Neutral Citation Number: [2019] EWHC 3461 (Admin)

Case No: CO/714/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2019

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

R (on the application of AB)	**Claimant**
- and -	
(1) CHIEF CONSTABLE OF HAMPSHIRE CONSTABULARY	**Defendants**
(2) THE SECRETARY OF STATE FOR JUSTICE	
(3) THE CROWN PROSECUTION SERVICE	
(4) THE NATIONAL POLICE CHIEFS' COUNCIL	

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Paul Bowen Q.C. and Nicola Kohn (instructed by **Bindmans LLP**) for the **Claimant**
Dijen Basu Q.C. (instructed by **Force Solicitor for Hampshire Constabulary**) for the **First Defendant**
The **Second to Fourth Defendants** were not represented and did not appear.

Hearing dates: **12 and 13 November 2019**

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Approved Judgment

Dame Victoria Sharp P.

1. This is the judgment of the court. There are reporting restrictions which must be observed in this case. The reporting restrictions, imposed by Ouseley J on 27 February 2019, continue to apply and are set out at the end of this judgment.

A. Introduction

2. This is a claim for judicial review concerning the investigation of alleged criminal offences against the claimant. In summary, in August 2017, the claimant was a 15 year old boy with Down's Syndrome, autism and communication difficulties. A few days after he spent some time at a respite care centre, he demonstrated actions that caused his parents to believe that he may have been subjected to a serious sexual assault, possibly rape. The police were contacted and an investigation carried out. Ultimately, the police decided that no further action could be taken.

3. The claim challenges first the adequacy of the investigation. The principal complaint is that a registered intermediary was not used during the video recorded interview of the claimant although other criticisms are also made. The claimant contends that the police were under an implied statutory duty by reason of the provisions of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act) to appoint an intermediary and failed to do so. The claimant also contends that the police failed to act in accordance with relevant guidance in relation to the appointment of an intermediary and other matters. He contends that the investigation was not adequate to discharge the first defendant's duty under Articles 3 and 8 of the European Convention on Human Rights (the Convention) or involved discrimination contrary to Article 14 of the Convention. He further contends that there was a failure to make reasonable adjustments under the Equality Act 2010 (the 2010 Act) or that the first defendant failed to comply with other statutory duties. Secondly the claimant contends that the decision to take no further action was unlawful.

4. The claimant originally sought judicial review against four defendants. The claim against the second defendant, the Secretary of State for Justice, concerned a claim that he unlawfully failed to provide an intermediary. That claim was settled with the second defendant agreeing to pay an undisclosed amount of damages and to provide an apology. The claim against the third defendant, the Crown Prosecution Service (the CPS), has been withdrawn. The claim against the fourth defendant, the National Police Chiefs' Council, has been stayed.

5. Sir Wyn Williams ordered that the matter be dealt with at a rolled-up hearing, so that the application for permission to apply for judicial review would be considered at the hearing and, if permission were granted, the substantive hearing of the claim would follow immediately. In practice, all the arguments, and all the evidence, were fully considered at the hearing on 12 and 13 November 2019.

B. The facts

6. The claimant was born in August 2001. He has Down's Syndrome, autism and severe learning difficulties. He has difficulties in verbal communication. He communicates using, amongst other things, Makaton sign language, actions, a Picture Exchange

Communication System (known as PECs) and some verbal language which can be difficult for those who do not know AB to understand.

The Stay at the Respite Care Centre

7. Between 1 and 3 August 2017, the claimant had a two-night stay at a respite care centre. Following that stay, his parents noticed a change of behaviour in AB. On 7 August 2017, AB made a demonstration to his parents, and said things, which made them fear that he had been sexually assaulted or raped by a person. He demonstrated, using his father, that he had been bent over and someone had been standing behind him. He pointed to his bottom and said "push, ow" and "hurt".

8. His parents made a video on 8 August 2017 when AB again demonstrated what had happened. We have viewed the video. It shows AB facing his bed, bending over with his legs straight and his forearms and chest flat on the bed and his bottom projected. He then lay flat on the bed face down with his feet extended over the floor. Asked by his father what had had happened, AB reached behind himself and pressed the fingers of one hand in the area of his anus. Later, he stands up, bends over the bed and pulls his father behind him with his bottom against his father's groin. He refers to "Growly". We well understand why this was seen by AB's parents, and police officers and others, as deeply troubling and providing a compelling indication that something had been done to AB which had caused him real distress.

9. On 8 August 2017, AB's mother contacted employees from the children social services department of the local authority. AB's mother also spoke to staff at the respite care centre to establish who was on duty during 1 to 3 August 2017. The matter was also reported to the police on 8 August 2017. At that stage, in accordance with relevant guidelines, and following discussion between police officers and employees of the children's social services department, it was agreed that the local authority would conduct an initial investigation under section 47 of the Children Act 1989. On 9 August 2017, AB's social worker visited AB and his parents at home.

10. AB also attended hospital for a physical examination on 9 August 2017. That examination did not note any injury to AB's genitals or anus. The fact that no injury was shown does not mean that no sexual assault (or other assault) took place. Two paediatricians who observed AB thought, from his behaviour, that something sexual had happened to AB.

The Police Investigation

11. On 10 August 2017, AB and his family went away on a pre-arranged two-week vacation. On 10 August 2017, the social worker concerned provided a report to the police about the initial inquiries. The police records noted that AB's parents and social services were concerned that some form of abuse had taken place although the exact nature was unclear. It was thought it could be cruelty or neglect, or some physical or sexual abuse. Police agreed that it should be dealt with as a joint police and children's services investigation and the matter was passed to the police's child abuse investigation team.

12. Police Constable Forder undertook the initial investigation. She had been a police constable for fourteen years and had been a child interviewer with the child abuse

team for almost four years. On 10 August 2017, Police Constable Forder visited the respite care centre in order to speak to staff and to obtain details of staff members, work rotas and care plans. It was established that one employee, CD, had been on duty between 2 p.m. and 10 p.m. on the relevant day and was the one-to-one carer for AB.

13. The police records show that the case was reviewed by senior officers on 10 August 2017. The records note that the police officers considered that this was a complex investigation due to the victim's vulnerability; that what had happened to AB was unclear; that medical professionals believed something had happened and that CD would have had the opportunity to assault AB. The records note that police officers were to obtain further information from the respite care centre to confirm times and opportunity to carry out an assault and seek any CCTV recordings. Further, that police officers were to secure any possible forensic evidence from AB's and the suspect's clothing. AB's clothing was in fact obtained but no forensic evidence was found. The records show that the police decided to arrest CD on suspicion of assaulting AB.

14. CD was arrested and interviewed on 11 August 2017. He denied the allegations. His property was searched and his mobile phone and laptop seized. His mobile phone was investigated. There was nothing to indicate any sexual interest in young boys. Mobile phones are usually the most likely source of such evidence and, given the absence of evidence of internet access and sharing of images, it was decided that it would be disproportionate to investigate the contents of his laptop. CD had no previous convictions. CD was released under investigation (not on bail).

