the absence of the correct application of the Law.
145. I am satisfied that in the absence of evidence or information that the Tribunal members properly applied the relevant legislation to the rationale for their decision making on 22<sup>nd</sup> December 2016 then that was a material irregularity and likewise with the decision making on the 7<sup>th</sup> December 2016 so profound was that irregularity that in all the circumstances the appeal has been allowed and is justifiable because I am unable to identify the legal and in part factual basis which informed the decision made by the Tribunal members on that day.
146. My reason for granting the appeal of 22<sup>nd</sup> December 2016 is therefore similar to the reasons as to why I granted the appeal of the decision of 7<sup>th</sup> December 2016. I do not consider the issues in respect of the disclosure of the paperwork to be a material irregularity and by 22<sup>nd</sup> December the child's plan and Dr X's report had been disclosed albeit in respect of the child's plan the appellant's advocate had said they did not have had sufficient time to take their clients instructions, and in any event the Tribunal members considered those issues when adjourning the matter until 3<sup>rd</sup> January 2017. I have taken that into account and if there was any irregularity it was not in my view so material to allow an appeal on that basis, on these facts.
147. I grant the appeal in relation to the decision of 22<sup>nd</sup> December 2016 on the basis that I cannot identify how the decision was arrived at by the Tribunal members, and therefore I cannot identify whether the decision to attach Condition 1 to the ICR was justifiable in all the circumstances and the Appellant has satisfied me that in regard to that decision, the Tribunal did not follow or adhere to the guidance in Re C, (both Royal Court and Juvenile Court), but perhaps more importantly, to the principles set down in The Children Law and the ECHR.
148. In general terms I grant the appeal on grounds 4 – 7 for the specific reasons given in paragraphs 143 - 147 and above including where relevant, those matters raised in grounds 4 – 7.

### **The hearing of 3<sup>rd</sup> January 2017**

149. It was the perspective or submissions of all three respondents that the appellant had an uphill task in seeking to appeal the Order of the 3<sup>rd</sup> January 2017 because on that day, she presented as consenting to the Tribunal making an Order for an ICR with the relevant condition attached.
150. I refer to the Tribunal's decision to adjourn the hearing from the 22<sup>nd</sup> December until the 3<sup>rd</sup> January in order to provide further time for consideration of certain documentation – as I have referred to above. On my reading of the Tribunal's decision of 22<sup>nd</sup> December 2016 the members presented as considering that it was imperative that the CYCT hold an urgent hearing

on the 3<sup>rd</sup> January 2017 to give the mother a full opportunity to put her case having by that time had an opportunity to read all of the papers and give instructions to her Advocate.

