Case No: HQ13X03397

Neutral Citation Number: [2015] EWHC 2629 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 September 2015

Before :
SIR ROBERT FRANCIS QCsitting as a Deputy High Court Judge

- -

Between :

(1) MR JOHN WILLIAMS
(2) MRS ADENIKE WILLIAMS

Claimants

- and -

LONDON BOROUGH OF HACKNEY

Defendants

- -

Christine Cooper (instructed by Dotcom Solicitors) for the **Claimant**
Ali Reza Sinai (instructed by Dawn Carter-McDonald, Legal and Democratic Services, London Borough of Hackney) for the **Defendants**

Hearing dates: 7, 8, 9, 10, 13 July 2015

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Judgment

The identity of the children referred to

1. At the beginning of the trial an application was made for an order that the names of the children not be reported and that all reference to them in reports of these proceedings should be anonymised. CPR 39.2 provides a general rule that hearings should be in public but that the court may order that the identity of any party or witness must not be disclosed if it is in the interests of that party or witness. There is a strong presumption that justice should be done publicly and that there should be freedom to report court proceedings. The reasons for this are well known and need not be rehearsed here. However the court is obliged to have regard to the legitimate rights of children and in particular the right to respect of their family life under Article 8 of the ECHR. In this case it was submitted by Ms Cooper for the claimants, with no opposition from Mr Sinai for the defendants, that the issues in the case involved reference to sensitive matters from their early childhood life and that public association of their identities with these matters would not only be embarrassing but could risk causing damage to them. I agree, and would add that they are not parties to these proceedings, and that the legitimate public interest in the case does not extend to knowledge of the children's identities. The disclosure of their identities would be counter to the protective purpose of the legislation under which the defendant purported to take the various actions which I have to consider in this case. Accordingly, I made an order that the names of the children referred to in these proceedings shall be kept private and not disclosed. Subject to any submissions the parties may wish to make I am now minded for the same reasons to continue the order indefinitely and further to order that no part of any witness statement or other document which might otherwise be open for inspection which discloses the names of the children will be open for that inspection [CPR 32.13].

   In this judgment where it is necessary to refer to the children, I have done so without disclosing their names.

Introduction

2. If ever there was a case illustrating the challenges that face children, parents, public authorities, and the courts when concerns are raised about the safety and welfare of children it is this. A relatively trivial incident on 5 July 2007, followed by an allegation made by a young child in potential trouble, led to the exposure of issues about the upbringing of a large family in respect of whom there had been no previous concerns. Eight children, including a young baby, were removed from their parents' care and distributed to foster homes. A swift consideration of the welfare issues concluded that if some simple improvements were made to their home, the children could return home. Yet it was some 2 months before the children returned to their parents, after experiencing a variety of foster placements, some of which were of dubious quality. A criminal investigation led to a 20-count indictment against the parents, but in the end, 2 years later, no evidence was offered and the parents were acquitted. The parents' complaints about the handling of their case by the defendants were considered in a complaints process over a period of nearly six years culminating in a final decision of the Local Government Ombudsman, issued on 22 April 2013. In spite of their complaints being upheld in part, and the exoneration of their character in the Crown Court, the

claimants believe their grievances have not been properly addressed and therefore bring these proceedings, ending in this trial, eight years after this unfortunate incident started. Fortunately it is not my task to adjudicate on more than a small fraction of what has occurred, but the overall picture is not a happy one.

3. The claimants bring this claim against the London Borough of Hackney ["Hackney"] in their own right, and not on behalf of any of their children. They accept that the authorities acted lawfully in the initial action of taking their children into foster care under the authority of what has been described as police protection order. However, they claim damages for what they say were the unlawful actions of the defendant authority and its officers in keeping the children of the claimants in authority controlled foster care after the expiry of the effect of the police order. The causes of action alleged are misfeasance in public office, breach of statutory duty, negligence, religious discrimination and breach of the parents' Article 8 human rights. The defendant denies liability in any of these causes of action.

Summary of what happened

4. The claimants, John and Adenike Williams, have been married for 24 years. They have 8 children whose ages at the time of the matters about which they complain ranged from 8 months to 14 years. All the children lived at home, and no concerns were raised about the manner in which their parents were caring for them until one of them was arrested on suspicion of shoplifting on 5th July 2007. This child was said to have told the police that he had been beaten by his father with a belt, as an explanation for a bruise on his face. The police visited the family home and were of the opinion that it was not in a fit state to be accommodation for the children. They alerted the defendant to their concerns. The police also initiated a Police Protection Order under section 46 of the Children Act 1989, and the defendants made emergency arrangements to accommodate them in foster homes. The police order authorised these arrangements for 72 hours. On 6th July, in circumstances I will have to examine in some detail, the parents signed a form of agreement which the defendants assert authorised them to continue to accommodate the children away from their parents, an assertion the claimants dispute. The children did not in fact return to live with their parents until 11th September 2007. It is right to record at the outset of this judgment, that, although the claimants were eventually charged with various offences relating to their treatment of the children, following strong observations made by a Crown Court judge, no evidence was offered, and a not guilty verdict was entered on all the charges.

The application to strike out the claims in negligence and discrimination

5. By a notice dated 16 June 2014 Hackney applied for an order striking out the claims in negligence and discrimination. On the same date Master Yoxall ordered that the application be considered on the first day of the trial. In relation to the negligence claim the ground for the application was that as a matter of law no duty of care is owed by a local authority to parents when exercising its statutory function to protect children. In relation to the

discrimination claim the ground was that the claim was insufficiently particularised.

6. CPR 3.4(2) provides in so far as relevant:
The court may strike out a statement if case if it appears to the court
(a) that the statement of case discloses no reasonable grounds for bringing … the claim.

Practice Direction PD 3A.1.4 offers examples of cases where the court might conclude that particulars of claim fall within the rule:

(1) those which set out no facts indicating what the claims are about…
(2) those which are incoherent and make no sense
(3) those which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant.

Paragraph 1.7 states
A party may believe that he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document), In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate

Paragraph 5 draws attention to Part 23 and PD23A requiring all applications to be made as soon as possible and before allocation if possible. It also suggests that applicants consider whether facts need to be proved and if so whether evidence in support should be filed and served.

7. Reference to the note in Civil Procedure para 3.4.2 shows that it has been held to be permissible to strike out on the ground in CPR3.4(2) where the case is "unwinnable", where continuance would bring no possible benefit to the relevant party: *Harris v Bolt Burdon* [2000] LTL February 2 2002, or as a matter of law *Price Meats Ltd v Barclays Bank Plc* [2002] 2 All ER (Comm) 346 ChD. However it is not appropriate to strike a case out in an area of developing jurisprudence in the law: *Farah v British Airways* The Times January 26 2000; *Barrett v Enfield BC* [1980] 3 WLR 83 HL. An application to strike out should not be granted unless the court is certain that the claim is bound to fail: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266.

8. At the outset of the hearing I decided to defer argument and a decision on this application to the end of the evidence. I did so for two reasons. Firstly, the statement of case is somewhat discursive, and I thought it might be better understood in the light of the documentary material and oral evidence which would be produced in the case in any event. Secondly even if I decided to grant the application, the case would have continued on the outstanding causes of action, and, as counsel agreed, the evidence relevant to the negligence and discrimination claims would be largely relevant to the other issues in any event. Therefore little time if any would be potentially saved by hearing the application at the outset of the trial. Having heard the evidence and argument

I have concluded that it would have been wrong to have struck out the negligence claim as a matter of law without hearing evidence as to the actions of Hackney, and its officers. Hearing the evidence has assisted the consideration of the precise nature of the activity which is said to give rise to the duty, and a comparison with the activity which has been authoritatively determined by appellate courts not to give rise to a duty to parents. With regard to the discrimination claim, it is correct that insufficient particularisation appears in any statement of case offered by the claimants, whether drafted by them in person or by their legal representative. Having heard the evidence and the way in which this part of the case has been put, if only lightly, by their counsel, I have to say that the basis for the claim is still lacking in clarity, but in my judgment no injustice is caused by considering the claim on its merits. Both parties have had a full and fair opportunity to put their cases before the court.

The evidence

9. Three volumes of documentary material were presented to the court. I was not referred to every page, for which I am grateful, and I believe that the parties referred me to every document they consider material to their case. There was a suggestion that some documentation was missing, but I am satisfied that the material which is available, supplemented by the explanations offered by the witnesses, enables me to form a fair picture of what happened.

10. I heard oral evidence from both claimants, and two of their sons, now adult. Kulbant McLaughlin, who was manager of the defendants' Access and Assessment Team at the material time, was summoned by the claimant to give evidence. She had not provided a witness statement in advance of the hearing and she was personally accused of misconduct in the claimants' statement of case. Accordingly her evidence was not easy to elicit. This is not intended to be a criticism of Mrs McLaughlin, but counsel for the claimants had the forensically challenging task of questioning her without cross-examining her. For the defendants evidence was given by Ciara Toal a social worker and Rory McCallum, who was also qualified as social worker and at the material time was head of the defendant's access and assessment service. All witnesses laboured under the inevitable difficulties in recalling details, given the passage of time and in some instances the possible absence of relevant documentation. I was satisfied that all witnesses were doing their honest best to offer me an accurate recollection of events and, where relevant, of the reasons for their actions. As will be seen, Mr and Mrs Williams had to endure a most distressing and stressful experience while their children were kept away from them and their home, and while they waited the outcome of the various investigations by the police and social services, not to mention the uncertainties which hung over them with regard to their prosecution for serious offences. As with the other witnesses I was satisfied they were doing their honest best to tell me the truth as they saw it, but I do consider that their recollection of these events has on occasion been clouded by their very understandable emotions. As a result there are some aspects of their evidence that I am compelled to treat with a degree of caution.

11. While, as I have said, witnesses sometimes struggled to remember details, I very much doubt that much more would have been reliably remembered, had the questioning taken place 12 months or so after the events in question. The documentation was in my judgment sufficient to fill substantially any gaps of memory. Accordingly I was satisfied that there was no prejudice to either party arise out of the length of time this matter has taken to arrive at a hearing.

The events which form the context of the claim

12. I now turn to describe what happened. Much of the history of events is not in dispute, but where it is I shall indicate my findings. It is important to the determination of the claims made against the defendant to view events in their chronological order. Where there are disputes I have had regard to all the evidence before me, both the written material and the oral evidence.

Allegations of violence against the children

13. On 5 July 2007 one of the Williams children was interviewed by the police. The child was reported said to have alleged that Mr Williams *"regularly beats him and his siblings and had reported that [the child] had been beaten the previous evening as he had gone to the shop without his permission to buy some lollipops."* It was also reported that the child had attributed a mark below the eye to the father using a belt.

14. The legality and justification, if any, for what was done following that report does not depend on whether the allegations made by the child were true but on the appropriateness of the reaction of the authorities to the potential risks to the children implicit in them. However the truth of the allegations of violence was put in issue.

15. In examining the evidence before me it is important for me to bear in mind and record in this public judgment the conclusions which HH Judge Paul Kennedy reached in the Crown Court having examined the evidence before him in the criminal proceedings brought against the parents for assault, cruelty and child neglect. Having read the file, he urged the Crown to offer no evidence. In his remarks, made on 16 September 2008 he said this:

These are persons of good character, who faced the quite enormous task of bringing up 8 young children in an overcrowded home. That they loved their children, that they wanted the best for them, that there were determined that the future held more for them than for what Mrs Williams described as "street kids" has never been in doubt and shines out from Mrs Williams's interview. Whilst there is little doubt that conditions at home were chaotic, the Williams have accepted the help they were offered and, within a remarkably short time, have turned around a difficult and dangerous situation to one where all departments of Social Services are content and positive about the future.

Following these observations no evidence was offered and the judge entered a verdict of Not Guilty on all counts.

16. There was much evidence in these proceedings to confirm the view arrived at by the learned judge, and I am absolutely satisfied that Mr and Mrs Williams

were loving parents who wanted only the best for their children. They had brought them up in what must have been challenging circumstances without reproach or concern until July 2007. Their anxiety and distress exhibited when they were separated from them, their reactions to the ordeals their children endured over the next few months, were as clear in their demeanour in the witness box in this hearing as they were from the contemporaneous documentation and the evidence of the two children who gave evidence. I have absolutely no doubt that the claimants were and remain loving and committed parents determined to do their best for all their children. Their sense of sadness at not being able to be reconciled with the child who made the allegations triggering the authorities' concerns was palpable.

