Neutral Citation Number: [2024] EWHC 598 (KB)

Case No: QB-2021-002519

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2024

Before :

MRS JUSTICE HILL DBE

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Between :

SZR (a protected Party, by her Litigation Friend, The Official Solicitor)	**Claimant**
- and -	
Blackburn with Darwen Borough Council	**Defendant**

- -
- -

Sam Jacobs (instructed by Leigh Day Solicitors) for the Claimant
Katie Ayres (instructed by Forbes Solicitors) for the Defendant

Hearing date: 13 February 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 15 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. The Claimant is a 24-year-old woman, who has autism, attention deficit hyperactivity disorder ("ADHD") and learning difficulties. She gives instructions by the Official Solicitor. The Defendant is the local authority in whose care she was placed on 13 July 2018.

2. By a claim issued on 8 October 2021, the Claimant brings proceedings under section 6 of the Human Rights Act 1998 ("the HRA") for a violation of her rights under Articles 3 and 8 of the European Convention on Human Rights. These are, respectively, the right to protection from torture, inhuman or degrading treatment and the right to respect for private and family life.

3. The Claimant's case is that she suffered serious neglect over a period of several years while being cared for by her mother. She contends that while the Defendant's professionals were involved with her family at various points from April 2012, effective action was only taken shortly after the adult social care team became involved after her 18th birthday in September 2017; and that the Defendant's failure to take earlier action violated its positive obligations to protect her under Articles 3 and 8.

4. By an application dated 4 April 2023 the Defendant sought summary judgment on the Claimant's claim under CPR 24.2; or alternatively an order to strike out the claim under CPR 3.4(2)(a). This is my judgment on that application, which was heard on 13 February 2024. I was greatly assisted by the written and oral submissions from both counsel.

The Claimant's claim

5. The Claimant was born in 1999. She is the oldest child of her mother, and she has one sister who is four years younger. Both children lived with their mother in housing association property in Blackburn. The Claimant attended a Special School under a Statement of Special Educational Needs which was made in September 2004.

6. Her claim focusses on the Defendant's involvement with her family over three key periods: (i) towards the end of 2013; (ii) between March and October 2014; and (iii) between April 2016 and December 2017. During each of these periods it is said that there were numerous occasions on which protective action by the Defendant was warranted.

7. She relies on the obligation, in certain well-defined circumstances, to take operational measures to protect specific individuals against a risk of treatment contrary to Article 3. It arises where the authority "knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the…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 the risk": *X v Bulgaria* (2021) 50 BHRC 244 at [178] and [184], cited in *AB v Worcestershire*

County Council and Birmingham City Council [2023] EWCA Civ 529, [2023] 2 FLR 795 at [13]-[14] and [56].

8. The Claimant contends that at all material times the Defendant was, or ought to have been, aware of a real and immediate risk of her suffering inhumane and degrading treatment of a severity that engaged Article 3. She places reliance in particular on the following matters, considered cumulatively:

> "(a) The Claimant was extremely vulnerable, not only by reason of her age, but also by reason of her learning disability and autism.
>
> (b) By the time of its intervention in 2013 the Defendant was aware of a real risk that, absent support, the Claimant was a particularly vulnerable child who would be exposed to the picture of neglect observed by the ambulance service in March 2013 and by the Defendant shortly thereafter including:
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> **i.** An "extremely dirty house" which was "smelling of urine" and had a significant build up of rubbish in every room;
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> **ii.** The Claimant and her sister being poorly clothed and "walking around in the filth with nothing on their feet";
>
> **iii.** The Claimant, aged 13, without underwear and visibly "playing with herself" without any intervention or understanding of appropriate boundaries being imparted by the mother;
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> **iv.** Limited access to education;
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> **v.** The family being entirely isolated;
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> **vi.** The Claimant having an untreated injury to her ankle that was causing her to limp;
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> **vii.** Parenting of a mother which was severely restricted by the mother's own learning difficulty, misuse of alcohol and poor mental health.
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> (c) Further, the Defendant as a social services department, would have been aware of the likely profound implications upon the development of the Claimant were she to remain living in such an environment.
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> (d) All of those concerns arose a fortiori on the subsequent occasions of the Defendant's involvements, and as it became clearer that the Claimant was suffering profound and prolonged neglect. The picture of neglect included dirty and inadequate clothing, poor diet, limited social contact, limited access to education, poor personal hygiene and infestation with [nits], [an] extremely dirty home environment, neglect of her emotional and behavioural development, and neglect of her medical needs.

(e) Ultimately, the Claimant, as an extremely vulnerable learning disabled child, was left for years in living conditions that were predominantly characterised by squalor, and her needs were so neglected that she ultimately remained isolated in her home, with no socialisation, and keeping professionals away by arming herself with a pole. She was smelly and infested with nits to the extent they drop from her head. That was inhumane and degrading": Particulars of Claim ("POC") at [24].

9. She claims that the combined effect of the real and immediate risk of inhumane and degrading treatment as set out at [24], the extent of her vulnerability as a child, the nature of the risk (being one that warrants protection from the State) and the fact that the Defendant has been afforded by Parliament the necessary compulsory powers to intervene and protect her generated the Article 3 operational duty: POC at [25].

10. She argues that for the same reasons, the Defendant owed her an operational duty under Article 8, because the harm being suffered violated her family and private life: POC at [26].

11. She asserts that the Defendant acted unlawfully and in breach of the obligations arising under Articles 3 and/or 8 by failing to take reasonable preventative measures as follows:

"(a) By the end of 2013 the Defendant should have sought legal advice with a view to removing the Claimant from her home. There had been two significant periods of social care involvement with clear indications that the mother would not be able to sustain sufficient positive change in her parenting, and thus continuing to expose the Claimant to severe neglect with profound impacts upon the Claimant's development. Although some recognisable changes had been made to the home conditions, there remained serious concerns as to the mother's ability to meet the Claimant's physical and emotional care needs. The extent of the Defendant's engagement with and monitoring of the Claimant throughout its involvement in 2013 was limited and inadequate. The Defendant's immediate closure of the case upon receiving a referral in December 2013 regarding the mother drinking alcohol to excess, being abusive, and telling the social worker to "take the children away", was inadequate.

(b) In the course of the third period of the Defendant's involvement, between March and October 2014, the Defendant again failed to take steps towards removing the Claimant from her mother's care. Serious concerns as to neglect of the Claimant had again resurfaced and there was no reasonable basis to consider that a third period repeating the same or similar support would result in any different outcome and the mother being able to sustain positive change. The child and family assessment of 11th June 2014 was inadequate in failing to identify child protection concerns. The closure of the case in October 2014 left the

Claimant in a neglectful home where there was no overall, coordinated plan to address her complex needs.

(c) On 26th April 2016, and following the Claimant being placed in police protection, the Defendant failed to then act decisively and commence court proceeding to permanently remove the Claimant from her mother's care. The Claimant had experienced neglect for a number of years and it was abundantly clear that the mother was unable to maintain any substantial improvements.

(d) There were any number of occasions throughout the remainder of 2016 and 2017 during which the response of the authority was inadequate in failing to commence care proceedings or Court of Protection proceedings. That the Claimant was suffering severe neglect, and that the Claimant's mother was unable to meet her needs or sustain sufficient positive change, was manifest. There was no basis to consider that further support, which had already been provided on various occasions since 2012, would result in any different an outcome. Ultimately, by June 2017 the school was left complaining that there had been no progress towards care proceedings notwithstanding the Claimant's "basic needs [being] persistently neglected" and the chair of the review conference exclaiming that "this has got to stop" and advice should be sought "NOW". It was still a further six months before action was taken": POC at [27].

12. The Claimant's case is that, had the Defendant not breached these duties, she would have been removed into the Defendant's care a lot earlier and therefore protected from harm. She would likely have been placed into a residential placement or fostering arrangement that would have been able to meet her needs; and she would have had the opportunity to develop skills that could have led to independent or supported living as a young adult. Further or alternatively, had the Defendant not failed to take reasonable preventative measures, there would have been, at least, "a real prospect of altering the outcome or mitigating the harm suffered" (applying *E and others v UK* (App No 33218/96, 26 November 2002), [2002] All ER (D)): POC at [28]-[29]).