151. In the context of that decision, I am perplexed as to the events of what happened (or did not happen) on the 3<sup>rd</sup> January 2017.
152. A Tribunal hearing was duly “listed” for the 3<sup>rd</sup> January 2017 and I am told by both of the parents’ Advocates (the Appellant and First Respondent) that on that day they fully expected to attend the CYCT hearing as did their clients. I am told however by the appellant’s advocate that a short period of time before the Tribunal, or even shorter before she would have set off from her office to attend the Tribunal – approximately 60 – 80 minutes before the Tribunal was due to commence, she had received a telephone call from the Assistant Children’s Convenor telling her that the Committee were not in a position to send any one to the Tribunal on that day and Advocate Maindonald told me that she was asked words to the effect, ‘*was there any purpose in there being an effective Tribunal hearing that day?*’ (Not intended to be read as an exact quote).
153. It was the recollection of the First Respondent’s advocate that they had received a similar telephone call around that time and was given similar information. However, they were not as definite in their recollection as the appellant’s advocate had been, although their recollection was not dissimilar to the appellant’s advocate.
154. The appellant’s told me that after some discussion with (the ACC) they had agreed on behalf of their client, that the appellant would not attend the CYCT on the 3<sup>rd</sup> January 2017 because she was told that there would be no effective hearing on that day save that the Tribunal would meet and make the interim care requirement with the conditions as previously attached. She told me that when she agreed to such a course of action, that she said that she would only do so, “*without prejudice*” to the fact that an appeal was pending in respect of the decision of the 7<sup>th</sup> December 2016 and (implicitly although this was not expressly said), she had intended that to mean she did not wish her client’s consent (if that were the correct word), to the fact she was not attending the Tribunal on the 3<sup>rd</sup> January 2017 to be ‘held against her’ (my words).
155. The Committee told me something very different in respect of what they said that they had told the ACC which was that whilst the specific social worker could not attend the Tribunal on the 3<sup>rd</sup> January 2017, their senior colleague would be able to attend in her place. After the Practice Direction version of this judgment was handed down the Committee’s advocate made representations that he recalled that during the appeal hearing before me that the Deputy Children’s Convenor had confirmed to me in Court that the ACC had accepted that what the HSC representatives recalled was correct, although if that was the case neither of the parents’ Advocates recall being given that information and as I refer to below it was not endorsed on the record of hearing.
156. Further, I was told by the Deputy Children’s Convenor that the ACC recollection was not as both advocates (the appellant and first respondent) had recalled and his recollection was that they had both consented to the making of the ICR with the attached conditions.
157. Whatever the content of telephone conversations that occurred on the 3<sup>rd</sup> of January 2017, the outcome was that no-one attended the Tribunal hearing although it went ahead quite properly in their absence.
158. The Assistant Children Convenor’s record of the 3<sup>rd</sup> January 2017 hearing stated that the Tribunal decided to: “*Proceed in the absence of the mother and father.*” The Tribunal’s record of decisions and reasons stated that they would adjourn the hearing – “*Enabling [the appellant] and [the first respondent] to attend the next hearing on the basis, ‘because they [the Tribunal] had learned that no-one from the social work team would be attending and therefore a*

*substantive decision could not be made'. On learning this, [the appellant] communicated through their Advocate that they would not be attending. [The first respondent] communicated through their Advocate for the same reasons that they also would not be attending on this occasion."*

159. The Tribunal received an e-mail from the Committee (I believe dated the 3<sup>rd</sup> January 2017) in which:

*"The Committee recommended that 'an interim care requirement be made to keep the child safe and healthy and to ensure that they are provided with adequate care, protection, guidance and control'. The Tribunal felt that although the current ICR does not expire until the 18<sup>th</sup> January it makes sense to deal with the child at the same time as her siblings and issue a further ICR."*

160. And the Tribunal further stated that

*"In making our decision the Tribunal has taken into account the child welfare principles and child welfare checklist" and also stated that the condition that the child reside in the care of the Committee was made because "the Tribunal felt that the child's current residential placement offers the child a safe and stable environment which we do not feel that the appellant can provide at this time".*

161. In the ACC's notes they noted that the issues considered during the course of that hearing were:

- *"Recognized non-attendance of anyone."*
- *"Accepted e-mail recommendation from Committee."*
- *"Considered legal test."*
- *"Issued ICR with conditions."*

162. The written record of the decision by the chairperson (dated the 4<sup>th</sup> January 2017) of the decisions made on the 3<sup>rd</sup> January 2017 appears to reflect what both the parents' advocates had understood, that *"no-one from the social worker team would be attending"*. The Committee are adamant that they never said that they would not attend, but were clear that they had said that they could and would attend if required to do so. The appellant's advocate was equally adamant that if she had known that there was someone available from the Committee to attend, she would have insisted that the hearing proceed.

163. I did not hear evidence of 'who said what to whom'. I do not consider that anybody attempted to deceive anybody, but it is likely that there is an element of people misunderstanding what was being said, likely in a hurry, only a short time before a Tribunal hearing was due to be listed.

164. I do not concur with the three Respondents' submissions that as this had been a consent order that the appeal should fail on that basis. The decision taken on the 3<sup>rd</sup> January 2017 was an important decision. The appellant had made it clear, both in her submissions to the Tribunal on the 7<sup>th</sup> and on the 22<sup>nd</sup> December 2016 and by the fact that she had filed an appeal on the 22<sup>nd</sup> December in respect of the decision of the Tribunal hearing of the 7<sup>th</sup> December 2016 that she did not agree that her child should remain in the care of the Committee. The appellant did not say anything through the appellant's Advocate on 3<sup>rd</sup> January 2017 to intend anyone to take their non-attendance at the Tribunal to be taken as consent.

