



Neutral Citation Number: [2019] EWHC 1685 (Admin)

Case No: CO10432019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 03/07/2019

**Before :**

**MR JUSTICE DINGEMANS**

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**Between :**

**R (on the application of (1) LXD (2) AXT (a child, by her mother and litigation friend LXD); (3) NXT (a child, by his mother and litigation friend LXD); and DXD (a child, by his mother and litigation friend LXD)**

**Claimants**

**- and -**

**The Chief Constable of Merseyside Police**

**Defendant**

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**Blinne Ní Ghrálaigh (instructed by Hodge, Jones & Allen solicitors) for the Claimant**  
**Ian Skelt (instructed by Force Solicitor, Merseyside Police) for the Defendant**

Hearing dates: 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> June 2019

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**Approved Judgment**

## **Mr Justice Dingemans:**

### **Introduction**

1. This is an expedited “rolled up” hearing of an application for permission to apply for judicial review and then an application for judicial review of “the ongoing failure to take steps to protect the Claimants from direct threats to kill made against them by associates of the First Claimant’s ex-partner, and related decisions”.
2. The Claimants say that a threat to kill them was made on 17 January 2019 and since then the Claimants say that they have moved from their house (house A) and have been living with relatives in three different houses (houses B, C and D), moving from house to house because of the lack of sufficient space to house them. It is common ground that a threat was made against the Claimants on 17 January 2019. The Claimants also claim that the First Claimant was followed over the weekend of 23 to 24 February 2019 by an unknown male in a black Audi motor car and that two or three men in balaclavas visited house A on 26 February 2019. The police were unable to find evidence to prove the existence of those events.
3. The Claimants rely on duties under articles 2 and 3 of the European Convention on Human Rights (“ECHR”) and also allege an infringement of rights under article 8 of the ECHR. Recent amendments have been made to the claim form to seek orders quashing various decisions made by police officers in assessing and reviewing the threat against the Claimants.
4. The Defendant denies that he has acted in breach of any duties to the Claimants and asserts that the police has reacted appropriately to all the information available to them and made arrests of persons suspected of being involved in the threats. The Defendant disputes some of the factual matters relied on by the Claimants and asserts that the Claimants have returned to live at house A without incident. This is said to prove that the risks to the Claimants can be adequately managed by protective measures taken at house A. The First Claimant accepts that she has openly returned on occasions to house A but denies that she is living at house A.

### **Issues**

5. There are some procedural matters which need to be addressed. This includes how conflicts of evidence between the Claimants and Defendant should be resolved at this rolled up hearing. There are also issues about whether late evidence on behalf of the Defendant ought to be admitted.
6. So far as the merits of the claim are concerned, it is apparent from the final amended statement of facts and grounds (amended on 17 May 2019 to include rationality challenges to the Defendant’s decisions, and further amended on 13 June 2019, some 6 days after the hearing, pursuant to my direction given at the hearing, to specify which particular decisions were the subject of the claim) that the following matters are in issue: (1) whether the Claimants should be granted permission to apply for judicial review to bring the claims for infringement of articles 2, 3 and 8 of the ECHR and to quash the decisions made by the police officers; and if so: (2) whether there was an infringement of article 2 of the ECHR (amended ground 4); (3) whether there was an infringement of article 3 of the ECHR (amended ground 4); (4) whether there

was an infringement of article 8 of the ECHR (amended ground 6); (5) whether decisions made by the police officers ought to be quashed because irrelevant considerations were taken into account and relevant considerations ignored and because the decisions were irrational (amended grounds 1, 2 and 3); (6) whether the Defendant failed to provide the First Claimant with sufficient information (amended ground 5); and (7) whether the Defendant failed to have regard to the best interests of the child Claimants (amended ground 7).

### **The relevant principles of law**

7. There was no material dispute of law between the parties about the applicable law. Article 2(1) of the European Convention on Human Rights (“ECHR”) to which domestic effect was given by the Human Rights Act 1988 provides that “Everyone’s right to life shall be protected by law. No one shall be deprived of his life ...”.
8. It is common ground that article 2 of the ECHR “may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual ... such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities ... where there is an allegation that the authorities have violated their positive obligation ... it must be established ... that the authorities knew or ought to have known of a real and immediate risk to the life of an identified individual or individuals ...”, see *Osman v United Kingdom* [1998] 29 EHRR 245.
9. The words “real and immediate risk to the life” are ordinary words that do not need refinement, and Lord Dyson equated them to a “present and continuing” risk in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] AC 72 at paragraph 39, showing that a continuing risk to life can be an immediate risk to life. At paragraph 20 of *In Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135 Lord Carswell said that “the criterion is and should be one that is not readily satisfied: in other words, the threshold is high”. The test is “a stringent one which will not easily be satisfied”, see *Colle v Chief Constable of Hertfordshire* [2008] UKHL 50; [2009] 1 AC 225 at paragraph 115, correcting a misunderstanding of an earlier case.
10. Article 3 of the ECHR provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. In *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2019] AC 196 it was held that serious failures which were purely operational would suffice to establish a claim that an investigation carried out pursuant to article 3 infringed the duty to investigate provided that the errors were “egregious and significant”.
11. Article 8 of the ECHR provides that “everyone has the right to respect for his private and family life, his home and his correspondence”. This right is qualified pursuant to article 8(2).
12. In assessing a case in which the interests of children are engaged the decision making authority will need to take account of the best interests of children which are a primary consideration, see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2012] 2 AC 166.

13. It is for the Courts to decide “whether or not Convention rights have been breached”, see *R(Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 at paragraph 61 in the context of deciding whether a public authority has complied with its duties under the Human Rights Act. In determining whether there has been a breach the Court will need to assess the proportionality of steps taken, see *R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, which highlights the potential difficulties caused by the factual disputes in this case.
14. In relation to the challenges to the decisions made by the Defendant on rationality grounds the Court will need to give anxious scrutiny to any challenge, because the decisions involve fundamental human rights.