The Defence

13. The Defendant denies the Article 3 claim, in summary, on the basis that (i) the treatment the Claimant was experiencing did not breach Article 3; (ii) on that basis, the Defendant was not or ought not to have been on notice of a risk of any such treatment; and (iii) the Defendant's actions were reasonable throughout, such that an operational duty owed under Article 3 was not breached.

14. The Defendant denies the Article 8 claim for want of particularisation and for the same reasons as the Article 3 claim.

15. It is therefore denied that the Claimant is entitled to any damages.

The legal principles relevant to the applications

16. Under CPR 24.2 the court may grant summary judgment against a claimant in any type of claim. The grounds for such an order are set out in CPR 24.3 thus:

> "24.3 The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
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> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial".

17. The correct approach to applications for summary judgment was 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] 1 All ER 91;
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> 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];
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> 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];
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> v) 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)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the 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;
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> 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 or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. 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".

18. CPR 3.4 sets out the court's powers to strike out a statement of case, the material parts of which for this application are as follows:

> "3.4…(2) The court may strike out a statement of case if it appears to the court –
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> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim".

19. Practice Direction 3A (Striking Out a Statement of Case), at paragraph 1.2 gives examples of cases where the court may conclude that particulars of claim fall within CPR 3.4(2)(a) as:

> "those which set out no facts indicating what the claim is about…those which are incoherent and make no sense…[and] those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant".

20. The White Book at 3.4.2 sets out the following relevant principles:

> " For the purposes of a r.3.4(2)(a) application, the applicant was usually bound to accept the accuracy of the facts pleaded unless they were contradictory or obviously wrong, *MF Tel Sarl v Visa Europe Ltd* [2023] EWHC 1336 (Ch) (Master Marsh) (in contrast to the position under CPR r.24.2 where the court is considering the claim or an issue in

> it and may be required, without conducting a mini-trial, to examine the evidence that is relied upon to prove the claim and consider the evidence that can reasonably be expected to be available at trial…
>
> A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown*, 19 January 2000, unrep., CA)".

***AB v Worcestershire County Council and Birmingham City Council* [2023] EWCA Civ 529; [2023] 2 FLR 795**

21. This is a recent case in which the Court of Appeal considered an Article 3 claim, similarly advanced on the basis that social services departments had failed to remove a child from parental care, thereby exposing the child to a risk of Article 3 treatment. It was relied on heavily by the Defendant in these applications, both as to the approach the court should take to these applications and as to the substantive issues. Lewis LJ gave the lead judgment, with which Dingemans and Baker LJJ agreed: [88] and [89].

22. The Particulars of Claim in *AB* were pleaded in an "unusual way" in that they included a core chronology and a detailed chronology at appendix 1 to the particulars of claim. The chronologies were based on the respondents' social service records: [18].

23. As Lewis LJ explained at [19], the claim against the Second Defendant ("Birmingham") was advanced the basis that they knew, or ought to have known, that the Claimant was, or might be, being subjected to Article 3 ill-treatment, in light of the following reports:

Date	Report
8/7/05	[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.
7/05	[AB] had bruising to his legs caused by Mother's partner …". D2 investigates and discover that [Ms X] (a schedule 1 offender, who had been convicted of abusing her own daughter) has been staying with [AB] and his mother. The Mother reports that [AB] was scared of Ms X.
10/2006	[AB] was locked in his room "all of the time and was often hungry".
21/7/08	Ms [X] had struck [AB] with the mother's consent
12/08	Mother is dressing [AB] in women's clothes. Mother admits doing so for the amusement of her friends.
4/09	[AB] reports being pushed to the ground by his mother.
11/09	Mother reports to the police that [AB] has been slapped by a babysitter

24. The claim against the First Defendant ("Worcestershire") was put on the basis of the above reports (knowledge of which it was said they should have obtained from the Birmingham records) and the following reports made to Worcestershire directly:

Date	Report
4/12	[AB] (and his 2 year old brother) are seen walking unaccompanied at night and taken into police custody and returned to [Ms B] who was caring for them (who is intoxicated and admits to being alcoholic). The accommodation is squalid with evidence that [AB] and his brother had been eating from the floor.
7/13	[AB] discloses that his mother has: pushed him; sat on him; bumped is head and scratched his arm and neck with fingernails.
1/14	[AB] discloses that his mother would hurt him, including dragging him upstairs with her hands around his throat.
6/14	[AB] discloses to D1 that his mother was being emotionally and physically abusive.

25. Birmingham pleaded a Defence by reference to the detailed chronology, summarising the responses of the social workers to the incidents referred to by the appellant. Worcestershire's Defence effectively admitted the factual incidents listed in the core chronology but denied that Worcestershire had, on those facts, breached its Article 3 operational duty: [21]-[22].

26. The Defendants applied for summary judgment. In giving judgment on the application, the first instance Judge confirmed that the Claimant's case was limited to the "eleven incidents between 2005 and 2014" set out above; and that the claim was put on the basis that "either individually or cumulatively" they met the Article 3 threshold. The approach the Judge took was to determine the "dates and circumstances of the alleged treatment…by cross-referencing the alleged treatment with the reports of such treatment in the Claimant's chronology": [30] of the Court of Appeal's judgment.

27. The Judge considered the reports of concerns relied on by the appellant in relation to Birmingham and the records of the social services response to the concerns reported to them and made findings in respect of each. She concluded that none of the incidents of mistreatment reported by the appellant, considered individually or cumulatively, involved actual bodily injury, or physical or mental suffering, or humiliation of the severity required to amount to treatment contrary to Article 3; and that there was no realistic prospect of the appellant establishing that the respondents knew or ought to have known of the existence of a real and immediate risk of the appellant suffering treatment contrary to Article 3. Further, the Judge considered that there was no realistic prospect that the unstable family situation would have led the respondents' social services departments to conclude that removal of the child from the mother's care by means of an application for a care order was required [3]. Her detailed reasons are set out at [31]-[39] of the Court of Appeal's judgment.

28. The Court of Appeal upheld the Judge's conclusions with respect to the threshold and risk issues on the Birmingham appeal at [66]-[70] and the Worcestershire appeal at [74]-[77]. The Court upheld the Judge's findings on the breach issue with respect to each authority at [72] and [78].

29. One of the grounds of appeal was that it was inappropriate to resolve the claims by means of summary judgment. Counsel for the appellant submitted that other evidence might reasonably have become available from social workers, or possibly others at the school attended by the appellant, and that expert social work evidence was necessary to deal with the breach issue: [80].

30. The Court of Appeal reiterated the key elements of the relevant legal framework thus:

> "81…The principles governing when summary judgment may not be appropriate are set out in the judgment of Lewison J. in *[Easyair] Limited*. They include the fact that the issue is whether the claimant has a "realistic" prospect of success, i.e. one that carries some degree of conviction. Importantly, the court should not conduct a "mini-trial", but there may be cases where there is no real substance in factual assertions particularly where contradicted by contemporaneous documents. The court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial".

31. The Court then summarised the evidential position in *AB* in this way:

> "82. The present case is relatively unusual. The appellant produced a detailed chronology, based it seems on the social services records from Birmingham and Worcestershire which had been disclosed to him. Birmingham adduced in evidence extracts from the contemporaneous social services records. The appellant did not suggest that other parts of the contemporaneous records, or other documentary evidence, was required (and could have adduced such evidence had he thought so, pursuant to CPR 24.5). In the case of Worcestershire, the key facts had been admitted by Worcestershire and the chronology was, in effect, an agreed statement of facts. There was no other evidence that could reasonably be expected to be available. Counsel had made it clear that the appellant would not be able to give evidence of the relevant events. It is unrealistic to suggest that social workers would be able to do more than refer to the contemporaneous records made between about 8 and 16 years ago. Still less is it likely that a school teacher or another pupil could, realistically or reasonably be expected to give material evidence about events. There was no need for expert evidence. This is not a negligence claim where a court would be considering whether a particular professional, such as a social worker, had acted in accordance with a body of expert opinion. On this aspect of an alleged violation of Article 3 of the Convention, the question was whether "judged reasonably", either Birmingham or Worcestershire had failed to take appropriate steps to avoid a real and immediate risk of Article 3 ill-treatment. That was a question for the court, not for expert evidence".

