Neutral Citation Number: [2024] EWHC 431 (KB)

Case No: G90BM150

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil and Family Justice
The Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 29th February 2024

Before:

HER HONOUR JUDGE EMMA KELLY

- -

Between :

Lana McMahon **Claimant**

- and –

Birmingham City Council **Defendant**

- -
- -

James Counsell KC (instructed by Anthony Collins Solicitors) for the **Claimant.**
Robert Talalay (instructed by Browne Jacobson LLP) for the **Defendant.**

Hearing date: 14th December 2023
Judgment handed down: 29th February 2024

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Approved Judgment

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Her Honour Judge Emma Kelly:

1. Lana McMahon ("the claimant") seeks damages and declaratory relief from Birmingham City Council ("the defendant") in respect of personal injury and financial losses alleged to arise as a result of the time she was accommodated by the defendant pursuant to s.20 of the Children Act 1989 (hereafter referred to as "s.20" or "s.20 accommodation"). The claimant pleads her claim in negligence and as breaches of her Article 3, 6 and 8 rights, as protected by the Human Rights Act 1998.

2. This judgment is concerned with following applications:

    (1) The defendant's application, dated 28 July 2021, seeking strike out of the claim in negligence and the Article 6 claim; and

    (2) The defendant's application, dated 30 January 2023, seeking strike out, alternatively summary judgment, in respect of the Article 3 and 8 claims.

3. The applications are supported by witness statements from the defendant's legal representatives, Ms Louise-Marie Fisher, dated 28 July 2021, and Ms Joanne Pruden, dated 30 January 2023. The applications are opposed by the claimant, who relies on the witness statement of her legal representative, Ms Sarah Owen, dated 28 March 2023, in response. As is frequently the case in applications for strike out and/or summary judgment, much of the content of the witness evidence descends into legal submission rather than simply containing relevant factual evidence.

4. The court is grateful for the detailed skeleton arguments provided by counsel. On the day of the hearing it was known that the Supreme Court was due to hand down judgment in *HXA v Surrey County Council* and *YXA v Wolverhampton City Council* [2023] UKSC 52 the following week. It was therefore agreed that each party could file and serve additional written submissions limited to the effect of that decision on the instant applications. Each party availed themselves of that opportunity.

Background

5. The claimant was born on 31 December 1997 and is now aged 26 years old.

6. In around July 2013, the then 15 year old claimant was accommodated by the defendant in s.20 accommodation following a deterioration in the claimant's relationship with her mother. The claimant remained accommodated by the defendant pursuant to s.20 until she turned 18 years of age.

7. The s.20 accommodation included:

    (1) Emergency foster care (July 2013);

    (2) Trinity Road Children's Home, Aston, Birmingham (July 2013 – October 2013);

(3) Sandwell Home Care Unit in Smethwick, Birmingham (October 2013 – February 2014);

(4) Minstead House, Erdington, Birmingham (February 2014 – June 2014);

(5) Bournville House mother and baby unit, Stirchley, Birmingham (June 2014 - November 2014);

(6) Crown House mother and baby assessment unit, Malvern (November 2014 – December 2014);

(7) Foster care placements, initially in Birmingham and then in Coventry (December 2014 – March 2016 i.e. until after the claimant turned 18).

8. For the purposes of these applications, it is not in dispute that the claimant was a very troubled teenager. Her case is that she "was physically, sexually and emotionally abused and exploited by various men; she attended school infrequently; she drank alcohol and took illegal drugs; she absconded often; and was frequently involved in altercations with staff and residents at her accommodation." The claimant suffered periods of self-harm, at times requiring hospitalisation. The claimant alleges that during the time she was in s.20 accommodation she suffered very serious physical, emotional and sexual abuse and exploitation, including multiple rapes, at the hands of two males:

(1) SR, who she described as her then 17 year old boyfriend when she was first accommodated in July 2013.

(2) PT, a man she met in 2014 when living in Minstead House, who was thought then to be around 27 years of age.

9. The claimant gave birth to a baby on 24 October 2014 and there were other incidences of pregnancy. By 15 September 2016 the claimant was incarcerated following convictions for various criminal offences.

Procedural background

10. The claim was issued as long ago as 9 October 2020 but its progress has been delayed for a variety of reasons. By consent, there were various extensions to the timetable for the filing and serving of pleadings. The original particulars of claim, dated 4 March 2021, ran to 16 pages and pleaded claims in negligence and for breach of Article 3 (freedom from torture or inhuman or degrading treatment), Article 6 (right to a fair hearing) and Article 8 (right to respect for private and family life). The essence of the claimant's claim being that the defendant failed to take steps to prevent the abuse from SR and PT occurring.

11. The claim was met by a defence dated 12 July 2021, denying any liability. In summary, the defendant denied that any common law duty of care arose as a result of the claimant's s.20 accommodation, in any event denied breach of any duty of care, and denied liability for any claim under Articles 3, 6 or 8. The defence asserted that the claimant had failed to particularise various aspects of her claim.

12. On 28 July 2021 the defendant filed its first application to strike out the claim in negligence and the Article 6 claim. The application was listed for hearing on 25 January 2022 but adjourned by consent as the defendant had located a large amount of further disclosure, which the parties needed to consider. The application was relisted on 21 June 2022 but further adjourned at the request of both parties to await the decision of the Court of Appeal in *HXA v Surrey County Council* and *YXA v Wolverhampton City Council* [2022] EWCA Civ 1196.

13. The defendant consented to the claimant filing Amended Particulars of Claim, dated 27 October 2022. The revised pleading maintained the same causes of action but ran to 58 pages.

14. By order dated 2 December 2022, DJ Rich refused the defendant's application to further stay the proceedings pending the decisions of the Court of Appeal in *AB v Worcestershire County Council* [2022] EWHC 115 and of the Supreme Court in *HXA & YXA*.

15. By application dated 30 January 2023, the defendant issued a further application to strike out to include the Article 3 and 8 claims, alternatively seeking summary judgment in respect of those heads of claim.

16. The defendant's two applications were listed on 18 July 2023 but adjourned on the day when the defendant's counsel was unable to attend court due to an urgent personal matter. The applications were relisted on 14 December 2023 to accommodate the parties' limited dates of availability.

The issues

17. The defendant's applications are targeted at specific issues which, it submits, are fatal to the various causes of action as pleaded in the Amended Particulars of Claim. These issues are narrower in scope than all matters that the defendant would take issue with should the claim proceed to trial. The defendant's primary position is that all of the causes of action stand to be struck out and/or summary judgment entered but, in the alternative, the claimant should be ordered to amend her claim to properly particularise each cause of action. The applications give rise to the following issues:

    (1) Does the pleaded claim in negligence fail to disclose reasonable grounds to support the existence of a duty of care?

    (2) Does the pleaded Article 3 claim:

        a) Fail to disclose reasonable grounds to show that the defendant had knowledge of a real and immediate risk?

        b) Fail to identify a measure that, judged reasonably, might have been expected to avoid the risk?

        c) Advance a claim for breach of investigative duty in circumstances where no such duty exists?

(3) Does the Article 8 claim fall to be struck out as being co-extensive with the Article 3 claim?

(4) Does the pleaded Article 6 claim, relying as it does on a failure to bring care proceedings, fail to disclose reasonable grounds for bringing the claim?

(5) Is the Amended Statement of Case as a whole inadequate?

The legal framework relevant to strike out and summary judgment

18. There is no dispute between the parties as to the principles to be applied to an application to strike out and/or for summary judgment.

Strike out

19. By CPR 3.4(2), the court: “may strike out a statement of case if it appears to the court- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim…”

20. CPR PD 3A, para. 1.2 gives “examples of cases where the court may conclude that particulars of claim… fall within rule 3.4(2)(a)” as including “those which are incoherent and make no sense” and “those which contain a coherent set of facts but those facts, even if true, do not disclose a legally recognisable claim against the defendant.”

