CA (1) on appeal from Southampton County Court (His Honour Judge Milligan) (2) the Principal Registry of the Family Division (His Honour Judge Cook) (3) Brighton County Court (Her Honour Judge Norrie) before Thorpe LJ & Wall LJ : 22nd June 2005.

JUDGMENT : Lord Justice Wall :

Introduction

1. This is the judgment of the court. As it relates in part to the Guidance issued by the Office of the President of the Family Division relating to McKenzie Friends, reported at [2005] 35 Fam. Law 405, we have taken the opportunity to show it in draft to the President, who has authorised us to say that in so far as it amplifies that guidance, he is in full agreement with it, and in particular with paragraphs 124 to 138 below.

2. These three appeals raise two important issues of practice in relation to unrepresented litigants in the family justice system. The two issues are: (1) the circumstances in which such litigants may invoke the assistance of what have become known as "***McKenzie friends***" in family proceedings held in private; and (2) the extent to which (if at all) it is necessary for an unrepresented litigant to seek the permission of the court to disclose confidential documents and information generated by the court process both to a McKenzie friend and to other third parties.

3. In the course of his judgment in **Re G (Litigants in Person) (**hereafter **Re G**) [2003] EWCA 1055, [2003] 2 FLR 963, Thorpe LJ made a number of comments on the policy aspects of issue (2). In paragraphs 32 to 37 he said: -

   [32] *This appeal has focused attention on the shortcomings of FPR 1991 r 4.23. Rule 4.23(1)(b) grants a general dispensation for disclosure of court papers to the legal representative of a party. That provision may be said to discriminate against the unrepresented litigant. These rules were formulated by the Family Proceedings Rules Committee approximately 13 years ago. Since that date there has been a significant increase in the percentage of family cases in which one or other of the parties is unrepresented for all or part of the proceedings. There are no statistics to substantiate that assertion but it is universally recognised as the reality by all specialists in this field. The provision of legal aid in family proceedings is a shrinking rather than an expanding welfare service. In recent years support services for litigants in person have made an increasingly valuable contribution to the performance of the family justice system in the courts of trial and in the Court of Appeal. Arguably a litigant in person seeking the help of the RCJ Advice Bureau or the personal support unit at the Royal Courts of Justice should not be obliged to apply for the permission of a judge or a district judge before disclosing the case papers to a case worker.*

   [33] *The President, in the course of her judgment in* ***Re G (Contempt: Committal)*** *[2003] EWCA Civ 489, [2003] 2 FLR 58, endorsed the views of Hale LJ in granting permission to appeal when she said of the role of Families Need Fathers in that case:*
   "Again, I have to say, having read many of the communications in question, a great deal of very helpful advice and sound wisdom was provided to the father as a result of his communications in that discussion."
   Again I pose the question, does the litigant in person have to seek the permission of a judge or a district judge before taking his case to Families Need Fathers'

   [34] *Further the litigant in person may wish to enlist the help of a McKenzie friend in presenting an impending or prospective case to the court. In many cases McKenzie friends provide a valuable service not only to the litigant in person but also to the court in reducing the litigant's understandable feelings of anxiety and confusion when confronted by the court in session. In many instances the McKenzie friend will assist the litigant in person to identify the relevant issues and to abbreviate the overall presentation. Must a litigant in person seek the permission of a judge or district judge before disclosing the case papers to his McKenzie friend'*

   [35] *Further a litigant in person may wish to seek advice from a registered parenting charity not in relation to the presentation of the continuing case but in relation to issues thrown up by the case, such as relationship problems or the reduction of barriers that the litigation has created. If such an approach requires the disclosure of court papers should that be the subject of an application for prior permission'*

   [36] *Finally, I instance the litigant in person who wishes to approach a mediation service. Must he seek the permission of a judge before taking the case papers to a preliminary meeting'*

> ***[37]*** *In posing these questions I intend only to raise the policy issue. Obviously the attraction of a judicial filter is the maintenance of judicial control and the reduction of abuse that might flow from a liberal extension of the exceptions specified in sub-paras (a)-(e). On the other hand, some of the instances which I have given above might be made the subject of specific exception without much if any foreseeable risk of abuse. Given that further amendments to the Family Proceedings Rules 1991 are planned for the autumn of this year I would invite the Rules Committee to consider the modernisation of r 4.23 by extension of those to whom disclosure can be made without prior judicial permission.*

4. The policy issues which Thorpe LJ identified in this extract from **Re G** now fall to be addressed directly in the third of these three appeals, which we will designate **Mr. Whelan's case**, and in which the judge permitted the appellant the assistance of a McKenzie friend, but severely limited the disclosure of documents which Mr. Whelan was allowed to make to his McKenzie friend. The circumstances in which a litigant in person may seek the assistance of a McKenzie friend arise directly in the first two cases (those of **Mr. O'Connell** and **Mr. Watson**) in both of which circuit judges refused to allow the two litigants in person the help of a McKenzie friend.

5. The issues raised by these three cases have an obvious practical relevance to the work of the family courts. The trends identified by Thorpe LJ in paragraph 32 of his judgment in **Re G** have both continued and intensified. In this court, for example, between the end of 2003 and the end of 2004, the number of applications for permission to appeal in private law proceedings under the Children Act 1989 made by litigants in person almost doubled from 77 to 147. This in turn has led to an undoubted growth in the number of cases in which the litigant in person has invoked the assistance of a McKenzie friend.

6. Our independent experience of hearing such applications (which are normally heard by a single Lord Justice) has brought to light what appears to be a considerable divergence in the attitudes of judges at first instance to the use of McKenzie friends in family proceedings. Whilst some judges welcome their assistance as a means of facilitating a calm and coherent case presentation by an otherwise angry or anxious litigant, others refuse to allow their use at all. Between these extremes, there appears to be a variety of apparently inconsistent judicial approaches to the question.

7. It is furthermore plain to us that, in family proceedings, both the concept of the McKenzie friend itself, and the role he or she can properly play in the proceedings have themselves undergone a process of evolution and change since the term McKenzie friend was first used in 1970 following the appeal to this court in the defended divorce case of **McKenzie v McKenzie** [1971] P. 33. It is also apparent to us that judicial dicta in some of the early, pre-Children Act cases dealing with McKenzie friends do not always seem apt a generation or so later.

8. A further important development has been the recent enactment of section 62 of the Children Act 2004 (the 2004 Act), which, to a certain extent, relaxes the prohibitions on the publication of information relating to proceedings in private contained in section 12 of the Administration of Justice Act 1960 (AJA 1960) and section 97(2) of the Children Act 1989 (CA 1989).

9. It was for all these reasons, and with a view to settling the practice of the family courts in relation to McKenzie friends, that we heard these three cases together. In each, the litigant in person was a father engaged in private law proceedings for residence and contact under CA 1989 section 8 against the children's mother. Of the two appellants who had been refused the assistance of a McKenzie friend, the first, Mr. O'Connell, had been granted permission to appeal by Ward LJ at an oral hearing. The second, Mr. Watson, renewed his application for permission to appeal before us. The third, Mr. Whelan, had been refused permission to appeal against the limited nature of the order permitting disclosure. He accordingly renewed his application for permission before us.

10. Each appellant was accompanied in this court by his McKenzie friend. Each appellant argued his case courteously, calmly and persuasively. In Mr. Watson's and Mr. Whelan's cases we granted permission to appeal. After argument, we indicated that in each case we were minded to allow all three appeals and to set aside the orders made below. We reserved our reasons, which we now give.

The advocate to the court

11. In order to assist the court, we invited CAFCASS Legal to appoint an advocate to the court to advise us on the evolution of the concept of the McKenzie friend, and to proffer guidance which could be applied to the present and future applications. We are extremely grateful to CAFCASS Legal, and to Mr. Robin Spon-Smith of counsel for his comprehensive review of the authorities and his full and most helpful skeleton argument, much of which has found its way into this judgment.

The three cases:

(1) Mr. O'Connell's case

12. Although we do not have all the papers, it is clear that Mr. O'Connell has been engaged in litigation about his two children (now aged 13 and 11) in the Southampton County Court for a very long time. The first substantive hearing, in which Mr. O'Connell sought residence orders in relation to the children, concluded with a judgment given by HH Judge Milligan on 1 December 1997. The judge made residence orders in favour of the children's mother, granted Mr. O'Connell staying contact every alternate weekend, and reserved any further applications to himself.

13. Judge Milligan formed an unfavourable view of Mr. O'Connell in 1997. He described him as conducting a campaign against the children's mother and said he was blind to the children's needs insofar as they came second to his own plans.

14. On 12 April 2000, HH Judge Milligan gave judgment on Mr. O'Connell's second application for residence of, alternatively contact with, the children. By this time, contact had ceased. On this occasion the judge's criticisms of Mr. O'Connell were even stronger. He recorded that Mr. O'Connell had made numerous complaints against the professionals in the case and had refused to accept the outcome of those complaints. The judge made the same assessment of the parties that he had made in 1997: he found that Mr. O'Connell remained obsessed with his unfounded view that the children's mother was abusively mistreating them. He found that Mr. O'Connell had manipulated the children by inappropriate questioning. Nothing, he held, had changed since 1997. The judge concluded his judgment with these words: - *"Does the father do this deliberately or unwittingly? The mother feels that he is motivated by revenge. I think this is possible. I think it also possible that he has such a low opinion of her that he is determined that his opinions and views shall prevail over hers. It is in my judgment equally likely that he has some mental or psychological block that simply prevents him from considering any other point of view. But for these unfortunate children the result is the same. When I identify the seriously abusive conduct of this father towards his children, in manipulating them to speak ill and falsely of their mother for his own ends, or inducing them to a state of confusion and anxiety placing an enormous strain upon them, for the reasons and in the circumstances which I have indicated, I am left in no doubt that for the present time any further contact between this man and his children is strongly contrary to their interests."*

15. The judge then made an order under section 91(14) of the Children Act 1989 without limit of time. It is fair to say that in doing so he was encouraged by counsel for the mother, who when asked by the judge whether she was asking for a given period, replied: "*Your Honour, I do not. I leave it open".*

16. On 22 January 2002, the judge refused an application by Mr. O'Connell for permission to bring proceedings for shared residence and / or contact. Once again, he found nothing had changed. Giving leave at the present time, he said, would be to expose the children to considerable emotional risk and would be an act almost of irresponsibility. He refused permission to appeal and kept the indefinite section 91(14) embargo in place.

17. Mr. O'Connell unsuccessfully sought permission to appeal against the order of 22 January 2002 from this court. At an oral hearing on 19 April 2002, Sumner J refused the application. Expressing himself in more moderate language than that used by Judge Milligan, Sumner J nonetheless took the view that the application for permission to appeal was doomed to failure. At paragraph 10 of his judgment, he said: - *"I am left with the clear impression that Mr O has within him the potential to be a caring and concerned father. Of his love for his children I am in absolutely no doubt; it is clear and genuine. But reading the judgments and the papers, it is apparent that what has happened now is that either the injustices or the perceived injustices - the lack of investigation, the poor quality of all the professionals and the misleading of them - has become a matter of obsession. The difficulty with that is the reaction it has had on the children. I would invite Mr O to go back and read the earlier judgment of Judge Milligan and note the physical effects that it has had on the children. It is set out, as I recall it (and I*

am speaking from memory now) on page 1, and it is repeated later. The children have at various times expressed their own feelings for their father, but have asked that he does not behave in this way."

