Neutral Citation Number: [2020] EWHC 1204 (Admin)

Case No: CO/26/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2020

Before :

DAME VICTORIA SHARP
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
And
MR JUSTICE WILLIAM DAVIS

- -

Between :

TI	**Claimant**
- and -	
BROMLEY YOUTH COURT	**Defendant**

- -
- -

Joanne Cecil (instructed by **Just for Kids Law**) for the **Claimant**
The Defendant and Interested Party did not attend

Hearing dates: 13 May 2020

- -

Approved Judgment

Dame Victoria Sharp, P.

1. At the hearing of this application for judicial review yesterday, we announced that we quashed the decision challenged by the claimant and that we would give our reasons later. These are our written reasons.

Introduction

2. The claimant (TI) is now 15, his date of birth being 3 April 2005. He is awaiting trial at Bromley Youth Court in respect of charges of theft and breach of a criminal behaviour order.

3. On 13 October 2019 a woman, Ms H, was walking along Peckham Road, Camberwell in South East London. A group of young males on bicycles rode up behind her. One of the group snatched the mobile telephone she had in her hand. The group rode away. Approximately five minutes later police officers saw a group of young males on bicycles in Peckham High Street. They recognised the claimant as one of the group. They also recognised a young male to whom we shall refer as DB as being part of the group. Under the terms of the criminal behaviour order to which the claimant was subject, he was prohibited from associating with DB in public.

4. The police officers were aware of the incident involving Ms H. They drove in the direction taken by the group of young males. Within a short period of time they saw the claimant on foot emerging from a nearby estate. They arrested him and took him to Walworth Police Station. At the police station it transpired that the claimant had a small quantity of cannabis in his possession.

5. The claimant was interviewed by the police. He was represented by a solicitor. His mother acted as an appropriate adult. He admitted possession of cannabis. He provided a prepared statement which read:

> "My name is [TI] and in relation to this allegation I deny being involved in any robbery. I was not opposite the Sainsbury's on Peckham Road. In fact I was not on Peckham Road at all that evening. I do not know anything about a robbery. I was in Peckham Hill Street and did not go to that area. In relation to the breach I was not in contact with [DB]. We did not associate or speak to each other in public. He also lives in the same area so it is of course possible that we are in the same area by chance but there was no association. I was with a friend that I am allowed to associate with."

6. On 14 October 2019 Ms H took part in a video identification parade. She identified the claimant as the person who had taken her mobile telephone.

7. On 15 October 2019 the claimant made his first appearance at Bromley Youth Court. He pleaded guilty to possession of cannabis and not guilty to the charges of theft and breach of a criminal behaviour order. The District Judge was provided with a

Preparation for Effective Trial (PET) form. On the form the claimant 's solicitor identified the disputed issues of fact, namely the claimant was not the company of DB, the police officers being mistaken in their recognition, and the claimant was not present at the time of the theft, the identification of him by Ms H being disputed. The solicitor also indicated that there was a psychological report which indicated that the claimant had learning difficulties and recommended the appointment of an intermediary for the effective participation of the claimant in the proceedings. The District Judge ordered any intermediary report to be served by 12 November 2019.

8. On 29 November 2019 the case was listed for a further case management hearing before District Judge (Magistrates' Courts) Hammond. She was not the judge who had conducted the first hearing. She had the psychological report to which reference had been made on the PET form. She also had a report from an intermediary. The District Judge set a trial date: 8 January 2020. The claimant through his solicitor had applied in writing for the appointment of an intermediary to support the claimant throughout the trial. After oral argument the District Judge refused the application.

9. The claimant now applies with permission granted by Mr Justice Supperstone for judicial review of the decision of the District Judge refusing to appoint an intermediary and for an order requiring the appointment of an intermediary. The trial as listed 8 January 2020 was vacated by an order of Mr Justice Pepperall following an application for interim relief. The proceedings in the Bromley Youth Court have been stayed until the outcome of these proceedings. Neither the court nor the Crown Prosecution Service as interested party has made any submissions.

The decision of District Judge (Magistrates' Court) Hammond

10. The District Judge gave her reasons for refusing to appoint an intermediary in a short ex tempore judgment delivered on 29 November 2019. No recording was made of the judgment. However, the District Judge provided a statement dated 4 January 2020 to assist this court in its consideration of the application for interim relief. It sets out the reasons for her decision as taken from the notes she made during the hearing and from her memory of the hearing.