165. The Tribunal recorded that they were told that because no-one from the social worker team would be attending, the appellant had decided not to attend which was in accordance with the both advocates' recollections.

166. I am critical of the Appellant through their Advocate that the agreement not to attend the hearing on 3<sup>rd</sup> January was not limited to as short a short period of time as possible – likely a few days (say a week at the most) until the Tribunal could sit again. their consent should have been limited in that regard, but I accept that their consent was given only firstly on a pragmatic basis that it was likely that the Tribunal would make the Order requested, pending the outcome of the appeal and secondly that they were aware that it was wholly unlikely the Tribunal would make a different decision than the one they did because the appellant genuinely believed that no one from the Committee could attend.
167. I do not think it fair that the appellant should have that decision held against them namely to give consent on that day in those circumstances when it is obvious something had gone wrong in the communication between the parties. What happened was not done deliberately, and I do not criticise anyone for how it arose. It appears to have been one of those things that occur from time to time with no one at particular fault. However, I consider it wholly unfair that consent given in those circumstances limited to the outcome of this appeal on the basis of possibly incorrect information (as to whether the committee representative could attend or not) should be held against the appellant when considering the appeals. I was surprised that once the other parties understood the confusion as to what had occurred on the 3<sup>rd</sup> January that they did not then consider withdrawing their opposition to the appellant’s appeal in respect of the 3<sup>rd</sup> January 2017 decision being heard.
168. ....
169. Of course, the confusion that arose on the 3<sup>rd</sup> January as to who could or could not attend in itself is not in itself sufficient for me to allow the appellant’s appeal in respect of the decision taken by the CYCT on that date.
170. However, I am satisfied as per the judgments I have already given in respect of the decision-making of the 7<sup>th</sup> and 22<sup>nd</sup> December 2016 that the Tribunal did not give sufficient reasons for their decision-making on 3<sup>rd</sup> January 2017 and again I have been unable to identify the correct application of the Law to the reasons as to why the Tribunal members made the decisions that they did on the 3<sup>rd</sup> January 2017. I note that they stated in their record of reasons (4<sup>th</sup> January 2017) that they had taken into account the child welfare principles and child welfare checklist, but such reference by itself is not sufficient and gives rise again to a concern that lip service is being paid to the Law without there being full and detailed consideration of it.
171. As I have already stated there has to be an analysis of the child welfare principles and the child welfare checklist and how the Tribunal members factored those into their decision-making to attach the condition (number 1) to the ICR as they did on that date. They have to demonstrate how they considered the paramount consideration of the child’s welfare and which sections of the law they gave weight to in the context of the agreed facts and chronology. They have to consider Article 6 and 8 of the ECHR and they need to document carefully that they have done so and in detail.
172. In respect of this hearing of the 3<sup>rd</sup> January 2017, I have sympathy for the Tribunal members. They were presented with a *fait accompli* in that no one was present and were told the ICR with attached conditions were being made by consent and they therefore were being asked to deal with the matter in the absence of any person.
173. The difficulty for the Tribunal members is that each hearing is a new hearing and so they are still expected to provide a detailed analysis and record of their reasons (both legal and factual) and the record of decisions and reasons of the 3<sup>rd</sup> January 2017 did not sufficiently demonstrate that they had taken into consideration what the Law requires them to. In addition, the ACC’s notes state that the Tribunal members, “*considered legal test*”. I do not know what legal test

that is referring to, and whilst I think it is possible that it was the section 3 and section 4 criteria, I just do not know. There is no record of what that means