18. That is the background against which, on 29 September 2004, Mr. O'Connell issued a further application for permission to apply under section 8 of the Children Act 1989 for a shared residence order relating to his children. He also sought an order transferring the proceedings to the High Court and for Judge Milligan to recuse himself. In order to assist him make those applications, Mr. O'Connell made a preliminary application for the assistance of a McKenzie friend.

19. On 5 October 2004, HH Judge Milligan directed that Mr.O'Connell's application be listed without notice to the children's mother on 1 November 2004 with a time estimate of one hour. Although Mr. O'Connell asked for the application to be listed before a different judge, Judge Milligan took the view, correctly in our judgment, that an application for him to be recused from the case could not be made to another judge.

20. The judge dealt with Mr. O'Connell's application by delivering the following judgment: - *"Mr O'Connell has applied today for three matters before me. For leave to bring a section 8 application for a residence, or a shared residence order; to exclude my having any further conduct of the case; and to transfer the matters to the High Court. He has made a preliminary application for the assistance of a McKenzie Friend.*

In my judgement he has shown throughout lengthy proceedings a very good ability to marshal and present a large number of documents so that I am not persuaded that he will need any help in that regard.

Secondly, the McKenzie Friend, whose assistance he seeks, is a representative of a body called the Environmental Law Centre whose brochure he has produced for me today. Reference, or brief reference, to that brochure indicates that this is an organisation which purports to assist people requiring assistance and support on legal and medical services and matters relating to health, human rights and the environment.

I accept that Mr O'Connell raises human rights issues in his three applications, but I am persuaded that this is a body whose purpose and constitution is to forward what they see as disadvantages imposed on litigants by the court system. It, therefore, seems to me that his presence today is not to assist Mr O'Connell, but to further the ends of his organisation, in a manner inappropriate to the provision of McKenzie Friend help to Mr O'Connell in his present applications.

My third ground for refusing his application for a McKenzie Friend is that he speaks of wanting the gentleman here as his witness which of course is not a purpose, giving that he is not expecting him to give evidence, for which a McKenzie Friend is appropriate.

In those circumstances I have refused his application for the help of this particular McKenzie Friend.

He makes application for leave to appeal this decision which is refused. This is the order that I make. Upon hearing the applicant father in person, and without notice to the respondent mother, as ordered, it is ordered (1) that the applicant father's application for the assistance of a McKenzie Friend is refused; (2) leave to appeal is refused; (3) leave to the applicant father to obtain a transcript of the judgment at public expense."

21. If the hearing had ended at this point, we would, we think; (1) have given permission to appeal in relation to the judge's refusal to allow Mr. O'Connell the assistance of a McKenzie friend; and (2) allowed the appeal for the reasons which we will give later in this judgment. Whilst we would have thought the judge wrong, the argument would, nonetheless, have proceeded upon fairly conventional lines. What happened next, however, explains both the judge's reference to the presence of the McKenzie friend as a witness, and the reason for Mr. O'Connell's application for the judge to recuse himself. Mr. O'Connell wished him to be present not to give evidence in the proceedings, but as a witness to the judge's behaviour.

22. Having concluded his short judgment, the judge remarked, it seems to us without any provocation from Mr. O'Connell: "I remain hopeful, Mr. O'Connell, that one of these days you will find it possible to put your children first". When Mr. O'Connell protested that he was, the judge delivered a homily, which the transcript records as follows: -

"JUDGE MILLIGAN: No, put them beyond your consuming view that you have been mistreated, and misunderstood, and everybody has ganged up against you, and all the professional agencies, and your wife, and everybody you can think of, and you are a misunderstood man. Please, Mr O'Connell, ask yourself just once perhaps they might have got it right and you might have got it wrong.

MR O'CONNELL: I have evidence of perjury and the perversion of the course of justice and misfeasance in public office.

JUDGE MILLIGAN: You must adopt whatever position you think is appropriate, Mr O'Connell. I simply make that appeal to you. You have heard it before. Out of fairness to your children I make it again today. You come to me in a different frame of mind and anything might be possible. I have no wish, ambition or desire to keep you from your children, Mr O'Connell. I only do so because in my judgment you are an emotional danger to them. You know what that is. We have been around the course a number of times. You are entitled to your view and I respect it. One of these days I hope you will have the humility to reconsider. You do not have to respond. I am simply telling you what is in my mind."

23. We bear very much in mind that the judge had dealt with Mr. O'Connell over a period of some seven years, and had formed the clear view that his obsessional behaviour had caused serious damage to his children's emotional well-being. For the purposes of this judgment, we are prepared to accept that the judge is right about that. Mr. O'Connell also may well have tested the judge's patience in court on a number of occasions. We understand that. But we do not think that either the history of the case or Mr. O'Connell behaviour on 1 November 2004 warranted the judge addressing Mr. O'Connell in the terms set out above. The judge's use of the phrase "You come to me in a different frame of mind and anything might be possible" seems to us unfortunate.

(2) Mr. Watson's case

24. We regret to say that we also have to be critical of the judicial behaviour and the language used by the circuit judge in the second case. Most unusually, Mr. Watson's application for a McKenzie friend reaches this court by way of a second appeal, his application having been refused by a district judge and that refusal having been upheld by the circuit judge on appeal. We are, however, satisfied that a point of principle or practice arises within section 55(1)(a) of the Access to Justice Act 1999, and that it is appropriate for this court to entertain the appeal.

25. Mr and Mrs. Watson have three children now aged 12, 10 and 8. On 25 November 2003, District Judge Gamba, sitting in Brighton, made a residence order in favour of the children's mother, and an order for indirect contact in favour of their father. The case was to be listed for a review on the first available date after 11 October 2004, which turned out to be 4 November 2004, before the same district judge.

26. We have a transcript of the hearing before the district judge, which does not make altogether happy reading, although at no point is the district judge's behaviour to Mr. Watson either discourteous or unjudicial. The district judge opens by saying: *"Today is a review, is it not, effectively' There are obviously differing views of what should happen in the future"*. Mr. Watson interjects to say*: "There is also an issue of a McKenzie friend"*. The district judge then asks counsel for the mother what her position is on that. Counsel replies, somewhat, it must be said condescendingly: -

"MISS MORELLI: Yes. This is Mr Mackay. I have met him outside briefly, sir. He tells me that he is an accountant and he is a member of the charity, is it, Fathers Need Friends, or Fathers Need Families, or something like that. But he has experience with the court protocol. Sir, my client's view is that it is not appropriate in this case for Mr Watson to have a McKenzie Friend. This is an extremely delicate case. In the light of the findings, and the nature of the findings that were made last time, confidentiality is perhaps even higher than usual, and the necessity for it. Also there are matters of the medical records of the children, and the mother, and the mother objects to a McKenzie Friend being allowed in. Mr Watson is working. If he wanted to he clearly could instruct a lawyer. He has chosen not to. That is a matter for him. But this is not a case where Mr Watson needs help in reading the papers or anything of that nature. He is perfectly capable of doing that. We say under those circumstances it is not appropriate to allow a stranger into those proceedings."

27. The district judge then asks Mr. Watson what he wants to say, and the following exchange occurs: -

"MR WATSON: My position is that I felt severely disadvantaged in the last hearing, which was last November, and I feel I have been severely disadvantaged on this occasion without the assistance of my friend. He does have ten years' experience and is well known to several Appeal Court judges, in other courts, throughout this country. I believe that you are actually familiar with him yourself. The President of the Family Division had written to Families Need Fathers, who he belongs to, basically confirming that a McKenzie Friend is quite acceptable in the courts.

DISTRICT JUDGE GAMBA: We are talking about a review hearing at which no real decisions are made about contact are they' This is a directions hearing effectively. So there is that point to think about. There is also an application about an address I know which we will have to deal with, but the actual hearing today is a directions

hearing at which no final decision is going to be made, if the parties are not in agreement. That is what it is. It is not a contact order.

MR WATSON: I will be requesting an order to be made whatever the outcome."

28. The district judge's statement that the hearing before him is a review at which directions will be given but no final decisions taken is, of course, correct. However, that statement undoubtedly provides the rationale for his refusal of Mr. Watson's application for the assistance of a McKenzie friend. In our judgment, this is a non-sequitur. Directions appointments are important occasions, at which important decisions are taken - as the application before district judge Gamba on 4 November 2004 itself demonstrates. It is, we think, dispiriting nearly 14 years after the implementation of the Children Act to see directions appointments being misunderstood in this way.

29. The importance of the hearing before the district judge is illustrated by the fact that apart from his application for the assistance of a McKenzie friend, Mr. Watson wanted to make - and did make - (1) an application for the instruction of a consultant psychiatrist to examine the children and assess the position; (2) for the children to be separately represented by the National Youth Advocacy Service (NYAS); and (3) for the case to be transferred to the High Court. The two latter points involved reference to the Family Proceedings Rules and what the district judge refers to as *"guidelines laid down about separate representation for children"*. This, we think, must be a reference to the President's Direction of 5 April 2004 entitled **Representation of Children in Family Proceedings pursuant to FPR 1991 rule 9.**5 reported at [2004] 1 FLR 1188. Counsel makes reference to *"recent Court of Appeal decisions"*. When the district judge asks if Mr. Watson has looked at the guidelines, the latter replies, tellingly in our view: *"that is why I wanted my McKenzie friend with me because he would point me to the paper work and save the court a lot of time while I look through this"*. There is then substantial discussion of the guidelines.

30. The transcript lasts some 16 pages before the district judge gives judgment. He rejects each of Mr. Watson's applications. He also refuses his application to know the children's address. He directed an updated CAFCASS report. Apart from his refusal to allow Mr. Watson a McKenzie friend, we are not in this instance concerned with whether or not the district judge's rulings on the remaining issues were correct. We are, however, entirely satisfied that his refusal to allow Mr. Watson Mr. Mackay's assistance as his McKenzie friend was plainly wrong, for reasons which we have already foreshadowed, but which we develop below.

31. Mr. Watson appealed, and his appeal was listed for hearing in the Brighton County Court on 7 February 2005, in front of HH Judge Stephen Lloyd. Unfortunately, Judge Lloyd was unable to hear it due to other court commitments on that day. He therefore adjourned it. However, Judge Norrie unexpectedly became available, and the appeal came on before her.

32. We mention the matter in this detail because it provides an example of the inconsistency of practice amongst different judges. Mr. Watson tells us, and it does not appear to be contradicted, that Judge Lloyd made no difficulty in allowing Mr. Mackay into his chambers. However, Mr. Watson complains that Judge Norrie instructed her usher not to allow Mr. Mackay into her chambers for the hearing of the appeal, and he was thus excluded.