Seeking an Intermediary

15. On 11 August 2017, police records contain an entry on the log that due to AB's specific communication needs, he would need an intermediary assessment prior to completion of a video recorded interview. Police Constable Forder therefore e-mailed the National Crime Agency (NCA) requesting the appointment of a registered intermediary for initial assessment and an Achieving Best Evidence (ABE) interview during the period 24 August to 31 August 2017. The request included details of AB, describing him as having learning disabilities comprising Autistic Spectrum Disorder and provided additional information to the effect that AB had Down's Syndrome, had hearing aids and was non-verbal apart from one key word. It said that AB had difficulty with phonetics and forming words and used Makaton, PECs and other symbols and that he understood "what, where, show me" questions.

16. In his witness statement in these proceedings, Dr Kevin Smith, who is the NCA's national vulnerable witness adviser, explains how the witness intermediary scheme works. It is operated by the NCA under policies devised and managed by the Ministry of Justice. Registered intermediaries are persons who have professional communications skills through training or, on occasion, through unique knowledge of a particular potential witness's communication methods. They can assist a witness who has difficulty understanding questions or framing answers to communicate effectively. Intermediaries are recruited by the Ministry of Justice and provided with training on how to use their communication skills in the criminal justice system. Once trained, their names are placed on a central database and they are referred to as Registered Intermediaries. They are self-employed. Other persons may also seek to act as intermediaries, that is using their communication skills in the context of the criminal justice system, even though they are not registered with the NCA. They are

sometimes referred to as non-registered intermediaries. On receipt of a request for the appointment of an intermediary, the NCA will check their records and contact potential registered intermediaries from their database to see if a registered intermediary is able to act. If that search is unsuccessful, the request is placed on an online forum for registered intermediaries nationally.

17. In this case, the NCA contacted registered intermediaries who worked in the Hampshire area. Five were identified as potentially having the requisite skills to assist. In the event, four were unable to assist for various reasons. The fifth was unable to assist on the dates specified and said that she would contact the NCA in October to advise of her availability. In fact, that intermediary did not contact the NCA to say that she would be available. On 21 August 2017, the NCA officer contacted Police Constable Forder to explain that they had been unable to identify a registered intermediary. The officer explained that the NCA had had a large number of requests and registered intermediaries had limited availability. The NCA officer said that the request had been placed on the secure online forum accessible by all registered intermediaries, and the hope was that one of them may have a cancellation and be able to travel. There was an issue between the parties as to whether three registered intermediaries working through an organisation called Triangle would have had the skills necessary to act as an intermediary for AB. In fact, the evidence, which we accept, demonstrates that those intermediaries would have had access to the online forum and, that if they considered that they had the relevant skills and wished to put themselves forward, they could have done so.

18. On 18 September 2017, the NCA informed Police Constable Forder that there had been no response to the placement of the request online and suggested that she contact Dr Smith. On 20 September 2017, Police Constable Forder spoke with AB's mother who was anxious that something happened soon. Police Constable Forder explained to AB's mother the difficulties in obtaining an intermediary as none were available and that Police Constable Forder needed to speak to Dr Smith. On 20 September 2017, Police Constable Forder contacted Dr Smith. Police Constable Forder made the following record of the telephone call on the police log:

> "Call to Kev Smith (ABE) email from NCA stating that there are no intermediaries available. Advice sought from Kev Smith about the process of gaining an account from [AB]. I explained [AB's] needs and abilities. Careful considerations is to be used with PEC's and an understanding of what you want to achieve as this method will not allow you to going down a different path (a break would be needed to reform questions). The introduction will need to be through PEC and "who, what, where" questions to be asked to use the minimal amount of questions to achieve the best outcome from [AB].
>
> Consider use a photo of [the Respite Care] to put [AB] in the correct starting point.
>
> Consider use of wooden figurine props …. to describe the position of [AB] and offender

> Consider use of two cameras with one to record the PEC cards used
>
> Review Advocates Gateway in relation to autism and communication skills".

19. In the present case, Dr Smith remembers the call from Police Constable Forder although not the details. He remembers being struck by the complex combination of AB's communication needs and thinking that it would be very challenging to find the right registered intermediary for him. He recalls being told that one of AB's teachers might be able to attend the ABE interview with AB. His evidence is that, if asked, he may have advised Police Constable Forder on how to prepare the teacher and how to manage the ABE interview. In a reply to a request for further information, he says that he cannot recall being asked to advise on how to prepare the teacher. If asked, he would have said that the teacher could have acted as an unregistered intermediary. He understood that the teacher would be asked to act as an unregistered intermediary.

20. Following the telephone conversation with Dr Smith, Police Constable Forder spoke to the headteacher of AB's school. He agreed to support the interview process and work with police to prepare questions including the use of PECs to put to AB. He confirmed that the school had facilities for conducting a recorded interview.

21. On 29 September 2017, Police Constable Forder met AB's teacher, JD. They discussed the best way to approach an interview with AB and how best to put questions in a way that would enable AB to give an account of what had happened. JD explains in her witness statement that AB would be able to understand the difference between something that was factually accurate and something that was factually incorrect. AB was capable of telling someone if something had happened or not but the questions would have to be carefully worded. AB would respond using a mixture of verbal and non-verbal means and whether or not his response could be understood, depended on how well the person knew AB. JD explained to Police Constable Forder what PECs were, that is, laminated cards with symbols on them representing a word. JD suggested using PECs as she thought the questions would be challenging and would involve discussing body parts which AB would not discuss on an everyday basis. JD thought that would help AB. JD also suggested that RH, a teaching support assistant, also be present as she knew AB better and AB would be more at ease in her presence.

22. Following the meeting, Police Constable Forder prepared a written interview plan which she sent to JD. The plan explained, amongst other things, that the interview would take place in the school as it was an environment that AB was very familiar with and, in order to achieve the best evidence possible, AB would need to be in an environment in which he felt safe and secure. He would have his toy monkey with him to make him feel relaxed. The plan recorded that AB would not understand lies and truth in the way set out in the ABE ground rules but would recognise if things were factually incorrect. It noted that if AB repeated a question, that would generally indicate that he did not understand it. It noted that AB could communicate verbally if given what was described as forced choice questions (e.g., in order to find out how AB felt, he would be asked "is AB happy or sad?"). The plan noted that AB used PECs to

assist communication and PECs would be used. The plan noted that props (described as plastic bendy toys which were non-specific as to male or female gender) would be used to enable AB to demonstrate what had happened rather than having AB acting out what had happened, as this was degrading and could possibly re-traumatise AB. The plan dealt with the location and the set-up of the interview and where AB would sit. The interview plan then set out in detail the type of questions that would be asked. JD responded by saying that the plan looked good.

23. The police log records that during this process Police Constable Forder also e-mailed AB's mother saying they were working on an interview plan and further, telephoned her on 1 October 2017 to update her on the interview plan and how the ABE interview would be conducted. It records that AB's mother was content with the progress and wanted AB interviewed sooner rather than later.