32. The Court observed that:

> "In any event, the claim would have failed as there was no evidential basis for considering that there was a real and immediate risk of the appellant being subjected to ill-treatment falling within Article 3 if left in the care of his mother at the material times".

33. The Court concluded:

> "In those circumstances, the Judge was entitled to deal with the claim that there had been a violation of Article 3 of the Convention by summary judgment".

The grounds for the applications

34. The Defendant's applications were supported by a witness statement from Louise Goss, the Defendant's legal representative, dated 4 April 2023. This advanced four grounds for the applications.

35. The first ground related to the fact that due to her lack of capacity the Claimant will not be able to give evidence at the trial. It was submitted that summary judgment should be granted on this basis alone. The Claimant's representatives made clear that there was other evidence on which she would seek to rely at trial, namely the Defendant's contemporaneous records, cross-examination of the social workers and expert evidence obtained by the Claimant. The Defendant withdrew this ground of the application shortly before the hearing.

36. Another ground related to limitation, but this was also withdrawn shortly before the hearing.

37. The grounds that remained related, respectively, to the various elements of the Article 3 claim; and the Article 8 claim.

38. The Defendant's final position, as developed in Ms Ayres' Skeleton Argument, was to the effect that in respect of the Article 3 claim, the Claimant has no real prospect of succeeding on and/or no reasonable grounds for arguing that:

    (i) The treatment she was experiencing was of sufficient severity to cross the high threshold required for Article 3 (**"the threshold issue"**);

    (ii) The Defendant was on notice that she was at a real and immediate risk of experiencing such treatment at the relevant times (**"the risk issue"**);

    (iii) The Defendant did not take reasonable measures to safeguard the Claimant from the risk of Article 3 treatment (**"the breach issue"**); and/or

    (iv) But for the alleged breaches, the Claimant would not have suffered the treatment said to cross the Article 3 threshold (**"the causation issue"**).

39. The Defendant contended that no separate claim had been pleaded in respect of a breach of Article 8, and that if the Article 3 claim fails, the Article 8 claim will also necessarily fail.

The manner in which the applications were advanced

40. Ms Goss's statement at [13] made clear that the applications were being advanced on the basis of "the circumstances alleged within the Particulars of Claim", i.e. that even on the facts as pleaded, the claims could not succeed.

41. The Defendant provided witness statements from four of its professionals who had worked with the Claimant and her family: Zoe Fitzpatrick, Chris Brunning, Helen Greenhough, Suzan Bishop. These had all been prepared in late July and early August 2022.

42. The Claimant relied on a witness statement from Anna Moore, her solicitor, dated 20 November 2023. Ms Moore's statement responded to the summary of the facts set out in Ms Goss's statement, which she contended did not reflect some of the descriptions of the concerns raised by third parties that illustrated the extent of the neglect the Claimant suffered. Over [5]-[6] of her statement Ms Moore referred to a series of entries in the contemporaneous records which were collated into a supplementary bundle. This bundle comprised around 300 pages of extracts from the Court of Protection records and just under 1300 pages from the Defendant's records, described as (i) social work documents (forms, plans, assessments and records); (ii) case note reports for each year from 2012-2018; and (iii) contact case notes from 2017-2018. The Claimant also relied on expert evidence from Sylvia McKenzie (an independent social worker) and Dr Lisa Rippon (a consultant psychiatrist).

43. The contents of Ms Goss's statement had naturally led the Claimant to understand that the applications were being advanced on the same basis as the Worcestershire element of *AB*, namely that the facts as pleaded were taken as agreed, and the issues were largely legal ones around whether the necessary elements of the Articles 3 and 8 claims were arguably met, based on those facts. It was no doubt for this reason that Mr Jacobs' Skeleton Argument made clear that it was not anticipated that much reference would need to be made to the supplementary bundle in order to determine the applications.

44. Shortly before the hearing, the Defendant's Skeleton was served, indicating that counsel in fact intended to take the court through the social work records "in detail" to provide a fuller picture of the treatment that the Claimant was exposed to whilst at home, to illustrate that at no point was the Defendant on notice of a real and immediate risk of Article 3 treatment, and to show that it is highly unlikely that the Claimant would prove a breach of the operational duty at trial.

45. At the end of the working day before the hearing, Ms Ayres provided a 25-page chronology, comprising what she contended were the key entries from the Defendant's case note reports (element (ii) of the records described at [42] above) that related to the Claimant's home conditions and the Defendant's response to them at particular points. During the hearing she took me through a significant number of entries in the chronology.

46. She submitted that while the Defendant's primary case was that the pleaded case did not meet the Article 3 severity threshold, it was important for the court to look in detail at the underlying records to understand the factual context more fully. She

argued that in order to determine the threshold and risk issues it was necessary to consider the detail of the Defendant's chronology, together with all the contemporaneous records in the supplementary bundle. For the breach issue, it was necessary to consider the expert evidence as well.

47. Mr Jacobs objected to the Defendant's change in approach from pursuing the applications on the basis of agreed facts to contending that the Claimant's pleaded case only presented a partial picture. He also argued that the Defendant's approach was effectively inviting an inappropriate mini-trial. He nevertheless took me to a relatively limited number of pages in the records in support of his submissions.

48. Unsurprisingly the totality of this process exceeded the two-hour time estimate for the hearing by some way.

The correct approach to the applications

49. The matters set out above meant that there was substantial disagreement between the parties as to the correct approach that should be taken to the applications.

50. As a preliminary point, Ms Ayres noted that in *AB* the High Court and the Court of Appeal had examined each of the incidents pleaded in the Particulars of Claim to determine: (i) whether they individually constituted Article 3 treatment; (ii) whether the Defendant was or ought to have been aware of them at the relevant time; and (iii) whether, stepping back, the events could cumulatively amount to treatment crossing the Article 3 threshold. She contended that the same approach was appropriate here.

51. I do not consider that the approach taken in *AB* is directly applicable to this case. The claim in *AB* was advanced on the basis that the eleven incidents relied on either individually or cumulatively met the Article 3 threshold: see [26] above. In contrast, this claim is put on the basis of a significant number of aspects of the Claimant's treatment, which are said to have continued to exist to varying degrees over an approximately four-year period. The claim is only advanced on a cumulative basis: see [8] above. It was therefore not appropriate to focus on any one date, or series of dates, nor on any one element of the treatment: rather, it was necessary to look at the cumulative impact of the various elements on which the Claimant relies, and test that against the Article 3 threshold.

52. The more fundamental question was the extent to which I should have regard to the underlying evidence, principally the records in the supplementary bundle. Ms Moore's statement had identified certain passages in those documents which she said supported the Claimant's case. In her Skeleton Argument, Ms Ayres took issue with this approach, contending that an application to amend the Particulars of Claim would be needed. More generally, she suggested that the Claimant had pleaded the case on a selective basis and engaged in "cherry picking" from the history and failing to refer to more positive entries in the notes. Both of these positions became hard to sustain once the Defendant had provided its own chronology which referred to its chosen entries from the contemporaneous case notes. There was clearly a risk that the Defendant's chronology had focused on the entries favourable to its case and provided only one version of events.

53. In my judgment, it was unhelpful and unfair for the Defendant to change the way in which the applications were advanced from that set out in Ms Goss' statement so radically at such a late stage. Moreover, I do not accept the Defendant's submission that the wide approach contended for as set out at [46] above was consistent with that taken in *AB* and was thus correct in principle.

54. Unlike in *AB*, this claim did not revolve around a finite, and relatively small number of incidents, but on the cumulative picture of various aspects of the Claimant's treatment over several years: see [8] above.

55. In *AB* it is clear that the claim against Worcestershire did not require the court to consider any underlying evidence but proceeded on the basis of agreed facts: see [25] and [31] above. It also appears that although Birmingham had served extracts from its records, the Judge focussed her attention on the Claimant's chronologies, which were included in and appended to the Particulars of Claim, and which were based on the records: see [22], [26] and [31] above and the first instance judgment, [2022] EWHC 115 (QB) at [65]-[86].

56. The evidential position was very different here. There was no composite chronology agreed to represent the overall picture. The Claimant had identified a number of pages on which reliance was placed. The Defendant was seeking to rely its own chronology, based on one category of the notes, which did not purport to summarise all the records and had not been agreed by the Claimant as doing so.

