Claim no. A15YP024

IN THE LINCOLN COUNTY COURT

Court Hearing Centre
360 High Street, Lincoln
Lincolnshire LN5 7PS

Date: 16/02/15

Before:

MR. RECORDER R. WILSON QC

Between:

H

Claimant

- and -

LINCOLNSHIRE COUNTY COUNCIL

Defendant

Mr Paul Garlick QC (instructed under the Bar Council's direct access scheme)
on behalf of the **Claimant**

Mr Matthew Purchase (instructed by Legal Services Lincolnshire)
on behalf of the **Defendant**

Hearing date: 16th December 2014

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR RECORDER R. WILSON QC

MR RECORDER R. WILSON QC:

Preliminary

1. In the course of this judgment, I shall refer to the Claimant's daughter. Pursuant to section 39 of the Children and Young Persons Act 1933, I direct that no steps should be taken or information published that is likely to lead to the identification of the Claimant or the Claimant's daughter. This direction relates solely to this judgment.

The Application

2. This is an application by the Defendant local authority to strike out the Claimant's entire claim under CPR 3.4(2)(a) on the basis that the Claimant's Particulars of Claim disclose no reasonable grounds for bringing the case and/or pursuant to r.3.4(2)(b) on the basis that the Particulars of Claim is an abuse of the process of court or is otherwise likely to obstruct the just disposal of the proceedings. Further or alternatively, the Defendant applies for summary judgment to be entered against the entire claim under CPR r.24.2 on the basis that the Claimant has no real prospect of succeeding on the claim and that is there is no other compelling reason why the case should be disposed of at trial.

The Background

3. The Claimant is the mother of M (d.o.b 24.03.99). Following an alleged assault by M on the Claimant, the police referred M to the Defendant's Children's Services on 12 May 2011. Subsequently, there was a further allegation of assault by M on the Claimant, and on 19 June 2011 the police made a further referral.

4. On 20 June 2011, the Defendant carried out an initial assessment of M. Between 28 June 2011 and 8 July 2012, the Defendant carried out four "core" assessments of M. On 17 July 2012, the Defendant held a child protection conference ("the CP Conference"). The CP Conference determined that M should become the subject of a child protection plan ("the CP Plan"). The primary presenting concern was stated to be that of emotional harm to M; the secondary concern was stated to be that of "neglect".

5. The Defendant held three review CP Conferences over the following 12 months. There was a review CP Conference on 15 October 2012 ("the first review CP

Conference"). The Claimant did not attend but provided written submissions. The CP Conference determined that M was no longer at risk of neglect, but determined that the CP Plan should be maintained with regards to the primary presenting concern of "emotional harm".

6. There was a second review CP Conference held on 27 February 2013 ("the second review CP Conference"). The second review determined that as there had been no assessment of M's needs since the CP Plan had been put in place (in July 2012), it was not possible to discontinue the CP Plan.

7. Finally, there was a third review CP Conference on 23 July 2013. It was determined that M should be taken off the CP Plan given that M had, by the time of that review, attended school for one academic year and that the further information that had been received from M's head-teacher had not given rise to any safeguarding concerns.

The Claimant's Application for Judicial Review

8. On 23 May 2013, the Claimant issued an application for permission to seek judicial review of the Defendant's decision at the second review CP Conference (27 February 2013) to maintain M on a CP Plan.

9. On 8 August 2013, Dobbs J dismissed the Claimant's application for permission to apply for judicial review. The judge decided that the judicial review claim was by then academic, given the withdrawal of the CP Plan by the Defendant by that date; but that, in any event, the claim was unarguable on the merits.

10. The Claimant renewed her application for permission for judicial review at an oral hearing before Stuart-Smith J, on 26 November 2013. The application was dismissed. Stuart-Smith J stated that the claim was academic for the same reason given by Dobbs J. He also went on to consider whether the claim had any arguable prospects of success in any event. He concluded that it did not, stating that:

> "There was evidence, although it would be hotly contested by the Claimant, to support the view that the Claimant's daughter was suffering or was likely to suffer from harm, as defined by the Act, for the reasons set out in the minutes of the child protection conferences and the cores assessments. The Claimant says that these are inaccurate, and she has identified some inaccuracies but none that would vitiate the decision taken on 27 February 2013. She alleges bias, but I have found no evidence to suggest that this allegation is well-founded or provides a ground for judicial review of the decision taken on 27 February 2013. What happened on 27 February was to my mind, consistent with the Defendant attempting to discharge its statutory obligation to her daughter lawfully".

11. On 19 June 2013, the Claimant brought a second claim for judicial review, on that occasion against the Defendant and the Lincolnshire Safeguarding Children's Board. On 1 August 2013, Geraldine Clark sitting as a deputy judge of the High Court dismissed the application for permission. On 24 September, at an oral hearing, Haddon-Cave J dismissed the renewed application for permission. Unlike the first claim for judicial review, the second claim for judicial review did not deal directly with the matters now complained of by the Claimant in the instant claim ("the claim"), which is the subject of the application before me. But the Defendant says that the second set of judicial review proceedings are nonetheless relevant to the issue of whether the Claimant should be granted an extension of time in which to bring her claim. This matter will be addressed more fully later on in this judgment.

The Child Protection Conference procedure

12. To set the claim in the instant proceedings in context, it is necessary to refer to the statutory provisions and Departmental guidance that deals with the Child Protection Conference procedure.

13. Under section 47(1) of the Children Act 1989, where a local authority has *"reasonable cause to suspect that a child who lives … in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide what action they should consider to take to safeguard or promote the child's welfare"*. Subsection (3) provides that: *"the enquiries shall, in particular, be directed towards establishing (a) whether the authority should make any application to the court, or exercise any of their other powers under this Act"*.

