Strike Out and Summary Judgment Success for Local Authorities in Human Rights Act claims

On 20th January 2022 Margaret Obi, sitting as a Deputy High Court Judge, handed down her judgment in ***AB v Worcestershire CC and Birmingham CC*** [2022] EWHC 115 (QB). In a judgment which is likely to have important ramifications for local authorities defending human rights claims in the "failure to remove" context, she struck out the Art 6 claim on the grounds that it disclosed no reasonable cause of action and entered summary judgment on the Art 3 claim on a number of different bases.

Up until this point, case law has focused on the negligence aspect of such claims. In ***DFX v Coventry CC*** Lambert J held that her finding that the claimants were unable to prove breach of duty in negligence was also determinative of the claim under the Humans Rights Act 1998, but she declined to consider the remaining issues arising under the Act 1998. ***AB*** is the first decision which has considered claims brought under the HRA 1998 in detail.

Caroline Lody acted for the Second Defendant, Birmingham City Council ("BCC"). She also acted for the successful defendant in ***DFX v Coventry CC***, led by Adam Weitzman QC.

Background

The claimant, a young man now aged 19, lived in BCC's area between July 2005 and November 2011 before moving to the area of the first defendant, Worcestershire County Council ("WCC"). There were periodic referrals to social services. While in WCC's area he was temporarily placed in foster care between July 2013 and April 2014. In August 2014 he was accommodated by agreement following an allegation that he had sexually abused a friend of his brother. He was subsequently made the subject of an interim and then final Care Order.

AB started as a classic "failure to remove" case. The claimant alleged that he was abused and neglected while in the care of his mother. He claimed that BCC had been negligent in failing to apply for a care order from July 2008 onwards, and that WCC should have applied for a care order earlier and should not have returned him to his mother's care in 2014. Claims were also brought for breach of Arts 3, 6 and 8.

The procedural history of the litigation was deeply unsatisfactory. The particulars of claim went through several iterations. A Part-35 compliant medical report was never served. The negligence claims were abandoned. By the time of the hearing, a fifth version of the particulars of claim was being advanced, along with an application to re-amend. The Art 8 claim was abandoned shortly before the hearing following acceptance that the allegation added nothing over and above the Art 3 claim. While the earlier drafts of the particulars of claim had contained a catalogue of ill-treatment which was said to amount to Art 3 treatment, albeit without

reference to any dates or identifying the relevant alleged perpetrator, those paragraphs had been excised, and instead in support of his claim against BCC, AB relied on seven reports in his social services records between 2005 and 2009. The reports consisted of (i) him living in a dirty home, not being fed properly, being dirty and smelly with bleached hair which had left chemical burns to his scalp and neck; (ii) some bruising to his legs caused by mother's partner or another third party; (iii) being frequently locked in his room and often hungry; (iv) struck by a third party with his mother's consent; (v) dressed up in women's clothing for the amusement of others; (vi) pushed to the ground by his mother and (vii) slapped by a babysitter. In his claim against WCC he relied on a further four entries from WCC social services records between April 2012 and June 2014, which identified AB having been seen walking unaccompanied at night; neglect including squalid home conditions; and emotional and physical abuse from his mother including her having pushed him, sat on him, bumped his head, scratched him and dragged him upstairs with her hands around his throat.

In her judgment the Deputy Judge noted that there was no explanation of what specifically in those social services reports was alleged to amount to Art 3 treatment and that despite pleading the claim on four previous occasions and clarification having been sought in Part 18 requests, the claimant had not identified what specifically was said to have amounted to a real and immediate risk of Art 3 treatment around July 2008 (with respect to BCC) and April 2012 (with respect to WCC) so as to the trigger the defendants' operational duty and require care proceedings to be initiated.

The defendants applied for strike out and summary judgment and, referring to ***Owens v Chief Constable of Merseyside Police*** [2021] EWHC 3119 invited the Deputy Judge to "*grasp the nettle*" and determine matters of law to conclude that the remaining claims under Art 3 and 6 were misconceived and/or had no realistic prospects of success.

The Article 6 Claim

The Deputy Judge dealt swiftly with the claim under Article 6.

The applicability of Art 6 in civil matters 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. In the particulars of claim the claimant asserted that his right to be taken into care amounted to a "civil right" within the meaning of Art 6, and that there had been a breach of that right by the defendants' failure to refer the matter to court. The Deputy Judge concluded (as was ultimately conceded on behalf of AB) that a child has no right to seek a care order or to have one made in respect of their care. Only a local authority or an authorised person is empowered to make such an application. Nor had the defendants done anything to interfere with AB's rights or taken any action in relation to which an applicable dispute could have arisen.

