Neutral Citation Number: [2023] EWHC 986 (KB)

Case No: G90MA144

IN THE HIGH COURT OF JUSTICE
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 28/04/2023

Before :

MRS JUSTICE HILL

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Between :

(1) ABC **Claimants**
(2) DEF
(3) GHI (BY HER LITIGATION FRIEND, DOT)
(4) JKL (BY HIS LITIGATION FRIEND, DOT)

- and –

(1) DERBYSHIRE COUNTY COUNCIL
(2) THE CHIEF CONSTABLE OF THE DERBYSHIRE CONSTABULARY **Defendants**

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Marc Willems KC, Peter Edwards and Patrick Gilmore (instructed by **R. James Hutcheon Solicitors**) for the Claimants
Steven Ford KC and Rose Harvey-Sullivan (instructed by **Browne Jacobson LLP**) for Derbyshire County Council
Dijen Basu KC and Matthew Holdcroft (instructed by **East Midlands Police Legal Services**) for the Chief Constable of the Derbyshire Constabulary

Hearing dates: 31 January, 1, 2, 3, 6, 7, 8 and 9 February 2023
Oral closing submissions: 3 March 2023

Further written submissions: 8, 15 and 21 March 2023

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Approved Judgment

This judgment was handed down remotely at 14:00 on 28 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill:

1: Introduction

1. The First and Second Claimants are the parents of the Third and Fourth Claimants. The First Defendant ("D1") and Second Defendant ("D2") are, respectively, the local authority and Chief Constable responsible for the area in which the Claimants live.

2. All four Claimants bring claims against the Defendants under the Human Rights Act 1998 ("HRA") for breaches of their rights under the European Convention on Human Rights ("ECHR"), Article 8. GHI and JKL also bring claims against both Defendants for negligence and ABC and DEF bring claims against D2 for false imprisonment and a breach of their rights under the EHCR, Article 5.

3. The claims arise out of events which took place in 2017. There was a concern about possible Fabricated or Induced Illness ("FII") in both children. This is a rare form of child abuse, which can include the fabrication of signs and symptoms, the falsification of medical records, samples and correspondence and the induction of illness by a variety of means.

4. The Defendants decided that it was not appropriate to discuss the concerns with ABC and DEF and work with them under child protection procedures, but instead to seek removal of the children from their parents' care. This occurred on 24 May 2017 when D2's officers removed GHI and JKL into police protection, using the emergency police power under the Children Act 1989 ("the CA 1989"), s.46. Earlier in the day ABC and DEF had been arrested on suspicion of child cruelty offences. On 26 May 2017 at D1's application, the Family Court made an Interim Care Order ("ICO") removing of the children. This was renewed on several occasions until June 2018 when the care proceedings were withdrawn. D2 took no further against ABC and DEF in respect of criminal proceedings.

5. Both liability and quantum elements of the claims were listed to be heard over 10 days commencing on 30 January 2023. On 8 February 2023, for the reasons given in an ex tempore judgment on that day, I ordered a split trial. Accordingly, the hearing proceeded to deal with liability issues only. I heard from sixteen witnesses of fact and two experts. Several other statements were read. The trial bundles, containing a large

number of contemporaneous documents, ran to almost 6,000 pages, following which extensive written and oral closing submissions were made. I requested further written submissions on particular issues which were promptly provided. During this process Mr Willems KC indicated that it was not necessary for me to determine any issues related a further pleaded claim of a breach of Article 6, as this added nothing substantive to the Article 8 claims. I was greatly assisted by all the representatives in what is a factually and legally complex and sensitive case.

6. It is not possible in this judgment to refer to all the evidence and all the arguments advanced. I have given careful consideration to all the material placed before me, but only refer herein to that which is necessary to resolve the key issues. I have reminded myself throughout that, save as otherwise specified, the Claimants bear the burden of proof.

7. The Claimants were granted anonymity in the proceedings given the age of the Third and Fourth Claimants and the sensitive and intensely personal nature of the subject-matter. I have withheld from this judgment biographical details that would unnecessarily increase the risk of them otherwise being identified by jigsaw identification. As this case involves detailed consideration of issues that have been considered in the Family Court, I have followed the Practice Guidance issued by the President of the Family Division in December 2018 on the avoidance of the identification of children in judgments. The parties assisted in this task.

8. This judgment is structured as follows:

Section 2: The evidence and issues in overview;

Section 3: The factual background;

Section 4: The legal framework and relevant guidance;

Section 5: The expert evidence;

Section 6: The negligence claims against D1;

Section 7: Limitation on the HRA claims;

Section 8: The Article 8 claims against D1 and D2;

Section 9: The negligence claims against D2;

Section 10: The false imprisonment and Article 5 claims against D2;

Section 11: The Children Act 2004, s.11 and Article 3; and

Section 12: Conclusion.

2: The evidence and issues in overview

9. ABC and DEF gave evidence in person at the trial and were extensively cross-examined. GHI and JKL gave evidence before the trial, by way of pre-recorded

questioning with a court intermediary, in accordance with agreed ground rules. Both ABC's sisters, her brother-in-law, her mother and her father gave evidence. Witness statements from three family friends were read as (largely) agreed evidence. Initially, the Claimants relied on expert social work evidence from Shaun Barratt. However, for the reasons explained in section 5.1 below, when serving the closing submissions on behalf of the Claimants, Mr Willems indicated that he no longer did so.

10. D1's principal witness was Cheryl Hayward, the Team Manager in the relevant child protection team in May 2017. She was cross-examined at length as to how the professionals from different agencies had approached the task of deciding how best to respond to the safeguarding concerns raised about GHI and JKL. D1 also called evidence from Louis Hughes, the relevant Head of Service and Lucy Shirtcliffe, the social worker who had been allocated to the Claimant family from 15 August 2017 to September 2018. The social worker allocated to the family prior to 15 August 2017, Hannah Scott, was unwilling to give evidence at the trial. The Claimants contested an application to rely on her evidence as hearsay, which was ultimately withdrawn. Instead D1 relied on the evidence she had provided during the Family Court proceedings. D1 also relied on expert social work evidence from Felicity Schofield.

11. D2's main witness was Detective Superintendent ("DSI") Kerry Pope who, while a Detective Sergeant ("DS"), had attended the strategy meetings with D1's social workers. She provided a detailed account of the factors leading to the decisions to arrest ABC and DEF and to invoke the police powers under s.46. D2 also called former DC Jane Meadows (who arrested ABC), former DC Julie De Nardo (who arrested DEF) and PS Matthew Ansell (the custody officer who authorised the detention of ABC and DEF).

12. The Claimants concede that concerns about FII had been raised which required D1 to take some action and provided D2's officers with reasonable suspicion that criminal offences had been committed. However, the key complaints underpinning their claims are that (i) ABC and DEF should have been notified of the concerns; (ii) the evidence available on 24 May 2017 did not justify D2's use of the draconian power under s.46 or D1's application for an ICO, as there was no immediate risk to the children and would not have been even if ABC and DEF had been informed of the concerns; (iii) there were alternatives to removal of the children from the parents' care available which were not explored, including placement with other family members; (iv) D1 failed to disclose key documents during the Family Court proceedings until 11 October 2017; and (v) it was not necessary to arrest or detain ABC and DEF. The Claimants claim they have all suffered personal injuries, loss and damage as a result.

13. The Defendants agree that there was no imminent risk to the children prior to the parents becoming aware of the professionals' concerns. However, their case, based on the relevant guidance, is that (i) once that occurred, the risk to the children would increase; (ii) this justified the decision not to engage with ABC and DEF; (iii) it was necessary to arrest the parents; and (iv) D2's use of s.46 and D1's application for an ICO with removal were justified. D2 also argued that the Children Act 2004 ("the CA 2004"), s.11 and the ECHR, Article 3 necessitated the officers' actions. Both Defendants rely on the principle derived from *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 2 AC 245, arguing that notwithstanding the use of s.46, the

children would have been removed from their parents' care by the Family Court in any event.

3: The factual background

3.1: The safeguarding referral, 3 March 2017

14. GHI and JKL were born in 2006 and 2011 respectively. They lived with ABC and DEF in the family home, with ABC's two sisters and their families living nearby. They were a close family and regularly shared the school runs, social events and holidays with each other and the wider family.

15. Both children were regularly seen by medical professionals within the NHS and private sector for a series of issues. The concerns raised by ABC and DEF about GHI included suspected allergies/gastroenterological issues, benign joint hypermobility syndrome, energy levels, Mast Cell Activation Syndrome ("MCAS"), Postural Tachycardia Syndrome ("PoTS") and Ehlers-Danlos Syndrome ("EDS"). There was a family history of similar gastrointestinal and connective tissue disorders. In respect of JKL, the concerns related to allergies, energy levels, his height (he was short for his age), backache and other matters.

16. In 2014 the children came under the care of Dr S, an NHS Consultant Paediatrician. On 3 March 2017, Dr S made a referral to D1's children's social care team, seeking an urgent assessment regarding FII in respect of GHI and JKL. By way of background she explained in the letter that both children had had asthma and eczema in the past, with concerns about dietary intolerances and "significant dietary manipulations". She said that GHI had been discussed at a medical professionals' meeting in July 2015. There was a concern that ABC was seeking multiple medical opinions from practitioners throughout the country, mostly on a private basis, many of whom did not have paediatric expertise. A private psychology report had described GHI as binge eating, stealing food, feeling isolated from her peers and expressing suicidal ideation. She had missed extensive schooling due to medical appointments. The doctors were concerned that she was at risk of emotional harm, as a result of which GHI had been admitted to the local children's hospital for two weeks (referred to during the trial as the "in-stay"). No food allergies or intolerances were proven and after the admission, ABC and DEF "agreed not to seek further external reviews" of GHI.

17. Dr S's referral letter continued by explaining that in February 2017, JKL had disclosed at school that he had an oxygen "tank" (later clarified to be an oxygen concentrator) at home. Dr S had explored this and discovered that the oxygen treatment had been recommended for JKL by a private practitioner in Hemel Hempstead who had seen him on several occasions. Dr S stated that JKL's oxygen levels were normal; and that he did not need the treatment, which was potentially harmful. She stated that ABC and DEF had "not adhered to the boundaries previously set" and "their behaviour falls so far out of the normal range that I feel the threshold of "significant harm" has been reached". She concluded by explaining that the two children had been discussed with paediatric colleagues at a meeting on 2 March 2017 and the "consensus view" was that the "longstanding concerns regarding [GHI] seemed to be being transferred to [JKL]" such that an urgent FII strategy meeting was needed.

18. Dr S's referral letter was headed with the following: "THIS REFERRAL IS FOLLOWING THE FABRICATED OR INDUCED ILLNESS PROCEDURE AND THE PARENTS MUST NOT BE ALERTED TO IT UNTIL AFTER THE STRATEGY MEETING" [capitalisation in the original]. Records from the children's school show that Dr S informed the school that a referral was going to be made. The school's notes indicate "FII – fabric induced illness – totally diff – everything without parents" and "we are not to tell parents" and "Don't tell parents – only time we don't" [underlining in the original].

3.2: Whether a 'reporting' agreement was reached between ABC and DEF and Dr S after the in-stay and if so, whether it was breached by ABC and DEF

19. Dr S has repeatedly said that after GHI's 2015 in-stay, ABC and DEF agreed they would inform her of any medical appointments or treatments they had arranged for GHI or JKL, so that she could "vet" any referrals and coordinate the medical care of both children. ABC vehemently denied that such an agreement existed, saying it was "quite simply false" that they had been told they were not allowed to see other professionals without Dr S's "say so". However DEF gave evidence to contrary effect. In particular: (i) in his witness statement he described Dr S's role as being "a point of contact, to coordinate the care of both GHI and JKL" with "oversight between the NHS and the private sector"; (ii) when cross-examined by Mr Ford KC he agreed that the idea was that they would tell the NHS about the private appointments; and (iii) under cross-examination by Mr Basu KC, he said that if ABC had said to him that they did not have to "go through" Dr S, he would have corrected her.

20. I find that the agreement described by Dr S and DEF was in place after the in-stay, because of the consistency of their accounts of it and for the following reasons.

21. First, such an agreement was an entirely logical response to the concerns of the medical professionals around the time of the in-stay. These were clearly described in a letter dated 28 April 2015 from Dr D, a Consultant Paediatrician at the children's hospital, with a safeguarding responsibility. She referred to the fact that ABC and DEF had "sought and obtained numerous opinions within the private healthcare sector across the country" which led to a concern that there was "no cohesive multidisciplinary approach" to the children's care.

22. Second, the agreement is consistent with, if not implicit in, the 17 July 2015 discharge letter written at the end of the in-stay by Dr A, Paediatric Immunologist at the children's hospital. He stated that a key aim of the in-stay had been to "draw a line" under the parents' concerns about GHI's health. The "outcome" section of the letter, while not recording the reporting agreement in explicit terms, made clear that "Dr S would be the lead local paediatrician based at the hospital and the parents should contact her if they have any concerns". This was in the context of the medical professionals' view that GHI had been taken to "excessive" and "unnecessary" medical appointments, such that ABC and DEF had agreed with the clinicians to "reduce all non-essential professional involvement in GHI's care". The letter was copied to all other relevant medical professionals to ensure that "non-essential follow up and review was cancelled".

23. Third, it is consistent with later events. When describing the telephone discussion she had with Dr S about the oxygen treatment, ABC accepted that Dr S was keen to know why they had not told her about it, which supports the existence of the agreement.

24. Fourth, more pertinently, in noting this conversation, Dr S recorded ABC as saying that she thought the "restrictions only applied to [GHI]" (the "restrictions" being restrictions on arranging medical referrals without informing Dr S). Although ABC had no recollection of making this comment, I find that she did make it: it would be a very unusual thing for Dr S to have recorded if it was not said and it is entirely consistent with the existence of the "restrictions" in this agreement. DEF also made the point in his evidence that the focus of the in-stay (and thus, potentially, the agreement) was GHI not JKL. This provides a possible explanation for what ABC said. In any event the inference from the "restrictions" comment is that ABC understood that there was an agreement in place which restricted her ability to arrange referrals without Dr S's knowledge, even if it was concerning GHI only.

25. The existence of the agreement, and specifically what Dr S told the other professionals in the later safeguarding process about it, is significant: as Mr Basu put it to ABC, it was the "acid test for whether [ABC and DEF] could work collaboratively and co-operatively with professionals".

26. The agreement was breached, at the very least, and as DEF accepted, by ABC and DEF not reporting the oxygen treatment to Dr S. It is clear that the medical professionals only became aware of it because JKL himself volunteered it, in the course of a school lesson about space. Dr Mu and Ms K (from the same clinic as Dr J) had also been involved in the care of GHI and it does not appear that this was reported to Dr S, although it is unclear whether and if so when Dr S became aware of the treatment.

3.3: Whether Dr S advised ABC and DEF to stop the oxygen treatment for JKL

27. Shortly after making the safeguarding referral, on 6 March 2017, Dr S wrote a letter entitled "Patient Advice" to ABC and DEF. This stated that JKL's "average Oxygen saturation was 98% in air" and "[t]his confirms that JKL does not need any additional oxygen therapy". Dr S had arranged to have JKL's oxygen saturation levels checked during an overnight hospital admission on 17/18 February 2017. The letter was copied to the family's GP and Dr J, the practitioner who had recommended the treatment.

28. The Defendants' position was that Dr S had advised ABC and DEF to stop the oxygen treatment. ABC and DEF said that this was not the case: Dr S had simply said that JKL did not need it. Mr Basu contended that ABC and DEF's interpretation of the 6 March 2017 letter was to "dance on the head of a pin".

29. I find that Dr S did advise ABC and DEF to stop the oxygen treatment for the following reasons.

30. First, there is evidence that even before the admission of JKL to hospital and the 6 March 2017 letter, Dr S had advised ABC and DEF to stop the oxygen treatment: when the Safeguarding Nurse from Dr S's hospital telephoned D1's urgent child protection line on 3 March 2017 to effect the referral, she was noted by a member of D1's staff as

saying "Dr S told mum to stop and agreed to have [JKL] at hospital to check his oxygen levels".

31. Second, there are several references in the evidence from after that date suggesting that Dr S had done so: (i) Ms Scott's 25 May 2017 statement indicated was that she understood Dr S had advised ABC to stop the treatment; (ii) Ms Haywood and DSI Pope gave oral evidence that they were told or formed the impression in the 12 May 2017 meeting that Dr S had told ABC to stop the treatment; and (iii) in some passages of her 25 May 2017 police interview ABC appeared to accept that Dr S had told them to stop the treatment (albeit that her answers were not entirely consistent on this issue and in her oral evidence she distanced herself from this element of her interview account, saying that she had just been arrested and in the cell for hours and her head was "all over the place").

32. Third, the NHS professionals had made clear to ABC and DEF after the in-stay that they were concerned to avoid "unnecessary" medical treatments for the children. Accordingly, it was implicit in the 6 March 2017 letter - to the effect that the oxygen treatment was unnecessary - that Dr S was advising them to stop it.

33. ABC and DEF did not stop the oxygen treatment. Dr S's chronology records that during email exchanges on 7 March 2017 ABC said that the recent appointment they had had with Dr J was "merely a diagnostic thing"; and that she had been told that JKL still needed the oxygen and to go back in 8-12 weeks. Dr S noted "[h]ome oxygen administration is ongoing."

3.4: The first multi-agency strategy meeting, 9 March 2017

34. On 9 March 2017, D1 convened a strategy meeting in response to Dr S's referral. It was attended by, among others, Dr S, Dr Me (Consultant Paediatrician and Designated Doctor for Safeguarding at Dr S's hospital), Ms Scott, the children's GP and representatives of the children's school. It was not possible for any police officer to attend but the minutes of that meeting were subsequently made available to D2.

35. Attendees were told that the medical professionals present at the July 2015 meeting thought that the information, advice and diagnoses obtained by ABC and DEF were "not what would be of normal practice for the NHS"; and that there was evidence of "many symptoms which didn't have a proven diagnosis and were not necessarily typical symptoms [of] the diagnoses suggested". Reference was made to (i) the in-stay, where GHI was "social, happy and interacting" and which proved there was "no evidence for a diagnosis"; (ii) the liaison that had taken place with the hospital's safeguarding department at the end of the in-stay but the decision to continue working with the family (i.e. rather than making a referral to D1 at that stage); and (iii) the fact that the parents were aware of the safeguarding concerns but had agreed that they would only see Dr S due to difficulties in the NHS otherwise being aware of private appointments.

36. The meeting was told that JKL had disclosed the oxygen tank at school. The doctor recommending it (Dr J) had said he had done so "to kickstart his metabolism", in part because of problems with his mitochondrial tissue transfer of oxygen. However Dr S's view was that there was no evidence he needed this, in light of the results of his overnight hospital admission. Dr S had spoken to a Metabolic Consultant at the

children's hospital, who confirmed that none of her patients with proven mitochondrial disease ever needed oxygen treatment (and JKL did not have that condition in any event). Dr S said that oxygen contains toxins. She said she was unsure how it would physically impact a healthy child, but there would be a "significant emotional impact" and "significant points of difference" (with his peers). She informed the meeting that Dr J had been the subject of judicial criticism for recommending the oxygen treatment to an adult with autism.

37. The following concerns were raised at the meeting by the children's school: (i) GHI had said the water her mother gave her to bring to school "wasn't nice" and it had been observed to be cloudy; (ii) JKL had asked for his water bottle to be emptied at the end of the day if he had not finished it because he "knows his mother wants him to drink it all; (iii) the school had identified a "residue" in the water; (iv) when asked about the water, DEF had suggested that ABC was "probably using GHI as a guinea pig again" but ABC had denied that there was anything in it; (v) the school did not recognise GHI as the autistic child described in a private autism assessment volunteered by ABC; and ABC had told Dr S that JKL required an autism assessment "as school were concerned" but this was not the case; (vi) school staff were concerned about the amount of schooling missed to attend medical appointments: GHI had already been held back a year because of this and ABC had asked whether the same should happen with JKL; (vii) ABC had asked the school to "pace" JKL during sports competitions because of his exhaustion but the school did not see this in him; (viii) ABC had given instructions to the school cook as to what JKL could eat and claimed that he would not try new foods but the school did not agree, such that he was said to be hungry in the afternoons; and (ix) GHI had told the school that she was taking vitamin K to help her sleep, but Dr S reported that vitamin K is not prescribed for this purpose.

38. The following points were also mentioned during the meeting: (i) the in-stay had proved that there was no evidence for a diagnosis and GHI had gained 1.6 kg; (ii) GHI had a needle phobia and had been subjected to two colonoscopies, as well as a bone marrow aspirate: (iii) ABC had wanted their GP to investigate JKL for short stature, but after Professor C considered the results of endocrinology tests were normal, ABC wanted a second opinion; (iv) the school had been provided with lists of "safe foods" for each child; (v) GHI had reported that she was being taken to London to see if she had PoTS, but according to Dr S there was no real diagnostic test for this condition, it was felt to be a "minority medical opinion" and Dr A had already told ABC that GHI did not have it; and (vi) JKL had missed school for two blood tests the previous week but these were not required by an NHS professional.

39. Dr S explained that the eight consultants present at the recent meeting (that on 2 March 2017) had not got very far through the chronology before stating that there was evidence of "abnormal parenting" and the unanimous view was that there were "significant concerns" about the way the children were being presented to professionals. It was recognised that some of the professionals from whom ABC had sought private medical advice were registered with the GMC, but the overall assessment of the paediatric team at Dr S's hospital was that they were "minority and extreme" opinions.

40. Dr S reiterated the importance of ABC only discussing medical issues with her and reported ABC's response (on being challenged about the oxygen) that she "didn't realise the restrictions applied to [JKL] as well as [GHI]". Attendees were made aware that if

JKL had not spoken about the oxygen tank, the NHS doctors would not know about it. They were also not aware of medication prescribed to the children by private medical professionals and were not sure how many supplements the children were taking which were not prescribed. Dr S said ABC had "reneged" on the agreement in place with the hospital.

41. The meeting notes record that "[ABC] has informed school that she is waiting safeguarding 'knocking at her door' as she had informed Dr S that [JKL] is using an oxygen tank."

42. Dr S's perception was that ABC's focus "has moved away from [GHI] as diagnosis and advice has been sought and this has now transferred to [JKL]". Overall, there were concerns for the emotional and psychological impact on the children of the medical attention and tests they were exposed to, the number of appointments they were attending, the restrictions on their diet and in JKL's case the oxygen treatment.

43. The medical professionals at the 9 March 2017 meeting all agreed that GHI and JKL were at risk due to fabricated illness, although there was no evidence to suggest injury had been induced and no evidence of increased risk at that time to cause immediate safeguarding concerns. It was decided that an enquiry under the CA 1989, s.47 would be completed by social care (the threshold for the same being met on the basis of "reasonable cause to suspect" a child is "suffering, or likely to suffer, significant harm") and legal advice would be sought. Further information was to be gathered and a referral made to the GMC regarding Dr J for seeing a child without a paediatric qualification.

44. Dr S was invited to review the draft meeting notes. She made 18 comments on the notes, adding new information. In one, she corrected the substance of the draft note. It had stated that during a consultation with Professor T (a Paediatric Gastroenterologist to whom GHI had been referred) he had "reported strange behaviours from ABC, eye contact at length and safeguarding issues". Dr S's comment made clear that she had not said this, simply that Professor T had "reported a vague diagnosis", "sanctioned the return of some dietary restrictions" and then discharged GHI.

3.5: Further evidence obtained before the second strategy meeting

45. On 20 March 2017, Dr S provided a detailed report for D1, reiterating her concern about GHI and JKL being taken for frequent, largely privately commissioned medical appointments and obtaining various diagnoses, many of which were "on the periphery of current paediatric thinking". She described "an obvious pattern of reporting of symptoms, seeking of specialist opinion and then reporting of new symptoms once those initially reported have been dealt with". Dr S noted that Dr J mainly worked with patients with autism and Rett Syndrome. She observed that the adverse effects of oxygen in somebody that does not need it are "not known", but "more important" was "the emotional and psychological impact on this 6-year-old boy having a facial oxygen mask attached for four hours every night for no proven medical reason". She said she and her colleagues had attempted to work with the family to "explore their concerns around illness and to move forward with the lifting of restrictions, to minimise the points of difference between these children and their peers" but "things are progressing regardless". She felt an urgent multidisciplinary meeting was required to safeguard the

children, "who essentially present to NHS professionals and school as being inherently well".

46. On 22 March 2017, D1 began the search for foster placements for GHI and JKL.

47. On 23 March 2017 Dr J wrote a lengthy letter to Dr S. He described his various appointments at London hospitals as well as the Hemel Hempstead clinic and said he was the only practitioner in the UK accredited in Autonomic Neurophysiology. He explained that the clinic had diagnosed poor oxygen delivery into peripheral tissues in JKL using transcutaneous methods and that such patients usually do have high oxygen saturation in the bloodstream. He had therefore recommended a continuation of the oxygen concentrator treatment for at least 8 weeks. He said that the treatment had been tried on JKL from 3 August to 9 November 2016 and the results were "very encouraging". He urged Dr S to "be guided by what works for [JKL] and suspend dogma on this occasion for the sake of [JKL]".

48. On 31 March 2017, Dr S provided a further letter to D1, saying that she did not question ABC's love for the children; but considered that her "ongoing behaviours around seeking frequent medical opinions and reviews and treatments" was "the same pattern of behaviours that is seen in fabricated and/or induced illness." Dr S was concerned that these behaviours would adversely impact the children's emotional development and that "this might impair them as well-functioning adults."

3.6: The second and third strategy meetings

49. On 5 April 2017, the second strategy meeting took place. No medical professionals attended this meeting, although DS Pope did. Chronologies had been received from the health and education teams, but more information was needed in order to form a complete picture. The meeting notes record that "Legal advice is being sought throughout the strategy meeting process. Should concerns escalate then liaisons with Police will take place as to the most efficient and appropriate steps required to safeguard the children". Further, a manager inputted on to the notes as follows: "This is being treated as a potential fabricated illness case and is being managed as such. THEREFORE PARENTS ARE NOT AWARE OF ANY CURRENT INVESTIGATIONS AND IT IS TO REMAIN AS SUCH" [capitalisation in the original].