21. For the purpose of the application to strike out, it is agreed that the facts as alleged by the claimant are assumed to be true. [*Morgan Crucible Company plc v Hill Samuel & Co Ltd & others* [1991] Ch 295 at 314B]

22. An application for strike out requires the court to be certain the claim is going to fail. In *Hughes v Colin Richards & Co* [2004] EWCA Civ 226 Peter Gibson LJ held at para. 22:

> “I start by considering what is the correct approach on a summary application of the nature of Mr. Richards’s application at this early stage in the action when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at p. 557 per Lord Browne Wilkinson). Lord Browne-Wilkinson went on to add:
>
> > “[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.””

23. If a question of law can however be answered, independently of any disputed facts, strike out can be appropriate. In other words, the court should not shy from 'grasping the nettle.' [*Owens v Chief Constable of Merseyside Police* [2021] EWHC 3319 (QB) at para. 6 following *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para. 15.]

24. As to the approach to adopted where the pleading is held to be defective, in *Soo Kim v Youg* [2011] EWHC 1781 Tugendhat J adopted the following approach:

> " 40 …where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

Summary judgment

25. By CPR 24.2:

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

26. In *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 Etherton LJ [at para. 24] approved the approach to summary judgment formulated by Lewison J (as he then was) in *Easyair v Opal Telecom Ltd* [2009] EWHC 339 (Ch). Lewison J at para. 15 held:

> "The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real

substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

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

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

The substantive legal framework

The Children Act 1989

27. The claimant was accommodated with her mother's consent pursuant to s.20. S.20 makes provision for the accommodation of children in need by local authorities in England:

> "20(1). Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
> (b) his being lost or having been abandoned; or
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

28. S.22 of the Children Act 1989 Act deals with the general duty of a local authority in relation to children looked after by them.

> "22(1) In this section, any reference to a child who is looked after by a local authority is a reference to a child who is—
>
> (a) in their care; or
> (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 17, 23B and 24B.
>
> (2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.
> (3) It shall be the duty of a local authority looking after any child—
>
> (a) to safeguard and promote his welfare; and
> (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.
>
> (3A) The duty of a local authority under subsection (3)(a) to safeguard and promote the welfare of a child looked after by them includes in particular a duty to promote the child's educational achievement.
> (3B) A local authority must appoint at least one person for the purpose of discharging the duty imposed by virtue of subsection (3A).
> (3C) A person appointed by a local authority under subsection (3B) must be an officer employed by that authority or another local authority.
> (4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of—
>
> (a) the child;
> (b) his parents;
> (c) any person who is not a parent of his but who has parental responsibility for him; and
> (d) any other person whose wishes and feelings the authority consider to be relevant,
>
> regarding the matter to be decided.
> (5) In making any such decision a local authority shall give due consideration—
>
> (a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;
> (b) to such wishes and feelings of any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain; and

> (c) to the child's religious persuasion, racial origin and cultural and linguistic background.
>
> (6) If it appears to a local authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise their powers with respect to a child whom they are looking after in a manner which may not be consistent with their duties under this section, they may do so.
>
> (7) If the Secretary of State considers it necessary, for the purpose of protecting members of the public from serious injury, to give directions to a local authority with respect to the exercise of their powers with respect to a child whom they are looking after, the Secretary of State may give such directions to the authority.
>
> (8) Where any such directions are given to an authority they shall comply with them even though doing so is inconsistent with their duties under this section."

Negligence

29. The question of whether and, if so when, a local authority may owe a common law duty of care to children affected by the manner in which it exercises or fails to exercise its functions was considered by the Supreme Court in *N & another v Poole Borough Council* [2019] UKSC 25. The two child claimants in *Poole* lived with their mother in housing identified and adapted by the local authority to meet the needs of one of the claimants, who had severe mental and physical disabilities. The local authority provided a care package for the disabled child through its child health and disability team. After moving into the housing, the family suffered a campaign of harassment at the hands of their neighbours. The other child claimant developed mental health problems and he became subject to a child in need plan and later a child protection plan. After several years the claimants and their mother were moved to alternative accommodation. The claimants brought a claim in negligence in respect of personal injuries alleged to have been sustained during the period of harassment by their neighbours. The Supreme Court concluded that it was correct to strike out the claim as no common law duty of care arose.

30. Lord Reed [at para. 28] considered the development of the law as it relates to determining the existence or otherwise of a common law duty of care owed by public bodies. He noted:

> "28. Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm: see, for example, *Sheppard v Glossop Corpn* [1921] 3 KB 132 and *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to

confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm: see, for example, *Dorset Yacht Co Ltd v Home Office*, as explained in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057, para 39."

31. Lord Reed [at para. 65] concluded his analysis of the development of the law by formulating the following framework:

> "65. It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

32. Lord Reed [at para. 66-73] considered the approach to determining whether there had been an assumption of responsibility. At para. 73 he concluded:

> "…Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in cases such as *Hedley Byrne* [1964] AC 465 and *Spring v Guardian Assurance plc* [1995] 2 AC 296."

33. In *DFX & others v Coventry City Council* [2021] EWHC 1382 (QB) Lambert J [at para. 169] sought to distil the key principles in determining the existence of a duty of care. At paragraph 169(v) she held:

> "v) The general rule against liability for negligently failing to confer a benefit is subject to exceptions. The circumstances in which public authorities like private individuals and bodies may come under a duty of care to prevent the occurrence of harm were summarised by Tofaris and Steel in "Negligence Liability for Omissions and the Police" 2016 CLJ 128. They are (i) when A has assumed responsibility to protect B from that danger; (ii) A has done something which prevents another from protecting B from that danger; (iii) A has a special level of control over that source of danger; or (iv) A's status creates an obligation to protect B from that danger."

34. In *FXJ v Secretary of State for the Home Department & Home Office* [2023] EWCA Civ 1357 the Court of Appeal considered the existence or otherwise of

a common law duty of care by the public body defendants to confer a prompt decision on immigration status. After citing paragraphs 63-65 of Lord Reed's judgment in *Poole*, Lady Simler [at para. 32] held:

> "32. A critical distinction is therefore to be drawn between causing harm (or making things worse) where a common law duty of care might arise if fair, just and reasonable to impose it; and failing to confer a benefit (or not making things better), where no such duty will ordinarily be imposed. Despite the fact that there can be difficulties in drawing or applying this distinction in borderline cases, it reflects a recognition that there is a fundamental difference between requiring a person to take care, if they embark on a course of conduct which may harm others, not to create a risk of danger; and requiring a person, who is doing nothing, to take positive action to protect others from harm for which they were not responsible, and to hold them liable in damages if they fail to do so. The law of negligence generally imposes duties not to cause harm to other people or their property and does not generally impose duties to provide them with benefits, which are, in general, voluntarily undertaken rather than being imposed by the common law. As in the case of private individuals, however, a duty to protect from harm or confer some other benefit might arise in particular circumstances, for example where the public body has created the source of danger or has assumed a responsibility to protect the claimant from harm. Lord Reed explained that drawing the distinction in this way rather than the more traditional distinction between acts and omissions, better conveys the rationale of the distinction drawn in the authorities, and might be easier to apply."

35. The decision of the first instance judge that no common law duty of care arose was upheld by the Court of Appeal in *FXJ.* They categorised [at para. 47] the defendant's conduct as a "failure or series of failures to confer a benefit, rather than as causing harm or making things worse."

36. Shortly after the hearing of the index applications in this claim, the Supreme Court handed down judgment in *HXA v Surrey County Council* and *YXA v Wolverhampton City Council* [2023] UKSC 1196 ("*HXA/YXA*"). Both claims were pleaded in negligence and alleged that the respective local authorities owed a duty of care to protect the claimants from abuse by parents and/or step-parents. The claimant in *HXA* has been on the child protection register and there had been five investigations under section 47 of the Children Act 1989. The claimant in *YXA* lived with his parents but was accommodated pursuant to s.20 for respite foster care approximately one night per fortnight and one weekend every two months. The Supreme Court concluded that, applying *Poole*, no common law duty of care was owed in either case and reinstated the first instance decisions to strike out the claims.

