Neutral Citation Number: [2023] EWCA Civ 529

Case No: CA-2022-000131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MS MARGARET OBI SITTING AS A DEPUTY JUDGE OF THE HIGH COURT
[2022] EWHC 115 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 May 2023

Before:

LORD JUSTICE BAKER
LORD JUSTICE DINGEMANS
and
LORD JUSTICE LEWIS

- -

Between:

AB (by the Official Solicitor; his litigation friend) **Appellant**
- and -

(1) WORCESTERSHIRE COUNTY COUNCIL
(2) BIRMINGHAM CITY COUNCIL

Respondents

- -
- -

Lizanne Gumbel KC and Samuel Jacobs (instructed by **Leigh Day Solicitors**) for the **Appellant**
Lord Faulks KC and Paul Stagg (instructed by **Browne Jacobson LLP**) for the **1st Respondent**
Adam Weitzman KC and Caroline Lody (instructed by **DFW Law llp**) for the **2nd Respondent**

Hearing dates: 25 and 26 April 2003

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the circumstances in which a local authority may be held liable for a breach of the rights of a child under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") when the child is said to have been subject to neglect or ill-treatment by a parent and the authority did not take steps to remove the child from the care of the parent.

2. In brief, the appellant, AB, was born on 5 October 2002. He lived in the area of the second respondent, Birmingham City Council ("Birmingham"), between July 2005 and November 2011 and the area of the first respondent, Worcestershire County Council ("Worcestershire"), between November 2011 and January 2016. By a claim form issued on 26 June 2020, he claimed damages for, amongst other things, a breach of his rights under Article 3 of the Convention. In essence, the particulars of claim, which underwent a number of amendments, alleged that the appellant had suffered ill-treatment and neglect by his mother which was of such severity that it evidenced a real and immediate risk that the appellant would suffer further ill-treatment falling within the scope of Article 3 if left in the care of his mother and, consequently, the respondents should each have removed the appellant from the mother's care to avoid that risk.

3. The respondents applied for summary judgment pursuant to CPR 24 in respect of the claim based on the alleged violation of Article 3. The deputy High Court Judge ("the Judge") granted that application. The Judge held 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 of the Convention. In the circumstances, the Judge concluded 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 of the Convention. 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.

4. The appellant appealed. The principal ground of appeal is that the finding that there was no realistic prospect of the appellant establishing that he had been subject to treatment falling within the scope of Article 3 of the Convention was wrong and contrary to the documentary evidence before the Judge.

THE LEGAL FRAMEWORK

The Children Act 1989

5. For present purposes, the powers and duties of local authorities in relation to children are contained principally in the Children Act 1989 ("the 1989 Act"). The 1989 Act includes powers in Part III for supporting children and families. In brief, section 17 is headed "Provision of services for children in need, their families and others". The material provisions of section 17 provide that:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.
>
> …..
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.
>
> …..
>
> (10) For the purposes of this Part a child shall be taken to be in need if—
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services …"

6. Part 1 of Schedule 2 includes the following provisions:

> "4(1) Every local authority shall take reasonable steps, through the provision of services under Part III of this Act, to prevent children within their area suffering ill-treatment or neglect."
>
> …..
>
> 7(1) Every local authority shall take reasonable steps designed—
>
> (a) to reduce the need to bring—
>
> (i) proceedings for care or supervision orders with respect to children within their area …"

7. Part 1 of Schedule 2 provides power for the provision of a range of other services to children and their parents, including advice, guidance, and counselling (paragraph 8) and the provision of family centres (paragraph 9).

8. Section 20 of the 1989 Act confers powers on a local authority to provide accommodation for children. Section 22 deals with the duties of authorities towards looked after children, that is children who are in care or who are provided with accommodation by the local authority for more than 24 hours. The authority is under a duty, amongst other things, to safeguard and promote the child's welfare.

9. Part IV of the 1989 Act (incorporating sections 31 to 42) contains provisions dealing with the making of care and supervision orders by a court. Part V (incorporating sections 43 to 52) contains provisions for the protection of children. Section 47 deals with the duty of an authority to investigate and provides so far as material that:

> "(1) Where a local authority
>
> ….
>
> (b) have reasonable cause to suspect that a child who lives … in their area is suffering, or is likely to suffer significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare
>
> ..…
>
> "(3) The enquiries shall, in particular, be directed towards establishing –
>
> (a) whether the authority should
>
> (i) make any application to court under this Act;
>
> (ii) exercise any of their other powers under this Act;
>
> …..
>
> with regards to the child."

10. There are a range of orders that a court may make. These include emergency protection orders pursuant to section 44 of the 1989 Act. They also include an order placing the child in the care or under the supervision of the authority pursuant to section 31 or an interim order pursuant to section 38 of the 1989 Act. Section 31(2) provides that:

> "(2) A court may only make a care order or a supervision order if it is satisfied –
>
> (a) that the child concerned is suffering, or is likely to suffer significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to –

> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
>
> (ii) the child's being beyond parental control."

11. A court may only make an interim care or supervision order if it considers that there are reasonable grounds for believing that the circumstances in respect of the child are such as to fall within that subsection: see section 38(2) of the 1989 Act.

The Convention

12. Section 6 of the Human Rights Act 1998 (the "HRA") provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. A person may bring proceedings in an appropriate court for a remedy which may include damages in certain circumstances: see sections 7 and 8 of the HRA. "Convention rights" are defined in section 1 of the HRA and include the right under Article 3 of the Convention which provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

13. The principles governing Article 3 are well established in the case law and are usefully summarised in *X v Bulgaria* (2021) 50 BHRC 244 in the following way (references omitted).

> "177. The obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals…Children and other vulnerable individuals, in particular, are entitled to effective protection …
>
> 178. It emerges from the Court's case-law as set forth in the ensuing paragraphs that the authorities' positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to that provision; and, thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's positive "procedural" obligation.

14. Thus, Article 3 prohibits a state from inflicting inhuman or degrading treatment or punishment. It also imposes certain positive obligations on the state. These include putting in place a legislative and regulatory system for protection (often referred to as the "systems duty"). They also include an obligation to take operational measures to protect specific individuals from a risk of being subjected to treatment contrary to Article 3 (often referred to as "the operational duty"). They also include an obligation to carry out an effective investigation into arguable claims that treatment contrary to Article 3 has been inflicted (often referred to as the "investigative duty").