50. On 2 May 2017, the third strategy meeting took place. Again, no medical professionals attended but DS Pope did.

51. Ms Hayward explained in evidence that the notes from one meeting were often "pulled through" on their IT system to form the notes for the next meeting and could then be updated. The notes for these two meetings were not in fact significantly updated and so largely recorded information obtained at the first meeting. Unhelpfully they gave the impression of medical practitioners attending a meeting and making substantive comments, when it is now clear that that was not the case. In fact, the absence of the medical professionals from the second and third meetings limited the progress that could be made at either of them.

52. The outcome of the 2 May 2017 meeting was that a further meeting would be held when Dr S was available. Shortly after the meeting, Donna Chapman from within D1's social

care team asked Dr S for an addendum report by 5 May 2017, expressing her opinion as to whether GHI and JKL were suffering or at risk of significant harm by virtue of their parents' actions. Ms Hayward's evidence was that at this time, the social workers were envisaging that they would work with ABC and DEF through child protection measures, but they needed further input from Dr S.

3.7: The 3 May 2017 communications from the medical professionals

53. On 3 May 2017, a series of emails were sent from the medical professionals on which the Claimants placed considerable reliance because of their content, and because D1 did not disclose these in the Family Court proceedings until 11 October 2017. It is therefore appropriate to set out the salient parts of them in full.

54. At 11.29 am, Dr O (Named Doctor for Safeguarding at Dr S's hospital) emailed Dr S, reiterating Dr S's belief that there was a risk of significant harm to the children due to the emotional impact on them of the everyday restrictions and more recently interventions in relation to their health. Dr O observed that FII is "a spectrum". She expressed the view that Dr S should be at all future strategy meetings. Dr O concluded as follows, copying in Dr Me and inviting his views:

> "I don't think anyone can be certain as to whether mums beliefs around the children's health is fabricated or is developed from her own mental health problems. It is irrelevant because the children remain at risk of significant harm either way and CSC [D1's Children's Social Care team] intervention is required…CSC will be struggling with this case. They will not be sure as to whether the right course of action is application for a care order or normal child protection processes including a child protection plan. Due to the absence of immediate risk and lack of understanding re mothers motivations and ability to change, if I was a SW I'd be going for the latter. I'd go for proceedings if mother can't change".

55. At 12.47 pm, Dr Me replied, saying:

> "I am not sure you [Dr S] can help any further. You are acting as the treating physician here. We, as a department, have said we are concerned. This concern (to put it bluntly for social care) is that we think the children are victims of FII at a level of the balance of probability. […] it is now for CSC and Child Care Legal to decide how they manage this. They could decide that threshold has been crossed and commence Proceedings. An independent expert report would be sought on behalf of the Court. They might form the view that, as the concerns are now widely understood by all those interacting with the children, and because the concerns have not involved major intervention eg like surgery etc, that this could be managed without Proceedings. Here the risk would be that opinions far outside our remit and control have been obtained for them – some of them privately for dubious reasons. It would be difficult to ensure that these other opinions were shared with professionals working with the family without an order."

56. At 1.33 pm, Dr S emailed the social worker as follows:

> "This is all a little unusual and not the way that my colleagues and I understand that FII case investigations are conducted. I have already provided comprehensive chronologies for both children and shared these at the initial meeting. The unanimous view of my colleagues and I is that there are significant concerns that these children are at risk of harm, primarily emotional harm because of restrictions placed upon them and evolving reported medical issues. The above chronologies do not provide any new information to that which has already been shared. This is clearly a very difficult case, but the next step is for Children's Social Care and the Legal Team to decide how best to manage this situation. If the way forward is unclear then it would be sensible to invite the local Designated Doctor to the next meeting for her valuable opinion and input - and this is what I would suggest. We are not concerned about immediate harm and so this can be arranged so that all those involved can attend. As the treating doctor, I also need to be at future meetings, but do need more notice than a few days."

57. Dr S confirmed she had discussed the email with Dr Me and Dr O and forwarded on their earlier emails. The emails were followed up with a telephone call between Dr S and Ms Scott later on during 3 May 2017. The note records Dr S's views as follows:

> "She said it's not the usual way for FII cases and that she has given everything she can give. She said it is not her job, but everyones together. She said there is no new information in the chronologies to change her view. She does feel there is risk of significant harm, but she does not think the children are going to be poisoned or at immediate harm, so there is time to plan. She said that it is a difficult case and needs to be decided how to manage it and she is not an expert witness. She said that the designated Dr K should be included."

58. On 8 May 2017 one of D1's solicitors emailed Ms Scott stating that the questions posed to Dr S were not exactly as how counsel had phrased them. Most importantly, Dr S should be asked to address whether she considered the children "to be at any <u>immediate</u> risk of significant harm" [underlining in the original, in which red text was also used]. The solicitor noted that Dr S had considered the immediate risk factors and reported back verbally. He said he "would have preferred this in writing from her particularly re the immediate risk of harm element" but concluded that "perhaps the matter can be dealt with at the strat meeting further given the circumstances".

3.8: The fourth strategy meeting, 12 May 2017

59. On 12 May 2017 the fourth and final strategy meeting, at which the key decisions were taken, took place. It was attended by Ms Hayward and Ms Chapman, DS Pope, the Deputy Headteacher and the Deputy of Safeguarding from the school, Dr S, Dr O and Dr K (Designated Doctor for the county). This was the first opportunity for all relevant professionals to attend together, review the totality of the evidence available and decide on the appropriate next steps. In cross-examination to Mr Willems DS Willems said that

this meeting was the first time from her perspective that the medical professionals had "painted the picture" as "clearly as they did".

3.8.1: The meeting notes

60. Three different versions of the 12 May 2017 meeting notes have been provided. It was not clear which agency had provided which. The first two are identical save that the second version includes one additional paragraph. They both contain a section headed "police update". The third version, in a different font, is substantively different: it does not contain the police update; and records the decision reached, the actions agreed and the next steps slightly differently. There was no version of the notes agreed by all attendees nor evidence that anyone had been asked to comment on any version of the notes.

61. More fundamentally, Ms Hayward accepted in her 29 November 2017 statement to the Family Court that D1's version(s) of the meeting notes were not "robust" in that they did not fully reflect the "change in direction during the discussion" nor "specifically record the dialogue around immanency". By this she meant that the minutes did not clearly reflect the nature of the professionals' discussions about the extent to which the children were considered to be at immediate risk of harm such that removal was considered appropriate. She explained that the Team Coordinator would normally minute strategy discussions, but she was unavailable on this occasion; and it was difficult to record the conversation in its entirety, while taking part in it. The team had learned from this incident and she would ensure there was an appropriately trained minute taker present where possible in future.

62. In my judgment Mr Willems was right to be critical of this situation, given (i) the emphasis on accurate records in the government guidance on FII and the need for courts to be able to rely on such documents as noted in section 4.2.1 below; (ii) the duty to ensure procedural fairness to families as a matter of domestic law and under Article 8; and (iii) the serious consequences for the Claimants of the decisions taken at this meeting. Even allowing for the resource pressures described by Ms Hayward, it had been possible to allow Dr S to input into the notes of the first meeting; and it was not clear why this process was not followed with respect to this, more significant, meeting. The legal framework set out in section 4.1 below is clear that the decision to remove or seek a court order for removal of children from their parents without notice is an exceptional one, and so it was particularly important that the authorities' decision-making to that effect at this meeting was properly recorded. In fact, as will become apparent, there are other key areas of the authorities' decision-making that I do not consider were properly recorded.

63. That said, it is important to have regard to the purpose of the notes. They were intended to be read and used by others working in the field of child protection. Accordingly, as Ms Schofield explained, they contained certain "short-hands" which those attending could be expected to understand. Her evidence was that this process was reasonable and indeed normal: the minutes were "aides memoires" for experienced child protection professionals, not legal pleadings. I accept this evidence for the reasons given in section 5.2.2 below. I also note Ms Hayward's account that meeting notes were never going to provide "a legal ready" recording and that anyone working in child protection would say the same. I therefore approach the meeting notes with some care, for the reasons

given by Mr Willems, but bear in mind how they were prepared and who they were primarily intended for. In addition to the meeting notes and other contemporaneous documents, the various statements written for the Family Court proceedings (including some written very soon after the meeting) and the evidence in the trial before me helped explain what was discussed and decided at the meeting.

3.8.2: The purpose of the meeting and the key discussions

64. The notes indicate that the purpose of the meeting was to decide which of two options would be "the most proportionate response" and "keep the children the safest". The two options were (i) the completion of an investigation under the CA 1989, s.47 and the progression of the case under child protection procedures, before issuing care proceedings based on more information; and (ii) the issuing of care proceedings without such a process.

65. Ms Schofield's expert evidence, which I accept for the reasons given in section 5.2.2 below, was that the reference to "care proceedings" in the notes would be understood by the experienced child protection professionals attending as meaning an application for an ICO with removal of the children. This was because while care proceedings do not necessarily involve removal, applications for ICOs without removal are rare. It is therefore clear that the two options being considered at the meeting were, in reality, (i) child protection procedures involving working with the parents, while the children remained at home, with a view to care proceedings; or (ii) an application to court for an ICO to remove the children, likely on an ex parte (without notice) basis.

66. Attendees discussed the options at the meeting. The notes record that Dr S was "in no doubt" that this was a case of FII; and that the health professionals were "very clear that the behaviours of [ABC] fall way outside normal behaviour". Dr S believed that JKL was still receiving the oxygen treatment which he "definitely did not require" and which could cause "significant" damage. Dr K had never encountered a parent seeking private medical care which resulted in them thinking it appropriate to give a child oxygen, and this was "significantly outside normal parental behaviour". The notes record Dr K saying that the use of oxygen was "not a benign treatment" and could cause long-term damage, albeit that Ms Hayward's evidence at trial was that she also said it did not present a risk of immediate harm.

67. The notes indicate that the social workers "would prefer to work with the parents prior to proceedings" so that they could "understand the extent of the concerns, the personalities of parents and balance the potential risk of future harm for the children". The parents were "unknown to social care" meaning that they had "no current assessment on the likelihood of meaningful engagement with parents", but the school and health professionals had concerns in this regard. These were that (i) the school were "not confident that parents would share all information with them" and had concerns around policing any written agreement; and (ii) according to Dr S, "health" were concerned that ABC and DEF were not being open and honest with professionals; specifically that "mum has actively disregarded the advice of [Dr S]"; "even with a degree of scrutiny mum has still managed to get oxygen therapy for JKL"; and that the parents "could not be trusted to tell the truth about life at home."

68. Further, and importantly, the notes refer to the fact that "FII research indicates that the risk to children can spike once a parent is aware of the concerns held by professionals." This was a reference to one or more of the research/guidance documents summarised at section 4.2 below.

69. Attendees at the meeting also discussed their concerns at the physical and emotional impacts on GHI and JKL of the unnecessary medical procedures and treatments and the ways in which they were treated differently from their peers. The notes record the view that "significant emotional harm has occurred."

3.8.3: The decisions reached at the meeting

70. It is clear that two key decisions were reached at the meeting.

71. First, the social workers chose to pursue the option of immediate care proceedings rather than working with ABC and DEF through child protection measures. Two versions of the notes record the following as the decision of the meeting in identical form:

> "After careful consideration and deliberation it is felt that on balance that the children are potentially experiencing emotional and physical harm. When considering the possible ways forward the safest option appears to be care proceedings because there is strong evidence suggesting that mum does not adhere to the agreements made with health professionals, indicating that she would not adhere to the requests made under child protection.
>
> The chronology highlights that mum has not listened to Dr S's requests, therefore indicating that she is willing to disregard professional advice and act in a cover manner.
>
> A Child Protection Plan is only safe if parents agree to work alongside it, openly, honestly and transparently. The evidence indicated that this is unlikely therefore; Child protection procedure could increase the risk to the children and be unmanageable from a social care point of view.
>
> What we know is that mother is exhibiting signs of heightened anxiety and Child Protection procedures are only going to increase this. Again this will increase the risks for the children.
>
> A strong worry is that health has already done the advising but mum has not listened and continues to take the children to London to seek private consultation…
>
> The level of potential risk, the unknowns and the history of mum's engagement with health leads us to concluded that the potential harm for the children is significant and that child protection procedures would not be a robust enough threshold to work under in order to proceed. By being in care proceedings the court would assist in ensuring that relevant professional assessments were undertaken and that parents understood

the seriousness of the concerns."

72. The third version records the decision in virtually identical terms save that after "the safest option appears to be care proceedings", the following phrase appears: "particularly in light that this is also now a criminal investigation".

73. The notes record that Dr K, Dr O'C and Dr S were all in agreement with the decision, with the latter recorded as saying "Felt that health have lost control. We don't know what is going on – if mum is anxious and looking to treat she is not listening to professional advice she…instead actively seeks out further professionals privately and therefore cannot see this is damaging for the children".

74. The school were noted as saying that ABC was a loving mother, but they were very concerned about her and felt she needed support (or "treatment" in one version of the notes). They considered they were "airing [sic] on side of caution". They suggested that after GHI's hospital admission and liberalisation of her diet "mum's preoccupation with the children's health needs improved" but were "sliding again now".

75. Second, DS Pope concluded that she had reasonable suspicion that both ABC and DEF had committed criminal offences of "neglect or assaults" such that ABC and DEF would be arrested and interviewed. As explained further in section 3.8.5 below, she also mentioned the possibility of using s.46 to remove the children.

3.8.4: The immediate risk issue

76. The Defendants' case, supported by the oral evidence of Ms Hayward and DSI Pope in particular, was that the meeting attendees concluded that (i) at the point ABC and DEF became aware of D1 and D2's concerns and the steps they planned to take, in particular to issue proceedings and to arrest the parents, then the children would be at immediate risk of significant harm; and (ii) this meant that removal of the children would have to be effected immediately after the parents were made aware of the concerns in order to keep them safe. This view had been reached taking into account research and guidance on FII.

77. This represented a significant shift in the professionals' thinking from the position on immediate risk (i.e. that there was not one) expressed in the medical professionals' 3 May 2017 emails. It is this "change in direction" and "dialogue around immanency" which Ms Hayward accepted was not properly recorded in the meeting notes (see [61] above).

78. This was an absolutely crucial element of the professionals' decision-making, perhaps the most crucial part of it, and it had very significant consequences for all four Claimants given that it led directly to the without notice removal of the children from their parents' care. It is highly regrettable that it was not properly recorded. The absence of proper recording of the professionals' thinking makes it entirely understandable that the Claimants have continued to question the basis on which removal of the children took place.

79. It is also not surprising that Mr Willems took issue with whether the decision had actually been taken at all. In closing submissions as well as the limited nature of the

meeting notes, he highlighted that there was no mention of an alleged increase in potential risk once the parents were informed of the professionals' concerns in (i) the interim care plans dated 19 May 2017; (ii) D1's "threshold" document; (iii) Ms Scott's statement dated 25 May 2017 (also referred to as her Social Work Evidence Template or "SWET"); or (iv) DS Pope's statement for the Family Court. The omission of this issue was particularly notable from (ii) and (iii) because they did refer to D1's arrests of ABC and DEF and the items seized in the searches but did not assert that this had led to an increased risk; and (iii) had a specific section entitled "precipitating events" which would have been the appropriate place to mention the alleged increased risk, but it did not. Further, GHI's care plan primarily addressed historical matters from 2015.

80. Mr Ford and Mr Basu argued that this point had not been squarely put to the witnesses. Accordingly, relying on *EPI Environmental Technologies Inc v Symphony Plastic Technologies Plc* [2004] EWHC 2945 (Ch) at [74(iii)] and *Markem Corporation & Anor v Zipher Ltd* [2005] EWCA Civ 267 at [57]-[61], it would be unfair to find that Ms Hayward and DSI Pope had not been honest in their evidence about this key decision when they had not had the chance to answer such a suggestion.

81. Mr Willems responded that in a High Court trial without a jury it is not necessary to put every point to a witness; cross-examination can be more subtle and nuanced; and it is permissible to make submissions based on the documents. In any event, he argued that he had put his case sufficiently to the witnesses.

82. I am not satisfied that the point was properly put. The cross-examination was primarily focussed on whether the view of increased risk was reasonable, not whether the professionals actually held the view. I am also satisfied that D1 has provided a persuasive explanation for the content of the Family Court documents: (i) the purpose of a care plan is to set out what the proposals are for the child's placement and care; (ii) the "historical" concerns referred to in GHI's care plan were in the section about her needs, which was not intended to act as a further opportunity to set out concerns about her care; (iii) the purpose of the threshold document is to address the "significant harm" threshold in the CA 1989, s.31(2) so as to show why a supervision or care order may be made; and (iv) the basis for removal of the children, i.e. "immediacy" was set out in other documents, such as the SWET.

83. Further, and crucially, Ms Scott's SWET at [82]-[88] did address the issue of the professionals' views as to the increased risk (albeit, in fairness to Mr Willems, not in the "precipitating events" section). In particular Ms Scott wrote that:

> "86…Health professionals were of the view that [ABC]'s behaviours were so far out of the spectrum of "normal" behaviour that it is not possible to rule out risk of imminent harm to the children as there is uncertainty in how parents will respond once concerns are openly raised…
>
> 87…There is uncertainty over how [ABC] will respond when concerns are raised or what else she may do and therefore we cannot assure that the children are not at risk of imminent physical and emotional harm if they currently remain in their parents care".

84. I reiterate that it is regrettable that this crucial conclusion was not recorded clearly in the contemporaneous notes. Indeed, it is possible that the entirety of this litigation could have been avoided if it had been. However, in light of the totality of the evidence before me, I am satisfied that the professionals at the 12 May 2017 meeting did conclude, as the Defendants witnesses said they did, that once ABC and DEF became aware of the nature and extent of the professionals' concerns, the children were at immediate risk of significant harm.

3.8.5: The agreed next steps

85. The list of "actions" from the meeting included that the social workers would "take legal advice…with a view to making an ICO application" and that the police would "have their own investigation". It was understood that the social workers would need to "work very closely with Police in order to ensure that the children's needs were paramount." However, the detail of how this inter-agency working would operate in practice was recorded, and perhaps understood, differently:

(i) The police update in the meeting notes records the following: "Parents would be arrested and interviewed and we all agreed that this needed to take place when the children were not in parents care. Social care advised that the court documents would be filed with court the week following this meeting and asked the police to co-ordinate with social care, so that any powers used to remove the children did not run out before an order was made to safeguard the children".

(ii) One version of the notes records that the court paperwork was "almost completed"; that an urgent hearing could be requested; and that the police would need to search house to gather evidence. It was anticipated that there would be a further meeting once the timeframe for action was known, which would be a "strategy discussion between Police and Social care looking at practical elements to Intervening whilst protecting the children and potential evidence".

(iii) On 17 May 2017 DS Pope noted her understanding of the meeting's outcome on the police log as being that the arrest of both parents was to "occur on the same day that SC [D1] go to court for the care order". In her witness statement DSI Pope said that the decision reached was that that D1 would obtain an ex parte ICO and that the police would arrest the parents once that was granted.

86. The reference in the police update to removal powers which might "run out" was a reference to DS Pope telling the meeting that if it was not possible to coordinate the arrests of the parents with D1 making their ICO application in court, the children could be taken into police protection under s.46. The plan to remove the children under an ICO with removal became known during the trial as "Plan A" with their removal under s.46 as "Plan B".

87. However, again, the detail of this thinking by the professionals was not set out in the meeting notes. The legal framework summarised at section 4.1 below recognises that the use of the police emergency power to remove children under s.46 is fundamentally different to court orders for removal and requires particular justification. It is therefore, again, very unfortunate that the rationale for potentially using this power was not properly recorded. Indeed, as I note at [85] above and consider further in section 3.9 below, there appeared to have been a level of misunderstanding between the police and

social care as to what was actually going to happen after the meeting. This is despite the fact that what appeared likely to happen was, by one means or another, the draconian step of a without notice removal of children from their parents.

3.8.6: The level of multiagency agreement to the plan to remove the children

88. The Defendants' position was that all the professionals present at the meeting agreed with the plan to remove the children. Mr Willems contended that there was no evidential basis for this. In particular he observed that D1 had not called Dr S as a witness in the trial. In reliance on the principle set out in *Ahuja Investments Limited v Victorygame Limited* [2021] EWHC 2382 (Ch) at [23]-[25], he argued that I should infer that the reason Dr S did not give evidence was because she did not support the plan for removal of the children.

89. I do not accept this submission because (i) there was an evidential basis for the Defendants' position in the form of Ms Hayward and DSI Pope's evidence at trial; (ii) Dr S's 24 May 2017 statement referred to the need for a thorough assessment by social care and urgent mental health evaluations for the family which "could not be reliably undertaken with the children resident at home", illustrating her agreement to a plan involving removal; (iii) the phrase "we all agreed" in the extract of the meeting notes set out at [85(i)] above, sensibly read, extends to the entirety of the paragraph which includes the plan for removal; (iv) Dr S made herself available via telephone during the 26 May 2017 hearing, which again illustrates her agreement to the plan; and (v) it is clear that in FII cases, social workers are often "guided by health" and that plainly occurred here, such that it is unlikely that if Dr S had not agreed with a plan for removal, the social workers would have proceeded with it.

90. Accordingly, I accept the Defendants' case that all the professionals present at the 12 May 2017 meeting agreed the plan for removal of the children.

3.9: Liaison between D1 and D2 from 12-23 May 2017

91. DS Pope was concerned that action should be taken prior to the children's upcoming two-week half-term holiday because (i) there was a concern that the monitoring of the school was a "safety net" for the children (as there was an alert at the school so that a notification would be generated if the children did not attend for any reason; and teaching staff could report any concerns) which would be absent during the holiday; (ii) there was evidence that ABC and DEF regularly took their children to medical appointments in London and the southeast during the holidays; and (iii) arresting the parents during the half-term break would increase the risk of the children witnessing the arrests, which the professionals had agreed was not appropriate. This meant that action was needed in the week commencing Monday 22 May 2017 because the school was due to break up for the half term holiday on the Friday of that week. Again, it is regrettable that the 12 May 2017 meeting notes do not reflect the detail of this discussion about half-term. However, the emails DS Pope sent shortly thereafter, as set out below, reflect her understanding of what was discussed.

92. DS Pope also needed time to arrange to have the appropriate number of officers available on the day that police action was taken, to make the arrests of ABC and DEF, to search their house and interview them as effectively as possible. She was the sole

Detective Sergeant in the Buxton unit, managing six Detective Constables (three assigned to child abuse and three to domestic abuse). This, together with the Chesterfield unit, covered the large geographical area of the North Derbyshire division.

93. On Wednesday 17 May 2017 DS Pope met her supervisor DI Prince and they agreed on next steps. At 3.52 pm she updated the police log as noted at [85(iii)] above. She also recorded (i) the names of three officers who were to be involved as exhibits officer and officers in the case; (ii) the need for a search of the home, "seizure" of the "O2 tent and mask, computers and medical documents"; and (iii) the requirement for a police photographer to attend.

94. During the morning of Thursday 18 May 2017 DS Pope emailed Ms Chapman emphasising her desire to agree a date for action during the following week. Ms Chapman replied, indicating that the social workers still needed to submit their paperwork to D1's legal team, who would then have to make the application to the court for an urgent hearing. She wrote that this "will not happen this week" and that it was "possible that it could be the week after". Shortly thereafter, DS Pope replied as follows:

> "I just want to be really clear about this, having spoken to Hannah and receiving the below I am a little concerned that the court paperwork has not yet gone in.
>
> It was agreed that the action would be taken W/C 22nd May, this action was the arrest of the parents on the same day that SC took this to court. It was agreed that this need[s] to be done before half term. There is no monitoring of the children during half term and I would be very concerned to leave them without any monitoring. The school is our safety net at this moment in time.
>
> It was agreed at the meeting that this week we would further liaise and agree a date for next week to take the action. This is clearly not going to happen if the court paperwork has not been submitted and is unlikely to be done until tomorrow.
>
> Whilst we can act very quickly if the need arises, the best outcome would be for the planned approach we agreed upon as we need time to arrange to have the required number of officers for the day in question. This is to ensure that we are able to gather best evidence on the day and be able to plan other work commitments around this, something that we are struggling with at the moment.
>
> Can I ask that I am kept up to date with your current position and you express the urgency to your legal department for a date?
>
> I appreciate that you are also very busy, I just feel strongly that we need to stick to the agreement from the strategy meeting to ensure that this goes as smoothly as possible."

95. Ms Scott replied to the effect that she had cleared her diary with a view to completing the paperwork so it could be submitted to the legal team by the end of the day. She did so.

96. On Friday 19 May 2017, Ms Hayward replied to DS Pope's email as follows:

> "I understand your concern and maybe I was not clear in the logistics of issuing care proceedings. I said that the court paper work would be filed the week beginning 22nd March 2017. This is sent to legal and then legal write the threshold document and make the application. It is up to legal whether threshold is met for an urgent hearing or the standard 14 day. We are on target for filing today and legal are up to date with our positions.
>
> There are some logistical issues with half term coming up and we can ask for a urgent hearing but the argument maybe that the children have been in the home during half term without them being placed at immediate risk. It maybe that it has to be done over the half term but legal will make the final decision.
>
> I know that you have staffing issues to sort and as soon as I have heard from legal I will let you know".

This email reflects a level of misunderstanding between the police and the social workers: it makes clear that the latter did not understand that it had been agreed that the co-ordinated action would take place before the half-term holiday.

