Neutral Citation Number: [2022] EWHC 115 (QB)

Case No: QB-2020-002195

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 January 2022

**Before**:

**MARGARET OBI**
(sitting as a Deputy High Court Judge)

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**Between:**

**AB**
**(by the Official Solicitor, his litigation friend)** **Claimant**

- and -

**WORCESTERSHIRE COUNTY COUNCIL** **Defendants**

**BIRMINGHAM CITY COUNCIL**

**Richard Copnall** (instructed by **Ramsdens Solicitors LLP**) for AB
**Paul Stagg** (instructed by **Browne Jacobson LLP**) for the **First Defendant**
**Caroline Lody (**instructed by **DWF Law LLP) for the Second Defendant**

Hearing dates: 18 and 19 November 2021

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# APPROVED JUDGMENT

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 20 January 2022.*

**Margaret Obi:**

## I. Introduction

1. The Claimant ('AB') has brought a claim against Worcestershire County Council ('WCC') and Birmingham City Council ('BCC') ('the defendants').

2. The issue of anonymity was raised with Mr Copnall during the hearing. He invited the Court to grant anonymity and no objection was raised by the defendants.

3. AB is an adult. However, he is a 'protected party' as he does not have capacity to conduct proceedings in his own right. Therefore, these proceedings have been brought on his behalf, by the Official Solicitor, as his litigation friend. The evidence in this case involves highly sensitive matters relating to AB's private family life and the involvement of social services. In my judgment, notwithstanding the importance of open justice, non-disclosure of AB's identity is necessary to secure the proper administration of justice and to protect his right to respect for his private life in accordance with Article 8 of the Human Rights Act 1998 ('HRA'). In these circumstances, I made an anonymity order. The order prevents publication of the name and address of AB, or information which is liable to, or might lead to, his identification. The order also restricts access by non-parties to documents in the court record other than those which have been anonymised. To protect AB's identity by association, I shall refer to his mother solely by her relationship to him and to his brother and known visitors to the family home by cyphers.

4. AB lived in BCC's local authority area between July 2005 and November 2011, and in WCC's local authority area between November 2011 and January 2016. AB alleges that he was abused and neglected whilst in the care of his mother. AB was accommodated by WCC on several occasions in 2013 and was subsequently made the subject of an interim care order in May 2015 followed by a final care order in January 2016. However, AB asserts that BCC should have applied for a care order around or shortly before July 2008 and that WCC should have applied for a care order from about April 2012.

5. There are three applications before the Court (heard remotely via MS Teams):
    i. The defendants' application for strike out of AB's Article 6 claim as it discloses no reasonable cause of action.

    ii. The defendants' application for summary judgment (including the Article 6 claim in the alternative) on the basis that the claims have no reasonable prospect of success.

    iii. AB's application to re-amend the Particulars of Claim.

## II. Background

<u>Factual Outline</u>

6. AB was born on 5 October 2002. He is now aged 19.

7. As stated above, BCC were involved with AB's family periodically from 2005-2011. AB relies on the following reports within BCC's social services records:

    i. **8 July 2005** – AB is living in a dirty home, not being fed properly, was dirty and smelly and had bleached hair which had left him with chemical burns to his scalp and neck.

ii. **27 July 2005** – AB had bruising to his legs caused by his mother's partner. BCC investigates and discover that Ms A (a Schedule 1 offender, who had been convicted of abusing her own daughter) has been staying with AB and his mother. AB's mother reports that he was scared of Ms A.

iii. **5 October 2006** - AB was locked in his room "*all of the time and was often hungry*".

iv. **21 July 2008** - Ms X had struck AB with his mother's consent.

v. **5 December 2008** – AB's mother is dressing him in women's clothes. His mother admits doing so for the amusement of her friends.

vi. **April 2009** - AB reports being pushed to the ground by his mother.

vii. **November 2009** – AB's mother reports to the police that he has been slapped by a babysitter.

8. WCC social services were involved periodically with AB's family from 2011-2016. In addition to the reports set out in paragraph 7 above (which it is alleged WCC had or ought to have obtained), AB relies on the following reports within WCC's social services records:

i. **April 2012** - AB (and his 2 year old brother - YZ) are seen walking unaccompanied at night and taken into police custody and returned to Ms B who was caring for them (she is intoxicated and admits to being an alcoholic). The accommodation is squalid with evidence that AB and YZ had been eating from the floor.

ii. **July 2013** – AB discloses that his mother has: pushed him; sat on him; bumped his head and scratched his arm and neck with fingernails.

iii. **January 2014** - AB discloses that his mother would hurt him, including dragging him upstairs with her hands around his throat.

iv. **June 2014** - AB discloses to WCC that his mother was being emotionally and physically abusive.

9. On 20 August 2014, AB was accommodated by WCC by agreement following allegations that he had sexually abused a female friend of YZ. AB never returned to his mother's care. As stated above, an interim care order was obtained in May 2015 and a final care order was made in January 2016.

Procedural History

10. The relevant procedural history can be summarised as follows.

11. The Claim Form was issued on 26 June 2020. The original Particulars of Claim (PoC 1) included a "*core chronology*" which listed various events including those listed in paragraphs 7 and 8 above and referred to a "*detailed chronology*" in Appendix I (which

was not served until sometime later). Claims in negligence were made against both defendants for not seeking a care order and a catalogue of ill-treatment inflicted by AB's mother was set out. Although the alleged ill-treatment was said to amount to a breach of Article 3 (freedom from torture and inhuman or degrading treatment) of the HRA, no details were provided as to when or how often the treatment was inflicted. There were also unparticularised claims for breaches of Articles 6 (right to a fair hearing) and Article 8 (right to respect for private and family life).

12. WCC filed a defence dated 21 December 2020. BCC filed a defence, dated 15 January 2021, followed by a Part 18 Request (request for further information) on 3 February 2021. BCC filed and served its Directions Questionnaire and draft Directions on 8 February 2021. It was made clear in the Directions Questionnaire that BCC took the view that the claim was *"wholly deficient and contradicted by binding House of Lords and Supreme Court precedent."* AB's solicitors responded to the Part 18 Request and served Amended Particulars of Claim on 10 March 2021. BCC's solicitors replied on 15 March 2021 stating that they were considering their response to the claim and any agreement to the proposed amendment would be without prejudice to their client's right to make an application to strike out the pleaded claim and/or statement of case.

13. The defendants subsequently consented to an amendment of the Particulars of Claim (PoC 2) which was approved by Master Thornett on 3 June 2021.

14. On 26 May 2021, following the judgment of Lambert J in *DFX & Others v Coventry City Council* [2021] EWHC, BCC wrote to AB's solicitors stating that in light of that decision it considered the common law negligence claim pleaded against BCC to be unsustainable and asked them to confirm that they would discontinue the claim and/or whether they intended to re-amend the claim, making clear that "*unless there is a discontinuance and/or re-amendment an application will likely be made to strike out and/or for summary judgment*". On 27 July 2021, a draft Re-Amended Particulars of Claim and a Notice of Discontinuance in respect of the common law negligence claim against BCC was served (PoC 3). The effect of PoC 3 was to abandon the negligence claim against BCC and to plead that both defendants breached AB's Article 3, 6 and 8 rights by failing to make an application for a care order. The breaches of Articles 6 and 8 were unparticularised. The negligence claim against WCC was maintained.