During oral submissions, counsel for the claimant instead suggested that AB's "civil right" was to protection under Art 3, and that he was entitled to a determination of that right within a reasonable time through the mechanism of care proceedings, rather than through a claim

brought after the event for damages under the Human Rights Act. The Deputy Judge found that alternative formulation of the claim to be equally misconceived, commenting further that since the alleged breach lay in not applying for a care order at an earlier stage, the Art 6 claim added nothing to the claim under Art 3.

The Article 3 Claim

The Deputy Judge determined three substantive issues with respect to the Art 3 claim:

i. Whether the treatment of the claimant met the threshold for treatment or punishment falling within the scope of Article 3;

ii. Whether an operational duty could be owed under Art 3 to children living in the community;

iii. Whether a local authority owed an investigative duty to children under Art 3.

Art 3 threshold

The Deputy Judge acknowledged that the court should be cautious about making a final decision without a trial where there are reasonable grounds for believing that a fuller investigation into the facts of the case may affect the outcome of the case. However, she noted that the social services records represented the high water mark of AB's claim. It was not suggested by AB that they 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 appropriately responded to the referrals, nor was it suggested that there would be any direct evidence adduced at trial in relation to the alleged incidents. In the circumstances she rejected counsel for the claimant's submission that at trial there would be further inferences which the court could draw. At its highest, it was the eleven incidents between 2005 and 2014 which either individually or cumulatively had to meet the Art 3 threshold.

Following a careful analysis of both the social services records relied upon by BCC and the claimant's detailed chronology, the Deputy Judge concluded that while there were instances of poor or insensitive parenting, they appeared to have been isolated and sporadic. None of the 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 Art 3 threshold. Nor was there a realistic prospect of establishing that either defendant knew or ought to have known of the existence of a real and immediate risk of Art 3 treatment. She concluded that there was no realistic prospect of AB establishing that any particular aspects of the disorderly and unstable family situation should have led social services to conclude that a care order was required. 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.

Her conclusion on this first issue was determinative of the Art 3 claim, but she continued to consider the remaining issues.

The requirement for "care and control"

BCC successfully argued that a local authority does not owe an Art 3 operational duty to children living in the community, who are not under its care and control.

The Deputy Judge considered a number of authorities relating to the parallel operational duty owed under Art 2 (right to life). Lord Dyson JSC in ***Rabone v Pennine Care NHS Trust*** [2012] 2 AC 72 had noted that the ECtHR had never clearly articulated the criteria by which it decides whether an Art 2 operational duty exists in any particular circumstances. However, it was clear that it would be held to exist where there had been an assumption of responsibility by the state for the individual's welfare and safety. Lord Dyson JSC had remarked that in circumstances of sufficient vulnerability, the ECtHR had been prepared to find a breach of the operational duty even where there had not been an assumption of responsibility, such as in ***Z v United Kingdom*** (2001) 34 EHRR 97. However, the Deputy Judge noted that Lord Dyson JSC's comments were obiter and in the child abuse cases of ***Z*** and ***E v United Kingdom*** (2003) 36 EHRR the issue had not been contested, nor was there adjudication on the point.

The issue had, however, been 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). In that case the court had held that Art 2 was not engaged, and hence there was no scope for an Art 2 inquest into the death of a child, because he was not in the care of the local authority, in the sense that no proceedings had been commenced under s31 Children Act 1989. He was not therefore living within the control or under the direct responsibility of the local authority. The Deputy Judge noted that it was observed in ***Osman*** and ***Rabone*** that the operational duty should be interpreted "*in a way which does not impose an impossible or disproportionate burden on authorities" particularly "in terms of priorities and resources*", and that the court in ***Kent*** had held that the measure of responsibility arising from the provision of services under s17 of the Children Act 1989 was insufficient, otherwise it would impose an impossible or disproportionate burden on local authorities.

The Deputy Judge held that there was no reason why the test for Art 2 should be any different for the purposes of a claim under Art 3 and was satisfied that the "care and control" aspect of the operational duty under Art 2 applied equally. She accepted the submission made on behalf of BCC 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.

Accordingly, she stated that if she had not already determined that the treatment did not meet the threshold of Art 3, she would have found that the claim in respect of BCC had no realistic prospect of success based on the absence of "*care and control*".

Article 3 Investigative Duty

The Deputy Judge accepted the defendants' submissions that there was no applicable investigative duty owed under Art 3.

She held that the description of the investigative duty in ***D v Commissioner of Police for the Metropolis*** [2019] AC 196, as well as ***MC v Bulgaria*** [2005] 40 EHRR 20, and ***X v Bulgaria*** [2021] unreported, (application 22457/16) made it clear that duty 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 of which the primary purpose is to protect individuals from future harm. Accordingly, she held that the duty did not apply to a local authority undertaking investigations under the provisions of the Children Act 1989. In any event, she noted that only very significant operational failures would give rise to a breach of the investigatory duty. There was clear evidence that the defendants carried out suitable enquiries and investigations upon the receipt of reports. Therefore, this aspect of the claim also had no realistic prospect of success.

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