97. At 12.01 pm, DS Pope replied:

> "Thanks for your reply, I don't think I was mistaken in the fact that we agreed that the joint action needed to be taken prior to the half term whilst the children were at school. It was clear that any action would be taken whilst the children were at school and NOT over the half term. I do not feel that however many police officers and social workers turning up at the address, arresting parents and removing the children would be in their best interests and I would not feel comfortable doing it in this way. It would be very distressing for the children.
>
> If your legal cannot get in court this week, I will stress again that the action that Police take needs to be the same day you are going in to court. If you go in to court 1st then any evidence is likely to be destroyed. This is documented in the minutes from the last meeting.
>
> Please keep me up to date".

98. At 5.29 pm, Ms Hayward replied:

> "Just seen this email. I definitely don't want to be going to the house and removing the children, I meant if we had to wait a week to intervene but by the sounds of it we will get into court next week. The hope is for Wednesday to be the day we go to court. The children will be taken from

> school once we have agreement that you are willing to PPO, to give time to get to court and get the ICO. I will call you at the start of next week".

99. On D2's case, this email envisaged that D1 would make the ICO application to court on Wednesday 24 May but sensibly raised the need for D1 to be in a position to invoke their s.46 power because of the risk that an ICO may not be secured in time following the arrests of the parents, including because the hope that D1 could "go to court" on the Wednesday would not materialise.

100. On the same day a foster placement was identified for GHI and JKL.

101. On Tuesday 23 May 2017, at 8.53 am, DS Pope emailed Ms Hayward as follows: "Any update from your legal? If it's Wednesday then we need to get staff in on overtime. So need to know ASAP so we can call in the staff that we need".

102. DS Pope organised officers to be in place for Wednesday 24 May 2017 and briefed them accordingly. The officers drafted in from the wider unit would search the Claimants' property. DC Meadows and DC De Nardo, who were already part of the team and had some knowledge of the facts of the case, would be the arresting officers. They spent time ahead of the arrests formulating their interview plans. As DSI Pope said in evidence, the transcripts of their interviews indicate that they had prepared in detail.

3.10: The events of Wednesday 24 May 2017

3.10.1: The arrests and interviews of ABC and DEF and the search of their home

103. During the morning of 24 May 2017, police officers attended at ABC and DEF's home, but they were not there. They made contact with DEF by telephone, who called ABC. They both returned home. DEF arrived home first. At 11.42 am he was arrested by DC De Nardo and conveyed to the police station. During the journey he saw ABC driving past them in the direction of their home. At 11.55 am she was arrested by DC Meadows and taken to the police station. PS Matthew Ansell, the custody officer, authorised the detention of DEF at 12.42 pm and ABC at 1.15 pm.

104. The family home was searched. Officers located the oxygen concentrator in JKL's bedroom. Various electronic devices and items of correspondence were also seized. The children's water bottles were seized from the school.

105. At 6.29 pm and 7.37 pm Inspector Stevenson authorised the continued detention of DEF and ABC respectively. DEF was interviewed between 5.15 pm and 7.10 pm and again between 8.36 pm and 9.43 pm. He was released without charge at 10.15 pm. ABC was interviewed from 10.35 pm until 00.08 am on 25 May 2917. She was released without charge at 01.59 am that morning.

106. ABC and DEF both described the process of being arrested and interviewed and their disbelief at the suggestion that they had done anything to harm their children. ABC said that when the officers mentioned FII this was the first time she had heard the term. They both considered that the interviewing officers were trying to "create a rift" between them through their questions.

3.10.2: The use of s.46 to remove the children

107. During the afternoon of 24 May 2017 D1 received confirmation of the arrests and search. The Defendants' case was that it was not possible for D1 to make an application to court to be heard that day; and that that being the case, there was no option but for the police to exercise their s.46 powers in order to effect removal of the children.

108. Ms Scott made contact with family members. Various family members described their concern that the children were being sent to spend the night with "strangers" when several of them who could have cared for them. They said they were told this could not happen as they had not yet been assessed.

109. D2's s.46 powers were exercised at 3.30 pm in order to effect removal of the children. The rationale for the use of the power was recorded thus:

> "Reason for believing child was at risk of immediate significant harm…Concerns have been raised by medical professionals that parents are fabricating illness in their two children which is leading to unnecessary medical treatments and appointments. There is policy around fabricated and induced illness to state that the children are at an increased risk at harm when the parents become aware of these concern".

The documentation also noted that: "SC [Social Care] are at court this week seeing an interim care order to take over the PPO".

110. In fact, social workers effected the removal of GHI and JKL. The children were taken into a room at the end of the school day with the Headteacher, Deputy Headteacher, their maternal grandfather and two social workers. ABC's father said he was asked by the foster carers to "make some kind of story up, saying that the children were going on some kind of adventure or something, to try and keep the children calm" when GHI and JKL were taken into care. He described how GHI was stunned at the information and JKL's immediate reaction was one of panic and fear. He said the children held each other and it was "horrible" seeing them taken away. Social workers took them to the home of the pre-arranged foster carers.

3.11: Family Court proceedings on 25 and 26 May 2017

111. On Thursday 25 May 2017, D1 made an application to the Family Court for an ICO with removal in respect of GHI and JKL. The section explaining the urgency of the application stated: "The case concerns fabricated illness. On the 24th May 2017 both GHI and JKL were taken into Police Protection after the Police had arrested the parents earlier that day. The Police have indicated to the Local Authority that they were concerned regarding fabricated illness and wanted to act without warning being given to the parents in order to preserve evidence for their criminal investigation." Both Ms Scott and Dr S provided evidence in support of the application.

112. The social workers expedited the foster care viability assessment process in respect of carers known to GHI and JKL, namely their grandparents and their aunt and uncle (ABC's youngest sister and her husband). Although she should not normally do so, Ms Hayward carried out the assessments herself, during the morning of 25 May 2017. Once the maternal aunt and uncle were approved, it was agreed that they would move into

ABC and DEF's home and care for GHI and JKL there. Ms Hayward described this an unusual measure but one that they were willing to adopt to allow the children to remain in the comfort of their own home, and because the maternal aunt and uncle appeared respectful of the proposed safeguarding measures.

113. On Friday 26 May 2017, an inter partes Family Court hearing took place. The children's Guardian supported the interim separation of the children from their parents. ABC and DEF were separately represented. They each accepted that the threshold for the making of an ICO was met. They did not contest D1's proposal for GHI and JKL to return to the family home under the care of ABC's youngest sister and her husband, subject to the order. The order was granted. On that basis, GHI and JKL returned to the family home after two nights in foster care.

3.12: Events after 27 May 2017

114. ABC's youngest sister and her husband cared for GHI and JKL in their home. The children were evidently distressed at being separated from their parents and bedtimes were particularly difficult. On 15 June 2017 the Guardian provided an initial analysis, supporting the making of interim orders and D1's proposals for interim care of the children, on the basis that it was "necessary and proportionate" in order to safeguard them. She considered a psychological assessment of both parents was necessary. The contact ABC and DEF had with their children was gradually increased. Ms Hayward explained that this required a diversion of a lot of their limited resources, but they were keen to minimise the impact that removal from their parents had had on the children.

115. On 1 September 2017, the Family Court case was listed for a fact-finding hearing to take place with a time estimate of 20 days. There were a number of further Family Court hearings, almost all of them before the local Designated Family Judge. ABC and DEF continued to accept that the threshold had been met for the making of an order and did not actively challenge interim separation (though they did invite D1 and the Guardian to keep the issue under review).

116. On 11 October 2017 the 3 May 2017 emails set out in section 3.7 above were disclosed to the parents and Guardian. The case was listed for a contested removal hearing on 13 December 2017.

117. On 10 November 2017, the Guardian completed a further analysis. She recommended a continuation of the ICO but a gradual return home by ABC and DEF. On 29 November 2017, DI provided a draft rehabilitation plan, which provided for such a gradual return, and for ABC and DEF to begin to have some unsupervised contact with the children, including overnight. The Family Court approved the plan and on 2 December 2017 ABC and DEF moved back into the family home.

118. On 15 February 2018, Dr Mo, a Consultant Paediatrician, provided a lengthy report in his capacity as a jointly instructed expert in the Family Court proceedings. He found no evidence of induced illness or that the children were given medications to induce symptoms; but concluded that it was "likely that there has been exaggeration of the children's symptoms and that both children have been subjected to investigations that were probably not necessary and have been given treatments that were also not necessary."

119. In March 2018, D1 indicated an intention to apply to withdraw the care proceedings. This took into account the parents' presentation throughout proceedings and the view that a fact-finding hearing would be disproportionate. Ms Hayward noted that the intervention of D1 appeared to have "disrupted" the parents' behaviour; that once the phased return had been agreed, the day-trips to medical appointments had ended; and . there were other safeguards that could be put in place to prevent "doctor shopping".

120. On 18 June 2018, the bail for ABC and DEF was cancelled as it had been concluded by the Crown Prosecution Service that it was appropriate to take no further action in respect of criminal charges against them.

121. On 28 June 2018, the Family Court judge approved the final order in the care proceedings, granting D1 permission to withdraw them. The order noted that (i) ABC and DEF had agreed to co-operate with D1 and medical professionals outside of proceedings; (ii) since 12 February 2017, when their children had been rehabilitated to them, they had worked collaboratively with all professionals and the children had been safeguarded; and (iii) a child protection conference had unanimously concluded that a child in need plan was appropriate, which would end in three months if there were no issues arising.

4: The legal framework and relevant guidance

4.1: The legal powers to remove children from their parents

4.1.1: Emergency Protection Orders and Police Protection Orders

122. An Emergency Protection Orders ("EPO") for the removal of a child can be made under the CA 1989, s.44 if the court is satisfied that "there is reasonable cause to believe that the child is likely to suffer significant harm if…he is not removed". An EPO can be put in place for up to 8 days, with the potential to extend it for a maximum of a further 7 days.

123. The statutory guidance to the CA 1989, Volume 1 recognises that an EPO is only appropriate if removal of the child "is necessary to provide immediate short-term protection", as the separation of a child from its parents, is a "draconian" and "extremely harsh" measure and one requiring "exceptional justification" and "extraordinarily compelling reasons". Consistent with case-law from the European Court of Human Rights, the child must be in "imminent danger" and the court must be satisfied that the EPO is both necessary and proportionate and that there is "no less radical form of order available".

124. This guidance reflects the comprehensive summary of the relevant principles set out by Munby J (as he then was) in *X Council v B* [2004] EWHC 2015 (Fam) 1356 at [57], which also included the following:

    (i) Separation is only to be contemplated if immediate separation is essential to secure the child's safety: "imminent danger" must be "actually established".

(ii) Both the local authority which seeks and the court which makes an EPO assume a heavy burden of responsibility. It is important that both the local authority and the court approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the European Convention rights of both the child and the parents.

(iii) Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.

(iv) If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a child assessment order under the CA 1989, s.43.

(v) No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte application, very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety.

(vi) The evidence in support of the application for an EPO must be "full, detailed, precise, and compelling…[u]nparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning".

(vii) Save in "wholly exceptional cases", parents must be given adequate prior notice of the date, time, and place of any application by a local authority for an EPO. They must also be given proper notice of the evidence the local authority is relying upon.

(viii) Where the application for an EPO is made ex parte the local authority must make out a compelling case for applying without first giving the parents notice. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency and even then, it should normally be possible to give some kind of, albeit informal, notice to the parents or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.

(ix) The evidential burden on the local authority is even heavier if the application is made ex parte. Those who seek relief ex parte are under a duty to make the "fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law".

125. In *Re X: Emergency Protection Orders* [2006] EWHC 510 (Fam) McFarlane J was very critical of the circumstances in which an EPO had been granted in a case of suspected FII. At [64], he adopted Munby J's guidance in *X Council*. At [101] he summarised the further guidance he had given, including that:

> "(c) Mere lack of information or a need for assessment can never of themselves establish the existence of a genuine emergency sufficient to justify an EPO. The proper course in such a case is to consider application for a Child Assessment Order or issuing s.31 proceedings and seeking the court's directions under s.38(6) for assessment…
>
> (j) Cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice.
>
> (l) Cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO".

126. At [69], he observed that in *P, C and S v UK* (2002) 35 EHRR 1075, the European Court of Human Rights had held that even where the possibility of harm arose from the mother introducing something into the child's system (such as a laxative) that did not justify separating mother and child. There was no such suggestion in *Re X*.

127. Further, at [72]-[79] McFarlane J found that (i) the social workers had not been able to give a satisfactory reply to the question of what imminent danger the child in question faced; (ii) there had been a "conflation of a lack of information and a need for assessment into a genuine child protection emergency"; (iii) the team manager's repeated assertion that "I could not say that X was 100% safe in that household" was "nothing like the test needed to justify an EPO application"; and (iv) the only evidence which suggested some form of imminent danger to the child arose from a nurse's concern that the father may harm himself if care proceedings were commenced, which was "embellished" by the social workers to a concern that he might also harm the child. He concluded that this "danger" was a "potential consequence of the application" which might have justified making an application (on other grounds) without notice to the parents, but it was not a ground for the EPO application itself.

128. Since *Re X* it has been recognised that an immediate risk of significant emotional harm, absent any risk of physical harm, can justify removal of children without notice: see, for example, *Re L* [2013] EWCA Civ 179 at [67] and [69], where McFarlane LJ, with whom Davis and Thorpe LJJ agreed, emphasised that "safety" should be given a broad construction to include a child's psychological welfare and rejected the submission that "emotional harm is in some manner necessarily less serious than physical harm".

129. A Police Protection Order ("PPOs") can be effected under the CA 1989, s.46, which addresses the "[r]emoval and accommodation of children by police in cases of emergency". Under s.46(1)(a), where a constable has reasonable cause to believe that a child would "otherwise be likely to suffer significant harm", they may "remove the child to suitable accommodation and keep him there". Under s.46(6), no child may be kept in police protection for more than 72 hours.

130. The Court of Appeal considered the interaction between the powers under ss.44 and 46 in *Langley v Liverpool City Council* [2005] EWCA Civ 1173, [2006] 1 WLR 375. Dyson LJ (as he then was), with whom Lloyd and Thorpe LJJ agreed, concluded at [36]-[40] and [70] that:

(i) Removal under s.44 involves a "more elaborate, sophisticated and complete" process than removal under s.46, involving, for example, the power of the court to give directions regarding contact, examinations and assessments and the applicant being given parental responsibility;

(ii) Parliament had afforded "primacy" to s.44 and intended that, if practicable, the removal of a child should be authorised by a court under that section: this was not surprising given the seriousness of removal, with the role of the court being a "valuable safeguard";

(iii) On that basis, s.46 should be invoked only where it is not practicable to execute an EPO, albeit that in deciding on practicability, the police must always have regard to the paramount need to protect children from significant harm"; and

(iv) If there is no imminent danger the appropriate application is for an ICO and if there is greater urgency the appropriate remedy is an EPO: even in an emergency the local authority should seek a court order as this is a "potent check on the local authority's powers of intervention in emergency".

131. The principle that s.46 should only be used in exceptional circumstances where there is insufficient time to seek an EPO, or for reasons relating to the immediate safety of the child, is reiterated in the statutory guidance to the CA 1989, Volume 1 at paragraph 4.64 and the March 2015 version of Working Together to Safeguard Children (the statutory guidance on inter-agency working to safeguard and promote the welfare of children; "Working Together").

132. Similarly, Home Office Circular 17/2008 on the use of s.46 emphasises that the power is an "emergency" one that "should only be used when necessary, the principle being that wherever possible the decision to remove a child/children from a parent or carer should be made by a court." Paragraph 8 of the Circular defines the officer who takes the child into police protection and undertakes the initial inquiries as the "Initiating Officer" ("IO"). Under paragraph 17, save in exceptional circumstances, no child is to be taken into police protection until the IO has seen the child and assessed their circumstances. Paragraphs 34-35 make provision for the IO to take account of the child's wishes as part of the decision-making process and to keep the child informed of what is happening if they appear capable of understanding.

133. In *A v East Sussex County Council and Chief Constable of Sussex Police* [2010] EWCA Civ 743 the Court of Appeal considered an appeal against a trial judge's dismissal of an HRA claim arising out of the immediate removal of an 11-week-old baby from his mother by police under s.46. The case also involved suspected FII. At [11], Hedley J, with whom Carnwath and Jackson LJJ agreed, quoted McFarlane J's observation in *Re X* at [101] (l) that cases of FII, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO, and said "All the more should this apply" to an exercise of the s.46 power.

134. The appeal in *A* was ultimately dismissed. However, at [23], Hedley J reiterated that (i) it was "essential to stress that even in an emergency it is desirable, where possible, to work in partnership with a parent"; (ii) even where emergency powers under ss.44 or 46 are used, "least interventions are best" such that the removal of the child to a known

destination such as a relative is to be preferred to removal to a stranger; and (iii) if a court order has not been obtained or obtained ex parte, an inter partes hearing should be arranged as soon as possible, with an interval of two days being "the norm".

4.1.2: Interim Care Orders ("ICOs") with removal

135. Under the CA 1989, s.31(1)(a) the court may make an order placing a child in the care of the local authority. Under ss.38(1) and (2) the court may make such an order on an interim basis if it has "reasonable grounds" for believing that "the circumstances with respect to the child" are those described in s.31(2). That section provides, insofar as is relevant, that the child concerned is "suffering, or is likely to suffer, significant harm" and that the harm, or likelihood of harm, is attributable to "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." At the final hearing stage, the test does not include the reasonable grounds element, and the court must be satisfied that the child "is" suffering or "is likely to suffer" significant harm in the manner set out in s.31(2). It is for the local authority to establish that the threshold criteria are met.

136. The Family Court Practice at paragraph 2.290[2] makes clear that the court "should not equate satisfaction of the interim threshold criteria with satisfaction of the case for removing the child from a parent". Rather, the test for removal is set out in a series of Court of Appeal authorities. The parties agreed that the test consists of three elements: (i) immediacy (i.e. that the child is believed to be at imminent or immediate risk of significant harm); (ii) necessity; and (iii) proportionality. In *C (A Child) (Interim Separation)* [2019] EWCA Civ 1998 at [2], Peter Jackson LJ set out the applicable principles thus:

> "(1) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.
>
> (2) The removal of a child from a parent is an interference with their right to respect for family life under Art. 8. Removal at an interim stage is a particularly sharp interference…
>
> (3) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.
>
> (4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

> (5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation."

137. The parties agreed that there is a continuing obligation on the court at any interim hearing to consider whether the test for removal is met.

4.1.3: Disclosure obligations

138. In *Langley* at [92] Dyson LJ made clear that it is "essential" that a parent be placed in a position where they can obtain access to "information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child", reflecting the Strasbourg case-law to this effect: see [245] below.

139. Similarly, in *W (A Child) v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1227 at [77], Ryder J (as he then was) explained the need for procedural fairness to parents as follows:

> "The local authority is in complete charge of the decision to make an application but from that moment on, it becomes subject to the procedural obligations imposed by the Rules and Practice Directions of the Court and the Orders of the allocated Judge. Procedural fairness for parents, for example, in relation to disclosure, notice of decisions made and the reasons for the same, and the obligation to put both sides of the case in statements of evidence including evidence favourable to another party that may be inconsistent with or has the effect of undermining the local authority's case, are all aspects of the objective inquiry mandated by the Act".

4.2: The guidance to professionals in cases of suspected FII

4.2.1: The government guidance

140. The government has published various iterations of statutory guidance on FII entitled Safeguarding Children in whom illness is fabricated or induced, as a supplement to Working Together.

141. The guidance in place at the material time emphasised (i) the general need for "sound assessment of the child's needs, the parents' capacity to respond to those needs…and the wider family circumstances" when making judgments on how best to intervene when there are concerns about harm to a child (paragraph 1.14); and (ii) the different forms of assessment required, including the "initial assessment" under the CA 1989, s.17 to determine whether the child is in need, and the nature of any services required and the further, more detailed "core assessment, commenced at the point at which s.47 enquiries are initiated (paragraphs 3.68-3.72, 4.19-4.21 and 4.25).

142. As to the role of the police, the guidance recognised that (i) it may be crucial for any ongoing criminal investigation that a carer is not made aware of the child protection concerns; (ii) before suspicions are confirmed, the priority of police officers should be

to assist the paediatrician where relevant and appropriate in reaching an understanding of the child's health status; but (iii) the balance may change when it becomes clear that a crime appears to have been committed, in which case the police need to ensure the rights of the suspect are upheld and that evidence is gathered in a fair and appropriate way (paragraph 3.100).

143. The guidance referred to the options of using child in need plans and child protection plans, even in cases where the concerns were substantiated and the child judged to be at continuing risk of significant harm (paragraphs 3.74-3.76, 4.44 and 4.46).

144. For circumstances where the child's welfare could not be safeguarded at home, the options of seeking a care order or EPO (if the child was in immediate danger) were referred to (paragraphs 3.77 and 4.26). The following was given as an example of where emergency action may be needed: "…when a child's life is in danger...through poisoning or toxic substances being introduced into the child's blood stream", with the need for a multi-agency strategy discussion and legal advice before emergency action being emphasised (paragraph 4.18). The guidance made specific further reference to "immediate protection" issues as follows:

> "If at any point there is medical evidence to indicate that the child's life is at risk or there is a likelihood of serious immediate harm, an agency with statutory child protection powers **should act quickly to secure the immediate safety of the child**. Emergency action might be necessary as soon as a referral is received, or at any point in involvement with the child and their family. Alternatively, the need for emergency action may become apparent only overtime as more is learned about the circumstances of a child or children…The nature of the abuse will be a key determining factor i.e. if it is known a child is being intentionally suffocated or poisoned then **immediate action should be taken**. If the child is subject to verbal fabrication only, and not the induction of physical signs, it is unlikely it will be necessary to act as quickly to secure the immediate safety of the child." [bold in the original] (paragraph 4.28).

145. The guidance emphasised that (i) family members should normally have the right to know what was being said about them and to contribute to important decisions about their lives and those of their children; (ii) this was so even where statutory child protection powers to intervene in family life were being used; and (iii) there should be a "presumption of openness, joint decision making, and a willingness to listen to families and capitalise on their strengths" with the "guiding principle" always [being] what is in the best interests of the child" (paragraphs 6.2, 6.3 and 6.6).

146. However, the guidance was clear that these general principles were subject to modification in cases of suspected FII: (i) it repeatedly stated that decisions about what information was to be shared with parents, when and by whom should be taken by senior staff on a muti-disciplinary basis and take into account that the decision would have a bearing on any police investigation; (ii) it provided that "[c]oncerns should not be raised with a parent if it is judged that this action will jeopardise the child's safety"; and (iii) it stated that "discussion and agreement-seeking" with parents should only take place where it "will not place a child at increased risk of significant harm" (paragraphs 4.17, 4.22, 4.27 and 6.7).

147. Further, the section on immediate harm recognised that "[t]he circumstances may change significantly if…the carers become aware that the professionals think the child's symptoms are being fabricated". For this reason, "[d]ecisions…about possible immediate action to safeguard a child should be kept under constant review" (paragraph 4.28).

148. As to record-keeping, the guidance reiterated that (i) it is "essential that careful and complete notes are kept at every stage, together with the reasons why decisions are taken, for example, not to inform the parents of concerns during particular periods in time in order to prevent the child suffering harm"; and (ii) good records are important for professional accountability, help focus work, support effective inter-agency working, assist with staff continuity, provide an essential tool for management oversight, audit and peer review and provide an essential source of evidence for s.47 enquiries and court proceedings (paragraphs 3.16 and 6.25).

4.2.2: The Royal College of Paediatricians and Child Health ("RCPCH") guidance

149. The RCPCH has also provided guidance on suspected FII cases. During the trial I was taken to an 8-page document from 2014. This provided as follows in respect of the period before a referral to children's social care is made:

> "…any concerns are not usually discussed with the family at this stage as there is a risk that the behaviour may escalate and increase harm to the child or could impact on the evidence gathering...
>
> Whilst practitioners should, in general, discuss any concerns with the family and, where possible, seek agreement to making referrals to Children's Social Care, this should only be done where such discussion and agreement-seeking will not place the child at increased likelihood of Significant Harm" (pages 3-4).

150. The guidance continued in respect of the period once a referral to children's social care has been made thus:

> "At no time should concerns about the reasons for the child's signs and symptoms be shared with parents if this information would jeopardise the child's safety…
>
> All decisions about what information is shared with parents should be agreed between the Police, Children's Social Care, the consultant paediatrician and the referring practitioner, bearing in mind the safety of the child and the conduct of any Police investigations…
>
> Decisions must be made and recorded about what information will be shared with the parents, by whom and when. The decision should be guided by a clear assessment of the risk to the children as a result of informing the parents of the concerns" (pages 4-6).

151. After closing submissions, I raised with counsel the fact that DS Pope and Ms Scott appeared to have been referring to another document dated 2009. There was a link to

this document at the end of the one referred to above. This much longer (54 page) document from 2009 was not located until after my draft judgment had been circulated. However, it is of materially similar effect and had been quoted by DS Pope and Ms Scott in their evidence to the Family Court. It noted that "[t]here is evidence that once FII is detected, there is a significant risk of further fabrication and other types of abuse" (paragraph 4.9). It also provided that before a referral to social care, **"concerns about FII can not be discussed with the family as the child may be put at risk"** (page 21); and that once a referral is made "carers should **not** be made aware of the concerns about FII or their consent sought for a referral, as this may put the child at additional risk of harm" (paragraph 6.5) [bold in the original]. There is an entire section (section 7) devoted to how to disclose concerns to the child's carers.

4.2.3: National Society for the Prevention of Cruelty to Children ("NSPCC") research

152. In July 2011, the NSPCC published a Research Briefing entitled Fabricated or induced illness in children: a rare form of child abuse? The Briefing explained:

> "Although the induction of illness usually carries a greater risk of causing serious physical harm to the child, children can also suffer harm as a result of repeated inappropriate investigations, such as lumbar punctures, which are administered as a result of false accounts of symptoms or fabricated symptoms" (page 8).