57. Further, unlike in *AB*, the Defendant had chosen to rely on evidence from various professionals in support of the applications, albeit placing relatively little reliance on this evidence in submissions. Those statements are not agreed by the Claimant; and Mr Jacobs made clear that he would wish to cross-examine these professionals at trial, primarily on the risk and breach issues, albeit no doubt with the caveats expressed by the Court of Appeal in *AB* (see [31] above) in mind).

58. Unlike in *AB*, the Claimant had served expert evidence. Although the issue of the reasonableness of the steps taken by the Defendant will ultimately be a matter for the trial judge, Ms Ayres did not contend that the expert evidence was inadmissible at this stage or at trial: indeed, I was expressly invited to consider it: see [46] above.

59. In light of these issues, the factual basis for these applications was much more fluid than the position in *AB*; and there were a significant number of serious live issues of fact, especially on the breach issue. These issues rendered the claims inherently unsuitable for strike out (see [20] above) or summary judgment, if, in order to resolve that issue, a mini-trial was required (see [17] above).

60. In my judgment *AB* makes clear that proper determination of summary judgment applications of this kind still requires compliance with the *Easyair* principles. Accordingly, it was appropriate to consider the supplementary bundle to the extent necessary to assess whether it was "clear that there [was] no real substance in factual assertions made" [by the Claimant], perhaps because they were "contradicted" by the records in that bundle. This approach would avoid taking the Claimant's assertions "at face value and without analysis". It would thus be consistent with *Easyair* principle iv). However, it was not permissible to go further, and seek to resolve disputed issues

of fact and make findings on them, based on the records, and the other evidence, as invited by the Defendant: to do so would amount to the sort of mini-trial expressly precluded by the *Easyair* principles.

Ground 1: Article 3

1.1: The threshold issue

General principles

61. It is well-established in case law from the European Court of Human Rights ("ECtHR") that suffering or harm must, objectively, attain a particular level before it can be classified as inhuman or degrading for the purposes of Article 3.

62. The assessment of whether the ill-treatment reaches the minimum level of severity necessary to fall within the scope of Article 3 is "relative and depends on all the circumstances of the case, principally the duration of the treatment or punishment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim": *AB* at [59].

63. It has been said that a claimant bears the burden of "conclusively establishing" that they have suffered treatment that could be classified as inhuman or degrading including that any harm suffered was "sufficiently serious": *ASK* at [72], quoting *Aerts v Belgium* (App No 25357/94, 30 July 1998), [2000] 29 EHRR 50 at [66]. This may (but need not) connote a standard of proof higher than the usual balance of probabilities: *ASK* at [73]. However, as Mr Jacobs observed, the expression "conclusively proved" has not featured consistently in the case law, and was not referred to in *AB*.

64. Treatment has been held to be "inhuman" within Article 3 because, among other things, it was "premeditated, had been applied for hours at a stretch and had caused either actual bodily injury or intense physical and mental suffering": *VK v Russia* (2018) 66 EHRR 7 at [168].

65. While ill-treatment that attains the appropriate minimum level of severity to fall within Article 3 "usually" involves the relevant individual suffering "evidenced actual bodily harm or intense physical or mental suffering", even in the absence of these elements, treatment may be characterised as "degrading" within Article 3 where it "humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance"; and "it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others": *ASK* at [70]-[71].

66. In *E v Chief Constable of the Royal Ulster Constabular*y [2009] 1 AC 542 at [8], the House of Lords reiterated that the special vulnerability of children is relevant to the assessment of whether the Article 3 threshold is met.

Cases relied on by the parties

(i): Z v UK (2002) 34 EHRR 3

67. *Z v UK* involved four siblings. It was an application to the ECtHR made by the Claimants in *X v Bedfordshire* [1995] 2 AC 633. In the Court of Appeal judgment, Sir Thomas Bingham MR described the abuse the children had suffered. In summary, reports had been made to the effect the children were at risk, including of sexual abuse; that the children were locked out of the house for long periods of time with the oldest child (aged five) supervising the next two (aged three and two); that the third child was observed to have an abrasion which could have been caused by a cigarette burn; that the oldest child had been found to be "pale, depressed, pathetic and possibly hungry"; that the second and third children's bedroom had been observed to be squalid and to have faeces smeared on the wall; that the children's home was in a disgusting state, with the second and third children's beds sodden with urine; that the two older children attended school looking dishevelled and smelly; and that there was concern for the children's emotional well-being. It was later reported that the two older children had been seen taking food out of school waste bins; and that the second and third children were barricaded in their room for up to 14 hours; that the second and third children's bedroom was damp and smelly, one bed was broken, the bedding was damp and there was no lighting; and that they were later described by foster parents as "dirty and underfed with poor personal hygiene": pp. 654-655.

68. The ECtHR noted that the children had suffered significant physical and psychological effects, variously involving physical scarring, unmet need for an eye condition and requiring specialist care and/or therapy: [48] and [128]-130]. The expert psychiatrist had described the children's experiences as "horrific" and added that the case was "the worst case of neglect and emotional abuse that she had seen in her professional career": [40].

69. The European Commission of Human Rights concluded that the treatment the children had suffered reached the minimum level of severity to engage Article 3: [C91]. The government did not contest that finding before the ECtHR: [72].

(ii): Khan v France (App No 12267/16, 28 February 2019)

70. A 12-year-old unaccompanied foreign minor had lived in a hut for six months on a site near Calais. The ECtHR found a violation of Article 3 on the basis that the environment was "totally unsuited to his status as a child, whether in terms of safety, housing, hygiene or access to food and care, and in unacceptably precarious conditions in view of his young age". The particularly serious circumstances and the failure to enforce the decision of the Youth Judge ordering measures for the applicant's protection, when taken together, attained the threshold of severity required for Article 3: [85] and [93]-[94].

(iii): AB

71. The Court of Appeal's reasons for upholding the Judge's conclusions on the aspects of the Birmingham appeal material to this issue are set out at [66]-[69] of the judgment. In summary, the Court concluded that the Judge was entitled to find that (i) the first and third reports of concerns (including that the appellant had chemical burns to his scalp and neck due to hair bleach; and was locked in his room/hungry) were respectively, inaccurate and malicious; (ii) the second, fourth, sixth and seventh

reports of physical injuries were not said to relate to injuries that were sufficiently serious to meet the Article 3 threshold; they related to "isolated incidents, spread over 4 years, and with significant gaps in between"; and none had involved the appellant's mother striking or slapping the appellant (save one, where it was said that the mother had, accidentally, pushed the appellant and he fell to the ground); and (iii) the fifth report, which concerned the appellant's mother dressing him up in women's clothing for the amusement of her friends, was "insensitive, unkind and an example of poor parenting but did not, objectively, meet the threshold required to amount to inhuman or degrading treatment".

72. The Court's overall finding on the Birmingham appeal was as follows:

> "70. The Judge was entitled to conclude, therefore, that the evidence showed that the mother's ability to protect the appellant from physical chastisement from others was inconsistent and there were occasions when she demonstrated poor caring and nurturing abilities. The Judge was correct to conclude that 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 amount to Article 3 ill-treatment. The reports did not, therefore, provide a basis for concluding that there would be a risk of real and immediate treatment (or punishment) which would fall within the scope of Article 3 of the Convention. There was no other basis for concluding that there was such a risk".

73. The Court addressed these aspects of the Worcestershire appeal at [74]-[77] of the judgment. The Court noted the Judge's findings that (i) although the first report related to the appellant being left in the care of an inappropriate carer such that he needed to be taken into police protection, he had not been left with that carer again, and thereafter regular social services support was given; (ii) although there were reports in July 2013 and January 2014 that the appellant's mother had assaulted him, he was not in her care at this point, but with his aunt and uncle; and (iii) although there was a further report that his mother had hit him after he returned to her care in May 2014, there were no incidents reported in July or August 2014 and in August 2014, he left her home and never returned. Overall, the Court concluded that the Judge was entitled to make the findings she did; and to have reached the same overall conclusion as she did on the Birmingham appeal.