17. Mr Williams denies that he beat his child as alleged in the police report. He told me that there was a troubled relationship with this child which, sadly, has never subsequently been repaired. He agreed that he did smack the children, but in the case of three of them on only a few occasions. In relation to the child who had made the allegation, Mr Williams said he had never smacked, or used a belt to smack, the child in the face. To my mind somewhat strangely, Mr Williams told me that he did not "recollect" punching this child in the face, an allegation made by this child to doctors in relation to a later incident in November 2009. In relation to a row that occurred in 2010 he said that he could not remember if the child had any resulting injuries, although he could not see any. He used similar expressions claiming a lack of memory on several occasions about incidents which appeared from his descriptions and the records of them to be dramatic. Of course to say something cannot be recollected can merely be a form of denial, but I sensed here that there was a degree of equivocation in Mr Williams's answers. There was, however evidence before me that he did hit his children in the course of disciplining them. One of the adult children who gave evidence before me agreed that this was so. I was told by this witness that Mr Williams used a belt *"sometimes but not always"* if the children "*really misbehaved*, [were] *really really bad"*. The witness added, *"sometimes he went a bit too far"*. When I asked this witness what was meant by "*misbehaving*" in this context I was told this meant "*arguing with mum, messing about outside or doing things repeatedly – that is when the belt came out*". Very much in favour of Mr and Mrs Williams is that whatever the nature of the discipline handed out certainly the two children who gave evidence clearly remained very close to their parents. There is no evidence that with the one exception described, any of the other children have a less close relationship.

18. I am satisfied on the evidence before me that Mr Williams did administer what he believed to be justifiable discipline to his children, which included on occasion the use of a belt. It is distinctly possible that a belt was used on or shortly before 5 July, although the circumstances and the extent to which it was used cannot now be reliably established. The only relevance of these matters is that in the course of the involvement of the defendant's officers with this family they would have seen an attitude towards discipline similar to that which I have seen in this court. It is this sort of factor which persuades me that the defendant was justified in considering that the allegations were

evidence of a risk to the safety of the children which they could not ignore in determining whether to exercise their statutory powers. This is not in any way to contradict the very positive conclusions that both HH Judge Kennedy and I have reached about the general character of both claimants.

Entry and examination of the claimant's home on 5 July 2007

19. In the light of the information they had received from the child, the police visited the family home and instituted a Police Protection Order and arrested Mr and Mrs Williams. They contacted the defendant's Access and Assessment Service to inform them of what had happened and of the need to for social services to take care of the children. Mrs McLaughlin led a team of social workers to respond to this request. The scene they found clearly concerned them. Ciara Toal, the social worker, [who was not one of those who visited the home on this occasion] made a note on 5 July of what must have been reported to her, that the

    "family home was found to be were extremely dirty and untidy and unfit for the children to be living in. The children looked unkempt in that their clothes were dirty and their hairs [sic] were quite matted. Dirty mattresses were also found which some of the children had been sleeping on. The children also informed my manager and colleagues … that some were even sleeping three to a mattress."

    She also noted that when she saw the children at the office two of them were sufficiently hungry to finish off not only their own plates of food but also what their siblings left. In an email written the following day Mrs McLaughlin described the home as being "*extremely dirty and unhygienic*." In a later summary of a Children's Resource Panel meeting on 16 July it was recorded that the home was "*dirty, cluttered, mattresses had been ripped out, and there was no food and clean clothes. Twigs and canes wrapped together with string were found in each room (allegedly used for beatings*)"

20. In a statement for the police made on 27 July Mrs McLaughlin stated that she was "*immediately struck by the chaotic, disorganised, dirty, unhygienic and filthy environment of the home*." It was her judgment that placements were required for the children "*as I could not leave them in the dangerous and inappropriate environment in which they were living*." The cleanest room, where the TV was placed, had clothes strewn across it; it was dirty and had loose wires across it. The bathroom was extremely dirty; all areas in it were "*ingrained with dirt and grease. It appears not to be used*." The toilet was in a similar condition. The mattress in one of the bedrooms was "*dirty and rotten with dirty sheets on it*". Clothes were strewn across the room or were in piles against the walls. She stated that she could not find a clean pair or knickers for one of the younger children. The only clean clothes were adult male clothes in the wardrobe, still in their dry cleaning bags. In the kitchen the floor was filthy, and there was "*no apparent food in the freezer – only plastic bags.*" The cooker was dirty with burnt rice in the grime. She saw no food for the children. In the hallway, which was also dirty, there were loose wires across the floors and sockets hanging from the walls. The children were unkempt with matted hair, and dirty faces and clothes. They were extremely

reluctant to engage with the social workers and the two eldest were "*hostile*". One child had an apparent skin condition some parts of which were "*weeping*". Mrs McLaughlin could find no medication in the home. In her oral evidence she told me that this was one of the worst homes she had ever been in, before or since. A statement made by another social worker on the visiting team, Mark Burgess, was to a similar effect.

21. In her evidence to this court Mrs McLaughlin confirmed that she could clearly remember the dry cleaned suits. There was material covering the windows which made it dark. There were clothes piled up on the floor and wires across the room. Thee were bundles of sticks in each room,. The home smelt of urine. A police officer put a key into the grime on the bath "*and it swallowed up the key*". The 'fridge and cooker were very dirty. There was no food apart from a snapper fish in the freezer.

22. At a Child Protection Conference on 31 July, the police officers who attended at the home to arrest Mr Williams are recorded as having reported that the conditions they saw were "*not suitable for children*." They referred to the smell of urine. They said that the lack of hygiene and hazards rather than the uncleanliness were their main concerns.

23. While Mr and Mrs Williams accepted that the home was in a poor state they did not accept that it was as bad as made out by the evidence I have just described. Mr Williams said that normally they made sure their children had a healthy diet and that the home was clean and tidy. Mr Williams said that his wife had been unwell for a short time and because of that the state of the home "*not in the best state*". He denied it was as dirty as described by the defendant's witnesses, still less that it was uninhabitable, that there were wires across the floor, that there were no clean knickers or that the was no food available. These were, he asserted, all lies.

24. I consider that Mrs McLaughlin's recollection of the state of the property has been affected by the passage of time, and in some limited respects is unintentionally exaggerated. For example, I doubt that it would be literally possible for a key to be "*swallowed*" in grime as she suggested. Furthermore Ms Toal's recollection of what was reported with regard to the availability of clean underwear was that it had been difficult to find any rather than that there was none. Nonetheless the material to which I have just referred persuades me that, bluntly, the premises were in an appalling state. It is inevitable that social workers must as part of their duties see many homes which are less than perfect in their cleanliness and safety, but it is evident to me that the concerns expressed in the contemporaneous records were not exaggerated for forensic purposes but were genuine and substantially true. It is understandable that caring parents like Mr and Mrs Williams find it hard to accept the full extent of the deficiencies that have been described, but I cannot accept that the state as described represented a transient phenomenon caused by a short term illness. If there were any doubt it is laid to rest by the photographs produced to me by the claimants. These were put to witnesses, but their provenance was not a matter of formal evidence and is therefore uncertain. It appears, however, that they may have been taken by the police. It is possible they were

taken after some, perhaps preliminary, attempt, had been made to start remedying the deficiencies. Nonetheless they show very concerning conditions. If there is more food in the freezer than the snapper just mentioned, it is contained in unwholesome looking bags. The fridge itself is filthy, as is the cooker and various other surfaces. There are indeed hazardous wires on the floor, even if they are not across the entire floor. There are piles of items in various places, and a tied bundle of sticks is clearly visible. Accordingly I am entirely satisfied that on 5 July 2007 the claimant's home was not a suitable environment in which to accommodate children of any age.

25. That the conditions in the home may not always have been unsuitable for children in this way received some support from the information the defendants obtained from the school attended by four of the children that they always looked clean and tidy. They had a 100% attendance and punctuality record, and there were no other concerns expressed. However this reassurance cannot outweigh the strength of the evidence of the actual observations made on 5 July by professional social workers whose findings, subject to the qualification mentioned above, have been, I am satisfied, substantially accurately described to me by Mrs McLaughlin. Further it was clearly reasonable for her and her colleagues to believe that such a state of affairs could not have come about during a few days or even weeks previously.

Police bail for Mrs and Mrs Williams

26. As already described Mr and Mrs Williams were arrested in the course of the afternoon of 5 July and taken to a police station and interviewed. They did not at that time know where their children were and this must have been an extremely distressing and stressful experience. The youngest child was only 8 months old at the time and was still being breast-fed. The claimants were released on bail in the early hours of the morning of 6 July. Mr Williams says they were told by the police to go to social services who would return their children. According to him no mention was made of any bail conditions.

27. While this latter point seems surprising, there is no evidence to contradict this recollection. The records of bail produced to the court are not signed by either claimant but instead in the space for the signature of the person bailed is typed the word "INCAPABLE". This is consistent with what Mr Williams told me: he said that he and his wife were in a "*dazed state*" when they left the police station. They did not look at the documents they were given before they left. It was only subsequently that they realised there was a condition. Therefore I accept that the claimants did not understand that they had been granted bail subject to a condition at this time, even though they were handed copies of the bail documents. Nonetheless it is clear that bail was granted by the police on condition that Mr and Mrs Williams not contact their children "*unless supervised*". The ground given on the forms for this condition was "*to prevent interference with victims*". The legal consequences of this condition will be considered below but, as will be seen, it was at least a practical impediment to the return of the children to their parents' care. Although the condition was silent as to the nature of the supervision expected, it was interpreted as requiring the presence of a social worker during any contact with the children.

28. It is rightly not in dispute that the circumstances existing on 5 July justified immediate action to safeguard the welfare of the children and, in particular, it is accepted that the police decision to invoke their powers to protect children under section 46 of the Children Act 1989 was justified. A serious allegation of physical abuse had been made which clearly required investigation. The police arrested the parents and therefore those with parental responsibility were not in a position while in custody to look after the children. I am satisfied that the children presented as possibly neglected. The home was clearly in an unsuitable state to accommodate the children, even if an adult to care for them had been identified. However the relevance of these concerns extends beyond the immediate action taken by the police: it forms the background to the consideration of the subsequent actions of the defendants to which I must now turn.

Availability of alternative accommodation

29. There is a dispute as to whether any accommodation was available from family members of friends which could have been used to avoid the children continuing to be placed by the local authority in foster homes. Mr Williams stated that there were three relatives, an aunt, a cousin and an uncle who could have offered accommodation. His brother could have taken all eight. However he agreed that over the ensuing period in which the children were in foster care none of them had written to the defendants offering accommodation. One of the adult children who gave evidence told me that he had been taken by a social worker to a friend's home nearby to see if it was suitable. Then they went to another set of family friends. He thought that they had said they would offer accommodation.

30. Mrs McLaughlin asserted in her police statement of 25 July 2007 that she asked another social worker, Anne Ayodeji, to go with the child to whose evidence I have just referred to see if there were family or friends who could accommodate the children, but they could not do so. The police statement made by Mr Burgess, social worker, also asserted that they had been given two names and that the son had confirmed that they were indeed family friends. Mrs McLaughlin had asked Ms Ayodeji to accompany the son to see if their accommodation was suitable. However later, he stated, he was told by Mrs McLaughlin that the children could not be placed with family friends because of a fear that the parents might be released from police custody during the night. Asked about this, Mrs McLaughlin recalled that the response reported back from the visit to the friends was that they could not accommodate the children; she thought Mr Burgess's statement was inaccurate. Ms Toal also said that on the night the children were taken into care a colleague had been provided with the name of someone to contact, but reported back that this person was not suitable. Mr McCallum, who, it will be recollected, was not present at the home that evening, asserted in his witness statement for these proceedings that the parents had not volunteered the names of any one who could look after any of the children. Ms Ayodeji did not give evidence before me, but did give a statement to the police on 25 July 2007 in which she stated that it had been her role to try to find other family members after the children had been taken into police protection but she had been

unable to do this. Unfortunately she did not describe what, if anything, she had done to explore the possibilities.

31. I find it surprising that there is no contemporaneous record of the steps taken to look for alternative accommodation. However I note that in spite of the assertion made now by the claimants that family members were willing to take the children in, no such suggestion was made in the correspondence sent by their solicitor to which I will have to refer for other reasons below. Given the clear wish, indeed desperation, of the claimants to have their children back in the family rather than in separate and in some cases what they believed to be distinctly undesirable foster homes, I consider the absence of such a suggestion at the time inconsistent with any realistic chance of one or more family members having been willing or able to take on the challenging task at short notice of accommodating all or part of this large family. I conclude that throughout the period with which I am concerned no realistic alternatives were available, and that the defendants did probably take sufficient steps on 5 July 2007 to satisfy themselves of that position at the time.

The "section 20 agreement"

32. On 6 July Mrs and Mrs Williams signed a document carrying the title "*Safeguarding Agreement in respect of [their eight children]*". It was also signed by Ciara Toal. The circumstances in which it was signed, and its effect have been the subject of significant dispute between the parties and I must therefore set out what happened in some detail. Where there has been a significant dispute of fact I shall make my factual findings clear.