37. In *HXA/YXA* the Supreme Court considered the need for an assumption of responsibility and, at para. 88, held:

> "88. Applying the approach of looking at whether a private individual would have owed the children a duty of care to protect them from harm, it is clear that the claimants must here establish a relevant assumption of

responsibility. This is because we are concerned with a failure to benefit the claimants by protecting them from harm by a third party. To establish liability for such a failure to benefit (which can be viewed as imposing liability for an omission), which is the exception rather than the rule in the common law, one of the recognised exceptional principles must be established. These principles were neatly encapsulated by Stelios Tofaris and Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128 in a summary which was cited and approved in *Robinson* and then in *N v Poole*.

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.""

38. The Supreme Court [para. 104] disagreed with the Court of Appeal's view [see *HXA/YXA* [2022] EWCA Civ 1196] that this was a developing area of the law such that claims should not be struck out before the facts had been established.

39. The Supreme Court [para. 106-107] provided examples of when there could be an assumption of responsibility by a local authority to protect a child from harm. This included express consideration of a child subject to a care order and to a child being accommodated pursuant to s.20:

> "106. We agree with Baker LJ that it is plainly incorrect to say that there can never be an assumption of responsibility by a local authority, in respect of social work functions, to protect a child from harm. The obvious example is where the local authority has obtained a care order and has thereby taken on parental responsibility for a child: see para 30 above. In that situation, therefore, the local authority has assumed responsibility to use reasonable care to protect the child from harm including harm from third parties. This is exemplified by *Barrett v Enfield London Borough Council* [2001] 2 AC 550 ("Barrett") which was explained and approved in *N v Poole* at paras 69, 73 and 81. Lord Faulks submitted that that case did not establish that there was an assumption of responsibility even where a care order had been obtained because the decision not to strike out was based on a number of factors including that, at the time the case was decided, the decision in *Osman v United Kingdom* (Application No 23452/94) (1998) 29 EHRR 245 was casting a shadow over English courts' general approach to a strike out application. We reject that submission. The decision in *Barrett* is correct and is not restricted in the way suggested by Lord Faulks.
>
> 107. We also agree with Baker LJ that it is incorrect to say that there can only be an assumption of responsibility where, as in *Barrett*, the local authority has obtained a care order. While acknowledging that there may be other examples of an assumption of responsibility arising on particular facts, it is helpful to focus on the *YXA* case. In our view, and in agreement with Master Dagnall (see para 64 above), by accommodating *YXA* under

> section 20 of the 1989 Act, there was an assumption of responsibility by the local authority during the time that the child was in respite care, including the mechanics of return, to use reasonable care to protect the child against harm including from third parties (and it should also be noted that, as laid down in *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355, in respect of abuse by the foster parents themselves, the local authority may be vicariously liable to the child for the torts of the foster parents). The assumption of responsibility flows from the fact that the child's safety has been entrusted to the local authority by the parents, the local authority has accepted that responsibility, and indeed the parents may be said to have delegated parental responsibility to the local authority (see para 36 above). If one thinks of the analogy of a private individual, a similar duty of care at common law would arise if a private individual was requested by a parent to, then agreed to and did, accommodate the parent's child. The assumption of responsibility flows from the fact that the private individual was entrusted by the parent with the child's safety and accepted that responsibility. An assumption of responsibility would be for the period of time that the child was being accommodated (and in respect of the mechanics of return) so that the private individual would owe a common law duty of care to protect the child against harm including from third parties during that period of time."

Article 3 (freedom from torture or inhuman or degrading treatment)

40. The parties agree that the judgment of Lewis LJ in *AB v Worcestershire County Council & Birmingham City Council* [2023] EWCA Civ 529 sets out the applicable legal framework in respect of the Article 3 claim. In *AB* the court was concerned with the circumstances in which a local authority may be held liable for a breach of Article 3 in respect of exposure to neglect or ill-treatment by a parent in whose care the child remained. Lewis LJ summarised the legal framework of an Article 3 claim as follows:

> "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")."

41. Lewis LJ went on to consider the extent of the "operational duty" owed by a local authority. He concluded [at para. 57] that there were four components to the obligation:

> "57. … 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."

42. At first instance in *AB* [2022] EWHC 115 (QB) the Court considered the claimant's Article 3 claims based on alleged breach of both the operational duty and investigative duty. The claimant in *AB* sought to argue that the Supreme Court in *D v Commissioner of Police for the Metropolis* [2018] UKSC 11 had not considered whether, and if so what, investigative duty might by owed by local authorities to children and, as such, *D* was not authority for the proposition that the investigative duty was limited to detecting and punishing criminality. The Deputy High Court Judge concluded that the investigative duty did not apply and struck out the claim. She held [at para. 97-98]:

> "97. … Allegations of ill-treatment falling within the scope of Article 3 will invariably engage the criminal law and the language used to describe the duty strongly indicates that 'investigation' in this context has

a particular meaning. The investigative duty as described in *D* (supra) makes it clear that it refers to a criminal investigation discharged by the police and prosecuting authorities after the fact to recognise, apprehend and punish the wrongdoer. It is not an investigation for which the primary purpose is to establish the existence of future potential harm and protect the victim against it. The provisions of the 1989 Act are framed to empower social workers to investigate a child's circumstances in order to take steps to prevent any risk or further risk of significant harm. The purpose of section 47 investigations is to decide whether and what type of action is required to safeguard and promote the welfare of a child who is suspected of, or likely to be, suffering significant harm. Referrals may arise from the police or school. The provisions do not require an independent enquiry to identify what has happened and the purpose is not to punish a wrongdoer.

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

43. The claimant in *AB* initially attempted to challenge the summary determination of the Article 3 investigative duty claim but, as is made clear in para. 44 of the Court of Appeal's judgment in *AB*, the claimant did not pursue the ground of appeal. Accordingly, the Court of Appeal said nothing further about that ground.

44. The concept of a "real and immediate risk" was considered in *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225. Lord Hope [at para. 66] adopted the assessment of Lord Carswell in *In re Officer L* [2007] 1 EWLR 2135 to the effect that the test of a "real and immediate risk" was a high threshold, not readily satisfied.

Article 6 (right to a fair hearing)

45. The claimant bases her Article 6 claim on the failure of the defendant to institute care proceedings whilst keeping her in s.20 accommodation for a long period.

46. In *Northamptonshire County Council v AS & Others* [2015] EWHC 199 (Fam) an 11-month period of s.20 accommodation led to the local authority conceding Article 6 and 8 claims and paying damages to the child concerned. Keehan J did not demur from the concession and endorsed the offer of damages. At para. 30- he held:

" 30. Prior to the final hearing the children's guardian had formally notified the local authority that she intended to issue proceedings in respect of the local authority's multiple breaches of DS's human rights contrary to Article 6 and Article 8 of the European Convention on Human Rights and Fundamental Freedoms A50 ('the Convention').

31. The mother issued proceedings against the local authority claiming damages for various alleged breaches of her Article 6 and Article 8 Convention rights.

32. Despite the appalling conduct of the local authority hitherto, it is right that I record that at the final hearing the local authority conceded it was liable in respect of both claims. It accepted it had acted in violation of DS's and the mother's article 6 and article 8 convention rights as follows:

> (a) …
>
> (b) Whilst the child was accommodated pursuant to section 20 CA on 30 January 2013, a decision to initiate proceedings was not made until 23 May 2013 and an application for a care order was not made until 5 November 2013. Over this period of 11 months the child was without access to any independent representation of his welfare interests and had no access to any remedy or recourse and no person was exercising parental responsibility for him, in breach of the child's article 6, 8 and 13 rights."