33. We have the transcript of the hearing before Judge Norrie. She immediately took the point that the only orders made by the district judge were for an updated CAFCASS report and the recorded refusal to allow Mr. Watson to know the children's address. It appears that nobody had had any notice before the district judge of any of the other applications Mr. Watson had intended to make. Mr. Watson tried to say that he was appealing against the district judge's refusal to make orders. We take up the transcript on page 5, where the judge says: -
"JUDGE NORRIE: Right. I do not really see where the problem is. The matter is coming back before the court again for directions. It is a matter that was reserved to Judge Gambler (sic). He heard it and gave the directions on the review for it to come back again before him once he has got the CAFCASS report.

MR WATSON: I am not prepared to proceed without the support of my McKenzie Friend. I am not familiar with the terminology you are using. One of the points of my ----

JUDGE NORRIE: I can assure you I can see absolutely that you are an intelligent man, and these are directions. It is the appeal on a review hearing.

MR WATSON: Are you dismissing my request for a McKenzie Friend and this hearing without determination in the court - hearing the case.

JUDGE NORRIE: No, not at all. You are open to make an application before me now for a McKenzie Friend, but I was not letting your McKenzie Friend in before you made your application. I have not determined that yet.

MR WATSON: I misunderstood what the usher was explaining to us.

JUDGE NORRIE: That is the position. If you want to make an application for a McKenzie Friend, please do so now. This is for this hearing. Okay'

MR WATSON: Yes.

JUDGE NORRIE: Right.

MR WATSON: Yes, I wish to have my McKenzie Friend to assist.

JUDGE NORRIE: Why do you wish for a McKenzie Friend to assist you today'

MR WATSON: To privately point out points of law and references to case precedents to support my application for the appeal.

JUDGE NORRIE: Which points of law' You must have an idea of your plan. Which points of law would you wish him to draw your attention to' Insofar as it is simply, bearing in mind the court order, all that District Judge Gambler (sic)ordered was that CAFCASS should file an up-to-date report and that there should be further directions which will now take place about three weeks from now, and that the mother need not disclose her address or that of the children's schools. That was the order that was made. So why do you need a McKenzie Friend to assist you in an appeal which in fact only one element is there about the children's school and withholding of the address.

MR WATSON: All the points I make are contained in my skeleton argument. I am responding ---

JUDGE NORRIE: I would like you to tell me why, bearing in mind that it was just a simple issue of review, District Judge Gambler (sic) refused you a McKenzie Friend on that hearing, for cogent reasons which are set out there by him in the transcript that I have read, and I need you to convince me why there should be a McKenzie Friend today.

MR WATSON: I am entitled to a fair tribunal.

JUDGE NORRIE: It is coming back again in three weeks time. It is back before the court again in three weeks time, and you would at that stage be able to renew your application for a McKenzie Friend. All I am doing today is hearing this appeal against - I am not quite sure what, but you are appealing the order, but the order does not, with the exception of disclosing the address and schools, deal with any of those things.

MR WATSON: Are you looking at what is not printed in the skeleton argument' I was clear enough to the point I am making. I am appealing against the transcript content. The District Judge made decisions during the course of the hearing which are not necessarily printed on the court order, as you are obviously aware if you have read the transcript.

JUDGE NORRIE: Mr Watson, what do you say about a McKenzie Friend'"

34. Counsel for the mother (who coincidentally shares his surname with the appellant and to whom we will refer henceforth as Mr. Duncan Watson) then objects to Mr. Watson being afforded the assistance of a McKenzie friend on the basis of confidentiality. He refers to some particularly sensitive information in the case. He also says that Mr. Watson is perfectly able to represent himself, and had been acting in person since March 2003. We take up the transcript again:
"JUDGE NORRIE: Any response to that, father'

MR WATSON: I will not proceed on the points in this case without my McKenzie Friend. I should then appeal to a higher court to try to get effect of proper support. I feel this court loses sight of the important issue of the children's relationship with their father, as well as the mother.

JUDGE NORRIE: The decision that District Judge Gamba made was after a review hearing when substantial matters were not going to be dealt with, apart from the one matter which is decided, that the mother need not disclose her

address or that of the children's school. That is not a complex matter. That is not matters of law. You have represented yourself successfully and adequately at numerous previous hearings.

MR WATSON: I feel very disadvantaged and I feel I have suffered as a consequence of attempting to represent myself without any support, hence I did not understand the rights to appeal the hearings at the end of 2003, and the consequence of that is now they are referred to in subsequent hearings when the evidence was not properly tested in court. The only evidence from the mother's side was assertions that ---

JUDGE NORRIE: I am going to stop you. Do I understand that your McKenzie Friend has already read the bundles'

MR WATSON: He has had a brief summary from me, an outline of what areas of law ---

JUDGE NORRIE: I do not think that is a proper answer. Has your McKenzie Friend had sight of the evidence'

MR WATSON: No.

JUDGE NORRIE: Of what benefit then to you is going to be a McKenzie Friend'

MR WATSON: What benefit' Taking notes and pointing references to case law supporting my argument.

JUDGE NORRIE: I am quite content to take it slowly so that you can make an adequate note yourself. Clearly you know the bundle much better than your McKenzie Friend. What is your response to that'

MR WATSON: The same response. I am not happy to proceed in the circumstances.

JUDGE NORRIE: Anything to add, Mr Watson'

MR (DUNCAN) WATSON: No, your Honour."

35. The judge then proceeded to give judgment. She did not, however, get very far. The transcript tells the story: -
"JUDGE NORRIE: I do not see a necessity for a McKenzie Friend in the present circumstances. That does not prevent you from making an application - I am not saying whether it will be granted or not - for a McKenzie Friend when you appear at the next hearing.

(Mr Watson then left court)

JUDGE NORRIE: I presume he is not going to come back. I do not know.

MR (DUNCAN) WATSON: That is my assumption. I was just pondering the means of how this appears before the court can be dealt with.

JUDGE NORRIE: Appeal dismissed.

MR (DUNCAN) WATSON: There is the issue of costs. My client is privately funded. Unfortunately this case was originally listed before Christmas and had to be adjourned at short notice, so she has incurred costs there, and she has incurred obviously the costs of today. It is most unfortunate it has occurred. I have a costs schedule here. I hand it up.

JUDGE NORRIE: The unfortunate thing is I am sure he is now going to appeal against my decision not to allow him a McKenzie Friend.

MR (DUNCAN) WATSON: Yes.

JUDGE NORRIE: It is a vicious circle. It goes round and round in circles. I think he should be given the opportunity of looking at these before I make an order.

MR (DUNCAN) WATSON: What order does your Honour intend to make' If there can be an order in principle for costs, save that if costs cannot be agreed within fourteen days that - (inaudible)

JUDGE NORRIE: Yes. Is there going to be a proper bundle' I know District Judge Gamba knows the case very well, does he not'

MR (DUNCAN) WATSON: He does.

JUDGE NORRIS: Right."

36. It may not have been wise for Mr. Watson to walk out of court whilst the judge was giving judgment. However, we have to say that we think he was badly treated by the judge. Even given the coincidence that Mr. Watson and his former wife's counsel had the same surname, we think the judge should have done better than to address Mr. Watson as "father". Furthermore, she never allowed him to develop his

argument. As the transcript shows, he was neither prolix nor discourteous, yet the judge both interrupted him and stopped him. Mr. Watson had the courage to say that he was entitled to a fair tribunal. He was. We do not think he received it.

37. In our judgment, not only did Judge Norrie misconduct the hearing. The conclusion she reached was plainly wrong. Once again, we set out our reasons for reaching this conclusion below.

(3) Mr. Whelan's case

38. On 9 December 2004, in the Principal Registry of the Family Division, His Honour Judge Cook heard an important directions appointment in residence / contact proceedings relating to the parties' daughter, then aged three and three quarters, and now aged 4. No difficulty was raised, either by the judge or any of the parties, about the presence of Mr. Whelan's McKenzie friend, whom the judge made welcome.

39. An unsatisfactory feature of the case from Mr. Whelan's perspective was that the local authority, the London Borough of Hackney (Hackney), had become involved because of child protection issues raised by Mr. Whelan. Hackney had not, however, been made a party to the proceedings, although it was represented before the judge. Mr. Whelan was highly critical of Hackney's role in the case.

40. At an earlier stage in the case, Mr. Whelan had asked the court to order separate representation for his daughter through NYAS. That application had been refused. It was, however, agreed that the court should receive expert advice from a child psychiatrist, and the first order made by the judge on 9 December 2004 was a direction that Dr. Judith Trowell be instructed to report by 31 March 2005, and that should Dr. Trowell be unavailable, Dr. Florence Chambers from the Marlborough Family Service was to report in her place. Hackney was ordered to file and serve an updated report under section 7 of the Children Act 1989, and the author of both that report and an earlier report were to attend the final hearing on 12 and 13 May 2005. An order was also made for updated statements by each of the parents.

41. Mr. Whelan then made an application for permission to disclose the court papers to his McKenzie friend, Mr. Mackay. Objection was taken to that application by the respondent, and after argument, the judge made a limited order for disclosure to Mr. Mackay comprising, in essence, position statements and statements of issues, as well as a transcript of the hearing on 9 December 2004 at which, of course, Mr. Mackay had been present.

42. As a consequence of the judge's order, we have a transcript of the hearing on 9 December 2004. Mr. Whelan was in person; the children's mother and the local authority were each represented by counsel. Mr. Whelan's McKenzie friend, Mr. Mackay was present in chambers throughout. The judge asked at the outset who he was, and when he was told, made him welcome - as we have already recorded.

43. The transcript reads well. The judge, throughout, was courteous and well informed. In our judgment he achieved the right balance between maintaining the formal structure of the hearing, whilst using informal, but plain and clear English, in his exchanges with Mr. Whelan. He had clearly read the papers. He listened carefully to Mr. Whelan, and was at pains to explain why, on a directions appointment, he could not grant some of the relief which Mr. Whelan sought.

44. The judge made it clear at the outset that what he was dealing with was: "what directions we need to facilitate the hearing next year" - that is to say, the final hearing of the applications relating to the children. Although he would have preferred the mother's counsel to open the case, in order to advise him "where we are at", the judge readily agreed, when Mr. Whelan protested, that Mr. Whelan should go first.

45. Mr. Whelan was plainly able to engage in a courteous dialogue with the judge. He explained his position and the relief he was seeking. After some 10 pages of these exchanges, the judge helpfully asked Mr. Whelan if he wished to ask Mr. Mackay "if there is anything else we ought to be looking at today'" Mr. Whelan then raised the question of Mr. Mackay seeing the court papers. Both the way in which Mr. Whelan put the point, and the judge's instinctive reaction to it are, in our view, instructive:
"THE APPLICANT: Would it be appropriate, in fact I need assistance and I ask leave of the court that Mr Mackay be allowed to see the papers in order to usefully give assistance because currently for I think it's three or four years he has assisted me but simply in a note-taking role and it would be very helpful if he was able to see the papers so that he could pick the issues, because it's very different to ...

HIS HONOUR JUDGE COOK: Well of course, I mean if he is here to assist you he is doing it blindfold if he cannot see the papers.

