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AB vs Worcestershire County Council and Birmingham City Council

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Failure to remove HRA cases – diminished in number, but likely to continue.

Last week's appeal

Dismissal of the Claimant's appeal in AB vs Worcestershire County Council and Birmingham City Council Court of Appeal Judgment will likely reduce the number of Human Rights Act damages claims local authorities face from those who feel Care Orders should have been applied from earlier in their childhood. However, this case was fact-specific, and the possibility of these types of claims being brought on behalf of claimants has not been extinguished.

Background

A couple of months before his 12th birthday on 20 January 2014, the Claimant was taken into care by the First Defendant, following allegations that he had sexually abused a female friend of his brother's.

Just over six years later, a failure to remove claim was issued on his behalf. There was initially a claim for common law negligence and breach of European Convention of Human Rights Convention Rights (ECHR) under Articles 3, 6 and 8. Although the Court described the Particulars of Claim as being set out in an "unusual way", the defendant organisations and their representatives who see these claims regularly won't be at all surprised about how the case was presented.

Effectively, the Claimant's solicitors set out a chronology of the social services records of the two local authorities and effectively asserted that this chronology in itself demonstrated the claim being presented. Clearly, the original pleading was unsatisfactory, and the first set of Claimant's solicitors had several attempts at setting out the pleadings adequately. By the time the case was listed for the hearing and both Defendants' applications for summary Judgement, a fifth draft was before the Court. In this fifth draft, the Claimant discontinued the negligence claim (although permission had not been explicitly given to do so). The Judge at first instance nevertheless worked from this fifth draft and dismissed the claims both under Article 6 and 8, and under Article 3.

How was the case set out?

The way the case was pleaded illustrated the "throw it at the wall and see what sticks" approach we often see in failure to remove cases in letters of claim and pleadings. The Claimant cited 11 incidents when he and his family were living in the Birmingham City Council area between 2003 and 2014; all either referrals which had been investigated (and sometimes not substantiated) or suggestions of physical abuse. The most serious of these allegations was arguably that the Claimant was living in a squalid home, was not fed properly, was dirty, and had bleached hair leaving him with chemical burns on his scalp and neck.

As far as the First Defendant was concerned, the allegations amounted to four complaints between April 2012 and June 2014, again of squalid accommodation. One report of being allowed to wander unaccompanied at night, as well as some allegations of physical and emotional abuse by the Claimant's mother.

By the time the Claimant's new legal team put this case to the Court of Appeal, the only issue before the Court was whether the Claimant had established that his experiences had reached the minimum level of severity to meet the required threshold to demonstrate inhuman

and degrading treatment under Article 3 of the ECHR.

At first instance, the Court Judgement was that none of the reported incidents, even taken at their highest either individually or cumulatively, involved actual bodily injury, intense physical or mental suffering, or humiliation of the severity required to meet the Article 3 threshold.

The Claimant had failed to establish that there was a real and immediate risk of Article 3 treatment, and there was nothing within the records that suggested that the local authority at any point should have been alert to a "real and imminent" risk that the Claimant might suffer significant harm amounting to Article 3 treatment.

In considering the appeal, the Court of Appeal made reference to the decision in Re: MA [Care Threshold) [2009] EWCEA CIV 853. It had to accept that it was better for children to be raised by their parents and families. "*Society had to be willing to tolerate very diverse standards of parenting, including the eccentric, the then inadequate and the inconsistent. Local authorities should only exceptionally intervene to remove children from their parents where they are satisfied that there was this suffering or likelihood to suffer significant harm*."

The Court of Appeal concluded that the Judge at first instance was entitled to draw those conclusions on Article 3, There was clear evidence of insensitive, unkind and poor parenting. However, it did not objectively meet the threshold required to amount to inhuman or degrading treatment.

Was summary judgment appropriate?

One of the challenges defendants find is that these cases are extraordinarily expensive to defend. They usually cost sums wholly disproportionate to the likely damages to be awarded, especially in physical abuse and neglect claims. The claimant's lawyers argued that the claim should have gone to trial, rather than be dealt with by summary judgement.

Their Lordships concluded that the case before them was relatively unusual. The parties appeared to agree there was no other evidence that could have reasonably been expected to be available. Social workers would do little more than refer to records made between eight and 16 years ago, and there was no need for expert evidence as this was not a negligence claim. The question of whether the defendant had failed to take appropriate steps to avoid a real and immediate risk of Article 3 ill-treatment was a question for the court only.

The appeal was dismissed. The claimant's application for permission to appeal was denied. As matters currently stand it is not known whether this will be pursued before the Supreme Court.

What next?

Unfortunately, the judgement doesn't provide a framework of the potential circumstances under which treatment by parents or others could amount to inhuman or degrading treatment. It does emphasise that there must be a *"serious and prolonged ill-treatment and neglect giving rise to physical or psychological suffering"*, and helpfully, it made clear that the records need to be read in a way which avoids hindsight.

It does mean that there will be some claimants that may be able to demonstrate a prolonged series of events amounting to poor parenting, care or neglect that does cross the Article 3 threshold. Claimants will also need to focus on the question of causation. They will need to show that a clear basis on which a Care Order might have been granted was present, or some other step taken by the defendant which would have stopped the mistreatment. Furthermore legal commentators have consistently made it clear that most consider any type of sexual abuse of a child will fall within Article 3.

Experience suggests the Legal Aid Agency will take this case seriously and will consider carefully which cases it is prepared to fund going forward. If the Supreme Court grants permission to appeal then many Article 3 failure to remove cases will probably continue to be stayed. If no such permission is granted, then we predict it will be a few months before the claimant's solicitors are able to push what they regard as their stronger cases forward. We recommend defendant organisations use that time to ensure that they have carried out their duties of search under the Civil Procedure Rules, and that they have captured the relevant witness evidence before it becomes even more stale.

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