47. At first instance in *AB* [2022] EWHC 115 (QB) the Article 6 claim, which was based on a failure within a reasonable time to initiate care proceedings in respect of AB, who had remained in the care of his mother, was struck out. The Deputy High Court Judge held:

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

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

48. The ability to bring an Article 6 claim based on a failure to take care proceedings was not ventilated when *AB* was considered by the Court of Appeal.

Article 8 (right to respect for private and family life)

49. There is a dispute in this case as to whether the Article 8 claim adds anything to the Article 3 claim. The question of whether an Article 8 claim offers a greater level of protection was considered by the Court of Appeal in *CLG v Chief Constable of Merseyside Police* [2015] EWCA Civ 836. In *CLG* the home address of prosecution witnesses in criminal proceedings was referred to in a police officer's witness statement and disclosed to those accused of the criminal activity. The witnesses brought an action against the police in respect of the disclosure pleading a claim for breach of Article 2 (right to life) and Article 8. The first instance judge rejected the claims. On appeal, Moore-Bick LJ [at para. 39] considered the interplay between the Article 2 and 8 claims and held:

> "39. … Moreover, I think Mr. Johnson was right in submitting that if the consequences of a breach of a positive obligation are said to have been exposure to the risk of death or serious injury, as was the case here, the claimant can succeed only if he can establish a breach of the state's positive obligations under articles 2 or 3. In *DSD v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) Green J. observed in paragraph 242 that he could not see any circumstances in which article 8 would provide a greater level of protection than article 3 and that in none of the Strasbourg cases had the court treated article 8 as having an effect extending beyond article 3. It is unnecessary to reach a final decision on that question in the present case, but in a case in which the appellants pursued, but have since abandoned, a claim under article 2, it is difficult to see how they could hope to succeed under article 8. The judge was in my view right to reject that part of their case."

50. The accommodation of a child pursuant to s.20 for an extended period of time can, in principle, give rise to breaches of Article 8. In *Williams v Hackney London Borough Council* [2018] UKSC 37 Lady Hale held:

> "52. Thus although it is not a breach of section 20 to keep a child in accommodation for a long period without bringing care proceedings, it may well be a breach of other duties under the Act and Regulations or unreasonable in public law terms to do so. In some cases there may also be breaches of the child's or the parents' rights under article 8 of ECHR."

Discussion and analysis

51. The applications fall to be determined on the case as pleaded in the Amended Particulars of Claim. CPR 16.4(1) requires particulars of claim to include "a concise statement of the facts on which the claimant relies." The importance of the pleading conveying the case with clarity was emphasised by the Court of Appeal in *HXA/YXA* where Baker LJ [at para. 87] held:

> "87. … In each case, it is said that the defendant assumed responsibility for protecting the claimant from that harm. In that context, the claimant should therefore identify the facts which are alleged to amount to an assumption of responsibility and the scope and extent of the alleged duty. Put simply, the claimants must identify clearly and concisely what it is said that the

defendant has assumed responsibility for, and what facts are relied upon as establishing that the defendant has assumed that responsibility. In addition, the claimant should identify the dates upon which the alleged duty arose and, if relevant, the period or periods during which the duty was owed. The claimant must also identify the facts and matters said to establish breach, causation and loss."

52. Although the Court of Appeal's decision in *HXA/YXA* as to the existence of a duty of care was overturned on appeal, the Supreme Court [at para. 92] did not demur from the notion that "it is important to consider the particulars of claim." It therefore follows that the content of the Amended Particulars of Claim calls to be scrutinised as it is that document that sets out how the claimant advances her case.

Issue 1: Does the pleaded claim in negligence fail to disclose reasonable grounds to support the existence of a duty of care?

53. Para. 85 of the Amended Particulars of Claim sets out the claimant's case on common law duty of care which is said to have arisen while the claimant was being accommodated under s.20, and which extended to taking reasonable steps to protect the claimant from harm caused to her by third parties and/or her own conduct. The circumstances in which the duty of care is alleged to have arisen is pleaded on different bases at para. 85(a) and (b) of the Amended Particulars of Claim:

(1) Para. 85(a) avers that the defendant assumed responsibility to protect the claimant from such harm. The "assumption of responsibility" duty is pleaded on two distinct bases:

i) It is said at sub-para. 85(a)(i) to arise from "the nature of the Defendant's functions under s.20 necessarily [involving] an assumption of a responsibility to provide accommodation and ancillary services (including the Claimant's transportation, education and health needs whilst accommodated) with reasonable care and skill and to provide reasonable safe accommodation…"

ii) It is said at sub-para. 85(a)(ii) "to be inferred from the manner in which the Defendant behaved towards the Claimant and the steps it took to safeguard her and promote her welfare while she was being accommodated…." Para. 85(a)(ii) pleads 19 sub-paragraphs particularising actions it is alleged the defendant took which form the factual basis for inferring the assumption of responsibility. I will return to the detail of those sub-paragraphs shortly.

(2) Paragraph 85(b) avers "that by involving itself in the Claimant's affairs…the Defendant prevented others (such as police and relatives) from protecting the Claimant from dangers posed by third parties." The "preventing others" duty of care relies on allegations that the defendant

did not refer all allegations of abuse by SR and PT to the police; did not hold regular, timely meetings with the police; did not ask the police to carry out Criminal Records Bureau checks on SR and PT until late 2015/early 2016 and did not provide the police with the claimant's address while she was in foster care in Coventry.

54. The defendant submits that each of these alternative bases upon which it is alleged that a duty of care arises falls to be struck out. In summary, the defendant argues:

(1) Para. 85(a)(i) is no more than an assertion that the s.20 statutory duty of itself gives rise to an assumption of responsibility and such is wrong as a matter of law.

(2) Para. 85(a)(ii) fails to particularise, insofar the 19 sub-paragraphs purport to do so, what it is the defendant assumed responsibility for, when it is said to have done so and the period for which the duty was owed. It is submitted that the pleading does not demonstrate that the defendant assumed responsibility to prevent the claimant having access to SR and PT.

(3) Para. 85(b) amounts to an attempt by the claimant to found a duty of care on a failure to confer a benefit, something the authorities, including *Poole*, prohibit.

55. The claimant rejects the defendant's analysis submitting:

(1) The "assumption of responsibility" of a duty of care by virtue of the claimant's accommodation under s.20 is well-founded, particularly in light of the Supreme Court's recent decision in *HXA/YXA*.

(2) Para. 85(a) appropriately pleads the assumption of responsibility duty of care in circumstances where the claimant was accommodated by the defendant for a period of about three years with minimal involvement by the claimant's mother.

(3) Para. 85(b), insofar as it asserts a duty of care arising from the defendant doing something to prevent the police from protecting the claimant, is a legitimate exception to the general rule against liability being imposed for failing to confer a benefit. The claimant relies on the decision of Lambert J in *DFX v Coventry City Council* [at para. 169(v)(i)(ii)] in that regard.

56. At the hearing on 14 December 2023, the claimant relied on the Court of Appeals' decision in *HXA/YXA* [at para. 105] to submit that the circumstances in which an assumption of responsibility arose was still an evolving area of law such that it would be inappropriate to strike out the claim. In light of the Supreme Court's conclusion in *HXA/YXA* [at para. 102-4] that the law on this topic is settled and turns on the application of *Poole*, the claimant confirmed in her additional written submissions that she no longer pursued that point.