### **Procedural history**

15. On 14 February 2019 the Claimants’ solicitors wrote to the Chief Constable asking questions and a reply was sent on 17 February 2019. On 20 February 2019 the Claimants’ solicitors wrote a further letter asking for disclosure of the assessments of risk and asking for a meeting. The Defendant replied by letter dated 26 February 2019 giving details about the risk assessment process but reporting that the operational officers did not consider a meeting was required. On 26 February 2019 the Claimants’ solicitors wrote requiring, among other matters, confirmation of the action being taken by the Defendant, an updated risk assessment and an apology. The Defendant replied identifying that the correspondence should be sent to the Force Legal Department.
16. A further letter dated 28 February 2019 was sent on 1 March 2019 requiring a response by 4 March 2019. The Defendant’s solicitor requested the 14 day timescale for a response provided by the pre-action protocols. The Claimants’ solicitors extended the time for a response to 7 March, and on 7 March 2019 the Defendant’s solicitor stated that the case required investigation and a response would take time. Letters were sent by the Claimants’ solicitors to the police officers dealing with the First Claimant, which has caused issues between the Claimants’ and Defendant’s legal representatives.
17. The Claim Form was issued on 13 March 2019, which the Defendant says was before any response to the letter of claim was due, but which the Claimants say was because of the urgency of the situation. The claim was in respect of a decision dated 7 March 2019 which was the “ongoing failure to take steps to protect the Claimants ...”. The Claimants sought urgent interim relief being an order for anonymity and an order for accommodation to be provided by the Defendant. On 14 March 2019 Swift J. ordered that there should be anonymity for the Claimants and refused immediate interim relief but abridged time for the Defendant to serve an acknowledgement of service and directed a hearing of the application for interim relief.
18. An oral hearing of the application for interim relief was heard by Thornton J. on 28 March 2019. The application for interim relief was refused but an order for an expedited rolled up hearing was made for 14 May 2019. Directions were given for service of evidence by the Defendant by 15 April 2019.

19. The Defendant's evidence was not served by 15 April 2019 and the Claimants applied for an order that the Defendant serve its evidence on 23 April 2019. On 23 April 2019 Murray J refused that application and ordered that there should be further directions hearings. On 25 April 2019 the Defendant filed statements from Inspector Fallows and Temporary Inspector Speight. The Claimant pointed out similarities between documents already filed on behalf of the Defendant and the statement from Temporary Inspector Speight.
20. On 1 May 2019 the Claimants served applications for further information and for the Defendant's risk assessment policy and on 2 May 2019 applied for consequential directions. On 3 May 2019 the Claimants served further evidence. On 7 May 2019 the Defendant wrote to the Court identifying what it said were areas of factual dispute. On 9 May 2019 the Claimants served an application to amend the grounds and responded to the letter about the factual disputes.
21. On 10 May 2019 there was a hearing before Supperstone J. at which the parties contended that it was not necessary to hear oral evidence. It was identified that the hearing on 14 May 2019 would need to be adjourned because the Defendant had not yet served all of its evidence (as appears from the transcript of the hearing at page 27G) and to accommodate a longer hearing. The rolled up hearing was ordered to be heard on 5, 6 and 7 June 2019.
22. There were further directions hearings before Freedman J. on 14 May 2019 and 28 May 2019 which related, among other matters, to applications: to prevent the Defendant serving further evidence; to give permission to the Defendant to serve witness statements; and to provide for disclosure of unredacted copies of police logs and disclosure of an unredacted copy of the Defendant's Threat management and Threats to life Policy ("the threats policy"). Freedman J ordered: further information to be provided by the Defendant; further disclosure to be provided; that the Defendant and Claimants be permitted to adduce further evidence; and that amendment of the statement and grounds for judicial review be permitted. He refused to bar the Defendant from adducing further evidence.
23. As it was, the Defendant served witness statements shortly before the hearing before me and police logs were disclosed only the week before the hearing. The Claimants submitted that the Court should give little weight to the Defendant's evidence because it had been obtained to support the case rather than comply with the duty of candour.

### **Evidence**

24. There were witness statements on behalf of the Claimants from: LXD; the father of LXD; the mother of LXD; LXD's brother's partner; and Alice Hardy, a solicitor in the Claimants' solicitors' firm.
25. There were witness statements on behalf of the Defendant from: Temporary Inspector Paul Speight; Inspector Mark Fallows; Detective Constable Fielding; Temporary Inspector Steve Fenna; Temporary Inspector Sean Kelly-Martland; Temporary Inspector Darren Wallace; Detective Constable Coy; Detective Inspector Andrew McCourt; Police Constable Steve Jones; Detective Constable Rachel Mallion; Police Constable Turton; Amanda Bushell, headteacher of the primary school attended by one of the Claimants; Anita Waters, Deputy Safeguarding officer at the primary

school; Caroline Anne Ashcroft, force solicitor for the Defendant; and Peter Vernon, Deputy force solicitor for the Defendant.

26. Police logs were in the bundles before me setting out information about relevant events and the threats policy was provided to me at the hearing.

### **Procedural matters**

27. At the hearing there were applications to adduce body worn video footage, said to be relevant to the issue of whether the Claimants were now living at house A, which footage was referred to in one of the statements served the week before the hearing. There was also evidence from Police Community Support Officer Ince, who had been away on leave at material times, about efforts that he said he had made to liaise with a housing officer to assist with efforts made by the First Claimant to be rehoused. The Claimants objected to the admission of the body worn footage and the statement from PCSO Ince, contending that the First Claimant wanted to explain some comments made on the video footage, and wanted to respond to PCSO Ince's statement to the effect that the First Claimant's understanding from the housing officer that support had not been provided.
28. I understand the difficulties which any order for expedition imposes on all the parties. It is apparent that the Defendant was very late in serving evidence but in my judgment it would not be right to discount the evidence on that basis alone nor on the basis that they were attempting to obtain evidence to meet the Claimants' case. This is because extensions of time to serve the evidence were granted by Freedman J. and because the evidence does address the issues in the case. There does not appear to have been an attempt to avoid adducing relevant evidence to the Court, and the evidence contained the sort of inconsistencies that one might expect when witnesses were trying to remember events, for example between DC Fielding and PC Coy.
29. The particular difficulty revealed by the evidence in this case was that there was a stark conflict of evidence on some issues. The most important dispute of fact related to whether the Claimants had returned to live in house A (as the Defendant contended) or were living at houses C or D (as the Claimants contended) and occasionally openly visiting house A. Other relevant disputes of fact included how the threat had originally been described to police officers, and what had happened over the weekend of 23-24 February 2019.
30. When I asked the parties how the court was to determine this dispute fairly without hearing evidence from the First Claimant and the relevant police officers both parties submitted that I should determine the case without hearing evidence. The Claimants submitted that it would be wrong to require the First Claimant, as a young mother of three young children, to be cross examined by counsel acting on behalf of the Defendant, particularly in circumstances where it was common ground that the Claimants had been openly at house A on occasions meaning that it would not be necessary to resolve the disputes of fact. The Defendant pointed to the fact that it had earlier highlighted the disputes of facts and suggested that the action should have been commenced by normal CPR Part 7 proceedings against the Defendant, but submitted that it was possible to deal with the claim without determining the factual dispute.