14. Under subsection (8) where, as a result of complying with section 47 of the 1989 Act, *"a local authority conclude that they should take action to safeguard or promote the child's welfare they shall take that action (so far as it is both within their power and reasonably practicable for them to do so)"*.

15. On 23 March 2013, the Department of Education published statutory guidance *"Working together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children"* ("the Guidance"). The Guidance provides that where the outcome of a section 47 inquiry is that concerns of significant harm are substantiated and the child is judged to be suffering, or likely to suffer, significant harm the social workers with their managers should *"convene an initial child protection conference"* (p.38).

16. The Guidance describes the purpose of the initial child protection conference as being to: *"bring together and analyse, in an inter-agency setting, all relevant information and plan how best to safeguard and promote the welfare of the child. It is the responsibility of the conference to make recommendations on how*

agencies work together to safeguard the child in future" (p.40). The child protection conference tasks include: *"agreeing an outline child protection plan, with clear actions and timescales, including a clear sense of how much improvement is needed, by when, so that success can be judged clearly*" (p.40).

17. Following the initial child protection conference, the Guidance describes the aim of the child protection plan being to (amongst other things):

    - ensure the child is safe from harm and prevent him or her from suffering further harm;
    - promote the child's health and development; and
    - support the family and wider family members to safeguard and promote the welfare of their child, provided it is in the best interests of the child. (p.42).

18. The Guidance provides that social workers and their managers should determine when the review conference should be held within 3 months of the initial conference, and thereafter at maximum intervals of 6 months (p.44).

19. The Guidance also sets out the circumstances in which the child protection plan should be discontinued: *"A child should no longer be the subject of a child protection plan if: it is judged that the child is no longer continuing to, or is likely to, suffer significant harm and therefore no longer requires safeguarding by means of a child protection plan…"* (p.46).

The Particulars of Claim

20. Counsel for the Defendant informed me that the Claim Form was issued on 21 July 2014. This does not appear to be in dispute between the parties. In her Particulars of Claim, the Claimant brings two claims under section 6 of the Human Rights Act 1998 ("the 1998 Act"). First, she seeks *"an adequate remedy"* for the alleged violation of her rights under Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("the Convention"). Second, she seeks *"an adequate remedy"* for the alleged disproportionate interference with her Convention rights under Article 8, specifically alleging that the Defendant: *"unlawfully deprived the claimant of her family life with M"*. Under the heading *"Statement of value"* the claimant pleads that she *"expects to recover more than the sum of £25,000",* and says that her claim *"exceeds £300,000 or is not limited"*.

21. In support of her human rights claims, the Claimant makes a number of principal complaints about the Defendant's conduct. First, she alleges *"procedural unfairness and incompetence"* by the Defendant. These allegations are pleaded at paragraphs 1 to 6 of the Particulars of Claim. Next, she alleges that first review CP Conference determination was: *"unlawful in that the defendant had no*

reasonable grounds upon which to make the first review determination" (para.7). She then claims that the second review CP Conference determination was: *"unlawful in that the defendant had no reasonable grounds upon which to make the second review determination"* (paragraph 8). Finally, the Claimant avers that throughout the section 47 Children Act investigation ("the section 47 investigation"), and on the occasions of the first and second review determinations, that the Defendant: *"wilfully failed to consider, adequately or at all, the representations made by the claimant and the evidence provided to the defendant by her"* (paragraph 9).

The Defence

22. The Defendant has pleaded its Defence in short form, stating that it is applying to strike out the entire claim and/or seeking summary judgment on entire claim. Should the claim survive the instant strike out/summary judgment application, the Defendant avers that it *"will plead more fully to the claim"*.

The Issues

23. Three specific issues fall for determination on this application, namely:

    (1) Is the Claimant's claim out of time; and if it is, should the court extend the time for bringing the claim?

    (2) Is the Claimant prevented from bringing her claim on *res judicata* grounds?

    (3) Does the Claimant have a real prospect of succeeding on the Article 3 claim or issue?

The Law

24. *Civil Procedure Rules*. CPR r.3.4(2) provides:

> **3.4— Power to strike out a statement of case**
>
> (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court–
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.

25. CPR r.24.2 provides:

24.2 Grounds for summary judgment

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if–

(a) it considers that–

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

26. *Human rights claims*. The Claimant brings her claims under section 6(1) of the 1998 Act, which provides that:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

27. Under section 7(1)(a) of the 1998 Act, a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the 1998 Act, may bring proceedings against the authority under that Act in the appropriate court or tribunal.

28. As to the Claimant's heads of claim, Article 3 of the Convention provides:

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

29. Article 8 of the Convention deals with the right to respect for private and family life, and provides:

> "1. Everyone has a right to respect for his private and family life, his home and 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 protections of health or morals, or for the protection of the rights and freedoms of others"

30. *Time limits*. Under section 7(5) of the HRA 1998 any proceedings under section 7(1)(a):

> "… must be brought before the end of -
>
> (a) the period of one year beginning with 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

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

31. In *Dunn v. Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, the Court of Appeal heard an appeal that a strike out application was statute-barred under section 7(5)(a) of the 1998 Act, and that it was not equitable in all the circumstances to extend the period for bringing the claim under section 7(5)(b). In dismissing the appeal, the Court of Appeal held that the claim was out of time and that the judge had exercised his discretion correctly in determining, pursuant to section 7(5)(b), that it would not be equitable to extend time for bringing the proceedings, and that accordingly the claim should be struck out under the 1998 Act on the ground that it was statute-barred.