174. I have to consider whether the decision made on 3<sup>rd</sup> January 2017 was justifiable in all the circumstances. That, as I have stated above, includes the Tribunal members providing both factual and legal reasons for their decision-making – why and how did they come to their decision? It has to be sufficiently detailed for those reading it, who were not there, to understand it and unfortunately, I am unable to identify where the Tribunal members actually identified the correct law to apply to their decision and their reasons for those decisions, and then did so.
175. I am satisfied that in the absence of evidence or information that the Tribunal members properly applied the relevant legislation to their decision making on 3<sup>rd</sup> January 2017, that that is a material irregularity and so profound was that irregularity that in all the circumstances the appeal has been allowed and is justifiable because I am unable to identify the factual and legal basis and reasons for the decision made by the Tribunal members on that day.
176. I have therefore allowed all three appeals on the basis that there was a failure to set out the factual (in different hearings to different degrees) reasons for the decision made and as importantly that there was very little if any detailed consideration given to the legislation that must be applied and considered when making such a grave decision as the one the CYCT were being recommended to make and did make on the three dates/hearings in question. I am satisfied that such a failure, not to apply the Law (and demonstrate that it had been applied by them) was in these circumstances a material irregularity on each occasion and was not capable of remedy and so I have allowed each appeal on each date on the basis that the decision on each occasion was not justifiable in all the circumstances taking into account the omissions that I have highlighted above.
177. In coming to this conclusion, I have formally considered that grounds 4 – 7 of the appellants grounds of appeal have been made out on each occasion because I was unable to identify the Tribunal member's reasons for their decision on each occasion in the manner that I have referred to above. I have not allowed the appeals on grounds 1 -3.

S104 – 'The second phase'

178. When I rose from Court on the afternoon of the 25<sup>th</sup> January 2017 I had intended (with the consent of the parties) to hand down my decision on these appeals on the morning of the 30<sup>th</sup> January 2017. This was the same date of the next intended CYCT hearing in respect of the child R. When I considered the matter further overnight I concluded that to wait until the morning of the 30<sup>th</sup> January 2017 to hand down my decision on the appeals would not be in sufficient time as a new decision would be made by the CYCT on the 30<sup>th</sup> January 2017 which could render the decisions I have made in respect of the 3 appeals otiose, as I would not then be able to proceed and consider the second phase as anticipated by the provisions of S104 of the Law. That was obviously not a situation in the child's welfare.
179. I therefore directed that all parties appear before me on 27<sup>th</sup> January whereby I informed the parties of my decision to allow all three appeals and I proceeded to hear the 'second phase' – where I considered my powers under S104 of the Law and R56.
180. After much discussion and submissions in respect of the Court's powers the parties came to a consensus with which I approved – that I grant an ICR with the same conditions as before but that in addition taking into account the issues that there had been to date I also provided that an Advocate be appointed for the child to ensure that at the next hearing and (hopefully) in the future hearings in respect of this child that the child's welfare was given paramount consideration by the appointment of an independent professional who could ensure that all of

the issues relating not only to the legal issues but also to the child's welfare were properly before the CYCT.

181. In coming to and approving that decision I had to and did consider the child's welfare as the paramount consideration. I also gave consideration to the issues in S3 and 4 of the Law along with the issues raised by Articles 6 and 8 of the Law and the relevant case law which was referred to in above Re C cases: -
182. Under S3(2)(a) of the Law I considered that the child's welfare was normally best served by being brought up within her own family (and community) – but that I was not in a position to determine between the competing factual issues on that day when a CYCT held in the near future would be able to afford the requisite time to consider that issue. ....
183. I must stress the fact that I made that decision does not bind the CYCT who are able if they consider it in the child's welfare to refuse to make the condition as recommended by the Committee. It is my expectation that in the near future there will be a full CYCT hearing to consider all the information (as filed to date and with any relevant updates) of what is in R's welfare and consider in detail the mother's recommendation that the child be returned to her as well as the Committee's recommendation that the child is not returned. The CYCT will be in the best position to hear that matter – more so than this court because the only opportunity this Court would have had to consider this matter (if it wished to do so and had power to do so) was limited to the afternoon of 27<sup>th</sup> January, as a consequence of the CYCT sitting again on the 30<sup>th</sup> January 2017 and that was not sufficient time to consider such an important matter for this child's welfare.
184. I considered S 3(2) (c) and took into account the S35 Facts as agreed by the parties dated 9<sup>th</sup> September 2016 and established by the Juvenile Court on 13<sup>th</sup> September 2016. I was wholly satisfied that in the light of those facts compulsory intervention was necessary for the reasons given in S3 (2)(c).
185. I gave consideration to S3(2)(d) of the Law and I was well aware that there had been a delay in the planning for this child already in that this child has been before the CYCT for a number of months and I wanted to ensure that the matter proceeded as swiftly as possible although not at the expense of loss of fairness and also ensuring that the child's Article 8 and 6 rights were also prioritised. By appointing an Advocate for the child and by also intending the safeguarder's appointment be continued I anticipate that the child's legal rights and her welfare in that regard will be protected and will assist the Tribunal members to give proper consideration to the legal issues relating to their decision making.
186. As per S3(2) (e) and (f) of the Law the child is too young to express her views but the appointment of a safeguarder and also of a child's Advocate will protect her interests by them (with the Advocate taking the safeguarder's instructions) independently considering and challenging where the safeguarder considers necessary, the information or recommendations before the Tribunal.
187. I have taken into account S3(2) (g) and (h) but at this stage did not consider them to be issues which are of import to the decision I have had to make.
188. Likewise, S 3(2) (i) – (k), although I have noted S3(2) (j) – but the issue of contact was not an issue in the appeals before me although it may well exercise the CYCT in due course. I was not asked in the appeals to consider the issue of contact and have not done so and nothing in this judgment should be read that I formed any view on that issue.
189. I have also considered the child welfare checklist in S4 of the Law.