15. This appeal concerns only the second of those obligations, that is the positive obligation to take operational measures to protect specific individuals against the risk of being subject to treatment contrary to Article 3 of the Convention.

THE FACTUAL BACKGROUND

16. AB was born on 5 October 2002. He is now aged 20. He lived with his mother, and his younger brother, YZ, in Birmingham between July 2005 and November 2011 (except for a period in 2010). Birmingham's social services department had periodic contact with the appellant and his family during that time. The appellant's mother left Birmingham and went to live in a refuge in Worcestershire in September 2011. The appellant and his younger brother stayed with their mother's step-sister. They went to live with their mother in about November 2011. Worcestershire's social services department had periodic contact with the appellant and his family between 2011 and 2016.

17. On 20 August 2014, AB was accommodated by Worcestershire following allegations that he had sexually abused a female friend of his brother. He never returned to the care of his mother. In May 2015, an interim care order was made placing the appellant in the care of Worcestershire and a final care order was made in January 2016.

The Claim

18. The appellant issued a claim in June 2020 claiming damages for common law negligence and breaches of Convention rights. At that stage, the appellant was contending that the failure to remove him from his mother's care gave rise to breaches of Article 3, Article 6 (the right to a fair trial) and Article 8 (the right to respect for family and private life) of the Convention. The particulars of claim were pleaded in an unusual way. 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 which had been provided to the appellant's litigation friend at some time in 2017 (some as part of the bundle for care proceedings and which the family court had given permission to provide to the litigation friend, and the remainder having been disclosed by the respondents as pre-action disclosure). The original particulars of claim were amended by consent and subsequently three drafts of amended particulars of claim were produced. A fifth version was produced before the hearing before the Judge. The only change from the fourth version was that the claim for damages for negligence against the first respondent was removed (notice to discontinue the claim for negligence against the second respondent having previously been given on 27 July 2021). The Judge worked from the fifth version of the particulars of claim although permission to amend had not been given for that amendment.

19. The claim for breach of Article 3 was expressed in the following terms:

> "7. Whilst in the care of his mother, the Claimant was subjected to inhuman and degrading treatment and punishment at the hands of his mother and other adults, of the kind prohibited by Sch1 Art3 of the HRA. The Defendants knew, or ought to have known, that the Claimant was, or might be, being subjected to such ill-treatment upon receiving the following reports.
>
> a. Second Defendant:

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

b. First Defendant, (in addition to the reports set out above, recorded in the Second Defendant's records to which the First Defendant had, or ought to have obtained, access):"

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.

20. Paragraph 8 of the fifth version of the particulars of claim says, in relation to Article 3, that:

> "8. Whilst the Claimant was in each Defendant's area, each Defendant:
>
> a. Failed to properly investigate each report set out at paragraph 8 above, shortly after receiving it, in breach of its investigative duty under Sch 1 Art3 of the HRA and/or to remove the Claimant from his mother's care in breach of its operational duty under Art3. The Claimant lost the opportunity of being removed:
>
> i. By the Second Defendant from about July 2008. If removed, the Claimant would have had a 50% chance of a successful adoption. In the alternative, he would have had a successful long-term family or foster placement.
>
> ii. By the First Defendant from about April 2012. If removed the Clamant would have been placed in long-term foster care."

21. Birmingham pleaded its defence by reference to the detailed chronology. Its defence based on the contemporaneous social services records summarised the responses of the social workers to the incidents referred to by the appellant.

22. Worcestershire served a defence which in effect admitted the factual incidents listed in the core chronology included in the particulars of claim. It then set out its defence denying that Worcestershire had, on those facts, breached its operational duty under Article 3 of the Convention.

23. Worcestershire also served a request under CPR Part 18 requiring further information about the claim for an alleged violation of Article 3 and seeking a reply by 4 p.m. on 24 September 2021. The appellant did not provide any further information on his case in relation to Article 3.

The Application for Summary Judgment

24. Both Birmingham and Worcestershire applied, amongst other things, for summary judgment pursuant to CPR 24.2 in relation to the claim of an alleged violation of Article 3 of the Convention.

25. Birmingham served a witness statement exhibiting contemporaneous social services records relating to the incidents. The appellant did not file any evidence in response. Worcestershire did not serve evidence in support of its application (save that there was one paragraph in the application for summary judgment stating that the claim was vague and dealing with procedural matters). The appellant did not serve any evidence. In effect, it seems, the appellant and Worcestershire appeared to proceed on the basis of agreed facts, that is the chronology in the particulars of claim and the defence admitting the factual matters.

THE JUDGMENT

26. In her judgment, the Judge dealt with the factual background, indicating that the appellant relied on seven reports within Birmingham's social services records in relation to its claim against Birmingham, and those reports and four other reports within Worcestershire's social services records in relation to its claim against Worcestershire. Those were the reports referred to in paragraph 7 of the particulars of claim and are set out above at paragraph 19. The Judge summarised the content of the 11 reports. The Judge then dealt with the procedural history of the claims.

27. At paragraph 24 of her judgment, the Judge set out the circumstances in which the court could give summary judgment in the following terms:

> "24. The Court has the power to give summary judgment against a claimant pursuant to CPR 24.2, on the whole of the claim or a particular issue, if:
>
> i. The Court considers that the claimant has no real prospect of succeeding on the claim or issue (CPR 24.2(a)(i)); and,
>
> ii. There is no other compelling reason why the case or issue should be disposed of at a trial (CPR 24.2(b))."

28. The Judge then considered the case law governing the correct approach to applications for summary judgment, including the principles identified by Lewison J. in *Easyair Limited (trading as Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) and set out the principles identified in paragraph 15 of that judgment.

29. At paragraphs 27 to 35 of her judgment, the Judge reviewed the case law governing the operational duty imposed by Article 3 including the need for any ill-treatment to attain a minimum level of severity to fall within the scope of Article 3. The Judge also summarised the provisions of the 1989 Act dealing with the powers and obligations of

local authorities concerning supporting children and families, investigating, protecting children in the community and seeking court orders which interfere with parental rights.