11. The District Judge identified seven factors as relevant to her decision. First, she observed that the Youth Court is a specialist jurisdiction well-accustomed to dealing with vulnerable young people. She considered that the recommendations in relation to questioning of the claimant were familiar in that jurisdiction and were not unusual or technical in nature. Second, she referred to *Rashid* [2017] EWCA Crim 2 as authority for the proposition that the bar of the appointment of an intermediary is a high one. She said that the court could adapt its processes to allow the Claimant 's participation in the proceedings. Third, she was able to make and did make directions to facilitate the recommendations of the intermediary. Fourth, a ground rules hearing on the morning of trial would ensure that the recommendations were followed. Fifth, the claimant had appeared in court on four previous occasions. In April 2019 he had been convicted after a trial. He had given evidence. He had not been assisted by an intermediary. There had been no appeal against the safety of that conviction. Sixth, the prepared statement provided to the police during the interview demonstrated that he had sufficient understanding of the issues and an ability to provide instructions to solicitors to allow him to conduct his case. Finally, the case was a "lawyers only" case. Given the nature of the evidence, his participation would be very limited. Were

he to give evidence, it would simply be to say that he was not there. The District Judge stated that she would not draw an adverse inference were the claimant not to give evidence.

12. The directions given by the District Judge were as follows:

(a) Ground rules hearing 10.00 a.m. on morning of trial.

(b) Claimant to be permitted to have suitable adult of his choice to sit alongside him at court at all times and to provide props for the claimant to handle during the trial as required.

(c) Both advocates at trial to be experienced Youth Court advocates and to undertake to the court that they are familiar with the relevant Advocates' Toolkit.

(d) A ten-minute break to be allowed for every hour of court sitting (as a minimum).

(e) Defence solicitors to provide prop cards as recommended by the intermediary.

The claimant 's previous court appearances

13. The claimant has a substantial history of appearances in the Youth Court. His first finding of guilt was in September 2017 when he was aged 12. He was made the subject of a referral order for an offence of robbery. He appeared twice when he was aged 13, once for an offence of robbery and once for common assault. Between 24 April 2019 and 8 October 2019 he appeared and was sentenced on six separate occasions for a variety of offences: affray; possession of cannabis; breach of criminal behaviour order; robbery.

14. On the face of the Police National Computer record the claimant pleaded guilty on each occasion save for 24 April 2019. On this date he pleaded not guilty to an offence of affray. The finding of guilt of that offence followed a trial in the Youth Court.

The reports of the psychologist and the intermediary

15. The reports on which the claimant relied in making the application to the District Judge for the appointment of an intermediary had been prepared in anticipation of a trial listed on 16 September 2019 in respect of a charge of robbery. A written application for the appointment of an intermediary for the duration of that trial was submitted to the court on 13 September 2019. In the event it was not pursued because the claimant admitted his guilt and no trial took place. This was the case in respect of which he was sentenced on 8 October 2019. No point was taken by the District Judge as to the fact that the reports were based on assessments made in August and September 2019 in relation to a different set of criminal proceedings. We conclude that she did not consider that this was relevant to her decision. This must have been because, given their nature, the assessments were equally valid in relation to the charges on which the claimant was due to be tried in January 2020.

16. The intermediary, Danielle Marron, assessed the claimant on 27 August 2019 in a meeting which lasted an hour and ten minutes. She found that the claimant was reluctant to engage with assessment tasks and quickly became bored. He did engage after encouragement from the intermediary with whom he built up a rapport over the period of the meeting. The claimant even then was frequently distracted. His concentration was poor. If he did not understand something his reaction was to disengage. Ms Marron provided him with calming aids which were of some assistance but only in combination with interaction with her. He did not have a good understanding of the kind of vocabulary used in the context of court proceedings. Taken in combination these factors led her to recommend that the claimant should be assisted by an intermediary throughout the hearing. Ms Marron concluded that the claimant not only had difficulties in dealing with questions but also in understanding anything communicated by the spoken word. She noted difficulties in explaining events in sequence. These were issues which would be of significance were he to give evidence. She made nine different recommendations in relation to examining or cross-examining the claimant in court.