24. There is an entry on the log by a different officer (not Police Constable Forder) on 1 October 2017 saying that she had been told by Police Constable Forder that the interview was arranged for 12 October 2017, that she had sought advice regarding use of an intermediary and one was not necessary. There is a further entry in the log made by a third officer on 17 October 2017 after the interview had been completed. That noted that an intermediary had been requested from the NCA but none was available. It said advice had been sought from Dr Smith who, it was said, had advised proceeding without one and to use AB's teacher who understood AB and with whom AB was comfortable and would communicate. The claimant contends that the notes are wrong. He contends that Dr Smith advised that a non-registered intermediary be used and that the interview proceeded on an erroneous basis. We do not find that to be an accurate summary of what happened on 20 September 2017. Dr Smith does not say in his evidence that he positively advised the use of an unregistered intermediary. He does not recollect the details of the conversation but, as set out above says, if asked, he would have said that AB's teacher could have been used as an intermediary. He believed she was going to be used as such (he also expressed his view that she would have been suitable as she was an experienced teacher who had taught AB for one year and was used to addressing his communication needs). Police Constable Forder does not say in her evidence that she was told to use a non-registered intermediary. She explains that neither JD, nor the teaching assistant, RH, were asked to act as an intermediary but, even if an intermediary had been found, JD would have been a source of information as she was experienced in dealing with AB and his methods of communicating.

25. The best contemporaneous record of what advice was given is the entry on the police log made on 20 September 2017 set out above at para 18. Dr Smith was asked to and gave advice on how best to get an account from AB in terms of use of PECs, types of questions, props and so forth. Dr Smith was not asked, and did not give advice on whether a person with communication skills who held himself or herself out as intermediary (but was not registered) should be used given the absence of a registered intermediary.

The ABE Interview

26. The video-recorded ABE interview was conducted on 12 October 2017. There were present AB, Police Constable Forder, Detective Constable Pirie, AB's teacher, JD, and his teaching assistant, RH. JD and RH were not there seeking to act as an intermediary

in the sense of providing services as an intermediary within the meaning of the 1999 Act. They did not take an oath as an intermediary. The ABE interview was therefore an interview which was not conducted through or with the use of an intermediary within the meaning of the 1999 Act; but it was conducted with two persons present who knew AB and were familiar with his method of communication. Contrary to JD's recollection put in evidence in these proceedings, and as is now acknowledged on behalf of the claimant, JD did in fact make numerous and appropriate interventions to assist the interview process.

27. We have viewed the entirety of the video recording of the interview. We have read the transcript prepared by the claimant's legal representatives. Only by viewing the video itself is it possible to obtain a real understanding of the interview. The interview dealt with a description of Growley, the name used by AB for the person who had done something to him. Early in the interview, AB was asked if the person was short/tall, fat/thin (using the type of forced choice questions used for AB as described above) and AB was asked to show the colour of Growley's hair. He said that Growley was short and fat and said red for hair colour, although later he used the PECs symbol for purple to describe Growley's hair. CD is tall, thin and does not have red hair. Asked if Growley and CD were the same or different, AB said different.

28. Police Constable Forder asks questions about what happened at the respite care centre. The answers are consistent with what AB told his parents (and can be seen in the video). They indicate that something was done to AB which caused him pain and also distress. He points to his bottom and says "ow". He says he was naked and Growley had his trousers down. He says he saw a toe (consistent with him bending over and looking down with a person behind him). At one point he picks up the PECs symbol for penis and, says words which sound like "It's a too stuck". When asked where it is stuck, he points to his bottom. All of this is deeply troubling. It is also right to say that there are answers that are not clear or are open to different interpretations. By way of example, asked what hurt his bottom, AB picks up the PECs card for eyes first, then when the question is repeated, picks up the PECs card for leg. There was a break when AB appeared tired. Towards the end of the interview, when Police Constable Forder was going though material that she had gone through earlier, AB appears not to be understanding certain questions and the interview was then concluded.

Other Investigative Steps

29. Formal statements were taken from AB's mother and father and from the leader of a day care group attended by AB on 7 August 2017 after the incident. Formal statements were also taken from staff at the respite care centre dealing with AB's normal behaviour and behaviour on the weekend of 1 to 3 August 2017. The police also decided to undertake what was described as a PROMAT identification process. This took place on 22 February 2018. Photographs of 8 persons similar to CD, and one photograph of CD were used. AB was shown each photograph and asked: "who is this?". When shown the photograph of CD and asked: "Who is this?" AB said Growley, that is, the name he had used to describe the person who did something to him.

Reviews

30. The results of the investigation were reviewed on a number of occasions. The log shows the case was reviewed by Detective Constable Pirie, on the 28 February 2018. She considered the strengths of the case. These included the fact that the video recording made by AB's mother on 7 August 2017 "is exceptionally compelling" and it was clear that AB was "desperately trying to convey to his parents that something has happened that has bothered him". AB had been consistent in saying that a person called Growley was the person who had done this. He had been consistent in telling others that he was sad, scared, mentioning Growley and other things. There was the identification of the photograph of CD as Growley. The weaknesses included that there was nothing of concern on the suspect's phone and there were no witnesses who could state what had happened. Detective Constable Pirie's log entry says:

> "What is unclear is whether [AB] is stating that someone has touched his anus, wiped his bottom, sexually assaulted him or something else. However [AB] is very consistent in his view that whatever has happened to him results in him saying words like "Ouch" "ow" "poo", "bum" "sad, "bad man" which would tend to indicate it is something [AB] is not happy about
>
> "Whilst I fear we could not rely upon his VRI, his initial video of disclosures to his parents and comments made in a statement of … are very compelling and show his consistent account and I recommend that both be viewed by the CPS".

31. The case was reviewed by Detective Sergeant Scullion on 6 March 2018. He reviewed the information and viewed the video recorded interview. He set out a summary of the case, the evidence from AB and from the suspect and noted that other witnesses had not actually witnessed any concerning behaviour. He noted that examination of the suspect's phone had not disclosed a sexual interest in children. The outcome is recorded as:

> "In summary we have a reported sexual offence against a vulnerable child where the victim has demonstrated a potential sexual offence and this has been recorded by his parents. The victim has gone on to provide a VRI but this has been more limited and unclear.
>
> The suspect has fully denied the allegation and is of previous good character.
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> There are no witnesses to inappropriate behaviour from the suspect.
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> Review of the suspect's mobile phone has not yielded any further information.
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> In this case whilst we have the victim demonstrating concerning behaviour I feel that it will be evidentially difficult for a jury to be sure in this case."

32. On 7 March 2018, there was a review by Detective Inspector Middle who concluded:

> "I am of the view this case has not met the threshold test. The investigation has been unable to prove beyond reasonable doubt what offence, if any, has been committed. I note this is classified as rape but we are unable to say if this is so. It could equally be digital penetration, sexual touching over/under clothing or no offence at all. What we do not have is additional verifiable information to challenge this initial classification, this will therefore remain classified as rape. Whilst this will be filed [No further action], if further evidence were to become available at a later date this decision could be reviewed."