33. After reciting the parties to it [the claimants and Hackney Children and Young Person's Services] the "agreement" continued as follows
This document was drawn up on Friday 6th of July 2007 and is a Safeguarding Agreement concerning the child mentioned above.
This Safeguarding Agreement was drawn up in relation to all of the children. Although the agreement is not legally binding, it may have significance, should there be any court procedures in the future.
We, Mr & Mrs Williams parents to all the above children, agree to the following:
1. That all the children will remain in their foster placements for the present time.
*2. When contact takes place you will encourage the children to return to their placements and ensure [*sic*] them that this is a safe place.*
3. That we will behave appropriately while contact is taking place, ie assure the children that we love and care for them, show them affection.
4. That we will not discuss with any of the children what has happened.
5. To continue to comply with Hackney Children's Social Care.
In conclusion Hackney Children's Social Care will seek legal advice with a view to protecting the children if it is found that parents are not complying with the contents of this Safeguarding Agreement.

34. By the time this document was signed all the claimants' children had been placed in foster homes. Mr Williams's account in his witness statement – supported formally by Mrs Williams in her witness statement - is that after

their release from the police station he and his wife went to the defendant's offices arriving at around 9.30 am. They met Mrs McLaughlin and asked for their children back. She told them that the defendant wanted to inspect the house and if it had been tidied up and cleaned they would return the children. She told them to return to the office at midday. Accordingly, he says, the claimants went home and cleaned and tidied it up. No-one attended to inspect it. On their return the defendant's office they were met by Mrs McLaughlin and Ms Toal who told them that the police had now issued a Police Protection Order under which the defendant could hold he children for 72 hours. Ms McLaughlin then produced a document in which the defendant said the children would be released after 72 hours, and asked the claimants to sign it. Mr Williams said he wanted to speak to a solicitor before signing a document to which Mrs McLaughlin responded that the claimants should not speak to a solicitor as otherwise they would not get their children back. As the claimants were about to leave Mrs McLaughlin told them that unless they signed a document they would not see their children again. Because they were tired and did not understand what was happening they panicked and signed the document Mrs McLaughlin then said that they could see the children that afternoon. Mr Williams says he made it absolutely clear that the claimants wanted to take their children home but they were misled into signing the "agreement".

35. Before considering the defendants' evidence on this episode it is necessary to refer to the relevant documentary material. In addition to the "agreement" described above the claimants have signed forms for each child which contain consents to various forms of medical treatment, should that prove necessary. An example appears at bundle 3A page 39 to 40. Further printed forms, also dated 6 July 2007 and containing the claimants' signatures are on their face each an agreement by them for the local authority to accommodate a child or young person, except for the fact that no name for any child has ben inserted on the form – see bundle 3A pages 49, 62, 81, 100. It may be that if the forms, which appear to have consisted of some 19 pages each, were viewed as a whole it would be clear to which children they referred, but the space for a child/s name on the signature page remains empty.

36. Ms Toal took a note of meeting with the parents that day. While it needs to be read in full, it is sufficient to summarise the points that appear to me to be pertinent:
    a. Mr Williams is recorded as claiming that the home was tidied twice every day with the help of the children but that on the previous day the children were too tired, and he was unable to do so because he was working. The claimants rejected the, to my mind, entirely reasonable point offered by Mrs McLaughlin that the direct and untidiness observed could not have accumulated in days but must have been over weeks.
    b. The claimants denied that their children had looked dirty and unkempt.
    c. They denied that the cooker was covered in food that looked as though it had been there a long time. If they did indeed deny this, their denial is at odds without the photographs I have been shown.

d. While Mr Williams did not agree that the mattresses were dirty he did accept that what the children were sleeping on was inappropriate.

37. With regard to the proposed "agreement". The following discussion is recorded:

Kulbant [McLaughlin] *then spoke to Mr and Mrs Williams about the children remaining* [in] *accommodation until we complete our investigation. She also informed parents that she understood their need to have the children home but outlined that we must carry out assessment first before this can take place. Kulbant asked parents if they would agree to work with us and in turn give their consent for all their children to remain accommodated.*

Kulbant discussed with parents the need for all the children to be medicated and asked for their consent on the issue also. In response to this Mr Williams stated that he was not happy for his children to remain in care but that he preferred to work with us than against us. He also outlined that he hoped we would do everything in our power to ensure that his children would be returned home to him and his wife as quickly as possible. He stated they would agree to the children remaining accommodated and for them all to be medicated as long as they could attend the medicals. Kulbant informed Mr & Mrs Williams that this was fine.

After a record of discussion about what would be in the agreement, rehearsing the terms I have set out above, and the child's allegations of assault, it was recorded that:

Parents agreed to come back into our office at 1pm to complete the Section 20 forms, to sign the Safeguarding Agreement, to sign the form giving medical consent and to give me any necessary items the children may need.

There appears to be no contemporaneous record of the second meeting, which, as is apparent from the note just quoted, must have taken place.

38. In her witness statement Ms Toal said that she could not recall the exact details of the conversation, but her practice would have been to explain that there were two options for the defendant. Either the consent of the parents could be obtained or they could make a court application: the defendants followed the "no order approach" wherever possible in order to work in cooperation with the parents.. The parents would have been aware that they did not have the option of taking he children home because of the bail condition. It was possible she did not expressly explain that the parents could withdraw their consent at any time. She would have made it clear that the children would not be returned until the investigation was completed, and it was assessed that it was safe for the children to do so.

39. In her oral evidence Ms Toal accepted that, contrary to her witness statement, she may not have mentioned the option of children staying with family or friends, as there was no note of that being said. She also accepted that she had been concerned about Mrs Williams's presentation: she was "quite low"

and quieter than Mr Williams. However, while both parents were rightly upset and low in mood, they were able to engage in conversation and appeared to understand what was being asked. She agreed that the notes showed that Mrs Williams did not want the children to be accommodated by the defendants. Ms Toal said her understanding of the bail conditions was that if the parents had taken their children home they would have been in breach of bail and would probably have been arrested.

40. Mrs McLaughlin found it difficult to remember who had done the talking at this meeting, although she thought it was Ms Toal. She recalled that Mrs Williams was quiet and upset and that Mr Williams was understandably cross. She could not remember if the right to take the children home after 72 hours or not to agree to the authority accommodating their children had been explained.

41. Mrs McLaughlin told me she recalled that at the meeting on 6 July Mr Williams was "understandably" cross; Mrs Williams was quiet and upset. She avoided eye contact. She was concerned about Mrs Williams's mental health but did not think she lacked capacity or an understanding about what was happening. She could not remember any of the detail of what was discussed, but recalled Ms Toal talking about the children and section 20 of the Children Act 1998. She could not remember if the parents were told of their right to take the children home at the end of the 72 hour period. She had noted that Mrs Williams looked "down" and was concerned about her mental health. However she had not thought that she lacked capacity to give her consent, or was unable to understand what was happening. She did recall the parents saying they had tidied their home during the night. She emphatically denied that she told the claimants that their children would be returned in 72 hours if they signed the agreement, or that they should not go to a solicitor or that they would not see their children again if they did not sign. She said that this would have been against all her ethics as a social worker.

42. In assessing the evidence I have heard on the circumstances surrounding the signing of the so-called section 20 agreement, I have had regard to the fact that the claimants were on any view in a highly distressed and doubtless tired state when they met Mrs McLaughlin and Ms Toal. Their recollection of what they were told is likely to have been clouded by their understandable emotions, and indeed anger, at what had happened. They were vulnerable people without advice facing two officials vested with the powers of the state to take their children away, possibly indefinitely. The claimants were not therefore in an ideal position to understand the complexities of what they were being faced with. On other side, the two social workers were dealing with an unusual and fraught situation. The defendants had as a matter of urgency found themselves having to accommodate eight children, who themselves were showing signs of distress, against a background of apparently serious allegations of physical abuse, and a home which was without doubt at that moment unfit for accommodating children. Considerable, and to my mind laudable, energy had been devoted to inspecting the home and relocating the children in these challenging circumstances. The parents, however caring they wanted to be, were arguably not in a position to offer that care without being in breach of bail conditions. The notes of what happened are almost certainly not complete

and understandably the officers' direct recollection of what was said is also incomplete. However, given all the circumstances, I consider it likely that the claimants have built up a mistaken picture in their minds of what they were told, in part through misunderstanding at the time and in part through their distress at having to relive these events repeatedly over the intervening years. I prefer the account to be gained from the contemporaneous record as supplemented by the evidence of Mrs McLaughlin and Ms Toal where it conflicts with that of the parents. That does leave a number of points of serious concern about the process adopted to which I will return after examining the legal framework under which the consensual accommodation of children by a local authority is meant to occur.

The relevant statutory framework

43. Unless otherwise stated the citation of statutes refers to the provisions in force at the time of these events in 2007. I must consider not only of the local authority's powers and duties with regard to the protection of children, but the powers of the police in that regard, as well as the role played by police bail.

44. When there are concerns about the safety and welfare of children there are a range of options available to address the issues. I will consider those principally relevant to the circumstances of this case.

Police protection

45. Section 46 of the Children Act 1989 provides in so far as is relevant:

> *(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may (a) remove the child to suitable accommodation and keep him there…*
> *(2) As soon as is reasonably practicable after taking a child into police protection, the constable concerned shall*
> *(a) inform the local authority within whose area the child was found of the steps that have been, and are proposed to be, taken with respect to the child under this section and the reasons for taking them*
> *(b) give details to the authority within whose area the child is ordinarily resident ("the appropriate authority") of the place at which the child is being accommodated.*
> *(c) Inform the child (if he appears capable of understanding)*
> *(i) of the steps that have been taken with respect to him under this section and of the reasons for taking them; and*
> *(ii) of the further steps that may be taken with respect to him under this section*
> *(d) take such steps as are reasonably practicable to discover the wishes and feelings of the child*
> *(e) secure that the case is inquired into by an officer designated for the purposes of this section…*
> *(f) where the child was taken into police protection by being taken to accommodation which is not provided*
> *(i) by or on behalf of a local authority….*
> *secure that he is moved to accommodation which is so provided.*

(4) As soon as is reasonably practicable after taking a child into police protection, the constable concerned shall take such steps as are reasonably practicable to inform
(a) the child's parents…
of the steps that he has taken under this section with respect to the child. The reasons for taking them and further steps that may be taken with respect to him under this section

(5) On completing any inquiry under subsection (3)(e), the officer conducting it shall release the child from police protection unless he considers that there is still reasonable cause for believing that the child would be likely to suffer significant harm if released.

(6) No child may be kept in police protection for more than 72 hours.

(7) While a child is being kept in police protection, the designated officer may apply on behalf of the appropriate authority for an emergency protection order to be made under section 44 with respect to the child.

(8) An application may be made under subsection (7) whether or not the authority know of it or agree to it being made

(10) Where a child has been taken into police protection the designated officer shall allow
(a) the child's parents…
to have such contact (if any) with the child as, in the opinion of the designated officer, is both reasonable and in the child's best interests.

(11) Where a child who has been taken into police protection is in accommodation provided by or on behalf of the appropriate authority, subsection (10) shall have effect as if it referred to the authority rather than to the designated officer.

46. "Harm" is defined in section 31(9) as

ill-treatment or the impairment of health or development [including, for example, impairment suffered from seeing or hearing the ill-treatment of another]

Whether harm is "significant": to be determined in accordance with section 31(10) [see section 105] which provides:

Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

47. It is stating the obvious to observe that this provision gives a power to the police to address an emergency in which, in their judgment, children can only be protected from the risk of "significant harm" by removing the child to "suitable accommodation", preferably provided by the relevant local authority. Accordingly the police are required to notify that authority as soon as reasonably practicable. Responsibility for arranging contact between the parents and their children transfers to the local authority [see subsection (10) above]. As was common ground between the parties, a child cannot be kept in police protection for more than 72 hours. In that time the section requires the

police to make inquiries [subsection (3)(e)], and they have the power to apply for an emergency protection order ["EPO"] under section 44 [subsection (7)].

Care orders and interim orders

48. A local authority may apply for a care order [section 31] and in so doing may seek an interim care order [section 38]. Such orders cannot be made unless [section 38, 31(2)] the court is satisfied that

> *(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 to him; or*
> > *(ii) the child's being beyond parental control.*

An interim order takes effect for such period as the court specifies but in any event comes to an end at the conclusion of the proceedings.