17. The psychologist, Dr Karen Hathaway, assessed the claimant on 10 September 2019. She also discussed his position with his mother and his YOT worker and had access to an Education, Health and Care Plan dated 2 May 2018. She noted that the claimant had not attended school since November 2017. Dr Hathaway carried out a range of psychological tests. The claimant 's general cognitive ability, his verbal comprehension and his working memory were measured as being in the lowest two percentiles of the population. She also attempted a more general assessment of the claimant. This was cut short because he displayed the same lack of engagement and concentration as he had with Ms Marron. From all of the material she was able to consider, Dr Hathaway concluded that the claimant was socially detached from his family, education and society in general. Dr Hathaway's conclusion was that he would not be able to engage with the trial process or to understand the need to participate without assistance throughout the trial from an intermediary with experience of dealing with problematic children. She recommended breaks in any court proceedings every 45 minutes.

The legal framework

18. There is no statutory basis upon which an intermediary can be appointed to assist a defendant. Section 33BA of the Youth Justice and Criminal Evidence Act 1999 has yet to be brought into effect. Even when it does come into effect, this legislates only for "a direction that provides for any examination of the accused to be conducted through an interpreter or other person approved by the court for the purposes of this section ("an intermediary")." It does not extend the function of an intermediary beyond the defendant giving evidence.

19. However, it is not in doubt that a court, including a Youth Court, can appoint an intermediary to assist a defendant as part of its inherent jurisdiction. No further authority for this proposition is needed than the current iteration of the Criminal Practice Directions which are the law and are binding on all courts: CPD 1A.3. The appointment of an intermediary is dealt with at CPD 3F. Paragraphs 3F.11-18 deal with the position of intermediaries for defendants in general. The passage most commonly cited appears at CPD 3F.13:

> "The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial. Terms of appointment are for the court and there is no illogicality in restricting the appointment to the defendant's evidence (R v R[2015] EWCA Crim 1870), when the 'most pressing need' arises (OP v Secretary of State for Justice[2014] EWHC 1944 (Admin)). Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare…"

20. Paragraphs 3F.24-26 deal specifically with intermediaries for defendants under the age of 18. In CPD 3F.25 it is stated that there is no presumption that a defendant under the age of 18 will be assisted by an intermediary at court. Rather, "the decision should be made on an individual basis in the context of the circumstances of the particular case."

21. There is a significant body of authority in relation to the appointment of an intermediary to assist a defendant. Most of the decided cases relate to adult defendants. *C v Sevenoaks Youth Court* [2009] EWHC 3088 Admin is a decision of this court which, as is apparent, concerned the Youth Court. The defendant in that case was a 12 year with very complex mental health issues. He clearly required an intermediary throughout the trial. This court quashed the decision of the Youth Court revoking an earlier appointment of an intermediary. The Youth Court had only revoked the order due to a misunderstanding of its inherent powers. The decision in *C* provides no assistance as to the general principles to be applied when considering the appointment of an intermediary.

22. The most recent consideration of the way in which a court should approach the appointment of an intermediary is to be found in *R v Dean Thomas* [2020] EWCA Crim 117 in which Lord Justice Fulford, Vice President of the Court of Appeal, Criminal Division took the opportunity to review all of the significant authorities including *R v Cox* [2012] EWCA Crim 549, *R v Rashid* [2017] EWCA 2 and *R v Biddle* [2019] EWCA Crim 86. It is not necessary for us to repeat that review. However, we do repeat and adopt those parts of the Lord Justice Fulford's judgment which set out the core principles. These passages follow on from his citation of the Criminal Practice Direction:

> "The experience of the courts as reflected in the Practice Direction is, therefore, that there will be cases when the needs of the defendant and the circumstances of the trial will be such that an intermediary will be required for the entire trial, whilst in others, notwithstanding the defendant's difficulties, a fair trial can be secured without the appointment of an intermediary for any stage of the proceedings. There are of course other variations coming somewhere between these two extremes. An intermediary may only be necessary for a particular part or for particular parts of the trial process, such as the defendant's evidence.