15. BCC applied for summary disposal of AB's claim by its Application Notice dated 19 August 2021. WCC followed suit by an Application Notice dated 14 September 2021 and also served its own Part 18 Request. There was no direct response to this request, but AB's legal representatives served another draft Re-Amended Particulars of Claim dated 28 September 2021 (PoC 4).

16. Both defendants subsequently gave notice that they intend to proceed with their applications: BCC by a letter dated 26 October 2021 and WCC by a letter dated 2 November 2021.

17. The fifth version of AB's Particulars of Claim (PoC 5) is dated 15 November 2021. During the hearing, it was referred to as the Re-amended Particulars of Claim (RAPoC). Strictly speaking it is a proposed RAPoC; BCC consents to the application to re-amend the Particulars of Claim but WCC does not.

18. PoC 5 alleges that whilst in the care of his mother:

i. AB was subjected to inhuman and degrading treatment and punishment at the hands of his mother and other adults, of the kind prohibited by Article 3 of the HRA.

ii. The defendants failed to properly investigate the reports that were made to them, in breach of their investigative duty under Article 3 and/or failed to remove AB from his mother's care in breach of their operational duty under Article 3.

iii. The defendants failed to refer AB's case to the court, by applying for a care order, within a reasonable time, contrary to Article 6 of the HRA. AB's right to be taken into the care of the defendant was a "civil right" within the meaning of Article 6.

iv. The defendants interfered with AB's right to respect for his family life in that they failed to remove him from his mother and thereby denied him a happy, stable (adoptive or long-term foster) family, contrary to Sch1, Article 8 of the HRA.

19. The only difference between POC 4 and PoC 5 is that the negligence claim against WCC is no longer pursued. However, Mr Copnall in his skeleton argument and during the hearing, made it clear that AB was also abandoning the Article 8 claim in respect of both defendants on the basis that it adds nothing to the Article 3 claim. Therefore, if this case is to proceed, PoC 5 will not be the definitive version.

## III. Key Legal Principles

Strike Out and Summary Judgment

20. The applications made by the defendants rely on rules 3.4(2)(a) and 24.2 of the Civil Procedure Rules (CPR). There is no dispute about the effect of those rules, or the principles that govern the Court's exercise of the powers they confer. Both are clear and well-established.

*Strike Out*

21. The Court has the power to strike out a claim if it appears that no reasonable grounds are disclosed for bringing the claim (CPR 3.4(2)(a)). Examples include cases "…*which are incoherent and make no sense*," and those claims "…*which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant*." (see CPR Practice Direction 3A, paragraph 1.4).

22. The core principles are as follows:

i. Particulars of Claim must include "*a concise statement of the facts on which the claimant relies*", and "*such other matters as may be set out in a Practice Direction*": CPR r 16.4(1)(a) and (e). The facts alleged must be sufficient, in the sense that, if proved, they would establish a relevant and recognised cause of action.

ii. An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials, it should "*grasp the nettle*": *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725. However, it should not strike out unless it is "*certain*" that the statement of case, or the part under attack discloses no reasonable grounds of claim: *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266. Even then, the Court has a discretion. The Court should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.

23. In the recent case of *Owens v Chief Constable of Merseyside Police* [2021] EWHC 3119 (QB) Fordham J stated [at §6] that it may be appropriate for the court to "*grasp the nettle*" on an application to strike out and determine an issue of law which arises between the parties, even if the facts are in dispute.

*Summary Judgment*

24. The Court has the power to give summary judgment against a claimant pursuant to CPR 24.2, on the whole of the claim or a particular issue, if:

i. The Court considers that the claimant has no real prospect of succeeding on the claim or issue (CPR 24.2(a)(i)); and,

ii. There is no other compelling reason why the case or issue should be disposed of at a trial (CPR 24.2(b)).

25. The correct approach to applications for summary judgment made by defendants was helpfully summarised by Lewison J. (as he then was) in *Easyair Limited (trading as Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at §15, as follows:

> *"i) The court must consider whether the claimant has a 'realistic' as opposed to a fanciful prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]; However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2011] EWCA Civ 550;*

*vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 ltd [2007] FSR 63;*

*vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim…If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

26. It is also necessary to bear in mind the Court's duty to actively manage cases to achieve the overriding objective of deciding them justly and at proportionate cost. CPR 1.1(2)(e) states that the overriding objective includes allotting a case "*an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*". If the Court concludes that the claim has no realistic prospect of success, and the question arises whether there is "*some other compelling reason*" for a trial, it is bound to have regard to considerations such as saving expense, proportionality, and the competing demands on the scarce resources (CPR 1.1(2)(b), (c) and (e)).

Article 3 and Article 6

*Article 3*

27. Article 3 provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment."* It imposes positive duties on the State to take adequate steps to prevent individuals from suffering treatment at the hands of private individuals. This involves two positive duties: (i) a duty to take reasonable steps to protect individuals from ill-treatment falling within Article 3: the "*operational duty*" and (ii) a duty to investigate an arguable breach of Article 3 in order to increase the likelihood of future compliance: the "*investigative duty*".

*The operational duty*

28. To fall within the scope of Article 3 the treatment must attain a minimum level of severity. This is an objective test based on the circumstances of the case. Although it is difficult to define the conditions and circumstances which will meet the Article 3 threshold, it is clear that inhuman or degrading treatment is set at a high level. In *Ireland v UK* (1979-80) 2 EHRR 167 the European Court of Human Rights (ECtHR) stated at §162:

> *"The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and state of health of the victim."*

Children are especially vulnerable. This is a key factor in assessing whether the ill-treatment to which they have been subjected reaches the minimum level of seriousness to engage the protection of Article 3.

29. Suffering must also attain a particular level before treatment or punishment can be classified as "*inhuman*." As to degrading treatment, the actions described in *Ireland v UK* (wall-standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink) were said (at §167) to be "*degrading*", because:

> "*they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance*"

30. In *V.K v Russia* (2018) 66 EHRR 7 a 4-year old boy was emotionally and physically abused by his nursery school teachers for a number of weeks. Eyedrops were forcibly administered without the consent of his parents and without medical necessity; he was locked in the dark and told he would be eaten by rats; he was made to stand in the lobby in his underwear and with his arms up for prolonged periods of time; his mouth and hands were taped with Sellotape; and he was told that if he complained to his parents he would be subjected to further punishment. As a result, the child sustained serious damage to his health in the form of a post-traumatic neurological disorder. The ECtHR concluded that the cumulative effect of those acts of abuse rendered the treatment sufficiently serious as to be considered inhuman and degrading treatment. In considering whether the high threshold was met the ECtHR stated at §168:

> *"Treatment has been held by the Court to be "inhuman" because, inter alia, it had been premeditated, had been applied for hours at a stretch and had caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it had been such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading," the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."*

31. Actual bodily injury of sufficient severity or intense suffering is also required. In *A v United Kingdom* (1999) 27 EHRR 611 a 9-year-old boy was beaten with a cane by his step-father with considerable force on more than one occasion, causing bruising and

suffering. On examination, by a consultant paediatrician, he was found to have the following marks on his body:

> *"(1) a fresh red linear bruise on the back of the right thigh, consistent with a blow from the garden cane, probably within the preceding twenty-four hours; (2) a double linear bruise on the back of the left calf, consistent with two separate blows given some time before the first injury; (3) two lines on the back of the left thigh, probably caused by two blows inflicted one or two days previously; (4) three linear bruises on the right bottom, consistent with three blows, possibly given at different times and up to one week old; (5) a fading linear bruise, probably several days old."*

The ECtHR held in *A* that the step-father's conduct met the requisite threshold of inhuman treatment. However, in *Tyrer v United Kingdom* (1978) 2 EHRR 1, judicial corporal punishment on a 15-year old boy in the form of 3 strokes of the birch, which raised, but did not cut, the skin, was not sufficiently severe so as to amount to "*inhuman punishment*". Similarly in *Costello-Roberts v UK* (1995) 19 EHRR 112, smacks administered as punishment on a 7-year old's buttocks, through shorts, with a soft soled shoe causing no visible injury did not attain the minimum level of severity to amount to a degrading punishment.