153. It included the following as "specific factors for social workers to bear in mind":

> "Being honest about suspicions from the start may scare off the parent (making it difficult to gain evidence), attract undue media attention, or worse, can lead to an increase in harmful behaviour in an attempt to be more convincing.
>
> Remember that some parents may be extremely manipulative and convincing. They may be middle class and they will know how to invoke the complaints procedure." (pages 10-11)

154. It provides as follows under the heading "management":

> "When FII is recognised in a child, this leads to child protection procedures in order to determine whether the abusing parent should continue to care for the child and this may include care proceedings. In most cases, the protection plan or the courts will place the child in the care of the local authority. Abusing parents may or may not have contact depending on individual circumstances…Reunification is not usually an option for parents who continue to deny FII." (page 14)

5: The expert evidence

5.1: The Claimants' expert evidence

155. The Claimants' pleaded case on their HRA and negligence claims against both Defendants relied on the expert social work evidence of Shaun Barratt. He was called

by Mr Willems at the trial and adopted his report, which was critical of the actions of both Defendants.

156. However, during cross-examination by Mr Ford, Mr Barratt accepted that on the basis of what D1's social workers had been told, a responsible body of social workers would have decided not to inform ABC and DEF about the professionals' safeguarding concerns; and would have decided that child protection routes were not sufficiently robust such that immediate care proceedings were required. He also agreed that the decision to initiate care proceedings was not only compliant with professional negligence test set out in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 but was right. In *Bolam* it was held that a doctor who had acted in accordance with a practice accepted at that time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not negligent merely because there was a body of competent professional opinion which might have adopted a different technique.

157. When cross-examined by Mr Basu, Mr Barratt said he could not recall receiving formal letters of instruction. He also accepted that despite his signed declaration of truth to contrary effect, he was not aware of the requirements of Part 35 of the Civil Procedure Rules, Practice Direction ("PD") 35, the Protocol for the Instruction of Experts to give Evidence in Civil Claims (albeit that this was replaced in 2014 with the Guidance for the Instruction of Experts in Civil Claims) or the PD on Pre-Action Conduct, before signing his report.

158. In re-examination Mr Barratt said that he was familiar with the requirements of giving evidence in the Family Court as that is his usual forum.

159. After he had concluded his evidence, two formal letters of instruction to him were disclosed by the Claimants' team. One of these enclosed a detailed 'briefing' drafted by one of the Claimants' junior counsel setting out potential failings by D1 (which counsel had not intended to be used for this purpose) as well as a chronology prepared by counsel.

160. After the hearing Mr Barratt wrote two letters to the court, explaining that he had been under significant personal pressures at the time of writing his report and when giving evidence. The Claimants' solicitor also wrote to the court to apologise for sending Mr Barratt the briefing and chronology prepared by counsel and for some of the language used in his letters of instruction.

161. In light of these developments, Mr Willems indicated when serving the Claimants' closing submissions that he no longer relied on Mr Barratt's evidence.

5.2: D1's expert evidence

5.2.1: Ms Schofield's evidence

162. D1 relied on expert social work evidence from Felicity Schofield. She was well qualified to assist the court. She qualified as a social worker in 1980 and worked in statutory children's services from 1976 to 2019 as a practitioner and manager, including as the manager of a child protection team. She has held various senior roles, including

Assistant Director of a children's services department, Vice-Chair of a Local Safeguarding Children Board and lead reviewer for a number of Serious Case Reviews. She has worked as an independent social work consultant since 2009 and has completed over 50 expert witness reports in that capacity.

163. Her evidence on the central issue of the decision not to inform ABC and DEF of the professionals' concerns prior to seeking removal of the children can be summarised as follows:

(i) The children were not at immediate risk of harm when at home with ABC and DEF if they were not aware of the professionals' concerns. However, this situation could not remain as it was: all the professionals agreed that some action needed to be taken.

(ii) At the time of the fourth strategy meeting on 12 May 2017, a decision "could" still have been made by the social workers to challenge ABC about the use of oxygen, demand that she cease immediately and arrange a case conference and put both children on child protection plans. Further, the social workers "could" have decided to seek an assessment of the family within the child protection process. However, they concluded that these options were too risky.

(iii) Instead, the social workers decided that the safest way to protect the children was to seek an ICO with removal of the children before approaching the parents with their concerns. As to this decision:

(a) It was based on detailed medical evidence which had been analysed and assessed by medical professionals both before the referral was made and at the later strategy meetings, with the FII diagnosis confirmed and agreed by all relevant medical personnel;

(b) It was an "exceptional" decision based on legal advice and reflecting the "exceptional" and "particular" features of an FII case, which can be different from other abusive situations, namely the recognition that in some cases of FII, once the parents are challenged, the risk to the children may increase;

(c) The social workers could not know what the parents' response would be in this case, but were entitled to rely on the views of the other professionals who did know the family, principally the paediatricians, and they had highlighted concerns regarding ABC's previous disregard of medical advice and failure to be open about the various private doctors she was consulting, which behaviour contributed to the decision to issue proceedings rather than follow the child protection investigation route; and

(d) It was reached after detailed consideration of the various options. Whilst recognising the distress their decision to issue proceedings was likely to cause, all the parties at the 12 May 2017 meeting, including the medical practitioners, agreed that this was the most appropriate response to protect the children; and neither police nor social workers wanted to risk

the parents concealing additional evidence once they became aware of the professionals' concerns.

164. Ms Schofield recognised that it was unusual to seek an ICO with removal without informing the parents first. There was insufficient evidence to justify seeking an EPO, but the social workers had not done this: they had sought an ICO with removal, and that was the appropriate order for them to apply for, given their view that the immediacy of risk arose at the point when the parents became aware of the professionals' concerns.

165. She disagreed with Mr Willems' contention that the following series of factors in ABC and DEF's favour, to be balanced against what he described as a merely "theoretical" risk of harm, showed that the social workers' decision not to engage with them was unreasonable: (i) there was no evidence of induced illness; (ii) the school had a good relationship with ABC; (iii) the first strategy meeting had taken place before the Easter holiday; (iv) it had been over two months until the fourth meeting; (v) everyone agreed ABC and DEF loved their children very much; (vi) there was no suggestion they were not taking the children to doctors who were not registered with the GMC; (vii) they were not known to the social workers or the police which was also a positive factor; (viii) ABC had been facilitating a discussion between Dr S and Dr J; and (ix) the paediatricians were proposing ways forward that involved engagement.

166. Her understanding was that the use of oxygen was not said to create the immediacy of risk: rather, this was considered to arise from the parents' knowledge of the professionals' concerns.

167. As to the use of s.46 by D2, Ms Schofield's evidence can be summarised as follows:

(i) She noted that the police officers did not want the children to continue living with their parents over the half-term break when the school would not be able to monitor their well-being. They appeared to have assessed the risk to the children as being greater than the social workers, who seemed less concerned about the half-term, and to regard the date on which ABC and DEF were made aware of the professionals' concerns as flexible;

(ii) Although the social workers did not appear to share the police officers' sense of urgency and were keen to put their case before the court before taking action, they did not argue against the action the police planned to take, namely, to proceed under s.46 if necessary, before the social workers were in a position to file their application;

(iii) The use of s.46 by the police was not a matter within her expertise. However, the legal principles relevant to EPOs set out in section 4.1.1 above would apply to the use of s.46. The HRA meant that it was always necessary to seek the least restrictive order and that social workers' actions had to be necessary and proportionate. If the social workers had had serious concerns about the action proposed by the police they would have spoken up, but as they were already seeking removal themselves, it was unlikely that they had those concerns.

168. As to the social workers' response to the use of s.46, Ms Schofield observed that they did not know what action they would need to take regarding the children until after the

parents had been arrested and the police had searched the family home. Advance plans had been made in preparation for whatever the police might find. The social workers could not approach family members in advance of the parents' arrest. The timing of the police's use of s.46 powers was their decision and in fact appeared to have been sooner than the social workers would have liked, not least because they had not had sufficient time to complete and file their court application.

169. She said it is not unusual for the police to use their powers of protection without consulting social workers; and for social workers to let s.46 powers lapse such that a child simply returns home. However, in this case, the 12 May 2017 meeting had already agreed that the risk to the children might increase once the parents had become aware of the investigation, that proceedings would be issued, and that the court's agreement should be sought to remove the children. Therefore, once the parents had been arrested, the need for the children to be separated from their parents pending further assessments became more immediate and led to the social workers issuing proceedings and requesting an urgent hearing, again because of the exceptional circumstances.

170. Ms Schofield observed that the social workers in conjunction with the extended family and the parents made every effort to minimise the disruption to the children and to establish the least damaging arrangements for them going forward. As a result, within just two days, the children were back living at home, albeit cared for by their aunt and uncle, and able to see their parents every day. In the circumstances this was "the best possible short-term outcome" for the children

171. Finally, Mr Willems put to her robustly that if s.46 had not been used, the court would not have been granted an ICO with removal. She expressed the view that the court would have done so. I address this issue further at section 8.6 below.

5.2.2: Submissions on Ms Schofield's evidence and analysis

172. In light of the position with respect to Mr Barratt's evidence, Ms Schofield's expert evidence as summarised above was uncontroverted by any other expert evidence.

173. A central feature of the evidence given in her report was that "Whilst other social workers may have reached a different decision, the decisions [D1's social workers] took could be justified and explained". She maintained this in oral evidence, saying the decision the social workers made was reached in a "carefully considered" way and was "reasonable", but was "not the only one they could have taken". Accordingly, her view was that the social workers' actions were in accordance with the view of a responsible body of social work professionals and thus satisfied the *Bolam* test (indeed, she went further, and said that the decisions they took were right).

174. Mr Willems invited me to reject Ms Schofield's evidence as to this body of professional opinion, applying the principle set out by Lord Browne-Wilkinson in *Bolitho v City & Hackney Health Authority* [1998] AC 232 at p.241H-242A thus:

> "The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing

> of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter" [my emphasis].

175. Mr Willems invoked the *Bolitho* principle on the basis that Ms Schofield had appeared to accept that the consequence of her evidence was that immediate removal of children was appropriate in every case of suspected FII where the parents were not known to the authorities. He argued that this was tantamount to accepting that some children would be subject to arbitrary and unlawful removal, by the application of a blanket approach that was not tailored to the facts of a particular case. Even if this only affected a very small number of children, this was not a reasonable or logical opinion.

176. I do not accept this submission. As Mr Ford rightly pointed out, Ms Schofield's evidence on this issue was more nuanced. She said that the scenario put to her by Mr Willems (which included the added qualification that the case was "towards the middle of the spectrum of fabricated illness") would be "very, very rare…very unusual" and that there would not be "dozens of children in this situation". More pertinently, she said that social workers still had to "look at individual features of the case". She was not therefore accepting that any blanket principles or arbitrary approach should be applied in respect of the removal of children.

177. Mr Willems advanced various further challenges to Ms Schofield's evidence. It was not clear whether these were said to invoke the *Bolitho* principle or to be more general arguments to illustrate that her evidence should not be accepted. To the extent that they were the latter, I have borne in mind the principles set out in Phipson on Evidence (20th Edition), paragraph 33-66, cited by Mr Ford, to the effect that the court's ability to reject uncontroverted expert evidence is limited to "rare" situations, such as where the evidence was "manifestly wrong", amounted to "mere assertion without proof", "failed to explain the basis of the conclusions stated" or was "based on incorrect assumptions or unproven facts".

178. First, Mr Willems was critical of Ms Schofield's evidence that local authorities usually issue care proceedings when separation of children from their parents is sought. She had said "In my experience, you'd only go for care proceedings if you were looking to remove the children as the local authority" and "it would not be the practice of most local authorities to seek care proceedings unless their intention is to remove". Mr Willems submitted that this was likely to be a reflection of practice in her locality of experience but cannot reflect the nationwide application of the CA 1989 and its guidance, because (i) the ethos behind the CA 1989 is keeping families together, as is evidenced, by for example, its provisions for children to be placed at home with their parents under an ICO while parents are assessed and the court's ability to make supervision as well as care orders; and (iii) case-law such as Re G [2013] EWCA Civ 965 at [56], per McFarlane LJ, recognises the weight that is to be given to the relationship between a child and their parents.

179. In my judgment Ms Schofield's reference to "most local authorities" indicates that she could not be referring to practice simply in her "locality". More fundamentally, when Mr Willems put to her that her opinion on this issue was "surprising", she rejected the

suggestion and provided a rationale for it. This was to the effect that most of the processes that can be achieved under an ICO can also be achieved by child protection procedures, save for situations where removal is required. This explained why local authorities tend to pursue child protection procedures unless they seek removal, and why most ICO applications involve removal.

180. I therefore agree with Mr Ford that this was an expression of opinion based upon Ms Schofield's experience, which was well within her area of expertise, and which has a reasonable and logical basis. In any event as a statement of her understanding of the general practice of local authorities, it was not directly relevant to the central issue of whether this local authority was acting in accordance with a reasonable body of social work opinion in seeking removal of these children.

181. Second, Mr Willems argued that Ms Schofield's acceptance of the social workers' observations that it is not possible to fully and accurately record strategy meetings was a serious breach of the government guidance with respect to record-keeping, which severely undermined her evidence.

182. However, Mr Ford was right to highlight that it had never been accepted by Ms Hayward that the meeting notes were inaccurate; merely that they were not comprehensive notes of everything that was said at the meeting in question. Further, as noted at [63] above, Ms Schofield's evidence provided her view as to the purpose of the notes, based on her extensive professional experience, which helped explain why they contained certain "short-hands". In my judgment this was a further expression of Ms Schofield's opinion, which was logical and reasonable. Further, as evidence of the procedure for making notes, it does not bear on the central issue of the reasonableness of seeking removal of ABC and DEF without engaging with them.

183. Third, in his oral closing submissions Mr Willems made broad contentions that Ms Schofield had (i) like the social workers, "fallen into the trap" of elevating the FII guidance to a significance it did not have; and (ii) had wrongly assumed that because the social workers had been acting in good faith and followed legal advice, they could not have been acting unlawfully.

184. Mr Ford objected to these further points being taken. He submitted that (i) they had not been put to Ms Schofield, nor trailed in the written closing submissions; and (ii) it was not acceptable to levy these sort of serious criticisms at an expert in oral closing submissions for the first time. Similarly, Mr Basu categorised these aspects of Mr Willems' submissions as "fair rhetorical points" but reiterated that they had not been put to Ms Schofield for her comment and did not, in any event, undermine her expertise.

185. I agree that these two issues were not squarely put to Ms Schofield. However, in any event they do not justify rejecting her evidence.

186. As to the first, Ms Schofield was plainly aware of the pertinent guidance, citing it at [21]-[39] of her report. Her evidence was to the effect that the actions of the social workers could be justified by reference to it. The thrust of Mr Willems' argument was a disagreement with Ms Schofield's opinion on this issue, but it did not illustrate that her opinion lacked a reasonable and logical basis.

187. As to the second, she stated that the legal advice provided to the social workers at this time was likely to have been very influential in their decision-making, especially given both the rarity of FII cases generally and the very unusual step being considered in this case of removing the children without the social workers having had any prior involvement with the family. However, her observations as to the role of legal advice in the social workers' decision-making were in no way determinative of her opinion as to the decisions they took.

188. I do not therefore accept that any of these reasons justify rejecting Ms Schofield's evidence by reference to the *Bolitho* principle or because they illustrate any of the Phipson scenarios that would entitle me to reject it.

189. Finally, a related point is that Ms Schofield's evidence was provided on the basis that the social workers were entitled to rely on the information they were given by other professionals at the 12 May 2017 meeting. In closing submissions Mr Willems took issue with this approach. I address the argument here because (i) this suggestion was, in effect, another way of challenging Ms Schofield's evidence; and (ii) it is important to establish the basis on which D1's decisions should have been taken before assessing the merits of the claims arising from those decisions.

190. Mr Willems highlighted that paragraphs 3.69 and 4.31 of the government guidance on FII made clear that (i) D1 had the lead responsibility for co-ordinating the information gathering process after the referral; and (ii) it was important that all available information was "carefully presented and evaluated, where possible its accuracy having been verified at source".

191. On that basis, he argued that the social workers were obliged to ensure that any assertions made by those present at the 12 May 2017 meeting were verified against the information they already had. Had the social workers done so, they would have realised that (i) nothing had materially changed between the referral and the 12 May 2017 meeting; and that (ii) any impression that the oxygen treatment for JKL had been stopped and then deceitfully re-started by ABC, having said she would stop it, was mistaken (a mistake which he argued would inevitably have compounded the social workers' perception of risk).

192. He also contended that the social workers should have properly "stress tested" the various "risk factors" about ABC and DEF discussed in the meeting. Had they done so, they would have realised, for example, that (i) the "vague suggestion" that oxygen contains toxins lacked "scientific robustness"; (ii) Dr J was a GMC-registered physician and had explained his reasoning for the prescription of oxygen in his detailed 23 March 2017 letter to Dr S; and (iii) the advice by Dr K noted in the minutes that oxygen "is not a benign treatment" was misleading and omitted the important qualification she gave in the meeting to the effect that it did not pose an immediate risk of harm. Instead, he contended that the social workers failed to make any pertinent or relevant enquiries as to the actual risks involved in using oxygen.

193. However, as Mr Ford highlighted, Mr Willems was able to point to no authority for the proposition that the social workers should have "second guessed" what they were told by medical professionals at the 12 May 2017 meeting and independently checked whether what they were being told was consistent with other evidence. Further, *RK and*

AK v United Kingdom (38000(1)/05) [2008] at [54]-[55] is authority for the reverse proposition: there, it was held that social workers were entitled to rely on information from doctors even though that information was later discredited. In addition, Ms Schofield gave uncontroverted expert evidence to the effect that (i) it would be unreasonable to impose such an obligation on a social worker; and (ii) the multidisciplinary child protection system works on the opposite basis, in that while it is the responsibility of each member of the strategy meeting to be responsible for their own information, they are all entitled to assume that what they are being told by other professionals is correct. I found this evidence reasonable and logical.

194. In my judgment, therefore, the social workers were entitled to make decisions based on the information they were given by other professionals at the 12 May 2017 meeting. The effect of this finding is that I would have been entitled to approach this claim entirely on the basis of the information provided to the social workers at the meeting. However, I have considered it appropriate to make certain findings of fact in section 3 above as to some of the matters discussed at that meeting which were contested by the Claimants. This is because (i) they have become relevant to the credibility of the Claimants and the key witnesses for both Defendants; (ii) it is more likely that the social workers were told certain things if they had in fact happened; and (iii) understanding the history provides a more comprehensive context for the nature of the discussions that took place at the 12 May 2017 meeting.

6: The negligence claims against D1

195. I address these claims first because they are the ones most closely impacted by my findings with respect to Ms Schofield's evidence.

6.1: The legal principles

196. D1 accepted that its social care professionals owed GHI and JKL (but not ABC and DEF) a common law duty to take reasonable care in the exercise of their statutory child protection powers, by the investigation of suspected child abuse or neglect and the conduct and pursuit of care proceedings: see *D and others v East Berkshire and others* [2004] QB 558 at [83]-[85].

197. As to the standard of care, Mr Ford submitted that the claim was in substance a professional negligence one, such that the *Bolam* test was applicable. In *Phelps v Hillingdon Borough Council* [2001] 2 AC 619 at 672, a case from the analogous context of educational negligence, the *Bolam* test was described by Lord Clyde as importing:

> "deliberately and properly a high standard in recognition of the difficult nature of some decisions which those to whom the test applies require to make and of the room for genuine differences of view on the propriety of one course of action as against another".

198. In *Barrett v Enfield LBC* [2001] 2 AC 550 at p.591, Lord Hutton held that the *Bolam* test was applicable to claims against social workers in respect of children in their care:

> "…when the decisions taken by a local authority in respect of a child in its care are alleged to constitute negligence at common law, the trial

> judge, bearing in mind the room for differences of opinion as to the best course to adopt in a difficult field and that the discretion is to be exercised by the authority and its social workers and not by the court, must be satisfied that the conduct complained of went beyond mere errors of judgment in the exercise of a discretion and constituted conduct which can be regarded as negligent".

199. Similarly in *NA v Nottinghamshire County Council* [2014] EWHC 4005 (QB), the applicability of the *Bolam* test was conceded in a negligence claim relating to social workers' failures to remove a child from the family home: see the judgment of Males J (as then was) at [3].

200. Mr Willems' initial position was that the claim against D1's social workers was not akin in any way to a clinical negligence claim. He submitted that the only aspect of this case to which the *Bolam* test might apply was the actions of the medical professionals in deciding that this was, or might be, a case of FII. He did not press these arguments in closing submissions and indeed appeared to concede the application of the *Bolam* test to the negligence claim against D1. However, his position remained unclear as he later agreed a revised list of issues which included this as a matter for determination.

201. In my judgment Mr Ford's submissions to the effect that the *Bolam* test is applicable to the negligence claim against D1 are sound. This claim is effectively a professional negligence claim. The actions of the social workers involved matters of professional discretion where there was "room for differences of opinion as to the best course to adopt in a difficult field". *Barrett* confirms the application of the *Bolam* test to social workers' actions with respect to children in their care. The concession in *NA* therefore sensibly acknowledged its application to social workers' alleged negligence in failing to remove a child. It follows that the test applies to the reverse factual situation, which was present in this case, namely social workers' alleged negligence in respect of such a removal.

202. Further, Mr Ford argued that (i) social workers are dealing with problems that are not of their making; (ii) the court must be careful not to judge decisions with the benefit of hindsight; (iii), there is often no clearly right or wrong decision for them to make and each alternative option may have potential future benefits and negatives; and (iv) local authorities owe duties to large numbers of children and social workers operate within and are restricted by finite resources. These principles were distilled from the unreported judgment of HHJ Birtles, sitting in the Mayors and City County Court, in *TF v London Borough of Lewisham* at [95]. Mr Ford commended these principles to me in the absence of higher authority. I agree that they provided appropriate guidance. As HHJ Birtles explained, they illustrate the operation of the *Bolam* test in this context. They are also consistent with the observation of Males J in *NA* at [131] thus:

> "The social workers were at all times dealing with a challenging situation which required balanced judgments to be made, not only as to past facts…but as to future courses of action, each of which involved advantages and disadvantages which had to be weighed up, with no certainty of a good outcome whatever they did. The actions required of them in such situations were not obvious…"

6.2: The issues on these claims

203. The Claimants' Particulars of Claim advanced 29 discrete allegations of negligence by GHI and JKL against D1. They can be distilled into areas reflecting three of the five key complaints made by the Claimants set out at [12] above, namely (i) the decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children; (ii) the removal of the children; and (iii) alleged failings with respect to disclosure. I address them in turn.

6.3: The decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children

204. The parties agreed that this issue could be formulated as follows:

> Have the Claimants proved that the decision not to alert the parents prior to removal was outside the range of reasonable responses open to a reasonably competent and careful social worker, judged by the *Bolam* test?

205. Mr Ford argued that this allegation of negligence by the Claimants, as with the other two elements, required expert evidence to support it. He relied on the principle that a court should be "slow to find a professionally qualified [person] guilty of a breach of their duty of skill and care…without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified [person] to measure up to that standard" set out by Waller LJ in *Sansom v Metcalfe Hamilton & Co* (CA, 19 December 1997) and cited by Males J in *NA* at [132].

206. Mr Ford recognised that the need for expert evidence is not an immutable rule and there may be cases that are such obvious examples of negligence that expert evidence would not be necessary. However he noted that the Claimants had never advanced that proposition, which was no doubt why they had initially obtained their own expert evidence. He also drew support from the fact that Males J recognised the existence of those sorts of cases in *NA* at [133] but held that *NA* "was never the kind of obvious case where [expert] evidence is unnecessary". In my judgment, the same is true here. Expert evidence is required to support the allegations of negligence.

207. The negligence claims against the social workers in *NA* were dismissed because by the end of the trial the position was that (i) none of the Claimant's allegations were supported by expert evidence, the Claimant's own expert having withdrawn his criticisms of the Defendant's social workers; and (ii) the Defendant's expert had given "clear and compelling evidence throughout" showing that there was "no substance" to the Claimant's complaints: [133]-[134].

208. The position is the same here, as explained in sections 5.1-5.2 above. Mr Willems no longer relies on the expert evidence from Mr Barratt to support the negligence claim, the latter having withdrawn his criticisms of D1's social workers once he properly applied the *Bolam* test. Further, Ms Schofield gave clear and compelling evidence that the social workers' decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children was a reasonable one that complied with the *Bolam* test as it was consistent with what a responsible body of social workers would have

considered proper, even if - as she recognised - other social workers might have made a different decision. As explained in further detail at [163]-[166] above, Ms Schofield opined that the decision was an "exceptional" one, based on detailed medical evidence and legal advice after detailed consideration of the various options. It took into account the views of the professionals who knew the family and reflected the specific features of an FII case, as set out in the guidance.

209. Mr Willems submitted that the decision was outside the range of reasonable responses open to a reasonably competent and careful social worker and sought to challenge Ms Schofield's evidence in the ways described in section 5.2.2. above. However, for the reasons given there, I am not persuaded that I should reject Ms Schofield's evidence by reference to the *Bolitho* principle or more generally.

210. Finally, he argued that the court should avoid any possible contradictions developing as between this claim and the Article 8 claim, as this would have the curious effect of suggesting that a local authority can breach an individual's human rights without being negligent in so doing. I disagree: it was specifically recognised in *D* at [85] that liability for breach of Article 8 can arise in circumstances where the tort of negligence is not made out. Mr Ford agreed this proposition. This is because the two claims involve different legal tests.

211. On that basis, I consider that the answer to the issue is "no". As in *NA*, there is no expert evidence to support this allegation of negligence by GHI and JKL and there is compelling expert evidence to the effect that the social workers' decision was reasonable. Accordingly, this aspect of GKL and JHI's negligence claim is dismissed.