32. On the correct approach to the grant of extension of time for bringing proceedings under the 1998 Act, Thomas LJ who gave the principal judgment of the court, stated:

> "30. It was common ground in the submissions to us that a court should not add to or qualify or put any gloss upon the words "equitable having regard to all the circumstances" when considering the exercise of the discretion under section 7(5)(b) of the Human Rights Act 1998 (which I have set out at para 9 above). The words of the subsection meant exactly what they said and the court should not attempt to rewrite it.
>
> 31. I accept the submissions made. Parliament gave the court a wide discretion; I do not think it would be helpful to list the factors to be taken into account or to state which should have greater weight or lesser weight. The statute requires the court to consider all the circumstances in deciding whether it is equitable to allow a longer period within which to bring the claim. It is useful, I think, to refer to the observations of Earl Loreburn LC in the House of Lords in *Hyman v. Rose* [1912] AC 623 in relation to the exercise of a very wide statutory discretion, even though given in the very different context of relief against forfeiture. He disagreed with the approach of the Court of Appeal which had thought it helpful to lay down some general principles according to which the discretion should be exercised. Earl Loreburn LC made it clear, at p 631, that where the court was given a wide discretion and directed to consider all the circumstances, it was not desirable to fetter that discretion by rules.
>
> 32. In my view, it is desirable to follow a similar approach in relation to the Human Rights Act 1998 and not to list the factors or to indicate which factor may be more important than another. It is for the court to examine in the circumstances of each case all the relevant factors and then decide whether it is equitable to provide for a longer period. It may be necessary in the circumstances of a particular case to look at objective and subjective factors; proportionality will generally be taken into account. It is not in my view appropriate to say that one particular factor has as a matter of general approach a greater weight than others. The court should look at the matter broadly and attach such weight as is appropriate in each given case.
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> 33. The three first instance cases cited to us might at first sight indicate a more prescriptive approach, but on analysis I do not consider that any of these decisions did more than highlight the factors that the judge thought of greatest weight on the facts of that case".

33. Thomas LJ then went on to consider further some of the cases cited to the court. He made some observations, by way of illustration only, of the factors judges in the cited cases *"thought of greatest weight on the facts before them"*. First, in *Weir v. Secretary of State for Transport* [2005] UKHRR 154, certain shareholders in Railtrack Group plc had brought a human rights claim under Article 1 of the First Protocol (peaceful enjoyment of possessions) against the Secretary of State, in respect of an administration order made for the company. Thomas LJ observed of this case (at [33](i)), that:

> "Lindsay J extended the period under section 7(5)(b) in circumstances where the Secretary of State had known for a long time that a Human Rights Act 1998 claim might be made and the raising of the issue by amendment had caused no surprise. The judge described his approach, at paras 36 and 57:
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> > "36. So it seems to me that the proper approach, having in mind Woolf LJ's observations [in *R v Comr for Local Administration, Ex p Croydon London Borough Council* [1989] 1 All ER 1033, 1046] is that an absence of prejudice, so far as section 7(5)(b) is concerned, is a highly material factor but is not of itself conclusive in favour of an extension of time being granted. One cannot say simply because the defendant suffered no prejudice, ergo there should be an extension of time. Delay, as it seems to me, must always be a relevant consideration."
> >
> > "57. … I have to consider whether here it would be proportionate to deny the claimants the right to raise the human rights aspect of the case simply because a claim form or a stand-still agreement was not sought within the period."

34. Thomas LJ then referred to the decision in *Cameron v. Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2007] 1 WLR 163, which concerned claims under Article 2 (right to life) and Article 8 of the Convention, both of which were said to arise out of the Potters Bar railway accident. Thomas LJ stated (at [33](ii)) that:

> "Sir Michael Turner in declining to extend the period under section 7(5)(b) referred to the provisions of section 33(1) of the Limitation Act 1980, at para 43:
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> > "Section 7 of the 1998 Act prescribes a limitation period of one year from the date of the occurrence giving rise to, and the initiation of, the proceedings except that, if the court considers it equitable to extend the period, it may do so. The word 'equitable' in this statutory context has an obvious resonance with its use in the Limitation Act 1980. Section 33(1) of that Act permits the court to direct that the primary period of limitation shall not apply if it appears to the court that it would be 'equitable' to allow an action to proceed, having regard to the extent to which prejudice would be caused to the claimant or the defendant as the case might be. While it would not be right to incorporate all the circumstances to which the court is enjoined to have regard as set out in section 33(3), which are inclusive and not exclusive of 'all the circumstances', it would not make any sense to disregard them as having no relevance to the circumstances which the court should consider in exercising its discretion whether or not to extend time under these provisions of the 1998 Act."

After setting out the facts and commenting that he did not consider that there were any circumstances which would make it equitable for time to be enlarged, Sir Michael continued, at para 47:

> "As a matter of the proper construction of the section, the presumption has to be that the need to prove that it would be 'equitable' not to apply the limitation provisions rests on those who seek that result. In other words, the burden must be on the claimant to prove that there are circumstances which make it 'equitable' why the defendant should not be able to take advantage of the limitation provisions. There are, in my judgment, no circumstances present in this case where it would be appropriate to rule that they should not apply. Quite clearly, a huge administrative burden would fall on the defendant if it was forced to meet the claim on its strict merits. The disadvantage to the claimant is that he has lost the claim, but that is the consequence of failing to issue his proceedings in time."