THE APPLICANT: That's correct.

HIS HONOUR JUDGE COOK: All right, we will address that as well, then. Right, let me have a word now with the other advocates.

46. In response, counsel for the mother took two points. Whilst recognising that it was "very helpful" for Mr. Whelan to have the assistance of a McKenzie friend, she added: - *"However, again for the same reasons that I have outlined to your Honour in relation to disclosure of papers to other individuals, that is something that we would seek to resist today. Material contained in this court file does contain highly confidential and sensitive material and Mr Mackay's role as a McKenzie Friend extends to offering advice and assistance, not offering legal representation and legal advice. Mr W dispensed with the services of his solicitors previously. Additionally, on my instructions Mr Mackay is a member of a campaigning organisation for fathers, from Families Need Fathers, and that again raises concern on the part of those representing mother."*

47. The judge's immediate reaction to that submission is, in our view, also significant: *"It is a matter I have never applied my mind to before. I mean it is jolly difficult for a McKenzie Friend to assist if he does not see the papers. This must apply in every case where there is a McKenzie Friend. Has there been no finding on that before'"*

48. Counsel then referred the judge to FPR 1991 Rule 4.23, and there followed a discussion on the law relating to disclosure, during the course of which the judge retired to his room and appears to have returned with a summary of the decision of this court in **Re G**. The result of further argument was the order identified at paragraph 41 above, which we set out in detail at paragraph 116.

49. Mr. Whelan asked for permission to appeal against the limited disclosure order. The judge refused permission but advised Mr. Whelan that he could get permission from this court. Indeed, he went slightly further and expressed the hope that this court would grant permission because *"it would be very interesting to know what the Court of Appeal thinks of it."*

Judicial treatment of litigants in person

50. Before turning to the principles underlying the applications for the use of McKenzie friends, and giving our reasons for allowing the appeals in Mr. O'Connell's and Mr. Watson's cases, we wish to make some observations about the behaviour of the three judges whose decisions are the subject of the current appeals.

51. Unlike lay magistrates, professional judges are not subject to appraisal by their colleagues. The argument that such appraisal is unnecessary often relies on the fact that judges sit in public. Thus their every word can be reported and, if necessary, publicly criticised. But this is not, of course, true of cases involving children, which are, currently, invariably heard at first instance in private. The fact that cases are heard in private in order to protect the identities of the children concerned, and the fact that they deal with highly sensitive material are, in our judgment all the more reason for judges to be astute to ensure that at all times they behave judicially and in particular that they remain both courteous and calm.

52. We make no apology for our extensive citations from the transcripts. No doubt all of us have read transcripts of hearings over which we have presided, and winced at the occasional inappropriate remark which we wished we had not made. But the transcript is the only way judicial conduct in family cases can be appraised.

53. For the purposes of this discussion, we are quite prepared to accept that Mr. O'Connell has all the attributes Judge Milligan found him to have, and that the fact Mr. Watson is not seeing his children is because of his behaviour towards them and his former wife. But none of that justifies discourtesy on the part of the bench, or the denial of a fair hearing to the litigant in question. Indeed, as a general proposition, the more difficult the litigant, the greater the need for judicial courtesy and calm. In the instant cases, however, both Mr. O'Connell and Mr. Watson appear to have behaved entirely properly, and on the clear face of the transcript, neither said anything which was either discourteous or even remotely inappropriate.

54. Every judge who has heard cases conducted by litigants in person, whether at first instance or on appeal, knows only too well that they are an extremely diverse cross-section of the population. But two obvious points must be made. The first is that litigants in person are as entitled to a fair hearing as any other

litigant. The second is that they are as entitled as everybody else to be treated with courtesy. There is never any excuse for judicial discourtesy.

55. Our joint experience, both at first instance and in this court, is that we have only rarely found litigants in person to be discourteous. We have, of course, experienced anger and abuse by litigants in person (notably at the conclusion of judgment), but more commonly litigants in person are nervous, anxious or upset. Sometimes, as a consequence, they are less coherent and less self-controlled than they would be in other circumstances. The corollary to this, in our view, is that any judge hearing a litigant in person is under a particular obligation to remain courteous and to ensure that the litigant in person has a full and fair hearing.

56. The three cases demonstrate, we think, the advantages of the presence of a McKenzie friend. Perhaps if Judge Norrie had allowed Mr. Watson's McKenzie friend to be in her chambers when he made his application (as she should have done) Mr. Watson might not have become sufficiently upset to walk out.

The authorities

57. In their skeleton arguments, both Mr. Robin Spon-Smith and Mr. Duncan Watson helpfully identified and summarised the relevant cases, starting with **McKenzie v McKenzie** [1971] P. 33, the case from which, of course, the expression McKenzie friend originates. Although this is well canvassed territory, we nonetheless think it helpful to re-visit some of it in the light of the conclusions we have reached.

58. **McKenzie v McKenzie** itself was, of course, a case heard at first instance in open court, and contains this court's citation of the statement of Lord Tenterden CJ in **Collier v Hicks** (1831) 2 B & Ad 663 that: *'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice ... '.*

59. The next case in time is the decision of this court in **R v Leicester City JJ, ex p. Barrow** [1991] 2 QB 260. This was an appeal against a community charge liability order in which justices had refused an application made on the defendants' behalf for a friend to be allowed to sit with them to give advice and assistance. At page 288, the Master of the Rolls stated: - *A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thinks appropriate, subject to the right of the court to intervene ..... if a party arms himself with assistance in order the better* ***himself*** *to present his case, it is not a question of seeking the leave of the court. It is a question of the court objecting and restricting him in the use of this assistance, if it is clearly unreasonable in nature or degree or if it becomes apparent that the 'assistance' is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing the party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions.*

60. The first in time of the cases in this court arising from an appeal against the refusal of a judge to allow a litigant in person a McKenzie friend in family proceedings relating to children heard in chambers is **Re G (Chambers Proceedings: McKenzie friend)** which, although reported at [1999] 2 FLR 59, was heard on 10 July 1991. It is also the only case in this court in which a refusal at first instance to permit a McKenzie friend has been upheld in this court. In this instance, this court upheld a decision of Waite J to refuse to allow a party to wardship proceedings to have a McKenzie friend on the basis that the decision as to who was permitted to be present in a chambers matter was one for the judge alone. As Mr. Spon-Smith pointed out, the case was an unusual one in that the proposed McKenzie friend was a solicitor who was to be paid for his services but did not wish to put himself on the record. We think it highly unlikely that the case would be decided the same way in this court today.

61. There is then a gap in time in the reported cases until **Re H (Chambers Proceedings: McKenzie Friend)** [1997] 2 FLR 423. This was an application by a father for permission to appeal against two orders made on different occasions in the county court. The first was against a Recorder's refusal to allow him to have a McKenzie friend in an application for contact to his daughter. The Recorder had taken the view that because the proceedings were in chambers it was inappropriate to have anyone other than the parties and the lawyers present. Giving the short leading judgment, Ward LJ said: - *The recorder ought not to have taken the view that a McKenzie friend should be removed, even if the matter proceeds in chambers as a matter affecting a child. Provided the McKenzie friend does no more than a McKenzie friend is entitled to do, that is to sit and advise and quietly to offer help, I for my part can see no objection to that whatever. I note with approval that when the matter next*

came to the court before his Honour Judge Paul Clarke the judge correctly and promptly , without question, permitted the presence of the friend who was then there to assist the father.

62. In **Re M (Contact: Family Assistance: McKenzie Friend)** [1999] 1 FLR 75 this court held that a father should have been allowed a McKenzie friend on an application for contact and other orders. Ward LJ (with whom Roch LJ agreed) stated that it was 'a matter of regret' that the father had been denied the assistance of a McKenzie friend and that no apparent explanation for the denial had been put forward. Ward LJ commented: ([1999] 1 FLR 75 at 76-7) *The judge has the father appearing in person. There is a ground of appeal before us complaining of having been denied a McKenzie friend. It emerged from the submissions of Mr. Cadin that the refusal occurred at an earlier hearing and may or may not have been influenced in part by the personality of that particular McKenzie friend. The father simply does not know. He feels the burning injustice of having been besieged with paper and coping with the difficulty of the management of that paper and the conduct of the litigation. I have considerable sympathy with him . It is always difficult, and the more emotive and important the issue to the litigant, often the more useful it is to have the restraining influence of a McKenzie friend. The value was demonstrated in this court when we asked for assistance as to a certain passage of evidence to which the father had made reference. That was left to the gentleman here, who was not the gentleman against whom any possible objection could have been taken in July 1997. The answer was forthcoming. It showed the virtue of how the McKenzie friend is to operate. It is therefore a matter of regret that the father was denied that assistance. The judge would not have had referred to him a decision of this court given by me in* ***Re H (Chambers Proceedings: McKenzie Friend)*** *[1997] 2 FLR 423. Provided that the McKenzie friend acts with restraint, he is often a useful assistant to the conduct of litigation.*

63. In **R v Bow County Court ex p. Pelling** (hereafter **ex parte Pelling**) [1999] 2 FLR 1126 (in which both **Re H** and **Re G** (supra) were cited) the appellant was not the litigant in person, but the McKenzie friend. The judge had refused to allow Dr Pelling to act as a McKenzie friend in an application by the litigant concerning contact arrangements with his son. Dr. Pelling had sought judicial review of the judge's refusal to allow him to act as a McKenzie friend, and when judicial review was refused, Dr. Pelling appealed to this court.

64. In a constitution comprising Lord Woolf MR, Brooke and Robert Walker LJJ) this court dismissed Dr. Pelling's appeal. It summarised its conclusions in paragraph 28 of its judgment in five propositions: -

a. In relation to proceedings in public, a litigant in person should be allowed to have the assistance of a McKenzie friend unless the judge is satisfied that fairness and the interests of justice do not require a litigant in person to have the assistance of a McKenzie friend.

b. The position is the same where the proceedings are in chambers unless the proceedings are in private.

c. Where the proceedings are in private then the nature of the proceedings which make it appropriate for them to be heard in private may make it undesirable in the interests of justice for a McKenzie friend to assist.

d. A judge should give reasons for refusing to allow a litigant in person the assistance of a McKenzie friend.

e. The assistance of a McKenzie friend is available for the benefit of the litigant in person and whether or not a McKenzie friend is paid or unpaid for his services, he has no right to provide those services; the court is solely concerned with the interests of the litigant in person.

We will return to discuss this case in more detail later.

65. In **Re H (McKenzie Friend: Pre-Trial Determination)** [2001] EWCA Civ 1444, [2002] 1 FLR 39, the judge had refused a father's application to be assisted by a McKenzie friend (actually Dr Pelling) on the ground that, having listened to and observed the proposed McKenzie friend, he felt that, with the father on his own, the hearing would be fairer, as well as less adversarial and legalistic. This court allowed the father's appeal. Giving the leading judgment, Thorpe LJ stated that the presumption in favour of permitting a McKenzie friend was a strong one. The argument in the court below had necessarily been an adversarial and legalistic one and, since it was unusual for a respondent to oppose an application for McKenzie assistance, as the mother had done vehemently, it was possible that she had contributed to the adversariality.