6.4: The removal of the children

212. The children were removed from their parents' care by the use of s.46 and then the ICO because the view was reached that once the parents became aware of the professionals' concerns, that they would be at immediate risk of significant harm. Accordingly, the issue on this element of the negligence claim, which plainly overlaps with that under section 6.3 above, was agreed by the parties as:

> Have the Claimants proved that the social workers' conclusion that the risk of harm to GHI and JKL would be immediate when ABC and DEF became aware of the investigation was outside the range of reasonable responses open to a reasonably competent and careful social worker, judged by the *Bolam* test?

213. Mr Ford argued that the social workers' belief in this regard was consistent with the relevant guidance that such a risk existed in FII cases; was based on their own professional judgment; and was supported by the other experienced child protection professionals from varying backgrounds involved in the strategy meetings. More fundamentally, it was supported by uncontroverted expert evidence from Ms Schofield, to the effect that the conclusion, with the consequence that they sought and obtained an ICO to confirm the removal of the children, was a reasonable one. For the same reasons as are given in section 6.3 I am not persuaded by Mr Willems' arguments with respect to Ms Schofield's evidence or the potential inconsistency between findings on the negligence and the HRA claims. Again, therefore I answer the issue posed with "no".

214. In closing submissions Mr Willems sought to develop an argument that the social workers had also been negligent by failing to prevent D2 from exercising the s.46 power, on the basis that the social workers owed the children a "non-delegable" duty of care. However the Claimants had not responded to D1's invitation to them to address the central legal issues on a claim of this nature, such as how D1 owed a duty to the children to protect them from harm caused by D2 as a third party in light of cases such as *N and another v Poole BC* [2020] AC 780 and how the criteria for a non-delegable duty of care set out in *Woodland v Swimming Teachers Association and others* [2014] AC 537 were said to be met. Is it by no means clear that such a duty was owed.

215. Further, as I explain in section 8.6 below, due to the application of the *Lumba* principle, the aspects of GHI and JKL's negligence claim against D1 relating to their removal would also fail as they cannot show any material loss.

6.5: Alleged failings with respect to disclosure

6.5.1: The Claimants' allegations

216. As noted at [12] above, one of the Claimants' key complaints is that D1 failed to disclose certain key documents promptly. The Claimants sought to litigate this issue through both the negligence and the Article 8 claim against D1.

217. However the nature of the documents that are the subject of complaint has evolved over time. Paragraph 63(q) of the Particulars of Claim alleged that D1 had been negligent in failing to disclose the email from Dr Me (understood to be the 3 May 2017 email). Paragraph 65(g) of the Particulars alleged that D1 had breached Article 8 by failing to ensure that "all relevant documents, specifically those relevant to the issue of whether [ABC and DEF] were at risk of significant harm" were disclosed, but then referred specifically to the email from Dr Me. Both paragraphs also referred to Dr J's March 2017 letter. In opening the trial, Mr Willems referred to all the 3 May 2017 emails from Dr S, Dr O'C and Dr Me. In closing submissions, he also referred to (i) the note of the 3 May 2017 telephone call between Dr S and Ms Scott; (ii) the strategy meeting notes; and (iii) Dr K's views on the risk of immediate harm to JKL by the use of oxygen.

218. The negligence claims are brought by GHI and JKL only. The Article 8 claims are brought by all four Claimants.

6.5.2: Procedural submissions and analysis

219. At the end of the evidence I directed the parties to file a list of issues before closing submissions. They were able to agree the matters in issue, albeit not the precise wording of some of the issues. The Claimants' allegation of non-disclosure against D1 did not feature in the lists provided. Accordingly, D1 assumed the matter had been conceded. However Mr Willems made clear that this was not the case. He indicated that the omission of this issue from the list was an oversight, because during the week when the list was due to be filed he and his team were very focussed on their closing submissions.

220. Mr Ford objected to the Claimants pursuing this allegation as part of their negligence or Article 8 claims against D1. He relied on *Parekh v London Borough of Brent* [2012]

EWCA Civ 1630 at [31], where Mummery LJ (with whom Patten LJ and Foskett J agreed) cited the "general rule" set out in *Land Rover v. Short* Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30]-[33] that if a list of issues is agreed, the issues at the hearing will be limited to those on the list. He argued that other causes of action or issues had been modified or conceded throughout this claim, and so it was all the more important that the parties could sensibly rely on agreed lists of issues. It was impossible even now to understand the claim the Claimants were advancing, which kept changing. To allow the Claimants to introduce yet another change to the way they put their case, particularly in such a fundamental way, after closing submissions had been written and heard, would be deeply unfair to D1, who would be materially disadvantaged by not having had the opportunity to make submissions on this element of the claim.

221. In reply Mr Willems contended that the Claimants should be permitted to advance their claim in this regard. The Particulars had been drafted before the CPR disclosure exercise. It was not suggested in response to the Claimants' opening submissions, which squarely raised the non-disclosure allegation, that any amendment to the Particulars was required. Unlike in *Parekh*, the list of issues had not impacted on the evidence heard during the trial. The court had heard all the relevant evidence on the non-disclosure issue, including from Ms Schofield. The facts were, in reality, not in dispute, as D1 conceded that the 3 May 2017 documents had not been disclosed before 11 October 2017. Further, Dr K's comment about the oxygen had only emerged during this trial.

222. I accept Mr Willems' submissions on this issue to the extent that the disclosure complaint relates to the three 3 May 2017 emails. It was clear from the opening of the trial that the non-disclosure complaint in relation to this material was one of the Claimants' five key complaints. It featured in the trial and all material evidence on it was heard, albeit that there is limited disagreement about the factual background. To the extent that D1 assumed from the list of issues that the non-disclosure claim was conceded, that misapprehension was rapidly corrected a few days later when the preamble to Mr Willems' closing submissions made clear that the non-disclosure allegation remained relevant as one of the five key complaints. Indeed that fact, and a response to it, was noted in D1's closing submissions a week later. Further, after their *Parekh* submissions, D1 was permitted to make further submissions on the merits of this allegation, to cater for the possibility that I might permit the claim to continue. Accordingly, any unfairness to D1 has been ameliorated.

223. In my judgment it would not be fair or appropriate for the Claimants to be permitted to advance a claim of non-disclosure beyond the 3 May 2017 emails. Although the Particulars of Claim referred to the letter from Dr J, this allegation was not pursued at trial (perhaps because it now appears clear that ABC saw a draft before it was sent). No complaints about non-disclosure of the note of the 3 May 2017 telephone call or the strategy meeting notes were made in the opening; and it remains unclear even now when those documents were disclosed. Although Dr K's views on the risk of immediate harm to JKL by the use of oxygen were not disclosed during the trial, no amendment to the Particulars to reflect this issue was properly formulated by the Claimants to which D1 could respond. The impact of this material is likely to be similar to that in respect of the 3 May 2017 emails in any event.

224. Accordingly, I permit GHI and JKL to pursue their negligence claim in relation to non-disclosure of the 3 May 2017 emails; and all four Claimants to pursue their Article 8 claims on this basis.

6.5.3: Submissions on the merits and analysis

225. Mr Willems pointed to the family law jurisprudence emphasising the disclosure obligations of local authorities when making applications for care and other orders, especially ex parte, as noted in section 4.1 above. He argued that D1 had failed to comply with these duties by not disclosing the 3 May 2017 emails which were central to the immediacy issue.

226. The need for local authorities to take a rigorous approach to their disclosure obligations in care proceedings is established by the common law, the family law procedural framework and by Article 8. However the fact that such obligations exist does not mean that they generate an actionable duty of care. I was taken to no clear basis for the proposition that the *D* duty incorporates such a duty in respect of the children. No negligence claim at all was pleaded on behalf of the parents.

227. Moreover, even if there was a duty of care, in my judgment Mr Ford was right to submit that whether or not such a duty was breached is again a *Bolam* issue which requires expert evidence. Ms Schofield gave unchallenged evidence to the effect that it was not unreasonable not to disclose the 3 May 2017 emails before the first hearing; and did not suggest that it was unreasonable to do so any earlier than actually occurred.

6.6: Overall conclusion on the negligence claim against D1

228. For these reasons all the aspects of GHI and JKL's negligence claim against D1 fail. I turn now to the Article 8 claims which overlap substantially with the negligence claims. However it is first necessary to determine the limitation issue on those, and the Article 5 claims.

7: Limitation on the HRA claims

229. Under the HRA, s.6(1) it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Under s.7(1)(a) a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may bring proceedings against the authority. The primary limitation period for bringing such claims is one year. All four Claimants' claims under Article 8, and ABC and DEF's claims under Article 5, relate to the events of 24 May 2017. Their HRA claims were issued on 21 May 2020. Accordingly, they were issued just under two years outside the primary limitation period.

230. In determining whether to extend time for these claims under the HRA, s.7(5)(b), on the grounds that it would be "equitable having regard to all the circumstances" to do so, I have applied the principles derived from the various authorities set out in *Solaria Energy UK Limited v. Department for Business, Energy and Industrial Strategy* [2020] EWCA Civ 1625 at [43]-[53]. The principles can be summarised as follows:

(i) 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 s.7(5)(b).

(ii) The language of s.7(5)(b) has an obvious resonance with the Limitation Act 1980, s.33(1). While it would not be right to incorporate all the circumstances to which the court is enjoined to have regard as set out in s.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 HRA.

(iii) It is desirable 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.

(iv) 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.

(v) An absence of prejudice, so far as s.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.

(vi) It is necessary to consider whether here it would be proportionate to deny the claimant the right to bring an HRA claim.

(vii) The burden is 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. However, it may be more appropriate to approach the question by an "open ended examination of the factors that weigh on either side of the argument".

(viii) "Equitable" must mean fair to each side.

(ix) While there is a significant public interest in public law claims against public bodies being brought expeditiously, expedition is less obviously necessary in a claim for a declaration in vindication of the claimant's human rights, upon which nothing else depends, or of a claim for damages. These are retrospective remedies, aimed at marking or compensating what has happened in the past.

231. Mr Willems submitted at the outset of the trial that it would be equitable to extend time under s.7(5)(b) because: (i) while the one-year limitation period under the HRA does apply to GHI and JKL, their ages and lack of litigation capacity, are very powerful factors militating towards granting an extension of time; (ii) the other claims in negligence and for false imprisonment were commenced within the relevant limitation period and would need to be determined by the court; (iii) no additional witnesses, expert evidence or findings of fact would be required for the court to determine the HRA claims; (iv) the extensive contemporaneous documentation, rather than witness recollection, would be the primary way in which the claims are determined; (v) the

consultant psychiatrists instructed by all parties to assist on quantum issues had confirmed that their assessments were not prejudiced by the delay; and (vi) more generally, the Defendants had not been prejudiced in any way by the delay in instituting the HRA claims.

232. In my judgment these factors are all compelling. GHI and JKL are children, and these claims relate to events when they were very young. The in-time claims have had to be determined in any event, and it was not necessary to call any further witnesses or consider any further evidence at the trial in order to address the HRA claims. Extensive contemporaneous documentation was preserved and has enabled the fair consideration of the HRA claims. The experts who have examined the Claimants for the purposes of assessing any personal injury damages have not been impacted by the delay. There is no suggestion that the Defendants have been prejudiced by the delay.

233. The only point advanced by Mr Ford and Mr Basu against the extension of time was that the Claimants could have utilised legal advice to bring their HRA claims earlier.

234. As to the evidence on this issue:

(i) ABC and DEF took some informal legal advice in March 2017 when they found out about the information sharing between the school and Dr S as a result of JKL's disclosure about the oxygen tank. This happened to be from the solicitor who would later represent the Claimants in this claim. However, he was not formally instructed at that point.

(ii) The Claimants were all represented by specialist solicitors and counsel during the Family Court proceedings. When the HRA limitation period expired, those proceedings were still ongoing: they did not formally end until the order dated 28 June 2018.

(iii) Once those proceedings had concluded, DEF volunteered in his evidence at trial that he was advised by his KC to take the matter further. However, he said that they did not take legal advice at that point because "we did not have the headspace or mental capacity to do that…I could not even answer my phone…we just wanted to move on; our lives had been obliterated". In a similar vein, ABC said in her witness statement that she and DEF were "not really in any fit state" to do very much at the conclusion of the Family Court proceedings. In her oral evidence she said, "when you have lived that experience you are just happy to have got the kids back and can live family life again".

(iv) The evidence from their family and friends gives an insight into this period of time: for example, one said that in the immediate aftermath of the family being reunited they "needed to nest and stay together".

(v) ABC and DEF both accepted they had not complained to the Independent Office for Police Conduct.

(vi) ABC's evidence was that she was advised to submit various Subject Access Requests and she did so in late 2018 (albeit that Mr Basu put to her that D2 had

not received one). However, she said the paperwork took a long time to come through and when it did, she found it difficult to read. She did not think DEF had ever done so. She said in her oral evidence "I struggled to look through a lot of the paperwork…I thought I would have to re-live it all".

(vii) She described how, as time went on, they considered taking legal advice but it was very difficult for her and DEF to decide to see a solicitor, as that meant they would have to "dig up" what had happened. She found even handing over the paperwork to an outsider "extremely distressing". She said that even now reading the paperwork triggers the memories of what happened and of guilt and inadequacy.

(viii) It appears they instructed their current solicitors at some point shortly before April 2020, when the first letter of instruction was sent to Mr Barratt.

235. I found ABC and DEF's evidence on this issue entirely credible. It is apparent that the events of May 2017 have had a very significant and enduring impact on them. It is understandable that their focus in the immediate aftermath of the Family Court proceedings was on rebuilding their relationship with their children on a day-to-day basis and that it took some time until they were mentally stable enough to consider further legal proceedings.

236. In my judgment the delay in the Claimants seeking legal representation for the HRA claims and not commencing them earlier does not outweigh the other powerful factors relied on by the Claimants in favour of extending time.

237. I am therefore fully satisfied that it would be equitable having regard to all the circumstances to extend time for all four Claimants to bring their Article 8 claims and for ABC and DEF to bring their Article 5 claims under the HRA, s.7(5)(b).

8: The Article 8 claims against D1 and D2

238. Article 8 provides:

> "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 others."

8.1: The relevant Article 8 case-law

8.1.1: General principles

239. The removal of young children from the care of their parents engages their Article 8(1) right "absolutely and starkly": see, for example, *A-W (A child) and C (Children)* [2013]

EWHC B41 (Fam) at [18].

240. Whether the interference with the Article 8(1) right caused by the removal of children is "necessary in a democratic society" for the purposes of Article 8(2) is to be determined by consideration of (i) whether, in the light of the case as a whole, the reasons adduced to justify the measures were "relevant and sufficient"; and (ii) whether the decision-making process involved in measures of interference were fair and afforded due respect to the interests safeguarded by Article 8: *RK and AK* at [34].

241. Element (ii) requires consideration of whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been "involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests". If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8: *Venema v UK* (2004) 39 EHRR 5 at [91].

242. While the Strasbourg bodies have held that a local authority's decision-making process relating to children in its care should include the views of the parents, they have recognised that there are some instances where that will not be possible or desirable, such as "when action has to be taken to protect a child in an emergency". In such cases it may not always be possible to involve parents in the decision-making process because of the urgency of the situation. Further, it may not be desirable to do so if "those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness": *W v United Kingdom* (A/121); (1988) 10 EHRR 29 at [63] and [64] and *Venema* at [93].

243. The court must nevertheless be satisfied that the authorities were "entitled to consider that there existed circumstances justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation". In particular, they need to establish that "a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to the removal of the child from its family, was carried out prior to the implementation of a care measure": *Venema* at [93].

244. In *Haase v Germany* [2004] 2 FLR 39; (2004) 40 EHRR 430 at [99], the Strasbourg court holding that before public authorities have recourse to emergency measures in such delicate issues as care orders "the imminent danger should be actually established". While in obvious cases of danger no involvement of the parents is called for, "if it is still possible to hear the parents of the children and to discuss with them the necessity of the measure, there should be no room for an emergency action, in particular when, like in the present case, the danger had already existed for a long period".

245. Parents must be placed in a position where they can "obtain access to information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child". Otherwise, they will be unable to participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of their ability to provide the child with proper care and protection": *Venema* at [92].

246. In *McMichael v United Kingdom* (1995) 20 EHRR 205, care proceedings were found to have been in violation of Article 8 because certain social reports about the child, A, had been considered by the children's hearing and the Sheriff Court, but had not been disclosed to the mother. However, her complaints that the taking of A into care, the termination of access to him and the freeing of him for adoption were also breaches of Article 8 were declared manifestly ill-founded and thus inadmissible by the Commission.

247. In *TP and KM v United Kingdom* (2002) 34 EHRR 2 a mother's Article 8 rights had been violated because a video and transcript of the interview with her child was not disclosed promptly to her, thus depriving her of an effective opportunity to address the allegation that the child could not be safely returned to her. However, the use of a "place of safety order" (the predecessor of the EPO) to take the child into care was considered justified under Article 8(2), because it was based on strong suspicions that she had been abused and the doubts which existed as to her mother's ability to protect her.

8.1.2: The role of the court

248. When the Strasbourg court is assessing whether there has been a violation of Article 8 by the taking of children into care, its role is not to substitute itself for the domestic authorities in the exercise of their responsibilities but "to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation": *P, C & S* at [115].

249. The margin of appreciation varies in light of the nature of the issues and the seriousness of the interests at stake. Mr Willems suggested that as there is no greater interference than the removal of children from their parents, this suggested a limited scope for the margin of appreciation. However, the Strasbourg court has approached the matter differently, holding that national authorities enjoy a wide margin of appreciation in "assessing the necessity of taking a child into care, in particular where an emergency situation arises". That said, the court must still be satisfied in the circumstances of the case that:

> "…there existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measures on the parents and the child, as well as the possible alternatives to taking the child into public care, was carried out prior to implementation of a care measure": *P, C & S* at [116].

250. As to the position of the domestic courts, in *Langley*, Dyson LJ cited *Venema* at [90]-[93] on the margin of appreciation, continuing at [60]:

> "Although this passage is concerned with the margin of appreciation that should be, it seems to me that there is much here that has application when the national court is reviewing the decision of an authority to seek to remove a child from those who have custody of him or her. An authority such as the Council in the present case is better equipped than the court to judge how urgent a situation is, and whether in all the circumstances removal of the child is necessary. In my view, therefore…[social workers]…should be allowed some latitude by the

> court when reviewing their decisions in these difficult cases where they have reasonable cause to believe that a child is at risk of significant harm. Of course, 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."

251. Account must be given to the fact that the national authorities have the benefit of direct contact with all the persons concerned": *RK and AK* at [34].

252. The parties agreed that the *Bolam* test is not determinative of the HRA claims. However, Mr Ford submitted that when considering the allegedly wrongful removal of children, the approach taken both in Strasbourg and the domestic courts shows a very close alignment with the principles that would be applied in the common law of negligence. In my judgment this observation is correct, in two key respects: (i) the Strasbourg court has recognised in cases such as *RK and AK* that social workers can act on genuinely and reasonably held concerns, even if those concerns are proved, retrospectively, to have been misguided; and (ii) it has acknowledged the difficulties facing the authorities in situations where emergency steps must be taken: "If no action is taken, there exists a real risk that harm will occur to the child and that the authorities will be held to account for their failure to intervene. At the same time, if protective steps are taken, the authorities tend to be blamed for unacceptable interference with the right to respect for family life": *Haase* at [101]. Very similar observations were made by the Court of Appeal in *A* at [25].

8.1.3: Strasbourg cases involving suspected FII

253. In *P, C & S* the Strasbourg court upheld the decision to obtain an EPO within hours of a baby's birth observing at [130] that (i) questions of emergency care measures are, by their nature, decided on a highly provisional basis and on an assessment of risk to the child reached on the basis of the information, inevitably incomplete, available at the time; (ii) there were relevant and sufficient reasons for the EPO, in particular the fact that the baby's mother had been convicted of an offence related to harming her older child and had been found by an expert to suffer from a syndrome which manifested itself in exaggerating and fabricating illness in a child, with consequent significant physical and psychological damage to the child. However, the Court held that Article 8 had been breached by the manner in which the EPO was implemented, namely that it was not apparent why the baby could not have remained in hospital and to spend at least some time with the mother, noting that she had been permitted supervised contact with the baby once she had left hospital: *P, C and S* at [131]-[133].

254. In *Venema* the Strasbourg court concluded that the parents had not been sufficiently involved in the process by which a provisional order to remove their baby had been made. The Child Welfare Board had advised the hospital doctors to discuss their concerns with the parents. This advice had not been followed. The Board did not renew this advice or ascertain whether the parents had been consulted. The Court was not persuaded by the doctors' opinion that the applicants might have reacted unpredictably if the matter was discussed with them, holding that "this justification, while it may be relevant, cannot of itself be considered sufficient to exclude [the baby's] parents from a procedure of immense personal importance to them, the less so having regard to the fact that Kimberly was in perfect safety in the days preceding the making of the

provisional order" (the "perfect safety" being that she was in hospital until she was removed under the order). The Court also noted the findings of the official inquiry and the Court of Appeal to the effect that parents should have been more involved in the decision-making process. The authorities had "presented the applicants with a fait accompli without sufficient justification": *Venema* at [94]-[96] and [98]-[99].

8.2: Overview of the issues on the Article 8 claims

255. The Claimants' allegations of breaches of Article 8 can be considered by reference to same three broad areas as GHI and JKL's negligence claim against D1, namely (i) the decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children; (ii) the removal of the children; and (iii) alleged failings with respect to disclosure. I address them in turn.

256. The Defendants accepted in respect of the first two areas above that their actions constituted an interference with the Claimants' Article 8(1) rights. On that basis they agreed that they bore the burden of proving that the interferences were justified under Article 8(2), such that they would need to prove that (i) they acted in accordance with the law; (ii) they pursued an aim that was legitimate under Article 8(2); and (iii) their actions were "necessary in a democratic society". The Claimants did not suggest that the Defendants' actions lacked a legal basis (albeit challenging whether s.46 or the power to seek an ICO had been properly exercised), such that the focus was on the last two elements of the Article 8(2) test, principally the "necessary" element.

257. I have adopted the Defendants' formulation of the issues under these headings because where appropriate they used the wording of the aims specified in Article 8(2), whereas the Claimants' draft focused more broadly on the safeguarding of the children.

8.3: The decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children

258. The Defendants formulated the overarching issue under this claim as follows:

> Have the Defendants proved that it was necessary, on the basis of their genuine and reasonably held beliefs, for the protection of the rights and freedoms of the children and/or of their health and/or for the prevention of crime, for the parents not to be told about concerns prior to the removal of the children and was that the least intrusive measure which could have been used without unacceptably compromising the achievement of that objective?

259. This overall issue can be distilled further into the following sub-issues.

8.3.1: Have the Defendants proved that the decision not to inform ABC and DEF of the concerns prior to removal was necessary on the basis of Article 8(2) interests?

260. The Claimants accepted that the Defendants' actions, in general, were taken in order to safeguard the children from the risk of harm (albeit challenging the assessment of that risk). Accordingly, they effectively conceded that both Defendants' actions were aimed at the protection of the rights and freedoms and/or the health of the children for the

purposes of Article 8(2).

261. Further, in the context of the false imprisonment claims, the Claimants sensibly agreed that the police had reasonable suspicion that criminal offences had been committed. I am therefore satisfied that in taking the actions they did, the Defendants were also acting for the purpose of preventing further criminal offences being committed, a further Article 8(2) interest.

262. The answer to this sub-issue is therefore "yes".

8.3.2: Have the Defendants proved that the professionals genuinely believed the decision was necessary on the basis of those interests?

263. As noted at [82] above the focus of the cross-examination of DSI Pope and Ms Hayward on the issue referenced there, and generally, was to the effect that their views were not reasonably held, rather than they were not genuinely held. They both presented as credible and honest witnesses who had struggled with the decision-making process in this case. I have no reason to doubt the veracity of their evidence as to what they believed. I am satisfied that when they ultimately decided, collectively, not to inform ABC and DEF of the safeguarding concerns prior to seeking removal of the children, the professionals all genuinely believed that such action was necessary.

264. The answer to this sub-issue is therefore also "yes".

8.3.3: Have the Defendants proved that the professionals' beliefs were reasonably held and that the decision was the least intrusive measure which could have been used without unacceptably compromising the achievement of their objectives?

265. The Defendants understandably placed considerable reliance on Ms Schofield's unchallenged expert evidence that the Defendants' decision in this regard was not only *Bolam*-compliant but right.

266. Mr Ford accepted that the absence of expert evidence in support of the Claimants' Article 8 claims was not technically fatal to them as it was to the negligence claims. However he contended that the practical effect was the same because (i) the close alignment of HRA and common law principles, as noted at [252] above, suggests that a similar approach should be applied to the need for expert evidence in the HRA claim; (ii) the court's ability to reject uncontroverted expert evidence remains limited to those rare situations set out at [177] above; and (iii) although the *Bolam* test does not apply to the HRA claims, the expert evidence from Ms Schofield had gone well beyond the "responsible body" test.

267. Mr Willems' position was that expert evidence was not necessary for resolution of this issue (or indeed any aspect of the Article 8 claim). His submissions to the effect that the Defendants' beliefs in the need to inform ABC and DEF of the concerns prior to removal were unreasonably held and/or that the option chosen was not the least intrusive one were very wide-ranging. I hope I do them justice by distilling them into the following broad themes.

(i): Training and expertise

268. Mr Willems referred to the lack of training and expertise among the professionals making the decisions. Paragraph 6.52 of the government guidance emphasised the need for specific training on FII issues. However, despite the publication of the guidance in 2008, some nine years before these events, the social workers had had very little by way of such training. They also had very limited experience of these cases in practice. In those circumstances he contended that it would have been appropriate to engage an independent social worker, with specific experience in FII, to provide guidance, but they did not do so.