35. *Res judicata*. A recent iteration of the *res judicata* doctrine is to be found in *Clark v. In Focus Asset Management and Tax Solutions Ltd* [2014] 1 WLR 2502. There, Arden LJ who gave the main judgment of the court, stated;

> "6. Res judicata principally means that a court or tribunal has already adjudicated on the matter and precludes a party from bringing another set of proceedings (see generally *Lemas v. Williams* [2013] EWCA Civ 1433). The doctrine also covers abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which the claimant ought to have brought in the first set of proceedings (this is known as the rule in Henderson v. Henderson (1843) 3 Hare 100).
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> 7 The requirements of res judicata are different from those of merger. All that is necessary to bring merger into operation is that there should be a judgment on a cause of action. Res judicata may apply either because an issue has already been decided or because a cause of action has already been decided. We are concerned on this appeal with res judicata of the latter kind, known as cause of action estoppel.
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> 8. I take as the requirements of cause of action estoppel the summary from *Spencer Bower & Handley, Res Judicata* , 4th ed (2009) cited with approval by Lord Clarke of Stone-cum-Ebony JSC (with whom Lord Phillips of Worth Matravers PSC, Lord Rodger of Earlsferry and Lord Collins of Mapesbury JJSC agreed) in the recent case of R (Coke-Wallis) v. Institute of Chartered Accountants in England and Wales [2011] 2 AC 146, para 34:
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> > "In para 1.02 *Spencer Bower & Handley, Res Judicata* , 4th ed makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are: '(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was— (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem.'"
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> 9. If the requirements of res judicata are fulfilled, they constitute an absolute bar and the court has no discretion to hold that res judicata should not apply in any particular case.
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> 10. If the requirements of merger are satisfied, it is unnecessary to see if the

> requirements of res judicata were fulfilled, and vice-versa.
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> 11. There is a powerful twofold rationale for the doctrines of merger and res judicata. The first rationale is "the public interest in finality of litigation rather than the achievement of justice as between the individual litigants" (see per Lord Goff of Chieveley in *Republic of India v. India Steamship Co Ltd (No.2)* [1998] AC 878, 903). Mr Clive Wolman, for the claimants, suggests that the public interest in finality arises out of a concern that the public courts and tribunals should not be clogged by repetitious rehearings and redeterminations of the same disputes. This is clearly a powerful consideration.
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> 12 Second there is the private interest. As Sir Nicolas Browne-Wilkinson V-C put it in Arnold v. National Westminster Bank plc [1989] Ch 63, 69, "it is unjust for a man to be vexed twice with litigation on the same subject matter"."

36. And later in the same judgment, when applying the principles cited above to the facts of *Clark,* Arden LJ stated at [52] that the *res judicata* doctrine was *"about not having two bites at the same cherry"*; and that *"the court must focus on the substance of what occurred before the ombudsman and what is involved in the new proceedings"*.

37. *Article 3 of the Convention*. In *R (Limbuela) v. Secretary of State for the Home Department* [2006] 1 AC 396, the House of Lords considered whether the treatment of asylum seekers who claimed to be destitute but had been refused support under the Immigration legislation could be considered "inhuman and degrading treatment" within the meaning Article 3 of the Convention. Lord Bingham of Cornhill stated:

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one.

38. The prohibition in Article 3 is an absolute one, permitting of "no qualification or excuse" (per Sullivan J, in *R (Bernard) v. Enfield LBC* [2003] HRLR 4, 111 at [22]). And:

> "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art.3. The assessment of this minimum level is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim"
>
> See: *A v. United Kingdom* (1998) 27 EHRR 661, at [20].

39. In deciding whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether the object of the treatment is to humiliate and debase the person concerned. Though it is to be noted that the absence of such purpose "cannot conclusively rule out a finding of violation of Art.3" (see *Bernard*, at [24] where Sullivan J considered two cited decisions of the European

Court of Human Rights). In *Bernard*, although he found that the accommodation the claimants were forced to live in was "deplorable", Sullivan J did not consider those conditions crossed the necessary threshold of severity so as to amount to a breach of the claimants' rights under Article 3.

The Defendant's submissions

40. Mr Purchase on behalf of the Defendant submitted that the claim was out of time. He argued that the acts complained of, the section 47 investigation and the first and second review decisions all occurred on or before 27 February 2013, the date of the second review. That it was said is the last matter the Claimant complains about in the Particulars of Claim. So, given that the claim was only issued on 21 July 2014, it is almost five months out of time.

41. Further, it was submitted that it would not be "equitable" for the court to extend the time for bringing the proceedings. There were a number of reasons given: (1) no reasons had been provided by the Claimant as to why it would be equitable to extend time; (2) the Claimant was capable of bringing judicial review proceedings promptly after the decisions in question, and could have done the same in respect of the instant claim. She could have brought the current claim within the limitation period had she chosen to; (3) the Claimant has had "a fair crack of the whip" on the substance of the claim in applications before two different High Court judges; (4) those two judges each took the view that her claim was unarguable; (5) the Claimant was well aware of the 1998 Act because she cited and relied on that Act in those proceedings; (6) the Claimant was in receipt of legal advice during the relevant period. In this respect, reference was made to page 20 of the Claimant's statement of facts for the judicial review proceedings where the Claimant refers to having been *"instructed by my solicitor during July 2012 to disengage with the Local Authority on the grounds that their conduct was entirely questionable"*. Reference is also made to the letter dated 15 November 2012 sent by the Claimant's solicitors (William Bache Solicitors) to the Defendant; (7) the relevant judicial review proceedings came to an end on 26 November 2013 with the decision of Stuart-Smith J. The instant claim was still not issued until 21 July 2014, some 8 months later; (8) the Defendant would suffer prejudice by reason of the fact that time has now passed and the expectation that claims of this kind would be dealt with promptly; (9) Stuart-Smith J was saying that it was not appropriate to delve into the general merits.