> As this court observed in R v Grant Murray [2017] EWCA Crim 1228, at paragraph 225, there have been very significant improvements in recent years to ensure vulnerable defendants participate effectively. These include "the provision of intermediaries for defendants when necessary" (paragraph 225).
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> As set out above, in the Practice Direction it is observed that the appointment of an intermediary for the defendant's evidence will be a rare occurrence and that it will be exceptionally rare for a whole trial order to be made. That projection as to frequency serves as an important reminder to judges that intermediaries are not to be appointed on a "just-in-case" basis or because the report by the intermediary, the psychologist or the psychiatrist has failed to provide the judge with a proper analysis of a vulnerable defendant's needs in the context of the particular circumstances of the trial to come. These are fact-sensitive decisions that call for not only an assessment of the relevant circumstances of the defendant, but also the circumstances of the particular trial. Put otherwise, any difficulty experienced by the defendant must be considered in the context of the actual proceedings which he or she faces.
>
> Criminal cases vary infinitely in factual complexity, legal and procedural difficulty, and length. Intermediaries should not be appointed as a matter of routine trial management, but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure he or she can effectively participate in the trial. The assessment in the Practice Direction as to the number of instances when this is likely to occur, albeit an important reminder to the judge to apply the most careful scrutiny to these applications, cannot derogate from the need to appoint an intermediary as identified by the Lord Chief Justice in Grant Murray "when necessary".
>
> It follows that these applications need to be addressed carefully, with sensitivity and with caution to ensure the defendant's effective participation by whatever adaptation of the usual arrangements is required. The recommendation by one or more experts that an intermediary should be appointed is not determinative of this issue. This is a question for the judge to resolve, who is best placed to understand what is required in order to ensure the accused is fairly tried…."

23. The particular defendant with whom Lord Justice Fulford was concerned in *Thomas* was an adult defendant. His observations were of general application. They are relevant to young defendants as is clear from his reference to *Grant-Murray* (to which we shall return when considering some of the more general submissions made on behalf of the claimant), a case in which some of the defendants were aged 14. The

essential point is that any defendant in any criminal proceedings must have a fair trial. Where a defendant cannot participate effectively in the proceedings, whether in whole or in part, he will not have a fair trial. Particular problems may arise in cases involving vulnerable young defendants and a court must be vigilant to consider how issues of concentration and understanding may affect such a defendant's ability to participate in his trial. We note also that, where the defendant is under 18, the court is under a duty to "have regard to the welfare of the child or young person" pursuant to Section 44(1) of the Children and Young Persons Act 1933. This statutory duty essentially is mirrored by the provisions of Article 3(1) of the UN Convention on the Rights of the Child identifying the rights of the child as being a primary consideration for any court taking a step in respect of a child.

24. It is necessary for us to consider one of the authorities reviewed in *Thomas* since it is referred to specifically by District Judge Hammond in her statement. In *Rashid* the defendant was a 19-year-old man charged with terrorism offences. He was not someone with any significant impairment of intelligence and/or social functioning though he was assessed as being of low intelligence. Two psychologists and an intermediary had provided reports recommending that the defendant should be assisted by an intermediary throughout his trial in the Crown Court. The trial judge decided that this was not necessary to ensure a fair trial. Rather, he appointed an intermediary to assist the defendant simply when he was giving evidence. The Court of Appeal, Criminal Division rejected an argument that this decision was wrong. The submission made was two-fold: it was wrong of the judge to have substituted his own view for that of the experts; it was illogical to restrict the appointment of an intermediary to the point at which the defendant gave evidence given his low intelligence.

25. At the time of the trial with which *Rashid* was concerned, CPD 3F.13 to which we have referred had not yet been introduced. The Court of Appeal expressed the common law position as follows:

> "…it is necessary for us to determine the position as it was under the inherent powers of the court to assist the defendant give best quality evidence, participate in his trial and receive a fair trial. In the overwhelming majority of cases, competent legal representation and good trial management will provide this. There may be rare cases where what is provided by competent legal representation and good trial management is insufficient because of the defendant's mental or other disability. What may then be required is an intermediary…."
>
> There can be no doubt that the order made by the judge for an intermediary during the giving of the defendant's evidence was, for the reasons we have explained, the most common form of order in what, amongst the considerable volume of cases dealt with in the criminal courts, is the rare case where the threshold of disability is crossed such that an intermediary is required when the defendant gives his evidence. For the reasons we have given, cases in which an order will be made for an intermediary to be present for the whole trial will be very rare.

26. The effect of *Rashid* is that a court will always consider what is necessary for a defendant to receive a fair trial. In most cases that will be achieved by the legal representation provided to the defendant and by appropriate management of the trial process by the judge. That is the context in which the court in *Rashid* said that an order for an intermediary for the whole trial will be very rare. Self-evidently this requires the judge to assess whether competent representation and good trial management can overcome the issues affecting a particular defendant in a particular case.