31. I understand that some of the factual disputes only became clear in the late witness statements served by the Defendant, but in my judgment the parties should have made applications so that oral evidence could be heard in this case. Fairness dictates that if any witness is to be disbelieved the witness should be cross examined so that the witness has an opportunity to be heard, see *Browne v Dunn* (1864) 6R 67 as approved in *Markem Corporation v Zipher* [2005] EWCA Civ 267; [2005] RPC 31 at paragraphs 58 to 61. This means, for example, that I should not disbelieve either the First Claimant and her mother and father or police officers about whether the Claimants were living back at house A without hearing evidence. I understand that a witness may have concerns about giving evidence to a Court, but the procedures ensure that all witnesses including vulnerable witnesses are fairly treated.
32. In circumstances where no order had been made for the hearing of live evidence it was agreed that I should take account of the evidence set out in the witness statements and police logs, but that if I am unable to resolve the legal issues before me without resolving the critical disputes of fact it was agreed with counsel that I would identify which disputes of fact I needed to resolve in an interim judgment, and arrangements would be made to hear witnesses in relation to the dispute of fact. In these circumstances I will also not take any account of the transcript of the body worn camera or watch the footage and I will leave out of account the statement from PCSO Ince. If I consider that I need to review the footage or take account of the statement from PCSO Ince I will give directions for this evidence to be served and tested together with other evidence relevant to the disputed factual issues.
33. I have therefore set out below my findings of fact based on the witness statements and police logs but I have not and cannot made findings of fact on the critical disputed issues. I have addressed towards the end of the judgment how claims of this sort might be brought to the Court and speedily resolved in the future.

#### **The backgrounds to the threat**

34. The Claimants are a mother, as First Claimant, and her three very young children aged between 6 months and 6 years who are the Second, Third and Fourth Claimants. Up to 17 January 2019 the Claimants lived at a house (“house A”) in the police area of the Chief Constable of Merseyside Police. The police officers in this case are all police officers in the Merseyside Police.
35. The First Claimant had had a relationship with her former partner, AB, who was the father of her first two children, the Second and Third Claimants. By an order made in the Liverpool Family Court AB is at present restricted from having unsupervised access to his children with the First Claimant.
36. AB provided a police statement in which, among other matters, he reported that from about mid December 2018 he had been receiving telephone calls from unknown men telling him to make contact with EM, a former tenant of AB who had recently been released from prison. The unknown men were abusive to AB but he told them he had no reason to speak with EM. The telephone calls had become threatening and had demanded that AB make payments to EM saying that if he did not “the baby mums house is going to be shot at”. AB had believed that nothing would happen and felt safe because EM did not know where he lived.

37. In mid-January AB had received a note which said “Call me, Seb”. AB understood Seb to be a reference to SM, who was known to AB and was associated with EM. On 15 January SM had visited AB’s house and told AB that EM wanted money because EM believed that AB had grassed on him and he had been in prison as a result of that. SM had pulled up his top to reveal the handle of what AB believed was a gun. SM said that if AB did not make contact with EM “things are going to get messy”.

### **The threat**

38. On 16 January 2019 a man had knocked on door of house A but the First Claimant had not answered. He was accompanied by two other men. The unknown man had asked neighbours if AB was around and this had been reported back to the First Claimant. The First Claimant had telephoned AB saying she had not answered the door to the unknown men.
39. On 17 January 2019 at about 1330 hours, a man had knocked on the door of house A and identified himself as “David”. The First Claimant was asked for AB’s number.
40. In the early afternoon AB had called SM and arranged to meet at a restaurant in Liverpool. At about 1900 hours AB had met SM at the restaurant together with an unknown man known as “Alan”. SM told AB to contact EM and offer him money. AB said he was not going to offer EM anything because he had done nothing wrong. SM had hit AB in the face, causing some reddening which then faded. AB attempted to leave but SM blocked his path. Alan said that there were men waiting outside and that AB would not “make it out alive”. AB left the restaurant and ran into friends and reported what SM had done. His friends went to talk to SM. AB returned to the restaurant. Alan gave SM’s mobile telephone to AB and AB was told on the phone by an unknown man that he needed to sort this money out “you have got until the end of the night to get it sorted or things are going to get messy”. AB interpreted this as a threat against him and the Claimants. AB was asked for his phone but AB said “no chance” and left the restaurant.
41. In the evening of 17 January 2019, at a time before 2015 hours and estimated by the First Claimant to be 1930 hours, two men came to the door of house A and said that if AB did not make contact and pay the money owed by midnight the men would return and kill the First Claimant and her children. The First Claimant had noticed another two men in a vehicle down the road and she did not know if those two men were with the men who had knocked at her door. The First Claimant reported this to AB who admitted that he owed money to the men. AB said that he had been shown a piece of paper with the address of house A and a threat had been made against the Claimants. AB said that the First Claimant and children should leave the house immediately.