33. The log records that Detective Constable Pirie noted the views of those officers but was still of the view that the matter should be considered by the CPS. She also noted that she had considered alternative offences to rape which might not require proof of anal penetration such as sexual activity with a child by a person in a position of trust contrary to section 16 of the Sexual Offences Act 2003.

34. In the light of that, the matter was reviewed again by Detective Chief Inspector Bitters on 13 April 2018. She wished to have certain matters confirmed before reaching a final decision. These included ascertaining why the medical professionals believed that something sexual had happened. They also included conducting inquiries to see if other possibilities could be excluded such as investigating the extent to which AB had access to the internet so could be acting out something that he had seen, and also investigating claims that AB had demonstrated sexualised behaviour. The detective chief inspector also asked if they had ruled out a possible medical episode which could provide an alternative explanation. She wanted that information to be provided by 30 April 2018. All those matters were duly investigated.

35. On 18 May 2018, Detective Chief Inspector Bitters noted that she had reviewed the video footage from the parents and that it was very difficult to explain away. She noted that the video recorded interview had some related disclosure but this was surrounded by seemingly unrelated comments. She noted that the stumbling block was knowing what offence was in issue as, if the prosecution could not be certain, how could a jury? But she weighed that against the video footage indicating that a sexual act had taken place. She requested early investigative advice from the CPS.

36. That advice was provided by the duty lawyer on 20 June 2018. That lawyer indicated that he was not optimistic that the case would pass the evidential test for a prosecution. He had not, however, viewed the video footage or the interview. There was, therefore, a further request for advice which was provided by the same duty lawyer from the CPS on 10 August 2018. He did, on that occasion, review the video recorded interview. He expressed the view that he remained pessimistic that the case would pass the evidential test for bringing a prosecution. He set out the reasons for his view. These began with identification and the fact that the description in the interview did not match the suspect. He noted that AB had also said that one other carer was bad,

and he selected the PECs card for sad when asked about a third carer. The lawyer expressed views about competence. In fact, none of the police officers involved had taken the view that AB might not be competent and either thought he was, or proceeded on the basis that he was competent. He also expressed the view that the defence might have cause to complain if AB was competent but the prosecution was relying on a video recorded interview. This advice is not easy to understand. As a child, his evidence would be given by video recorded interview as he would be entitled to a special measures direction to this effect under sections 16, 21 and 27 of the 1999 Act. In any event the lawyer went on to say:

> "I entirely accept that the recording made by [AB's] parents is both disturbing and unnerving. However, it remains unclear exactly what occurred. The VRI did not really clear up this question. I think it is fair to say that uncertainty remains as to whether there was penile penetration, digital penetration or no penetration at all."

37. The lawyer's conclusion was as follows:

> "11. In conclusion I remain pessimistic because a) uncertainty remains as to what exactly happened to [AB] and b) I cannot see that there is any admissible identification evidence to establish in a definitive way who "Growley" is.
>
> "12. When I spoke with DC Stocker we discussed the question of whether there were any additional lines of enquiry that could take this case forward. It is difficult to see what could be done that might actually change things. It would be possible to re-interview [AB] with a Registered Intermediary. However, I harbour doubts whether this will elicit more evidence bearing in mind that the interviewing officer did have the benefit of [AB's] teacher being present. It might be possible to conduct a promat ID procedure but that is fraught with difficulties for the reasons set out above."

The Decision to Take No Further Action

38. On 30 August 2018, Detective Chief Inspector Bitters reviewed the case and decided that no further action should be taken on the case. She recorded her reasons on the log in the following terms:

> "I am aware of this case. I reviewed it on the 13th April and then again on the 18th May when I asked for EIA. This advice has now been received and CPS are in agreement that despite the recording being unnerving and disturbing, there is insufficient to proceed to FCT.

> The investigation team has been unable to establish what, if anything, happened to [AB] and furthermore there are a number of undermining factors outlined in the advice which I am in agreement with. Without a verbal, clear disclosure about what happened to [AB] and clarity about who was responsible this case cannot proceed. I am therefore authorising this filed [No Further Action] …".

39. AB's parents requested the decision be reviewed. It was and Detective Superintendent Barton decided to uphold the decision and to take no further action. This is the second matter under challenge. His decision was conveyed to the parents by letter dated 21 November 2018. The material parts of the letter say:

> "I have now completed my review of the case and have decided that the original decision to take no further action is upheld.
>
> I would like to take this opportunity to provide an explanation of this decision to help you understand my reasons for making it. This was a challenging investigation from the outset with no clear allegation being made by [AB] and no independent corroborative evidence to support any criminality. Due to [AB's] disability, the ability to obtain a clear verbal account from him was difficult. In such circumstances we would seek to utilise an intermediary to assist however on this occasion we were unable to identify one who had the required skills. Our searches included our own database and then contact with the NCA who hold a national register of intermediaries. They too were unable to assist. As the alleged incident was already 2 weeks old due to your pre-booked vacation, the decision was taken to press on with the interview and not risk losing any further recall. This interview did go ahead in the presence of [AB's] teacher. No clear disclosures were made.
>
> Intermediaries are not there to offer an opinion or an interpretation of what was said; they are there to assist the person whom is being interviewed to understand the questions and to advise the interviewer on how to get the best out of the interviewee according to their needs.
>
> You have offered some explanations as to why [AB] may have said certain things in his interview. This is subjective and open to challenge and would be the case should AB's account ever be given in court.
>
> In relation to the identification procedure, there was nothing wrong with the procedure. The issues around identification were that [AB] gave a description of 'Growly' which were different to the actual appearance of [CD] and whilst he picked

> out [CD], it could be argued that he picked out the only person recognised by him and not the person who did something to him. As there was no clear allegation made by [AB], the identification procedure was always likely to be of little value. There was no medical evidence to support any offence and whilst the Paediatrician's views are important as is the video footage you have provided us, they do not provide evidence of any offence. You have questioned whether the right procedures were carried out given the nature of [AB's] disabilities. Having reviewed this investigation I believe the investigating officers have tried their very best to ascertain what may have happened to [AB] but there is no evidence to support your allegation. Witnesses were interviewed, a male was arrested and his property was searched. There were no witnesses to any incident, no forensic evidence or medical evidence and the male arrested denied the offence. In order to seek criminal charges one must first identify an offence, identify a suspect and then have sufficient evidence to obtain a realistic prospect of conviction beyond all reasonable doubt. I am afraid we are nowhere near getting to that threshold and no further investigative work would change that. For completeness, this case has also been reviewed by two separate lawyers within the Crown Prosecution Service who have both reached the same conclusion as I have. If you are dissatisfied with the outcome of the police review, you have the option to pursue the matter further by applying to the High Court for a judicial review."

C. The Procedural History

40. On 20 February 2018, the claimant issued a claim form. So far as the first defendant was concerned, the claimant sought judicial review of an alleged failure properly to investigate the allegation of sexual assault and the decision not to refer the matter for prosecution. The claim form included what the claimant described as interim grounds of claim and sought permission to file detailed grounds within 4 weeks.