32. Neglect and inadequate home standards may meet the threshold depending on the seriousness and severity - see *Z v United Kingdom* (2002) 34 EHRR 3) where the children had "*horrific experiences*" and suffered "*appalling neglect*". It was conceded in the *Z* case that the threshold had been met. Further, there needs to be a "*clear pattern of victimisation or abuse*" which justifies severing family ties: *DP v United Kingdom* (2002) 36 EHRR 14, §112-113). But, as identified by Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, "*society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent*" (§50). This passage which was cited with approval by Lord Wilson JSC in *Re B (A Child)* (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911.

33. In *Osman v United Kingdom* (1998) 29 EHRR 245 the ECtHR sets down a stringent threshold test for Article 2 (right to life) claims. Where there is an allegation that the authorities have violated their positive obligation to protect the right to life, it must be established that the authorities knew or ought to have known of the existence of a "*real and immediate*" risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Article 2 threshold test has been held to equally apply to alleged breaches of Article 3. For example in *Bedford v Bedfordshire City Council* [2013] EWHC 1717 Jay J stated at §34:

> *"…there is no reason in principle why the test should be any different for the purposes of a claim under article 3 of the Convention as opposed to one brought under article 2, and it has been drawn to my attention that Wyn Williams J came to the same conclusion: see O v Comr of Police for the Metropolis [2011] HRLR 643, para 157. Although the human right under article 2 is capable of being envisaged as even more precious and fundamental than the prohibition against torture etc vouchsafed by article 3, both are absolute rights which fail to succumb to countervailing public policy considerations. The most that this claimant may*

*possibly derive from E v United Kingdom 36 EHRR 519 is that the risk of harm need not be "immediate". Having made that observation, I find that the test for article 3 purposes is exactly the same as that applicable to a claim brought under article 2."*

34. In *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 Lord Dyson held, in relation to the parallel Article 2 duty, that a real risk was a substantial or significant risk, and not a remote or fanciful one, a risk that, on the facts of that case, all competent psychiatrists would have recognised (§38). He considered an immediate risk to be one which was "*present and continuing*" and stated that, *"[t]he idea is to focus on a risk which is present at the time of the alleged breach and not a risk that will arise some time in the future*." (§39).

35. Lord Hope in *Mitchell v Glasgow City Council* [2009] 1 AC 874, citing Lord Bingham in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 referred to the emphasis in *Osman* on what the authorities knew or ought to have known at the time and cautioned against the dangers of hindsight. Lord Hope stated, "*The court must try to put itself in the same situation as those who are criticised were in as events unfolded before them. These events must, of course, be viewed in their whole context"* (§33).

*The investigative duty*

36. In *D v Commissioner of Police for the Metropolis* [2019] AC 196 the nature of the investigative duty was considered in the context of the police's failure to apprehend the taxi rapist, Worboys. Lord Kerr, by reference to the ECtHR authorities, identified the content of the duty to properly investigate reported offences and allegations of ill-treatment. The duty requires authorities to: (i) conduct an effective investigation into ill-treatment inflicted by private individuals; (ii) ensure the investigation is capable of leading to the establishment of the facts (iii) identify and punish those responsible; and (iv) conduct the investigation independently, promptly and with reasonable expedition.

37. An investigatory duty can be breached by operational failures, but only very significant failures will give rise to unlawful conduct. In *D*, Lord Kerr held that "*only obvious and significant shortcomings in the conduct of the police and prosecutorial investigation will give rise to the possibility of a claim*" (§72), those that were "*conspicuous and substantial*" (§29 and §53) or "*egregious*".

Article 6

38. Article 6 enshrines an individual's right to "*the determination of .... civil rights and obligations*." The applicability of Article 6 in civil matters firstly depends on the existence of a genuine and serious "*dispute*", which must relate to a "*civil right*" which can be said, at least on arguable grounds, to be recognised under domestic law.

39. The dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it is to be exercised.

The Legislative Framework under The Children Act 1989

40. The Children Act 1989 (the 1989 Act) provides local authorities with statutory powers and obligations which includes supporting children and families, investigating, and protecting children in the community, and seeking orders from a court which interfere with parental rights.

*Section 17: provision of services for children in need*

41. Section 17 of the 1989 Act empowers local authorities to provide services for children in need, their families and others within the community and insofar as possible within the family unit. It states that:

> *"(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) –*
>
> *(a) to safeguard and promote the welfare of children within their area who are in need; and*
>
> *(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."*

42. Section 17(10) defines a "*child in need*" as follows:

> *"(10) For the purposes of this Part a child shall be taken to be in need if –*
>
> *(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without provision for him of services by a local authority under this Part*
>
> *(b) his health or development is likely to be significantly impaired or further impaired without the provision of him for such services*
>
> *(c) he is disabled.*
>
> *(11) … in this Part*
>
> *…*
>
> *"development" means physical, intellectual, emotional, social or behavioural development;"*

43. Part 1 of Schedule 2 sets out the specific duties and powers of local authorities in the discharge of their general duty under section 17. It states that every local authority shall take reasonable steps to identify the extent to which there are children in need within their area. These steps include preventing children in their area suffering ill-treatment and neglect (Part 1, Schedule 2 paragraph 4(1)). Local authority services under section 17 are provided on a voluntary basis; there is no power to impose them.

44. Part 1 of Schedule 2, paragraph 7 states that every local authority shall take reasonable steps designed to reduce the need to bring proceedings for care or supervision orders with respect to children within their area.

*Section 47: Local Authority's duty to investigate*

45. Section 47 of the 1989 Act imposes a duty on local authorities to investigate a child's circumstances where there is "*reasonable cause to suspect a child in their area is suffering or is likely to suffer, significant harm*".

46. Section 47 states that:

> *"(1) Where a local authority*
>
> *...*
>
> *(b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering or is likely to suffer significant harm the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.*
>
> *...*
>
> *(3) The enquiries shall, in particular, be directed towards establishing*
>
> *(a) whether the authority should –*
>
> *(i) make any application to court under this Act;*
>
> *(ii) exercise any of their powers under the Act;*
>
> *...*
>
> *(4) Where enquiries are being made under subsection (1) with respect to a child, the local authority concerned shall (with a view to enabling them to determine what action, if any, to take with respect to him) take such steps as are reasonably practicable –*
>
> *(a) to obtain access to him; or*
>
> *(b) to ensure that access to him is obtained, on their behalf, by a person authorised by them for the purpose, unless they are satisfied that they already have sufficient information with respect to him.*
>
> *...*
>
> *(7) If, on the conclusion of any enquiries or review made under this section, the authority decide not to apply for an emergency protection order, a child assessment order, a care order or a supervision order they shall:*

*(a) consider whether it would be appropriate to review the case at a later date; and*

*(b) if they decide that it would be, determine the date on which that review is to begin*

*(8) Where, as a result of complying with this section, a local authority conclude that they should take action to safeguard or promote the child's welfare they shall take that action (so far as it is both within their power and reasonably practicable for them to do so)"*

*Section 31: Care Proceedings*

47. Only the local authority (or an authorised person) is empowered to make an application to the court for a care order. Part IV of the 1989 Act sets out the provisions in respect of care proceedings which can result in either a care order or a supervision order.