The evidence relevant to the threshold issue in this case

74. The Claimant's pleaded case involves, in summary, a child rendered vulnerable by age and disability who (i) was living in an extremely dirty house, which smelt of urine and had a significant build-up of rubbish in every room; (ii) was given dirty and inadequate clothing; (iii) at times had no underwear; (iv) was observed "walking around in the filth with nothing on [her] feet"; (v) had an untreated ankle injury that was causing her to limp; (vi) had a poor diet; (vii) had poor personal hygiene and was smelly; (viii) was infested with nits to the extent they dropped from her head; (ix) had limited access to education; (x) was living in an isolated family environment, with limited social contact; and (xi) had a mother whose parenting skills were severely restricted by her own learning difficulty, misuse of alcohol and poor mental health,

and who neglected the Claimant's medical needs and her emotional and behavioural development. It was in this context that the pleaded occasion when the Claimant was seen "playing with herself" without any intervention or understanding of appropriate boundaries being imparted by her mother, occurred; and that she kept professionals away by arming herself with a pole: see [8] above.

75. Ms Moore's statement at [5]-[6] referred to evidence from within the Defendant's records which adds the following further details on the home conditions at various points: (i) the house was described as having no carpets or proper flooring, and containing rotting food, old takeaway boxes, litter and cigarette ends and flies; (ii) there were reports of old cat food and full used cat litter trays around the house, from the three cats living there; (iii) there were references to faeces/excrement on the floor, said to be from the cats, from a bird that was in the lounge that was often out of its cage and potentially also from humans; (iv) the kitchen was said to be "full of full bin bags, broken furniture and flies"; (v) it was noted that "rubbish and old/broken furniture" rendered the back door to the property inaccessible from both inside and outside; (vi) it was said that there was "stale bath water in the bath" with the bathroom floor "cluttered with rubbish, broken things and mounds of soiled toilet tissue"; (vii) the house was reported as having a very bad smell; and (viii) the conditions were described variously by professionals as, "dangerous", "dire" and "diabolical". One further document to which Mr Jacobs took me, from June 2017, described the bath as "yellowed with urine" and noted that there was "faeces in the entrance to [the Claimant's] bedroom".

76. In addition to the home conditions, Ms Moore's statement pointed to evidence to the effect that (i) the Claimant's school had reported that not only did the Claimant often smell of urine but she had large headlice falling out of her hair (described in June 2017 as "the worst" case of lice the school nurse had seen); (ii) her ankle injury made it difficult for her to walk, and was left untreated for around four years; (iii) as well as not wearing underwear, there was evidence of the Claimant not having appropriate sanitary products when she had her period; (iv) her feet were often black with dirt and she was persistently unwashed; (v) the inadequacies in her diet meant she was often hungry and went through periods of rapid weight gain, ultimately becoming morbidly obese; and (vi) one social worker had observed that the Claimant usually sat on a certain sofa in the lounge, in a very dirty area, and the considerable indent in the seat suggested she spent a lot of time sitting in the same position.

77. Ms Goss's statement at paragraph 2.u refers to evidence that in July 2017 the police were called out due to reports of the Claimant "wandering the street in a nightie". It is said that the Claimant made allegations that her mother had hit her which she later retracted.

78. It is clear - and indeed appears to be agreed – that the Claimant's home conditions fluctuated: there were regular patterns of deterioration, followed by some improvement, and then deterioration again, often within quite short periods of time. The professionals noted, for example, that the conditions varied from "visit to visit"; and that the improvements made by the Claimant's mother "cannot be sustained for a prolonged period of time". The Defendant's chronology confirmed this broad picture: for example, there was a serious deterioration in the conditions by April 2016 and then some improvement by early May 2016; there was deterioration in early

November 2016 followed by some improvement and then a significant deterioration by early December 2016; there was an apparent pattern of more consistent deterioration from early March 2017 leading to the Claimant's school intervening on 12 June 2017 and inquiries being made into whether the Claimant could go and stay with her aunt; some improvements were noted on 13 and 20 June 2017, by 13 July 2017 there had been a further deterioration, followed by some improvement, and then conditions being described as "extremely poor" by 8 September 2017.

Submissions and analysis

79. First, Ms Ayres submitted that caution was needed with the Claimant's use of the Defendant's records from late 2017. This was because by that point, the Defendant accepted that the Claimant's living circumstances were sufficiently poor that her accommodation elsewhere should be facilitated. It was submitted that care should be taken when extrapolating social work findings from this time to other periods.

80. However, the evidence from late 2017, including the graphic photographs of the property taken on 28 December 2017, can reasonably arguably be used to infer that the conditions present at that time had developed over a prolonged period. In any event, the Claimant's case does not rely solely on "mapping back" conditions from late 2017: on the contrary, as is apparent from the way the claim is pleaded (see [8] above) it is advanced on the basis of the conditions found in 2013, which it is submitted continued in largely unremitting fashion until the Claimant's removal in 2018. Further, the records for the pre-2017 period were available, and both counsel took me to certain entries in the notes from that time, such that it was not necessary to rely solely on the late 2017 evidence.

81. Second, Ms Ayres argued that the treatment that the Claimant experienced did not have a lasting effect on her physical or psychological health, in contrast to *Z v UK*. It is right to note that Dr Rippon, the Claimant's expert, found "no evidence of any anxiety, low mood or any other psychiatric symptomatology during the interview". Her report does not, as Ms Ayres rightly highlighted, establish causation of any psychiatric injury on the balance of probabilities.

82. However Dr Rippon recognised that the Claimant's difficulties with communication may explain why she struggled to articulate any symptoms. Despite that, she had noted that the Claimant was showing signs of trauma. Overall, she concluded at 7.1 of her report as follows:

> "Given the long-standing nature of the neglect which [SZR] has suffered, it is my opinion that, even if interventions had been undertaken in 2012, she would always be an individual who would have been at risk from developing maladaptive strategies to manage and communicate distress. However, it is my opinion that, should interventions have been put place in 2012, then [her] outcomes could have been improved" [emphasis added].

83. Dr Rippon explained these potentially better outcomes further at sections 7.1-7.3 thus:

> "…given [her] diagnoses of Autism and a probable mild learning disability, it would have been unlikely that she would have been able to live independently [but] [i]t is probable that she would have been able to manage in an independent supported living environment with a need for a much reduced level of support…she may have been able to work on a voluntary basis and this would have provided structure and meaningful activity".

84. I therefore accept Mr Jacobs' submission that the Claimant's pleaded case, and the evidence on which it relies, makes out an arguable case that the Defendant's failure to remove her earlier has had long-term consequences for her, albeit of a different kind to those suffered in *Z v UK*.

85. Third, Ms Ayres relied on the fact that the length of time that a person experiences particular treatment or an environment is relevant to the Article 3 threshold: see, for example, *Limbuela v Secretary of State for the Home Department* [2006] 1 AC 396 at [78], where the Court of Appeal observed that:

> "It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading."

86. She relied on the evidence that the Claimant's home conditions fluctuated over time, which presented a somewhat cyclical picture with respect to the deterioration and improvement of home conditions: it was not the case that the Claimant was consistently living in an extremely poor home environment.

87. I accept the evidential basis for this submission: see [78] above. However, I do not agree that the fluctuating or cyclical nature of the treatment the Claimant experienced means that the Article 3 threshold was not met. As Mr Jacobs noted, in *Limbuela* at [7], the Article 3 threshold was satisfied where an adult asylum seeker "with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life". The Court observed at [71]:

> "Not only did they [the applicants] have to face up to the physical discomfort of sleeping rough, with a gradual but inexorable deterioration their cleanliness, their appearance and their health, but they had also to face up to the prospect of that state of affairs continuing indefinitely."

88. I accept Mr Jacobs' submission to the effect that the same "potentially indefinite" situation arguably applied here: while the evidence did suggest that at times the Claimant's mother was able to improve her living conditions, it is reasonably arguable that the Claimant could not reasonably know whether such improvement would occur, and if so when. She was therefore arguably in the same position as the individuals in

Limbuela, regularly facing the prospect that her conditions would continue indefinitely.

89. Fourth, Ms Ayres contended that there is a "spectrum" of neglect cases in which *Z v UK* is at one end and *AB* is at the other. She argued that the conditions alleged by the Claimant are not of the same magnitude as those experienced by the children in *Z v UK*. In particular, this Claimant was much older, did not witness and was not subjected to violence, was not at risk of sexual abuse, did not suffer from a profound lack of food and did not show signs of serious psychological disturbance as a result of her treatment. Her mother was loving, ensured the Claimant was fed (albeit not to the most nutritious of standards) and clothed, was not intentionally cruel to her and at times positively engaged with social workers. She argued that it was quite clear that the Claimant's treatment fell at the *AB* end of the spectrum, as both cases involved similar allegations of poor parenting, dirty and unclean home conditions, limited access to education, physical injury and isolation. She argued that unless *AB* can be materially distinguished from this case, it is binding, and the Article 3 claim must be dismissed.