66. Mr. Spon-Smith pointed out that all of the cases mentioned above other than **Re H (McKenzie Friend: Pre-Trial Determination)** were decided before the coming into force of the Human Rights Act 1998. He submitted that in any application by a litigant in person for the assistance of a McKenzie friend, the right to a fair hearing under Article 6.1 of the European Convention on Human Rights (ECHR) is engaged. This included, he argued, the requirement that there should be 'equality of arms' - that is to say that "each party must be afforded a reasonable opportunity to present his case ... under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent": see **Dombo Beheer BV v The Netherlands** (1994) 18 EHRR 213. This, he submitted, reinforced the strong presumption in favour of allowing a litigant to have the assistance of a McKenzie friend and the corresponding necessity for very good reasons to be shown for refusing to allow such assistance, even in cases heard in private.

Our comments on the authorities

67. We accept Mr. Spon-Smith's submission that Article 6 of the ECHR is engaged in any application by a litigant in person for the assistance of a McKenzie friend. Furthermore, in our judgment, two clear propositions stand out from the authorities as they apply to family proceedings. These are: (1) that the presumption in favour of the litigant being allowed the assistance of a McKenzie friend is a strong one; and (2) that such a request should not be refused without good reason, even where the proceedings relate to a child and are being heard in private.

68. The case which, at first blush, appears to contain a different emphasis is **ex parte Pelling**. There are, however, several points which can, we think, properly be made about that case. Firstly, it is **not** an appeal by a litigant in person in family proceedings from a judge's refusal to allow him the assistance of a McKenzie friend. It is an appeal by the McKenzie friend against a decision of the Divisional Court of the Queen's Bench Division which had refused the McKenzie friend's application for judicial review of the judge's refusal to allow him to act as a McKenzie friend. This is an important distinction since, as this court pointed out in its fifth conclusion set out in paragraph 64 above, the McKenzie friend has no enforceable right to provide his services. The court is solely concerned with the interests of the litigant in person. That is plainly correct, and that, in our judgment, is what the case decides.

69. Secondly, the judge in the original family proceedings in this case had not given reasons for his refusal to allow Dr. Pelling to act. Whilst commenting that it was desirable for a judge to give reasons in a such a situation, this court did not see the judge's failure to do so as a reason for allowing the appeal since, once again, it held that the duty to give reasons was owed to the litigant in person, not to the McKenzie friend: - see [1999] 2 FLR at 1132.

70. Thirdly, it seems to us from the court's recitation of the facts that the procedure adopted by the judge in the county court was unacceptable. The facts are set out at [1999] 2 FLR 1126 at 1127: -

> *(2) On 9 December 1997 Mr. Greenwood (the litigant in person) had made an ex parte application concerning contact arrangements with his son. From what Dr. Pelling informed us, the application was in connection with transport difficulties. In an affidavit sworn in support of Dr. Pelling's application, Mr. Greenwood states that he was waiting at court when he was told that the court manager wanted to speak to him. He went to her office accompanied by Dr. Pelling. She told him that Judge Goldstein was willing to hear his application, but would not let Dr. Pelling into court to assist as a McKenzie friend. Mr. Greenwood says that he was concerned and upset at this news as it was essential to have the matter resolved. "I felt that without Dr. Pelling there to help me" his case would not be adequately argued and presented. No explanation was given for the judge's refusal except some reference to some outstanding matter. Dr Pelling asked if he could see the judge to obtain an explanation, but the court manager reported back that the judge would not give him an audience. Later the court manager informed Mr Greenwood that a district judge was prepared to hear his application and would have no objection to Dr. Pelling acting as a McKenzie friend. However, Mr. Greenwood preferred to appear before Judge Goldstein who was the Senior Civil Judge at the Bow County Court. He did so, but without a McKenzie friend. Mr. Greenwood says that he did not at this time obtain the order he sought and felt that he may have been disadvantaged by not having the assistance of "my friend in court". Mr. Greenwood did not, however, appeal.*
>
> *(3) Mr Greenwood also states in his affidavit that when the original hearing in relation to contact took place before the same judge in June 1995, Dr. Pelling was present and assisted Mr. Greenwood as a McKenzie friend without any objections being raised.*

71. We make three points on the facts of **ex Parte Pelling** as set out above. Firstly, they appear to demonstrate an inconsistency of practice between judges in the same court. If Mr. Greenwood was entitled to the assistance of a McKenzie friend, he was entitled to that assistance whether the tribunal was the district judge or the circuit judge. Permitting a litigant in person to have the assistance of a McKenzie friend is not a matter of judicial preference. In making these observations, however, and in fairness to Judge Goldstein, we bear in mind that he had refused an application by Dr. Pelling to have his own case, involving his own child, heard in open court - a decision which Dr. Pelling unsuccessfully appealed to this court and then took to the European Court of Human Rights. Since the application to Europe was, we think, pending in December 1997, it may be that this was the reason or part of the reason why Judge Goldstein declined to allow Dr. Pelling to act as Mr. Greenwood's McKenzie friend.

72. Secondly, the reason Mr. Greenwood did not appeal is probably explained by the first two sentences from paragraph (2) as set out in paragraph 70 above. Thirdly, had Mr. Greenwood sought permission to appeal against Judge Goldstein's refusal to allow him the assistance of Dr. Pelling as a McKenzie friend in the litigation, we are confident that the judge's decision in principle would almost certainly have been reversed in this court.

73. We therefore do not think that, on analysis, **ex parte Pelling** detracts from the proposition that the presumption in favour of a litigant in person being allowed the assistance of a McKenzie friend is a strong one, and that the strength of the presumption is not diminished by the fact that the proceedings are being heard in private. It is, moreover, plain to us that matters have moved on in what is a period of nearly six years since **ex Parte Pelling** was decided. The second and third conclusions of this court in that case must, we think, be read in the light of later developments.

The submissions of the advocate to the court in relation to the cases before us.

(1) Mr. O'Connell's case

74. Mr. Spon-Smith addressed each of the three decisions before this court. He began with the decision in **Mr. O'Connell's case.** We have, of course, set out the transcript of the judge's judgment in paragraph 20 above. Mr. Spon-Smith identified three reasons given by the judge for refusing Mr. O'Connell's 'preliminary application for the assistance of a McKenzie friend'. They were, in summary: (1) Mr. O'Connell's capacity throughout the proceedings to marshal and present a large number of documents; (2) the fact that that the proposed McKenzie friend was a representative of a body called the Environmental Law Centre; and (3) that the father 'speaks of wanting the gentleman here as his witness which of course is not a purpose, giving (sic) that he is not expecting him to give evidence, for which a McKenzie friend is appropriate'.

75. Mr. Spon-Smith made the following submissions in relation to those reasons. We adopt the same numbering.

i. This is not a good reason for refusing a party the assistance of a McKenzie friend. It does not begin to outweigh the strong presumption in favour of allowing such assistance. This was not even a case in which the father was applying for an adjournment so that he could obtain the assistance of a McKenzie friend, in which situation the balancing exercise would be slightly different (as it would if a party sought an adjournment to obtain legal representation).

ii. If there were evidence that the presence of a McKenzie friend was sought for an improper purpose, that could justify refusal of permission. There does not seem to have been any such evidence in this case. The basis upon which the judge reached such a conclusion is unclear. He referred to having made 'brief reference' to the Environmental Law Centre's brochure. Mr. Spon-Smith had searched that organisation's web site. It states that it is a registered charity 'that specialises in helping to protect your Human Rights on issues that concern Health and the Environment'. The proposed McKenzie friend's connection with that organisation is of limited relevance; while it gives no indication of an interest in family proceedings, it would be difficult to misuse those proceedings for the purpose of pursuing a campaign relating to health and the environment. In general the fact that a proposed McKenzie friend belongs to an organisation which promotes a particular cause or interest is no reason for not allowing him to undertake the role. Members of Families Need Fathers - an organisation whose cause is no secret - regularly act as McKenzie friends.

iii. It is accepted that, as a matter of principle, a prospective witness should not act as a McKenzie friend - just as he should not act as a professional advocate. As the judge recorded that the father did not propose that the McKenzie friend should give evidence it seems that by 'his witness' the father meant somebody who would observe the proceedings in court and be able to corroborate any complaint which the father might later wish to make concerning the conduct of the proceedings. Whilst this is not the main purpose of a McKenzie friend, it does not seem to be particularly objectionable, especially when the other party to the proceedings is represented by counsel and/or a solicitor.

76. We accept those submissions. We need to point out, of course, that in Mr O'Connell's case there was no representation or appearance on behalf the children's mother since, somewhat unusually, Ward LJ had directed that the appeal should be heard without notice to her. No doubt this was because the order under section 91(14) of the Children Act 1989 in Mr. O'Connell's case required any application for permission to be made initially to the judge without it being served on his former wife.

77. We were, however, able to make arrangements for her solicitors to be contacted, and they made it clear that were their client offered the opportunity to appear, it was highly unlikely that she would wish to do so. She was content for Mr. O'Connell's application for permission to apply for a shared residence order to be dealt with in this court. The solicitors acknowledged that permission to appeal might well be granted by this court, and that their client's position was fully protected since she would be able to deal with the application for shared residence / contact in the trial court on its merits.

78. We decided to proceed both with Mr. O'Connell's appeal against Judge Milligan's refusal to allow him the assistance of a McKenzie friend, and with his appeal against the judge's adjournment of his application for permission to make an application under section 8 of CA 1989. Whilst against the background we have described, it may be that Mr. O'Connell's application for shared residence has little prospect of success, we took the view in the light of the judge's remarks post judgment that we had no alternative but to extend the limited permission to appeal given to Mr. O'Connell by Ward LJ in order to allow him to challenge the judge's section 91(14) embargo. We then allowed Mr O'Connell's appeal, and directed that his application under section 8 of the Children Act be listed before Coleridge J, the Family Division Liaison Judge for the Western Circuit, for directions, with a view to Coleridge J either hearing the application himself, or allocating it to a different circuit judge. In making that application, Mr. O'Connell will, of course, be allowed the advice and assistance of a McKenzie friend.

(2) Mr. Watson's case

79. Mr. Spon Smith identified the five grounds on which Mrs. Watson, through her counsel, had, before the district judge, objected to Mr. Watson having the assistance of a McKenzie friend. These were: -
    a. it was an extremely delicate case;
    b. confidentiality was perhaps even higher than usual;
    c. there were matters concerning the medical records of the children;
    d. Mr. Watson could instruct a lawyer;
    e. Mr. Watson did not need help in reading the papers etc.

80. Mr. Spon Smith also pointed out that later, in the transcript, when Mr. Watson had said to the district judge: *'So I go back to your position regarding my McKenzie friend''* the district judge had repeated that what was before him was *"a review hearing today for directions"* on which Mr. Watson did not need a McKenzie friend. We have, of course, set out this passage at paragraph 27 above.