269. The social workers were open about their lack of experience of FII claims. Ms Hayward said that this was the only FII case she had dealt with in her thirteen year career; and that no-one else in her team had dealt with an FII case. This is not unexpected: Ms Schofield had told Ms Hughes that some social workers would never see an FII case in their career; and her evidence was that FII cases are rare, such that most social workers would be unlikely to have pre-existing expertise in this area. However, the social workers' manager at times "ran" the case herself and oversaw the actions of the social workers; Mr Hughes also inputted; and they consulted the relevant guidance. It is also clear that the social workers relied heavily on legal advice. How closely they worked with legal colleagues was one of Ms Hayward's "prevailing memories" of the case. Mr Hughes explained that a large amount of resource was spent providing the social workers with legal support, both from the internal team and from external counsel, such that the social workers as operating "hand in glove with legal advice". The social workers also took into account the views of others within the multidisciplinary process including the paediatricians who had expertise in FII and who knew the family, as did the school.

270. The social workers also worked closely with DS Pope, who did have some experience of FII cases. She explained that between April 2011 and November 2011, she had dealt with an FII case involving a mother who told her children that she had cancer and went to the extreme of shaving hair. She told the children that they had a serious illness and she would take them into hospital and claim benefits for the ill child. That case ended with the conviction of the offender who received a substantial prison sentence. As a result of that case, DS Pope had been asked by the local authority to deliver joint police/local authority training on the issue which she did. Her presentation covered the contents of the FII guidance. She said she had also been to strategy meetings on other cases where there were concerns about possible FII.

271. Further, as Mr Hughes said, he did not consider instructing an independent social worker was necessary because, regardless of the fact that FII was a complex and rare issue, the core skills including risk assessment were within the skillset of the team. Ms Hayward also highlighted that although FII cases are rare, social workers are very experienced in risk management and working out the balance of harm; those are the "core elements of social work practice" and they applied here.

272. I am not therefore persuaded that the lack of training/expertise or input from an independent social worker was material.

(ii) The need for assessment

273. Mr Willems relied on the fact that the government guidance repeatedly emphasised the need for various forms of assessment: see [141] above. He submitted that D1 completed no assessment at all prior to seeking removal of the children: there had been no s.17 assessment and no proper s.47 enquiry even though, under paragraph 4.2 of the guidance, the initial assessment process "should" (not "may" or "could") be followed. He argued that this failure to complete the assessment process meant that D1 had "failed at the first hurdle".

274. However, in my judgment Mr Ford was right to categorise this argument as circular: it amounted to a suggestion that the decision not to inform the parents was flawed because the social workers did not do a proper risk assessment by speaking to the parents first. The decision not to inform the parents of the professionals' concerns may not have been reached after the assessments contended for by Mr Willems, but it was based on detailed evidence about the family, obtained from all the professionals involved in the multi-agency process, and after detailed discussion at the first and fourth strategy meetings. Further, once the overall decision not to involve the parents before seeking removal had been taken, as explained by Ms Schofield, the other forms of assessment could not be implemented in the conventional way, because they would be contrary to the overall decision not to involve the parents at that stage.

(iii): The balance of harm assessment

275. Mr Willems specifically alleged that the social workers had failed to carry out a "balance of harm" assessment, which considered and weighed the harm that the children would suffer upon removal against the possible harm of leaving them with their parents. No document existed which even purported to show this exercise having been carried out. This inevitably led to a substantial risk that the least intrusive option was not considered. Any such assessment would have been hampered in any event by the lack of prior assessment, the lack of knowledge of the parents and a misunderstanding of the actual risk that the Defendants were attempting to guard against. Ms Scott's statement for the care proceedings, which included a table of options, was not evidence of a balance of harm test, but rather a consideration of the placement options before the court.

276. I cannot accept this submission. As Mr Ford pointed out, the 12 May 2017 meeting notes make clear that the two options being considered were child protection procedures (which meant leaving the children at home) and immediate care proceedings (which was understood to mean removal). The discussion of the options is set out under a heading referring to identifying the one that will keep the children the safest (i.e. the option least likely to cause harm. The notes specifically reflect discussion of the "pros and cons" and of consideration of "the balance of risk and harm". Ms Hayward's evidence at the trial, supported by that of Ms Schofield, was that the experienced child protection professionals discussing in a strategy meeting whether or not to effect removal were plainly engaged in weighing the harm resulting from removal against the other factors. Ms Scott's table for the Family Court, listing the pros and cons for each option, included the option of leaving the children in the parents' care.

(iv): The guidance

277. Mr Willems submitted that it was unclear, even now, which guidance had been referred

to by the Defendants: Ms Hayward referred to the government guidance on FII; Ms Scott cited the RCPCH guidance even though this was intended for paediatricians; DSI Pope had referred in her witness statement in these proceedings to "local" guidance, but none in fact existed, and she had to correct this at the outset of her oral evidence.

278. However, all three documents summarised at section 4.2 above are to similar effect on the central issue for the purposes of this claim: in different ways, they all indicate that (i) there should be a presumption of openness with parents; but (ii) it is permissible, in certain FII cases, to decide not to engage with parents. The government guidance specifically recognised the significance of the point in time at which "carers become aware that the professionals think the child's symptoms are being fabricated" (paragraph 4.28). The RCPCH guidance and the NSPCC research was more explicit in terms of the risk to children potentially increasing at that point, with the former noting that "behaviour may escalate and increase harm to the child or could impact on evidence gathering" and the latter stating that openness "can lead to an increase in harmful behaviour in an attempt to be more convincing". Government guidance was statutory and so the social workers were required to follow it. However, given the rarity of FII cases, it was understandable that the professionals consulted guidance from more than one source.

279. Mr Willems contended that the guidance documents had been selectively quoted by the Defendants. For understandable reasons the Defendants relied in particular on those parts of the guidance which justified their decision, but all three documents were before the court in full and were referred to by all parties in questioning the witnesses and in submissions. The central messages of the guidance for the purposes of this claim as set out at [278] above are also clear when the documents are read in full.

280. Most fundamentally, Mr Willems submitted that the guidance documents read as a whole did not justify the crucial decision not to engage with ABC and DEF. I disagree. As set out at [278] above, none of them are prescriptive to the effect that parents must be engaged with. On the contrary, all recognise that in some cases that will not be appropriate. The decision as to engagement is a matter for the judgment and discretion for the professionals involved. I consider that aspect further in sub-section (v) below.

281. I am therefore satisfied that the Defendants have shown that their decision was consistent with the guidance. Even if the guidance had been breached, this would not automatically make out a breach of Article 8. It has no specific procedural requirements of its own and the Strasbourg court has accepted that authorities should not be expected to follow guidance and policies inflexibly: see, for example *W* at [62]. Further, as noted by Ms Schofield in her report, over-reliance upon guidance can lead to "insufficient attention [being] paid to the expertise and skills required to make procedures work effectively, particularly in complex cases". The focus should instead be on the "principles of good practice".

(v): The overall multidisciplinary risk assessment underpinning the decision

282. First, Mr Willems contended that (i) engaging with parents and children is a fundamental principle of social work practice and is therefore the usual and expected practice, even when family members do not wish to work co-operatively with statutory agencies; and (ii) case-law, such as the observations of Hedley J in *A* (see [133] above),

made clear that even in an emergency it is desirable to work with parents.

283. There was no dispute about that this general presumption of openness. The 12 May 2017 meeting notes make clear that the social workers would have preferred "to work with parents prior to proceedings" if possible. Ms Hayward described transparency as a "core value which permeates usual social work practice"; Mr Hughes agreed that social workers generally try and work in collaboration with families, as that is how the "best results" are achieved; and DSI Pope recognised that it would be usual practice for the family to be aware that there are concerns and that such meetings were taking place. However, the professionals rightly recognised the key message from the guidance that in FII cases, that is only a starting point, and there is a need to tread very carefully with respect to disclosure to parents. Dr S had recognised this from the outset: hence her use of the capitalised warning on her referral letter and her advice to the school before the referral was made, as set out at [18] above. Ms Hayward was clear that in FII cases, the usual "weighting" given to transparency does not apply and that the "delicacy" required was "paramount"; Mr Hughes also recognised that there are some situations where social workers would be cautious at an early stage and FII cases are one of those.

284. Second, Mr Willems contended that the professionals were all vague when asked about the actual risks to the children they thought would eventuate once the parents became aware of the professionals' concerns. He submitted that DSI Pope found it difficult to articulate what risks she was trying to protect against: in cross-examination, she said that the increased risk that she had in mind was of GHI and JKL being taken to further medical appointments to confirm that they were genuinely ill and only in re-examination did she say that she could not rule out the risk of inducing symptoms. He contended that her answers in cross-examination should be preferred. He relied on the fact that DS Pope failed to hear or remember the information provided by Dr K in the 12 May 2017 meeting that the oxygen did not pose an immediate risk of harm. On that basis, he argued that when tested, the real, as opposed to hypothetical risk could only be stated to be, at its highest, that of emotional harm or fabricated illness as opposed to physical harm or induced illness.

285. I do not agree. DS Pope believed that the parents would do "something" to prove that their children were ill. She could not say "what that something was or would've been, but just the fact that it created the immediacy". The "something" includes "taking them to more appointments with private doctors on the periphery of ethical practices". She was concerned that this might include further the unnecessary invasive medical procedures and treatments which could cause physical as well as emotional harm. She did say under oath, albeit in re-examination, that she could not rule out induced illness. In addition, Ms Hayward, when asked what risks she considered to be present, made reference to all potential risks mentioned in the government FII guidance, which includes reference to physical harm and inducement of illness. Further, Mr Hughes said he could not rule out the risk of the parents inducing harm and the risk of them leaving the area with the children: while there was no direct evidence that this family would do that, he could not dismiss it. A fear of this nature was also reflected in DS Pope's telephone call to the school shortly before the arrests were effected.

286. Third, Mr Willems submitted that the professionals placed no, or no appropriate, weight on the various positive factors in ABC and DEF's favour.

287. He noted that (i) no-one had considered referring the children to D1 between 2015 and 2017; and (ii) the issues in 2015 were more serious than in 2017. However, the fact that there had been no referral of the children between 2015 and 2017 is explained by Dr S's continued efforts to work with the family during that time. The discovery of the oxygen treatment effected an understandable change in her approach; and she did then consider the position serious enough to merit referral. By 2017 she was concerned not only by issues with GHI but also with JKL. He noted that the children were seen to be healthy and happy at school: but that reflected part of the problem, which was that the school did not recognise the sick children which their parents considered they were, and which was said to justify the various medical investigations and treatments to which they were subjected.

288. He relied on the fact that the paediatricians' 3 May 2017 emails made clear that they were suggesting routes that could not be completed without the involvement of the parents. However, as explained in section 3.8.4 above, their thinking on this issue moved on during the 12 May 2017 meeting. He noted that there was no suggestion that the parents had ever been to a non-GMC registered medical practitioner. However, Dr S and her colleagues were aware of this but were still concerned that the advice reflected "minority and extreme" opinions: see [39] above. He noted that in May 2017 ABC and DEF had facilitated a discussion between Dr S and Dr J. That is correct, but this had not ameliorated Dr S's concerns about Dr J's role: after the 16 February 2017 telephone conversation with him, she remained concerned that he did not have a formal paediatric qualification and recorded her view that his treatment of JKL reflected "[h]ighly unusual clinical practice".

289. Mr Willems also referred to the fact that ABC and DEF were unknown to the police and that they had business interests in the city and ties to the community. He argued that ABC and DEF would have co-operated with a process of assessment before removal, had it taken place. He understandably highlighted that when formal police and social work involvement became apparent, the parents' cooperation was exemplary. ABC said she would have "walked over hot coals" to avoid losing her children; DEF said "with total certainty" that if the professionals had raised any concerns with them, they would have done anything they were asked to do, in order to avoid the possibility of removal. Various family members said that they would have similarly co-operated with the professionals if concerns were raised.

290. These are all fair points that suggest that engagement with the parents might have worked. However, it is important to avoid assessing the matter by reference to hindsight. In my judgment none of these factors are so powerful that they illustrate that the Defendants' assessment to the contrary effect, supported by Ms Schofield, was wrong. As noted at [166] above, Ms Schofield considered various positive factors on ABC and DEF's behalf as put to her by Mr Willems, but ultimately concluded that the decision was the right one.

291. The Defendants were entitled to place greater weight on the factors they had identified from multidisciplinary discussion, especially with Dr S and the school, who had had contact with the family for several years, which went the other way in the balancing exercise. The factors which suggested that ABC and DEF might not fail to act honestly and openly with professionals, "disregard professional advice and act in a covert manner" and refuse to adhere to "requests made under child protection" included (i)

ABC's failure to "adhere to agreements made with health professionals", namely the reporting agreement with Dr S; (ii) the continuation of the oxygen treatment despite Dr S's advice to stop it (whether or not it had been stopped for a while and then re-started); (iii) the further evidence of the parents not following medical advice, such as disregarding Professor A's advice that they should stop exploring whether GHI had PoTS; (iv) the evidence suggesting that ABC was giving a different account about the children's water to both her children and her husband; (v) the concern that ABC may well have had a mental health condition of an unknown degree and nature, meaning that her behaviour would have been even less predictable than it otherwise might have been; and (vi) the perception that DEF was not a sufficiently "protective factor" and could also "come across as intimidating and aggressive", which was further risk factor. These factors also contributed to the view that the risk to the children would increase once the parents were aware of the professionals' concerns, as anticipated by the guidance. Finally, DSI Pope was clear that advance notice to the parents could prejudice the criminal investigation as it could allow them the opportunity to destroy evidence. Ms Schofield acknowledged this factor.

292. Overall the professionals at the 12 May 2017 meeting had to make a difficult decision in circumstances where there was no obviously right answer and where the consequences of making the wrong decision (particularly if it was alerting the parents to their concerns and/or not removing the children) had the potential to be very damaging to the children. They identified the options, considered the merits of each and discussed the matter on a multidisciplinary basis. The social workers also took advice from specialist counsel, due to the unusual nature and relative rarity of FII cases. Ultimately the unanimous decision was that the risks were too great for the parents to be informed of the issues. For the reasons set out above in my judgment this was a reasonable decision.

293. In reaching this conclusion I have borne in mind the role of the court in reviewing decisions of this nature, the fact that the professionals involved here had the benefit of direct contact with all the persons concerned and the degree of latitude to be afforded to decision-makers, as described in section 8.1.2 above.

294. As to the Strasbourg case-law, *Venema* at [93] indicates that there will be cases in which it is appropriate not to notify a family of concerns held prior to the seeking removal of a child. On the facts of *Venema*, although the Strasbourg court found that it was wrong not to involve the parents at an earlier stage, the Child Welfare Board had advised the hospital doctors to discuss their concerns with the parents, which advice had not been followed. This factor renders it factually distinguishable from this case. *Haase* is also distinguishable because the parents had themselves requested family aid, which provided a different context to the finding that they had been insufficiently involved in the decision-making process.

295. Finally, on the "least intrusive measure" issue, I agree with Mr Ford that the decision was a binary one: either the parents were informed of the concerns, or they were not. In that sense, there were only two options available. Given that the professionals genuinely and reasonably believed the parents could not be told, there was no less interventionist option that they could have deployed.

296. I am therefore satisfied that the answer to this sub-issue is "yes".

297. Having answered all the sub-issues positively, the overall issue set out at [258] above is also answered "yes". The Defendants have therefore proved that the professionals involved in this case had genuinely and reasonably held beliefs, based on the various Article 8(2) interests referred to under section 8.3.1 above, that it was necessary not to inform ABC and DEF of the professionals' concerns prior to seeking removal of the children. They were therefore entitled to consider that there existed "circumstances justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation", in accordance with *Venema* at [93].

8.4: The removal of the children

8.4.1: DS Pope's belief

298. The parties agreed that the first issue on this claim was:

> Has D2 proved that DS Pope believed, and that she had reasonable cause for believing, that the children were likely to suffer imminent and significant harm if they were not removed to suitable accommodation and kept there when she invoked the CA, s.46 power?

299. Against the background of the decision-making at the 12 May 2017 meeting, DS Pope's evidence was that she considered it likely, but not inevitable, that the s.46 power would be used after the arrests. If, for example, the oxygen concentrator had been found in the garage, packed up with DEF's tools, and if DEF had said to the officers that his wife used the children as "guinea pigs" and asked for help, the use of s.46 might not have been necessary. The children could potentially have remained with DEF. However, matters did not unfold like that. DS Pope explained that the post-arrest search of ABC and DEF's home confirmed the professionals' suspicions about the risks to the children. The officers' location of the oxygen concentrator in JKL's bedroom was particularly significant. Further, once the arrests and searches had taken place, there was insufficient time for D1 to seek an ex parte ICO on the afternoon of 24 May 2017.

300. DS Pope's evidence was that her rationale for concluding that the children were likely to suffer imminent and significant harm if they were not removed, such that she should invoke s.46 under the agreed Plan B, included that (i) she suspected the oxygen concentrator was, despite Dr S's advice to the contrary, still being used on JKL, causing him further physical and psychological harm; and (ii) she knew that from her previous experience and training that once carer(s) become aware of professionals' concerns, there is a significant risk of further harm being caused to the child(ren). She referred to the guidance.

301. Mr Willems challenged this rationale in a range of ways.

302. First, he contended that had DS Pope not changed the tone of the 12 May 2017 meeting by concluding that the threshold for potential criminal activity had been passed, immediate removal of the children would not have been considered. I disagree. The meeting notes make clear that D1 was going to pursue care proceedings with removal, irrespective of DS Pope's decision, albeit that, as Ms Hayward said, it provided the agencies with "clarity" as to the next steps.

303. Second, Mr Willems argued that DS Pope had an undue focus on the police investigation; that this wrongly took precedence over the welfare of the children; and that this was clear from her failure to comply with her IO responsibilities under the Home Office Circular 17/2008 (set out at [132] above). DS Pope had a significant amount of information available to her about the risk to the children; and the specific nature of the risk was one that the children may well not have been able to articulate. Therefore, the fact that DS Pope had not seen the children personally as required by the Circular did not mean that she was unable to assess the risk to them. Further, her delegation of the remaining responsibilities under the Circular to the social workers does not indicate a lack of regard for the children's welfare. Rather it shows the reverse: that the professionals appropriately co-ordinated their actions to minimise the distress to the children, it being considered, as DSI Pope said, that the social workers were better placed to speak to them, including as required by the Circular, than the police officers.

304. Third, he submitted that the reality was that s.46 was engaged in order to facilitate the investigation and to ensure that the parents did not have the opportunity to discuss matters prior to being interviewed by the police. I do not accept this. In my judgment DS Pope was a clear, compelling and measured witness and I accept her evidence as to her rationale and her focus on both the needs of the criminal investigation and the children's welfare. Her approach was supported by the multidisciplinary team present at the 12 May 2017 meeting. It was also to some degree vindicated by the decision of the Family Court on 26 May 2017 to order separation of the children through the ICO.

305. D2 has therefore proved that DS Pope believed, and that she had reasonable cause for believing, that the children were likely to suffer imminent and significant harm if they were not removed to suitable accommodation and kept there when she invoked the CA, s.46 power.

8.4.2: The removal of the children under s.46 by D2

306. The parties formulated this issue as:

> Has D2 proved that it was necessary, for the protection of the rights and freedoms of the children and/or of their health and/or for the prevention of crime, for them to be removed by DS Pope on 24 May 2017 into local authority foster care and was that the least intrusive measure which could have been used without unacceptably compromising the achievement of that objective?

307. In light of my assessment of DS Pope's evidence as set out in section 8.4.1 above, I am satisfied that her broad objective in exercising the s.46 power was to protect GHI and JKL. For the purposes of Article 8(2), she was therefore acting with the objectives of protecting their rights, freedoms and health and preventing criminal offences being committed against them.

308. The much more difficult issue is whether the use of s.46 was "necessary" and was the "least intrusive" measure which could have been used without unacceptably compromising the achievement of the broad objective of protecting the children.

309. I have considerable sympathy with Mr Willems' submissions to the effect that (i) all

professionals agreed that the children were not at immediate risk until ABC and DEF were aware of the professionals' concerns; (ii) by going "overt" on the morning of 24 May 2017, asking the parents to return home and then arresting them, the police had "created" an emergency situation of increased risk to the children; (iii) such pre-emptive acts of a third party are not the sort of "actually established" danger or "genuine emergency" necessary to justify an EPO, which tests apply "[a]ll the more" to the use of s.46, given the exceptional and draconian nature of the power (applying *X Council v B*, *Re X*, *Haase* and *A*). This may explain why although the government guidance on FII considers the various powers that might be used in emergency situations, it does not mention the possibility of the use of s.46.

310. However, Ms Schofield supported the professionals' assessment that the situation within the family could not remain as it was. Action was needed by one of the agencies. As Ms Hayward explained, it happened that D2 was able to arrange its resources to act more quickly. Had they not done so, D1 would have acted by making its ICO application. However there appeared to be some level of agreement that it was preferable for the police to act first in any event: (i) as DS Pope's 19 May 2017 email noted (see [97] above) they were keen to act before D1 to ensure no evidence was destroyed; (ii) Ms Scott explained in her SWET for the Family Court that "…the police have decided to instigate a criminal investigation and therefore the first contact with parents must be by the police when they arrest parents"; (iii) the 25 May 2017 application (see [111] above) referred to the police wanting to "act without warning being given to the parents in order to preserve evidence for their criminal investigation"; and (iv) Mr Hughes' recollection was that the police decided to arrest the parents first, without notifying them of the multidisciplinary concerns about their parenting, so that searches for evidence could be made.

311. Further, DS Pope has provided a cogent rationale for the police concluding that it was necessary to act on Wednesday 24 May 2017. Her reasons related to both safeguarding of the children given the looming half-term holiday and the logistical need to ensure adequate numbers of officers to effect the arrests, searches and interviews as effectively as possible: see [91]-[92] above.

312. It is right to acknowledge that the social workers appeared less concerned about the risks posed by half-term than the police, as Ms Schofield identified. For example, in Ms Hayward's 19 May 2017 email (see [96] above) she suggested D1's legal team may need to make the ICO application during half-term, when the children were still living with their parents. However, this does not mean that DS Pope's assessment of the risk the holiday posed was wrong. Ms Schofield explained that it is not uncommon for different agencies to assess risk differently. The social workers' apparent lower levels of concern about half-term were not so firmly held that they urged the police to wait before acting. Again, it is necessary to afford professionals making assessments of the sort DS Pope was engaged in a certain degree of latitude: see Dyson LJ in *Langley* at [60].

313. Both Defendants recognised that obtaining an ICO to effect the removal of the children, under Plan A, was preferable. It is therefore plainly a serious matter that when the police went "overt" on 24 May 2017, both Defendants understood that Plan A was unlikely to work. They actively adopted Plan B, which, through the use of s.46, involved far fewer procedural safeguards than Plan A, not least because of its lack of judicial oversight. I

agree with Mr Willems that in that sense, Plan B was not the least intrusive measure that could be used: Plan A would have afforded greater respect for the Claimants' Article 8 rights.

314. However, on balance, I am satisfied that, in light of how events unfolded on the afternoon of 24 May 2017, in this exceptional and highly unusual case, the police use of s.46 to remove the children was necessary and was the least intrusive measure that could be adopted, for the following reasons.

315. First, this was a very complex and sensitive situation in which the professionals liaised extensively before taking any overt action. The matter was discussed at an unusual number of strategy meetings. The professionals all agreed that once overt professional action was taken, the children were at immediate risk. DS Pope concluded, reasonably, that it was necessary for the police to act before half-term, in part to protect the children. There was a measure of multidisciplinary agreement to this course.

316. Second, DS Pope liaised with the social workers to try and ensure that they could make their application for an ICO on the day the arrests were effected, to achieve Plan A. It became clear that this appeared unlikely due to the time taken to collate the material for the ICO application and Ms Schofield was not critical of D1 for that. DS Pope was therefore faced with a collapsing timeframe prior to half-term and justifiably considered it necessary to take police action on 24 May 2017.

317. Third, once the arrests and searches had taken place over the lunchtime and early afternoon of 24 May 2017, the risks to the children as reasonably assessed by the professionals had increased, for the reasons given in section 8.3 above. The risk ultimately came from the parents not the actions of the police. The risk was, by this point, "actually established" and there was a "genuine emergency".

318. Fourth, the options by this point were very limited:

(i) It was "not practicable" for an ex parte ICO, or presumably EPO, application to be made that day. This was apparently due to a combination of D1's paperwork not being quite ready and the fact that D1 did not receive notification of the arrests until the early afternoon. As to the latter issue, Ms Shirtcliffe's evidence was that she could not remember an occasion in their locality in her 14 years of experience when social workers had received information in the morning and been able to obtain a hearing in the afternoon.

(ii) Ms Schofield agreed that it was not possible to assess family members as potential carers in advance of the removal. This was because D1 had no knowledge of their relationship with the parents, nor their views on their behaviour, such that it was unclear whether they would inform the parents of the concerns and thereby put the children at risk.

(iii) Similarly, as DSI Pope explained, there are occasions after the arrest of parents of young children where it may be appropriate to ask other family members to pick the children up from school and to take them into their care. However, this was not one of those cases. She said that it had been reported as part of the information sharing process that ABC had shown signs herself of FII and

therefore until D1 could undertake an assessment of the wider family, she concluded that it would not be appropriate from a safeguarding perspective to place GHI and JKL with family members.

(iv) The option proposed by Mr Willems of voluntary accommodation under the CA 1989, s.20 was not explored at any length during the trial but would surely have involved the co-operation of ABC and DEF, and the social workers had already justifiably ruled out any such liaison before seeking removal through an ICO.

(v) The child protection route had been justifiably ruled out at the 12 May 2017 meeting.

On that basis, DS Pope had no realistic option that could effectively meet the objective of protecting the children other than the use of s.46.

319. Fifth, the Defendants took a range of measures to mitigate the impact of the use of s.46 on the children. D1 arranged for foster carers to be in place and for social workers to attend at the school to take the children to them, without the need for the children to have contact with police officers. They assessed the children's maternal aunt and uncle as foster carers much more rapidly than usual. They filed their ICO application the following day. They arranged for an urgent inter partes hearing the day after. They offered an unusual plan for the children that returned them to their family home. They ensured ABC and DEF had as much contact with the children as possible (which later required extensive resources). Although not determinative, it is relevant that Ms Schofield's expert evidence was that for GHI and JKL to return to their home within two days, cared for by their aunt and uncle, and able to see their parents daily, was "the best possible short-term outcome" for them.