41. Ouseley J. ordered that the claimant and his parents should not be identified, nor should CD. He declined to grant any extension of time for the service of detailed grounds, requiring the parties to be put on notice and for the matter to be determined by an Administrative Court lawyer under delegated powers. Ouseley J. pointed out that the only reason given for the application to extend time was funding difficulties. He noted that a better explanation was required as there was no special rule for legal aid cases. He noted that starting half-formed proceedings to avoid an issue over undue delay and then delaying the next step might undermine the three-month time limit provided for in the Civil Procedure Rules (CPR). An Administrative Court Office lawyer did, however, grant the application to extend time by order of 4 March 2019.

42. On 22 March 2019, a document entitled detailed statement of grounds for judicial review was filed along with witness statements from three individuals. A document

dated 19 March 2019, described as an expert report, by Professor Cooper was also filed. No application was made (indeed none has ever been made) for permission to adduce expert evidence. We have nevertheless considered this report, an addendum report dated 24 September 2019 and a witness statement dated 8 November 2019 produced by Professor Cooper. The latter document was produced in part in response to certain criticisms in the first defendant's skeleton argument of Professor Cooper's evidence and the means of its introduction into these proceedings.

43. Sir Wyn Williams ordered that the application for permission be adjourned to an oral hearing for a "rolled-up hearing" where permission, and the substantive hearing, if permission were granted, would be considered. The judge set a timetable for the proceedings. This included provision for the claimant to apply to adduce evidence in reply by 4 p.m. on 5 July 2019. This timetable for the exchange of evidence was extended on a number of subsequent occasions. The hearing was listed for 12 November 2019.

44. The claimant subsequently served a 49-page document dated 14 October 2019 entitled amended statement of facts and detailed grounds. It is said that this was "served by way of reply" pursuant to an order permitting the service of a reply. This document expanded the factual allegations underlying the grounds of complaint and added a new ground, namely that the first defendant's investigation and the decision to take no further action breached her duty under section 11 of the Children Act 2004 (the 2004 Act).

45. The claimant filed a written skeleton argument dated 21 October 2019 and updated 7 November 2019. In those, the claimant indicated he would now be seeking to add an additional ground of challenge against the first defendant, not included in the detailed grounds (or amended grounds), namely that the first defendant had acted in breach of her duty under section 149 of the 2010 Act. The written skeleton argument also alleged the existence, and breach of an implied statutory duty under the 1999 Act to appoint a registered intermediary.

46. We will deal at the end of this judgment with the way in which the claimant's grounds emerged and the use of expert evidence. Those criticisms have not, in fact, affected the outcome of this case in any way. Before, during and after the hearing on 12 and 13 November 2019, the court has considered with care all the arguments, all the grounds of challenge and all the evidence. We are conscious that this claim for judicial review involves serious issues concerning the possible sexual abuse of a very vulnerable child by a carer. We have sought to make sure that the claimant has not been disadvantaged in any way. Our comments at the end of this judgment are intended to remind those representing claimants in judicial review proceedings of their obligations under the CPR and to assist in ensuring that litigation is, in future cases, properly and fairly conducted.

D. The Issues

47. In light of the written grounds of claim and the written and oral submissions made on behalf of the claimant, the principal issues are these:

(1) Do the criticisms of the investigation made by the claimant, including, but not limited to, the fact that (i) an intermediary was not used for the ABE interview (ii) early investigative advice was not sought until about June 2018 (iii) a special measures meeting discussion with the CPS was not held (iv) medical evidence as to the competence of AB to be a witness was not obtained, individually or cumulatively amount to

(a) a breach of implied statutory duties imposed by the provisions of the 1999 Act;

(b) an unlawful failure to follow relevant guidance;

(c) a breach of the duty to carry out an effective investigation under either Article 3, or 8 of the Convention or discrimination contrary to Article 14 read with those articles;

(d) a failure to make a reasonable adjustment contrary to sections 20, 21 and 29 of the 2010 Act;

(e) a breach of section 11 of the 2004 Act or section 149 of the 2010 Act?

(2) Was the decision not to take further action unlawful?

Implied Statutory Duties under the 1999 Act: issue (1)(a)

The Submissions

48. This was the principal argument raised in oral submissions and emerged, for the first time, in the claimant's updated skeleton argument. Mr Bowen Q.C. for the claimant submits that in the exercise of her common law powers to conduct a criminal investigation, the first defendant was under implied statutory duties imposed by certain provisions of the 1999 Act. Those duties required the first defendant to identify the claimant as a vulnerable victim of crime, to appoint a registered intermediary, or if that was not possible, an unregistered intermediary, to obtain early investigate advice from, and to seek a special measures discussion with, the CPS. He further submits that the provisions of the 1999 Act imposed a statutory duty on the part of the police to appoint a suitably skilled officer to conduct a video recorded interview, in the presence of an intermediary, which would be admissible in evidence. He also submitted that there was an implied statutory duty to treat the claimant as a competent witness unless and until the first defendant obtained medical evidence to rebut the presumption. Mr Bowen sought to rely on the terms of the third edition of the guidance on achieving best evidence issued in March 2011 under the auspices of a number of departments of the United Kingdom government and the Welsh Government as an aid to the construction of the 1999 Act.

49. In view of the late emergence of this point, we did not have written submissions from the first defendant in response. Mr Basu Q.C. for the first defendant submits however, in short, that, on a proper interpretation of the provisions of the 1999 Act, no such implied duties are imposed on the first defendant.

The Statutory Provisions

50. The first issue concerns the proper interpretation of the relevant provisions of the 1999 Act. This involves ascertaining what Parliament intended when it enacted those provisions. The task is to identify whether the words used were intended to impose the duties upon the police for which the claimant contends. This in turn, involves consideration of the meaning of the words in the particular context in which they are used, having regard to other permissible aids to interpretation such as any relevant presumption, the legislative history of the provision and other background material in so far as that assists in identifying the defect that the provisions are intended to cure or the purpose that the provisions are intended to achieve: see, for example, the observations of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex p. Spath Holme Ltd.* [2001] 2 AC 349, at pages 397A-399E**.**

51. The starting point is the wording of the relevant provisions of the 1999 Act. Chapter 1 of Part II of the 1999 Act is entitled "Special Measures Directions in the Case of Vulnerable and Intimidated Witnesses". The 1999 Act proceeds by identifying witnesses who are eligible for assistance in giving their evidence in criminal proceedings. It then provides for circumstances when a court may make a special measures direction and then sets out the particular special measures that a court may direct applies in relation to the giving of evidence by that witness. For present purposes the material provisions are as follows.

Eligible Witnesses

52. Witnesses eligible for special measures are defined in sections 16 and 17 of the 1999 Act. Section 16 provides as follows:

> "16. — Witnesses eligible for assistance on grounds of age or incapacity.
>
> (1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—
>
> (a) if under the age of 18 at the time of the hearing; or
>
> (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2)."

53. Section 17 of the 1999 Act deals with "a witness in criminal proceedings (other than the accused)" who is eligible for assistance:

> "if the court is satisfied that the quality of the evidence given by the witness is likely to be diminished by reason of fear distress on the part of the witness in connection with testifying in the proceedings".