42. As to *res judicata*, Mr Purchase submitted that the doctrine applies to this case. Reliance was placed on *Clarke v. In Focus Asset Management* (see above). It was argued that in line with what Arden LJ said at [52] of that judgment, that I should consider the two sets of proceedings and ask myself whether they are "in substance" the same. Mr Purchase submitted that they were.

43. As to the Article 3 claim, Mr Purchase contended that it had no real prospect of succeeding at trial. He pointed out that there was no "justification" defence available for any breach of Article 3. That was a sign, he said, of the seriousness of what needed to be shown to enable a court to make a finding that Article 3 had been breached. In the light of the authorities, it was argued, there was no chance of the Claimant showing at trial that the conduct or decision-making of the Defendant had amounted to "inhuman or degrading treatment".

44. However, Mr Purchase drew a distinction between Article 3 and Article 8. Should the Claimant survive the strike out of her claim either on the ground that it was out of time or that it was an abuse of process of the court by reason of the *res judicata* doctrine, the Defendant did not contend that the Article 8 claim should not proceed to trial. That was because, in comparison to Article 3, there was a much lower threshold. Placing M on a CP Plan was, the Defendant accepted, an interference with the Claimant's family life. It would be a matter for the court to determine at trial whether such interference was an interference with the right to respect for family life within the meaning of Article 8(1) and if so, whether such interference was disproportionate and unlawful having regard to all the circumstances and the various factors set out in Article 8(2).

The Claimant's submissions

45. On behalf of the Claimant, Mr Garlick QC opposed the strike out/summary judgment application. First, as to whether the claim was statute-barred, he submitted that there was a distinction to be made between the judicial review proceedings and the claim in the instant proceedings. In the judicial review proceedings, it was said, the court was concerned with a challenge to specific decisions; it was not concerned with a continuing process, nor was it looking at proceedings in a tortious way, by way of a course of conduct.

46. At paragraphs 1 to 5 of the Particulars of Claim, the Claimant makes a number of allegations about the section 47 investigation; which as a matter of fact continued until the CP Plan was determined on 23 July 2013. Specifically, in paragraph 1 of the Particulars of Claim, the Claimant pleads that: "*between the 20 June 2011, and the 23 July, 2012, the defendant purported to carry out an investigation in respect of the claimant's daughter ("M") under section 47 of the Children Act 1947"*. Mr Garlick submitted that the reference to "23 July 2012" was a typographical error and that the intention was to plead "23 July 2013". He sought permission to amend. I shall deal with that application at the end of this judgment. For the purposes of considering this application, I shall approach the Particulars of Claim as though the Claimant had pleaded the later date. This is because: *"where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity*

to amend (In Soo Kim v. Youg [2011] EWHC 1781 (QB)" (White Book, 2014 edition, p.81).

47. The Claimant complains about a course of conduct extending for the whole of the period of the section 47 investigation. Paragraph 1 of the Particulars of Claim continues: *"the investigation was conducted in an unfair and incompetent manner, amounting to procedural unfairness to the claimant, thereby resulting in a violation of the claimant's convention rights"*. Accordingly, it was submitted, the challenge made in paragraph 1 of the Particulars of Claim is not simply with regards to a specific decision or decisions but relates to and extends to, the whole period of the section 47 investigation. For example, it was argued, the particulars of procedural unfairness and incompetence aver that the Defendant: *"failed to inform the claimant in a timely manner of the allegations"* (paragraph 2); *"failed to make any proper investigation as to the veracity of the allegations made against the claimant*" (paragraph 4); *"throughout the section 47 investigation and on the occasions of the determination, the first determination and the second review determination, the defendant has acted maliciously and unlawfully towards the claimant in that it wilfully failed to consider, adequately or at all, the representations made by the claimant and the evidence provided by her"* (paragraph 9).

48. It is said that the point made by Stuart-Smith J on the Claimant's renewed permission application for judicial review, makes it clear that there is a clear distinction between the nature of the proceedings before him and the Claimant's instant claim in tort. At [13] of his judgment, Stuart-Smith J said:

> "In conclusion, although the Claimant has spoken eloquently about her concerns about the way in which the local authority has dealt with her and her daughter in the period since 2012, judicial review of these two decisions is not a proper vehicle for a full review of the conduct of the local authority over the years since that has happened".

49. In summary, Mr Garlick argued: (1) the claim was not out of time. The Claim Form and Particulars of Claim were issued on 21 July 2014. Accordingly, as the section 47 investigation did not come to an end until 23 July 2014, the claim was issued with two days to spare; (2) Alternatively, it would be equitable to allow the Claimant to bring the claim out of time because she was a litigant in person who had been focussed on the judicial review proceedings, and no prejudice had been caused to the Defendant by reason of any delay; (3) The Defendant had been aware throughout of the need to preserve documents in order to defend the Claimant's allegations; (4) The Defendant had known the nature of the claim being made against them by the Claimant throughout; (5) This was not a case that properly involved cause of action estoppel or *res judicata*; (6) Referring to the passage in the Stuart-Smith J judgment cited above, the present claim was the proper vehicle for a *"full review of the conduct of the Defendant since 2012"*.