320. Sixth, in terms of the authorities:

(i) This case clearly has some similarities with *Re X* as both involve concern by the authorities about the parental response to care proceedings. However there are important differences between the cases: in *Re X* (i) the mother had expressly sought the help of social services with her health concerns for her child; (ii) the suspicion of FII came from a social worker rather than a medical professional; (iii) prior to the making of the EPO of which McFarlane J was critical, the agreed plan had been "low level intervention by way of assessment and counselling; and (iv) the social workers had disregarded legal advice. None of those features is present here.

(ii) Further, in *Re X*, the only evidence which suggested imminent danger to the child was a concern that the father may self-harm if care proceedings were commenced, which was "embellished" by the social workers to a concern that he might also harm the child. Matters were different here: as explained in section 8.3 above, there were a series of factors, and pertinent guidance, which led the professionals to reach the justified conclusion that the children were in imminent danger once the parents were aware of the professionals' concerns.

(iii) As noted at [128] above, McFarlane J's observation in *Re X* that an EPO (and by implication the use of s.46) will rarely be warranted in suspected FII cases

where there is no medical evidence of immediate risk of direct physical harm to the child has been overtaken by cases such as *Re L* recognising the significance of emotional harm. In any event, as noted at [285] above, the risks to GHI and JKL were not limited to the risks of emotional harm

(iv) *A* also provides some support for the use of s.46 in this case. There, the use of s.46 was found by the trial judge and the Court of Appeal to be justified on the basis of medical evidence that the risk to the children could not be said to be "anywhere near 50%" but was neither "zero or sufficiently near zero for it to be discounted". The Court of Appeal also focused on whether the authorities had been entitled to take a particular course of action rather than whether it was the ideal one. The Court's view at [22]-[25] that things might have been done "better" through, perhaps, more communication with the parent, did not merit a finding of a breach of Article 8. It is also notable that in this case the duration of police protection was, as in *A*, just 2 days.

(v) Further support for the use of s.46 here can be drawn from *K v CPS* [2014] EWHC 1606 (Admin). At [18] and [20] Bean J (as he then was), with whom Beatson LJ agreed, held that while seeking an EPO is clearly preferable where practicable, the police must always have regard to the paramount need to protect children from significant harm; and the police are not debarred from using s.46 power at a stage where the child is believed to be at imminent risk of significant harm and it is too late to make an application for an EPO.

321. Seventh, I have again had regard to the latitude to be afforded to professionals in situations of this nature described by Dyson LJ in *Langley* at [60]; and the fact that the Strasbourg court affords a wide margin of appreciation to national authorities in relation to short term, initial decisions to take children into care in emergency situations before any hearing, such as the situation here. This is to be contrasted with orders that make irreversible changes depriving a parent of access and parental rights.

322. For these reasons I answer the issue set out at [306] above with "yes".

8.4.3: The actions of D1 with respect to removal

323. The parties formulated the issue under this claim as:

> Has D1 proved that the social workers genuinely and reasonably believed it was necessary, for the protection of the rights and freedoms of the children and/or of their health and/or for the prevention of crime, for the children to be removed ex parte; and on the basis of that belief, that such removal was the least intrusive measure available without unacceptably compromising the achievement of that objective, such that it was not incumbent on D1 to seek to intervene in respect of the police's use of their s.46 powers either before or following the planned DS search of the home and the arrest of the parents?

324. The first limb of this issue focusses on D1's assessment of the risk and decision to seek removal of the children through an ICO.

325. I accept Ms Hayward's evidence and the written accounts of Ms Scott which show that their purpose in acting was to protect GHI and JKL. Like DS Pope, for the purposes of Article 8(2), their actions were focused on the objectives of protecting the children's rights, freedoms and health and preventing criminal offences being committed against them.

326. For the reasons already set out, in particular at section 8.3 above, I am satisfied that the social workers genuinely and reasonably believed that the only way to manage the risks to the children was to remove them immediately upon the parents being informed of the professionals' concerns and investigations. Any on notice hearing of an ICO application would have provided the parents with advance warning of those concerns and investigations prior to the point at which the children would have been removed. It therefore follows that the social workers genuinely and reasonably believed that the only option left open to them was to effect removal on a without notice basis: any other measure would not have achieved the Article 8(2) objectives, particularly those of protecting the children's health and safety.

327. One element of the Claimants' pleaded case was that D1 should have applied for an EPO. However as Mr Ford highlighted, *Re L (A Child) (Interim Care Order Extended Family)* [2013] EWCA Civ 179 at [75] indicates that a local authority is not required to apply for an EPO, but is entitled to make an application for an ICO with separation on an ex parte basis as a "holding order to protect a child… pending further consideration at a hearing attended by all of the interested parties" if the circumstances permit this.

328. The second limb of this issue focusses on D1's failure to intervene in D2's actions.

329. Mr Willems contended that D1 should, as the lead authority with responsibility for the children, have sought to prevent D2 from acting in a way which it was known would cause the children harm, by removal under s.46, until D1 was able to pursue the less draconian measure of applying for an ICO in court. It was illogical for D1 to conclude that there was insufficient evidence for an EPO and then stand back and allow D2 to perform a more draconian, emergency removal of GHI and JKL, which they should have realised was contrary to established of social work principle and practice.

330. Again, I have considerable sympathy with this submission. However, Ms Schofield explained that she would have expected the social workers to speak up if they disagreed with the police proposal to use s.46, but they did not. Her understanding was that they did not, as they intended to seek removal themselves in any event. While the removal being sought by the social workers through an ICO was fundamentally procedurally different to the removal being sought by the police under s.46, I am satisfied that the social workers genuinely and reasonably believed that immediate removal would place the children at less risk of harm than leaving them in the care of their parents. The use of s.46 following the arrest of the parents would therefore mitigate the overall risk of harm. Ms Hayward also made the point in her evidence that she knew that there was significant planning around the police's actions (including, for example, in relation to how s.46 would be exercised in practice and the availability of social workers and foster carers).

331. I am therefore satisfied that it was not incumbent upon the social workers to seek to prevent the police from using their powers under s.46. As Mr Ford highlighted, the fact

that only two days later a court agreed that it was not safe to leave the children in their parents' care supports the social workers' assessment of the risk.

332. For these reasons I answer the issue set out at [323] above with "yes".

8.4.4: Overall conclusion on the removal issue

333. Accordingly, for all these reasons, the Defendants have proved that the removal of the children from their parents' care was not in violation of Article 8. The reasons given by the Defendants for the removal of the children under s.46 and then the ICO were "relevant and sufficient". Further, I am satisfied that there existed circumstances justifying the removal of the children; and that a careful assessment of the impact of the proposed removal on the parents and the children, as well as the possible alternatives to removing the children, was carried out prior to the removal. These key aspects of Article 8 as set out in *RK and AK* at [34] and *P, C & S* at [116] were therefore satisfied.

334. However, even if the s.46 removal was in breach of Article 8, for the reasons set out at section 8.6 below, the *Lumba* principle applies: the children would still have been removed by way of the Family Court making an ICO.

8.5: Alleged failings with respect to disclosure by D1

335. ABC and DEF gave evidence that they believed that the social workers acted deliberately and maliciously in not disclosing the 3 May 2017 emails until October 2017. I do not accept this. Ms Hayward made clear in her statement to the Family Court that the delay in disclosure was due to the fact that Ms Scott "mistakenly believed this correspondence to be irrelevant, as it was outdated"; and was related to the fact that the statement had to be completed in haste and the social workers' lack of experience in working on FII cases. That position was accepted by the Claimants during those proceedings. Further, the proposition that the non-disclosure was deliberate and malicious was not put to Ms Hayward in the trial before me.

336. Mr Willems contended that the 3 May 2017 emails went to the very heart of the immediacy question. He submitted that the non-disclosure of this material before the 26 May 2017 hearing prevented those representing the family from (i) identifying that the paediatricians were considering child protection initially, which necessarily involved engagement with the family and not immediate removal; and (ii) being able to question the basis upon which s.46 had been engaged by the police and to argue that the Family Court should not sanction continued removal. Had the material been disclosed to the Claimants, they would have been able to urge the court to cast a more critical eye over the decision by D2 to engage s.46 in order to remove the children.

337. However, Mr Ford was correct to note that Article 8 does not impose specific procedural requirements. What is required is a process that enables individuals to "obtain access to information relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child" so as to enable them to "participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection": *Venema* at [92].

338. Here, the inter partes hearing on 26 May 2017 took place less than 48 hours after the removal of the children. The Claimants were provided with detailed evidence supporting D1's position: Ms Scott statement ran to over 90 paragraphs; Dr S had provided a statement of her concerns dated 24 May 2017; and she also made herself available during the hearing to address any issues.

339. Further, Ms Scott's statement was a fair and accurate reflection of professionals' concerns, the decisions taken at the 12 May 2017 and the reasons why they were taken. On the risk issue, she did not suggest that any of the medical professionals felt that the treatments imposed, in particular the use of the oxygen, amounted to an immediate risk of significant harm. She indicated that Dr Me had been asked whether he felt the children were at immediate risk of harm. She noted that "he said they were not at any increased physical risk as tests of JKL had shown no current health impact from the oxygen". She specifically set out the views of the professionals as to the increased risk once the parents became aware of the safeguarding concerns at [86] and [87] of her statement: see [83] above. The evidence disclosed to the Claimants and placed before the Court therefore put forward the final position the professionals had reached on the risk issue.

340. Further, Ms Schofield gave evidence about what is realistic in terms of disclosure for a first hearing: she said as a local authority you would be expected to submit a "summary of involvement for an initial care application" but "you don't submit every single email that you've had".

341. She also expressed her view on the significance of the emails thus: (i) the fact that the paediatricians were making suggestions for next steps which involved engaging with the parents was nothing different to what the social workers were themselves considering; (ii) ultimately, the decision as to whether the child protection or care proceedings route was to be followed was for the social workers, not the paediatricians. To these factors, I would add the point pressed by Mr Ford: (iii) the 3 May 2017 assessment of risk had been overtaken by the 12 May 2017 meeting. In my judgment these matters show that the 3 May 2017 emails were not so crucial that Article 8 required that they be disclosed before the first hearing.

342. I do not therefore accept that the failure to disclose the 3 May 2017 material to the Claimants before the 26 May 2017 hearing breached their Article 8 rights.

343. The Family Court process enabled the Claimants to seek disclosure of this material, and once they had obtained it, they were able to deploy it as they saw fit. However, as I explain in section 8.6 below, even when the 3 May 2017 material was disclosed to the Claimants in October 2017, the Guardian still did not support any suggestion that the children be returned to them.

344. I therefore do not accept that the delayed disclosure of the 3 May 2017 emails breached the Claimants' Article 8 rights.

8.6: The application of the *Lumba* principle to the Article 8 claims relating to removal

8.6.1: The legal principles

345. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 2 AC 245 the claimants brought false imprisonment claims arising out of immigration detention. The Supreme Court held, inter alia, that if the power to detain had been lawfully exercised by the application of lawful published policies and in conformity with the correct principles it was inevitable that the claimants would have been detained. On that basis it was held that they had suffered no loss or damage as a result of the unlawful exercise of the power to detain and despite what was described as the "deplorable" conduct of Home Office officials, there was no justification for affording the claimants exemplary or vindicatory damages. Accordingly, they were entitled to no more than nominal damages for the tort of false imprisonment.

346. In *Parker v Chief Constable of Essex Police* [2018] EWCA Civ 2788, [2019] 1 WLR 2238 at [90]-[103], the Court of Appeal reviewed the authorities on the *Lumba* principle in the context of a claim for wrongful arrest against the police. Leveson P, with whom Ryder and Hallett LJJ agreed, held as follows:

> "104. The test therefore is not what would, in fact, have happened had [the officer not arrested the claimant] but what would have happened had it been appreciated what the law required. To Stuart-Smith J this appeared circular: to assume lawfulness was to assume what was sought to be proved. However, the counterfactual scenario envisaged by Lord Dyson and the accompanying majority in *Lumba* did not require the court to assume the lawfulness of the substantive detention. It required the court to assume the lawfulness of the procedure whereby the detention was effected. Lying behind the decision in *Lumba* therefore is the principle that although procedural failings are lamentable and render detention unlawful, they do not, of themselves, merit substantial damages…
>
> 108. It is thus clear that substantial damages will not be awarded if, had the defendant acted lawfully, the claimant would have been detained in any case, on the basis that no harm had ultimately been caused. That is not to encourage sloppy practice but, rather, to reflect actual loss. It also permits the distinction to be drawn between those who would have suffered the detriment in any event (in this case, false imprisonment) and those who would not".

8.6.2: The Defendants' positions

347. Mr Ford submitted that had the court been tasked with consideration of ex parte removal of the children for the first time on Friday 26 May 2017, it would have sanctioned this course of action by granting an ex parte ICO with removal. He noted that if that had occurred, it was likely that GHI and JKL would have spent slightly longer with unknown foster carers as it may well not have been possible to assess their maternal aunt and uncle as foster carers over the weekend.

348. Mr Basu advanced the counterfactual scenarios slightly differently. He argued that if D1 had made its application for an ICO with removal on 24 May 2017, immediately following the arrests, it would have been granted. The same would have occurred if the arrests and ICO application had taken place on 25 May 2017. On either day, the same

scene would have unfolded at the school, with the same people present, and with GHI and JKL spending the same two-day period with foster carers before returning to the family home once their maternal aunt and uncle had been approved as carers for them. He also advanced an alternative scenario of the court granting an EPO.

349. They both submitted that these counterfactuals meant that the Claimants have suffered no loss, such that (i) the claims in negligence, requiring proof of causation of material loss, must fail; and (ii) even if a breach of Article 8 was made out for the purposes of the HRA claims, this was of no material effect and so could not result in any necessity for damages to afford the Claimants' just satisfaction.

350. Although I have found that the removal of the children was not in breach of their Article 8 rights, the *Lumba* point was fully argued before me. It is appropriate for me to resolve it, not least if I am wrong with respect to the Article 8 issue. The same applies to the negligence claims.

8.6.3: Submissions and analysis

351. First, Mr Ford and Mr Basu relied on Ms Schofield's unchallenged evidence on the counterfactual issue.

352. Ms Schofield explained in her report that at an early stage, the Family Court would nearly always want the status quo to remain, until a Guardian had been appointed and more detailed evidence could be presented to the court. She said that if the Family Court had been presented with a different status quo on 26 May 2017, namely that the children were still living with their parents, it was "possible" that the court would still have granted ICOs but would have decided that the children could remain in their parents' care, pending a second hearing where detailed evidence could be presented.

353. However, she became more robust on this issue in her evidence at trial. Mr Willems specifically put to her that if s.46 had not been used the social workers would have been unlikely, on the evidence they had available to them, to persuade a court that removal of the children was the right order to make. She disagreed, saying:

> "I think they would have done because of the nature of FII which makes this very different to the types of cases the courts are used to hearing. CSC would have been stressing how concerned they would be for the potential for increased risk to the children once the parents were aware. This was the best information they had read in the guidance" [my emphasis].

He put the proposition to her again; and again she declined to accept it.

354. She had also emphasised in her report that while the children's Guardian appears to have wanted the children to return to their parents' care sooner than the social workers, she supported the continuance of the ICOs not only in June 2017 but again in November 2017.

355. Mr Willems argued that Ms Schofield is an expert in social work practice and was not able to offer an expert view on that the Family Court would have done, which was a matter of law.

356. I am satisfied that this was a matter properly within Ms Schofield's expertise: she was able to assist the court with the issue of whether, from her professional social work experience, D1's social workers would have been able to secure an ex parte ICO with removal based on the information they had available to them, and her view was that they would. She was well aware of the detail of the information advanced in the social workers' application; and I accept her evidence that this would have persuaded a Family Court judge to approve removal of the children through an ICO.

357. Second, Mr Ford and Mr Basu pointed to the fact that Ms Schofield's evidence was consistent with what actually happened in the Family Court proceedings in that (i) on 26 May 2017, ABC and DEF, each with the benefit of separate legal advice, conceded that the threshold for the making of the ICO with removal was met; (ii) D1's proposal for removal of the children was supported by GHI and JKL's experienced Guardian; and (iii) the Family Court made the ICO and approved the continued removal of the children, showing that the court considered that there was an immediate risk of significant harm posed by them being left in the care of their parents. Mr Ford and Mr Basu argued that this was a strong indication that the children would have been removed regardless of the use of s.46. They also relied on the fact that the position taken by ABC, DEF, the Guardian and the court at the first inter partes hearing was maintained at several further hearings until November 2017. This reflected a continued acceptance that the threshold for an ICO with removal was met.

358. Mr Willems argued that the Defendants were ignoring the very important fact that the children had already been removed and the court was being presented with a status quo of removal, which made the context different to an application for an ex parte ICO with removal or an EPO: once the children had been removed, the only applicable threshold was that for a care order, which involved whether or not the local authority could meet the lower test, that there was a reasonable suspicion of a risk of significant harm.

359. However, as the Defendants highlighted, this argument failed to take into account the legal principle agreed between the parties that the Family Court has an active obligation to consider at each interim hearing whether the test for separation continues to be met, in order to comply with Article 8. There is also force in Mr Ford's submission that GHI and JKL's two nights' absence from their parents was a very brief period of time in which to establish a status quo, but the Family Court had to consider the test afresh in any event.

360. I therefore accept the Defendants' argument that the fact that the Family Court sanctioned the ICO with removal on 26 May 2017 is powerful evidence that it would have done so if asked to do so in circumstances where D2 had not already removed the children under s.46. The fact that the Family Court continued to support the removal of the children for several months thereafter, being obliged to consider the issue of separation afresh at each hearing, adds further weight to this argument.

361. Third, Mr Willems relied on the fact that the 3 May 2017 emails and Dr J's report had not been disclosed to the Family Court in advance of the 25 May 2017 hearing. He contended that had such disclosure been made, it was unlikely that the court would have sanctioned the continued removal of GHI and JKL. Had they had early disclosure of this material, ABC and DEF may well have challenged the decision to remove the

children under s.46. Once the Guardian had sight of the 3 May 2017 material, she indicated that this "could" have had an impact upon her risk analysis and recommendations to the court at the first hearing on 26 May 2017.

362. However, in my judgment Mr Ford and Mr Basu were right to emphasise that even when the 3 May 2017 material was disclosed, the Guardian maintained her view that the ICO was necessary and proportionate. She wrote in her 10 November 2017 report that (i) the amount of medical appointments and interventions that the children had had, and the implications of these, raised "significant concerns" for her; (ii) she believed that "the children have suffered emotional harm as a result"; (iii) there had not yet been any independent medical assessment to add clarity around the issue of FII and the risk this poses to JKL and GHI; and (iv) there had been no independent expert assessments undertaken, such as psychological assessments of parents, to inform the local authority's examination of risk and future management of risk.

363. Further, they correctly highlighted that although the Guardian recommended a gradual return home by ABC and DEF, the totality of her report in this regard makes clear that what changed her view of the risks was not merely the disclosure of the 3 May 2017 material. Rather, she noted the following: (i) forensic testing had proven that that there were no suspicious substances in the children's water bottles; (ii) the overnight oxygen therapy for JKL had been discontinued; (iii) significantly, ABC and DEF had accepted during her meeting with them on 31 October 2017 that the children had attended too many medical appointments; (iv) ABC and DEF's engagement with professionals and agencies had been excellent throughout the proceedings; and (v) a six month time period had by that point passed which had enabled the professionals to test the parents' level of commitment to meeting and prioritising GHI and JKL's needs and adhering to written agreements, not only with the local authority, but with all agencies. By definition, those matters could not have been known about at the 26 May 2017 hearing. Further, none of these factors would have been any different had the 3 May 2017 emails been available to the Court on 26 May 2017.

364. For these reasons, I conclude that the Defendants have properly invoked the *Lumba* principle. I am satisfied that even if the law required that something other than s.46 be used, the children would have been removed in any event, by the Family Court making an ex parte ICO with removal, at or around the same time as the use of s.46. I do not therefore need to consider D2's alternative argument that an EPO would have been granted.

365. On that basis, even if I had found a breach of Article 8 by the use of s.46, it would have been of no material effect and so could not result in any necessity for damages to afford the Claimants just satisfaction.

8.7: Overall conclusion on the Article 8 claims

366. Accordingly, for all these reasons all the Article 8 claims are dismissed.

9: The negligence claim against D2

367. The sole issue in GHI and JKL's negligence claim against D2 identified in the list of issues related to the use of s.46. The closing submissions suggested that the claim also

embraced the pleaded allegations of negligence relating to the police officers' role in the decision not to inform ABC and DEF of the parents' concerns.

368. There was a stark legal dispute between the parties as to whether D2 owed a common law duty of care to GHI and JKL with respect to the police officers' involvement in the investigation and strategy meetings and the use of s.46.

369. Mr Basu's position was that the officers' relationship with GHI and JKL arose from their status as the suspected victims of crime such that no duty of care was owed to them, on the basis of *Hill v Chief Constable of West Yorkshire Constabulary* [1989] AC 53 and *Brooks v Commissioner of Police of the Metropolis and others* [2005] 1 WLR 1495. He also submitted that the Claimants had failed to plead or otherwise set out the basis on which they contended that D2 had assumed any responsibility to the children, such as might generate a duty of care, when the same was required (see, for example, *HXA v Surrey County Council* [2022] EWCA Civ 1196 at [87]).

370. Mr Willems argued that the police officers were not acting in their role as criminal investigators but jointly with the social workers to exercise child protection powers. The duty of care established by *D* in relation to the social workers therefore applied to the police officers by analogy; alternatively, it would be "fair, just and reasonable" to extend the *D* duty to this situation. Further, applying *Robinson v West Yorkshire Chief Constable* [2018] AC 736, the officers owed the children a duty of care for any harm foreseeably arising from their positive acts in pursuing the investigation into, and arresting, ABC and DEF.

371. There was also a dispute between the parties as to whether, if D2 did owe such a duty, the *Bolam* test applied.

372. Due to the number and complexity of other issues in this case neither of these points was the subject of detailed argument, despite their potential wider significance. It is not necessary, in any event, for me to resolve these issues in this case. As I have explained in sections 8.3 and 8.4 above, I am not satisfied that D2's officers breached GHI and JKL's Article 8 rights with respect to the decision not to engage with ABC and DEF or with respect to the use of s.46. For the same reasons I would not be satisfied that they breached any duty of care to them, whether by reference to the *Bolam* test or otherwise. Further, as I have explained in section 8.6 above, due to the application of the *Lumba* principle GHI and JKL's negligence claim against D2 in respect of removal would fail as they cannot show any material loss.

373. Accordingly, GHI and JKL's negligence claim against D2 is dismissed.

10: The false imprisonment and Article 5 claims against D2

10.1: The legal framework

374. Under PACE, s.24(2), "If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it".

375. It is well recognised that the bar for reasonable grounds to suspect in s.24(2) is a low

one; it is lower than a prima facie case and far less than the evidence required to convict: see, for example, *Parker* at [115].

376. Under PACE, s.24(4), "….the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question".

377. The two necessity reasons in s.24(5) relied on in this case were "(d) to protect a child or other vulnerable person from the person in question" and "(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question".

378. In *Rashid v Chief Constable of West Yorkshire Police* [2020] EWHC 2522 (QB) at [25], Lavender J observed that "…the requirement in subsections 24(2) and (3) for reasonable grounds for suspecting a person to be guilty of a crime imposed a comparatively low hurdle, the requirement in subsections 24(4) and (5) for reasonable grounds for believing that an arrest was necessary imposed a comparatively high hurdle".

379. In *Hayes v Chief Constable of Merseyside* [2011] EWCA Civ 911, [2012] 1 WLR 517 at [40], Hughes LJ, with whom Richards and Ward LJJ agreed described the s.24(4) test as having two elements, thus: "(1) the policeman must honestly believe that arrest is necessary, for one or more identified section 24(5) reasons, and (2) his decision must be one which, objectively reviewed afterwards according to the information known to him at the time, is held to have been made on reasonable grounds".

380. Police officers must "at least consider" whether a having a suspect attend for voluntary interview is a practical alternative, albeit that "in many instances this will require no more than a cursory consideration". The second stage of the thought-process does not require the officer to take into account all obviously relevant circumstances, as that would be to subject the process of arrest to the rigour of a public law reasons challenge, which is not appropriate: *Hayes* at [32]-[34], citing *Alexander and others* [2009] NIQB 20 at [19].

381. Under PACE, s.37(3):

> "If the custody officer has reasonable grounds for believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning the person, he may authorise the person arrested to be kept in police detention."

382. In determining whether such detention was lawful the court should ask itself "whether the decision of the custody sergeant was unreasonable in the sense that no custody officer, acquainted with the ordinary use of language and applying his common sense to the competing considerations before him, could reasonably have reached that decision": *Hayes* at [36], citing *Wilding v Chief Constable of Lancashire* (unreported), 22 May 1995; [1995] CA Transcript No 574.

383. Under the ECHR, Article 5:

> "**Right to liberty and security of person**
>
> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

384. An offence contrary to the Children and Young Persons Act 1933 ("the CYPA"), s.(1) is committed if a person over the age of 16 who has responsibility for any child under that age:

> "…wilfully assaults, ill-treats (whether physically or otherwise), neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (whether physically or otherwise), neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (whether the suffering or injury is of a physical or a psychological nature)".

10.2: The issues on these claims

385. As to reasonable suspicion under PACE, s.24(2), D2's case was that (i) DCs Meadows and De Nardo suspected ABC and DEF of offences contrary to the CYPA, s.1, on the basis that they had subjected GHI and JKL to a large number of potentially unnecessary medical examinations and medical treatment, which was likely to have caused them emotional and physical harm; and (ii) the officers had reasonable grounds for their suspicion.