### **The report to the police and the police response**

42. At 2015 hours the First Claimant made a 999 call relating this information to the police. The log shows that the threat was reported as: “They have told infmt that they will kill her and her children if [AB] does not make contact and pay the money ... She told the males that she did not have anything to do with the male ... and they said well you have kids to him ... so if the money is not paid we will return and kill you and your kids”.



43. The First Claimant said that she was very scared but did not feel that she could leave the house because she had been convicted of an offence on 8 January 2019 and sentenced to a suspended sentence of imprisonment with a curfew at house A between 1900 hours and 0700 hours which was monitored by an electronic tag. The First Claimant reported that she had attempted to contact AB without success which was not an accurate statement. An initial assessment of the call was undertaken and the call was graded as a priority. At 2028 hours a police car was sent to house A and arrived at 2050 hours.

#### **AB's report to the police**

44. After AB had left the restaurant he walked around for about 30 minutes. He then telephoned the First Claimant and decided to go to the police station to report the matter. At 2036 hours AB went to the police station and reported the matters set out above from the telephone calls in December 2018 to events at the restaurant. He provided details of SM's registration number and a description of Alan. AB handed over his mobile telephone for forensic analysis. AB reported that he was in fear for his life, and he did not want to go to his home (which was not house A) and he was worried about the Claimants.
45. An investigation was begun into the allegations made by AB and his phone was analysed. EM and SM were investigated as were the movements of SM's vehicle. Applications for search warrants were prepared.

#### **The police at house A**

46. At 2050 hours the police officers attending house A saw that the First Claimant and the children were safe and well. The First Claimant's father had attended. The First Claimant gave details to the police of the threat made to her in the evening.
47. The First Claimant was advised to call 999 if she heard anything unusual, was told to leave the house and call 999 if she believed her life was in immediate danger, and a treat as urgent ("TAU") marker would be placed on her house. A vulnerable person's form was completed for child protection purposes.
48. A note was made recording the threat in one of the log entries stating "one of these males has told the infmt that the number for Thompson does not work and that if Thompson does not see the males tonight then they will return to the address and kill the infmt and her children". This description of the threat is different from the way that the First Claimant reported the threat in the 999 call and in her later police witness statement because in one description the threat is conditional on meeting AB and in another description the threat is conditional on meeting AB and being paid that evening. The First Claimant says that this was an inaccurate record of the threat, but I am unable to say whether the First Claimant reported the threat in these terms to the police on that occasion and reported the threat in slightly different ways in the 999 call and formal witness statement. The recording of the threat in this way did not prevent the Defendant from treating the threat seriously and carrying out an investigation into the threat leading to later arrests.
49. At 2303 hours AB said that the First Claimant had telephoned him and reported that she did not feel safe and wanted to move, and had asked for police assistance with the

move. In the event the First Claimant did not want to wait for the police and the Claimants moved with the assistance of the First Claimant's brother to another house ("house B").

50. At 2318 hours Detective Inspector McCourt recorded that in the light of the information to suggest that the Claimants were under threat it was not appropriate for them to remain at house A. He would authorise the First Claimant to leave house A notwithstanding the terms of her curfew. He would provide police transport to the Claimants to enable them to move. A police car would also ensure that they were not being followed. A standard threat assessment was completed for the Claimants. It was also determined that detectives would speak with AB and discuss options about putting him in a safe location because he did not have anywhere else that he could live.
51. On 18 January 2019 at around 0022 hours a standard threat assessment was opened by Detective Sergeant McLoughlin. At 0033 hours the police transport arrived at house A but there was no sign of the Claimants. Contact was made with the First Claimant who reported that she had gone to house B and did not want to see police officers because it had been a difficult day and she wanted to go to bed. The First Claimant received a text from a neighbour telling her that three police vans had arrived at her house.
52. At 0200 hours a referral to the Persons at Risk Unit was made for AB because of the threat of the firearm shown to AB and because he had no other place to reside. At around 0241 hours the threat assessment was reviewed by Inspector Fallows for both the Claimants and AB. Both threat assessments were standard. It was noted that a statement needed to be taken from AB, an arrest strategy formulated for SM including advice from a firearms unit, and house A, house B and AB's address flagged for passing attention from police officers.
53. At 0402 hours the First Claimant was seen at house B where it was noted that she was safe and well. It was reported that the Claimants' whereabouts had not been disclosed. LXD said that at a time which she estimated to be at 0300 hours the next morning, two police officers attended the property at which the First Claimant was then staying. They informed the First Claimant that the persons who had threatened the Claimants were known to the police and that the threat was being taken seriously. They informed the First Claimant that if she dialled 999 it would be dealt with as a priority.
54. At 0509 hours the threat assessment was reviewed by DI McCourt. The standard threat assessment continued and it was recorded that the Claimants were at house B which was unknown to the offenders, G4S had been contacted about the First Claimant's electronic tag and AB had been moved to a new address.
55. At 0634 hours Inspector Wallace reviewed the threat assessment noting that the investigation was at an early stage. It was recorded that the best way to safeguard the Claimants and AB was to carry out the prompt arrest of the suspects and either to decline bail or to obtain bail conditions.

56. EM and SM were circulated as wanted. An ANPR marker was put on the car reported to have been driven by SM. Search warrants were executed at the homes of EM and SM.

### **The Defendant's threat policy**

57. The Defendant's threats policy was disclosed to the Claimants by order of Freedman J. Issues of public interest immunity were reserved to the hearing.
58. The Claimants complained that the Defendant had misunderstood the threat against the Claimants by characterising it as a conditional threat and by misdescribing it in various reports. It is apparent that the Claimants consider that the description of the threat as "standard" is misconceived. The Defendant said that this was not a direct threat but a conditional threat because it was conditional on the Claimant giving details to those attending at the premises of how AB could be contacted on one description of the threat, or conditional on giving details of how AB could be contacted and payment by AB of money that night, on another description of the threat. The Defendant said that the differing descriptions of the threat were taken from the First Claimant's reports and that the different descriptions made no difference to the threat assessment. In my judgment on either description of the threat they were conditional threats, albeit in relation to one description of the threat the condition to avoid the threat had been satisfied and in the other description of the threat the condition had not been satisfied. This does not stop the threat being conditional when made which is a relevant factor to be considered by the police.