81. Mr. Spon-Smith pointed out that the district judge did not advert to the latter point in his judgment, and there is no reference to it in the order dated 4 November 2004. He argued that the fact that the hearing in question is a directions hearing is not a good reason for refusing to allow a litigant in person a McKenzie friend. Something more than that, he submitted, is needed to overcome the 'strong presumption' in favour of allowing a litigant in person the services of a McKenzie friend. Important issues may be raised and decided at a directions hearing which significantly affect the future course of the litigation. It is not for the litigant in person to justify his desire to have a McKenzie friend, but for the objecting party to rebut the presumption in favour of allowing it.

82. Mr. Spon-Smith repeated in **Watson v Watson** the submission we have set out in paragraph 75(1) in relation to Mr. O'Connell's case on the question of refusing to allow a McKenzie friend on the ground that the litigant has managed to conduct litigation in the past.

83. Mr. Spon-Smith further pointed out that at the hearing before Judge Norrie on 7 February 2005 the father was both appealing against the district judge's refusal to allow him a McKenzie friend on 4 November 2004 and was also seeking permission to have a McKenzie friend at that hearing. Once again, we have set out what occurred at paragraphs 33 to 36 above.

84. Mr. Spon-Smith argued that it was not satisfactory for a litigant in person to be told that the question of whether or not he is to have the assistance of a McKenzie friend at the substantive hearing will be decided at that hearing. The father should be able to go to court - and, as importantly - to prepare for doing so - knowing whether or not he is going to have the assistance of a McKenzie friend. The matter should be dealt with at the earliest possible stage, applying the '*strong presumption'* in favour of allowing a McKenzie friend. A favourable direction should then be regarded as final, not as something which another party can ask the court to revisit later, save of course in the event of misconduct by the McKenzie friend or similar circumstances. Early disposal of the McKenzie friend issue is particularly important if the McKenzie friend is going to be permitted to see the documents. We will return to this point when addressing the question of disclosure.

The argument for Mrs. Watson in this court

85. Under cover of a letter dated 26 April 2005, Mrs. Watson's solicitors, Messrs Hamnett Osborne Tisshaw sent to the Court of Appeal office a bundle of documents running to 112 pages, included in which was a nine page skeleton argument dated 23 April 2005 settled by Mr. Duncan Watson, who had, of course, appeared as counsel for Mrs. Watson before Judge Norrie. The bundle was stamped by the court as having been received on 27 April 2005, the day before the hearing. We received it on the morning of the hearing as, we think, did Mr. Watson.

86. This court has regularly deplored the profession's persistent disobedience of the Practice Direction - Appeals attached to CPR Part 52. There are clear rules for the dates by which documents are to be lodged, and a respondent's skeleton argument should be filed no later than 7 days before the appeal hearing (see CPR Part 52 PD para 7.7(2)). Mr. Spon-Smith's skeleton, for example, was lodged on 11 April 2005.

87. In these circumstances, to lodge a bundle of documents containing 112 pages including a substantial skeleton argument the night before the hearing is inexcusable. It is doubly so in the instant case because Mrs. Watson's advisers knew that Mr. Watson was acting in person. Even if Mr. Watson was familiar with most of the documents attached to the skeleton, it was putting him in an impossible position to expect him to have to deal with such a bundle with no effective notice, and there is a savage irony in the fact that the purpose of the skeleton argument was to deny Mr. Watson the assistance of a McKenzie friend. In the same way that we have been critical of Judge Milligan and Judge Norrie for the manner in which they respectively treated Mr. O'Connell and Mr. Watson, we are equally critical of those members of the legal profession who do not obey the rules when dealing with litigants in person, and who do not extend to them the normal courtesies they extend to professional opponents.

88. Mr. Duncan Watson readily acknowledged that it was both unacceptable and unfair that Mr. Watson had received the bundle of documents so woefully late. His explanation was that he had only been instructed to settle the skeleton argument on 22 April 2005 (the day **after** it should have been lodged). He had acted promptly, completed the document the following day (a Saturday) and hand delivered it to his solicitors on the next working day, 25 April 2005.

89. Whilst we accept Mr. Duncan Watson's explanation of his role in the late preparation of the skeleton argument, it is not an excuse. The appellant's notice is dated 21 February 2005. It was served on Mrs. Watson's solicitors, who queried on 14 March Mr. Watson's assertion that he did not require permission to appeal. On 17 March 2005, Thorpe LJ ordered a hearing on 28 April 2005 on notice to Mrs. Watson, with appeal to follow if permission to appeal was granted. That order was sent to Messrs Hamnett Osborne Tisshaw on 22 March 2005. The solicitors thus had well over a month to take instructions, consider their client's position and instruct counsel.

90. Fortunately, in the instant case, we were able to avoid an adjournment to enable Mr. Watson and his McKenzie friend to read and prepare arguments in relation to counsel's skeleton argument because Mr. Watson had had the opportunity to read and absorb Mr. Spon-Smith's skeleton, which he adopted.

91. In the event, we do not think that Mr. Duncan Watson's skeleton argument adds a great deal to the summary of reasons identified for the decisions of District Judge Gamba and Her Honour Judge Norrie identified by Mr. Spon-Smith and set out in paragraph 79 above. Mr. Duncan Watson did, however, submit in relation to ECHR Article 6.1 that it permitted the exclusion of the public "from all or part of the trial .... where the interests of juveniles or the protection of the private life of the parties so require". He also submitted that ECHR Article 8(1) was engaged, and that where there were competing rights between parents and a child, the rights of the child were paramount. His authority for this proposition was the decision of the ECtHR **Yousef v The Netherlands** [2003] 1 FLR 210 at paragraph 73, although he conceded that this case related to competing Article 8 rights.

92. We reject both of Mr. Duncan Watson's arguments based on ECHR for the reasons given by Mr. Spon-Smith in reply. In relation to Article 6, the appointment of a McKenzie friend is not the admission of the public to the proceedings. The Article 8 argument was, Mr. Spon-Smith, submitted misconceived. The paramountcy of the child's welfare was prescribed by Statute. The appointment of a McKenzie friend was not an application to which CA 1989 section 1 applied, and there had been no suggestion anywhere that the welfare of the children was - or could be - affected by the appointment of a McKenzie friend.

93. Once again, we have no hesitation in accepting Mr. Spon-Smith's submissions. We are particularly anxious, for the reasons Mr. Spon-Smith has identified, to dispel the suggestion that a McKenzie friend should not be permitted because the hearing at which his assistance was sought was a directions hearing.

(3) Mr. Whelan's case: Disclosure of information and documents to the McKenzie friend: the relevant statutory provisions

94. The third of the cases raises directly both the question of disclosure to a McKenzie friend of confidential documents generated by the proceedings and the issue of the extent to which confidential documents may be disclosed to other third parties such as the police and the local government ombudsman. In examining these issues, we need, firstly, to remind ourselves of the relevant statutory provisions.

95. The publication or disclosure of documents or information relating to proceedings concerning children is subject to three distinct statutory restrictions, namely-

i. section 12(1)(a) of the Administration of Justice Act 1960 (now to be read in conjunction with the amendment to section 12(4) made by section 62(2) of the Children Act 2004 with effect from 12 April 2005);
ii. section 97(2) of the Children Act 1989 (as amended by section 62(1) of the Children Act 2004 also with effect from 12 April 2005);
iii. rule 4.23 of the Family Proceedings Rules 1991 (FPR 1991).

96. As we regard the changes made by section 62 of the 2004 Act as being of considerable importance, we propose to set out at their effect at this point. It is, however, important to bear in mind throughout that the hearing before Judge Cook on 9 December 2004 pre-dated the implementation of the amendments made by the 2004 Act.

97. The relevant parts of AJA 1960 section 12 now read as follows (we have italicised the changes): -

12. Publication of information relating to proceedings in private -

. The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say -

a. where the proceedings -

i. relate to the inherent jurisdiction of the High Court with respect to minors;
ii. are brought under the Children Act 1989;
iii. otherwise relate wholly or mainly to the maintenance or upbringing of a minor.

i. Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of any order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.....

iv. Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section ***(and in particular where the publication is not so punishable by reason of being authorised by rules of court).***

98. CA 1989 section 97(2) now reads: -

ii. No person shall publish ***to the public at large or any section of the public*** *any material which is intended, or likely, to identify -*

a. any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under this Act may be exercised by the court with respect to that or any other child; or

b. an address or school as being that of a child involved in any such proceedings .....

99. FPR 1991, rule 4.23, where relevant, reads: -

Confidentiality of documents

2.Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed other than to -

a. a party,

b. the legal representative of a party,

c. the children's guardian,

d. the Legal Services Commission, or

e. a welfare officer or children and family reporter

f. an expert whose instruction by a party has been authorised by the court

without leave of the judge or district judge.

100. The 2004 Act creates additional rule making powers. Thus the rule making power in Matrimonial &Family Proceedings Act 1984, section 40 now reads: - *Rules made under this section may .... authorise for the purposes of the law relating to contempt of court, the publication in such circumstances as may be specified of information relating to family proceedings held in private.*

101. Similarly, in section 145(1) of the Magistrates' Courts Act 1980 the 2004 Act adds a supplementary paragraph: - *(ga) authorising, for the purposes of the law relating to contempt of court, the publication in such circumstances as may be specified of information relating to proceedings referred to in section 12(1)(a) of the Administration of Justice Act 1960 which are held in private;*

102. Finally, the 2004 Act inserts into section 76 of the Courts Act 2003 (Family Procedure Rules: further provision) after subsection (2) an additional sub-section: *(2A) Family Procedure Rules may, for the purposes of the law relating to contempt of court, authorise the publication in such circumstances as may be specified of information relating to family proceedings held in private.*

103. For completeness we should point out that the 2004 Act also makes similar provisions in relation to rules made under the Adoption and Children Act 2002. We do not, however, propose to address these, both because they do not arise in the present appeals and because, in any event, different and additional considerations relating to confidentiality and disclosure apply in adoption proceedings.

104. It is also right to point out that the FPR 1991 are, as a consequence of the Courts Act 2003 currently undergoing a process of wholesale alteration and amendment with a view, in due course, to the preparation of a consolidated body of rules to be called the Family Procedure Rules, which will govern the whole field of family proceedings at every level of court, and which, so far as is practicable, will be compatible with the Civil Procedure Rules 1998 (CPR). The committee which is overseeing this process is called the Family Procedure Rules Committee, and is chaired by the President. Wall LJ is a member of the committee, and chairs it if the President is unable for any reason to attend one of its monthly meetings. No rules have yet been promulgated to embrace the question of disclosure in the light of the changes made by section 62 of the Children Act 2004. However, the government has consulted on the question, and the terms of such rules are, as a consequence, currently under consideration by the committee and by officials.

105. Mr. Spon-Smith pointed out that irrespective of the changes made by the 2004 Act, the court may of course give permission for the disclosure of documents or information; (1) in the case of s.12(1)(a) of the Administration of Justice Act 1960 by necessary implication; (2) in the case of section 97(2) of the Children

Act 1989 under s.97(4); and (3) in the case of rule 4.23 of the Family Proceedings Rules 1991 by virtue of the final eight words of r.4.23(1).