Para. 85(a)(i) of the Amended Particulars of Claim

57. Para. 85(a)(i) is the first of two bases upon which it is asserted that the defendant assumed responsibility to protect the claimant from harm caused to her by third parties and by her own conduct. The pleading pins the assumption of responsibility on the state of affairs necessarily involved in the "nature of the defendant's functions under s.20." Other than referring to the defendant's responsibility to provide accommodation and ancillary services, para. 85(a)(i) does not seek to plead specific factors that gave rise to an assumption of responsibility. The Supreme Court in *HXA/YXA* [at para. 87] emphasised that, whilst a local authority has statutory duties under the Children Act 1989, that does not give rise to an action for breach of statutory duty and that, when determining if a common law duty of care arises, "one has to be very careful not to slide back to resting the duty of care, and breach, at common law on the mere fact that the public authority had statutory duties towards, and powers in respect of, the claimant." Lord Burrows and Lord Stephens noted that what was required to establish a duty of care was what had been referred to in previous cases as "something more" or "something else." The pleading at para. 85(a)(i) does not particularise what else, other than the very existence of the provision of s.20 accommodation, is relied on to give rise to an assumption of responsibility. Nothing specific is pleaded that would not be present in any case where s.20 accommodation was being provided pursuant to s.20(1) or 20(4) of the Children Act 1989. In my judgment, the pleading wrongly seeks to equate existence of a statutory duty under s.20 with the existence of a duty of care. The pleading, as drafted, is therefore deficient and it cannot be said that there is a reasonable prospect of success that the claimant will be able to establish a duty of care based on that pleaded in para. 85(a)(i) of the Amended Particulars of Claim.

Para. 85(a)(ii) of the Amended Particulars of Claim

58. The second basis for the alleged assumption of responsibility is pleaded at para. 85(a)(ii). Here the claimant pleads, in 19 sub-paragraphs, the specific factual circumstances of her case which she asserts give rise of an assumption of responsibility by the defendant to protect the claimant from third parties and her own conduct. The defendant is critical of this pleading, submitting that all bar two of the factual circumstances are simply aspects of the exercise of the statutory duty. The defendant submits that the only two allegations that could touch on an assumption of responsibility are sub-paragraph 2 (the defendant's decision as to whether the claimant should be allowed to meet SR and, if so, in what conditions) and paragraph 3 (the defendant's decision as to which individuals the claimant was and was not permitted to stay with overnight). The defendant submits that the claimant's failure to plead that the claimant should not have had access to SR and PT is fatal and, at present, the defendant cannot understand what it is that it is alleged to have assumed responsibility for or why. The claimant rejects any criticism of the pleading at para. 85(a)(ii) and avers that defendant's analysis is too simplistic as many of the actions the defendant took (such as arranging the provision of external services, interacting with third parties and selecting the geographical and type of accommodation) all formed

part of the actions taken by which the defendant assumed responsibility to protect the claimant from harm caused by SR or PT or indeed by herself.

59. For the purpose of these interim applications, it is to be assumed that the claimant suffered very serious physical, emotional and sexual abuse and exploitation at the hands of SR and PT during the 2½ year period in which she was in s.20 accommodation up to her 18th birthday. As per the Supreme Court's decision in *HXA/YXA* [at para. 107] accommodating a child under s.20 can give rise to an assumption of responsibility by a local authority to protect the child against harm including from third parties for the duration of the time in the local authority's care. Whilst the claimant in *YXA* did not succeed on its facts, the claimant's case is distinguishable because, unlike *YXA,* she was accommodated full time for a continuous lengthy period rather than for merely occasional nights of respite care. Taking into account the factual matrix of her claim and the clarification by the Supreme Court in *HXA/YXA* at para. 107, the defendant cannot establish that the claimant has no reasonable prospect of succeeding in proving that the defendant assumed responsibility to protect her from harm occasioned by third parties, specifically SR and PT, and indeed from herself, whilst she was in s.20 accommodation.

60. The real question is whether para. 85(a)(ii) of the Amended Particulars of Claim, as pleaded, sets out the claimant's case with sufficient particularity. The importance of the pleadings identifying a claimant's case was emphasised by both the Court of Appeal and Supreme Court in *HXA/YXA*. In my judgment the pleading in para. 85(a)(ii) is deficient in a number of aspects:

(1) It is unclear precisely what it is said the defendant assumed responsibility for. For example,

a) The opening three lines of para. 85 do not reference any assumption of responsibility specific to protecting the claimant from harm caused by either SR or PT.

b) It is unclear from the pleading whether it is alleged that the duty alleged extended to taking reasonable steps to prevent any contact with SR and/or PT in addition to taking reasonable steps to protect from harm caused by them.

(2) The facts which are relied on by the clamant as establishing the assumption of responsibility require greater particularity.

a) The 19 sub-paragraphs of conduct fail to reference PT at all.

b) Many of the 19 sub-paragraphs are generic to the exercise of s.20 statutory duties generally. For example, at sub-paragraph 9 the claimant relies on the defendant holding "statutory review meetings, CIC reviews and looked after child review meetings" but gives no particulars as to the specific facts of the conducting of those reviews that gave rise to a duty to protect the claimant from SR and/or PT, and, if so alleged, to a duty to prevent the claimant from having any contact with SR and/or PT.

(3) No details are provided as to when the duties of care are alleged to have arisen. Whilst SR was already the claimant's boyfriend when the s.20 accommodation commenced, the pleading does not make it clear when the defendant is said to have assumed responsibility to protect the claimant from harm from him and/or prevent contact with him. On the claimant's case she did not become acquainted with PT until after she moved into Minstead House in around February 2014. The pleading does not identify when any specific duties arose in relation to PT.

61. Whilst the statement of case at para. 85(a)(ii) is defective as to the pleading of a common law duty of care arising from assumed responsibility, for the reasons discussed in paragraph 59 above, the defects are likely to be capable of being cured by amendment. It is not therefore appropriate for the court to exercise its discretion to strike out this aspect of the claim, rather the claimant should be given the opportunity to amend to remedy the defect (as per *Soo Kim v Young*).

Para. 85(b) of the Amended Particulars of Claim

62. Para. 85(b) of the Amended Particulars of Claim seeks to found a duty of care on the defendant's alleged actions in doing something to prevent others, namely the police or relatives, from protecting the claimant. The decision in *Poole,* as emphasised in *FXJ* and by the Supreme Court in *HXA/YXA,* calls for a distinction between actions that cause harm (making things worse) where a common law duty might arise, and actions that fail to confer a benefit (not making things better) where no duty is ordinarily imposed.

63. The description of the exceptional principles to the general rule encapsulated by Tofaris and Steel, "Negligence Liability for Omission and the Police" (2016) 75 CLJ 128 was approved by Lambert J [at para. 169] in *DFX v Coventry City Council* and by the Supreme Court in *HXA/YXA* [at para. 88]. Those exceptions do not extend the circumstances in which a common law duty of care arises beyond that identified in *Poole*. As per *Poole,* actions that fail to confer a benefit do not ordinarily give rise to a duty of care absent very limited circumstances including creation of a source of the danger or where there has been a voluntary assumption of responsibility. Para. 85(b) does not allege that the defendant created the source of danger; indeed it is difficult it could see how it could be so pleaded given that the danger came from third parties. The alleged duty arising from an assumption of responsibility is pleaded separately in para. 85(a)(ii) and has no bearing on the alternative basis pleaded at para. 85(b).

64. To rely on the exception to the general rule against the imposition of a duty of care for failing to confer a benefit, the claimant would need to demonstrate that the defendant did something to prevent the police or relatives from protecting the claimant. The pleaded allegations of the defendant's actions in preventing others protecting the claimant bear scrutiny. Para. 85(b) is couched in terms of actions the defendant failed to take: "not referring" allegations, "not holding" meetings, "not asking" the police to carry out Criminal Records Bureau checks and "not providing" the police with the claimant's address. [Emphasis added.] The risks associated with the claimant's interactions with SR and PT already existed. Indeed, SR was the claimant's boyfriend at the time of the commencement of the s.20 accommodation. PT entered the claimant's life when

she struck up an association with him in circumstances where he appeared, at one stage, to live close by. The substance of the claimant's complaint is the defendant should have taken action to remove the risks arising from her interactions with SR and PT. None of the allegations in para. 85(b) are examples of the defendant doing a positive act to prevent the police or relatives from protecting the claimant; they are all alleged omissions to act and do not therefore fall properly within the exception to the general rule. Accordingly, there are no reasonable prospects of the claimant succeeding in establishing a duty of care based on the omissions pleaded in para. 85(b) of the Amended Particulars of Claim. Para. 85(b) falls to be struck out.