Particularly, as there has never been a full disclosure of evidence by the Defendant in relation to the Claimant's claims; (7) To prevent the Claimant from bringing a claim under the 1998 Act would itself be a violation of Article 13 of the Convention; (8) It was accepted that Article 3 of the Convention presented a high bar to overcome, as there is no defence to a violation of Article 3 on grounds of justification. However, it was argued, that the Claimant had been caused "severe distress" by reason of her not being informed of the allegations against her for a substantial period of time. The allegations against the Claimant comprised neglect, inappropriate clothing, and insufficient care. The anxiety and distress the Defendant caused the Claimant as a mother was, it was said, capable of amounting inhuman and degrading treatment.

Discussion

(1) Time limits

50. It is to be noted that the Claimant's claim is not simply one that alleges a cause of action arising out of specific decisions (i.e., the initial CP Conference and the first and second reviews). In my view, Mr Garlick is right when he says that in the Particulars of Claim the Claimant is alleging causes of action that continue right up until the third review CP Conference on 23 July 2013. Only then, is the decision made to take M off the CP Plan, and thereby bring the section 47 investigation to an end.

51. In reaching this conclusion, I have had regard to the nature of "a cause of action". In *Clark v. In Focus Asset Management & Tax Solutions Ltd* (above), Arden LJ made reference to the well-known passage in *Letang v. Cooper* [1965] 1 QB 232, 242-3, where Diplock LJ said this:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. …
>
> If A., by failing to exercise reasonable care, inflicts direct personal injury upon B., those facts constitute a cause of action on the part of B. against A. for damages in respect of such personal injuries".

52. What is pleaded in paragraph 1 of the Particulars of Claim is an allegation that the section 47 investigation was unlawful. That investigation, as we know, lasted until 23 July 2013. As I have indicated, I am proceeding on the basis that there has been an error in the date pleaded in paragraph 1 of the Particulars of Claim, and that the date that should have been pleaded was 23 July 2013, not 23 July 2012.

53. The particulars pleaded at paragraphs 3 to 5, and 9 of the Particulars of Claim allege failures by the Defendant to keep the Claimant updated regarding the progress of the investigation; to make any proper investigation as to the veracity of the allegations against the Claimant or as to the appropriateness of the qualifications of a certain named individual to contribute to the section 47 investigation. Those are to my mind, allegations of acts or omissions of a continuing nature; and as such are acts and omissions that run concomitantly with the section 47 investigation, which did not come to an end until 23 July 2013.

54. Accordingly, given that it is common ground that the Claimant issued the claim on 21 July 2014, I find that the claim was as a matter of fact issued within the period of one year permitted by section 7(5)(a) of the 1998 Act, and is therefore not out of time.

55. However, if I am wrong as to the claim having been brought in time, I have given consideration as to whether I would, in any event, have found it equitable for the proceedings to be brought out of time. In addressing this issue, I have had regard to the observations made by the Court of Appeal in *Dunn v. Parole Board* [2008] EWCA Civ 374, [2009] 1 WLR 728 (see paragraphs 31 to 34, above). In particular, I note that I have a wide discretion, untrammelled by any particular list of factors, to take account of what I consider I should give greater or lesser weight to in this particular case.

56. On the facts of the instant case, I have treated the following factors as particularly material, namely: (1) the extent, if any, of *prejudice* caused to the Defendant by the delay; (2) the extent of any *delay*; (3) the *reasons* for the delay; and (4) whether it would be *proportionate* to deny the Claimant the right to raise human rights claims because a claim form was not issued in time. I also bear in mind that the burden lies on the Claimant to satisfy me that it would be equitable to extend time in all the circumstances of the case.

57. In considering prejudice, the fact that the evidence in this case is likely to be contained or recorded in written form is significant. The *decisions* in relation to the initial CP Conference and subsequent reviews are all recorded in writing. The *allegations* contained in the Particulars of Claim will have come as no surprise to the Defendant, given that the Defendant would have addressed many of those allegations in the judicial review proceedings (see Defendant's Summary Grounds for Resisting the Claim, [exhibit MDK2]). The Defendant's *reasons* for making the impugned decisions and the reasons underpinning its conduct of the section 47 investigation appear to have been recorded in writing (see Defendant's Summary Grounds for Resisting the Claim, where in the "suggested reading" section of the document, reference is made to minutes and reports for the Child Protection Conference and Plan on 17 July 2012, 15 October 2012, and 27 February 2012; and also note the reference to the letters from the Defendant to the Claimant dated 18 September 2012, 7 November 2012, 6 January 2013, 6 March 2013 and 26

March 2013). There has been no suggestion by the Defendant that the preceding propositions do not represent the position as a matter of fact. Accordingly, the Defendant's contention that there is prejudice by reason of the passage of time is ameliorated in this case by the fact that the Defendant's witnesses will be able to refresh their memories by reference to contemporaneous documents.

58. In considering the question of the extent of the delay, I shall assume for the purposes of this part of the exercise that the initial one year period under section 7(5)(a) of the 1998 Act expired one year after the date of the second CP Plan review; that is, on 27 February 2014. That would mean that there was a five-month delay before the claim was issued on 21 July 2014. In my view, that is a relatively short period of delay, and not something in and of itself that would have led me to find that it was not equitable to extend time.

59. I am less impressed with the reasons given by the Claimant for any delay. The fact that the Claimant was a litigant in person is not something that should put her in any better position than someone who was represented by lawyers. In dealing with a case justly, a court should be fair as between one litigant and another. There should not be one standard for a litigant who is represented and another for a litigant who is not. In any event, it is clear that the Claimant was in receipt of legal advice at material times prior to 27 February 2014 (see paragraph 41(6), above). Further, the Defendant is right to note that the relevant judicial review proceedings came to an end on 26 November 2013 with the decision of Stuart-Smith J, and that the instant claim was still not issued until 21 July 2014, some eight months later. However, for what it is worth, I do acknowledge that the Claimant may have been distracted by the judicial review proceedings from ensuring that she proceeded with the 1998 Act claim expeditiously.