Emergency Protection Orders

49. Section 44 of the Childrens Act 1989 empowers the court, on application, to make an Emergency Projection Order [EPO]. While in force this, among other things, authorises (but does not compel) the removal of the child at any time to accommodation provided by or on behalf of the applicant and gives parental responsibility to the applicant [section 44(4)]. The power of removal is only to be exercised to safeguard the child's welfare [section 44((5)(a)], and the applicant is obliged to take such action in meeting parental responsibility as is reasonable to safeguard and promote the child's welfare. Before granting an EPO the court must be satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm if not removed to accommodation provided by or on behalf of the applicant [section 44(1)(a)]

50. In a case to which I was not directly referred, *X v Liverpool City Council* [2003] EWCA Civ 173 (*sub nom Langley v Liverpool City Council* [2006] 1 WLR 375, helpful guidance was given about the relationship between the use of police protection orders and applications to the court for EPOs. The case concerned rather different facts to the present case: concerns arose for the safety of children whose father persisted in driving them around although registered blind. The police were requested by the local authority to take the children into protection under section 46, even though an EPO had already been obtained. In allowing a claim by both parents and children against both the police and the local authority for breach of their Article 8 rights, the Court held that there was no statutory prohibition on the use of section 46 where an EPO was in force [paragraph 30]. The reasoning is instructive for the present case. Dyson LJ, as he then was, with the agreement of Thorpe and Lloyd LJJ, rejected the contrary construction because

… there would be a real danger that one of the important powers provided by Parliament for the protection of children would be emasculated. [Paragraph 30]

and that

The relevant provisions of the Act should be construed so as to further the manifest object of securing the protection of children who are at risk of significant harm. A construction of the Act which prohibits a constable from removing a child under section 46 where he has reasonable cause to believe that the child would otherwise be likely to suffer significant harm would frustrate that object. [paragraph 32]

Dyson LJ compared and contrasted the requirements for an EPO to be made and the police powers under section 46. An EPO was a court order which could not be made unless the court was satisfied of the conditions in the statute and gave parental responsibility to the applicant. An EPO did not require the removal of the child which could only be done if reasonably required to safeguard or promote the child's welfare. The court had the power to make appropriate directions with regard to parental contact and medical examinations. The section 46 regime was quite different: "*the court is not involved"* [paragraphs 34, 35]. In those circumstances the Court held that where an EPO was in place, section 46 should not be used unless there were

"… compelling reasons to do so. The statutory scheme shows that Parliament intended that, if practicable, the removal of a child from where he or she is living should be authorised by a court order and effected under section 44… The removal of children, usually from their families, is a very serious matter, It is, therefore, not at all surprising that Parliament decided that the court should play an important part in the process. This is a valuable safeguard. The court must be satisfied that the statutory criteria for removal exist."

… In my judgment, the statutory scheme clearly accords primacy to section 44. Removal under section 44 is sanctioned by the court and it involves a more elaborate, sophisticated and complete process than removal under section 46. The primacy under section 44 is further reinforced by sections 46(7) and 47(3(c). The significance of these provisions is that they show it was contemplated by Parliament that an EPO may well not be in force when a removal is effected under section 46, and that removal under section 46 is but the first step in a process which may then include an application for an EPO. [paragraphs 36, 37]

51. Thorpe LJ added that
Practitioners, whether in the legal department or the social services department of the local authority, will naturally consider the powers provided by Parts IV and V [of the Act], *and the limitations on those powers, when considering how and to what degree they should invade the territory of the family in order to protect its children. If there is no imminent danger the appropriate application is an interim care order. If there is greater urgency the appropriate remedy is an emergency protection order. It is to be*

emphasised that even in an emergency the local authority must apply to the family proceedings court for the order and prove the need for the order to the satisfaction of the court. This is a potent check on the local authority's powers of intervention in an emergency. [paragraph 76]

52. I note that this decision was handed down in July 2005, two years before the events with which I am concerned. It makes it clear that unless there urgency requires otherwise, local authorities should apply for an EPO in preference to reliance on the emergency powers of the police in order to ensure the safeguard of court scrutiny.

Consensual accommodation of children

53. Under section 20 of the Childrens Act 1989 local authorities are empowered to take children into accommodation provided by it in the circumstances specified by the section. As this provision has been the subject of detailed argument I shall set it out in full:

20.— Provision of accommodation for children: general.
(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.

(2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within—

(a) three months of being notified in writing that the child is being provided with accommodation; or
(b) such other longer period as may be prescribed.

(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.
(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.
(5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.
(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes [and feelings] regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes [and feelings] of the child as they have been able to ascertain.

(7) A local authority may not provide accommodation under this section for any child if any person who—

(a) has parental responsibility for him; and

(b) is willing and able to—

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him, objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Subsections (7) and (8) do not apply while any person—

(a) in whose favour a residence order is in force with respect to the child;

(aa) who is a special guardian of the child; or

(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, agrees to the child being looked after in accommodation provided by or on behalf of the local authority.

(10) Where there is more than one such person as is mentioned in subsection (9), all of them must agree.

(11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section.

54. The structure of the section is that it imposes a duty on the relevant local authority to provide accommodation to children if the conditions of subsections (1) or (3) are met, and a discretion to do so if the conditions of subsections (2), (4) or (5) apply. Crucially accommodation cannot be provided under this section if a person with parental responsibility and who is willing to provide or arrange for accommodation objects [subsection (7)]. Furthermore any person with parental responsibility may remove the child from such accommodation at any time. It is to be noted that these limitations on the local authorities duty or power to accommodate children are not qualified by any requirement that the objecting parent is capable of caring for them, or that the proposed accommodation is adequate. This has been explained, albeit, I think, obiter by Black LJ in *Re B (A Child) (sub nom Redcar and Cleveland Borough Council* [2013] EWCA Civ 984 at para 34:

I raised the question during the appeal hearing as to whether a parent who is inadequate is in fact "willing and able to …provide accommodation" but it did not excite much argument. That is explained, I think, by there being a common understanding that where parents in fact object to a local authority providing accommodation, a local authority will have to have recourse to care proceedings if they seek to accommodate a child and any debate as to whether the parents are "able" to provide accommodation is to be had in that context,

not in the context of section 20. That accords with the overall structure of the Children Act 1989 and is the interpretation I would presently support.

55. At first sight section 20 might be thought not to require the active agreement of those with parental responsibility: the duty or power to provide accommodation is expressly conditional on the absence of parental objection. However, as was submitted by Ms Cooper without contradiction from Mr Sinai, on a proper construction the section imposes a more stringent requirement, namely that the positive and informed consent of a parent must be obtained. I was referred to *R (G) v Nottingham City Council* [2008] EWHC 152 (Admin), a decision of Munby J, as he then was. The case concerned the summary removal of a newborn baby from its 18 year old mother without any court order. The learned judge ordered the immediate return of the baby to the mother. He stated the law in emphatic terms which he described as "elementary" [paragraphs 15-18]:

15. The law is perfectly clear but perhaps requires re-emphasis. Whatever the impression a casual reader might gain from reading some newspaper reports, no local authority and no social worker has any power to remove a child from its parent or, without the agreement of the parent, to take a child into care, unless they have first obtained an order from a family court authorising that step: either an emergency protection order in accordance with section 44 of the Children Act 1989 or an interim care order in accordance with section 38 of the Act or perhaps, in an exceptional case (and subject to section 100 of the Act), a wardship order made by a judge of the Family Division of the High Court.

16 Section 46 of the Children Act 1989 permits a police constable to remove a child where he has reasonable cause to believe that the child would otherwise be likely to suffer significant harm, and that power can be exercised without prior judicial authority. But the powers conferred on the police by section 46 are not given to either local authorities or social workers.

17 Local authorities and social workers have no power to remove children from their parents unless they have first obtained judicial sanction for what they are proposing to do. Only a court can make a care order. Only if a court has authorised that step, whether by making an emergency protection order or by making a care order or an interim care order or in some other way, can a local authority or a social worker remove a child from a parent. And the same goes, of course, for a hospital and its medical staff.

18 As I said during the course of the hearing, no baby, no child, can be removed simply "as the result of a decision taken by officials in some room."

The learned judge went on to consider the circumstances in which the urgency of the situation precluded obtaining a court order before action was required, for example where a medical emergency was such that there was "not even time to make an urgent telephone application to a judge" [paragraph 25]. In such cases the doctrine of necessity could be involved, but, as he made clear, only for the shortest time.

56. The same case returned before Munby J, in *R (G) v Nottingham City Council and Nottingham University Hospitals NHS Trust* [2008] EWHC 400 (Admin) in which he agreed to make a declaration that the separation of the baby from the mother had been a breach of the mother's Article 8 rights [see paragraph 77]. He made clear in emphatic terms that acquiescence could not of itself be the equivalent of consent [paragraphs 53-55]:

53. I do not wish to be misunderstood. I am not suggesting that consent to the accommodation of a child in accordance with section 20 is required by law to be in writing – though, that said, a prudent local authority would surely always wish to ensure that an alleged parental consent in such a case is properly recorded in writing and evidenced by the parent's signature. Nor am I disputing that there may be cases where a child has in fact, and without parental objection, been accommodated by a local authority for such a period as might entitle a court to infer that the parent had in fact consented.
54. But the local authority here seemed to be going far beyond this. It seemed to be conflating absence of objection with actual consent – a doctrine which at least in this context is, in my judgment, entirely contrary to principle and which, moreover, contains within it the potential for the most pernicious consequences, not least because there are probably many mothers who believe, quite erroneously, that a local authority has power, without any court order, to do what the local authority did in this case.
55. To equate helpless acquiescence with consent when a parent is confronted in circumstances such as this with the misuse (or perhaps on another occasion the misrepresentation) of non-existent authority by an agent of the State is, in my judgment, both unprincipled and, indeed, fraught with potential danger.

He went on to hold that a failure to raise an objection does not amount to consent [paragraph 57] and that [paragraph 61]:

Submission in the face of asserted State authority is not the same as consent. In this context, as in that, nothing short of consent will suffice.

The learned President returned to and repeated this point in *Re W (Children)* [2014] EWCA civ 1065 paragraph 34.

Any such agreement requires genuine consent, not mere "submission in the face of asserted State authority"

57. Of course Munby J's case was not one in which the local authority was claiming it was acting lawfully under section 20. In that context I was referred to *Coventry City Council v C* [2013] EWHC 2190 (Fam) a decision of Hedley J. The factual background was that a young mother had been persuaded, having been admitted to hospital as an emergency, and having been administered morphine, to consent to the child of which she had just been delivered being removed to local authority provided accommodation under section 20, although she had previously resisted proposals for such a plan. The judge had before him adoption proceedings, and the approval of a proposed settlement of a Human Rights Act claim by the mother. The opportunity was

taken to consider the use of section 20 agreements. It is not totally clear to me that this consideration was strictly necessary to the decisions the court had to take, but the judgment contained guidance which was specifically approved by the President [see paragraph 46, 49]. Therefore what the learned judge said is at the very least of considerable persuasive weight and various points he made are particularly pertinent to the case before me:

a. The learned judge pointed out that section 20 is in Part III of the Act which has an emphasis on partnership and contained no compulsory curtailment of parental responsibility. While unwarranted restriction on the use of this section could undermine the partnership element of Part III, it must not be "*compulsion in disguise*" [paragraphs 25, 27], a description approved of by Munby P in *Re W (Children)* [above] paragraph 34.

b. Parents have a right to consent. This requires the social worker seeking such consent to be satisfied
    i. The parent has capacity to consent
    ii. He/she has been full informed and understands the nature and consequences of both consent and refusal of consent
    iii. It is fair and proportionate in all the circumstances to seek the consent.

58. I can do no better than to set out in full the guidance of Hedley J, which followed on from this conclusion:

i) Every parent has the right, if capacitous, to exercise their parental responsibility to consent under Section 20 to have their child accommodated by the local authority and every local authority has power under Section 20(4) so to accommodate provided that it is consistent with the welfare of the child.
ii) Every social worker obtaining such a consent is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so.
iii) In taking any such consent the social worker must actively address the issue of capacity and take into account all the circumstances prevailing at the time and consider the questions raised by Section 3 of the 2005 Act, and in particular the mother's capacity at that time to use and weigh all the relevant information.
iv) If the social worker has doubts about capacity no further attempt should be made to obtain consent on that occasion and advice should be sought from the social work team leader or management.
v) If the social worker is satisfied that the person whose consent is sought does not lack capacity, the social worker must be satisfied that the consent is fully informed:
a) Does the parent fully understand the consequences of giving such a consent?
b) Does the parent fully appreciate the range of choice available and the consequences of refusal as well as giving consent?
c) Is the parent in possession of all the facts and issues material to the giving of consent?

vi) If not satisfied that the answers to a) – c) above are all 'yes', no further attempt should be made to obtain consent on that occasion and advice should be sought as above and the social work team should further consider taking legal advice if thought necessary.
vii) If the social worker is satisfied that the consent is fully informed then it is necessary to be further satisfied that the giving of such consent and the subsequent removal is both fair and proportionate.
viii) In considering that it may be necessary to ask:
a) what is the current physical and psychological state of the parent?
b) If they have a solicitor, have they been encouraged to seek legal advice and/or advice from family or friends?
c) Is it necessary for the safety of the child for her to be removed at this time?
d) Would it be fairer in this case for this matter to be the subject of a court order rather than an agreement?
ix) If having done all this and, if necessary, having taken further advice (as above and including where necessary legal advice), the social worker then considers that a fully informed consent has been received from a capacitous mother in circumstances where removal is necessary and proportionate, consent may be acted upon.
x) In the light of the foregoing, local authorities may want to approach with great care the obtaining of Section 20 agreements from mothers in the aftermath of birth, especially where there is no immediate danger to the child and where probably no order would be made.