65. In conclusion, the alleged bases for the existence of a common law duty of care as pleaded in para. 85(a)(i) and 85(b) fall to be struck out. The claim based on para. 85(a)(ii), namely an assumption of responsibility from the particular circumstances of the claimant's s.20 accommodation, survives the application to strike out but on the basis that the claimant is to be given an opportunity to amend her pleading.

Issue (2)(a): Does the pleaded Article 3 claim fail to disclose reasonable grounds to show that the defendant had knowledge of a real and immediate risk?

66. For the purpose of the applications for strike out and/or summary judgment alone, the defendant does not seek to argue that the treatment the claimant alleges she suffered did not meet the threshold of severity required for an Article 3 claim.

67. The defendant does however submit that the pleading of the Article 3 claim in the Amended Particulars of Claim is insufficient to demonstrate that the defendant knew or ought to have known of a real and immediate risk. The defendant's argument therefore touches upon components (1) and (3) of the operational duty as explained by Lewis LJ in *AB*. The defendant submits that the pleaded case is deficient in a number of respects:

(1) It wrongly seeks to align "real and immediate risk" with reasonable foreseeability of risk in negligence.

(2) It fails to plead the dates that the treatment she suffered met the minimum threshold, the dates that she alleges the defendant knew or ought to have known that she was at a real and immediate risk and, in some cases, the identity of associates inflicting the treatment.

(3) The facts as pleaded are insufficient to support a finding that the defendant knew of such a real and immediate risk.

68. The claimant does not accept that there is any deficiency in the pleading of the Article 3 claim. The claimant submits that para. 6 to 84 of the Amended Particulars of Claim set out the chronology with para. 87 to 94 detailing the defendant's knowledge of the real and immediate risk. Moreover, the claimant submits that the issues concerning the defendant's knowledge of a real and immediate risk are simply not matters that can be determined on a summary

basis and require detailed findings of fact to be made at trial. The claimant submits that in order to make the required findings of fact, the trial judge will need to take into consideration the contents of over 7000 pages of social services records, the lay evidence of the claimant and the various social workers involved over the years and likely independent social work expert evidence as to investigations the defendant should have carried out that would have fixed them with knowledge.

69. Once again, it is necessary to scrutinise the pleadings. Para. 98(a)(ii) of the Amended Particulars of Claim deals with the question of knowledge of a real and immediate risk in the following terms:

> "The defendant failed to do all that could reasonably be expected of it to prevent treatment of the claimant violating Articles 3 and/or 8 of which it knew or ought to have had knowledge.
>
> 1. The defendant knew or ought to have known of a real or immediate risk of such treatment. Paragraphs 87 to 94 are repeated."

70. Paragraphs 87 to 94 of the Amended Particulars of Claim appear under the heading "Common Law" and sub-heading of "Reasonable foreseeability of risk/the defendant's knowledge." The paragraphs relate to the claim in negligence. Each of the paragraphs relates to different periods of time at different accommodation when it is alleged that the defendant "knew or ought to have been aware that the Claimant was already suffering/likely to suffer significant harm." In respect of each of the different accommodation locations, factual particulars are given as to what it is the defendant knew. For example, at para. 88(a) in respect of the period at Trinity Road between July and October 2013, it is alleged that the claimant made various disclosures about SR including of him inflicting serious physical violence.

71. The repetition of the pleaded claim in negligence is an unhelpful mechanism by which to plead the Article 3 claim. The concept of "real and immediate risk" for the purposes of an Article 3 claim does not equate with "reasonable foreseeability of risk" for the purposes of a claim in negligence. As *Van Colle* makes clear, establishing real and immediate risk requires a claimant to meet a high threshold. Even if that threshold is met, it may be met for certain periods of time only in relation to only certain risks. In my judgment, the criticisms of the pleading made by the defendant have merit. The pleading suggests that the claimant has drawn no distinction between differing components of the different causes of action. By way of example, para. 87 of the Amended Particulars of Claim opens with an assertion that "During the period between July 2013 and September 2016, the Defendant knew or ought to have known that the Claimant was suffering and/or was likely to suffer significant harm…" That paragraph is thus wholly silent as to the notion of a "real and immediate risk" as applicable to the Article 3 claim, as is the remainder of paras. 87-94.

72. It is essential that the defendant and court have clarity as to the basis upon which the claimant puts her case. In the course of oral submissions, the claimant's counsel submitted that the alleged date of knowledge in respect of the Article 3

claim was July-October 2013 in respect of the treatment by SR, and February 2014 in respect of PT. On the current pleading, that is simply not clear, nor is it clear precisely what happened at those times to put the defendant on the requisite notice or what the treatment was at those times that met the Article 3 threshold. Insofar as the claimant pursues an Article 3 claim in respect of treatment by the associates of SR and/or PT, (associates being referred to in para. 90-93 of the pleading), the detail of that aspect of the claim is entirely unclear. In short, it is simply impossible for the defendant and court to ascertain from para. 98(a)(ii), referring back to para. 87 – 94, the claimant's case as to the time period(s) over which harm of Article 3 severity subsisted, the dates the defendant had the requisite knowledge and the circumstances giving rise to such knowledge.

73. The defendant submits that the pleading is so deficient that the Article 3 claim should be met with an order for strike out and/or summary judgment. In my judgment, that is not the appropriate sanction. The claimant's factual case is that she made disclosures to the defendant of very serious abuse including of rapes by SR and PT and other men at their instigation, of being held against her will and of serious physical assaults. The seriousness of the alleged ill-treatment and alleged disclosures raise triable issues in respect of the defendant's knowledge of a real and immediate risk for the purposes of an Article 3 claim. It is therefore appropriate to afford the claimant the opportunity to remedy the defective pleading as to her case on the defendant's knowledge of a real and immediate risk.

Issue (2)(b): Does the pleaded Article 3 claim fail to identify a measure that, judged reasonably, might have been expected to avoid the risk?

74. The defendant further seeks strike out and/or summary judgment in respect of the Article 3 claim on the basis that the pleaded claim fails to identify a measure that, judged reasonably, might have been expected to avoid the risk. In other words, an inability to satisfy component (4) as described by Lewis LJ in *AB*, namely that "the public authority failed to take measures within their powers which, judged reasonably, might have been expected to avoid the risk."

75. Para. 98(a)(ii)(2) of the Amended Particulars of Claim pleads the measures the defendant should have taken to avoid the risk in the following manner:

> "In light of that actual or constructive knowledge, the Defendant ought to have:
>
> a. Assessed properly the risk of harm posed to the Claimant while being accommodated. Paragraph 95(a) above is repeated.
>
> b. Provided suitable and reasonably safe accommodation for the Claimant. Paragraph 95(b) above is repeated.
>
> c. Arranged for the Claimant to undergo therapy in relation to her experiences of abuse. Paragraph 95(c) above is repeated.
>
> d. Issued care proceedings. Paragraph 95(e) above is repeated."

76. The reader of the pleading is again referred back to earlier paragraphs that relate to the claim in negligence. Para. 95 as referred to in para. 98(a)(ii)(2) is a paragraph that pleads particulars of negligence and alone runs to approximately 9 pages of text. Paras. 95(a), (b), (c) and (e) each have a heading which mirrors the wording in para. 98(a)(ii)(2) and each contains a multitude of sub-paragraphs of allegations. The allegations include matters such as alleged failures to apply for a secure accommodation order, to place the claimant outside the Birmingham area, to ban all contact between the claimant and SR, to prevent contact between the claimant and PT, to help her apply for a non-molestation order and to provide adequate training or support to help the claimant stay away from SR, PT and his associates.