60. In terms of proportionality, I have to conduct a balancing exercise between the object of the legislation to ensure that claims under the 1998 Act are issued expeditiously (i.e., within one year of the cause of action arising), and the object of the same legislation to enable persons adversely affected by decisions of public authorities to seek remedies before a court or tribunal. In my judgment, it would be proportionate to extend time in this case given the nature of the claims made against the Defendant, the relative shortness of any delay and the fact that much of the evidence that will be relied upon by the Defendant is in recorded form which will enable relevant witnesses of the Defendant to refresh their memories from the key contemporaneous documents.

61. I have taken into account all the circumstances of the case, particularly the factors of prejudice, delay, reasons and proportionality. I have also had regard to the other points made by the Defendant on whether it would be equitable to extend time (see paragraph 41, above). In summary, had I not found the claim to be within time, I would have found it equitable for me to extend time for issuing the claim to 21 July 2014 (the actual date of issue), for the reasons given above.

(2) Res judicata

62. *Res judicata* may arise where an issue or a cause of action has already been decided (see *Clark v. In Focus Asset Management and Tax Solutions Ltd* [2014] 1 WLR 2502, at [6]). The Defendant contends that the permission for judicial review proceedings before Dobbs J and Stuart-Smith J and the instant claim are "in substance" the same. In essence, therefore, the Defendant is asserting cause of action estoppel.

63. Stuart-Smith J stated that the judicial review proceedings brought by the Claimant was not the proper vehicle for a "full review" of the conduct of the Claimant since 2012. What I interpret Stuart-Smith J to be alluding to is the nature of the judicial review proceedings. Judicial review proceedings are appropriate for review of the lawfulness of an enactment; or the legality, rationality, procedural propriety or proportionality of a decision, action or failure to act in relation to the exercise of a public function (see also CPR r.54(2)). Judicial review tends to be less appropriate where a heavy fact-finding exercise needs to be carried out by the court. In those circumstances, a fact-finding adjudicative alternative remedy will often be considered by the High Court to be preferable. Further, judicial review is a discretionary remedy. Ordinarily, the High Court will not permit judicial review proceedings to be brought, where there is an equally effective and convenient remedy available to a claimant.

64. In my view, Stuart-Smith J in his judgment was merely stating that judicial review was "not a proper vehicle" to review the conduct of the local authority over the relevant years. The judge did not purport to make any findings as to that conduct, but merely restricted himself to dealing with whether the Defendant's review decision on 27 February 2013 (to maintain the CP Plan) had any arguable prospects of success by way of judicial review. He concluded that it did not. Moreover, the learned judge made no determination on whether the initial CP Plan decision of 17 July 2012 or the first review decision of 15 October 2012, were susceptible to judicial review.

65. The other "decision" that Stuart-Smith J was concerned with related to the Defendant's decision to terminate payments to the Claimant under section 17 of the Children Act 1989 with effect from 5 April 2013. That is not a matter pleaded in the instant claim before me; and is not a matter with which I am concerned on this issue.

66. Moreover, I find that Particulars of Claim the Claimant alleges conduct, comprising acts and omissions, which are of a continuing nature extending throughout a period from 20 June 2011 to 23 July 2013, when the CP Conference was determined.

67. Given all of that, I find that whilst Stuart-Smith J found the Defendant's decision of 27 February 2013 was not susceptible to judicial review, the two sets of proceedings are *not* in substance the same. For these reasons. First, the two sets of proceedings are not co-extensive. The judicial review proceedings concerned the susceptibility of the decision of 27 February 2013 to judicial review. Whereas, the instant claim is concerned with the Defendant's conduct over a period of up to two years, the primary question being whether as result of that alleged conduct, the court should conclude that there has been a violation of Article 3 and/or Article 8 of the Convention. Moreover, the first review CP Conference decision of 15 October 2012, which is a subject of the instant claim, was not a decision specifically made the subject of the application for permission for judicial review before Dobbs J and then Stuart-Smith J.

68. Second, the judicial review proceedings was not the proper vehicle to test and make findings in relation to the numerous factual allegations made by the Claimant against the Defendant; and Stuart-Smith J expressly declined to do so (e.g., see his judgment at [11], [13], [16]-[18]). Whereas, in my view, the instant claim is a proper vehicle for those factual allegations to be tested and determined.

69. Third, the fact that a claim is held not to be susceptible to judicial review does not mean that the Administrative Court has thereby determined the merits of the claim. On the contrary, that Court may often decline to hear a claim for judicial review on the grounds that an appropriate remedy or procedure exists elsewhere. Judicial review proceedings are normally only available where all alternative remedies have been exhausted. That is clearly not the case here, particularly given the fact that the Claimant could have brought a claim on the current grounds, including a complaint about the decision at the second review CP Conference, at the time she brought the judicial review proceedings.

70. Fourth, I do not consider *res judicata* in the sense of cause of action estoppel, applies in the present case. No "cause of action" to my mind has previously been determined. A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person (per Diplock LJ, in *Letang v. Cooper* [1965] 1 QB 232, 242-3). Whether the factual situation exists that would entitle the Claimant to obtain a remedy against the Defendant, is yet to be determined by a court. Stuart-Smith J was not purporting to make any findings of fact in relation to the conduct of the Defendant since 2012. In fact, the very opposite was the case given his express observation that judicial review of the decisions before him was "not a proper vehicle for a full review of the conduct of the local authority" over the relevant years.