### **The investigations, arrests and closure of the threat**

59. On 18 January 2019 statements were obtained from the First Claimant and AB, and the note to "call Seb" was recovered from AB. In the First Claimant's statement the threat was recorded as "tell him if he doesn't get in contact and pay us by tonight we're going to come back and kill you and the kids". AB's phone was taken to be downloaded. CCTV was obtained from the restaurant. Witnesses from the restaurant were contacted. House to house inquiries were conducted around house A. The First Claimant's neighbour who had been contacted by the man on 16 January 2019 looking for AB provided a brief description of the man but otherwise refused to assist. The First Claimant said that when her statement had been taken she had been told that the threat was very serious but that witness protection measures would not be taken because of budgetary constraints. There is an issue about what was said at certain points because DC Fielding said that "I do not recall either of us making any comment that the threats were serious" whereas PC Coy said "we did state that the threats were being treated seriously and that it would be essential that no-one knew".
60. The Claimant received another call from Detective Sergeant Sean Kelly-Martland saying that arrests would be made over the weekend. The First Claimant stated that she required secure accommodation for the Claimants. The Claimants moved from house B to that of another relative which was house C.
61. On 19 January 2019 SM was arrested and interviewed. He said he had asked AB for £17,000 which was owed to SM and not EM, and he was not acting on behalf of EM. He accepted meeting AB at the restaurant but denied any assault or making any threats to kill. He surrendered his mobile phone. He was bailed with conditions

including reporting to a police station 3 times a week and not to contact victims or witnesses. I was not provided with a copy of the bail conditions.

62. On 21 January 2019 there was contact between police officers and the First Claimant about going to house A to pick up clothing. The First Claimant made her own arrangements rather than wait for assistance. On 19, 20 and 21 January 2019 the First Claimant made attempts to contact the police so that she could obtain assistance in collecting belongings from the house.
63. On 22 January 2019 the threat assessment was reviewed by Inspector Wallace. He noted that one suspect had been arrested and bailed but one had not. There had been no further incidents or intelligence. The threat was to remain open until EM had been arrested and target hardening (the installation of various protective measures) had been undertaken. This assessment was carried out while the Claimants were living away from house A at premises believed to be safe. The First Claimant said that she was informed about this risk assessment but she was not contacted until 23 January 2019.
64. On 23 January 2019 DS Kelly-Martland spoke with the First Claimant. The First Claimant reported that she could not live long term with members of her family in house C and asked whether the Defendant could arrange long-term accommodation. It was suggested that the First Claimant speak with her landlord about early termination of the lease and obtain assistance from local housing providers because the Defendant could not offer long term accommodation. On 23 January 2019 contact was made and the First Claimant asked if it was safe to return home and she was told a risk assessment would be carried out. There was a further phone call and there was mention about putting the Claimants on a pathway into a housing association.
65. On 24 January 2019 EM was arrested and interviewed. He denied any involvement in the making of threats to AB or the Claimants. EM said he had been recalled to prison, but this was because of a driving offence and had nothing to do with AB. He knew SM and AB but had not seen AB for years. EM's mobile phone was seized. He was bailed with conditions including reporting to a police station 3 times a week and not to contact victims or witnesses. The First Claimant reported that on 24 January 2019 Inspector Wallace told her that it was now safe to return home with protective measures including target hardening, which in this case was the installation of alarms in the house and a TAU marking. The First Claimant complained that AB was being offered further measures, and complained about the lack of response to her calls. Inspector Wallace gave the Claimant the details of a police officer called Dan, who said he would provide assistance in getting the Claimants housed in advance of the 2 year waiting list.
66. In the evening on 24 January 2019 the First Claimant was told by DC Mallion about the arrest of EM, but the First Claimant said she did not know him or what role he had.
67. On 25 January 2019 Inspector Wallace reviewed the threat assessment. It was noted that the Claimants were not at house A and were living elsewhere, although this was not a long term solution. Target hardening had been completed. There had been no further reported incidents. SM and EM had been arrested and bailed with conditions.

The threat could be closed. There is a dispute of fact about whether Inspector Wallace spoke to the First Claimant about the closure of the threat assessment.

68. There is evidence showing that the police spoke to the First Claimant about renting a new property through a housing association. The First Claimant recalled that she had been told about the arrest of the two men, that they had been told not to approach her or AB, and that if anything happened to her or AB they would be prime suspects. On 25 January 2019 the First Claimant was told that two men had been interviewed and both had been bailed.

#### **The swimming lesson on 8 February 2019**

69. On 8 February 2019 AB attended a swimming lesson for one of the Claimants. The First Claimant was very concerned that this increased the risk to the Claimants and made complaints to the police. The First Claimant reported that AB had said that the police had accompanied him there. The First Claimant complained about this and sought assurances that the police would not facilitate contact between the Second and Third Claimants and AB without having carried out a risk assessment. The First Claimant felt brushed off and decided to instruct solicitors on 12 February 2019.

#### **The weekend of 23-24 February, reports from 26 February 2019 and the VIPER procedure**

70. As part of the investigation into threats to kill the Claimants the First Claimant was asked to attend a VIPER identification parade. That is a form of identification parade which can be attended by the potential defendants' solicitors and where an image of the suspect is shown among other images to the witness. Detective Constable Mallion left a voicemail with the First Claimant about this on 15 February 2019. Further voice messages were left with the First Claimant on 21 and 24 February 2019.
71. On the weekend of 23-24 February 2019 the First Claimant "became aware that she appeared to be being followed in her car by a black Audi, driven by a young Caucasian man unfamiliar to her" (paragraph 33 of the amended statement of facts and grounds).
72. It was recorded on 25 February 2019 that social services did not consider any need to become involved because the First Claimant had reacted appropriately to the threat against the Claimants
73. On 26 February 2019 the First Claimant was told by her neighbour at house A that her neighbour's son had said that two men in balaclavas were outside house A at about 0645 hours and were looking into the house. There was a difference between the report of two men in balaclavas in paragraph 33 of the Amended Statement of facts and grounds and three men in balaclavas in paragraph 1 of the Claimants' Skeleton Argument for the hearing, but it is not necessary to resolve this difference.
74. The First Claimant attempted to report these matters to the police on 26 and 27 February 2019. On 28 February 2019 DC Mallion contacted the First Claimant to obtain further details about the black car but the First Claimant was unable to provide details of exact times, locations or any further details about the car. DC Mallion asked to speak to the First Claimant in person but she was unable to meet because of

other commitments. There was discussion about the VIPER identification process. DC Mallion offered to have the First Claimant collected and taken to the VIPER identification process but the First Claimant said she would make her own way.