48. Section 31(2) identifies the threshold criteria for a care order:

*"(2) A court may only make a care order or supervision order if it is satisfied –*

*(a) that the child concerned is suffering or is likely to suffer significant harm: and*

*(b) that the harm or the likelihood of harm is attributable to –*

*(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or*

*(ii) the child's being beyond parental control."*

49. The court may grant an interim order pending consideration of a care order, if it is satisfied that there are reasonable grounds for believing that the child "*is suffering, or likely to suffer significant harm*." Whilst investigating whether to make a care order the court may make orders in respect of contact between the child and its parents and make orders for assessments including medical or psychiatric examinations.

## IV. Issues and Analysis

50. It is convenient to address firstly the defendants' application that neither PoC 4 nor PoC 5 discloses reasonable grounds for bringing the Article 6 claim, within the meaning of CPR 3.4(2)(a). Thereafter, I address the application for summary judgment.

Application to Strike Out

51. Both defendants submitted that the statement of case in respect of the Article 6 claim does not *"disclose any legally recognisable claim against the defendant*."

52. For present purposes, I rely on PoC 5 as it is the most recent iteration of AB's claim. As will be apparent from my earlier summary of AB's pleaded case, his claim in general terms is intelligible and makes sense. The claim has benefitted from some additional clarification provided via the response to requests for further information and, on the whole, I am satisfied that it falls short of the kind of incoherence that would be required for a strike out. Therefore, the key issue with regard to the Article 6 claim is whether it discloses a legally recognisable claim. This issue is addressed below.

Issue 1: *Is AB's Article 6 claim recognised in law*?

53. As stated above, the court should be cautious where the law is not settled or is in a state of development. Mr Copnall submitted that the Article 6 issues in this case are novel. For the reasons set out below I have not accepted this submission.

54. The assertion that appeared to have been made on behalf of AB was that he had a civil right to be taken into care. A child has no 'right' to seek a care order, or to have one made in respect of their care (see ***Re S*** [2002] UKHL 10, [2002] 2 AC 291, §65-81 and §78). It is only a local authority (or an authorised person) that is empowered to make an application to the court for a care order. In making such an application, the local authority is not acting on behalf of the child. The child is a respondent to the application and is separately represented by a Guardian ad litem. Further, the interests of the local authority and the child will not necessarily align. There is also no relevant dispute in this case. The defendants had not done anything to interfere with AB's rights or taken any action in relation to which such a dispute could have arisen.

55. Further, in PoC 5 it is averred that the defendants failed to refer the matter to court. In respect of BCC the case had been closed since October 2006, with no further social services involvement until 21 July 2008. There was no arguable basis for any social services involvement, let alone an application for a care order "*shortly before July 2008*". WCC social services opened the case for Initial Assessment in April 2012. There were various interventions thereafter, but it is not arguable that a care order, which is the most draconian of measures available to a local authority, would have been made on the basis of any of the incidents relied upon in PoC 5.

56. During his oral submissions Mr Copnall appeared to depart from his written submissions and suggested instead that AB had the right to a determination of his right to protection within a reasonable time. In my judgment this formulation is misconceived for the same reasons as set out above.

57. In any event, since the alleged breach of AB's Convention rights lies in not applying for a care order at an earlier stage, the claim under Article 6 adds nothing to the claim under Article 3.

58. The application to strike out the Article 6 claim is granted. I have separately considered whether AB should be given the opportunity to amend his claim. However, I have concluded that this would not be appropriate for the reasons which I have set out below (see Issue 6).

Application for Summary Judgment

59. I have not addressed every point that has been raised; only such matters that have enabled me to conclude whether AB's Article 3 claim has a realistic prospect of success. Although there is no agreed list of issues, there is no material difference between the parties as to the findings that the Court would have to make in order to determine the application for summary judgment.

60. The remaining issues can be summarised as follows:

    i. Does AB's claim, on the facts pleaded, meet the threshold for treatment or punishment which falls within the scope of Article 3? (Issue 2)

    ii. Does a local authority owe an operational duty under Article 3 to children in the community? (Issue 3)

    iii. Does a local authority's social services department exercising child protection functions owe an Article 3 investigative duty? (Issue 4)

    iv. Is there otherwise a good reason to dispose of the claim at trial? (Issue 5)

    v. Should AB be given an opportunity to re-amend his claim? (Issue 6)

Issue 2: *Does AB's claim, on the facts pleaded, meet the threshold for treatment or punishment which falls within the scope of Article 3*?

*General Observations*

61. The section, in earlier drafts of the Particulars of Claim, entitled "*Particulars of Breach of Article 3*" has been excised from PoC 5. Therefore, PoC 5 contains no explanation of what in those social services reports is alleged to amount to Article 3 treatment. Despite pleading the claim on four previous occasions, and clarification having been sought in Part 18 requests the claim also fails to identify what specifically amounted to a "*real and immediate*" risk of Article 3 treatment around July 2008 and April 2012 so as to trigger the defendant's operational duty and require care proceedings to be initiated. That said, it is clear that AB, in support of his claim, relies on the reports made to BCC and WCC social services departments between July 2005 and November 2009 and April 2012 and June 2014, respectively. The response to BCC's Part 18 request, dated 10 March 2021, states that each incident in the chronology amounts to Article 3 ill-treatment. However, it is not clear to what extent reliance is placed on the detailed chronology as a whole. Other imperfections in the formulation of the Article 3 claim include the absence of: (i) any Part 35 compliant medical report supporting the alleged psychological injury (Post-Traumatic Stress Disorder and Borderline Personality Disorder and a contribution to Asperger's); and (ii) the inferences the court would be invited to draw.

62. AB asserts in PoC 5 that he was "*subjected to inhuman and degrading treatment and punishment at the hands of his mother and other adults*" which fell within the scope of Article 3 and that "*the [d]efendants knew or ought to have known that the Claimant was, or might be* [my emphasis], *being subjected to such ill-treatment*" based on the

reports in the social services records. The suggestion that there was a *possibility* that AB would be subjected to ill-treatment is not a sufficient basis for an Article 3 claim. On the assumption that '*might be*' was simply infelicitous use of language I shall proceed on the basis that AB's claim is that the defendants knew or ought to have known that he was being ill-treated by his mother and others.