71. Accordingly, I find that *res judicata* in the sense of cause of action estoppel does not operate in the instant case. I now move to the third ground on which the Defendant relies in its application.

(3) Article 3

72. The question I have to address here is whether the Claimant has no real prospect of succeeding on the Article 3 claim. The specific issue devolves down to a consideration of whether the claim as pleaded amounts to ill-treatment sufficient to attain the minimum level of severity required to bring it within the scope of Article 3. I particularly bear in mind that in coming to a conclusion on this issue, I must consider all the relevant circumstances of the case; such as the nature and extent of the treatment alleged, its duration, whether it has had physical and mental effects, and so on.

73. The Particulars of Claim allege that throughout the section 47 investigation, the Defendant acted "maliciously and unlawfully" towards the Claimant, in that: *"it wilfully failed to consider, adequately or at all, the representations made by the claimant and the evidence provided to the defendant by her"* (see paragraph 9 of the Particulars of Claim). The "Particulars of violation of Article 3(1)" are bare; in fact, so bare that only the bald allegation that the conduct amounted to "inhuman and degrading treatment" is actually pleaded (see paragraph 11 of the Particulars of Claim).

74. Quite apart from the sparse nature of the pleaded case on Article 3, I have also fully considered the oral submissions of Mr Garlick QC on behalf of the Claimant. He asserted that the Claimant was caused severe distress as a result of not being told of what the allegations against her were (at least, that is, until 4 April 2012); that the Claimant, as a very concerned mother, was caused considerable anxiety as a result of the Defendant's conduct over the course of the section 47 investigation. All that may be so, but those matters in themselves would not be sufficient in my judgment to cross the high threshold of severity required to bring this case within the scope of Article 3. Parents will often be very upset by decisions made by local authorities in relation to their children. That, however, is unlikely without more to bring their cases within Article 3; which is concerned with torture or inhuman or degrading treatment or punishment.

75. In the instant case, the following factors are significant. Although there is a bald assertion of conduct that was "malicious" and "wilful", no sufficient particulars of breach of Article 3 are pleaded. Further, quite apart from the pleadings, there is precious little (if any) evidence on the papers from which an inference could be drawn that it was the object of the Defendant, its officers or employees to "humiliate or debase" the Claimant; and to be fair, Mr Garlick QC did not really suggest that there was. However, I do take into account as noted in *R (Bernard) v. Enfield LBC* [2003] HRLR 4, 111 at [24-25], that the absence of any such purpose does not conclusively rule out a finding of a violation of Article 3. Particularly, that is, where the court is concerned with conditions in which a prisoner might be incarcerated (see *Bernard*, at [28]-29]).

76. I note, like Sullivan J in *Bernard*, that although not conclusive the fact that there was no apparent objective or intention to humiliate or debase the claimant is a most important consideration. Additionally, in the judicial review proceedings, Stuart-Smith J, when dealing with the second review decision on 27 February 2013 stated that to his mind what happened on that occasion was *"consistent with the Defendant attempting to discharge its statutory obligation to [the Claimant's] daughter lawfully"*. Although I am not bound to take the same view as Stuart-Smith J, I have been provided with no reasons or additional evidential material such as would suggest that I should take a different view of the materials to that of the learned judge. In the circumstances, and exercising my own judgment, I find that there is insufficient material on which it could properly be held that the intention of the Defendant in relation to the section 47 investigation was to "humiliate and debase" the Claimant.

77. In summary, I was not pointed to any or any sufficient material during oral submissions, which could lead me to find that there was some evidence (or some sufficient evidence) from which a court, at trial, could properly find that the minimum level of severity of treatment had been reached for the purposes of Article 3 of the Convention. Having considered all material circumstances of the case, in my judgment, there is no real prospect of the Claimant succeeding on the Article 3 claim; and there is no other compelling reason why the Article 3 issue should be disposed of at trial.

Conclusion

78. On the first ground of the Defendant's application (under CPR r.3.4(2)(a)), I find that the claim is not out of time. Alternatively, if it had been out of time, I would have held that it was equitable for me to extend the time for bringing proceedings to the date of issue of the claim.

79. On the second ground (under CPR r.3.4(2)(b)), I find that this is not an appropriate case to strike out the whole claim on the grounds of abuse of process as the *res judicata* doctrine (cause of action estoppel) is not applicable in this case. I reject the Defendant's application on this ground.

80. On the third ground (under CPR r.24.2), I find that there is no real prospect of the Claimant succeeding at trial on the Article 3 issue and that there is no other compelling reason why that issue should be disposed of at trial. Accordingly, I direct that the Defendant be granted summary judgment on the Article 3 claim and that, that issue be struck out from the Particulars of Claim.

81. That leaves the claim under Article 8 of the Convention as the sole head of claim; the Defendant having rightly recognised that the threshold for bringing such a

claim is significantly lower than it is for Article 3, and that it would not be susceptible to a strike out/summary judgment application. It will be a matter for the court at trial, having made relevant findings of fact, to determine whether any interference with the Claimant's family life was necessary and proportionate.

82. I accept Mr Garlick's submission that the intention was to plead the date on which the CP Plan was ended (23 July 2013), and that the actual date pleaded (23 July 2012) has no significance in the case. Accordingly, I grant the Claimant permission to amend her the Particulars of Claim within 14 days of the handing down of this judgment, specifically to enable her to plead the correct date in the first line of paragraph 1 of that statement of case. Such amended statement of case should also show that the Article 3 claim has been struck out by order of the court.

83. I thank Counsel for their respective submissions, and for the considerable assistance given to the court.