Specifying Appropriate Special Measures

54. The 1999 Act defines when a court may give a special measures direction. Section 19 of the 1999 Act provides, so far as material:

> "19. — Special measures direction relating to eligible witness.
>
> "(1) This section applies where in any criminal proceedings—
>
> (a) a party to the proceedings makes an application for the court to give a direction under this section in relation to a witness in the proceedings other than the accused, or
>
> (b) the court of its own motion raises the issue whether such a direction should be given.
>
> (2) Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—
>
> (a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and
>
> (b) if so—
>
> (i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
>
> (ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.
>
> (3) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—
>
> (a) any views expressed by the witness; and
>
> (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.
>
> (4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.
>
> (5) In this Chapter *"special measures direction"* means a direction under this section.

…"

55. Among the potential special measures available are the giving of evidence in chief by means of a video recorded interview rather than by giving evidence in court. Section 21 of the 1999 Act provides as follows:

> "21. — Special provisions relating to child witnesses.
>
> (1) For the purposes of this section—
>
> (a) a witness in criminal proceedings is a *"child witness"* if he is an eligible witness by reason of section 16(1)(a) (whether or not he is an eligible witness by reason of any other provision of section 16 or 17); and
>
> …
>
> (c) a *"relevant recording",* in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.
>
> (2) Where the court, in making a determination for the purposes of section 19(2), determines that a witness in criminal proceedings is a child witness, the court must—
>
> (a) first have regard to subsections (3) to (4C) below; and
>
> (b) then have regard to section 19(2);
>
> and for the purposes of section 19(2), as it then applies to the witness, any special measures required to be applied in relation to him by virtue of this section shall be treated as if they were measures determined by the court, pursuant to section 19(2)(a) and (b)(i), to be ones that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of his evidence.
>
> (3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—
>
> (a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and
>
> (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.
>
> (4) The primary rule is subject to the following limitations—

(a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability (within the meaning of section 18(2)) of the special measure in question in relation to the witness;

(b) the requirement contained in subsection (3)(a) also has effect subject to section 27(2) ; ...

(ba) if the witness informs the court of the witness's wish that the rule should not apply or should apply only in part, the rule does not apply to the extent that the court is satisfied that not complying with the rule would not diminish the quality of the witness's evidence; and

(c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(4A) Where as a consequence of all or part of the primary rule being disapplied under subsection (4)(ba) a witness's evidence or any part of it would fall to be given as testimony in court, the court must give a special measures direction making such provision as is described in section 23 for the evidence or that part of it.

(4B) The requirement in subsection (4A) is subject to the following limitations—

(a) if the witness informs the court of the witness's wish that the requirement in subsection (4A) should not apply, the requirement does not apply to the extent that the court is satisfied that not complying with it would not diminish the quality of the witness's evidence; and

(b) the requirement does not apply to the extent that the court is satisfied that making such a provision would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(4C) In making a decision under subsection (4)(ba) or (4B)(a), the court must take into account the following factors (and any others it considers relevant)—

(a) the age and maturity of the witness;

> (b) the ability of the witness to understand the consequences of giving evidence otherwise than in accordance with the requirements in subsection (3) or (as the case may be) in accordance with the requirement in subsection (4A);
>
> (c) the relationship (if any) between the witness and the accused;
>
> (d) the witness's social and cultural background and ethnic origins;
>
> (e) the nature and alleged circumstances of the offence to which the proceedings relate."

56. Section 27 of the 1999 Act then provides for a special measures direction to provide for "a video recording of a witness be admitted as evidence in chief of the witness". Section 27(2) provides for the court to decide that a recording, or part of it, is not to be admitted if the court "is of the opinion having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted".

57. Section 29 of the 1999 Act deals with the examination of a witness through an intermediary and provides, so far as material, that:

> "29. — Examination of witness through intermediary.
>
> (1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (*"an intermediary")*.
>
> (2) The function of an intermediary is to communicate—
>
> (a) to the witness, questions put to the witness, and
>
> (b) to any person asking such questions, the answers given by the witness in reply to them,
>
> and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
>
> (3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as Criminal Procedure Rules or the direction may provide, but in circumstances in which—
>
> (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the

> examination of the witness and to communicate with the intermediary, and
>
> (b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.
>
> (4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.
>
> (5) A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by Criminal Procedure Rules, that he will faithfully perform his function as intermediary.
>
> (6) Subsection (1) does not apply to an interview of the witness which is recorded by means of a video recording with a view to its admission as evidence in chief of the witness; but a special measures direction may provide for such a recording to be admitted under section 27 if the interview was conducted through an intermediary and—
>
> (a) that person complied with subsection (5) before the interview began, and
>
> (b) the court's approval for the purposes of this section is given before the direction is given.
>
> …"

Discussion

58. The relevant provisions of the 1999 Act do not impose, expressly or impliedly, any duty on the first defendant, or individual police officers, to conduct investigations into alleged criminal conduct in any particular way. The provisions referred to above, are directed towards the process which is to be applied to witnesses giving evidence in court and not to the process of gathering evidence in the course of a criminal investigation.

59. This conclusion follows in large part from the wording and the structure of the material parts of Chapter 1 of Part II to the 1999 Act. The provisions referred to above are directed in terms to the powers of the court to make a special measures direction about the way in which witnesses may give their evidence in the course of proceedings. The structure of this chapter reflects that. Sections 16 and 17 of the 1999 Act define which witnesses are eligible for assistance in the giving of evidence. Section 19 deals with the making of a special measures direction and is concerned with when a court may make a special measures direction to apply to the evidence given by a witness: see, in particular section 19(2) of the 1999 Act. That is reinforced

by the provisions which determine when the section applies, that is when a party to proceedings or the court considers that a special measures direction may be appropriate: see section 19(1) of the 1999 Act. It sets out the considerations that a "court" must consider in deciding whether to make a special measures direction (section 19(3) of the 1999 Act). Further, the content of a special measures direction is concerned with the way in which a person gives evidence in court proceedings. See, for example, sections 21 and 27 (evidence in chief of children to be given by video recording); section 23 (the use of screens or other arrangements to prevent the witness "while giving testimony or being sworn in court" from seeing the accused); section 24 (witness may give evidence by live link, that is where the witness is "absent from the courtroom or other place where the proceedings are being conducted" but can see and hear a person in the courtroom); section 26 (dispensing with the wearing of wigs or gowns) and section 28 (the use of an intermediary to communicate with a witness).

60. This interpretation also accords with the purpose and object underlying the relevant statutory provisions governing special measures. As the Court of Appeal (Criminal Division) observed at paras 17 and 18 of *R v Watts* [2010] EWCA Crim 1924:

> "17….The Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act") introduced a radical new regime by which special measures were made available to enable vulnerable witnesses (including witnesses with major communication difficulties to give evidence), or to improve the quality of their evidence…
>
> "18. The parliamentary intention which emerges from the 1999 Act is that those who are competent to give evidence should be assisted to do so….. Provided the court is satisfied that the witness is able to understand the questions put to him (or her) and give answers to them which can be understood, the competency test is satisfied. The Act further contemplates the reception of evidence in circumstances where a witness who satisfies the statutory test of competence may nevertheless lack sufficient communication skills to give evidence without the use of an intermediary. The use of intermediaries forms an integral part of the structure of the special measures regime."