63. As stated in the ***Easyair*** case the court should be cautious about making a final decision without a trial where there are reasonable grounds for believing a fuller investigation into the facts of the case may affect the outcome of the case. In the circumstances of this case, it is not pleaded that the eleven incidents (seven reports to BCC and four reports to WCC) relied upon in support of AB's claim were the '*tip of the iceberg*,' in the sense that, other forms of ill-treatment were taking place which the defendants would have discovered if they had responded appropriately to the reports that *were* made. However, Mr Copnall submitted that social services reports are often not the whole picture. At trial, the court will be invited to draw appropriate inferences and '*join up the dots*' based on the reports and assistance of the expert evidence of an independent social worker. Although there may be some force to these observations the inferences the court would be invited to draw have not been pleaded in any version of the PoC. As currently drafted, taking AB's case at its highest, it is the eleven incidents between 2005 and 2014, either individually or cumulatively, which must meet the Article 3 threshold. The dates and circumstances of the alleged treatment can be found by cross-referencing the alleged treatment with the reports of such treatment in the Claimant's chronology. It is not suggested that any further direct evidence would be adduced at trial. On the contrary, although AB is named as a witness on the Directions Questionnaire, Mr Copnall stated during his submissions that AB would not be able to provide any further information with regard to the treatment he experienced whilst in his mother's care as he was too young.

64. In light of these observations I will address the reports made to BCC and WCC in turn.

*Reports to BCC*

65. There are three reports to social services during the 15 month period between July 2005 and October 2006 which are relied upon by AB. As stated above, these relate to reports that: (i) he was living in a dirty home, not being fed properly, was dirty and smelly and had bleached hair which had left chemical burns to his scalp and neck ("the first incident"; (ii) bruising was caused to his legs by his mother's partner ("the second incident"); and (iii) he was locked in his room "*all of the time and was often hungry*" ("the third incident").

66. In relation to the first incident a social worker made an unannounced visit to the family home on the same day (i.e. 8 July 2005) and carried out an Initial Assessment. The report states that AB appeared happy and well cared for. His hair was not bleached, and he did not have burns to his neck and scalp. The house was clean and tidy with all the basic equipment and was furnished appropriately. The kitchen was tidy and food was available. Having spoken to AB and his mother the social worker concluded that there was no evidence to substantiate the concerns. The detailed chronology states that, in respect of the second incident reported on 27 July 2008, AB's father noticed during a contact visit that AB had two bruises on the top of his legs; one on each side. AB said

that Ms A smacked him. AB's mother stated that she had only noticed the marks the day before and had attended Ms A's address. Ms A "*admitted tapping his hand after he wet himself and had hit him on other occasions*." AB's mother wanted Ms A "*done for this*." The information was passed on to the allocated social worker. The decision by the Manager was that the incident would not be treated as a section 47 investigation but AB's mother was asked to take him to see the GP so the injury could be recorded and to contact the police to make a complaint. It appears that AB was not taken to the GP as he was in the Yorkshire area, where his father lived, but the matter was reported to the police and a child protection medical was undertaken on 29 July 2005. Following the medical examination there is reference to bruising on AB's legs, thighs and forehead. AB attributed the bruising to two different people and the medical evidence was inconclusive. The police took no further action and advised that AB should be returned to his mother. BCC's social services closed the case on 3 October 2005. However, there is reference in the detailed chronology to an undated working agreement in which, amongst other things, AB's mother agreed that she would ask Ms A to leave her household and that AB would not have unsupervised contact with Ms A.

67. The maternal grandmother made a referral approximately six months later on 22 February 2006. This incident is not relied upon by AB but includes an allegation that AB's mother smokes cannabis in front of him. An Initial Assessment was carried out. The social worker found AB to be "*alert and jolly*," dressed appropriately and able to communicate well with his mother. The social worker concluded that there was nothing to indicate that AB was at risk; there was no sign of abuse or neglect. It was recorded that the situation appeared to have been based on "*some kind of conflict*" between the mother and the maternal grandmother.

68. The third incident reported on 5 October 2006 included allegations which were similar to those made by the maternal grandmother eight months earlier. Concerns were raised by a friend of AB's mother who had, until recently, been living in the same property for some time. The detailed chronology states: *"[the friend] alleged that [AB's mother] takes cocaine daily and drinks heavily. Men are coming and going from the property all of the time. [AB] is locked in his bedroom a lot of the time. [AB's mother] will put a stairgate on the door so that he cannot get out. He is told not to come out or his mother will hit him. [AB] is allegedly always hungry and when you give him food 'he woofs it down like he does not know when he will eat again.'"* The Referral and Initial Information Record states the Team Manager concluded that this was a malicious referral.

69. The first and third incidents were a cause for concern, but the social workers concluded that the allegations were unsubstantiated. No additional evidence is likely to be forthcoming and based on the paucity of the evidence there are no proper inferences that could be drawn. Although it is asserted that these incidents amounted to ill-treatment falling within the scope of Article 3 there is no realistic possibility of that being established. Of the first three reports, the second incident is arguably the most serious as there is evidence that harm was caused to AB. However, there are scant details about what occurred (other than reference to "*a smack*"), when it occurred and whether the bruising was inflicted by Ms A, some other person or two people. It is also unclear whether the bruising was caused by neglect, the administration of a punishment, or both but on the assumption that two people were involved there is no allegation that either of the alleged perpetrators injured AB again. On its own, there is no realistic

possibility that the alleged assault could be properly characterised as degrading or inhuman treatment. The most that can be said is that the subsequent allegations had to be seen within the context of the first three reports.

70. There are four reports to social services between July 2008 and November 2009 which are relied upon by AB, the first of which is some 21 months after the third incident. As stated above, these reports state that AB was: (i) struck by Ms X with his mother's consent ("the fourth incident); (ii) dressed by his mother in women's clothes ("the fifth incident"); (iii) pushed to the ground by his mother ("the sixth incident"); and (iv) slapped by a babysitter ("the seventh incident").

71. The detailed chronology indicates that, in relation to the fourth incident, AB had been staying with Ms X for a few weeks. Preceding this was a report on 14 July 2008, to BCC social services from a voluntary agency that AB's mother was unable to cope with AB and was going to stay with Ms X and her two children for a few days. Advice was given that AB and his mother should attend the Child Centre the following day to see what help and support they could offer. The alleged assault was reported on 27 July 2008. Ms X was refusing to care for AB any longer as a result of the allegation, and therefore any further risk from Ms X appears to have been removed. An Initial Assessment was carried out. AB appeared happy and well cared for. AB's mother was under extreme pressure and was offered support and services under section 17 of the 1989 Act. There is evidence to suggest that AB's mother was unable or unwilling to protect him from the use of physical punishment by others and on this occasion actively encouraged the use of such chastisement. However, the alleged assault caused no visible injury, there is no evidence of intensity or severity, and no additional evidence is likely to be adduced. In these circumstances, even within the context of the earlier incidents, there would be no proper basis for concluding that this incident amounted to inhuman or degrading treatment.

72. In relation to the fifth incident, reported in December 2008, the detailed chronology records that AB's mother had taken a photograph of him dressed in women's clothes and had sent it to the anonymous reporter. AB "*looked very distressed*." A social worker attended AB's school to speak to him. He stated that he sometimes liked playing dressing up games and sometimes did not. The social worker then visited AB's mother. She said that she dresses AB up to make her friends laugh. According to the detailed chronology she expressed regret but showed no remorse. The social worker comments that the mother is struggling and that the house was very dirty. There can be no doubt that dressing AB in women's clothes for the amusement of friends was insensitive, unkind and is an example of poor parenting. However, objectively it does not reach the level of intensity and severity to meet the threshold required to amount to inhumane or degrading treatment.