The arguments of the advocate to the court on disclosure

106. Mr Spon-Smith began his submission by dealing with the position as it had been prior to the passing of the 2004 Act. He pointed out that in none of the cases cited to us in relation to McKenzie friends was the relevance of the restrictions on publication expressly considered. However, in **Re G**, this court had held that 'publication' in s.12 AJA 1960 and 'publish' in s.97 CA 1989 did not necessarily mean communicating to the public, but could include any communication even to a single individual. FPR 1991 r.4.23 used the word 'disclosed'. Thus the fact that disclosure was made for a good reason and in good faith was no excuse.

107. Mr. Spon-Smith also cited from the judgment of Munby J in **Re B (A Child) (Disclosure)** [2004] EWHC Fam 411, [2004] 2 FLR 142 at para.[73]. This was, of course, the decision which provided the catalyst for the 2004 Act. The judge had said: - *'...I need to emphasise that there is a 'publication' for [the] purpose [of AJA 1960 section 12] whether the dissemination of information or documents is to a journalist, a Minister of the Crown, a Law Officer, the Director of Public Prosecutions, the Crown Prosecution Service, the police (except when exercising child protection functions), the GMC, or any other public body or public official.'*

108. It followed, Mr. Spon-Smith submitted, that prior to the enactment and implementation of the 2004 Act, a litigant in person was prohibited from showing documents relating to a children case to, for example, a Citizens Advice Bureau adviser or a McKenzie friend, unless the permission of the court had been first obtained.

109. Mr. Spon-Smith pointed out that in **Re G** the county court judge had made an order that- *'The father is prohibited from disclosing in any manner any papers or documents filed in these proceedings or their content or any school reports he may obtain to either Dr RG or Dr LL or any other expert in parental alienation syndrome or any other agency or organisation such as Families Need Fathers without the specific permission of the court.'*

And that this court had substituted for that an order- *'prohibiting the father either by himself or by his servants or agents until further order from disclosing: (a) any document held by the court; (b) the text or summary of a judgment; or (c) the text or summary of an order to any person: save that in the course of seeking advice as to the conduct of his case the father may disclose a summary of:*

a. The orders made within these proceedings;
b. The nature of any proposed application to the court;
c. The issue or issues to be determined by the court;
d. The position of the other parties and the experts, including CAFCASS.

110. Mr. Spon-Smith then cited the extract from the judgment of Thorpe LJ (with whom Dame Elizabeth Butler-Sloss and Rix LJ agreed, and which we have set out at paragraph 3 above). Mr. Spon-Smith questioned whether permitting the disclosure of summaries was a satisfactory solution. He identified a number of its disadvantages: (1) it did little to preserve confidentiality; (2) it potentially hampered the ability of a McKenzie friend to assist the litigant; (3) it raised the question of who was to compose or approve the summaries (an issue not addressed by this court in **Re G**), especially when there were no *'independent parties'* to the proceedings (such as a children's guardian or a local authority); (4) it was likely to give rise to satellite litigation as to (a) what should be included and what omitted and (b) whether the summary was accurate.

111. Mr. Spon-Smith argued that the right of a litigant in person (subject to the over-riding discretion of the court) to the assistance of a McKenzie friend was significantly emasculated if the litigant could not show the documents in the case to the McKenzie friend. It was, he submitted, difficult to see how (to take one example) a McKenzie friend could suggest questions which the litigant might put in cross-examination if he had not seen the witness's statement. It would also, he suggested, be slightly absurd since - if the McKenzie friend was present during the hearing - he was going to hear the oral evidence, submissions and judgment. It seemed fair to assume that hitherto McKenzie friends in cases relating to children had in fact routinely seen the statements and reports filed in the proceedings without anybody concerned thinking anything of it or (it would seem) any adverse consequences ensuing.

112. Without having any intention to cast aspersions upon the proposed McKenzie friends in the present cases (of whom Mr. Spon-Smith knew nothing) he thought it right to draw attention to the fact that all those to whom disclosure was permitted under FPR 1991 r.4.23(1) were (other than the parties themselves) acting in a professional or official capacity. Thus Mr Spon-Smith submitted that it might be considered appropriate as a condition of giving permission for disclosure to a lay adviser to require them to give a written undertaking to the court not to make or permit further disclosure without the court's permission.

113. Subject to that proviso, Mr. Spon-Smith invited the court to indicate that the normal expectation should be that a lay adviser will be allowed to see the case papers, and that courts of first instance should regard applications for permission to disclose the case papers to McKenzie friends (or CAB advisers or the like) as being of a routine nature, with a presumption in favour of permission being granted unless really cogent reasons for not doing so could be shown. The matter should ordinarily be dealt with by the district judge at the directions stage. Legally represented parties should be strongly discouraged from opposing such applications in all save really exceptional cases. The order made should ordinarily apply to documents to be filed in future as well as those already filed; the onus should be on the party filing a document thereafter to apply for an order that it be not disclosed to the McKenzie friend if that was justified by truly exceptional circumstances.

114. For the sake of completeness, Mr. Spon-Smith drew our attention to the guidance note recently issued by the office of the President of the Family Division, published at [2005] 35 Fam. Law 405. This identifies what a McKenzie friend may and may not do. It did not, however, deal with the question of disclosing documents or information to the McKenzie friend to enable him to do those things.

The submissions of the advocate to the court with specific reference to Mr. Whelan's case

115. Mr. Spon-Smith reminded us of the grounds upon which counsel for the mother had opposed disclosure, which we have set out at paragraph 46. He pointed out that Mr. Whelan had expressly sought permission to disclose the papers to *'the investigators'* - apparently connected with the local government ombudsman - as well as to his McKenzie friend. As to the former, Mr. Spon-Smith noted that counsel for the mother suggested that the initiative should come from the ombudsman. She had opposed disclosure to the McKenzie friend on the ground that the court file disclosed *"highly confidential and sensitive material"* and because the proposed McKenzie friend was a member of Families Need Fathers, a matter that raised concern on the part of those representing the mother.

116. Mr. Spon-Smith also pointed out that according to the order dated 9 December 2004 as drawn up (which may or may not accurately reflect what the judge intended) Mr. Whelan had been given permission to disclose to his McKenzie friend-

a. a copy of his position statement dated 28 November 2004;
b. a copy of the hearing (sic) on 9 December 2004;
c. a copy of the mother's summary of background for the hearing on 9 December 2004;
d. a copy of the mother's statement of issues for the hearing on 9 December 2004; and
e. all mother's documents dated 9 December 2004.

117. An order of this kind, Mr. Spon-Smith submitted, avoided some of the disadvantages inherent in permitting the disclosure of summaries (for example, who is to prepare them; what can be included and what must be omitted; and the risk of satellite litigation). On the other hand, its utility in enabling the McKenzie friend to assist the litigant effectively was limited. Furthermore it was restricted to documents relating to or preceding the hearing at which the order was made, which meant that any future documents could not be disclosed without a further order of the court.

118. The judge had not dealt expressly with the application for permission to disclose the papers to the local government ombudsman. In Mr. Spon-Smith's view, the reasons for this application need to be elaborated. It was to be noted that in his appellant's notice Mr. Whelan was now also asking for permission to disclose to the *'Information Commissioner's investigating officer, and the Police'*.

119. Mr. Spon-Smith submitted that in principle, a public authority with a proper interest in the proceedings, or the background to them, should be allowed access to relevant documents. There seemed to be no good reason why the initiative should always be left to the authority concerned - which would not know what material of relevance the documents may contain.

120. Finally, and in view of the implied criticism of Families Need Fathers by counsel in this case, Mr. Spon-Smith thought it only fair to draw attention to the fact that the assistance given by that organisation has been judicially commented upon in favourable terms. He cited to us paragraph 33 of Thorpe LJ's judgment in **Re G** at page 969, which we have set out at paragraph 3 of his judgment.

The argument for the Respondent in this court

121. For the Respondent to the appeal, Ms Meena Gill put in a three page skeleton argument which is dated 26 April 2005. We repeat the thrust of the comments which we made above in relation to the late presentation of Mr Duncan Watson's skeleton. In Ms Gill's case the default was mitigated by the fact that the skeleton argument was brief and to the point. Moreover, the bulk of Ms Gill's submissions were directed to Mr. Spon-Smith's skeleton argument.

122. Ms Gill pointed out that her client was opposed to disclosure of confidential documents to a McKenzie friend she did not know, and whose details were not recorded on the court file. It followed that the McKenzie friend was unregulated, and that there was no sanction should he act in an unacceptable way. She repeated the argument that the case papers revealed highly sensitive personal information and allegations, and that the effect of disclosure on her client should be considered, given her responsibility for the care of the children.

123. Ms Gill objected to disclosure to the local government ombudsman and the police on the grounds that there was no evidence from either that they sought disclosure of the papers. Mr. Whelan's motives for disclosure were not known, although it was known that he had sought to bring charges of perjury against the author of the local authority's section 7 report. It was open, Ms Gill argued, for the ombudsman and the police to make an application for disclosure: neither had done so. Confidentiality existed to protect children against unnecessary intrusion: there was no warrant for disclosure in this case. The disclosure ordered by the judge was sufficient to enable Mr. Whelan and the McKenzie friend to present his case. The judge had not been plainly wrong to limit disclosure in the manner in which he had.

Discussion

124. The first point we wish to make is that in our judgment, the term McKenzie friend is here to stay. In 1991, Lord Donaldson of Lymington, in **R v Leicester City Justices and another, ex parte Barrow and another** [1991] 2 QB260 at 289 expressed *"the fervent hope .... that we shall hear no more of "McKenzie friends" as if they were a form of unqualified legal assistant known to the law." Such terminology obscures the real issue which is fairness or unfairness. Let the "McKenzie friend" join the "Piltdown man" in decent obscurity.*

125. Whilst we fully understand, and do not disagree with the point the Master of the Rolls was making in the second sentence of that citation, the passage of time has, in our view, demonstrated that the term McKenzie friend has become well recognised and understood by lawyers and litigants alike and aptly summarises a well-defined function. We note that the recent guidance from the President's office on McKenzie friends, to which we referred in paragraph 114 uses the term throughout. That guidance identifies what a McKenzie friend may and may not do. In our judgment, in the tradition by which lawyers from every discipline borrow the names of their clients (and occasionally the judiciary) to define the terms they use (**Gillick** competent, **Calderbank** letters, **Duxbury** calculations, **Segal** orders - to name but a few at random) the term McKenzie friend is well understood, has proved useful, and is here to stay, at least for the foreseeable future.

126. Our second point is that we fully endorse the Guidance from the office of the President referred to in the previous paragraph. Nothing in this judgment is to be read as in any sense being in conflict with it. To the contrary, whilst some points we make may contain a different or slightly stronger emphasis than that contained in the guidance, everything in this judgment is, in our view, in conformity with it. For example, the Guidance contains the following two bullet points: -

- *A litigant in person wishing to have the help of a McKenzie Friend should be allowed to do so unless the judge is satisfied that fairness and the interests of justice do not so require. The presumption in favour of permitting a McKenzie Friend is a strong one.....*
- *The court may refuse to allow a McKenzie Friend to act or continue to act in that capacity where the judge forms the view that the assistance he has given, or may give, impedes the efficient administration of justice. However, the*

court should also consider whether a firm an unequivocal warning to the litigant and / or the McKenzie Friend might suffice in the first instance.