61. We do not accept the submission of Mr Bowen that the provisions of the 1999 Act are to be interpreted by reference to the terms of the third edition of guidance issued in 2011 on achieving best evidence. That is problematic, not least as a matter of chronology. The guidance was first issued in 2002 (and replaced earlier guidance, contained in a memorandum of good practice issued in 1992). Material provisions of the 1999 Act, such as section 19, have been in force since July 1999 or came into force on that date but have been amended over time. We do not consider that guidance, issued by a variety of government departments, and expressed to be a description of good practice in interviewing victims and witnesses, is a legitimate or admissible aid to interpretation of the provisions of the 1999 Act. Nor, indeed, would they necessarily appear to assist the claimant. The principal submission of Mr Bowen on this part of the case was there was an implied statutory duty on the police to use an

intermediary in the case of an interview of a vulnerable victim. Yet the first edition of the guidance, issued in 2002, refers to the "Use of intermediaries (*when available)".* We do not consider that the various versions of the guidance assist in the interpretation of the 1999 Act. The fact that the various versions differ in their approach to the use of intermediaries reinforces the conclusion that they were not intended to describe the existence of absolute duties.

62. Nor do we consider that this is a case where the contention that the provisions of the 1999 Act impose an implied statutory duty on the police is reinforced by, or follows from, the general principle in administrative law that a person exercising a statutory discretionary power must not use the power in a way which frustrates the objects of the statute conferring the power: see *Padfield v Ministry of Agriculture* [1967] AC 997, and *M v Scottish Ministers* [2012] 1 WLR 3386 at para 42. Those cases deal with ensuring that powers conferred on a particular body are used in order to further purposes of the relevant Act, properly construed. They do not assist in determining whether powers governing the admissibility of evidence in court proceedings impose implied duties upon different bodies (the police) undertaking criminal investigations.

63. Furthermore, the submissions of Mr Bowen could materially limit the usefulness of the provisions in the 1999 Act and impinge on the ability of the courts to admit the evidence of vulnerable witnesses. He submits that there was an implied duty on the police to use an intermediary when interviewing the claimant and to take account of the fact that the absence of an intermediary would, or might, render the video recorded interview inadmissible by reason of section 29(6) of the 1999 Act. The purpose underlying the special measures provisions is not to create a series of hurdles which must be surmounted before evidence of vulnerable witnesses can be admitted in criminal proceedings. The purpose is to provide a range of special measures, tailored to different needs, which will facilitate, in a flexible way, the giving of the best quality evidence by a vulnerable witness. In the present case, there was a video recorded interview of AB. That was potentially admissible in evidence by virtue of sections 21 and 27 of the 1999 Act (unless excluded by the court under section 27(2) of the 1999 Act). The interview in this case was not, in fact, conducted through an intermediary. If an interview is conducted through an intermediary, then there is a need for the intermediary to make the appropriate declaration (as provided for by section 29(6) of the 1999 Act). A video recorded interview of a child is not, however, to be excluded simply because an intermediary might have been used in which case that (differently conducted) interview would have required a declaration by the intermediary.

64. For those reasons, we consider that the provisions of the 1999 Act dealing with special measures for vulnerable witnesses do not, properly interpreted, impose implied statutory duties on the police in the conduct of criminal investigations. A police officer or lawyer is likely to need to bear in mind the provisions governing the giving of evidence in a criminal trial. The purpose of a criminal investigation is to identify the alleged perpetrator of a criminal offence who may then be prosecuted in court and whose guilt or innocence may be determined. Those gathering evidence in the course of an investigation will necessarily wish to ensure that the evidence gathered will be admissible in the proceedings. In the case of children, that will, generally, mean that any interview will be recorded so that it may be admitted as evidence in chief under section 27 of the 1999 Act. Those involved in prosecuting an accused person may

need to consider whether a court should be invited to exercise its powers to order special measures (whether for children or other witnesses) in order to ensure that they give the best evidence they can. This falls far short of interpreting the provisions of the 1999 Act as imposing implied statutory duties on those involved in investigating offences to conduct the investigation in a particular way.

Departures from relevant guidance: issue (1)(b)

Submissions

65. Mr Bowen submits that the first defendant was required to comply with relevant guidance, including in particular the guidance on Achieving Best Evidence in Criminal Proceedings ("the ABE Guidance") unless there were cogent reasons for departing from it. Failure to comply with the ABE Guidance would amount to a public law error on the part of the police for which a remedy, such as a declaration, could be granted. He relies in that regard on *R (Munjaz) v Mersey NHS Trust* [2006] 2 AC 148 especially at para 21, and *R (Crompton) v Police and Crime Commissioner for South Yorkshire* [2018] 1 WLR 131. He submits, principally, that the first defendant did not appoint a registered intermediary (or alternatively an unregistered intermediary) in breach of paras 2.84 and 2.85 of the ABE Guidance, He submits that there was a real prospect that if AB had been interviewed (or re-interviewed) with an intermediary that AB would have given better evidence. He relies, in this regard, on the evidence of Professor Cooper.

66. Mr Bowen further submits that the first defendant failed to seek early investigative advice within 7 days of the release of CD on bail as required by the DPP's Charging Guidance. Yet further, that the first defendant failed to arrange for a special measures discussion with the CPS as required by paras 2.2 and 4.3 of the ABE Guidance. Mr Bowen relied upon other alleged breaches of the ABE Guidance.

67. Mr Basu submits that there was no duty to follow the guidance. It was non-statutory guidance designed to set out best practice for achieving best evidence. He submits that, in relation to the appointment of a registered intermediary, the real issue was whether the police should have delayed the interview in the hope of finding an intermediary, or re-interviewed AB with the benefit of an intermediary. The question then would be whether AB would have given 'better' evidence, which would have resulted in a real prospect of a different outcome. Whether or not to delay the interview was a matter of judgment for the police and there was nothing unlawful in the police deciding to proceed in the way that they did. Further, there was no realistic prospect that a further interview would have resulted in AB giving better evidence. He submits that none of the criticisms made of the ABE interview by Professor Cooper stand up to scrutiny. The ABE interview does, on careful viewing, demonstrate highly effective questioning using two individuals (JD and RH) who taught AB and knew his communication methods. He submits that the other alleged breaches were not, in fact, established.

Discussion

68. First, by way of preliminary observation, the ABE Guidance is issued under the auspices of a number of government departments and is drafted by a team of advisers

with comments and contributions by a number of specialists. It is not guidance issued pursuant to statute. Its status is described in para 1.1. in the following terms:

> "1.1 This document describes good practice in interviewing victims and witnesses, and in preparing them to give their best evidence in court. While it is advisory and does not constitute a legally enforceable code of conduct, practitioners should bear in mind that significant departures from the good practice advocated in it may have to be justified in the courts".