30. The Judge proceeded on the basis that the appellant was alleging that he was being ill-treated by his mother and others and was relying on the reports to Birmingham and Worcestershire as evidence, in effect, that he was at a real and immediate risk of being subjected to Article 3 ill-treatment if left in the care of his mother. The Judge said this at paragraph 63:

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

31. The Judge then 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. She began with the three reports covering the 15 month period from July 2005 to October 2006. The first related to concerns reported to Birmingham on 8 July 2005 that AB was living in a dirty home, not being fed and had bleached hair which had left him with chemical burns to his scalp. The social services records record the response of the social services to the concerns raised. A social worker made a visit to AB's home. The social worker noted that AB was happy and well cared for. His hair was not bleached and he did not have burns to his scalp. The house

was tidy and food was available. In relation to the second report, made on 27 July 2005, the Judge noted that AB had two bruises, one on each leg. AB said that a particular person, Ms A, (not his mother) had hit him and AB's mother had visited Ms A who had admitted tapping his hand and having hit him on other occasions. AB's mother reported this to the police. AB subsequently identified a different person, not Ms A, as the person who hit him. The third report made on 5 October 2006 was made by an anonymous caller and concerned the circumstances at AB's home where it was alleged that drugs were being used, men were visiting the property and AB was said to be locked in his bedroom a lot of the time and was not being fed. That was similar to allegations reported earlier which had been investigated and where the social services records indicate a home visit had been made and AB and his mother had been spoken to. AB was seen to be happy and cheerful, dressed appropriately and well cared for; the house was clean and tidy. The social worker concluded that there was nothing to indicate that AB was at risk. In relation to the third report, having considered the matter, the team manager decided that the anonymous referral was a malicious one. In relation to those three reports of concerns, the Judge said this:

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

32. The Judge then dealt with the next four reports to Birmingham's social services department. The first concerned a report on 21 July 2008 that AB had been struck by a Ms X with the mother's consent. The Judge considered the appellant's detailed chronology which indicated that AB had been staying with Ms X for a few weeks. Following the report, an initial assessment was carried out by social workers. AB appeared happy and well cared for but his mother appeared under extreme pressure and was offered support and services under section 17 of the Children Act. The Judge concluded at paragraph 72 that:

> "There is evidence to suggest that AB's mother was unable or unwilling to protect him from the use of physical punishment

> by others and on this occasion actively encouraged the use of such chastisement. However, the alleged assault caused no visible injury, there is no evidence of intensity or severity, and no additional evidence is likely to be adduced. In these circumstances, even within the context of the earlier incidents, there would be no proper basis for concluding that this incident amounted to inhuman or degrading treatment."

33. The fifth report, in December 2008, records that AB's mother had dressed AB in women's clothing, taken a photograph of him and sent it to a friend. A social worker went to AB's school and spoke to him and AB said he sometimes liked to play dressing up games and sometimes did not. The social worker then visited the mother who said that she dressed AB to make her friends laugh. She expressed regret but no remorse. The house was very dirty. The Judge concluded that:

> "There can be no doubt that dressing AB in women's clothes for the amusement of friends was insensitive, unkind and is an example of poor parenting. However, objectively it does not reach the level of intensity and severity to meet the threshold required to amount to inhumane or degrading treatment."

34. The sixth report, made in April 2009, was that AB had been pushed to the ground by his mother and had a scratch to his nose. On speaking to AB, he said that his mother had accidentally pushed him. The Judge noted that, even if at trial the court was invited to infer that the act was deliberate, not accidental, the act was at its highest "inappropriate, isolated and minimal in nature". The seventh reported concern was that AB had been slapped by a babysitter. In fact it was AB's brother who was slapped. There were no injuries and the matter was dealt with by the police who took no further action. As the matter had been dealt with appropriately by the mother, no action was taken by social services.

35. In relation to the claim against Birmingham, the Judge concluded:

> "76. The social service records represent the high water mark of AB's claim. The mother's ability or willingness to protect AB from physical chastisement from others was inconsistent. Regrettably, there were also occasions when she appears to have demonstrated poor caring and nurturing abilities. Cumulatively, the picture presented by the detailed chronology is of a variable standard of care, but there is nothing within [Birmingham's] records which comes close to alerting [Birmingham] to a " *real and imminent* " risk that AB will suffer significant harm amounting to Article 3 treatment. "
>
> 77. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (see *E v United Kingdom* at §99). Perhaps with the benefit of hindsight there may well be additional steps that could have been taken by [Birmingham], but the court must try to put itself in the same situation as those who were professionally involved

> with the family at the relevant time. There is nothing within [Birmingham's] records to indicate that care proceedings should have been initiated. There was a significant gap between the 2005-6 reports and the next involvement of social services in July 2008. Further, the instances of alleged ill-treatment in and after July 2008 (being struck by Ms X; dressed in women's clothes; pushed by his mother) were the first and only instances of such treatment. [Birmingham] cannot have had actual or constructive knowledge that AB was at risk of such treatment prior to these incidents taking place. A care order is a draconian measure which would have involved removing AB from his mother's care. The guidance to the 1989 Act emphasises that children are generally best looked after within the family without resort to legal proceedings. During AB's time in [Birmingham's] area, the case did not cross the child protection threshold so as to warrant a section 47 investigation, let alone registration on the child protection register and consideration of care proceedings. A care order can only be obtained where the court concludes that the child " *is suffering, or is likely to suffer significant harm* ": s31(2)(a) CA 1989. In *Re MA [2009] EWCA Civ 853, [2009]* at [§54] it was stated:
>
> > "Given the underlying philosophy of the Act, the harm must, in my judgment, be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it."
>
> In *MA* it was found that circumstances in which a young girl had been slapped, kicked, hit and pushed by her parents did not constitute "significant harm" in context of the 1989 Act.
>
> 78. There were no grounds for removing AB from his mother in July 2008. ….. I am satisfied that there is no realistic prospect of AB establishing that an interim or final care order would have been made whilst he lived in the [Birmingham] area.
>
> 79. In my judgment, none of the reported incidents, taken at their highest either individually or cumulatively, involved actual bodily injury, intense physical or mental suffering, or humiliation of the severity required to meet the Article 3 threshold. Nor is it arguable that from July 2008 there was a "*real and immediate risk* " of Article 3 treatment.

36. In relation to Worcestershire, the appellant relied on the seven reports of concerns made to Birmingham and four other reports made to Worcestershire between 2012 and 2014. The first report (referred to by the Judge as the eighth incident) was a report that AB and his brother had been taken into police protection in April 2012. AB and his brother had been left by their mother in the care of a woman referred to as Ms B.