59. There is no formal requirement that the parent's consent to a section 20 arrangement be obtained in writing [see *Re G* [above] paragraph 53], but clearly that would be a prudent step to take for all concerned, and that form should not imply or suggest any form of coercion. The form of some agreements has been the subject of adverse, albeit obiter, comment in *re W [above]*. Tomlinson LJ [paragraph 41, describing the agreement before the Court there as "*almost comical in the manner in which it apparently proclaims that it has been entered into under something approaching duress*." He went on:

There must be a suspicion that the reason why the mother did not object was because she was made to understand that if her agreement was not forthcoming, public law proceedings would have been instigated. I cannot believe that section 20 was enacted in order to permit a local authority to assume control over the lives of the mother and her children in this way.

Police bail

60. Bail in this case was granted under the powers accorded to police by section 37 of the Police and Criminal Evidence Act 1984. Conditions may be imposed by virtue of section 47. The person bailed has a right to apply to a magistrates court for a variation of the conditions: section 47 (1E), (1D). The conditions can be varied by the police. Breach of a bail condition entitles the

police to re-arrest the bailed person: section 46(1A). Such a breach does not constitute a statutory offence: *Regina v Ashley* [2005] EWCA Crim 2571, [2004] 1 WLR 2057.

61. It follows that any attempt by Mr and Mrs Williams to effect the return of their children home would not be an offence, unless, arguably, the conduct amounted to some substantive offence. Therefore the consequences of non-compliance would be most likely limited to a consideration by the police of whether to re-arrest the parents. The most likely immediate reaction to any attempt by the parents to take their children out of foster care would, or should, have been an urgent application by the defendants to the court for one of the available orders authorising them to retain the children in their care. Such an application would of course have enabled the parents to make representations to the court and, potentially give undertakings with regard to their care of the children and their plans for improving the home.

The parties' submissions on the validity of the section 20 agreement

62. The claimants submit that the defendant had no power to keep their children away from them after the expiry of the PPO, 72 hours after it was made on 5 July 2007, without either a court order of one of the types described above, or the consent of the parents to a consensual arrangement pursuant to section 20. They submit that there was no valid consent obtained on 6 July for a number of reasons:
    a. The mother at least lacked the capacity to give such consent because of her mental illness or general distress.
    b. Neither parent was fully informed to enable them to fully understand the consequences of their giving a consent, to appreciate the options available, and to be in possession of all the material facts.
    c. They were coerced into signing the agreement by the threat of not seeing their children again.
    d. They were not told of their right to take their children home at any time
    e. There was no indication that the agreement was to have any effect after the expiry of the PPO.

63. The defendants' argued that there was a valid consent under section 20. Mr Sinai relied heavily on what he said was the inability of the parents to provide accommodation because of the bail condition. It was his case that unless the person objecting was able to provide accommodation the right to object did not exist. Mr Sinai submitted that this as not a case of lack of capacity and that I should infer that the effect of section 20 was explained.

Conclusions on validity of section 20 agreement

64. Capacity for this purpose is equated to capacity as defined in the Mental Capacity Act 2005: see paragraph 37 of *Coventry City Council v C* [above]. I am satisfied that both Mr and Mrs Williams had the capacity to understand what they were told and the consequences of the decision they were being asked to make. They were distressed, but not so distressed that they lacked the capacity to make decisions. In my judgment this case is far removed from that of the newly delivered mother under consideration in *C*. Mr and Mrs Williams were able to express their wish to have their children returned as soon as

possible, and to challenge the allegations made against them. They were capable of understanding what they were told. That their distress has resulted in their misunderstanding what they were told has more to do with the inadequacy of the information conveyed to them and its communication than their capacity to understand it.

65. I do not consider the claimants were fully informed of the matters of which they should have been informed:
    a. Bearing in mind the threatening circumstances in which the "Safeguarding Agreement" was offered to the claimants, its form suffered from very similar defects to those described by Tomlinson LJ as being "*comical*".
        i. On its face the agreement is said to have possible "*significance*" in court proceedings. The strong inference is that the "*significance*" would be adverse to the parents' prospects of seeing their children back home. This is reinforced by the threat of the defendants to seek legal advice in the event of non-compliance by the parents; clearly such advice would be with a view to making an application to the court.
        ii. The document makes no reference to the legal basis on which the children are to be accommodated by the defendants. There is therefore no guidance for the parents as to the context of what they are signing.
        iii. The document contains only a list of obligations being imposed on the parents, with no reference to any obligations on the part of the defendants. In particular there is no mention of the parents' legal right to withdraw their consent and require the return of their children.
        iv. The parents are required "to comply" with the defendants whatever that means. It has the look of a provision which requires the parents to comply with absolutely anything the defendants might require.

    b. There is no persuasive evidence that the parents were expressly told that that they had a right to take their children away from local authority provided accommodation at any time or to object to that provision and I accept that they were not. It is no justification for this omission that the bail condition prohibited unsupervised contact. As was pointed out there could have been a number of solutions, ranging from either the parents or the defendant persuading the police to vary bail to allow alternative accommodation with family and friends if any were identified who could help. There is also an issue about what the police would have done if the children had returned home. Breach of police bail is not an offence and there has been no evidence enabling me – or the claimants - to know what was likely to have happened. It is clear that this issue was not raised or discussed by Mrs McLaughlin and Ms Toal when obtaining the parents' signatures to the agreement.

c. There is no evidence that they were told, still less encouraged, to seek legal advice before signing the agreement.

d. I agree that there was no clear indication offered as to the effect of the agreement following the expiry of the PPO.

e. While I do not accept that the parents were told, or that the defendants' officer intended to convey to them, that they would never see their children again if they did not enter the agreement, I do accept that this was what, in their distressed state, the claimants understood.

f. In short the circumstances, combined with the inadequacies of the information conveyed, were such as to amount to the "*compulsion in disguise*" of the type described by Hedley J in the Coventry case. For the same reasons such agreement or acquiescence as took place was not fairly obtained.

66. For these reasons I conclude that on 6 July there was no valid consent obtained from the parents such as to give the defendant authority to accommodate the children under section 20. It is therefore unnecessary to go on to consider the final part of the test, namely whether action under section 20 was a proportionate response to the circumstances facing the defendants at that time. Had I been satisfied that the parents had been fully and fairly informed of all relevant matters and given their consent, which I am not, I would have accepted that the circumstances were such that it would have been proportionate to take action to accommodate the children under section 20. The potential risks to the children posed by the condition of the family home, the parents' apparent unwillingness to acknowledge the extent of the problem, the allegations of abuse which were under investigation, and, as I find, the absence at that time of any established alternative accommodation would have made such action a reasonable response.

The defendants' response to the letters of 13 July 2007 from claimants' solicitors

67. Later in the afternoon of 6 July and again on 7 July the claimants were permitted to have supervised contact with their children. On the first occasion the claimants were distressed to find that only two of them were present, but on the second all appeared. I accept the claimants' evidence that, not surprisingly, the children were exhibiting distress.

68. On 9 July the claimants met Mrs McLaughlin at the defendants offices. According to them they asked for the return of their children as the 72 hours period of authority under the PPO had passed. They say that Mrs McLaughlin refused this request saying that the children would never be returned and that the document they had signed permitted the defendant to keep the children indefinitely. Mrs McLaughlin denied that she would have said this. I accept her denial. While I have no doubt she would have retained concerns about the risks that might be posed to the children were they to be returned home at that point, I find it would be improbable that she would have told the parents their children would never be returned. It is, however, probable that they would

have been told that the document they had signed authorised the children to be kept, as that appears to be what she believed at the time. I was not referred to contemporaneous records in relation to this meeting, and therefore it is difficult to determine whether and, if so on what, terms the claimants asked for their children to be returned. In the light of my conclusions with regard to the validity of the agreement of 6 July, this is not material and I make no finding about it. The fact is that by this time the defendants had no legal authority to hold the children.

69. At some point before 13 July Mr Williams consulted solicitors, Messrs Sternberg Reed. On that date they wrote and faxed two letters to the defendants' legal department. The first letter recited their understanding of the position following the PPO:

From what I could gather it appears that [Mr Williams] *subsequently gave his consent to the children remaining accommodated under section 20.*

The letter went on to request details of the defendants' plans, make clear the parents' concern at the way in which the children were being cared for, and stated that

Our client, and his wife, are very keen to have their children returned to their care as soon as that is thought possible, and indicated that they would cooperate with any further assessment that the Local Authority required them to undertake.

Finally they inquired whether the defendant was intending to institute care proceedings. They would be representing Mr Williams in any such proceedings.

70. The second letter of the same date went further:

Mr Williams wishes us to give you formal notice of his intention to withdraw consent to the accommodation of his children under Section 20 of the Children Act 1989. He wishes to continue to work cooperatively with the Local Authority and will therefore agree to their continued accommodation for a further 10 days, to Monday 23rd July 2007 in order that the Local Authority can make further investigations necessary to plan for the stable rehabilitation of the children to their parents' care.

The letter went on to ask for the plans for each individual child if the defendant felt unable to return them all. The solicitors conveyed an offer by Mr Williams to relocate to alternative accommodation to enable the children to return to their mother should that be necessary to allay the defendants' concerns. Finally the defendants were again requested to inform the solicitors of any plans to commence care proceedings.

71. On 16 July a meeting of the defendants' Children's Resource Panel, considered the case of this family. Dawn Carter-McDonald of the legal department and Rory McCallum were among those who attended. The

minutes recorded that the parents wanted their children back. The decisions recorded were:

- *The plan is to return the children home*
- *A Child Protection Conference must be held*
- *Talk to police re procedure and bail condition*
- *Speak to housing association and raise [at another panel] re getting the house in order*

Mr McCallum was noted to be responsible for the first and third items and jointly responsible with Ciara Toal for the second. Mr McCallum said in evidence he could not recollect having spoken to the police personally: he said the purpose of the panel was to take decisions which it was the responsibility of managers to put into practice. He believed that discussions had taken place with the police, but could not point to any record of that occurring, apart from the strategy meeting on 24 July, described below. He said that a panel would never have intended an immediate return of the children, given the outstanding serious concerns. A plan to return the children "*as soon as possible*" [as suggested by note written after a meeting to which I refer below] would have meant that they would be returned when it was safe, the right processes were in place and bail conditions had been changed to avoid "*criminalisation*" of the parents. It would also have been necessary for the case to be considered by a CPC before the return.

72. This understanding of the meaning of the plan arrived at by the Resource Panel was not shared by all. On 19 July, a Thursday, Ciara Toal sent an email to colleagues reporting a conversation with Mrs McLaughlin. She wrote:

After speaking to my manager Kulbant McLaughlin, I would just like to make you all aware that as of today it has been decided that we do not have enough evidence for the Williams children to remain accommodated, therefore the plan is that they will either return home to their parents tomorrow or Monday. For this reason we will not need to have the LAC [Looked After Children] *reviews.*

Mr McCallum's reaction to seeing that email in his written and oral evidence was that it did not correlate with the decision made by the panel. While the panel decided matters in principle that was subject to the social worker being satisfied that the family was ready for re-integration, and a target date would not have been set. Work would have been required with other services. He considered it inconceivable that the children would have been returned before the CPC on 31 July. Mrs McLaughlin said that any discussion as referred to in the email, the contents of which clearly puzzled her, could not have been just with her, but would have included Sue Morris and others as a decision of this nature would have involved more senior people then her. She said at that stage Ms Toal's assessment was not completed, and the decision to return the children home would have required gathering the relevant information. The panel's expectation to return the children just could not have been completed. Confronted with this evidence Ms Toal felt she could only explain this on the

basis that she understood her function following the panel's decision was to enable the children to go home.

73. Sternberg Reed sent a chasing letter, having received no reply to their earlier letters. The following day at 6.19 pm a solicitor from the firm emailed Erroll Reid of the defendant's legal department referring to the second letter of 13 July. She relayed an understanding of Mr Williams that the defendant would be willing to return the children were it not for the bail condition. She suggested that it would be "*highly unusual*" for the police to prevent children from returning home if the return was approved by social services. The email concluded:

    In the event that you will wish the children to remain in foster care we await notice of your application for an interim care order. We seek clarification of your position as a matter of urgency and expect to hear from you no later than 4pm on Monday 23rd July 2007.