75. The First Claimant did not attend the VIPER identification parade because she required a full risk assessment to be conducted prior to her attendance on any identification parade. DC Mallion rang the First Claimant about her failure to attend the VIPER parade. The First Claimant said it was not an appropriate time to speak. The First Claimant links the men in balaclavas at house A to the fact that the solicitors for SM and EM were told of her involvement in the VIPER identification parade and that those solicitors would have had to disclose that information to SM and EM. The First Claimant also links that incident and the fact that she says she was followed on the weekend of 23-24 February 2019 to EM's breach of bail at about the relevant time. The First Claimant has complained about pressure to attend the identification parade and noted that her neighbour has not attended an identification parade. As to the last point the logs suggest that the neighbour has made it clear that he will not become involved in the police investigation.

#### **Further investigations about the events on 26 February 2019**

76. The neighbour confirmed to the police that he had been given the information by his son about the men in balaclavas looking into house A which he had passed on to the First Claimant. House to house inquiries provided no further information and CCTV inquiries did not yield any information. The First Claimant's car was subjected to ANPR analysis over the weekend, but this did not show that the First Claimant's car was being followed by a black Audi motor car.
77. Police Sergeant Fenna carried out a threat assessment and concluded that the threat assessment should remain closed. This was in the light of the fact that the Claimants were not at house A. There had been target hardening and there was a TAU marker at the house where they were staying.
78. On the evidence before me I am unable to say whether the First Claimant just thought she was being followed on 23-24 February, or was actually being followed on 23-24 February 2019 and if so whether the following car was related to the threat made on 17 January 2019. Further I am unable to say on the evidence whether the report about two or three men with balaclavas, which I accept was made to the First Claimant, was a reliable report and if it was reliable whether the men were linked to the threat on 17 January 2019. However I note that the police carried out a proper investigation into these reports, and concluded that the threat assessment relating to the lives of the Claimants should remain closed. There is nothing in the evidence before me to suggest that this assessment by the Defendant was wrong because there was no other evidence or intelligence to suggest that there was a threat to the life of the Claimants.

#### **Later developments**

79. On 1 March 2019 DC Mallion asked the First Claimant to call her. On 5 March 2019 DC Kelly-Martland spoke with the First Claimant in relation to points raised by the Claimants' solicitors in an email. The First Claimant said that the new accommodation which had been offered to her was not up to standard and she could

not live there. DC Kelly-Martland asked to be kept up to date with any change of circumstances.

80. On 12 March 2019 DC Mallion asked the First Claimant to call her but she did not. On 18 March 2019 DC Mallion was conducting investigations and attended house A to speak with the First Claimant. The First Claimant was there with her children. There is a dispute about whether the First Claimant said she would not go to court and said that inquiries should go through her solicitors or the police should call her another day. The First Claimant said she had returned to house A on Monday 18 March 2019 following an argument with a person in the house in which she was then living and that she was not living at house A.

#### **The further assessment dated 21 March 2019**

81. TI Speight conducted a review of the threat assessment on 21 March 2019. He concluded that any risk could be suitably managed by a TAU at the relevant addresses, which included house A. It might be noted that the assessment was conducted on the basis of the police's understanding that the Claimants had returned home. The assessment showed that there was no current threat and no further intelligence. The assessment recorded that the First Claimant had been offered a property but had not liked its decoration. I should as a matter of fairness to the First Claimant record that both the First Claimant and her father had given details about why the property offered to her by a housing association was unsuitable and the reported defects amounted to more than complaints about the decoration. TI Speight recorded that the Claimants had gone directly to house D, without appearing to be aware of the movements between houses B and C and then D.

#### **The interim hearing**

82. The interim hearing took place on 28 March 2019 and interim relief was refused. It was not apparent that Defendant's legal team had understood that the effect of TI Speight's assessment was that it had been assessed that the risks of the Claimants returning to house A could be suitably managed by the TAU marker for the address.

#### **The incident with AB at house A**

83. On 19 April 2019 the First Claimant said that she had had a falling out with a relative and left house C, and gone to house D, but one of the Claimants had become hysterical because of the dog at house D. The Claimants had therefore stayed the night at house A. On 20 April 2019 AB had come round to house A for a family barbecue.
84. On 20 April 2019 the First Claimant called the police to attend house A. She reported an incident involved AB and her in which AB had assaulted her. The First Claimant said that she had stayed at house A only the night before, and was making the most of good weather. She denied that she was living at house A, although police officers reported that she appeared to be living there. The Claimants noted that the police response on 20 April 2019 had not been within the target times for a property with a TAU marker. It is therefore said that the TAU marker is not sufficient.

#### **The effect on the Claimants**

85. The First Claimant has given evidence about the continuing effect of the threats made against her. She remains seriously concerned that all of the Claimants are at risk of serious harm including death. The First Claimant is concerned with the effects of living in the conditions which the First Claimant says they have endured since 17 January 2019.

**Grant of permission (issue 1)**

86. I grant the Claimants permission to apply for judicial review on the grounds set out in the final version of the Amended Statement of Facts and Grounds. This is because there are proper issues to be determined about whether appropriate steps have been taken to protect the Claimants from threats to kill. However as is apparent from the order for expedition and the original statement of facts and grounds, this case is essentially about whether there is a real and immediate threat to life of the Claimants and whether further steps should be taken by the Defendant to protect the Claimants. The public law challenges raised by the amendment to the facts and grounds relate to past decisions made by the Defendant and in my judgment add very little to the case because the situation has continued to evolve. However given the overlapping nature of the claims considered I have considered it appropriate to grant permission on all grounds.