The conditions in Ms B's home were poor (described in the detailed chronology as "complete squalor"). There was evidence that the mother knew of the poor condition of Ms B's home when she dropped the children off (the detailed chronology indicates that the children had been left there for the weekend while the mother went away with a friend, and that this had happened before). The children were returned to the care of their mother. The Judge concluded from the detailed chronology that, when AB and his brother were visited at their mother's home, their mother was caring for them appropriately. There was no allegation that they were ever placed in the care of Ms B after the date of the report. The Judge concluded that there was no evidence of AB being forced to live in squalor for a sustained period. The children were made the subject of child protection plans on the grounds of neglect. There were a number of home visits and specialist family support session. At a review on 10 January 2013, it was agreed that the children were no longer at risk and they were removed from child protection plans. Specialist family support ended on 19 February 2013 and the case was closed on 24 April 2013.

37. The Judge summarised the next (ninth) report of concerns. The detailed chronology notes that this was in fact made by telephone call from AB's school on 11 July 2013. AB had disclosed that his mother pushed him, sat on him, bumped his head, and scratched his arm and neck. The Judge noted that the disclosure had led to AB and his brother being removed from their mother's care and placed first with an aunt and uncle and then in foster care. Whilst in foster care, a tenth report was made in January 2014 when AB disclosed that in the past his mother would hurt him, including by dragging him upstairs with her hands around his neck.

38. AB returned to live with his mother in May 2014. The final report related to disclosures made to Worcestershire in June 2014. The Judge described these as reports of the mother being horrible to AB and otherwise verbally abusive. The Judge noted that there were no allegations made in July or August and no further allegations that AB was suffering from physical or verbal abuse in that period. The appellant was removed from the family home in August 2014 following allegations that he had asked a friend of his brother to engage in sexual acts. The Judge concluded in relation to Worcestershire that:

> "84. There is clear evidence of poor parenting whilst AB was living in [Worcestershire's] area for which his mother received reasonable and appropriate support. The incidents appear to have been isolated and sporadic and, save for the emotional conflict in June 2014, were not repeated. In my judgment none of the reported incidents, taken at their highest either individually or cumulatively, involved actual bodily injury, intense physical or mental suffering, or humiliation of the severity required to meet the Article 3 threshold. Nor is it arguable that from April 2012 there was a "*real and immediate*" risk of Article 3 treatment. Further, there is nothing within [Worcestershire's] records which comes close to alerting the local authority to a "*real and imminent*" risk that AB will suffer significant harm amounting to Article 3 treatment."
>
> 85. AB's claim suggests that [Worcestershire] ought to have acquired all [Birmingham's] records and taken care

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

39. The Judge then summarised her conclusion on the Article 3 claim against both respondents in the following terms:

> "86. For all of these reasons, there is no realistic prospect of AB establishing that he was subject to ill-treatment which falls within the scope of Article 3. AB was undoubtedly vulnerable and at risk. He was at risk of being subjected to poor and inconsistent parenting and neglect. However, there is no realistic prospect of AB establishing there was a " *real and immediate* " risk of treatment falling within the scope of Article 3. Nor is there a realistic prospect of establishing that the defendants knew or ought to have known of the existence of a " *real and immediate* " risk of Article 3 treatment. There is also no realistic prospect of AB establishing that any particular aspects of the disorderly and unstable family situation should have led the social services to conclude that a care order was required. While there were occasions when AB demonstrated significant distress in the family environment, he also showed strong ties to his mother. Cogent reasons would have been required for a care order bearing in mind the principle of respecting and preserving family life and such reasons were not present in July 2008 or any time between April 2012 and June 2014."

40. The Judge noted that that conclusion was determinative of the Article 3 claim. Nonetheless, she also considered other issues. She concluded that it was necessary for the appellant to demonstrate that each respondent had care and control of the appellant such that they had assumed responsibility for his welfare and there was no such care and control here. The Judge also concluded that the respondents had not breached the investigative duty imposed by Article 3.

41. Finally the Judge refused to allow the appellant to amend his claim for the sixth time. She concluded that there was no indication that a sixth version of the particulars of claim would establish reasonable grounds for bringing an Article 3 claim. The Judge's conclusions are at paragraphs 105 and 106 of her judgment:

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

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

THE APPEAL

42. Permission to appeal was sought on six grounds. The principal ground is ground 3 which is that:

> "In respect of both Defendants the learned Judge was wrong to enter judgment… pursuant to CPR 24.2 in relation to the claims pursuant to Article 3 of the [Convention]. The finding of the Judge at paragraph 86 of her judgment that there is no realistic prospect of the Claimant establishing that he was subject to ill-treatment that falls within the scope of Article 3 was wrong in law and contrary to the documentary evidence before her for the following reasons:
>
> (a) It was inappropriate to determine the ill-treatment suffered by the Claimant was incapable of falling within Article 3 without a full investigation of the facts.
>
> (b) The documentary evidence including the documents provided by [Worcestershire] for the care proceedings strongly supported the case that the ill-treatment suffered by the Claimant fell within the scope of Article 3. [For the avoidance of doubt this subparagraph is only relied upon in the appeal against [Worcestershire]].
>
> (c) By comparison with other decided cases cited to the Judge the ill-treatment suffered by the Claimant clearly fell within Article 3.
>
> (d) It was arguable on the material before the Judge that there was a "real and immediate" risk and that such a risk ought to have been appreciated by the Defendants".

43. Grounds 4 to 6 were that the Judge was (a) wrong to refuse the appellant permission to amend the particulars of claim (b) wrong to find that the claim was bound to fail and (c) wrong to order the appellant to pay the respondents' costs. As was recognised by Singh LJ when granting permission to appeal those grounds followed on from the earlier grounds.

44. Ground 1 of the appeal is that the Judge was wrong to find that the operational duty was not applicable as the appellant had failed to establish that the respondents had care and control of the appellant while he was living in their area. The respondents have conceded that ground of appeal and I deal with it below. Ground 2 of the appeal concerned the investigative duty imposed by Article 3. The appellant no longer pursues that ground of appeal. Nothing further needs to be said about that ground.

SUBMISSIONS

45. Ms Gumbel KC, with Mr Jacobs, for the appellant, submitted the Judge was wrong to conclude that there was no realistic prospect of the appellant being able to establish a violation of Article 3. So far as Birmingham was concerned, this was a young child in respect of whom there were complaints over time that he was not fed, was physically punished, and was left with inappropriate adults including offenders. There was bruising to the child in 2005, he was struck by a friend in July 2008, and pushed to the ground by his mother in April 2009. By 2008, there had been a number of referrals involving AB living with or being left in the care of unsuitable adults. Each of the individual incidents which involved physical abuse was each capable of crossing the threshold of severity so as to fall within the scope of Article 3. Further, the incident where AB was dressed in women's clothing for amusement involved degrading treatment. Cumulatively, the incidents were capable of crossing the threshold of severity for Article 3 purposes.