73. The sixth incident, involved AB being pushed to the ground by his mother, resulting in a scratch on his nose. The matter was investigated. AB informed a social worker, when spoken to alone, that his mother had accidentally pushed him, and he knew it was an accident because his mother was not looking when it happened. It may be that at trial the court would be invited to infer that the scratch to AB's nose was as a result of the deliberate actions of his mother and that his suggestion at the time that it was accidental was an attempt to avoid getting her into trouble. Even so, at its highest, it was inappropriate, isolated and minimal in nature. There is no realistic prospect of this incident meeting the stringent threshold requirement.

74. Although AB alleges that the seventh incident involved him being slapped by a babysitter, the detailed chronology records that it was his brother XY who was slapped across the legs by a family friend. As there were no injuries and the friend was not a relative, the matter was to be dealt with by the police with no further action from social services. The social services records show that the family friend admitted "*lawful chastisement*" of XY, and the police took no further action. As AB's mother was deemed to have dealt with the matter appropriately no action was taken by social services.

75. AB is required to establish that BCC knew or ought to have known, at the time, of the existence of a "*real and immediate*" risk of an Article 3 violation from the acts of an identified individual and failed to take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk. Although in his skeleton argument Mr Copnall challenged the "*real and immediate*" risk requirement, he conceded that point during his oral submissions.

76. The social service records represent the high water mark of AB's claim. The mother's ability or willingness to protect AB from physical chastisement from others was inconsistent. Regrettably, there were also occasions when she appears to have demonstrated poor caring and nurturing abilities. Cumulatively, the picture presented by the detailed chronology is of a variable standard of care, but there is nothing within BCC's records which comes close to alerting BCC to a "*real and imminent*" risk that AB will suffer significant harm amounting to Article 3 treatment.

77. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (see *E v United Kingdom* at §99). Perhaps with the benefit of hindsight there may well be additional steps that could have been taken by BCC, but the court must try to put itself in the same situation as those who were professionally involved with the family at the relevant time. There is nothing within BCC's records to indicate that care proceedings should have been initiated. There was a significant gap between the 2005-6 reports and the next involvement of social services in July 2008. Further, the instances of alleged ill-treatment in and after July 2008 (being struck by Ms X; dressed in women's clothes; pushed by his mother) were the first and only instances of such treatment. BCC cannot have had actual or constructive knowledge that AB was at risk of such treatment prior to these incidents taking place. A care order is a draconian measure which would have involved removing AB from his mother's care. The guidance to the 1989 Act emphasises that children are generally best looked after within the family without resort to legal proceedings. During AB's time in BCC's area, the case did not cross the child protection threshold so as to warrant a section 47 investigation, let alone registration on the child protection register and consideration of care proceedings. A care order can only be obtained where the court concludes that the child "*is suffering, or is likely to suffer significant harm*": s31(2)(a) CA 1989. In *Re MA* [2009] EWCA Civ 853, [2009] at [§54] it was stated:

> "*Given the underlying philosophy of the Act, the harm must, in my judgment, be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it*."

In *MA* it was found that circumstances in which a young girl had been slapped, kicked, hit and pushed by her parents did not constitute "significant harm" in context of the 1989 Act.

78. There were no grounds for removing AB from his mother in July 2008. Further, AB has not suggested that anything other than a final care order ought to have been sought. If proceedings had been issued it would have taken at least 6 months for a final care order to have been made. In the intervening period consideration would have to be given to an interim care order. The threshold condition applicable to interim care orders requires the court to be satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2). The court will not remove a child on an interim basis unless the child's safety requires removal and it is proportionate in the light of the risk posed by leaving the child in the family home. I am satisfied that there is no realistic prospect of AB establishing that an interim or final care order would have been made whilst he lived in the BCC area.

79. In my judgment, none of the reported incidents, taken at their highest either individually or cumulatively, involved actual bodily injury, intense physical or mental suffering, or humiliation of the severity required to meet the Article 3 threshold. Nor is it arguable that from July 2008 there was a "*real and immediate risk*" of Article 3 treatment.

*Reports to WCC*

80. There were four reports to social services between 2012 and 2014 which are relied upon by AB. As stated above, these relate to reports that: (i) AB and his brother YZ were taken into police protection when they were being cared for by Ms B ("the eight incident"); (ii) AB discloses that his mother pushed him; sat on him; bumped his head and scratched his arm and neck with fingernails ("the ninth incident"); (iii) AB discloses that his mother would hurt him, including dragging him upstairs with her hands around his throat ("the tenth incident"); and (iv) AB discloses that his mother was being emotionally and physically abusive ("the eleventh incident").

81. The eight incident, in April 2012, when AB and YZ were taken into police protection relates to an occasion when they were in the care of Ms B. The failure to care for them appropriately was grossly unsatisfactory. There is also evidence that AB's mother was aware of the poor condition of Ms B's flat when she dropped the children off. However, based on the detailed chronology, when the children were visited at home their mother was caring for them appropriately, and there is no allegation that they were ever placed in the care of Ms B again. Therefore, there is also no evidence of AB being forced to live in squalor for a sustained period. The case was opened for Initial Assessment and on 4 May 2012, following an unannounced visit when AB and XY were not in school and were left unsupervised whilst their mother was asleep upstairs, they were made subject to Child Protection Plans on the grounds of neglect. A number of statutory home visits and Specialist Family Support Sessions took place culminating in a Child Protection Conference review on 10 January 2013. At the review it was agreed that the children were no longer at risk of significant harm and were removed from Child Protection Plans. The involvement of Specialist Family Support was terminated on 19 February 2013 and the case was closed on 24 April 2013.

82. The disclosure made in July 2013 (the ninth incident) resulted in the removal of AB and XY from their mother's care and placement first with an aunt and uncle and then

in foster care. The detailed chronology records that on 13 August 2013 there was an Initial Child Protection Conference in which the Manager recommended that the children did not need to be made subject of Child Protection Plans as they were being accommodated by the local authority. Assessments and future planning was to be monitored through the Looked-After-Child Review.

83. The disclosure in January 2014 of historical physical abuse was made at a time when AB remained in foster care, and therefore there was no immediate risk of ill-treatment by his mother. It is not alleged that AB's mother repeated such abuse when AB returned home in or around May 2014. The disclosure in June 2014 related to AB's mother "*being horrible*" and otherwise verbally abusive. There are a number of disclosures made by AB in that month but there is no suggestion that further allegations were made by AB in July and August, or that he was suffering further verbal or physical abuse during that period, before he was removed from the family home due to the allegations of sexual misconduct in August 2014 and never returned.

84. There is clear evidence of poor parenting whilst AB was living in WCC's area for which his mother received reasonable and appropriate support. The incidents appear to have been isolated and sporadic and, save for the emotional conflict in June 2014, were not repeated. In my judgment none of the reported incidents, taken at their highest either individually or cumulatively, involved actual bodily injury, intense physical or mental suffering, or humiliation of the severity required to meet the Article 3 threshold. Nor is it arguable that from April 2012 there was a "*real and immediate*" risk of Article 3 treatment. Further, there is nothing within WCC's records which comes close to alerting the local authority to a "*real and imminent*" risk that AB will suffer significant harm amounting to Article 3 treatment.