**No infringement of article 2 rights (issue 2)**

87. In my judgment the evidence shows that there was a threat made against the Claimants on 17 January 2019. It was a threat to kill the Claimants unless AB contacted certain persons and paid monies to certain persons on that evening. The evidence shows that AB did meet certain persons at a restaurant, was hit by them in the face, but he walked away from the meeting and supporters of AB went into the meeting. The evidence shows that AB did not pay those persons monies that night.
88. The evidence shows that the police took the threat against AB and the Claimants seriously. AB had no accommodation to which to move and was therefore housed for a period by the Defendant, and the Claimants managed to move to live with relatives in houses B, C and D. The evidence does show that the conditions in which the Claimants lived in B, C and D were considered by the First Claimant to be unsuitable. However the evidence also shows that the Claimants were safe in houses B, C and D.
89. The evidence shows that the police carried out proper investigations into the threat including: recovering the “call Seb” note; reviewing CCTV; obtaining mobile telephones; reviewing ANPR movements; obtaining search warrants; and arresting the suspects for offences of threats to kill. The suspects were bailed with conditions, among others, not to contact the First Claimant.
90. The police properly investigated further concerns raised by the First Claimant about being followed by a car on the weekend of 23-24 February 2019 and the report from a neighbour about men with balaclavas looking into house A.
91. For the reasons given earlier I am unable to find whether the Claimants had moved back to house A or had just openly visited house A on occasions in March and April 2019.



92. However in my judgment the evidence does not show that there is a real and immediate risk to the life of the Claimants requiring the Defendant to take steps to take “preventive operational measures to protect” the Claimants. I make this finding for a number of reasons. First it is common ground that the Claimants have openly visited house A on occasions after both 17 January and 26 February and stayed there for one night without incident. Secondly there have been no recent incidents of concern or intelligence to suggest that there is a real and immediate risk to the life of the Claimants and I note that the reported events of 23-24 February and 26 February 2019 were properly investigated by the Defendant. Thirdly EM and SM have been arrested and bailed and as was noted by the Defendant, the prompt arrest of suspects was the best way to protect the Claimants. This is because those who had made threats would know that the police were dealing with the matter, reducing the risk of the threats being acted upon.
93. It is clear that there was very real cause for concern on 17 January 2019, and it is plain that the First Claimant considers that it is wrong that AB has been provided with housing when she was not. However the difference in treatment occurred because AB did not have anywhere else to go whereas the First Claimant was able to go to houses B, C and D. It might also be noted that there was some violence used against AB. In my judgment the Defendant did not have an obligation to provide housing to the Claimants because of the availability of houses B, C and D. The article 2 ECHR duty is a duty to protect life, but it is not a duty to rehouse if other accommodation is available. Further it is apparent that the First Claimant has been provided with advice by the Defendant about how to move from house A and the First Claimant has been in contact with social housing landlords.
94. I accept that the fact that there is not a real and immediate threat to the lives of the Claimants does not mean that there is no risk to the Claimants. The Claimants pointed to the fact that there were bail conditions imposed on EM and SM as proving that there was a real and immediate risk to life. The bail conditions do not prove that there is a real and immediate risk to life, but only that bail conditions have been imposed to reduce risk. The TAU marker provides some further assurance to the Claimants, even though the evidence shows that a response time by the police will not always be within the target times. There is intelligence that EM is believed to harbour grudges and this demonstrates risk, but it does not prove a real and immediate threat to the life of the Claimants.
95. The disclosure of the fact that the First Claimant would act as a witness for the VIPER identification parade may have caused the First Claimant to have become more fearful, but her involvement in this case as a victim of the threats to kill was already known and there were bail conditions relating to her. Disclosure of her involvement with the VIPER parade added nothing, and it was not a breach of duty on the part of the Defendant.

**No infringement of article 3 or article 8 rights (issues 3 and 4)**

96. It was not apparent to me what the claims under articles 3 and 8 of the ECHR added in the particular circumstances of the case. The evidence does show that one of the Claimants was very concerned about a dog at one house at which the Claimants were accommodated, but that does not prove an infringement of article 3 rights by the Defendant. I can confirm that I was unable to identify any “egregious and

significant” errors in the execution of the duty to investigate under article 3 of the ECHR.

97. I have been unable to identify any infringement by the police of the Claimants’ article 8 rights either generally or in disclosing the First Claimant’s involvement in the investigation. The Claimants identified that it is possible in certain circumstances to order the anonymisation of prosecution witnesses in criminal proceedings. I accept that the power exists but there was nothing in the evidence before me to suggest that any such power ought to be exercised in this case because the First Claimant’s involvement was known, and because the level of risk to life did not justify such a step.

#### **No quashing of the Defendant’s decisions (issue 5)**

98. In the amended statement of facts and grounds the Claimants have complained that the Defendant took into account irrelevant considerations and failed to have regard to relevant considerations and came to irrational decisions in assessing, reviewing and closing the threat risk assessments relating to the Claimants. The Claimants complain that the threat against them was treated as conditional in circumstances where the conditions had not been met, and that relevant information, for example about EM and the intelligence about his past actions was not recorded.
99. In my judgment the logs show that the Defendant did take account of the relevant matters and did not come to any irrational conclusions about the threat to the Claimants. The Defendant came to rational assessments about whether the Claimants were and are the subject of a real and immediate threat to life. The actual threat made to the First Claimant was conditional. It was recorded in different ways on the night but it was conditional on AB meeting with certain persons and paying monies to persons on the same evening. There are always likely to be differences between a direct threat and a conditional threat because a direct threat is ready to be acted on immediately. In the event although AB did meet with SM the money was not paid. Although as a matter of analysis that means that the condition had not been satisfied, the threat was still a conditional threat when made.
100. I accept that under the Defendant’s threats policy the threat should have been recorded as being a conditional threat to life, meaning that it should have been described as “medium” for the purposes of the policy (I have not set out paragraph numbers of the threats policy to avoid having to determine issues of public interest immunity). A medium assessment would have meant that different appendices to the threats policy should have been completed by the police officers. As it was, the Defendant recorded the assessment as standard. The Claimants appear to have considered that the assessment of the threat as standard meant that it was not considered seriously. That is not the effect of assessing a threat as standard in the threats policy, and it appears that the threat against AB was also assessed as standard. It is apparent that the Defendant did take the proper steps which should have been taken in relation to the Claimants and that the failure to assess the threat as medium did not make any practical difference to the way in which the Claimants were treated. The threats policy is designed to ensure that lives are preserved, and the Claimants’ lives have been preserved. I understand the First Claimant’s frustration that the Claimants have been safe only because they have endured the living conditions in

houses B, C and D which the First Claimant considers unsuitable, but the proper application of the policy would not have led to a different outcome in that respect.