127. The court must plainly retain control over its own procedure. We use slightly different language in our summary in paragraph 128 below, but the underlying principles being applied are, in our view, the same.

128. Thus dealing firstly with the manner in which applications for the appointment of a McKenzie friend should be treated, we have already made it clear that we accept in their entirety the submissions made to us by Mr. Spon-Smith. In particular, we highlight the following points: -

1. The purpose of allowing a litigant in person the assistance of a McKenzie friend is to further the interests of justice by achieving a level playing field and ensuring a fair hearing. We endorse the proposition that the presumption in favour of allowing a litigant in person the assistance of a McKenzie friend is very strong, and that such a request should only be refused for compelling reasons. Furthermore, should a judge identify such reasons, (s)he must explain them carefully and fully to both the litigant in person and the would-be McKenzie friend.

2. Where a litigant in person wishes to have the assistance of a McKenzie friend in private family law proceedings relating to children, the sooner that intention is made known to the court and the sooner the court's agreement for the use of the particular McKenzie friend is obtained, the better. In the same way that judicial continuity is important, the McKenzie friend, if he is to be involved, will be most useful to the litigant in person and to the court if he is in a position to advise the litigant throughout.

3. We do not think it good practice to exclude the proposed McKenzie friend from the courtroom or chambers whilst the application by the litigant in person for his assistance is being made. The litigant who needs the assistance of a McKenzie friend is likely to need the assistance of such a friend to make the application for his appointment in the first place. In any event, it seems to us helpful for the proposed McKenzie friend to be present so that any concerns about him can be ventilated in his presence, and so that the judge can satisfy her / himself that the McKenzie friend fully understands his role (and in particular the fact that disclosure of confidential court documents is made to him for the purposes of the proceedings only - as to which see paragraphs 132 to 138 below) and that the McKenzie friend will abide by the court's procedural rules.

4. In this context it will always be helpful for the court if the proposed McKenzie friend can produce either a short curriculum vitae or a statement about himself, confirming that he has no personal interest in the case, and that he understands both the role of the McKenzie friend and the court's rules as to confidentiality.

5. We have already stated that any litigant in person who seeks the assistance of a McKenzie friend should be allowed that assistance unless there are compelling reasons for refusing it. The following, of themselves, do not, in our judgment, constitute compelling reasons: -
   i) that the litigant in person appears to the judge to be of sufficient intelligence to be able to conduct the case on his own without the assistance of a McKenzie friend;
   ii) the fact that the litigant appears to the judge to have a sufficient mastery of the facts of the case and of the documentation to enable him to conduct the case on his own without the assistance of a McKenzie friend;
   iii) the fact that the hearing at which the litigant in person seeks the assistance of a McKenzie friend is a directions appointment, or a case management appointment;
   iv) (subject to what we say below) the fact that the proceedings are confidential and that the court papers contain sensitive information relating to the family's affairs.

129. We do, of course, understand the point made to us by both Mr Duncan Watson and Ms Gill that a parent who is in conflict with his or her former partner or spouse may well be wary of allowing a stranger who is not legally qualified into a private hearing in order to assist his or her estranged partner in relation to the dispute between them. But we think there are several powerful factors which properly outweigh a reliance on any such reluctance. The first is the compelling Article 6 argument. In each of the cases before us, the party opposing the litigant in person was legally represented by solicitors and counsel. Even if the litigant in person is unrepresented from choice, the Article 6 argument for allowing him a McKenzie friend remains powerful.

130. Secondly, the proceedings remain confidential. The presence of the McKenzie friend does not affect the confidentiality of the proceedings. Thirdly, as Mr. Spon-Smith pointed out, participation in court proceedings involves a discussion of personal matters in front of a variety of strangers, albeit that they have an official function of some kind or another. There is, of course, currently a great deal of pressure to open up the family courts. As the law currently stands, the Press is entitled to be present in the Family Proceedings Court (see Magistrates' Courts Act 1980, section 69(2)(c)), although it is a right rarely taken up, and rule 16(7) of the Family Proceedings Courts (Children Act 1989) Rules 1991 gives the court the power to exclude the press and hear the case in private "if the court considers it expedient in the interests of the child". If journalists are to be admitted to hearings in chambers in the County Court and the High Court, parties will have to become accustomed to giving evidence in their presence.

131. Finally, and this is the point to which we now turn, the court can, in our view, ensure that the confidentiality of the proceedings is protected against unauthorised wider disclosure of information.

Disclosure of court documents to McKenzie friends

132. We accept the arguments addressed to us on the disclosure issue by Mr. Spon-Smith. The critical question, in our judgment is whether or not the court's permission for the disclosure of court documents to a McKenzie friend is now necessary.

133. Section 62 of the 2004 Act marks a clear relaxation of the rules relating to the disclosure of confidential information in family proceedings. It has not, however, fundamentally altered the law. It may have limited the extent to which certain types of disclosure are a contempt of court, but it has not repealed AJA 1960 section 12, or CA 1989 section 97, nor has it affected the underlying confidentiality of the information generated by family proceedings. That said, it is, in our judgment, difficult to describe a court sanctioned McKenzie friend as "the public at large or any section of the public". We therefore see no reason in principle why a litigant in person should not disclose the court papers to his court sanctioned McKenzie friend. At the same time, however, the McKenzie friend must appreciate that disclosure is being made for the purpose of enabling the litigant in person effectively to present his case and thus to ensure a fair hearing. The documents and information disclosed to the McKenzie friend must not be used by the McKenzie friend for any other purpose. Access to the court documents thus brings with it a clear responsibility on the part of the McKenzie friend not to disclose them or publish the information they contain to any third party or outside body without the court's permission.

134. In the context of disclosure to a McKenzie friend therefore, emphasis in our judgment needs to be placed not only on the purpose for which disclosure of the information is required, but also the use to which the person receiving the information puts it. In our judgment, the argument that it is inappropriate for a McKenzie friend to have access to confidential and in some cases sensitive family information is best met by the judge ensuring, as a matter of practice, that whenever an application is made by a litigant in person for the assistance of a McKenzie friend, both the litigant in person and the McKenzie friend express their clear understanding to the judge of the role of the McKenzie friend and in particular the responsibility which the McKenzie friend has in relation to ensuring that the documents to which he is being given access are being disclosed to him for the sole purpose of assisting the litigant in person present his case in the proceedings.

135. We therefore entirely endorse Mr. Spon-Smith's suggestion that the court should require an assurance from both the litigant in person and the McKenzie friend that the documents will be used only for the purpose of the proceedings and to enable the litigant in person to obtain advice about how to conduct his case. For the reasons we give in paragraph 137 below, we do not think a formal undertaking is required. The McKenzie friend will need to understand, however, that it will remain a contempt if he publishes that information to the public at large or a section of the public without the permission of the court.

136. Thus in Mr. Whelan's case, where there was a substantive hearing due to take place during the period over which this judgment has been reserved, we informed the parties that we proposed to make a direction that Mr. Whelan was to be at liberty to show his McKenzie friend all of the papers on the court file, provided that both he and the McKenzie friend accepted that the disclosure was strictly for the purposes of the proceedings and that there was to be no further disclosure by the McKenzie friend to anyone else without the permission of the court.

137. In our judgment, this practice meets the objections raised by Ms Gill in the instant case, and should meet the objections raised in other cases. The extent to which disclosure to a McKenzie friend can take place without an order of the court will, ultimately, be defined by Rules. Our present view, however, is whilst good practice requires the litigant in person to identify and obtain the court's agreement to his use of a particular McKenzie friend, it should not be considered a contempt of court for a litigant in person to seek advice prior to any application to the court from a proposed McKenzie friend, in the same way that it will be legitimate for a litigant in person to consult an organisation such as the Citizen's Advice Bureau, or Families Need Fathers, or a particular mediation service. In seeking that advice, we are of the opinion that it is not a contempt if the litigant in person shows court documents to the person from whom the advice is being sought. The critical point is that those to whom the documents are shown appreciate that they are being shown the documents for the purpose of giving advice, and that wider dissemination of the documents is not permissible. On this basis, we would agree with the last 5 lines of paragraph 37 and answer in the negative the hypothetical questions posed by Thorpe LJ in paragraphs 32 to 36 of his judgment in **Re G** set out at paragraph 3 above.

138. Plainly, once the McKenzie friend has been accepted by the court, and provided that an appropriate assurance is given by the litigant in person and the McKenzie friend about the use of court documents, orders for disclosure of documents to McKenzie friends should not be necessary. We repeat, however, that if a litigant in person is to seek the assistance of a McKenzie friend, the earlier that is done the better; and in the same way that judicial continuity is desirable, it would usually be preferable if the same McKenzie friend appeared throughout.

Disclosure by the litigant to outside bodies such as the Local Government Ombudsman and the police

139. Like Mr. Spon-Smith, we can see no objection in principle to disclosure of court documents to a public authority with a proper interest in the subject matter of the disclosure. Such a body would not seem to us to be either "*the public at large or any section of the public*" within CA 1989 section 97(2) as amended by the 2004 Act. Such bodies moreover would have a public duty only to use the documents for an appropriate statutory purpose, and if in any doubt would be able to seek the court's assistance. Equally, we see no force in the argument that the initiative for disclosure should be left to the statutory body which, as Mr. Spon-Smith pointed out, would not know what material of relevance the documents contained. Equally, if a body such as the local government ombudsman takes the view that it has no jurisdiction to investigate the complaint it will no doubt say so, and return the papers.

140. We therefore see no reason why Mr. Whelan should not be given permission to disclose papers to the local government ombudsman, and we also accordingly allow his appeal in this regard.

The outcome of the three appeals

141. For the reasons we have given, Judges Milligan and Norrie were plainly wrong to refuse Mr. O'Connell and Mr. Watson the assistance of a McKenzie friend. In each case, we set aside their orders in this respect and allow Mr. O'Connell and Mr. Watson the McKenzie friend of their choice. Judge Cook was also wrong, we think, to limit the disclosure he allowed Mr. Whelan to make to his McKenzie friend and to refuse him permission to disclose papers to the local government ombudsman However, we think it only fair to say that Judge Cook's judicial instinct was, we think, sound, and that if he had had the assistance available to us, we are confident he would have decided the matter the other way.

142. In all three cases, therefore, the appeals will be allowed. We dealt separately with Mr. O'Connell's substantive application on 28 April.

The three Appellants Appeared in Person
Meena Gill (instructed by Children & Families Law Firm - Solicitors) for the Respondent in Mr Whelan's case
Duncan Watson (instructed by Hamnett, Osborne and Tisshaw - Solicitors) for the Respondent in Mr Watson's case
Robin Spon-Smith (instructed by CAFCASS legal) - Advocate to the Court