    Mr Reid replied within 2 hours that the email had been forwarded to the fee earner for a response and ended:

    It appears likely that we will proceed to a hearing given that there are further investigations and a possible charge.

    On the same date, presumably after receiving Sternberg Reed's email, Mr Reid faxed copies of the letters to Mrs McLaughlin.

74. Mr McCallum told me that his understanding of the letter would have been that although the solicitors were serving a notice of intent they did not want to be precipitous. He thought they were working together and there was a working assumption that the consent remained in place.

75. On Monday 23 July the defendants held a panel to consider the case of the children attended by, among others, Mrs McLaughlin, Ciara Toal and the director of the children and young persons panel. It was suggested that the letters and emails from Sternberg Reed may not have been received by them at the time of the meeting. The minutes do, however, refer to the father's wishes:

    Accommodation was initially agreed by father but he has sought legal advice and is planning on withdrawing the Section 20

    I observe that this is clearly not an accurate or fair summary of the position stated by Sternberg Reed, but the reference to legal advice suggests strongly that at least someone attending the meeting was aware of their letters. I note that one person in attendance was from the legal department.

    The minutes went on to note that information about the father's church was outstanding, and that the police were still gathering information. There was reference to the bail condition and a report that there were no concerns about the mother's mental health. The decisions and actions noted were as follows:

Bail conditions need to be resolved/changed in order for children to return home as soon as possible
Request an earlier CP [child protection] *conference to evidence risk to children will be appropriately managed. A 3 week delay … is unacceptable. Work with father in order for children to return home.*

Each of these was to be actioned by Sue Morris and Mrs McLaughlin.

In a note of the meeting, dated in error 20 July, Ms Toal recorded that the Director

… clearly stated that the children should be returned home as soon as possible.

76. Mr McCallum explained, as observed earlier, why this did not equate to an intention to return the children immediately. He said it would "wholly unrealistic" to have expected the children to be returned within a few days. He accepted that if there were no consent from the parents, the local authority would have had to react to that. He did not believe there had been any question of consent not being in place and that had that been the case "a whole host of questions" would have had to be asked. He considered that the Sternberg Reed letters were saying that the parental consent continued. At another point in his evidence he suggested that the solicitors were saying that although there was no legal basis for the authority to continue holding the children they "*did not want to pull the plug*". He conceded that if they were stating simply that the parents wanted the children back, that would have been a different matter.

77. Mrs McLaughlin also said of this meeting that she could not recall the solicitors' letters and did not recall it being said that Mrs Williams was withdrawing consent. Had that occurred she would have consulted Sue Morris and a head of service and after consideration of whether it was safe and appropriate for the children to go home, if was safe to do so they would have been returned. If necessary they would have taken court proceedings. However she accepted on reading the letters that the practical and legal effect of them was that the children were to be returned, and, later, that she did not know what the basis was for keeping children in foster accommodation.

78. On 24 July the defendants' senior legal officer wrote in response to Sternberg Reed's letters. This stated that the defendants were in the process of undertaking a "section 47 investigation". It went on

…the outcome of the initial assessment is that the local authority are not minded to take care proceedings and the plan is to return the children home once the investigation is completed and satisfactory responses are received from the initial inquiries of the school, health visitor and any other external agencies who are being asked for information…
Unfortunately the local authority are unable to provide you with a date as to when the children will be returned home as we are instructed that the bail

conditions… are that the children should not be left unsupervised with your clients… This therefore has a significant impact on the local authority's plans and abilities to return the children home to your clients.
We therefore trust that your clients will not seek to remove the children from the care of the local authority until clarification can be contained with regards to the police bail conditions.

The letter went on to seek confirmation of what if any charges had been made and stated that

The answers to the above will have an impact on the local authority returning the children to your clients care.

Finally the letter repeated the requirement for cooperation and informed the solicitors that further information would be forthcoming after a strategy meeting to be held that day and that

A written agreement will be presented to you clients for their agreement and for them to sign.

79. Mrs McLaughlin did not recall seeing or approving this letter. She thought it was possible that she did so, and it would have been approved by a line manager. She agreed that a section 47 investigation could proceed while children were at home, but also that they would have wanted to be satisfied that it was safe to allow their return.

80. The strategy meeting was attended by Mrs McLaughlin, Ciara Toal and two police officers and others. This was largely taken up, according to Ms Toal's note, with discussions about the allegations of physical abuse and other information from the children made, but it was noted that the police had spoken about the bail conditions.

81. Mrs McLaughlin had a limited recollection of these letters and records, and it was clear to me that she struggled to reconcile the apparent inconsistencies between the recorded decisions of the panel and the contents of the letter to Sternberg Reed. In particular she found the apparent decision that the children should be returned as soon as possible difficult to understand. According to her the children could not possibly have been returned immediately because in her view this could not have happened before the CPC meeting and the completion of the necessary inquiries. She therefore suggested that the meaning of the instruction was that the children be returned as soon as possible having regard to their safety and the completion of the necessary plans. When asked whether it would not have been appropriate to apply to the court for an interim order she said that would not be appropriate if the parents were saying they would cooperate. To do so would prejudice the relationship with them. It would also have been wrong for the defendants to assist the parents break the bail conditions, which would impact on the children in any event. She said that in her mind at the time the children were still being accommodated by virtue of section 20 and she was also relying on the welfare of the children being paramount. She denied there was any deliberate or

considered action by social services or herself in particular to act outside the law.

The parties' submissions

82. The claimants submitted that the letters of 13 July clearly withdrew any consent previous given, even if there had at that point been a valid consent in force. They could not amount to a validation of a previously invalid agreement. In any event if there was a policy that the children could not go home before the Child Protection Conference, the parents and the solicitors were not told that, and therefore any consent at this point was not fully informed. They argued that an indication they did not want to act precipitously did not amount to consent. It was further submitted that section 20 could not be relied on to achieve a result that could not have been achieved in court. Further the bail conditions did not provide a justification for overriding an objection to section 20 arrangements. The only way that could have been achieved was to obtain a court authorisation.

83. The defendants submitted that the letters of 13 July did not claim that the original consent was invalid, but confirmed that the consent would continue until the 10 day period had elapsed. It was argued that because the letters did not say the claimants were withdrawing their consent at that time and acknowledging that other things needed to happen, consent was not withdrawn.

Conclusions on the effect of the solicitors' letters and the defendant's response

84. I reject the defendants' attempt to justify their omission to make a court application on receipt of the Sternberg Reed letters of 13 July. The absence of a contention that any consent originally offered was invalid does not amount to a retrospective ratification. The acknowledgement that the defendants would need time to complete their investigations is no more than an acceptance that if the authority was determined to keep the children there was nothing the claimants could do about it practically in the short term. That does not amount to a consent but to a submission in the face of the power of the State. In my judgment the letters amount to an express withdrawal of any consent that may have been signified at the time of the signing of the "agreement". For the reasons stated above acquiescence does not amount to a on agreement for these purposes and I do not regard the solicitors description of the previous "agreement" as more than a summary of their understanding of events as opposed to a statement of their legal effect.

85. However I do not accept that either Mrs McLaughlin, or Ms Toal or any other officer of the defendants were aware that in law there was no lawful authority in place to retain the children in foster care. While I find that their understanding of the position was wrong, I accept that they honestly, but mistakenly, believed that there was a section 20 consent in place. I consider their behaviour as evidenced by the contemporary documentation is inconsistent with a belief that they had no legal authority for their actions. The facts were known to the defendant's legal department but the response to the solicitors' letters is inconsistent with any advice having been given that legal authority was absent.

86. It does not necessarily follow from the absence of a legal authority under section 20 that the only option available to the defendants would have been the return of the children. I have to consider whether they had material on which they could have made an application for an EPO. There is material suggesting that such evidence was not available, in particular the email from Ms Toal of 19 July. While in the absence of evidence at that time the logical position was that the children had to be returned the following day or very soon thereafter, I am satisfied that the overall thinking was that the children needed to be kept in foster care while investigations were completed and the bail position was resolved. The contrary is not consistent with the actions taken thereafter or indeed with an appreciation of the practical reality. Throughout the period considered above investigations were continuing. It is true that reassuring information had been received, for example that there were no reported concerns at the childrens' schools. However, there remained outstanding serious allegations of physical abuse, and the correction of the appalling state of the family home. The underlying causes of that were far from fully explored. Finally, whatever the theoretical possibilities for accommodating the children in compliance with the bail conditions, I accept that the practical reality was that without reliable evidence of satisfactory alternative accommodation, releasing them from foster care arguably gave rise to risks for the children which a court might have wanted to explore. Nonetheless no opportunity was given to a court to consider these matters, and, importantly, to the parents to offer their proposals to an impartial tribunal.

Continued foster care until 11 September 2007

87. In the light of my conclusion that there was no legal authority for the children to be kept away form their parents from mid-July, I need not consider the events that followed in great detail. There are, however, points in the story as it unfolded which are relevant to the effect of what happened on the claimants.

Requests for assistance with regard to the bail conditions

88. The defendants declined an invitation from the father's solicitors on 27 July to confirm in writing to the police that the bail conditions were hindering the return of the children. The reason given in their reply of 2 August in my judgment missed the point of this request: the claimants were not asking for the defendants to participate in an application to vary bail, but merely to confirm the effect of the condition.

89. There was no reason why the defendants could not have provided the claimants or the police with their view of the effect of the bail conditions. Indeed they were willing to the provide information to the police on 17 August in response to an inquiry from the police requesting information to assist them in making a decision about the bail conditions. However in a number of respects the information provided was, I am satisfied, substantially incorrect or was not an adequate basis for concern. Sue Morris is recorded as having told them that

    a. The claimants had been missing appointments with social workers. The only evidence offered to justify this was in relation to an appointment Mr Williams had missed through a misunderstanding. Ms

Toal was unable to offer any detail of what might have lain behind this concern.

b. The claimants had not been engaging sufficiently for the completion of the core assessment. There is no evidence that the claimants were not cooperating fully with the defendants and providing information as they were requested for it. As late as 7 August Ms Toal was noting that updating of the assessment had not started and she had not spoken to the parents about this.
c. The claimants had been inappropriately taking photographs of their children. Yet the only photographs taken by them were intended to be a record of various injuries visible. No secret was made by them of this activity, and it is difficult to understand why this was in itself considered to be a matter of concern.
d. The children's aunt had been contacting the children and advising them to disrupt their placements. If this occurred, there was no evidence that this had been instigated or encouraged by the parents. The parents observed with some force that as they did not know whether the children were being accommodated the aunt could not have known either. Ms Toal could not recall anything of substance on this point.
e. There had possibly been some unauthorised contact by the parents. It was not clear to what, if any, specific occasions this referred. The parents' evidence was that there was no contact outside supervised meetings, apart, perhaps from accidental sightings in the road.
f. There were concerns about Mrs Williams's mental health. There was some basis for this observation, but it is open to doubt whether it was a concern which was likely to justify the police maintaining the bail condition.

Some of these concerns were repeated in a letter from the defendants' legal department to Sternberg Reed on 28 August, but repetition does not in itself provide any satisfactory evidence that there was a reality behind them.

90. On 22 August solicitors acting for the mother in the criminal proceedings wrote to the defendants to say they had been informed by the police that the bail condition was still in force because of the concern raised in relation to missed appointments. The letter asked the defendants to contact them as a matter of urgency to confirm their position on this. If the parents were confirmed to be engaging with social services they intended to make representations to the police that the bail condition should be varied. There does not seem to have been a direct response to that letter, but on 6 September Sue Morris is recorded as having

arranged with the police for the bail conditions to be varied with a view to the children being returned on Tuesday.

91. It is likely that the police were willing to receive information from the defendants to help them form a judgment with regard to relaxing the bail condition. That the defendants did not take this step before 6 September is certainly not due to a lack of a request on behalf of the claimants. In my judgment it is probable that the apparent reluctance to do so was caused by a

collective concern that there were still issues to be considered in order to be satisfied that the potential risks for the children had been addressed. Unfortunately the coherent communication of what those concerns were was hindered by a failure to ensure that sufficient detail was conveyed with the overall description of the concern. The result was that the police did not, until 8 September, receive a clear and accurate account of the progress of the defendants' investigations. As the police had their own independent concerns which in the end led to multiple charges of neglect and assault, it is not possible to say what effect an earlier positive report from the defendants would have had on bail. It is clear, however, that the claimants at least lost the opportunity to support an argument in favour of a relaxation of the condition at an earlier stage.