The claimant 's submissions

27. Wide ranging written submissions were made to us (a) on the impact of "international laws and norms" as they were described in the skeleton argument provided in advance of the hearing; and (b) on the treatment generally of young people in the court. We did not find these submissions of assistance.

28. In relation to the former point, we adopt what was said by the then President of the Queen's Bench Division, Sir Brian Leveson, in *R v Markham* [2017] EWCA Crim 739 in the context of an appeal relating to the issue of reporting restrictions in relation to a young defendant and whether a judge had erred in lifting those reporting restrictions:

> "…..submissions in this area of the law should focus on the facts of the particular case relevant to the exercise of the court's judgment, rather than the siren calls of abstract principles that have already informed the approach which the courts adopt."

We consider that similar considerations apply to any appeal against the decision of a court in relation to special measures.

29. The latter point is summarised in paragraph 50 of the skeleton argument which reads as follows:

> "The general consensus is that the measures currently deployed are simply not good enough to ensure effective participation. See also the Law Commission report 'Unfitness to Plead (Law Com No. 364) and the Review of the Youth Justice System in England and Wales by Charlie Taylor pointing to significant deficits in the Youth Court (Chapter 4), notwithstanding the adjustments made to facilitate a child's participation."

30. A submission that current measures – which include the provision of an intermediary – cannot ensure effective participation is of no assistance to us in determining whether a District Judge erred when considering the appointment of an intermediary. Insofar as this is an invitation to provide a judicial view on the so-called general consensus, we reject the invitation. We can only apply the law as it is. Indeed, the claimant 's case is that a proper application of the principles would have led to an appointment of

an intermediary in his case. We understand the evidence adduced on his behalf to be that this would ensure that he could participate effectively in his trial.

31. We observe also that the submission made at paragraph 50 of the skeleton argument was made in almost precisely the same terms by the appellants in *Grant-Murray and others* [2017] EWCA Crim 1228. Paragraph 223 of the judgment in that case sets out the submission then made:

> "In addition, counsel for the applicants contended that despite the significant improvements made consequent on the decision of the Strasbourg Court and continually updated through the Practice Directions, and relying on the Law Commission report 'Unfitness to Plead (Law Com No. 364) and the Review of the Youth Justice System in England and Wales by Charlie Taylor December 2016, "the general consensus is that the measures currently deployed are simply not good enough to ensure effective participation"."

32. The judgment continues at paragraphs 224 and 225:

> "We reject the assertion that 'the general consensus is that the measures currently deployed are simply not good enough to ensure effective participation'.
>
> The material upon which reliance was placed does not take into account the very significant improvements made in recent years to ensure vulnerable defendants participate effectively in the trial process and the wide range of special measures designed specifically to cater for the needs of the vulnerable; we do not criticise the Commission, as the changes are moving at a pace that may not be readily discernible without detailed study of the changes and the development of the case law. They include the provision of intermediaries for defendants when necessary, the extensive training of judges and advocates (a national roll out of the training of advocates is currently underway), the provision of and repeated judicial endorsement of advocacy toolkits for questioning vulnerable witnesses and the holding of ground rules hearings designed to ensure the particular needs of individual witnesses and defendants are met."

33. The constitution of the court in *Grant-Murray* included the then Lord Chief Justice and the then Vice President of the Court of Appeal, Criminal Division. We agree with and endorse the observations made in *Grant-Murray*. In the course of the hearing before us, counsel explained that she had not appreciated that, in her written submission in this case, she had so closely followed the submission made in *Grant-Murray*. Whatever the position, the submission does not acknowledge developments since 2017 such as the requirement for any barrister who intends to undertake work in the Youth Court to register this intention with the Bar Standards Board. Any barrister so registered will be subject to spot checks in respect of competence.

34. We turn to the more focused criticisms made of the District Judge's decision based on the facts and the circumstances of the claimant and his case. Taking particular factors referred to by the District Judge, the submissions are as follows;

    (a) The proposition that the Youth Court is a specialist jurisdiction does not address the issues of engagement presented by the claimant.

    (b) *Rashid* does not establish the principle suggested. It maintains the requirement to take such steps as may be necessary to ensure a fair trial.