85. AB's claim suggests that WCC ought to have acquired all BCC's records and taken care proceedings immediately on the family first coming to its attention in April 2012. I do not accept this. The last allegation of ill-treatment by AB's mother which is relied on against BCC occurred three years prior to April 2012. There was no realistic prospect of any court making a care order on that basis. Further, it is not arguable that it was mandatory for WCC to initiate care proceedings in response to any of those incidents, or in relation to the historic matters relating to the period when AB was living in BCC's area. Significant harm suffered in the past is only relevant evidentially to whether the child is currently suffering significant harm or is likely to do so in the future.

*Summary*

86. For all of these reasons, there is no realistic prospect of AB establishing that he was subject to ill-treatment which falls within the scope of Article 3. AB was undoubtedly vulnerable and at risk. He was at risk of being subjected to poor and inconsistent parenting and neglect. However, there is no realistic prospect of AB establishing there was a "*real and immediate*" risk of treatment falling within the scope of Article 3. Nor is there a realistic prospect of establishing that the defendants knew or ought to have known of the existence of a "*real and immediate*" risk of Article 3 treatment. There is also no realistic prospect of AB establishing that any particular aspects of the disorderly and unstable family situation should have led the social services to conclude that a care order was required. While there were occasions when AB demonstrated significant distress in the family environment, he also showed strong ties to his mother. Cogent reasons would have been required for a care order bearing in mind the principle of

respecting and preserving family life and such reasons were not present in July 2008 or any time between April 2012 and June 2014.

87. My conclusion on Issue 2 is determinative of the Article 3 claim, but I will nonetheless go on to consider the remaining issues.

Issue 3: *Does a local authority owe an operational duty in terms of 'care and control' under Article 3 to children in the community?*

88. As an alternative to the high threshold of Article 3 and "*real and imminent*" risk argument, Ms Lody invited the Court to consider whether BCC were in a position of '*care and control*'. Mr Copnall submitted that there is no authority for the proposition that the Article 3 duty requires "*care and control*". He made the observation that the authorities referred to by Ms Lody relate to Article 2.

89. The existence of a "*real and immediate*" risk is a necessary but not sufficient condition for the existence of the operational duty (see *Rabone v Pennine Care HS Trust* [2012] UKSC 2 at §21). Lord Dyson JSC noted in *Rabone* that the ECtHR had never clearly articulated the criteria by which it decides whether an Article 2 operational duty exists in any particular circumstances. However, it is clear that the operational duty will be held to exist where there has been an assumption of responsibility by the state for the individual's welfare and safety. This includes where the state has detained an individual, whether in prison, in a psychiatric hospital, or an immigration centre (see *Mitchell v Glasgow City Council* [2009] 1 AC 874, §66 and 69).

90. In *Rabone* (supra) [at §23] Lord Dyson stated:

> "*In circumstances of sufficient vulnerability, the ECtHR has been prepared to find a breach of the operational duty even where there has been no assumption of control by the state, such as where a local authority fails to exercise its powers to protect a child who to its knowledge is at risk of abuse as in Z v United Kingdom (2001) 34 EHRR 97*."

However, these comments were obiter, and in any event in *Z*, the issue was not contested and there was no adjudication on the point. Nor was the issue contested in *E*. The question as to whether a local authority owes an Article 2 operational duty to a child in the community, with whom social services had involvement, but who was not in their care and control, was expressly considered in *R on the application of Kent County Council v HM Coroner for the County of Kent (North West District)* [2012] EWHC 2768 (Admin) (§49-52). The case concerned the judicial review of a coroner's finding that an inquest needed to be Article 2 compliant. A 14-year-old boy had suffered a downward spiral for a period of 9 months before dying of a methadone overdose. The family submitted that Article 2 was engaged as children's services knew that there was a "*real and immediate*" risk to his life. However, the court held:

> "*…there was…no operational duty in place…and, accordingly, no scope for an Article 2 inquest. The claimant did not have parental responsibility for [the child] and he was not 'in care' in the sense that no proceedings had been commenced under section 31 of the Children Act 1989. He was not therefore living*

> *within the control or under the direct responsibility of the local authority.*"

91. The court in the ***Kent*** case also held that the measure of responsibility arising from the provision of services under section 17 of the 1989 Act was insufficient, as it would impose an impossible or disproportionate burden on local authorities. It was observed that in ***Osman*** [at §116], it was stated that the operational duty should be interpreted "*in a way which does not impose an impossible or disproportionate burden on the authorities", particularly "in terms of priorities and resources*" (see also *Rabone* at §104).

92. As stated by Jay J in ***Bedford*** (supra) there is no reason in principle why the test for Article 2 should be any different for the purposes of a claim under Article 3. I am satisfied that the '*care and control*' aspect of the operational duties under Article 2 and Article 3 are similar if not identical. I accept the submission made by Ms Lody that the touchstone is "*care and control*" or an assumption of responsibility and the capacity to control the immediate risk, for example by arresting or detaining or otherwise removing the source of the risk otherwise the duty would be too burdensome.

93. BCC did not have "*care and control*" of AB whilst he was living in that area. The operational duty is therefore not engaged. If there was no operational duty in place, there could be no breach of it. If I had not already determined that the treatment did not meet the threshold of Article 3, I would have found that the claim in respect of BCC had no realistic prospect of success based on the absence of "*care and control*".

Issue 4: *Did the defendants when exercising child protection functions owe an Article 3 investigative duty?*

94. In PoC 5 it is alleged for the first time, on behalf of AB, that the defendants breached the Article 3 investigative duty. The claim is unparticularised. Beyond making reference to the eleven reports to social services, the pleadings do not make clear what treatment amounted to a credible or arguable claim of Article 3 treatment so as to give rise to an investigative duty and has failed to particularise in what manner the defendants failed to investigate the reports.

95. Mr Copnall submitted that the application of the investigative duty will depend on the context. He stated that the nature of the police's duty to investigate in ***D*** was the in the context of potential criminality and prosecution, but the Supreme Court did not consider whether, and if so what, investigative duty might be owed by other public authorities in general, or by local authorities to children in particular. He further submitted that ***D*** is not authority for the proposition that the investigative duty under Article 3 is limited to detecting and punishing criminality, or that if it is, that duty is confined to the police or other similar agencies.