46. In relation to Worcestershire, Ms Gumbel submitted that the appellant aged 9 and his brother were found unaccompanied late at night on the street, having been left in the care of Ms B who was an unsuitable carer and where the conditions in her home were squalid. They had to be taken into police protection. That incident alone was sufficient to indicate a real risk of inhuman or degrading treatment, but all the more so when taken with the previous incidents when AB had been left in the care of, or exposed to, inappropriate adults. Further, in July 2013, the appellant alleged that he was subject to physical abuse by his mother which again indicated that he was subject to a real risk of inhuman and degrading treatment. Again within a month of his return home, the appellant was reporting that his mother was horrible, and he was frightened of being hit and he did not want to live at home. In the circumstances, Ms Gumbel submitted that the Judge set the threshold of severity before ill-treatment could fall within the scope of Article 3 too high. Further, in relation to both respondents, Ms Gumbel submitted that there were specific errors in the Judge's reasons. The Judge failed to consider whether there was a real risk of inhuman or degrading punishment. She submitted that the Judge also considered, wrongly, at paragraph 31 of her judgment, that actual bodily injury was required to establish a violation of Article 3.

47. Finally, Ms Gumbel submitted that it was inappropriate to deal with the claims of alleged violation of Article 3 by way of summary judgment. The Judge was required to consider what evidence might reasonably be expected to be available at trial. Here there might be evidence from social workers, and possibly those at school with AB, who would provide details or context of the incidents and the effect on AB as a young child. So far as breach was concerned, expert evidence from social workers as to what was reasonable practice would be required.

48. Mr Weitzman KC, with Ms Lody, for Birmingham submitted that the context in which the allegations had to be assessed was treatment within the family. As was

recognised in *Re MA*, it was in general better for children to be raised by their parents and families were diverse and society had to be willing to tolerate very diverse standards of parenting including the eccentric, the barely adequate and the inconsistent. Further, the policy underlying the 1989 Act, which was consistent with the right to respect for family life in Article 8 of the Convention, was to work with children and their families in cases where children were in need and only exceptionally should the state intervene to remove children from their parents and only where the court was satisfied that the child was suffering or was likely to suffer significant harm.

49. In the present case, Mr Weitzman submitted that the Judge had not been wrong in finding that the incidents relied on by the appellant, whether considered individually or cumulatively, did not establish harm of the severity required for the purposes of Article 3. They did not therefore evidence a real and immediate risk of the appellant being subjected to ill-treatment contrary to Article 3. Rather, they evidenced the kind of inconsistent and poor parenting that did not involve a violation of Article 3.

50. Mr Weitzman submitted that the Judge's analysis and conclusions on the incidents relied upon by the appellant was correct and consistent with the case law. Of the first three incidents, one was not substantiated on investigation and one was an anonymous call assessed as a malicious referral. The second involved bruising but the mother (and Ms X, the person said to be an inappropriate carer) were not within the group of possible perpetrators. There was then a gap of 21 months during which no concerns were raised. Of the four remaining incidents, only one involved AB being struck. He was struck by Ms X, a person whom it was said was an inappropriate carer. That was an isolated act of chastisement after which Ms X no longer cared for AB, thus removing any potential for risk of harm from being left in her care. Of the others, one was not proven (AB said the injury happened accidentally). One involved the babysitter slapping AB's brother. These had been sporadic events over a long period of time. The Judge acknowledged the shortcomings in the care of AB by his mother but rightly concluded that the treatment did not cross the threshold to fall within the scope of Article 3. There may have been bad parenting but not treatment of such severity as would evidence a real and immediate risk of Article 3 ill-treatment.

51. Mr Weitzman submitted that the Judge did not err in dealing with the matter by summary judgment. This was not a case where there was likely to be any more available evidence. The Judge had the chronology and the relevant social services records. It was accepted that AB could not give any evidence of the events. There was no real basis for the suggestion that social workers, many years after the event, might say more than was contained in the contemporaneous documentary records. This was not a case where AB was alleging bad practice by social workers and expert social work evidence was required to establish a breach. The question here was whether, given the facts, there was a real and immediate risk of Article 3 ill-treatment such that Birmingham should have sought to remove the appellant from his mother's care. That was a matter for determination by a judge.

52. Lord Faulks KC, with Mr Stagg, for Worcestershire submitted that in relation to the April 2012 incident, the situation was that AB and his brother had been taken into police protection having been found in the street alone late at night having been left with a person who was providing inadequate care. However, the appellant had not been returned to that carer subsequently but stayed with the mother. Social workers

carried out an initial assessment and made an unannounced home visit to see how AB was being cared for at home and assessed the care as satisfactory. The appellant was subject to a child protection plan on the basis of neglect. There were further visits and social services involvement. A further year elapsed. Then the file was closed. There were no allegations about the level of support provided during that period nor were there allegations that the appellant should have been removed from his mother's care during that period.

53. In relation to the July 2013 reports, the child was removed from the mother's care and placed first with the aunt and uncle and then foster carers. There was no real and immediate risk of any ill-treatment from the mother in those circumstances. Similarly, the report in January 2014 of earlier physical abuse was made while AB was still in foster care and there was no real and immediate risk. The appellant returned to the mother in May 2014. There was a report of the mother being horrible and verbally abusive in June 2014 but no reports in July and August 2014. The appellant was removed from the family home in August 2014, due to allegations of sexual misconduct, and never returned. While the conduct complained of was evidence of very unsatisfactory parenting, Lord Faulks submitted that it did not fall within the scope of Article 3 ill-treatment.

54. Further, Lord Faulks submitted that when considering whether there had been a violation of Article 3, the court should adopt a similar approach to that adopted by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245 dealing with the assessment of an analogous positive obligation in the context of Article 2 to protect a person from threats to life. At paragraph 116, the European Court referred to the need to interpret the positive obligation in a way that did not impose an impossible or disproportionate burden given the difficulties involved, the unpredictability of human behaviour and the operational choices. Further, regard should be given to the legitimate restraints on the scope here of local authorities' powers to intervene in the lives of families and children, particularly having regard to Article 8 of the Convention and the need to respect the right to family life and the provisions of section 17 of the 1989 Act. Further, the matter should not be assessed using hindsight as recognised in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225. In all the circumstances, given the context and the powers available to support families, this was not a case where the authorities would have sought a care order under section 31 of the 1989 Act. The Judge was correct therefore to conclude that there had been no violation of Article 3.