    (c) The directions made by the District Judge would not overcome the lack of engagement and concentration of the claimant.

    (d) The fact of a previous trial in which no intermediary was appointed cannot indicate anything about the fairness of that trial or whether a trial now without an intermediary would be fair.

    (e) The prepared statement was prepared by a solicitor and was provided to the police in the course of an interview. Engaging in the court process involves wholly different considerations.

    (f) To categorise the proceedings as a "lawyers only" case is to prejudge the position and fails to give proper weight to the entitlement of the claimant to participate in the proceedings.

35. In relation to the directions given by the District Judge, it is submitted that the provision for a "suitable adult" to sit with the claimant is meaningless in the absence of any indication as to whom might fulfil that role.

Discussion

36. The decision challenged by the claimant was made by a District Judge (Magistrates' Courts) with substantial experience of proceedings in the Youth Court. It was a case management decision albeit one that had an impact on the fairness of the trial process. Such a decision by an experienced first instance judge must be given respect. This court only will interfere if it can be shown that the decision was wrong. The District Judge engaged in an evaluative exercise of the ability of the claimant to participate in the trial listed in January 2020. If her conclusion fell within the ambit of a reasonable decision maker in her position, it is not for us to interfere even if we would have decided differently. Equally, if the decision was wrong and unsupportable by reference to the material available to the District Judge, we must quash it.

37. Although the District Judge set out seven factors relevant to and underpinning her decision, we consider that two of those factors – giving directions about questioning of the claimant in line with the intermediary's recommendations and ordering a ground rules hearing – are subsumed within other matters relied on by her. In reality, there were five matters considered by the District Judge: the specialist nature of the Youth Court and its ability to deal with vulnerable young defendants; the effect of *Rashid*; the fact that the claimant had participated in a trial in April 2019 without an intermediary; the prepared statement provided by the claimant at the police station and the nature of the case faced by the claimant .

38. There is no doubt that the Youth Court is a specialist jurisdiction. It is a court designed to deal with trials of young offenders, particularly those under 15: see *DPP v South Tyneside Youth Court* [2015] EWHC 1455 (Admin). It is accustomed to dealing with vulnerable young people with complex needs since sadly very many of those who appear in the Youth Court fit that description. However, that does not mean that the judge in the Youth Court cannot be assisted by another professional such as an intermediary if the needs of the individual require such assistance. As was emphasised in *Thomas*, the circumstances of the individual must be assessed. In stating that the intermediary's recommendations as to the nature of the questioning appropriate for the claimant were familiar to her, the District Judge did not address the evidence that, even with appropriate questioning, the claimant would find it difficult to cope with the trial process. More important, the District Judge did not explain how the court would be able to ensure that the claimant engaged with the trial process generally given his inability to engage and to concentrate as reported by the intermediary and the psychologist.

39. We already have considered the judgment in *Rashid*. The District Judge relied on *Rashid* for the proposition that the bar for the appointment of an intermediary is a high one. We understand why she used that expression given the use of the words "rare" and "very rare" in relation to the appointment of an intermediary. However, she did not have the advantage of the judgment in *Thomas* when she made her decision, that judgment being delivered on 29 January 2020. If she had done, she would have appreciated that what was said in *Rashid* as is now reflected in CPD 3F.13 referred to all cases coming before courts. In that context most cases will involve defendants who do not require the assistance of an intermediary. Therefore, the appointment of an intermediary will be rare. It does not follow that there is a high hurdle to overcome for the appointment of an intermediary if one is necessary for the effective participation of a defendant in the trial process. The District Judge's reference to the bar being a high one is not obviously consistent with the application of careful scrutiny to the particular circumstances of the claimant in order to decide whether an intermediary was necessary. Her assertion that the court could adapt its processes to enable the claimant's effective participation does not explain what adaptation would occur so as to ensure that the claimant concentrated on and engaged with the trial as it progressed.