The experiences of the children in foster care

92. While this is not a claim brought on behalf of the children, the perception of their experiences in foster care is potentially relevant to an assessment of the interference with the parents' family life. Any non-consensual separation of children from their parents is bound to be distressing for all concerned, but in this case there were some particular features which went beyond what is implied in that generalisation:
    a. On 1 August one of the children fractured an arm while in foster care. There was some delay in this being reported both to the defendants and the claimants.
    b. On 6 August another child was burnt by hot water while taking a shower.
    c. Concerns were raised by the parents that one of their children has been the subject of sexual abuse while in foster care owing to the child complaining of pain in the genital area, although this was not confirmed on medical examination
    d. Most of the children were moved to different foster carers several times, in two cases at least five times, while in accommodation provided by the defendants.

Causes of action arising out of the facts

Negligence/breach of duty

93. At my request Ms Cooper for the claimants produced more detailed particulars of negligence than had been included in the particulars of claim. They can be summarised as falling into the following categories:
    a. Failing to make prompt arrangements to return the children to their parents.
    b. Failing to give accurate information to the police of their plans to do so or its lack of evidence for maintaining the separation or requesting them to reconsider the bail condition.
    c. Failing to explore the options for returning some or all of the children in spite of the bail condition.

94. In *X v Liverpool City Council* [see above] the observations of the Court on the factors to be taken into account on such a claim are in my judgment helpful

and relevant in the present case, even if the subject-matter was not precisely the same, and the proceedings were public law proceedings not, as here, a private law claim:

a. Latitude had to be accorded to local authority officials in making judgments on the urgency of the need to protect children in any particular case because
An authority such as the council in the present case is better equipped than a court to judge how urgent a situation is and whether in all the circumstances removal of the child is necessary

b. However:

… the court should never lose sight of the fact that the removal of children from those who have custody of them is an extreme form of interference with family life and calls for compelling justification. [paragraph 60]

95. The stresses and strains under which local authorities and their social workers are placed in undertaking the protection of children were eloquently expressed by MacFarlane J in *Re X: Emergency Protection Orders* [2006] EWHC 510 (Fam) [paragraph 19]:

The child protection system depends upon the skill, insight and sheer hard work of front line social workers. Underlying those key features, there is a need for social workers to feel supported and valued by the courts, the state and the general populace to a far greater degree than is normally the case. Working in overstretched teams with limited resources, social workers frequently have to make crucial decisions, with important implications, on issues of child protection; often of necessity these decisions must be based upon the available information which may be inchoate or partial. There are often risks to a child flowing from every available option (risk of harm if the child stays at home, risk of emotional harm at least if the child is removed). It is said that in these situations, social workers are 'damned if they do, and damned if they don't' take action. Despite these difficulties, it is my experience that very frequently social workers 'get it right' and take the right action, for the right reasons, based upon a professional and wise evaluation of the available information. Such cases sadly do not hit the headlines, or warrant lengthy scrutiny in a High Court judgment. I say 'sadly' because there is a need for successful social work, of which there are many daily examples, to be applauded and made known to the public at large.

I consider that an elegantly expressed reminder that I must be cautious before finding proved criticisms of the sort made against Hackney and must bring to bear an appreciation of the challenging circumstances in which many decisions concerned with the protection of children have to be made. It also raises factors relevant to the consideration of whether a cause of action is permissible in a case like this one.

96. In *A v East Sussex County Council, Chief Constable of Sussex Police* [2010] EWCA Civ 743 the Court of Appeal applied the principles set out in *X v Liverpool City Council* in upholding the dismissal of an Article 8 claim by a mother whose baby had been removed from hospital under section following concerns about possible factitious illness, but it was later concluded that there was in fact no cause for concern. In doing so the court expressed some cautionary observations about this class of case which I must keep in mind:

    a. Local authorities are required to protect children from the risk of harm, and cannot wait until that risk has been conclusively proved or disproved. Hedley J, with the agreement of Jackson and Carnwath LJJ said [paragraph 6]:

    ….. child protection is just that. It is protection from the consequences of perceived risk. There will be cases, as here, whether either risk was incorrectly perceived or did not eventuate. That of itself does not mean that protective measures were wrongly taken. It merely illustrates the price that sometimes has to be paid for having a child protection system and it is unfortunate that it was exacted from this appellant and her son

    b. However the powers involved must be exercised lawfully and proportionately:

    Nevertheless, because child protection powers can have draconian consequences, it is essential that they are exercised lawfully and proportionately.

    c. Hedley LJ went on to observe [paragraph 9] that in deciding whether to seek parental agreement under Part III of the Act, or to apply for an EPO, or to leave the matter to the police under section 46 it was

    incumbent on the local authority where practicable to act in partnership with a parent and to devise a process (whether by supervision, retention in hospital or removal) which commands at least the acquiescence of the parent. That accords with both the spirit of the Act and with Convention requirements of Proportionality.

97. The defendants maintained from the outset that there was in law no duty of care owed to the parents, as opposed to the children on the authority of *JD v East Berkshire County Council* [2005] UKHL 23; [2005] 2 AC 373. That authority established that in relation to the diagnosis of sexual abuse against children no duty of care was owed to parents as to impose such a duty on social workers and doctors would give rise to a conflict with the duty owed to the child. It was submitted that there was no valid distinction between that case and this.

98. For the claimants it was submitted that *JD* could be distinguished because the claim here is limited to the time after the children were taken into care and after a decision had been made that there was insufficient evidence to keep

them there and their action in retaining the children was outside the scope of their statutory authority. Relying on the speeches of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*, and Lord Slynn in *Barrett v Enfield London Borough Council*, it was contended that where the decisions taken were so unreasonable as to fall outside the scope of the ambit of discretion conferred on the local authority, or if the authority acted in abuse or excess of its power, it could not be supposed that there was an immunity. This, it was argued, was a case of operational failings not of policy.

99. *JD* concerned an application to strike out cases as showing no arguable cause of action on the pleadings. It was alleged, and had to be taken as true for the purposes of the decision, that in breach of acceptable professional standards, an erroneous diagnosis of abuse had been made. The majority held that a common law duty of care owed to the parents would be in conflict with the performance of a duty to the children who required protection. Lord Nicholl put it this way [paragraph 78]:

The existence of such a duty would fundamentally alter the balance in this area of the law. It would mean that if a parent suspected that a babysitter or a teacher at a nursery or school might have been responsible for abusing her child, and the parent took the child to a general practitioner or consultant, the doctor would owe a duty of care to the suspect. The law of negligence has of course developed much in recent years, reflecting the higher standards increasingly expected in many areas of life. But there seems no warrant for such a fundamental shift in the long established balance in this area of the law.

Although the facts of the cases arose before the enactment of the Human Rights Act 1999 and the importation of Article 8 rights into domestic law, their Lordships did consider the impact of the ECHR right to respect for family life and concluded that it did not alter the substance of the result at common law. Lord Nicholls said [paragraph 85]:

Ultimately the factor which persuades me that, at common law, interference with family life does not justify according a suspected parent a higher level of protection than other suspected perpetrators is the factor conveniently labelled "conflict of interest". A doctor is obliged to act in the best interests of his patient. In these cases the child is his patient. The doctor is charged with the protection of the child, not with the protection of the parent. The best interests of a child and his parent normally march hand-in-hand. But when considering whether something does not feel "quite right", a doctor must be able to act single-mindedly in the interests of the child. He ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent.

Lords Steyn, and Brown gave speeches to a similar effect [see paragraphs 110, 129]

That was the general principle expressed, but their Lordships accepted there could be exceptions, albeit limited ones. Lord Nicholl, at paragraph 91, said:

This should be the general rule, where the relationship between doctor and parent is confined to the fact that the parent is father or mother of the doctor's patient. There may, exceptionally, be circumstances where this is not so. Different considerations may apply then. But there is nothing of this sort in any of these three cases. The fact that a parent took the unexceptional step of initiating recourse to medical advice is not a special circumstance for this purpose. Nor is the fact that the parent took the child to a general practitioner or to a hospital to see a consultant

100. There is a suggestion in the earlier case of *S v Gloucestershire County Council* [2001] Fam 313, 338-339 by May LJ that the principles enunciated in *X)(Minors) v Bedfordshire county Council* [1995] 2 AC 633 did not apply across all cases which could be labelled as "child abuse" cases. He observed: *it may be seen that a decision whether or not to take a child said to have been abused away from its natural parents and into care may often be acutely difficult. But many of the decisions about care and upbringing of a child once he or she has been taken into care, difficult though they may be, may not have the acute complications, strains and conflicts identified in the Bedfordshire cases.*

101. The evidence offered in this case has been considered already. I have found that at material times the defendants were indeed acting outside the statutory authority granted to it by Parliament to interfere with the family life of Mr and Mrs Williams. However they were doing so in the mistaken belief that they had sufficient consent from the parents to authorise their actions under section 20 of the Children Act 1989. They were taking decisions and implementing actions solely for the purpose of protecting children against risks which, on the basis of the information they had, they reasonably believed required protective steps to be taken. It was not disputed that some action was justified as a result of what was found on 6 July. There was at all times a potential for conflict of interest between the children and their need for protection and the parents who were suspected of neglect and abuse. The fact that they were subsequently exonerated of the criminal allegations does not mean there was not a basis for a belief that protective action was required. Therefore I find some difficulty in the distinctions Ms Cooper has sought to persuade me exist between this case and one concerning the actual diagnosis of abuse. Diagnosis and assessment of risk to children is not a one off event, but a continuous process in which the significance of information and the balance of risks has constantly to be reviewed. As the, at times somewhat painful, dissection of decisions and processes in this case has shown, disentangling the rights and wrongs of individual decisions can be complex. It would in my judgment raise the danger of inhibiting authorities from taking steps to safeguard children in difficult cases were they to be open to a minute examination of their every action in a case like this. In short, if there are exceptional cases where there is no conflict justifying an exclusion of cause of action in favour of a parent, this is not one of them. This is not to apply a

blanket policy, but to do my best to apply the principles of the common law as determined by the higher courts to the facts of this case.

102. There is a further reason why in my judgment a claim in negligence cannot be pursued in this case. Even if there is a duty of care, and a breach of that duty, the claimants have to show actionable damage caused by the breach. The claimants accept that they have neither pleaded nor suffered any psychiatric or other personal injury and that damages cannot be recovered for psychological trauma or distress falling short of that. If I understand Ms Cooper's submissions correctly, her case is that there is pure economic loss for which the defendants are liable. The loss is said to be a loss of a chance of Mr Williams making a profit from the introduction of a developer of a hotel complex in Nigeria to a lender, and that work to this end was prevented by the traumatic events surrounding the removal of the children. An agreement dated 28 May 2007 is produced between two companies, signed by Mr Williams in the capacity of CEO and chairman of one of them. Apart from that the only evidence is that in Mr Williams's statement that he received a sum of £10,671 in expenses for the work done on the contract. Mr Williams claims they lost the chance of gaining US$263,000 as a result. I observe that such a huge profit is completely at odds with the impoverished circumstances in which the Williams family were living. There is no evidence of a previous pattern of income which remotely equates to this expectation. In my judgment this is little more than wishful thinking. Leaving aside the inherent improbability of this claim and the completely speculative basis on which it is submitted that I should award 25% of this sum for loss of chance I consider that any such loss was not sufficiently proximate to the alleged breach of a duty of care. Put another way I reject the contention that a loss of this nature was the reasonably foreseeable consequence of a local authority seeking, albeit imperfectly, to exercise its statutory responsibilities to safeguard children.

103. For these reasons I conclude that as a matter of law the claimants have not shown that on the facts proved there is a cause of action in negligence, or a loss which would be recoverable in negligence.

Religious discrimination

104. I can deal with this allegation shortly. The defendants rightly complain that the pleaded claim contains no substantial particularisation of it. The claimants' evidence did little more. The case amounts to this. In paragraph 36 of the reply the claimants allege that they were treated more harshly by Mrs McLaughlin than would a person who was not of their religion. The sole basis for this allegation is that on 6 September she asked Mr Williams over the telephone for details about his church, its publicity and details of the contract for the church hall. This is said to amount to an implied threat that if the information were not provided it would further delay the return of the children. I accept Mrs McLaughlin's explanation for these questions. Details of Mr Williams's church, of which he was a pastor, were needed in order to enable the authority to fulfil its duty to report information about the case to the designated safeguarding officer for investigation. Pastors are in a position of trust and where allegations of abuse are raised this process is required. With considerable passion Mrs McLaughlin convincingly explained to me that she

was not a person who would discriminate against any one on the ground of religion. This allegation is without foundation and I dismiss it.