77. The defendant submits that none of the pleaded measures could have avoided the risk of harm given that the claimant repeatedly and continually sought out SR and PT despite being urged not to. The defendant argues that the only measure that would have avoided the risk would have been the obtaining of a secure accommodation order. It is submitted that there was no reasonable prospect of such a draconian order being granted in light of guidance in cases such as *London Borough of Barking & Dagenham v SS* [2014] EWHC 4436 [at para. 15-16]. The defendant criticises the pleading for failing to particularise what therapy would have made a difference beyond that already provided by the defendant via in-patient and out-patient mental health services. The defendant also submits that the claimant has failed to plead that a care order would have affected the behaviour of those involved and, in any event, does not accept that it would have done.

78. The claimant's skeleton argument details [at para. 42 thereof] seven measures that the claimant alleges the defendant should have taken. Of the four measures identified at para. 98(a)(ii)(2) of the Amended Particulars of Claim, the claimant's counsel provides further details as to the type of suitable and reasonably safe accommodation, that being secure accommodation, or accommodation far away from the geographical orbit of her abusers, or at least not on the same road as SR's home. In addition, the skeleton argument includes a further three measures the defendant should have taken namely, a banning of all contact between the claimant and SR, helping the claimant to apply for a non-molestation order against SR and PT and providing the claimant with training and support in relation to domestic/sexual abuse. The claimant submits [para. 43 of the skeleton argument] that such steps "would have likely avoided any sexual abuse by SR and being abused by PT and his associates altogether." It is submitted that the claimant's case in this respect will be supported by independent expert evidence.

79. There is no reason why, as a matter of principle, the question of whether measures, judged reasonably, would have avoided a risk cannot be dealt with on a summary basis. Indeed, in *AB* the Court of Appeal upheld the first instance judge's decision to grant summary judgment on the issue. Lewis LJ [para. 82] did however recognise that the case was relatively unusual in that the court had before it a detailed chronology based on social services records, extracts from contemporaneous social services records, an appellant who could would not be able to give evidence, social workers who would only be able to refer to their

contemporaneous records and no claim in negligence such that there would not be any expert evidence.

80. The evidential position in the index case is rather different. The court is told that there has been disclosure of over 7000 pages of records, none of which are before the court. The claimant was aged 15 -18 at the material times and likely to be able to assist with the evidential picture. Moreover, no decision has yet been made as to whether permission will be granted for expert independent social worker evidence. On the limited evidence before the court at this stage, in my judgment it does not necessarily follow that only the making of a secure accommodation order would have addressed the risk. The claimant was only placed in s.20 accommodation within the Birmingham area or, on two occasions, the wider Midlands (in Coventry and Malvern). Depending on the evidential picture at trial, it may well be that accommodation further away from the Midlands would have been reasonable and, on the balance of probabilities, have avoided the risk of contact with SR and PT. Likewise, it is difficult to pre-judge what the outcome of therapies and/or care proceedings would have been on the information put before the court in respect of these applications. The defendant does not, for the purpose of these interim applications, seek to argue that care proceedings were not appropriate and/or would not have been successful. Accordingly, it cannot be said that the substance of the claimant's case on this issue is bound to fail such that it should be struck out, nor can it be said there is no realistic prospect of success such that summary judgment is appropriate.

81. As with other aspects of the Amended Particulars of Claim, I am however troubled by the manner in which this issue is pleaded at para. 98(a)(ii)(2). At risk of repetition, the defendant needs clarity as to the case it has to meet. The reference back to the para. 95, which addresses particulars of negligence rather than an Article 3 claim, is unhelpful. The use of multiple sub-headings and particulars makes it even more difficult to discern the alleged reasonable steps. If, as is submitted in the claimant's skeleton argument at para. 42, the claimant relies on 7 alleged reasonable measures that the defendant should have taken, those should be clearly identified in the pleading. It is not acceptable for that only to be gleaned from a skeleton argument. The claimant also needs to provide details as to what difference the required actions would have made. As with other aspects of the defective pleading, it is however appropriate to allow the claimant the opportunity to amend to address the default rather than to summarily determine the claim.

Issue (2)(c): Does the Article 3 claim advance a claim for breach of investigative duty in circumstances where no such duty exists?

82. The defendant relies on the first instance decision in *AB* [at para. 97] to submit that, regardless of any pleading points, the Article 3 investigative duty claim is bound to fail.

83. The claimant seeks to distinguish the case from *AB*, arguing that in *AB* the allegation of a breach of an investigative duty only emerged in a fifth version of the particulars of claim, for which permission had not been given, and in circumstances where that claimant had failed to particularise the breach.

84. The Article 3 investigative duty claim is pleaded at para. 98(a)(iii) of the Amended Particulars of Claim in the following terms:

> "The Defendant failed to investigate effectively credible allegations that the Claimant's Article 3 rights were being or were at risk of being violated.
>
> 1. The Defendant knew or ought to have known of a real and immediate risk to the Claimant of treatment violating Article 3. Paragraphs 87 – 94 above are repeated.
>
> 2. The allegations that the Defendant failed to investigate are set out above at paragraph 95(a). At what points the Claimant asserts an investigation ought to have been commenced is likewise set out above at paragraph 95(a).
>
> 3. All of the investigative failures set out in paragraph 95(a) were egregious and/or significant."

85. In keeping with the general style of the pleading, the reader has to again revert to earlier paragraphs to try to glean further details of the way in which the cause of action is put. The details of knowledge referred to at para. 87-94 of the pleading are those referable to the defendant's alleged knowledge of reasonably foreseeable significant harm for the purposes of the claim in negligence. The allegations that the defendant is alleged to have failed to investigate are said to be set out in para. 95(a). Para. 95(a) contains 11 sub-particulars of negligence said to fall under the umbrella of a failure to assess the risks of harm. They are not in themselves the factual allegations that called for investigation; rather they are allegations of failures to act to assess risks of harm. The pleading does not therefore identify the allegations which the defendant failed to investigate or indeed when the investigation into each allegation should have commenced. The pleading is thus deficient and does not clearly plead the case. On that basis alone, this aspect of the claim risks strike out on the basis that it does not disclose a real prospect of success.

86. It is however necessary to consider whether it is appropriate, as with some of the other aspects of the claim, to allow the claimant the opportunity of amending the pleading. The defendant's application of 30 January 2023 was accompanied by written submissions. Para. 20 of those submissions puts the claimant on notice that the defendant would argue that the claimant had failed to specify the factual basis upon which she would invite the court to depart from the reasoning as to a lack of investigative duty as found in *AB.* The claimant still proffers no satisfactory explanation as to why para. 97 and 98 of the High Court decision in *AB* should not be applied. Those findings were not interfered with on appeal. The factual matrix at the heart of the claimant's case is founded on the same relationship as that in *AB.* The defendant in both cases being a local authority charged with various statutory duties under the Children Act 1989 to investigate a child's circumstances to prevent risk or further risk of significant harm. The local authority defendants in each case were not charged with investigating with a view to criminal proceedings being brought. Whilst the seriousness of the allegations made by the claimant against SR and PT undoubtably give rise to potential criminal offences, that investigative duty lay with the police. There is

accordingly no basis for distinguishing the claimant's factual case in respect of an Article 3 investigative duty from that in *AB.* For the reasons identified at para. 97-98 of the High Court decision in *AB,* it cannot be said that this branch of the Article 3 claim (as opposed to the operational duty claim) has a real prospect of success and thus it falls to be struck out entirely rather than the claimant being given an opportunity to amend the pleading.

Issue (3): Does the Article 8 claim fall to be struck out as being co-extensive with the Article 3 claim?