90. In my judgment Mr Jacobs was correct to submit that there is nothing in *Z v UK* to suggest that the Commission had any difficulty in concluding that the Article 3 threshold was met: in other words, it did not appear to be a borderline case. Nor is there any reason to conclude that *Z v UK* set the standard of what is required in order to meet the Article 3 threshold. On the contrary, the authorities are clear that the assessment of Article 3 severity is fact-specific, and depends on all the circumstances of the case: see [62] above.

91. In any event, I observe that there are several features of this claim that are similar to the facts of *Z v UK*: both cases involved children living in dirty and squalid conditions, infested by urine and faeces (in this case, cat and bird faeces and potentially human faeces too: see [75] above) and with broken and unsuitable furniture, the children attending school dishevelled, smelly and dirty with poor personal hygiene, them being given inadequate diets, with untreated medical conditions and with concerns for their emotional well-being.

92. Further, there is evidence that on 9 December 2016, the home conditions in this case were described by a family support worker as the "worst" she had ever seen, and this was endorsed by the social worker, which resonates with the similar observations made by the expert psychiatrist in *Z v UK*: see [68] above.

93. Ms Ayres was correct to identify certain elements that were present in *Z v UK* that are not present here. However this case also involves allegations of the Claimant's access to education being impeded, the family being very isolated, inappropriate boundary-setting by her mother and her mother's ability to parent her being generally hampered by her own learning difficulty, misuse of alcohol and poor mental health, such that she kept professionals away by arming herself with a pole, and the other matters referred to at [74]-[77] above.

94. Given the fact-specific nature of the Article 3 threshold assessment, the facts of *AB* and the finding in it can only provide some assistance here, especially because the claim in *AB* was advanced in a conceptually quite different way to this claim: see [54]

above. There were also very specific factual reasons why the Judge dismissed the Article 3 claim in *AB*, which were upheld by the Court of Appeal: [71]-[73] above. These were, effectively, a combination of the reported concerns being found to have been unsubstantiated, not being considered sufficiently serious or having been responded to appropriately. They do not amount to the conclusive findings on the threshold issue, binding on other cases, as suggested by the Defendant. Accordingly the fact that the claim in *AB* was dismissed does not mean that the same outcome is required here.

95. Overall, Ms Ayres submitted that the conditions alleged by the Claimant, even taken cumulatively, were not arguably serious enough to meet the Article 3, threshold.

96. Having reviewed the contemporaneous evidence to the extent appropriate given the nature of this applications, I do not consider that any of the pleaded assertions by the Claimant were ones that had "no real substance" or were "contradicted" by the records. The records supported the picture set out in the POC at [24] (see [8] above). Reference to the evidence merely added to the detail in the Claimant's claim, albeit also making the "fluctuation issue" more clear.

97. I therefore agree with Mr Jacobs that the Defendant's characterisation of the Claimant's claim in Ms Goss's statement and Ms Ayres' Skeleton as involving complaints that the "home was untidy and unclean" and that her mother "ordered takeaways" and "did not always ensure that she went to school" significantly underestimates the scale of the neglect the Claimant alleges. Rather, the full picture of the Claimant's pleaded case, and the additional details she is likely to point to at trial, are as set out at [74]-[77] above. Those paragraphs represent the Claimant's case at its highest.

98. Mr Jacobs contended that the third period of time relied on was particularly striking and just short of two years. The Claimant's case was that the neglect she suffered in this period was essentially unremitting and led to her being placed with her maternal aunt at one point and taken into emergency police protection at another.

99. In addition to the observations of the social worker on 9 December 2016 about the nature of the conditions by that point (see [92] above), on 27 June 2017 it was noted at a child protection review conference that "words could not portray how awful the conditions have been" over the last six months. Concern was expressed that they had been "allowed to continue for so long". It was at this meeting that reference was made to the Claimant's "basic needs [being] persistently neglected" and the chair concluded that "this has got to stop" and advice should be sought "NOW": see [11] above.

100. The assessment of whether the Article 3 threshold is met is "relative and depends on all the circumstances of the case". Considering the various factors referred to in *AB* as the ones to which regard must "principally" be had (see [62] above), (i) the "duration" of the treatment was around four years; and (ii) its "effects" on the Claimant have been set out at [82]-[84] above. Consideration of the further factors which can be relevant, namely "the sex, age and state of health" of the Claimant, adds weight to her claim: although she was older than the children in *Z v UK*, she was still a child, and a particularly vulnerable one at that given her disabilities and the impact of the neglect on her health such as through her ankle injury and her morbid obesity.

Her status as a female child added an additional element of neglect, given the inappropriate provision made for her menstrual cycle.

101. The case law makes clear that actual bodily harm or intense physical or mental suffering is not a prerequisite for the Article 3 threshold for degrading treatment to be met. What ultimately matters is whether, objectively, the treatment "humiliates or debases an individual, showing a lack of respect for or diminishing…her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance": [65] above. In my judgment the Claimant can arguably meet this threshold.

102. In *AB* at [57], the Court of Appeal confirmed that *Z v UK* indicates that in the context of alleged failures to remove a child from the care of the parent, "serious and prolonged ill-treatment and neglect, giving rise to physical or psychological suffering", is capable of amounting to treatment contrary to Article 3. In my judgment, that test is arguably met here, with the element of suffering being made out by Dr Rippon's evidence as set out at [82]-[84] above.

103. Accordingly, taking into account all the matters set out above, the Defendant cannot prove that the Claimant has no real prospect of proving that the cumulative effect of her treatment met the Article 3 threshold and/or that she has no reasonable grounds for bringing the claim on this basis.

1.2: The risk issue

104. In *AB*, the Court of Appeal emphasised the following principles relevant to this issue:

> "60…the risk of Article 3 ill-treatment must be real and immediate, that is the risk must be present and continuing. The obligation is to focus on a risk which exists at the time of the alleged violation and not a risk that may arise at some stage in the future. See the observations of Lord Dyson at paragraph 39 in *Rabone and another v Pennine Care NHS Trust (Inquest and others intervening)* [2012] UKSC 2, [2012] 2 AC 72.
>
> 61…in considering whether the authorities knew or ought to have known at the time that there was a real and immediate risk of ill-treatment contrary to Article 3, the court must be wary of assessing events with the benefit of hindsight. The court should assess the events as they unfolded at the time. See the observations of Lord Bingham in *Van Colle* [*v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225] at paragraph 32, dealing with Article 2 but similar principles apply to Article 3".

105. The test is a stringent one and will be harder to establish than mere negligence because it is sufficient for negligence that the risk of damage be reasonably foreseeable, whereas the operational duty requires the risk to be real and immediate: see *Rabone* at [36-37].

106. The Defendant's case on this issue is set out in the Defence at [15]. It is to the effect that the Defendant took reasonable steps to bring about improvements in the Claimant's home conditions which were effective, at least in the short term, such that that at no point was the Defendant on notice of a real and immediate risk of Article 3 treatment. Ms Ayres argued that the social workers' interventions improved the Claimant's circumstances such that the Article 3 threshold, even if it had been met previously, was no longer met; and at those times there was no real and immediate risk to the Claimant. She reiterated that Article 3 does not impose a longer-term obligation to ensure that the situation did not deteriorate in the future; and that it was important not to look at matters with hindsight. Rather, it was necessary to look at the records to see what picture was confronting the social workers in order to assess whether they should have realised the real and immediate risk if indeed one existed.

107. Mr Jacobs did not agree that Ms Ayres' formulation of how the *Rabone* risk issue operates in a case like this was correct: he contended that to adopt an approach that limited the applicability of Article 3 to the immediate alleviation of risk would render the right no longer practical and effective. This is a novel legal issue which was only touched on in the submissions before me. It remains a live issue between the parties and can only properly be resolved on the basis of findings of fact. That, in itself, renders this issue unsuitable for summary determination.