96. ***Osman*** in the context of Article 2 refers to the duty to ensure that effective criminal law provisions are in place to deter the commission of offences in order to prevent, suppress and sanction breaches of such provisions. The ECtHR also stated in ***Osman*** that in certain well-defined circumstances Article 2 confers a positive obligation on the authorities to take preventive operational measures to protect an individual whose life

is at risk from the criminal acts of another individual. There is also reference to the criminal law in *MC v Bulgaria* [2005] 40 EHRR 20 (see for example § 153) and also in *X v Bulgaria* [2021] unreported, February 2nd (application 22457/16) where the Article 3 investigative duty was described in the following terms:

> "*184. Furthermore, where an individual claims on arguable grounds to have suffered acts contrary to Article 3, that Article requires the national authorities to conduct an effective official investigation to establish the facts of the case and identify and, if appropriate, punish those responsible. Such an obligation cannot be considered to be limited solely to cases of ill-treatment by State agents (see S.Z. v. Bulgaria, cited above, § 44, and B.V. v. Belgium, no. 61030/08, § 56, 2 May 2017).*
>
> *185. In order to be effective, the investigation must be sufficiently thorough. The authorities must take reasonable measures available to them to obtain evidence relating to the offence in question…"*

97. In light of the above, I accept the submissions of Ms Lody and Mr Stagg that this aspect of the Article 3 claim is misconceived. Allegations of ill-treatment falling within the scope of Article 3 will invariably engage the criminal law and the language used to describe the duty strongly indicates that 'investigation' in this context has a particular meaning. The investigative duty as described in *D* (supra) makes it clear that it refers to a criminal investigation discharged by the police and prosecuting authorities after the fact to recognise, apprehend and punish the wrongdoer. It is not an investigation for which the primary purpose is to establish the existence of future potential harm and protect the victim against it. The provisions of the 1989 Act are framed to empower social workers to investigate a child's circumstances in order to take steps to prevent any risk or further risk of significant harm. The purpose of section 47 investigations is to decide whether and what type of action is required to safeguard and promote the welfare of a child who is suspected of, or likely to be, suffering significant harm. Referrals may arise from the police or school. The provisions do not require an independent enquiry to identify what has happened and the purpose is not to punish a wrongdoer.

98. Accordingly, the investigative duty does not apply in the present case.

99. Even if I am wrong, and the investigatory duty was owed by the defendants it can be breached by operational failures, but only very significant failures will give rise to unlawful conduct. In *D*, Lord Kerr held that "*only obvious and significant shortcomings in the conduct of the police and prosecutorial investigation will give rise to the possibility of a claim*" (§72), those that were "*conspicuous and substantial*" (§29 and 53) or "*egregious*". There is clear evidence that suitable enquiries and investigations were made upon the receipt of reports raising concern about the welfare of AB including referrals to the police. It is unclear, what a "*proper investigation*" would have entailed and what additional information is likely to have been obtained.

100. In my judgment this aspect of AB claim has no realistic prospect of success.

Issue 5: *Is there otherwise a good reason to dispose of the claim at trial?*

101. There is no good reason to dispose of this claim at trial. There are aspects which are misconceived and overall the claim is weak.

102. It would be contrary to the overriding objective to permit weak claims to proceed as it would result in significant further costs and court resources being expended in circumstances where there is no justification.

Issue 6: *Should AB be given an opportunity to re-amend his claim*?

103. This claim would clearly require amendment if it were to proceed to trial. Therefore, I have considered whether AB should be given the opportunity to amend his claim.

104. However, I concluded that this would not be appropriate. There is no indication that if pleaded for a sixth time the claim would establish reasonable grounds for bringing either an Article 3 or Article 6 claim. I am satisfied that AB would face a considerable hurdle in re-casting his causes of action. Therefore, if this case is permitted to continue there is a real risk that the defendants will be put to considerable expense defending a claim which has no realistic prospect of success.

## V. Conclusion

105. In conclusion, the merits of the overall claim are poor and have no realistic prospect of success.

106. It would be difficult not to empathise with AB. There were a catalogue of reports in the social service records which raised a cause for concern and strongly indicate that the parenting skills of his mother were inadequate. He may well feel that he did not have a good start in life, and he is now a vulnerable adult. However, my task has been to determine whether the claims as pleaded are viable. In the circumstances, and for the reasons set out above there is insufficient evidence that the various incidents relied upon by AB reached the high threshold required to sustain an Article 3 claim and are bound to fail. Further, the Article 6 claim does not disclose a legally recognisable claim.

*Postscript*

**Following the circulation of my Approved JudgmentMr Copnall provided me with the judgment in *Griffiths and others v Chief Constable of Suffolk and others* [2018] EWHC 2538 QB which had not previously been referred to the Court. Mr Stagg and Ms Lody challenged the appropriateness of this action. However, I accept Mr Copnall's explanation that this was not an attempt to re-argue the case; it was in accordance with his duty to bring to the Court's attention any potentially relevant authority.**

107. Put very shortly, in the *Griffiths* case the claim against the NHS Trust was that the assessment under the Mental Health Act was flawed in a number of respects, in that, the psychiatric patient ought to have been admitted to hospital, voluntarily or compulsorily, which would have prevented him being in a position to murder Ms Griffiths. Ouseley J concluded that, on the facts of the case, the operational duty did not arise because the NHS Trust did not know, nor ought it to have known of any real or immediate risk to Ms Griffith's life, nor of any risk that her Article 3 rights would

be breached. However, he was not persuaded that the NHS Trust could not owe an Article 3 operational duty to a member of the public in relation to the risks posed by a psychiatric patient in the community. This observation is obiter, it is an unreasoned comment and relates to circumstances which are very different to the circumstances of this case. For these reasons, I do not find the ***Griffiths*** judgment to be helpful and it makes no difference to my conclusion that BCC did not owe an operational duty to AB under Article 3.

108. I am grateful to Counsel for liaising in light of circulation of this judgment in draft. By doing so, they were able to reach agreement as to consequential matters.

109. I make the following Order:

(1) Until further Order of the court:

i. The Claimant shall be referred to using the pseudonym "AB" in all court documents.

ii. No-one shall publish the Claimant's name, address or any information which is liable to, or might lead to his identification, including the real names of the other individuals anonymised in the court's judgment (including, but not limited to, his brother referred to as YZ, his mother, and the women referred to as Ms A and Ms B).

(2) The parties and any other individual affected by the prohibitions made pursuant to paragraph 1 of this order shall have permission to apply to vary or discharge paragraph 1 on notice to the parties or the other parties, as the case may be.

(3) The Claimant's application for permission to re-amend the Amended Particulars of Claim dated 10 March 2021 is refused.

(4) The Claimant's claims in the Amended Particulars of Claim pursuant to Article 6 of the ECHR shall be struck out as against both Defendants pursuant to CPR 3.4(2)(a) as disclosing no reasonable cause of action against either Defendant.

(5) The Claimant's claims in the Amended Particulars of Claim against both parties pursuant to Article 8 of the ECHR and against the First Defendant in negligence are dismissed on their withdrawal by counsel for the Claimant (the claim against the Second Defendant in negligence having been previously discontinued by service of a Form N279 dated 27 July 2021 relating to that claim).

(6) Summary judgment is granted to both Defendants pursuant to CPR 24.2 in relation to the claims pursuant to Article 3 of the ECHR.

(7) In consequence of the orders made in paragraphs 4, 5 and 6, the claim is hereby dismissed.

(8) The Claimant shall pay the Defendants' costs of and occasioned by the applications and the proceedings, subject to:

i. A detailed assessment of the Defendants' costs if not agreed; and

ii. A determination pursuant to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the regulations made thereunder of the sum that it is reasonable to expect the Claimant to pay, save that either Defendant may set off the costs to which it is otherwise entitled under this paragraph against any damages, interest or costs payable to the Claimant without such a determination.

(9) There shall be an assessment of the Claimant's publicly-funded costs.

(10) Any application by the Claimant for permission to appeal shall be made in writing by 4pm on 3 February 2022.

(11) Any observations by the Defendants on such an application shall be made in writing by 4pm on 10 February 2022. The court will then determine the application on paper.

(12) Any Appellant's Notice must be filed with the Court of Appeal by 4pm on 23 March 2022 or 4pm on the day falling 21 days after the court's written determination on an application for permission to appeal lodged under paragraph 10 above, whichever is later.