Misfeasance

105. The particulars of claim allege that Ms Toal knew as evidenced by her memo of 19 July that a decision had been made to return the children and that her continued involvement in the case thereafter in the knowledge that the separation of the children from their parents was not authorised was misfeasance. A further allegation is effectively that any officer with that knowledge was guilty of misfeasance. No other officer was named in the particulars, but in the reply Mrs McLaughlin was alleged to have had the relevant knowledge that

a. The claimants retained the right to take their children home at any time
b. There were no grounds for obtaining a court order to authorise retention of the children

It is further alleged that Ms Toal and Mrs McLaughlin deliberately acted to refuse to permit the claimants to take their children home in the knowledge that they were acting beyond their powers or with reckless indifference to whether or not they had such power, and knowing that to do so would cause harm loss and damage to the claimants.

106. The case was put on the basis of the second form of misfeasance identified in *Three Rivers District Council v Bank of England (No 3)* [200] 3 All ER 1 in which the ingredients of the cause of action are

a. an act done by a public officer
b. knowing or recklessly indifferent to the fact that:
    i. he had no power to do the act complained of
    ii. the act would probably injure the claimant

107. I have set out in detail my findings of fact with regard to the actions of both Ms Toal and Mrs McLaughlin. Dealing first with the issue of authority to place and keep the children in foster care, while I have found the defendants did indeed not have the valid consent of the parents to the accommodation of the children in foster care, or any valid legal authority to retain them in such care after the expiry of the police protection order, I am satisfied that these officers honestly believed they had such authority for the reasons I have explained above. They were not in my judgment recklessly indifferent either to the need for legal authority for their actions or the possibility of harm to the claimants. As to the first, the defendants legal department were involved at many of the critical stages of the management of this case, and there is no evidence that they were other than supportive of the actions being taken by these officers and their colleagues. It is evident to me that throughout the process the officers were genuinely attempting to bring about the reunification of the family, even if this was not at a pace which satisfied the parents. Both of them may have been mistaken in their belief that there had been a valid consent or that any such consent had not been withdrawn, but this was based on their judgment of the factual situation and their honest conclusions. There was in my judgment no deliberate action to delay the end of a known unauthorised or unlawful separation.

108. It was suggested in closing submissions that there was a further act of misfeasance in refusing to allow the parents to accompany their child, whom they feared had been sexually abused to a medical examination on 29 August. No such act was complained of as misfeasance in either the particulars of claim, reply or the opening written skeleton argument. Not surprisingly therefore it was not perhaps the focus of as much attention during the hearing as it might otherwise have been. The nearest to a contemporaneous account I have seen was in an email dared 30 August 2007 by Mrs McLaughlin. After the concern of abuse as raised by the parents the plan was that the children be taken to a general practitioner, she decided that in the interests of the child the parents should not go because of the way they behaved in taking photographs. The GP declined to undertake the examination because the children were on the Child Protection Register. Arrangements were subsequently made for an examination by a paediatrician and the parents accompanied their daughter to that appointment. Mrs McLaughlin was concerned at the parents' behaviour in insisting that their daughter had been "violated" and in demanding an internal examination, which the paediatrician considered to be unwarranted. Mrs McLaughlin could remember little of this episode, but Mrs Toal agreed that she had a view that the parents should have been part of the process but that she could not override her manager's decision. Mrs Williams gave evidence on this episode. In the course of telling me her recollection she became very distressed and a pause was required while she recovered some form of composure. I have no doubt that she was exhibiting genuine distress, and would have been very distressed at the time. Given the parents' reaction to their suspicions, as described by Mrs McLaughlin, I consider there was potential reason to be concerned at the impact on the child of their presence at an essential medical examination. Where the welfare of a child is at risk it cannot be that the parent has an absolute right to be present. While the judgment of Mrs McLaughlin may be open to question on this issue I am satisfied neither she nor Ms Toal deliberately or recklessly contravened the parents' rights. In any event any failure to recognise their rights to be present at an examination were not in practice contravened, as in the result the GP conducted no examination. Therefore no case of misfeasance is proved in respect of this incident.

109. I accordingly I reject the claim in misfeasance.

Liability under the Human Rights Act

110. Section 7 of the Human Rights Act 1998 provides that a victim of an act of a public authority made unlawful by section 6 may bring an action against the authority. Section 6 makes it unlawful for a public authority to act in a manner which is incompatible with the specified Convention Rights. In this case the right engaged is that in Article 8 which reads [Schedule 1 paragraph 1 of the Act]:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of other.

111. It is not disputed that the rights set out in Article 8 are engaged on the facts of this case and therefore it is unnecessary to burden this judgment with extensive citation of authority. Clearly the separation of children from their parents is an interference with the parents' family life and therefore to be lawful such an action must be justified by reference to the qualification of the right set out in article 8(2). The first such qualification is that the interference must be in accordance with the law. For the reasons I have already set out the consent necessary in law for a separation by virtue of section 20 of the Children Act 1989 was not obtained. Alternatively even if agreement to the separation was validly obtained out the outset, that agreement was withdrawn by the solicitors' letters of 13 July. It follows that, while the initial removal of the children from their home was lawful and indeed a proportionate and necessary response to the need to safeguard them from harm, the actions of the defendants in retaining the children away from their parents after the expiry of the 72 hour period were unlawful, and therefore the interference with the parents' Article 8 rights was also unlawful. The interference only came to an end when the children were returned on 11 September. This remains the case even if, hypothetically, the separation might have been rendered compliant with the State's Article 8 obligations by seeking the authority of the court for it.

112. The defendant contends that the human rights claim, is time barred by virtue of section 7(5) which provides that

> *Proceedings under subsection (1)(a) must be brought before the end of—*
> *(a) the period of one year beginning with the date on which the act complained of took place; or*
> *(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances*

113. It is clear from the authorities that the court is accorded a broad discretion with regard to the period within which it can consider it equitable to allow a claimant to bring a claim, and that the exercise is not on all fours with an extension of time limits under the Limitation Act 1980. Lord Dyson JSC set out the principles succinctly in *Rabone v Pennine NHS Trust* [2012] UKSC 1, [2012] 2 AC72, 100 paragraph 75:

The court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These

may include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one-year period; and the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant. However, I agree with what the Court of Appeal said in Dunn v Parole Board [2009] 1 WLR 728 , paras 31, 43 and 48 that the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question of interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980.

114. This claim was started on 1 July 2013, nearly 6 years after the actions complained of. The defendants contend that the passage of time is such that it would be inequitable to allow it to proceed. They say that they are hampered in their defence by the lack of availability of evidence and they point to the absence of much material in the files of Sternberg Reed, or the criminal solicitors. They contend further that the time taken for a complaint to be processed with the Local Government Ombudsman is immaterial as that complaint was never going to resolve the issues in this case. There had been independent findings in 2009 and these proceedings were launched four years after that.

115. In my judgment the length of time taken to bring these proceedings, though considerable, does not make it inequitable to allow the claim to proceed. The final decision of the Local Government Ombudsman was issued on 22 April 2013, less than three months before these proceedings were started. I note that the proceedings before the Ombudsman were protracted, including a judicial review application [which resulted in the Ombudsman re-opening the investigation] and a review of a provisional report. While a significant amount of the time taken in this process seems to have been about the handling of the claimants' complaints, rather than their initial treatment, I consider it reasonable for them to have awaited the final outcome of the process before issuing these proceedings. The latter stages involved interviewing both Ms Toal and Mrs McLaughlin, which had not been undertaken before. One of the complaints considered was the alleged failure to return the children when the parents "withdrew their consent" – referred to as "complaint 3" in the Ombudsman's report. The Ombudsman's conclusion was that the defendants had been at fault in failing to record the claimants' consent and in failing to explain the process to them. While this outcome did not entirely satisfy the claimants, there was a sufficient overlap with the subject-matter of this claim for it to have been justifiable to await the Ombudsman's final decision. Furthermore the continuation of the complaints process meant that the defendants had a continuous reason to maintain their records and indeed recollections of this case.

116. With regard to the effect of the passage of time on the cogency of the evidence, I have already commented on this. In my judgment the recollection of all witnesses has to some extent been hampered by this, but in my judgment

there has been sufficient documentary material enable them to refresh their memories on the most significant issues. In any event I doubt whether memories for some of the details lost would have been any better within a year of the events in question. I have paid regard to the difficulties of memory to ensure in assessing the evidence, and in particular the evidence of the defendants' witnesses. In assessing the defendants' compliance with such a fundamental requirement as obtaining the fully informed consent of the parents for the very serious step of placing all their children in foster care it is to be expected by public authority that it will take care to retain such documentation as sufficiently records the steps taken in that regard. It has very largely been possible to assess the merits of the claim in this respect by reference to the defendants' documentation which has proved to be demonstrably inadequate, but not missing.

117. Finally I consider the evidence relating to a breach of the claimants' rights sufficiently cogent to justify the claim being brought, albeit out of time. Their entitlement to a remedy outweighs such prejudice as may exist.

118. For these reasons I have concluded that it is equitable to allow the claim to proceed in all the circumstances of the case. I have borne in mind that it is clearly desirable that such claims be brought as soon as possible after the events in question and that public authorities should not be kept under threat of such proceedings indefinitely. However here for the reasons described the defendants were inevitably going to be concerned with this case until the conclusion of the Ombudsman's process.

Remedy

119. The claimants seek financial redress and submit that I should award £15.000 to each on the basis that a declaration that their rights have been unlawfully interfered with would be an insufficient remedy. I was referred to *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWHC 3563, *TP and KM* [2001] 1 FLR 549; *PC and S v United Kingdom* [2002] 2 FLR 631, *Venema v Netherlands* [2003] 1 FCR 153 as indicating that the range of damages for cases of this nature lay between £10,000 to £15,000. Perhaps the most pertinent case is *AD vi United Kingdom* [2010] ECHR 28680/06, which was the ECHR claim resulting from the *JD* case [above]. There the interference with the parents' Article 8 rights through unjustified separation from their child. While it accepted that the decision to investigate injuries was justifiable, they held there was an unlawful interference the result of which included an enforced stay in an assessment centre of 12 weeks and a six week separation later. An award of E15,000 was made to the parents jointly.

120. *Rabone v Pennine NHS Foundation Trust* concerned a claim by parents under Article 2 of the ECHR arising out of the failure of a hospital trust to prevent the death of their daughter by suicide. The Court of Appeal [2010] EWCA Civ 6698, [2011] QB 1019, while rejecting their claim opined obiter that an award of £5,000 for each of the parents would have been appropriate. While the parents succeeded on their appeal to the Supreme Court [above]on liability they did not appeal on the issue of quantum, but the defendant did. Dyson PSC considered the ECHR authorities on redress and

noted that the range of awards in such cases was between E 5000 and E60,000, He described this range as "considerable" but "relatively modest". [paragraph 85] he went on:
This is not surprising, because Strasbourg does not award a fixed conventional figure for this head of loss. One would expect the court to have regard to the closeness of the family link between the victim and the deceased, the nature of the breach and the seriousness of the non-pecuniary damage that the victim has suffered. Factors which will tend to place the amount of the award towards the upper end of the range are the existence of a particularly close family tie between the victim and the deceased; the fact that the breach is especially egregious; and the fact that the circumstances of the death and the authority's response to it have been particularly distressing to the victims. Conversely, factors which will tend to place the award towards the lower end of the range are the weakness of the family ties, the fact that the breach is towards the lower end of the scale of gravity and the fact that the circumstances of the death have not caused the utmost distress to the victims.

Noting that the family ties were strong, that the parents had expressed their anxiety to the authorities and that the very risk which they feared and warned the authorities against occurred, making the occurrence of their daughter's death all the more distressing, he considered that made it a "bad case". He thought that there was real force in the argument that the £5,000 preferred by the Court of Appeal was too low but as there was no appeal against this by the claimant, that assessment would have to stand: see paragraphs 87, 88.
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121. I consider that comparable factors are relevant in an Article 8 case generally, and the present case in particular. This was undoubtedly a close family presided over by loving parents. They were extremely distressed by the continued separation from their children and constantly voiced their anxieties in that regard to the defendants. They witnessed the adverse effects of foster care on more than one of their children, one of whom was a baby who was being breast fed. On the other hand, I must bear in mind that the initial separation was justified, and that an investigation of the type which occurred would have taken place in any event. This is not a case of permanent loss or bereavement, and the children were returned in the end.

122. Clearly the claimants have not received adequate redress to date. While certain of their complaints were upheld by the complaints process and the Ombudsman, they have received no acknowledgement let alone compensation for the unlawful deprivation of the care of their children for a number of months. Reminding myself that awards of this type should be fairly modest, I consider that the appropriate sum to award to each parent is £10,000 each. It was contended by Ms Cooper that I should award aggravated or exemplary damages, but if I understood her submissions correctly this related to the misfeasance claim which I have rejected. In any event I do not consider that such an award would be appropriate.

Conclusion

123. For the reasons given judgment will be entered for the claimants in the sum of £10,000 each. I will hear submissions on any further and consequential orders that are said to arise out of this judgment.