55. In relation to the application for summary judgment, there was a detailed chronology based on the social services records and Worcestershire had indicated in its defence that the factual incidents relied upon were admitted. Here there were 4 incidents over three years. The Judge reviewed the evidence, taking the appellant's case at its highest, and concluded rightly that there was no violation of Article 3 for the reasons given at paragraph 86 of her judgment. There was no basis for saying something might turn up at trial so that summary judgment should not have been granted.

ANALYSIS

The Scope of the Operational Duty under Article 3

56. This appeal concerns an alleged violation of the positive obligation on the two public bodies involved to take operational measures to protect the appellant against the risk of being subject to ill-treatment contrary to Article 3 of the Convention. For a positive obligation to arise:

> "it must be established that the authorities 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…"

See paragraph 183 of *X v Bulgaria.* That paragraph refers to criminal acts but it may be that other acts, not of themselves involving criminal conduct, could give rise to a real and immediate risk of a person being subjected to Article 3 ill-treatment: see, e.g., paragraph 73 of the judgment of the European Court of Human Rights in *Z v United Kingdom* (2002) 34 EHRR 97.

57. The obligation can be seen as comprising four components. There needs to be (1) a real and immediate risk (2) of the individual being subjected to ill-treatment of such severity as to fall within the scope of Article 3 of the Convention (3) that the public authority knew or ought to have known of that risk and (4) the public authority failed to take measures within their powers which, judged reasonably, might have been expected to avoid the risk. Depending on the facts, a particular case may focus on one or more of those component parts. An allegation of a violation may fail because one or more of the component parts is not established. The issue may be, for example, whether the public authority knew, or had any reason to know, of a particular risk to a child. The risk may, for example, be of sexual abuse but the abuse may have been concealed or hidden and the local authority may have had no reason to know of the risk. In other cases, the risk may not be real and immediate. Or it may be that the ill-treatment to which the person is at risk of being subjected would not be of such severity as to fall within the scope of Article 3. It may be that the particular public authority did take appropriate steps, judged reasonably, to avoid the risk (even if the risk did, ultimately, materialise and the individual did suffer ill-treatment falling within the scope of Article 3).

58. There are certain well-established principles governing the interpretation and application of the positive operational duty imposed by Article 3. The relevant principles can be summarised as follows so far as material to this case.

59. First, the ill-treatment must reach a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that level is, in the nature of things, 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. See, for example, *X v Bulgaria* at paragraph 176. Sexual or physical abuse of a child is capable of involving ill-treatment falling within the scope of Article 3. 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, as appears from the case of *Z v United Kingdom*.

60. Secondly, 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. Thirdly, 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* at paragraph 32, dealing with Article 2 but similar principles apply to Article 3.

62. Fourthly, the positive obligation 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. Furthermore, 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 of the Convention. A court will need to have regard to the "difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life" (see paragraph 74 of the judgment of the ECtHR in *Z v United Kingdom).* Accordingly, not every risk of ill-treatment can entail for the authorities an obligation pursuant to Article 3 to take measures to prevent that risk from materialising. That is why it must be established that the authorities knew or ought to have known at the material time of the existence of a real and immediate risk of treatment and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. See paragraphs 182 to 183 of the judgment in *X v Bulgaria*, and see also *Osman v UK* which deals with the positive obligation in relation to Article 2 of the Convention, but similar principles apply by analogy to Article 3.

63. Finally, it is recognised that 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: see the observations in *Van Colle* of Lord Hope at paragraph 66, and of Lord Brown at paragraph 114.

64. The operation of those principles can be seen in *DP and JC v UK* (2003) 36 EHRR 14. In that case, there had been constant involvement by the local authority social services department for many years with assistance being provided for housing, payment for utilities and in relation to problems experienced by the children in terms of one child soiling himself and truancy. Further, there were incidents of violence, four in all, in just over three years. In deciding that the authorities were not under any obligation to take steps to move the children into permanent care at the material time, the European Court of Human Rights said this at paragraph 113:

> "Nor can it be regarded that the social services, due to the ongoing problems of the applicants within the home, were under any obligation, imposed by Article 3 of the Convention, to remove them into permanent care. The Court has had

> previous occasion to acknowledge the difficult and sensitive decisions facing social services and the important and countervailing principle of respecting and preserving family life. While there were times when both applicants showed significant distress in the family environment, both also showed strong ties to the family. After the first applicant was placed in temporary foster care in May 1980, she returned home at her own request. The second applicant was placed in a Children's Home from 1982 to 1984, with alternate weekends at home and though on some occasions he showed reluctance to go home on other occasions he appeared to enjoy the visits. For the social services to be justified in taking the draconian step of cutting permanently both applicants' links with their family would have required convincing reasons, which were not apparent at that time."

The Two Cases.

65. In the present case, the allegations were that the seven reports received by Birmingham between 8 July 2005 and November 2009 and those reports and four others received by Worcestershire between April 2012 and June 2014 demonstrated that the appellant's mother was subjecting him to ill-treatment which was so severe as to fall within the scope of inhuman or degrading treatment or punishment prohibited by Article 3 of the Convention. In those circumstances, the appellant submitted that the reports evidenced that he was at a real and immediate risk of being subjected to ill-treatment contrary to Article 3 by his mother, given that she had already subjected him to such treatment and Birmingham and Worcestershire knew this. As the Judge observed at paragraph 63, it was not suggested that other incidents of ill-treatment had occurred. Nor is it suggested that there are other reasons why Birmingham or Worcestershire ought to have known of a real and immediate risk of the appellant being subjected to Article 3 ill-treatment. Evidentially, therefore, the question was whether these seven incidents in the case of Birmingham, and eleven in the case of Worcestershire, individually or cumulatively, were such that the respondents should have been aware that there was a real and immediate risk of AB being subjected to Article 3 ill-treatment by his mother and, if so, did the respondents, judged reasonably, fail to take measures that they might have been expected to take to avoid that risk by not applying for a care order so that he would be removed from his mother's care.