190. Again I have considered the child's "*wishes and feelings in the context of his age and understanding*" (S4 (2) (a)). The child is too young to give an express view but there is no doubt in years to come she may wish to review the decision made in respect of them during this time. The child will want to know that everything possible was done to ensure the appellant continued to be her primary carer whilst also prioritising their welfare as the paramount consideration and they will likely look at how that decision making was achieved (whether or not she returns to her mother's care).
191. The appointment of the safeguarder and an Advocate will help to ensure that the child's welfare is at the forefront of all decision making and that neither the Committee's nor the appellant's recommendations will be accepted purely on the basis of who made them without independent consideration. They will know that their welfare was so important that the appointment of independent professionals was thought necessary for their welfare to be protected.
192. During the course of the S104 stage of the proceedings (the hearing on 27<sup>th</sup> January) I gave thought to the bespeaking of a second psychological opinion in respect of the appellant and because this matter would next be dealt with by the CYCT I decided that it was a matter the parties and the Tribunal members could give consideration to at that hearing when factoring in the child's welfare. However, that does not mean or prevent the appellant from opposing the condition of residence at the discretion of the Committee when the matter comes next before the CYCT and it may be just one of a number of issues that the Tribunal will need to consider. Being asked to effect the removal of a child is such a draconian decision that obtaining such opinions can ensure that the child's welfare is prioritised but it may take some time, and any further delay will have to be considered, factoring in the child's welfare and the need to not only be seen to be fair but to actually be fair.

The welfare check list

193. S4(2)(b) – the child's "*age, gender ethnicity, cultural background, language, religion and any other relevant characteristics of the child*".
- ...
194. ....
195. S4 (2)(c) "*any harm that the child has suffered or is at risk of suffering*"
- .....
196. S4(2)(d) "*the child's physical, emotional and educational needs*"
- .....
197. I retain a concern as to is how the Tribunal are expected to consider the opinion of one professional over another person's view/opinion, or one party's view over another – for example if the appellant does not accept Dr X or the social workers' opinions and the Tribunal members wish to consider whether to rely on the mother's views or the professionals' opinions, how can they do that without those opinions being tested before them and in what manner?
198. S4(2)(e) "*how capable each of the parents...is of meeting the child's needs*"
- ....
199. S4(2) (f) "*the importance of likely effect of contact between the child and her parents, siblings and relatives and any other people significant to the child*"
- .....

200. *“the effect or likely effect of any change in the child’s circumstances....”*

Unfortunately, there is no evidence that this was considered by the Tribunal members on 7<sup>th</sup> December 2016 or at the subsequent Tribunals. The removal of a child from their primary attachment figure –should only happen where there has been a detailed analysis of the factual issues in the context of the relevant law. The Tribunal members have to demonstrate in detail that they have done this and that in addition where there is a disparity between the parties and professionals views as to whether certain information and opinions can be relied on, they need to be clear as to what they have relied on and why.