87. Neither party focussed detailed attention, either in their skeleton arguments or oral submissions, on this aspect of the applications for strike out and/or summary judgment. The defendant relies on the same submissions as to the inadequacy of the pleading as it does in relation to the pleading of the Article 3 claim. In addition to the 'pleading point', the defendant further submits that as a matter of substance, the Article 8 claim adds nothing to the Article 3 claim and is therefore redundant and falls to be struck out. For the purposes of this application, the defendant did not contend that an Article 8 cannot arise as a matter of law on the facts of the claimant's case.

88. The claimant does not accept that the Article 8 claim is redundant. She postulates circumstances where an Article 3 claim may fail for want of sufficient knowledge but an Article 8 claim succeed. Moreover, the claimant submits that the fact that a cause of action is co-extensive does not mean that it should be struck out.

89. The Article 8 claim is pleaded at para. 98(a) and (b) of the Amended Particulars of Claim. Para. 98(a) encompasses both the Article 3 and 8 claims and is founded on the same allegation, namely a failure to act compatibly with its positive duties under Articles 3 and/or 8 such that the claimant suffered physical, sexual and emotional abuse. In the context of the Article 8 claim, it is said this amounted to an interference with her right to dignity, autonomy and physical integrity. Para. 98(b) relates solely to the Article 8 claim and is founded on the keeping of the claimant in s.20 accommodation for a long period without instituting care proceedings.

90. Having considered the issue of co-extensivity and, if so, the effect thereof, I am not persuaded it is appropriate to strike out the substance of the Article 8 claim for the following reasons:

(1) It is apparent from para. 98(b) of the Amended Particulars of Claim that the claimant puts part of her Article 8 claim (in respect of her being kept in s.20 accommodation for a long time) on a different factual basis to the Article 3 claim, which rests on para. 98(a). It does not therefore necessarily follow that the issues will be the same.

(2) In *CLG* the Court of Appeal noted the observations of Green J in *DSD* to the effect that he could not see any circumstances in which Article 8 would provide greater protection than Article 3, but did not find it necessary to reach a final decision on the question. Neither party has made detailed submissions on the issue and it would be unjust not to

allow the topic to be explored with the benefit of fuller submissions at trial.

(3) Even if the Article 8 claim is co-extensive with the Article 3 claim, the defendant has not put before the court any authority to the effect that a claimant should be required to elect one cause of action rather than pursuing co-extensive causes of action.

91. Many of the criticisms levelled earlier in this judgment at the style of drafting of the Amended Particulars of Claim do however also apply to the pleading of the Article 8 claim. Reference back to previous paragraphs in the pleading relating to the common law cause of action continues to be required. As discussed in para. 94 below, the claimant needs to be given an opportunity to remedy this by way of amended pleading.

Issue (4): Does the pleaded Article 6 claim, relying as it does on a failure to bring care proceedings, fail to disclose reasonable grounds for bringing the claim?

92. The defendant contends that the Article 6 claim, based on the keeping of the claimant in s.20 accommodation for a long period without bringing care proceedings, is wrong as a matter of law and thus bound to fail. The defendant relies on the High Court decision of *AB* at para. 54] in that regard.

93. The claimant submits that her Article 6 rights were engaged by her extended period of s.20 accommodation. She does not accept that *AB* is authority for the proposition that Article 6 can never apply to circumstances where a child is accommodated pursuant to s.20 for long periods. Moreover, she submits that her case is factually different from *AB.* The claimant points to conflicting High Court authority [*Northamptonshire County Council v AS*] where a failure to initiate care proceedings did sound in an Article 8 claim.

94. It is worth a reminder that this is an application for strike out and not the trial of the action. At this stage the court is concerned with whether the Article 6 claim is "bound to fail." [Per *Hughes v Colin Richards & Co.*] For the following reasons, I am not satisfied that the Article 6 claim based on a lengthy period of s.20 accommodation is bound to fail:

(1) There are conflicting High Court decisions as to whether a failure to bring care proceedings can sound in an Article 6 claim. [See *AB* and *Northamptonshire County Council v AS.*] Although the point was conceded in *Northamptonshire County Council v AS,* Keehan J did not seek to suggest that the admission was inappropriate. Furthermore, in *Worcestershire County Council v AA* [2019] EWHC 1855, Keehan J, in the context of the use of long term s.20 accommodation, referred [at para. 71] to a failure to institute care proceedings as depriving the child of "the protection of a judge led process and the protection afforded to him by giving him a voice via a children's guardian." The deprivation of access to a judicial process may well engage Article 6 rights. The issue thus requires full argument at trial rather than the court simply being

presented with the competing two authorities at an interim application stage without any analysis of the underlying principles.

(2) The facts of *AB* were very different to the claimant's case. The claimant in *AB* was not in s.20 accommodation and, in his case, it was clear that care proceedings would not have been successful. It is therefore unsurprising that the Judge concluded that an Article 6 claim should be struck out. The instant claimant's case is that the defendant should have issued care proceedings after September 2013 and at any time up to June 2014 [see para. 98(c) read with para. 95(e)(iii) of the Amended Particulars of Claim] which would have brought about judicial scrutiny of the arrangements and resulted in a care order. At this interim stage, the defendant does not seek to argue that care proceedings were inappropriate or would not have succeeded. The court thus has to assume the claimant is someone in respect of whom care proceedings should have been commenced and whose living arrangements would therefore have come under judicial scrutiny and who is thus someone who has been deprived of the opportunity to have her welfare considered by the court. The application of Article 6 or otherwise to the claimant's specific circumstances requires full argument which was simply not ventilated at this interim stage.

Issue (5): Is the Amended Statement of Case as a whole inadequate?

95. It follows from the aforementioned findings that some aspects of the claim stand to be struck out, namely para. 85(a)(i) [the common law claim based on s.20 necessarily equating to an assumption of responsibility]; para. 85(b) [the common law claim founding a duty on the "not making things better" allegations] and para. 98(a)(iii) [the Article 3 investigative duty claim]. Aspects of the surviving claims require very substantial amendment to correct defects in the pleadings. The scale of the required amendments means that this will be best achieved by the complete redrafting of the claim rather than piecemeal amendments to the current pleading.

96. Furthermore, the criticisms made by the defendant to the effect that the Amended Particulars of Claim, running to 58 pages, are unnecessarily prolix and insufficiently precise are well-founded. The constant requirement for the reader to flick backwards and forwards through the pleading to try to understand how the claimant puts her case, coupled with the cross-referencing to other causes of action that require proof of entirely different ingredients, makes the document as a whole very unsatisfactory. Most importantly, it does not provide the defendant or court with the clarity that is required to understand how the claimant puts her case. The court will hear submissions at the handing down of this judgment as to the appropriate form of order giving the claimant the opportunity to further amend her statement of case. The court's provisional view is that any re-amended pleading should be limited to no more than 30 pages and must address each surviving cause of action separately and the constituent ingredients of each. The further amended pleading must avoid the use of multiple sub and sub-sub paragraphs.

Conclusion

97. The defendant's applications for strike out and/or summary judgment are allowed in part, limited to the striking out of the following three issues:

    (1) The common law claim in negligence alleging a duty of care arose by virtue of the mere fact of s.20 accommodation "necessarily equating" to an assumption of responsibility. [Para. 85(a)(i) of the Amended Particulars of Claim."]

    (2) The common law claim in negligence alleging a duty of care to prevent others from protecting the claimant. [Para. 85(b) of the Amended Particulars of Claim."]

    (3) The Article 3 investigative duty claim. [Para. 98(a)(iii) of the Amended Particulars of Claim."]

98. The remaining causes of action are not struck out nor summary judgment entered but the current pleading is deficient. The claimant is to be given the opportunity to correct the deficient Amended Particulars of Claim by way of a replacement pleading.

HHJ Emma Kelly