386. Mr Willems conceded in opening the trial that both elements in s.24(2) were made out, albeit submitting that the officers did not, at the time, identify with any degree of precision what criminal offence ABC and DEF were alleged to have committed. This does not appear accurate: while DC De Nardo's notebook simply referred to suspicion of "child cruelty" as being the reason for the arrest of DEF, DC Meadows' notebook specifically referred to arresting ABC on suspicion of the offence contrary to the CYPA, s.1. Further, the custody records for both ABC and DEF gave the reason for their arrests as "CY33049 – assault / ill-treat / neglect / abandon a child / young person to cause unnecessary suffering / injury" which is clearly a reference to the wording of the CYPA, s.1 offence.

387. ABC and DEF challenged the necessity of their arrests under s.24(4). Mr Willems contended that the following were relevant to both the necessity questions: (i) the fact that the decision to arrest would inevitably lead to the removal of the children; and (ii) the fact that on D2's own case, the significant risk to GHI and JKL, allegedly justifying the use of the s.46 emergency power of removal, arose precisely because of D2's own decision to arrest ABC and DEF. Mr Basu submitted that it was wrong to assume that removal of the children was the inevitable consequence of the arrests of the parents:

while removal was likely, it was far from inevitable.

388. ABC and DEF also took issue with the custody officer's decisions to detain them and denied that their arrests and detention were justified in all circumstances for the purposes of the tort of false imprisonment or under Article 5.

389. The parties could not agree the precise wording of the issues on the claims. The issues are set out below, with the additional language for which Mr Willems contended, which Mr Basu disputed, in italics:

> Has D2 proved that each arresting officer believed that arresting the parent whom she arrested was necessary to allow the prompt and effective investigation of the offence which she reasonably suspected and/or of his/her conduct and/or to protect their children from them in all the circumstances, *when such arrest led to the removal of the children*? (**"the necessity (subjective belief) issue"**);
>
> Has D2 proved that each arresting officer's belief in the necessity for arrest was held on reasonable grounds, *when such arrest led to the removal of the children*? (**"the necessity (reasonable grounds) issue"**);
>
> Has D2 proved that the custody officer believed that each of the parents' detention without being charged was necessary to secure or preserve evidence relating to an offence for which she/he was under arrest and/or to obtain such evidence by questioning her/him and that he had reasonable grounds for that belief? (**"the custody officer issue"**); and
>
> Has D2 proved that the deprivation of the parents' liberty by D2 was justified for the purposes of the common law tort of false imprisonment, and Article 5, in all the circumstances? (**"the overall justification/Article 5 issue"**).

10.3: The necessity (subjective belief) issue

390. DC Meadows' witness statement was to the effect that she believed that her arrest of ABC was necessary in order to (i) allow the prompt and effective investigation of the suspected offences or of the conduct of ABC; and to (ii) protect GHI and JKL from ABC. She therefore relied on the reasons set out in both s.24(5)(d) and (e).

391. D2 had been given permission to rely on a witness summary of DC De Nardo's evidence as she was reluctant to attend court. However, she attended the trial under a witness summons and explained that her reluctance to give evidence was due to the fact that she had been out of the police service for 2½ years and was concerned about her memory of events. She adopted the witness summary subject to certain amendments. The summary included the assertion that she believed that her arrest of DEF was necessary for the same two necessity reasons as DC Meadows.

392. Notwithstanding the officers' evidence as to their belief in two of the necessity reasons, there was some inconsistency in the contemporaneous documentation: while DC De Nardo referred to both these reasons in her notebook, DC Meadows only recorded the

protection of GHI and JKL in her two notebooks; and the custody records only recorded "Allow the prompt and effective investigation" under the "Arrest and necessity reason". This part of the custody record is completed by the custody officer on the basis of information provided by the arresting officer. It is capable of recording more than one "Arrest and necessity reason" via a "drop down" menu.

393. In addition to these documents, Mr Willems' noted that the Custody Information Form completed at the police station by DC Meadows only referred to "child cruelty to [GHI] and [JKL]" and did not refer to the need for a prompt and effective investigation. DC Meadows was not questioned about this form; and DC De Nardo was not asked about the same form she had completed. However, it appears likely that the words used by DC Meadows on this form were referring to the offence of which ABC was suspected under s.24(2), rather than the necessity reason.

394. DC Meadows was cross-examined about the fact that her notebook did not refer to the need for a prompt and effective investigation as one of the necessity reasons. She explained that the nature of her work in the Child Abuse Unit was that this reason generally did apply, and so she regularly referred to it during arrests when explaining why an arrest was necessary. She had not therefore felt it necessary to record this in her notebook. She had, however, made the note about the protection of children as this was an additional necessity reason in ABC's case and DC Meadows wanted an "aide memoire" for the words she would use when arresting ABC. She also said she would have given the protection of the children as a necessity reason to the custody officer, and she did not know why he had not noted it.

395. Mr Basu argued that it was important not to place unduly high expectations on busy police officers with respect to their documentation. The fact that the custody officer did not record all the reasons why the arrests were necessary was irrelevant: the officer did not suggest that he had not been told that part of the reason why the arrests were necessary included the protection of the children and nor was this put to him. Further, his responsibilities were different to those of the arresting officers, and it was no part of his role as a custody officer to assess whether an arrest is lawful: *DPP v L and S* (Unreported, Divisional Court,14 December 1998).

396. Mr Willems submitted that the contemporaneous records showed a confused evidential basis on the issue of necessity. He referred to the agreed evidence that a custody record is capable of recording more than one necessity reason. He submitted that it was telling that the protection of children did not feature on the custody records. He argued that the evidence invited the conclusion that the protection of GHI and JKL was not in fact a reason contemporaneously relied on by the arresting officers.

397. In my judgment D2 has proved that DC's Meadows and De Nardo both subjectively believed that the arrests were necessary to allow the prompt and effective investigation of the suspected offences or of the conduct of ABC and DEF and to protect GHI and JKL from ABC and DEF. I make this finding because: (i) although the contemporaneous documents are not entirely consistent, DC De Nardo's notebook referred to both reasons; (ii) the officers gave sworn evidence in these proceedings that both necessity reasons were in their minds at the time of the arrests; (iii) their evidence on this issue was supported by the contemporaneous documents read as a whole; (iv) I found the account given by DC Meadows for the disparity between her notebook and

the custody record, set out at [394] above, credible; (v) I therefore accept both officers' evidence on this issue; and (vi) Mr Basu's arguments as set out at [395] above provide a realistic explanation for the fact that the custody records only record one necessity reason.

398. Mr Willems relied on the fact that DSI Pope accepted in cross-examination that there was a requirement to consider and balance the negative impact on the children of the decision to arrest ABC and DEF when considering the necessity to arrest. He argued that there was no evidence that either of the arresting officers took that into account, or even considered the same, when making the decisions to arrest ABC and DEF. I disagree: the effect of my finding that both officers subjectively believed that the arrests were necessary for the protection of GHI and JKL is that they must have taken into account the fact that the immediate impact of the arrests would be to separate ABC and DEF from their children. Indeed, the effect of my finding is that the officers considered that this separation was necessary in order to protect the children, not that arrest was necessary despite the risk of an adverse impact on them.

399. Further, I did not understand DC's Meadows and De Nardo to be saying that they considered that the arrests were necessary so that the children could be protected through the route of removal under s.46. Indeed, DC De Nardo's evidence was that she could not remember when she was made aware that the s.46 route was being considered. I also accept Mr Basu's submission that the arrests did not make the removal of the children under s.46 inevitable. DC De Nardo explained in re-examination that if an arrestee raises concerns about their children, arrangements to care for them can be made that do not involve the invocation of s.46 powers.

400. In my judgment the real thrust of Mr Willems' complaint was that by arresting ABC and DEF when they did, the officers made the use of s.46 likely. Even if that is right, it does not render the arrests not necessary under PACE or otherwise unlawful, absent, perhaps, an argument (which was not advanced) that the s.46 factor rendered the exercise of the discretion to arrest perverse. In other words, I consider that the legality of the arrests is to be judged by reference to the PACE framework. For the reasons I have set out I consider that the arresting officers did consider the need to protect GHI and JKL in that context. Whether s.46 was properly invoked in this case is, in my judgment, a distinct issue to whether the arrests were necessary, subject to its own legal threshold, and challenged here through the Article 8 and negligence claims.

401. However, if I am wrong with respect to the officers subjectively believing that the arrests were necessary for the protection of GHI and JKL, it is clear that they subjectively believed that the arrests were necessary due to the need for a prompt and effective investigation: this featured in DC De Nardo's notebook and both officers must have given this reason to the custody sergeant for it to feature on the custody records. Indeed, I did not understand Mr Willems to seriously challenge this proposition. If the need for a prompt and effective investigation was the only necessity reason, that is sufficient (subject to the reasonable grounds issue below), as an officer need only rely on one of the necessity reasons in s.24(5).

10.4: The necessity (reasonable grounds) issue

402. Per *Hayes*, the second part of the s.24(4) test requires that the officer's belief in the

necessity reason was one that was "objectively reviewed afterwards according to the information known to him at the time…based on reasonable grounds". I address the two necessity reasons in turn.

10.4.1: The prompt and effective investigation reason under s.24(5)(e)

403. The submissions under this heading can be distilled into four broad themes.

404. First, Mr Basu argued that the arrests of ABC and DEF were necessary as they would allow for more prompt and effective interviews of them, and thus a more prompt and effective police investigation, than if they had been interviewed voluntarily.

405. DC Meadows' witness statement specifically addressed this. She explained that she considered but discounted the idea of ABC and DEF being invited to attend the police station to be interviewed voluntarily, because this would afford ABC and DEF the opportunity to collude with one another and to destroy evidence which would have prejudiced the investigation.

406. DC De Nardo's evidence that she had specifically considered but excluded the option of a voluntary interview was less explicit. However I am satisfied that the fact she considered the issue can be inferred from (i) her attendance at the detailed team briefing DS Pope led on 17 May 2017; (ii) DSI Pope's witness evidence that her view was that voluntary interviews were not appropriate for the reasons given by DC Meadows; and (iii) DC De Nardo's notebook entry on 22 May 2017, recording both necessity reasons, which illustrates some thought being given to the question. As *Hayes* at [32] makes clear, in many instances the officer need only give "cursory consideration" to the question of alternative options to arrest.

407. Mr Basu submitted that (i) before arresting and interviewing ABC and DEF, neither officer could have any confidence that they would answer any questions, even if they might have attended a police station voluntarily; (ii) as a general principle, an interview which is, or can be, interrupted at will by the suspect is likely to be less effective (see, for example, *Holgate-Mohammed v Duke* [1984] 1 AC 43); (iii) there was a real risk that ABC and DEF could have colluded between themselves or with other people, including potential witnesses; (iv) this created a risk that evidential opportunities, including those which might tend to exonerate one or other of ABC or DEF would be lost; (v) there was a potential difference in the levels of knowledge and culpability between ABC and DEF and it was therefore necessary to interview them separately and ensure that they could not collude; (vi) ABC had not been honest with Dr S; and (vii) DEF had been described by the children's school as a "formidable presence", "intimidating" and "aggressive", which suggested he was likely to try to control a voluntary interview and might seek to collude with ABC. For all these reasons he contended that the officers needed to arrest the parents so as to create a "sterile situation" in which to interview them.

408. Mr Willems was clear that ABC and DEF would have acceded to a voluntary interview if they had been given that option. He asserted that a voluntary interview would have been appropriate in this case. He placed reliance on PACE Code G (2012). This is a code of practice on the statutory power of arrest by police officers. It is one of a series of codes issued under PACE, s.66(1)(a)(iii), which are admissible in evidence in civil

proceedings and which, under s.67(11) must be taken into account where considered by the court to be relevant to any question arising in the proceedings. This code reiterates that if it is necessary to interview the person suspected of committing the offence, the officer must consider whether their arrest is necessary in order to carry out the interview. It also gives a series of examples of occasions when voluntary attendance is not considered to be a practicable alternative to arrest.

409. However, these general principles and examples set out in Code G do not undermine the specific assessment the officers made in this case, that voluntary interview was not the appropriate route. Moreover, under cross-examination, DEF agreed with the substance of the officers' concerns over collusion. He accepted the general principle that where it is necessary to ask two people important, upsetting and concerning questions, the questioner would not want them to talk to each other. He also agreed that with the following points that were more specific to this case, namely that it was possible that (i) it appeared to the police that he might not really know what was being done to his children and that this was a difference between his situation and ABC's; (ii) the police might want to explore that and keep him and ABC separate before asking questions; and (iii) the police might not want ABC and DEF talking together to get their "stories straight" or having ABC influence him.

410. In my judgment the matters set out above illustrate that this was a sensitive and difficult investigation where there were specific and justifiable reasons for wanting to interview ABC and DEF under arrest, rather than voluntarily, to ensure that they could not collude with each other, contact other witnesses or destroy evidence if given advance notice of the officer's desire to interview them. They show that the officers' reliance on the prompt and effective investigation necessity reason in order to ensure interviews under arrest were based on reasonable grounds.

411. As the Claimants had cited *Commissioner of Police of the Metropolis v MR* [2019] EWHC 888 (QB) at [23], [30], [33]-[39] and [47]-49] and *Rashid* at [33]-[37], Mr Basu anticipated that their case might be that it would have been possible to interview ABC and DEF voluntarily, holding the power of arrest "in reserve" and then exercising that power if they sought to leave the interview. He developed a detailed argument in writing that such a proposition is wrong. In my judgment it is not necessary to resolve this issue in this case. The evidence referred to above shows that DC Meadows and DC De Nardo's primary concern was that ABC and DEF would collude, contact other witnesses or seek to destroy evidence if given notification of the police desire to interview them. There was a concern that either of these things could occur before any interview took place. This alone gave them reasonable grounds for determining that an arrest was necessary to ensure effective interviews of ABC and DEF, and a prompt and effective investigation more generally, whatever actually transpired during the interviews. Further, as explained in the remainder of this section and the one that follows, there were a range of other reasonable grounds for their beliefs in the necessity for the arrests.

412. Second, Mr Basu argued that arresting ABC and DEF entitled the officers to impose bail conditions on them which may protect others, preserve evidence and prevent contact with witnesses, which power would not have been available had they been voluntarily interviewed. I accept this argument. Under cross-examination DC De Nardo specifically mentioned the option of bail conditions when she was cross-examined

about the protection of children necessity reason, but it is also relevant to the prompt and effective investigation necessity reason for the reason given by Mr Basu.

413. Third, Mr Basu relied on the fact that the arrests provided officers with search powers: where a person is arrested at premises other than a police station, PACE, s.32(2)(b) entitles officers to search those premises for evidence relating to the offence for which they have been arrested; and PACE, s.18 permits officers to enter and search other premises occupied or controlled by a person under arrest for an indictable offence if they have reasonable grounds for suspecting that there is on the premises evidence relating to that, or connected, offences. The s.32 power was exercised at ABC and DEF's home and would have been a lengthy process.

414. Both DC Meadows and DSI Pope referred in their witness statements to the alternative means by which ABC and DEF's home could have been searched if they had not been arrested, namely via a PACE, s.8 search warrant. However, they had discounted this option as it would have alerted ABC and DEF to the police investigation but left the children in their care, which would have contradicted the assessment reached at the 12 May 2017 about the increased risk to the children once the parents became aware of the professionals' concerns. It would also have afforded them the opportunity to destroy evidence. I therefore also accept Mr Basu's argument in this respect.

415. Fourth, Mr Basu contended that if ABC and DEF had not been arrested, they could have refused to provide their fingerprints or DNA samples which were required for an effective police investigation, including speculative searches of police databases. Although this reason was not specifically referred to by the officers and is based on generic police practice rather than the facts of this case, it provides a further reason for rejecting the non-arrest route (although had this been the only reason advanced, PACE Code G at paragraph 2H makes clear that it would been unlikely to have sufficed).

416. Overall, therefore, I conclude that D2 has proved that each arresting officer's belief in the prompt and effective investigation necessity reason under s.25(e) was held on reasonable grounds.

10.4.2: The protection of children reason under s.24(5)(d)

417. Three separate but inter-related themes emerged to suggest that the officers' reliance on this necessity reason was based on reasonable grounds.

418. First, the officers considered that the impact of arrest, leading to separation of GHI and JKL from their parents, was a means of ensuring some short-term protection to the children. DC Meadows said that she was aware from the information she had been given that the children had been subjected to potentially harmful medical examinations; of the school's concerns over the contents of their water bottles; and about DEF's "guinea pig" comment. She said that this information raised concerns with her in her role as a child protection officer and led to her belief that it was necessary to arrest ABC in order to protect the children in the short or long term. DC De Nardo said she was aware of the multiple hospital appointments, the issue over the water bottles and the oxygen treatment. She said that these factors informed her belief that it was necessary to arrest ABC in order to protect GHI and JKL. DS Pope had also expressed real concern that the parents might seek to remove the children from school, reflecting her call to the

school to alert them to the impending arrests.

419. Second, arrest left open the option of providing some longer-term protection to the children through the imposition of bail conditions imposed on ABC and DEF on their release from custody to the effect that they could not contact their children. Bail conditions could not have been applied if ABC and DEF had been interviewed voluntarily. DC De Nardo specifically mentioned the option of bail conditions when she was cross-examined about the protection of GHI and JKL being one of the necessity reasons.

420. Third, as noted above, DC Meadows' witness statement explained that the use of a search warrant under PACE, s.8 in order to seize relevant evidence such as the oxygen "tank" would not have protected GHI and JKL and would have notified ABC and DEF of the police investigation and left the children in their care. She referred to being aware that in these types of cases the risk of harm to the children can increase when the suspected abuser(s) become aware of the investigation. This was, of course, the view reached at the 12 May 2017 meeting.

421. Mr Willems submitted that the arrests were not objectively necessary to protect GHI and JKL as they were in school at the time of the arrests and were subsequently forcibly removed pursuant to s.46. Further, on D2's own case, the significant risk to GHI and JKL, allegedly justifying the use of the s.46 emergency power of removal, arose precisely because of D2's own decision to arrest ABC and DEF.

422. However, D2's case was not that the risk arose specifically due to arrest but arose upon the parents becoming aware of the professionals' concerns: and had ABC and DEF not been arrested, that would have occurred through the exercise of a s.8 warrant at their home (or by D1 in some manner going "overt"). For that reason, the officers were, on reasonable grounds, entitled to invoke s.24(5) on the basis that it would protect the children from their parents during the short-term duration of the arrests or through the longer-term imposition of bail conditions, notwithstanding any use of s.46. Further, as already noted, removal under s.46 was not inevitable.

423. Overall, therefore, I am satisfied that D2 has proved that each arresting officer's belief in the protection of GHI and JKL under s.25(e) was held on reasonable grounds.

10.5: The custody officer issue

424. Mr Basu relied on PS Ansell's evidence that he considered whether detention of both ABC and DEF should be authorised. He decided that both limbs of s.37(3) applied. There was a search of ABC and DEF's home in progress and a voluntary interview was not appropriate for the reasons set out above in relation to the necessity issue. Instead, a police interview under arrest was necessary. Both ABC and DEF were interviewed at length and were then released.

425. Mr Willems' questioning of PS Ansell was focussed on whether he had considered the impact of detention on the children. He had not, but that was not his role. His role was to consider whether the tests in s.37(3) were satisfied, and he considered that they were, and his view was, in my judgment, based on reasonable grounds.

426. Accordingly, I am satisfied that D2 has discharged the burden of proving that PS Ansell believed that the detention of ABC and DEF without being charged was necessary to secure or preserve evidence relating to an offence for which they were under arrest and/or to obtain such evidence by questioning them; and that he had reasonable grounds for that belief.

10.6: The overall justification/Article 5 issue

427. In my judgment ABC and DEF's false imprisonment claims fail for the reasons set out above. ABC and DEF properly conceded that the test in s.24(2) was satisfied. D2 has proved that the tests in s.24(4) and 37(3) were also satisfied. This provides a complete justification for the arrests and detention of ABC and DEF. D2 has proved they were not falsely imprisoned.

428. It is correct that the arrests and detention of ABC and DEF constituted a deprivation of their rights to liberty and security of the person under Article 5(1). However, those rights are not absolute: Article 5(1)(c) provides that such deprivation can be justified if it is "in accordance with a procedure prescribed by law" and involves "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". D2 has proved that Article 5(1)(c) applied to the arrests of ABC and DEF for the reasons given above in relation to their false imprisonment claims. Accordingly, the Article 5 claims are also dismissed.

11: The Children Act 2004, s.11 and Article 3

429. D2 also argued that (i) the duty under the Children Act 2004, s.11 and the Article 3 operational duty necessitated the use of s.46; and (ii) both those duties, and the Article 3 investigative duty, necessitated the arrests of ABC and DEF.

11.1: The Children Act 2004, s.11

430. This section requires local authorities and chief officers of police to "make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children".

431. I have found at sections 8.4 and 9 above that the use of s.46 was the least intrusive measure that could have been used to protect the children and was thus compliant with Article 8; and was not negligent. I have found at section 10.3 and 10.4.2 above that the arrests were necessary under PACE, s.24(4) and 5(d) for the protection of GHI and JKL. To that extent the officers' actions in using s.46 and arresting ABC and DEF were in accordance with, and arguably necessitated by, their statutory duty to safeguard and promote the welfare of GHI and JKL under s.11. However, I make no finding as to whether if the use of s.46 or the arrests had been otherwise unlawful, s.11 could have rendered them lawful. It was not clear to me whether Mr Basu was advancing such a case; but the issue does not arise here.

11.2: Article 3

432. This provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

433. The Article 3 investigative duty requires that credible or arguable claims of Article 3 breaches are investigated effectively. Further, where there is a real and immediate risk of a person suffering Article 3 harm, the Article 3 operational duty requires police officers to take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk: *Osman v United Kingdom* (1998) 29 EHRR 245, read with and *X v Bulgaria (22457/16)* 50 BHRC 344).

434. Mr Willems' position on the Article 3 issues was unclear. In the list of issues process he conceded that the investigative duty applied. However, in closing submissions he referred to the very high threshold for establishing Article 3 harm set out in cases such as *Ireland v UK* [1978] 2 EHRR 25 at [167] and argued that the oxygen treatment given to JKL came "nowhere close" to the threshold for Article 3 harm. It was not therefore clear to me why, or indeed whether, he had conceded that the arguability threshold had been met so as to trigger the investigative duty. He made clear in the list of issues process that he did not concede that the operational duty had been triggered.

435. However, it is not necessary for me to determine any of the Article 3 issues because for the reasons set out at sections 8.4 and 10 above I have found the use of s.46 justified in Article 8 terms and the arrests of ABC and DEF lawful under PACE. Whether these actions were also necessitated by either of the Article 3 duties is therefore irrelevant.

12: Conclusion

436. The events of 2017, and in particular the removal of GHI and JKL from the care of ABC and DEF for several months, were undoubtedly very distressing experiences for all four Claimants. However, this was a particularly complex and sensitive situation for the police officers and social workers who were seeking to safeguard the children, who also found the process very challenging. Through this litigation the Claimants have investigated and tested the rationale for the decisions taken by the child protection professionals in great detail.

437. I have:

(i) Permitted GHI and JKL to pursue their negligence claim in relation to non-disclosure of the 3 May 2017 emails from the medical professionals; and all four Claimants to pursue their Article 8 claims on this basis, notwithstanding the omission of this from the parties' agreed list of issues (section 6.5.2 above); and

(ii) Extended time for all four Claimants to bring their Article 8 claims and for ABC and DEF to bring their Article 5 claims under the HRA, s.7(5)(b) (section 7).

438. However, I have ultimately found the Defendants' actions lawful. In summary, I have:

(i) Dismissed GHI and JKL's negligence claims against D1 relating to the decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children, their removal and the non-disclosure of the 3 May 2017 emails on the basis that (a) the *Bolam* test applied; (b) there was no expert

evidence in support of the allegations of breach of duty; and (c) the *Lumba* principle applies (sections 6.1, 6.3-6.4 and 6.5.3);

(ii) Dismissed all four Claimants' Article 8 claims on the basis that (a) the decisions not to inform ABC and DEF of the professionals' concerns prior to removal of the children and to remove the children were necessary and the least intrusive measures that could have been adopted (sections 8.3-8.4); and (b) the delay in disclosing the 3 May 217 emails until October 2017 was not a breach of Article 8 (section 8.5);

(iii) Concluded that in any event the *Lumba* principle applies to the removal of the children: if the law required that a process other than s.46 be used, the children would have been removed in any event, by the Family Court making an ex parte ICO with removal, at or around the same time as the use of s.46 (section 8.6);

(iv) Dismissed GHI and JKL's negligence claims against D2 relating to the decision not to inform ABC and DEF of the professionals' concerns prior to removal of the children and their removal as I am not satisfied that there was a breach of any duty of care and due to the operation of the *Lumba* principle (section 9);

(v) Dismissed ABC and DEF's false imprisonment claims against D2 on the basis that (a) the arresting officers subjectively believed that their arrests were necessary for at least one of the reasons given in PACE, s.24(5) and their beliefs in this regard were reasonable; and (b) the custody officer subjectively believed that their detention without being charged was necessary under PACE, s.37(3) and he had reasonable grounds for that belief (sections 10.2-10.5);

(vi) Dismissed ABC and DEF's Article 5 claims for the same reasons (section 10.6);

(vii) Concluded that the officers' actions in using s.46 and arresting ABC and DEF were in accordance with, and arguably necessitated by, their statutory duty to safeguard and promote the welfare of GHI and JKL under the Children Act 2004, s.11 (section 11.1); and

(viii) Concluded that it is not necessary for me to determine any of the Article 3 issues in light of my other findings (section 11.2).

439. I reiterate my thanks to all the representatives for their considerable assistance with this very complex and sensitive case.