The Birmingham Appeal

66. First, in relation to Birmingham, I deal with the question of whether there was a real and immediate risk of the appellant being subjected to Article 3 ill-treatment by his mother. The position in relation to two of the seven reports (the first and third) is as follows. The first reported concerns in July 2005 had been investigated by social workers and found not to be accurate. The appellant had not had his hair bleached with chemicals, his scalp and neck were not burnt and he was being well cared for. There was continuing social worker involvement in subsequent months, including an assessment after concerns were raised in February 2006, and there were no concerns raised about the appellant's care. The third report in October 2006, raising similar concerns that the appellant was locked in his room and was often hungry, was judged

to be a malicious referral. The Judge was entitled to conclude that those two reports did not evidence a real and immediate risk of ill-treatment.

67. Some of the reports involved concerns about physical injury. The second report was made in July 2005 when bruising was discovered on the appellant's legs. That was not caused by the mother nor by a person, said to be an inappropriate carer, with whom the appellant had been left by the mother. The fourth report came in July 2008 when it was said that a friend of the mother's had struck the appellant with the mother's consent. The sixth report, made in April 2009, was that the mother had pushed the appellant to the ground but that was said to be accidental. The seventh report, made in November 2009, involved concerns that a babysitter had slapped the appellant's brother.

68. The Judge was entitled to conclude that those reported incidents, individually or collectively, were not of sufficient severity to amount to ill-treatment contrary to Article 3 of the Convention and that they did not evidence a real and immediate risk to the appellant of ill-treatment contrary to Article 3. All the circumstances need to be considered in assessing whether the reported concerns amounted to evidence of ill-treatment contrary to Article 3. These include the circumstances in which the reported injury came to be inflicted, the severity of the injury, and the age and vulnerability of the individual involved. None of the reported injuries were sufficiently serious to justify a conclusion that there had been treatment (including punishment or chastisement) contrary to Article 3. The reported incidents were isolated incidents, spread over 4 years, and with significant gaps in between. None involved the mother striking or slapping the appellant (save where it was said that the mother had, accidentally, pushed the appellant and he fell to the ground). The reports did not evidence a real and immediate risk, that is, a risk that was present and continuing. Nor was the ill-treatment of such severity as to fall within the scope of Article 3 of the Convention.

69. The other report, the fifth report in December 2008, concerned the mother dressing up the appellant in women's clothing for the amusement of her friends. As the Judge said, that was insensitive, unkind and an example of poor parenting but did not, objectively, meet the threshold required to amount to inhuman or degrading treatment.

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.

71. I do not accept Ms Gumbel's submission that each of the reported incidents was of itself enough to amount to treatment contrary to Article 3 of the Convention. Whether an individual incident, including one involving the infliction of physical harm, amounts to a breach of Article 3 depends upon all the facts as repeatedly recognised in the case law. Nor do I consider that the Judge considered that

there had to be actual bodily injury before treatment could fall within Article 3. Nor did the Judge wrongly overlook the fact that Article 3 prohibits degrading and inhuman punishment as well as treatment. Rather, the Judge properly considered each reported incident. She correctly considered whether in all the circumstances the reported treatment amounted to "actual bodily injury, intense physical or mental suffering, or humiliation of the severity required" as she said at paragraph 79 of her judgment.

72. Secondly, and additionally, Birmingham, judged reasonably, did not fail to take the measures necessary to avoid any risk that there might have been to the appellant. In particular, there was no basis upon which it could be said that Birmingham should have sought to remove the appellant from the care of his mother between 2005 and 2011. Judged reasonably, given the nature of the problems with the mother's parenting skills, the Judge was correct to conclude that there was no realistic prospect of the appellant demonstrating that Birmingham failed to take appropriate steps by not applying for a care order.

73. For each of those reasons, the Judge was correct to conclude that there was no realistic prospect of the appellant establishing that Birmingham was in breach of its operational duty under Article 3 of the Convention.

The Worcestershire Appeal

74. The first report to Worcestershire in April 2012 concerned the fact that the appellant and his brother had been left in the care of an inappropriate carer, Ms B, and had been found wandering the streets alone at night and had been taken into police protection. Taken in the context of the earlier reports from Birmingham, that, too, could be taken to evidence failings by the mother to ensure appropriate care for the appellant.

75. I am satisfied, however, that the Judge was entitled to conclude there was no real and immediate risk to the appellant if he was left in the care of his mother. The appellant and his brother were returned to their mother's care and were not left in the care of Ms B again. A social worker visited the mother's home and found that the children were safe and well whilst being cared for at home. When, on a second unannounced visit, the children were found to be unsupervised and not in school, they were made the subject of child protection plans under the heading of neglect. There were further social work visits to the home. Arrangements were made for specialist family support for the family. In December 2012, the children were assessed as not being at risk of significant harm and they were no longer subject to child protection plans but were dealt with as children in need within the meaning of section 17 of the 1989 Act. In April 2013, the children were assessed as settled at home and in school. In all those circumstances, the Judge was entitled to conclude that there was no real and immediate risk of ill-treatment falling within the scope of Article 3 of the Convention. The immediate cause of any risk – being cared for by Ms B – had been removed. The care provided by the mother was adequate. Further, there was regular social services involvement, the children were subject to child protection plans, and there were support services in place. There was no real and immediate risk that the appellant would be subjected to treatment contrary to Article 3 of the Convention.

76. The appellant relies upon two further reports of ill-treatment by his mother. In July 2013, the appellant disclosed that his mother had pushed him, sat on him, bumped his

head and scratched him. He was immediately put in the care of his aunt and uncle and then with foster parents (with no objection from his mother). In January 2014, whilst in the care of foster parents, he disclosed that his mother would hurt him, including dragging him upstairs with her hands around his throat. From July 2013 until May 2014 however, the appellant was not at a real and immediate risk of harm from his mother precisely because he was not left in the care of his mother. He was at his aunt and uncle's home and then with foster parents. There was no real and immediate risk to him from his mother at that stage.

77. Social services worked with the family to enable the appellant to return to his mother's care. In February 2014, the appellant said that he was ready to go home. In May 2014, he returned to his mother. In June 2014, he disclosed that his mother had hit him and was being verbally abusive. Again, social workers were involved, explaining to AB that they were trying to keep him with his family. There were no incidents reported in July or August 2014. In August, the appellant left his mother's home because of new allegations involving alleged sexual misconduct by the appellant and never returned. I am satisfied that the Judge was entitled to conclude that there was no realistic prospect of the appellant establishing that the report in June 2014 established a real and immediate risk of harm from his mother between June and his leaving the family home in August 2014. Social workers were involved and were actively working with AB to ensure that he remained with his family. There were no allegations or reports of any ill-treatment in July and August. In those circumstances, the Judge was entitled to come to the conclusion she did.