201. Further, where that disparity of views may affect their decision making the Tribunal members should consider both whether there should be a further referral to the Juvenile Court and also even then whether that in any event such dispute would be within the remit of the Juvenile Court or whether it has to be dealt with in another manner. The Tribunal members should not shy away from raising these issues during the course of the hearing in front of the parties and must feel confident they can ask for advice from the ACC and if there are Advocates present ask them for submissions. If they do not know the answer they must ask the question – it is in the child’s welfare they make their decisions having full understanding of the Law. They will then have to give a decision on that issue with reasons so those hearing or subsequently reading their decision can follow the reasoning.

202. Articles 6 and 8 of the ECHR

Having made the decision I did in approving the agreed order that decision engages the child and the parents’ Article 8 rights – the right to respect for family life, as I have set out more fully as above. The child and the parents’ rights cannot be breached or dismissed lightly save that the decision is proportionate to any breach and has been taken balancing the child’s welfare which is the paramount consideration. I was satisfied that the period of time that my order under S104 will be in effect for gave the paramount consideration to the child’s welfare but again I stress that my order is not intended in any manner to influence any decision the CYCT will have to make either at the next Tribunal hearing or indeed thereafter. I was satisfied that in the circumstances of this case that despite allowing the appeals the order under S104 was proportionate and in the child’s welfare.

203. It is important in this and any child’s welfare that any decision taken about the child which could lead to a breach of their ECHR rights is done so fairly and in accordance with the law and that their welfare is the paramount consideration. The CYCT may well wish generally to consider the introduction of safeguards for the child and the parents’ rights including but not exclusively: -

- The appointment of a safeguarder in all cases where a child (and parents)’s Article 8 rights are likely to be engaged.
- Similarly, in such cases the appointment of a child’s Advocate, who will take their instructions from the safeguarder.
- Allowing - even ensuring that where requested the parties are allowed to have Advocates represent them.
- Consideration being given to second opinions where the child’s welfare requires it and such consideration are given early as possible so as not to add to delay.
- Emphasis being placed on parallel planning where the child’s welfare requires it to prevent or limit delay.

- The listing of lengthier hearings so everyone has sufficient time to address the issues which are agreed and those that are not agreed and to allow the parties to give their lawyers instructions on those occasions where papers are not seen until the last moment (which as this case shows can occur)
- And as I have previously referred to perhaps in some manner allow the Tribunal members the facility to have time to write up their decisions and reasons for the decisions so what occurred in the hearings which led to these appeals does not happen again. Tribunal members must feel able to take their time in coming to their decision – otherwise the risk is that they make a decision on the spot which later they may regret and they must have time to consider the reasons for their decisions both in the context of the agreed facts and the Law. They must not feel under time pressure. Some consideration will have to be given to this taking into account S's 11 and 12 of the Third Schedule of the Ordinance, which on my reading would not prevent them from retiring before they consider the decisions they have to make and their reasons for making them but as I have previously stated in this judgment that is a matter for those at the CYCT to consider further, although it may become an issue at the next hearing in this very case.

204. Nothing in the above paragraph is to be treated as mandatory – they are I hope helpful considerations to be looked at in each case which comes before the CYCT where those important decisions have to be made which are likely to engage Articles 6 and 8 of the ECHR and which could be defined as life changing such as separating a child from a parent or interfering (e.g. stopping or limiting contact) with the parent/child bond or relationship. They are not intended to be exclusive – each case has to be decided in the context of the paramount consideration being the welfare of that individual child.

205. Each decision that the CYCT makes in any event has to take into account the Law. Some cases by their very nature require more detailed consideration than other cases that come before the CYCT. This was one such case and unfortunately, I could not identify on any of the three dates which were the subject of the appeals that the necessary legal considerations were taken into account when considering the outcome for this child.

**Judge Cherry Amanda McMillen**

**3<sup>rd</sup> February 2017**