40. We have no evidence about the course of the trial in April 2019 for which no intermediary was appointed. The claimant's current solicitors were not then acting for him. The District Judge was not able to say whether an application was made for an intermediary in respect of that trial. We assume from her lack of knowledge that she did not preside over the trial in April 2019. Thus, her reliance on the lack of an intermediary in April 2019 to support her decision in relation to the trial in January 2020 is based simply on the absence of any appeal against the finding of guilt made in April 2019. We consider that this is insufficient to warrant reliance on the events in April 2019. First, neither we nor the District Judge know anything about the representation of the claimant at that time. We cannot say whether his legal representative considered instructing an intermediary. We do not know whether one was instructed but the court declined to appoint one. Second, the absence of an appeal does not necessarily say anything about the effectiveness of the claimant 's participation in the trial. Whether he was engaged with the trial process may not have been apparent to those in court at the time. If the claimant was not properly engaged,

he is hardly likely to have instructed his solicitors to lodge an appeal. Put shortly, the fact that the claimant participated in a trial in April 2019 without an intermediary is of limited assistance in determining whether his participation on that occasion was effective.

41. In many cases the fact that a defendant has given an account to the police when interviewed will be good evidence of his ability to participate in the trial process. It will demonstrate that he understands the allegation made against him and that he can develop his account when questioned by the police. A coherent account will suggest an ability to engage with a process akin to a trial. In this case the claimant provided a prepared statement. It was presented by his solicitor. As is obvious from the language of the statement, the wording of the statement was hers. What the prepared statement shows is that the claimant was able to give basic instructions in relation to the allegations. It does not demonstrate that he could engage satisfactorily in the trial process. The District Judge concluded that the fact of the prepared statement was evidence that the claimant could provide sufficient instructions to enable his solicitors to conduct his case. That may be so although we note that the prepared statement was very limited in its ambit. Absent consideration of the other relevant evidence, it did not show an ability on the part of the claimant to engage with the trial process as a whole.

42. The District Judge described the proceedings as a "lawyers only" case. The prosecution case consists of witnesses purporting to identify the claimant. His case is that they are mistaken. On that basis the District Judge concluded that the claimant 's "participation will be very little if any". We take this as justifying the decision not to appoint an intermediary irrespective of the claimant 's ability to participate in a trial on the basis that there would be nothing he could contribute to the case as it progressed. With respect to the District Judge, this is tantamount to saying that it will not matter if the claimant cannot or does not follow the proceedings. We consider that this proposition is not consistent with a fair trial of the claimant. In any event, whilst we recognise the concept of a "lawyers only" case, we do not consider that it is a fair description of these proceedings. There will be cases where the factual basis of the prosecution case is agreed – potentially reduced entirely to agreed facts or admissions - with the only issue being the proper inference to be drawn from the facts. In those circumstances a judge may well be entitled to consider the appointment of an intermediary for any stage prior to the defendant giving evidence as unnecessary. In this case a lay witness and police witnesses will give evidence of identification of the claimant. The evidence is disputed. Whether there will be some unexpected development in the course of the prosecution case is impossible to say. It is possible that the claimant will not have to contribute directly at any point during the prosecution case. But it cannot be said that this is inevitable. If he is not engaged with the proceedings, he will be unable to contribute should the need arise.

Conclusion

43. It follows from our analysis of the factors relied on by the District Judge that we consider that her reasoning was flawed. We conclude that her decision not to appoint an intermediary was wrong. As is clear from the judgment in *Thomas* a judge is not required to follow the recommendations of a psychologist and an intermediary however strongly expressed they may – though in this case we consider that the recommendations were put in a moderate and reasoned fashion. The judge must

consider all of the circumstances of the case. But, in a case where the evidence demonstrates that the defendant lacks the capacity to participate unaided in the trial process, it is incumbent on the judge to explain how the court will enable the defendant effectively to participate in the proceedings despite that evidence. The District Judge did not do so. Nor did she explain why she rejected the views of Ms Marron and Dr Hathaway. Those views are not mere assertions. They follow the findings of each in their assessment of the claimant. A striking factor about the claimant is that he has not been at school or in any kind of education since November 2017. It is more than two years since he has been required to engage with any process within a structured environment other than his various court appearances. This was something of significance so far as Dr Hathaway was concerned. It was not referred to by the District Judge.

44. Since we conclude that the decision of the District Judge was wrong and that the only appropriate course in this case was to appoint an intermediary for the entirety of the claimant's trial, we quash her decision and we order the appointment of an intermediary in the trial of the claimant on the charges of theft and breach of a criminal behaviour order. We order that the claimant 's case be referred forthwith the Chief Magistrate for listing and allocation of a judge at the Bromley Youth Court. Further directions will be a matter for the Chief Magistrate or the trial judge. It is clearly very important that the trial be listed as soon as possible.