78. Secondly, and in any event, judged reasonably, Worcestershire did not fail to take appropriate measures after April 2012 by seeking to use other means of addressing the shortcomings and difficulties in the mother's care of the appellant rather than applying for a care order. The Convention itself, and the case law of the European Court of Human Rights, recognise the importance of respecting and preserving family life. The domestic legislation provides for support and services to assist the child and the family, and to help the family remain together. Section 17(1) of the 1989 Act recognises that it is the general duty of every local authority to safeguard and promote the welfare of the children within their area and, so far as is consistent with that duty, "to promote the upbringing of such children by their families". Local authorities have powers to provide support and services to children and their family. Paragraph 7 of Schedule 2 to the 1989 Act provides that local authorities are to take reasonable steps designed to reduce the need to bring proceedings for care and supervision. The aim is to ensure, so far as possible, that children can remain with their family. 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). That does mean that children will remain if possible with their families. 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, as recognised in the case law summarised by Ward LJ in *Re MA (Care Threshold*) [2009] EWCA Civ 853, [2010] 1 FLR 431 at paragraphs 49 to 53.

79. In all those circumstances, the Judge was right to find at paragraph 86 of her judgment that there was no realistic prospect of either Birmingham or Worcestershire being

found to have failed to take appropriate measures because they did not seek a care order. It is worth repeating the material passage. The Judge said that there was:

> "no realistic prospect of AB establishing that any particular aspects of this disorderly and unstable family situation should have led the social services to conclude that a care order was required. While there were occasions when AB demonstrated significant distress in the family environment, he also showed strong ties to his mother. Cogent reasons would have been required for a care order bearing in mind the principle of respecting and preserving family life and such reasons were not present in July 2008 or at any time between April 2012 and June 2014."

The Issue of Summary Judgment

80. Ms Gumbel submitted that it was inappropriate to resolve these claims by means of summary judgment and the claims should have gone to full trial. She 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 what she described as the issue of a breach of Article 3 of the Convention.

81. As the Judge expressly recognised, a court may give summary judgment on a claim or an issue if (a) there is no real prospect of the claimant succeeding on that claim or issue and (b) there is no other compelling reason for a trial: see CPR 24.2. The principles governing when summary judgment may not be appropriate are set out in the judgment of Lewison J. in *Easy Air 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.

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. 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. 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.

Fresh Evidence

83. The appellant applies to admit new evidence in relation to the appeal involving Worcestershire. The evidence consists of two documents. The first is a draft statement, prepared by Worcestershire and dated 22 May 2015, of facts and reasons relied upon to satisfy the threshold criteria for the grant of a care order. The second is a version dated 11 December 2015 agreed by the parties to the care proceedings. CPR 52.21 provides that an appeal court will not normally receive evidence that was not before the lower court. The appeal court has a discretion to permit fresh evidence. The criteria identified in *Ladd v Marshall* [1954] 1 WLR 1489 continue to be used in determining whether as a matter of discretion evidence should be admitted: see, for example, *Terluk v Berezovsky* [2011] EWCA Civ 1534. We considered the new evidence and heard submissions on that evidence at the hearing. I would not admit it. First, the evidence was available to the appellant and could have been adduced, if he had wished to do so, before the Judge. Secondly, and more significantly, I do not consider that the documents add materially and they would not have an important influence on the appeal. The material largely covers the incidents already dealt with in the detailed chronology (which was before the Judge). One incident is added in the first document, indicating that the mother struck the appellant with a hairbrush in July 2013 and it broke. That incident is not included in the second document. Further, the documents were prepared in the context of care proceedings begun after new, and very significantly different, allegations of sexual misconduct on the part of the appellant were made. The documents deal with the way in which earlier incidents and those later, and significantly different allegations, were subsequently viewed in May 2015 when the appellant had not been in his mother's care for some time and they were prepared as part of care proceedings. For the reasons given I would not grant permission to adduce that fresh evidence.

Conclusion on Ground 3

84. For those reasons, I would dismiss the appeal on the principal ground, ground 3.

THE OTHER GROUNDS OF APPEAL

85. Ground 1 is conceded. Counsel for the respondents submitted that a requirement for the appellant to be in the care and control of the respondents was not consistent with the established case law or the scheme of the 1989 Act. I agree that that concession was correctly made in the context and on the facts of this case. The 1989 Act deals with the powers and obligations of local authorities to protect children for whom they are responsible. In that context, there is no additional requirement that the child has to be under the care and control of the local authority, such that the authority assumed

responsibility for the child's safety and welfare, in order to establish that there has been a violation of the operational duty imposed on local authorities by Article 3 of the Convention. Ground 1 therefore succeeds. However, that would not of itself result in the appeal being allowed. That was an alternative basis for finding that the appellant had failed to establish a violation of Article 3 of the Convention. The appellant needed to succeed on the principal ground, ground 3, in order for the appeal to be allowed and, for the reasons given above, that ground fails.

86. Ground 2 is no longer pursued. In relation to ground 4, Ms Gumbel did not make oral submissions arguing that the Judge erred by not allowing the particulars of claim to be amended. The proposed draft, the fifth version, was not materially different, so far as Article 3 is concerned, from the earlier draft. No further, amended version was produced. The claimant had not provided the further information of his claim under Article 3 that had been requested. In those circumstances, ground 4 fails. Ground 5 contends that the Judge was wrong to find that the claim was bound to fail. The Judge in fact found that there was no realistic prospect that the appellant could establish that there had been a violation of Article 3 of the Convention and there was no other compelling reason for a trial. She was entitled to reach those conclusions. Finally, ground 6 challenges the decision of the Judge on costs. As the Judge was correct to grant summary judgment, there is no basis for challenging her decision on costs.

CONCLUSION

87. I would dismiss this appeal. The Judge was correct to find that there was no realistic prospect of the appellant establishing that either Birmingham or Worcestershire violated Article 3 of the Convention by failing to take steps to seek a care order to remove the appellant from his mother's care at the material time. First, the evidence does not establish that there was any real and immediate risk of the appellant being subjected to treatment by his mother which would fall within the scope of Article 3 of the Convention. Secondly, judged reasonably, neither Birmingham nor Worcestershire failed to take appropriate measures to address any risk that might exist by adopting measures which were less intrusive than seeking a care order.

LORD JUSTICE DINGEMANS

88. I agree.

LORD JUSTICE BAKER

89. I also agree.