101. In my judgment the evidence from the police logs shows that the risks to the Claimants were fairly and properly assessed, reviewed and closed. There was, in my judgment and applying anxious scrutiny, no irrationality on the part of the Defendant in making the decisions.
102. Further the decisions made by the Defendant about threat assessments and the reviews of threat assessment were past decisions where the situation has evolved. The reason that this case was heard on an expedited basis was because of the claim that there was an ongoing failure to take steps to protect the Claimants. It is not apparent that quashing past decisions would serve any purpose useful to the Claimants or Defendant.

#### **Sufficient information (issue 6)**

103. It was apparent from the entries in the logs that information was regularly provided by the Defendant to the First Claimant, and the information is also summarised in paragraph 51 of the Defendant's Skeleton Argument for the hearing. It is apparent that there were times when the First Claimant was unable to contact police officers, but the delays were for limited times and did not show any breach of rights protected by the ECHR or infringement of public law duties. It is also fair to note that there were occasions when the First Claimant did not want to discuss matters with the police, but there was no duty on the First Claimant to do so.
104. However it was apparent that misunderstandings about the rival positions of the Claimants and Defendant were exposed in the hearing. For example the Claimants' desire to have a different form of letter about the threats to be written by the Defendant to the Housing Association became clear to the Defendant in a way that it had not before. I understand that an order for an expedited hearing creates real pressures on legal representatives and can polarise positions as both parties work to prepare for the hearings. I am not on the information before me in a position to attribute fault to one party or the other, but I can say that this was a case where it did not appear to me that there was any co-operation between the parties in attempting to address the difficulties that an order for expedition causes for both sides.
105. In my judgment this was a case where the parties should have undertaken a mediation. It would, at the least, have resolved what was in issue for the hearing. It would also have enabled the Defendant to address the real and continuing fears of the First Claimant, regardless of what the evidence proved about whether the fears were objectively justified and regardless of whether the threshold for finding an infringement of articles 2, 3 and 8 of the ECHR was met. It is apparent that the parties will need to talk after delivery of this judgment so that further reassurance can be provided to the First Claimant. In that respect the parties informed me at the hearing that they had started to talk about providing further information by the Defendant to housing associations.

### **Best interests of the children properly considered (issue 7)**

106. The evidence does show that the best interests of the Second, Third and Fourth Claimants have been properly considered. A vulnerable persons' referral form was completed immediately. The social services noted that the First Claimant had acted responsibly in protecting the child Claimants by moving. The Defendant has assessed and reviewed whether the Claimants are at risk. I accept that it was not the decision of the Second, Third and Fourth Claimants to return to house A (either on open visits or to live there, depending on the factual issue which I have not resolved for the reasons given earlier) but the fact that it is common ground that the Claimants have been openly back at house A on occasions without incident is a relevant matter which was properly taken into account by the police.

### **Consideration to be given to bringing proceedings by way of CPR Part 7 claim**

107. As appears above I have managed to decide this case without needing to resolve some disputes of fact. However in my judgment in proceedings in which it is asserted that a public authority has failed to protect persons from a real and immediate threat to life, very careful consideration should be given either to commencing the proceedings by Part 7 Claim Form or, where the proceedings have been commenced by way of judicial review claim form, to transferring the proceedings to the Queen's Bench Division so that they be treated as if it was begun by way of Part 7 claim form, pursuant to CPR Part 54.20. This is because there are likely to be factual disputes raised by the evidence in such a case which might need to be resolved to determine whether the risk is a real and immediate risk to life. Those disputes might, for example, be about whether a person has returned to live openly in a certain location, or whether particular events happened. In some threats to life cases, findings of fact will already have been made by a decision making body such as a tribunal, for example in the *Re Officer L*, which may make such a case suitable for judicial review. However the processes of the Administrative Court, which are designed to permit the speedy auditing by the Court of the legality of decisions, are not well suited to resolving disputes of fact.
108. The Claimants suggested that the proceedings needed to be brought by way of judicial review because an order for mandamus requiring the Defendant to provide protection to the Claimants was being sought. However a claim for a mandatory injunction could have been sought in Part 7 proceedings. It was also suggested that the Claimant required quashing orders and that if decisions were quashed the Claimants would be entitled to damages. However the quashing orders were being sought in relation to the past decisions made by the Defendant and were only brought into the proceedings by way of amendment to the statement of facts and grounds. Further whether the past threat assessments were quashed was not going to affect the real issue between the parties, namely whether the Defendant should be required to provide further protective measures for the Claimants. In any event quashing a past assessment by the Defendant would not lead to an award of damages for the Claimants in the absence of a private law cause of action.

### **Conclusion**

109. For the detailed reasons set out above: (1) I grant permission to apply for judicial review of the claims made for infringement of the Claimants' rights under the ECHR,

and I have granted permission to apply for judicial review on the public law grounds as amended; (2) the risks to the Claimants do not amount to a real and immediate threat to the life of the Claimants under article 2 of the ECHR; (3) there is no infringement of article 3 of the ECHR because a proper investigation has been carried out; (4) there is no infringement of article 8 of the ECHR; (5) the decisions made by the Defendant were rational and took account of proper considerations; (6) sufficient information was provided to the Claimants; and (7) the best interests of the children were properly addressed by the Defendant.

110. I therefore dismiss the claim for judicial review.