108. Further, even if Ms Ayres' analysis is correct, the material to which I was taken for the purposes of these applications did not conclusively "isolate" any lengthy periods of time in which the impact of the Defendants' interventions meant that the Article 3 threshold was no longer met. Given what was known about the Claimant's inability to sustain improvements, and how rapidly any deterioration might re-start (see [78] above), it is arguable that the risk of Article 3 treatment to the Claimant remained "present and continuing" in the *Rabone* sense (see [104] above). I say this bearing in mind that a risk is real if it is "a substantial or significant risk and not a remote or fanciful one" (*Rabone* at [38]) and that arguably applied here: the neglect arguably continued to be endured by the Claimant, subject to some modest periods of short-term improvement, and the risk of repetition did not relate to a fanciful prospect of some future event.

109. Mr Jacobs correctly drew an analogy with *Renolde v France* (2008) 48 EHRR 969, where a prisoner's risk of suicide varied over time but remained sufficient to require "careful monitoring in case of any sudden deterioration" such that the real and immediate risk test for Article 3 purposes was met. I accept his submission that it is arguable that the Defendant was aware of the risk (or ought to have been) not least as the relevant matters are all recorded within the Defendant's records, whether by the Defendant's employees and/or information provided to the Defendant, at the time, by third parties (such as the school and ambulance service).

110. For these reasons the Defendant's applications fail on this issue.

1.3: The breach issue

General principles

111. In *AB* at [62]-[64], the Court of Appeal emphasised certain key principles relevant to the breach issue, by reference to *Z v UK, Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225 and *DP and JC v UK* (2003) 36 EHRR 14. They can be summarised as follows:

(i) The positive obligation under Article 3 is to be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.

(ii) Regard must be had to other Convention rights, including in the present context, the right to respect for family and private life guaranteed by Article 8.

(iii) Regard must also be had to the "difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life".

(iv) Generally, the test for determining whether a public authority has violated Article 3, by failing to take reasonable measures within its powers to avoid a real and immediate risk of harm of which it knows or ought to have known, is a stringent test that is not readily satisfied.

112. In upholding the Judge's findings on the breach issue at [72] and [78], the Court also observed that:

(i) The domestic legislation (as summarised at [5]-[11] of the judgment) provides for support and services to assist the child and the family, and to help the family remain together.

(ii) Section 17(1) of the Children Act 1989 recognises that it is the general duty of every local authority "to promote the upbringing of such children by their families".

(iii) An application for a care order, with a view to removing the child from the care of the child's parents, is the last resort where the child is suffering, or is likely to suffer, significant harm (or, in the case of interim care orders, there are reasonable grounds for believing that such harm may result).

(iv) Society will have to tolerate very diverse parenting including "the barely adequate and the inconsistent" and children will have very different experiences of parenting and very unequal consequences as a result (citing *Re MA (Care Threshold*) [2009] EWCA Civ 853, [2010] 1 FLR 431 at [49]-[53].

113. In *DP* at [113], the ECtHR similarly observed that for social services professionals to be justified in taking the "draconian step" of cutting permanently both applicants' links with their family would have required "convincing reasons". The Court was not satisfied that on the facts of that case a "clear pattern of victimisation or abuse" should have been identified: [112].

114. As noted at [31] above, the Court in *AB* observed that there is no need for expert evidence on the breach issue: rather the question of whether the Defendant has failed to take appropriate steps to avoid a real and immediate risk of Article 3 ill-treatment is one for the court.

Submissions and analysis

115. Against this legal backdrop, the Defendant submitted that the Claimant has no real prospect of establishing that the Defendant failed to take reasonable preventative measures. The sole basis for that contention was Ms Goss's statement that the Defendant "took all reasonable steps to safeguard the Claimant from experiencing Article 3 treatment".

116. Mr Jacobs was right to characterise this as a bare assertion, that taken in isolation would be an inadequate basis for summary judgment or strike out.

117. In response, Ms Ayres prayed in aid the contents of the Defence, particularly [15] thereof. This paragraph, together with [2] of the Defence, makes clear that the Defendant's case on the breach issue is as follows. The Claimant's mother was loving, but at times failed to cope. This created a cycle of occasions where input from the Defendant was required in order to improve the home conditions. The Defendant intervened appropriately by, for example, cleaning up the home and encouraging the Claimant's mother to do this, putting the Claimant on a Child in Need plan, escalating the case to the public law outline process, offering respite and holding monthly core group meetings to monitor progress. Even though the Claimant's conditions generally deteriorated again, it was not until late 2017 that they deteriorated to such an extent, without improvement following intervention, that care proceedings were necessitated. It was also relevant that due to her autism, the Claimant would have not been able to understand why she was being removed from her mother's care and this could have been significantly harmful, and not in her best interests.

118. Ms Ayres submitted that the Defendant's interventions were sufficient to cause an improvement in the Claimant's home conditions such that any Article 3 risk was averted, even if this was not then subsequently maintained over the long term. It was not necessary to remove the Claimant from the care of her mother in order to mitigate this particular risk as and when it arose. Further, she argued that although the Claimant's social work expert, Ms McKenzie, was critical of the various occasions on which the case was closed, asserting that this was premature, she had not addressed the correct question, namely whether what the social workers had done was sufficient to ameliorate the Article 3 risk.

119. In my judgment, there may be force in all these points; and ultimately, they may succeed before the trial judge. However, the Defendant has not satisfied me that they are so persuasive that it can be said at this stage that the Claimant's alternative case on breach has no real prospect of succeeding and/or that there are no reasonable grounds for advancing it.

120. I say this primarily because Ms McKenzie has provided apparently clear and rational reasons for her expert opinion. She is highly experienced and can be taken to be well aware of the threshold for a care order (having set out the relevant legislation and

guidance in the appendices to her report), and the potential impact of removal on the Claimant. Yet her view is that there were numerous opportunities when the Defendant should have intervened and initiated care proceedings, prior to late 2017. Her key conclusions, as set out in the Executive Summary to her first report dated 28 January 2021, are as follows:

> "4. SXR's health and educational needs were not regularly addressed by her mother, who found difficulty in processing information. The basic care of both children provided by the mother was inadequate. The family lived in squalor with poor personal hygiene, lacking appropriate clothing or food. SXR's personal care was not properly addressed, and she had persistent head lice. Over time this became chronic, and SXR became morbidly obese, due to living on junk food and takeaways, and her social behaviour became out of control.
>
> 5. The involvement of Blackburn with Darwen Children's Social Care (CSC) began in 2012, following serious concerns about the care of the home and the children raise by the Neighbourhood Officer of the housing association.
>
> 6. There were three episodes of CSC intervention prior to the creation of a Child Protection plan in May 2016: March-October 2012, March-December 2013 and February-October 2014.
>
> 7. The initial response of CSC to each of these episodes was appropriate leading to the completion of Initial Assessments and subsequent Core Assessments. Each of these assessments gave ample evidence of the neglect experienced by SXR and her sister. However, after input from a variety of agencies, on each occasion the case was closed prematurely.
>
> 8. The mother was unable to sustain changes and closure allowed her to fall back into a pattern of neglect. This left SXR in a neglectful home and there was no coordinated plan to address her complex needs.
>
> 9. Between 2012-2016 the delay in any meaningful intervention from CSC, despite multiple referrals, suggests a lack of robust management supervision and illustrates poor social work practice.
>
> 10. On each occasion the CIN [Children in Need] plan should have been applied more rigorously in order to achieve a positive outcome. <u>The evidence of rapid deterioration after each episode indicates that legal advice should have been taken, with a view to removing SXR from the home</u>.
>
> 11. <u>At the latest this should have occurred in December 2013,</u> when, in all likelihood, SXR would have been placed in a residential or family unit that was able to meet all her needs. This would have given her an opportunity at an earlier age to learn social skills that could lead to independent living.

> 12. Further referrals early in 2016 regarding concerns about the home conditions led to a strategy meeting and a S47 Enquiry. The response to this was only the offer of support from a Family Support Worker (FSW) to maintain home conditions and management of the case by a CIN plan.
>
> 13. The Initial Child Protection Conference in May 2016 and the creation of a Child Protection (CP) Plan was an appropriate response. However, the CP Plan was not sufficient to change the situation, and this led to drift 2 in the process of protecting SXR.
>
> 14. In my view this approach to what were already recognised as 'dire conditions' and neglect of SXR and her sister was inadequate, and the local authority should have sought legal advice at this stage with a view to an appropriate application to court to protect SXR. As SXR was approaching 17 years of age this might have been an application to the Court of Protection.
>
> 15. The Letter Before Proceedings sent to mother in June 2016 was the correct procedure before making an application to court. However, this did not lead to proceedings. The local authority should have taken legal advice to instigate appropriate proceedings when it became clear that mother was unable to comply with the CP Plan and maintain adequate change in the home conditions and the care of SXR. The failure of CSC to respond appropriately to these concerns indicates social work practice that fell below and acceptable standard.
>
> 16. During 2017 all the High-risk factors remained and there was little evidence of any progress over a period of 2-3 years since the first CAF in March 2014.
>
> 17. Had SXR been made the subject of a Care Order at age 13 or 14 years, she would have been afforded care appropriate to her complex needs. This would have given her the chance to develop skills that could have led to independent or supported living as a young adult.
>
> 18. The eventual involvement of Adult Services led to a proper assessment of SXR's capacity and care needs and resulted in legal action being taken to protect her from further abuse.
>
> 19. The actions taken by the local authority CSC were muddled and lacked coordination. Evidence of a lack of robust management and delays in decision making led to further drift for SXR and is further indication of social work practice and management that fell well below an acceptable professional standard" [my emphasis].

121. In her addendum report dated 9 September 2022, Ms McKenzie confirmed that she had reviewed the Defendant's witness statements provided for the purposes of these applications. She explained that they had clarified the position of the social workers

but that "nothing in these statements alters my opinion or conclusion of my report of 28 January 2021".

122. In my judgment it is reasonably arguable that Ms McKenzie was not simply required to address the question of amelioration of the Article 3 risk. The various opportunities for intervention she outlined can credibly be advanced by the Claimant as reasonable steps that could and should have been taken to protect her from the risk of Article 3 treatment.

123. Even if Ms McKenzie's expert opinion is ultimately found to be inadmissible at trial, there is a reasonable prospect that the trial judge will reach the same view as she has set out, having seen the social workers cross-examined and having heard submissions from the Claimant's counsel, no doubt based on the contents of her expert report. I say this in part because there are some observations in the contemporaneous records suggesting that some of the professionals involved at the time felt that greater intervention was merited: see, for example, the observations from the chair of the review conference in June 2017 cited at [11] above.

124. For these reasons the Defendant's applications also fail on this issue.

1.4: The causation issue

125. In her Skeleton Argument Ms Ayres advanced a fourth ground for summary judgment/strike out on the Article 3 claim, to the effect that the Claimant has no real prospect of succeeding on the causation issue and/or no reasonable grounds for bringing this aspect of the claim. No separate argument to this effect had been made in Ms Goss's statement. However, Mr Jacobs did not object to the point being taken.

126. The point was developed in the Skeleton Argument simply by cross-reference to the Defence at [16]-[17]. These paragraphs set out the Defendant's case on causation, to the effect that care proceedings were properly initiated in late 2017 and the Claimant removed from her mother's care at that point; but that they were not justified at any earlier stage.

127. As with the breach issue, the Claimant relies on the expert evidence of Ms McKenzie. For similar reasons to those given in section 1.3 above, the Defendant has not persuaded me that there is no real prospect of the trial judge accepting Ms McKenzie's evidence if it is admitted and/or reaching the same view as she has set out, to the effect that there were indeed numerous opportunities when care proceedings were necessitated, prior to late 2017.

128. A care order to remove the Claimant from her mother's care would arguably have stopped her suffering the Article 3 treatment in question. The Defendant did not address the Claimant's argument that it was also likely that removal would have led to the Claimant being placed in a residential placement or fostering arrangement which met her needs and enabled her to develop the skills required for independent or supported living as a young adult.

129. Further, the Defendant contended that the Claimant must prove that "but for" the alleged breaches, she would not have suffered the treatment said to cross the Article 3

threshold. That submission does not reflect the fact that it is sufficient in this context if the Claimant can show a real prospect of altering the outcome or mitigating the harm suffered: see [12] above.

130. The Defendant has not therefore proved that summary judgment or strike out is appropriate on this issue.

Ground 2: Article 8

131. A person's "private life" for Article 8 purposes encompasses their physical and psychological integrity: *Denisov v Ukraine* (App No 76639/11, 25 September 2018) at [95].

132. Article 8 requires treatment to reach a "certain level of seriousness" and to cause "prejudice to the personal enjoyment of the right to respect for one's private life": *F.O. v Croatia* (App No 29555/13, 22 April 2021) at [58]. In *F.O.*, the Court found that a teacher calling a student a "fool", a "hillbilly" and a "moron" (amongst other epithets) violated the student's Article 8 rights. It also observed that, in cases involving children, assessment of seriousness must be undertaken in light of their inherent "vulnerability as minors" [58].

133. In *A v Croatia* (App No. 55164/08, 14 October 2020), [2011] 1 FLR 407 at [57] the court was willing to consider a course of conduct (such as several instance of domestic violence) as a whole, and take the view that such a course of conduct can trigger the positive obligation under Article 8.

134. Article 8 does not merely compel the State to abstain from arbitrary interference with private or family life but involves "positive obligations inherent in effective respect for private or family life", requiring consideration of "whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8": *Guerra and others v. Italy* (1998) 26 EHRR 357 at [58], citing *Airey v Ireland*, Judgment of 9 October 1979, Series A no. 32, p. 17 at [32].

135. The Defendant contended that no separate claim had been pleaded in respect of a breach of Article 8, and that if the Article 3 claim fails, the Article 8 claim also necessarily fails.

136. In my judgment the first part of this submission is met by the Court of Appeal's recognition in *PF (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 1139, [2019] Imm AR 1351 at [19] that the same factual matrix "may coincidentally engage" both Articles 3 and 8. On that basis there was nothing improper in the Claimant's Article 8 claim having been pleaded on the same factual basis as her Article 3 claim.

137. As to the second part, the Defendant also relied on the observations of Green J (as he then was) in *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) at [242], to the effect that he could not see any circumstances in which Article 8 would provide a broader level of protection than is accorded by Article 3.

138. It is right to recognise, as the Court of Appeal emphasised in *PF* in [19], that an Article 8 claim should not be treated as an alternative to an Article 3 claim, with the Article 8 claim simply having a "lower" threshold. Rather, it is important to remember that the "focus of and relevant criteria for the two provisions are very different" and that "[t]he threshold criteria are essentially different in nature, not (or, at least, not only) degree".

139. It is perhaps for these reasons that, as Mr Jacobs rightly highlighted, there have been cases in which a person's experiences have been found to be outwith Article 3, but to engage Article 8. *Wainwright v UK* (2007) 44 EHRR 40 and *R (on the application of Bernard) v London Borough of Enfield* [2002] EWHC 2282 (Admin), [2003] HRLR 4 are examples of such cases. They cast some doubt on Green J's observations in *DSD*, which were, in any event, obiter.

140. *Bernard* was a case specifically about a local authority's responsibility for a vulnerable person's living conditions. It involved a housing department's failure to make suitable accommodation available for a severely disabled claimant as she was unable to use her wheelchair in the property and was confined to the lounge room for over 2 years. Sullivan J held that the provision of suitable accommodation was necessary to secure the physical and psychological integrity of the second claimant and that the authority's failure to provide such accommodation breached the Article 8 rights of the claimant (and those of her carer husband). Very similar arguments could credibly be advanced in this case, on arguably stronger facts than were present in *Bernard*.

141. Accordingly, I accept Mr Jacobs' submission that if the Claimant's Article 3 claim fails, she may nevertheless succeed in her alternative claim under Article 8. Prolonged neglect of the sort alleged here is clearly capable of impairing a person's physical and psychological integrity. By analogy with *Bernard*, and in any event, I consider that the Claimant has a reasonable prospect of showing at trial that the Defendant's failure to remove her from her mother's care violated her Article 8 rights.

142. I do not therefore accept that the Article 8 claim should be summarily determined in the Defendant's favour or struck out for the reasons advanced.

Conclusion

143. Accordingly, for all these reasons I dismiss both of the Defendant's applications.