69. Against that background, it is, in our view, artificial and wrong to treat this a situation where the police, when exercising public functions, are obliged as a matter of law, to follow the ABE Guidance as though it was a statute so that decisions reached in the exercise of their functions may be quashed or declared unlawful if they do not do so. In our view, this is the wrong way of analysing what the Guidance is for. A better approach is to recognise that the ABE Guidance is intended to give advice and describe best practice. If there are significant departures from that practice, those involved may have to justify their actions in the courts. That will usually be in the context of criminal proceedings and the admissibility of evidence in those proceedings rather than by way of judicial review claims to challenge the lawfulness of individual decisions taken by the police in the course of criminal investigations. That said, we recognise that, in appropriate circumstances, a court of judicial review may have to consider the compatibility of investigative actions with the ABE Guidance. Such circumstances may arise, for example, in considering whether the police have complied with their duty under Article 3 of the Convention to conduct an effective investigation into alleged criminal conduct.

The Absence of an Intermediary

70. The ABE Guidance has a section dealing with providing support for vulnerable witnesses. This would include a witness with a learning disability who communicates using a mixture of gestures and words or alternative methods of communication. In such cases, paras 2.84 and 2.85 of the ABE Guidance states that "the services of an intermediary are essential". The ABE Guidance says at para 2.199 that "Registered Intermediaries should be used" and that the use of an unregistered intermediary "can only be considered once the options for using a Registered Intermediary are exhausted".

71. In the present case, the police officers recognised at a very early stage that AB had severe communication needs and would need an intermediary assessment prior to the video recorded interview. Police Constable Forder contacted the NCA, the body responsible for providing registered intermediaries, and described AB's specific needs. She requested a registered intermediary for a week in August 2017. The NCA tried but could not find a registered intermediary who had the necessary skills and was available. The NCA placed the request on its on-line forum available to registered intermediaries working nationally for a further period. No registered intermediaries came forward.

72. In the light of that, Police Constable Forder then had to determine how best to proceed. She took advice from Dr Smith at the NCA. He did not suggest that an unregistered intermediary be used nor did he advise dispensing with an intermediary (although that may be how officers later understood what he had said). See paras 18, 19, 24 and 25 above. Police Constable Forder then contacted the headteacher of AB's school who was able to facilitate an interview with AB. She met with AB's teacher who had worked with AB for over a year and knew AB's methods of communication. She prepared an interview plan which she showed to the teacher in advance and discussed the interview with AB's mother.

73. The video recorded interview was then held. We are satisfied that this interview was a well-planned, well-conducted interview. It is clear that AB was comfortable and had established a rapport with everyone in the room, namely his teacher, JD, his teaching assistant, RH, and the two officers. He was able to answer questions and to use PECs to communicate and indeed, enjoyed showing the PECs to the camera for the answers to be recorded. He was asked questions about the two critical areas early in the interview, namely, details of what had happened to him at the respite care centre and a description of the man he called Growley. The police officer did all that was reasonably possible, with the help of the two teachers, to enable AB to give his best evidence on those topics. The video recording gives a far more accurate reflection of what happened than a simple reading of the transcript. Towards the end of the interview, the officer was trying to think of further questions that she might ask to help AB give more details. At that stage, AB did become tired or distracted and there was a break.

74. We have considered the views of Professor Cooper. Though for reasons given below we do not consider her evidence is admissible, in the event, we do not consider that her criticisms of the interview are justified or that the use of an intermediary would, on the facts, have led to AB being able to give better evidence than he did. For present purposes, it is sufficient to deal briefly with the seven criticisms made by Professor Cooper in her second expert report dated 24 September 2019 where she considers what an intermediary could have done in respect of the interview.

75. First, she says that an intermediary could have assessed AB's communication skills and advised on how best to communicate with AB in interview. In fact, Police Constable Forder did meet with JD, the teacher who knew AB's method of communication best and established with her the best means of enabling AB to communicate. Secondly, she says that an intermediary would have conducted a practice interview before the video recorded interview to establish rapport. It is clear, however, that the arrangements put in place, and the presence of JD and RH, ensured that there was a good rapport between AB and all the people in the interview. It is equally clear from the video recorded interview that AB felt comfortable with the interview. Thirdly, Professor Cooper says that an intermediary would have assisted Police Constable Forder to plan the questions. However Police Constable Forder took advice from JD on how to structure questions and provided an interview plan with proposed questions for JD to comment on. The questions actually asked in interview were appropriate and were designed to enable AB to give the best evidence he could.

76. Fourthly, Professor Cooper says that an intermediary would have helped Police Constable Forder to plan the layout of the room including furniture. But that is precisely what Police Constable Forder did with the headteacher and JD. It was

decided to hold the interview at the school because AB would feel safe there. Express consideration was given to whether AB would be comfortable sitting on a chair and with a table present where the book with the PECs could be laid out. It is clear that the location, and layout, of the interview room facilitated AB's giving best evidence. Fifthly, she says that an intermediary would have assisted in planning how best to present a test to AB that would establish the difference between truth and lies. In fact, Police Constable Forder discussed this with JD. It is clear that AB can identify and communicate what things did and did not happen. As AB's mother said, AB does not lie and is not capable of lying. The interview was planned around putting questions to AB to enable him to say what had happened and give a factual description of the person who had done it. Sixthly, she says that an intermediary would have been "on hand" to support Police Constable Forder's verbal communication if miscommunication arose. But JD and RH did precisely that when, on occasion, the issue arose about how best to ask a question. On the facts, having regard to AB's particular communication needs, his teacher and teaching assistant were as well, if not better placed to assist in this respect than an intermediary would have been. Indeed, even if an intermediary had been present the teachers still could have been present to assist with communication. In *R v B* [2010] EWCA Crim 1824, for example, the evidence (their eye movements) of the victim had been interpreted by a service manager who was familiar with the victim's eye movements, rather than the intermediary and the interview in question was held to be admissible (see para 35). Finally, Professor Cooper says that an intermediary would have supported non-verbal methods of communication. In part, this concerns whether AB should have been given the opportunity to stand up and show what he said had happened to him. But for understandable reasons, the police officer did not wish AB to undergo the indignity of having to re-enact the episode and was concerned this may traumatise him; and in any event AB had already given a demonstration of this nature to his parents which they had recorded on their mobile phone.

77. Standing back from the detail, we are satisfied that the steps taken by Police Constable Forder were appropriate and did, on the facts of this case, enable AB to give the best evidence he could. It was reasonable to hold the interview without a registered intermediary. The steps taken in terms of planning and preparation were appropriate steps. Seeking the assistance of the teachers, those who knew AB and his communication methods best, was an appropriate course of action given the absence of an intermediary. Given the particular features of this case, and the needs of this vulnerable victim, the underlying aims of involving intermediaries were, in fact, met by the steps taken. Using the words of para 1.1 of the ABE Guidance, the departure from the guidance in respect of intermediaries would be well capable of justification if the case had come to court. The actions taken, although involving a departure from best practice which would involve the use of intermediaries, enabled AB to give his best evidence. The video recorded interview would still have been admissible, in principle. It was not unreasonable to proceed with the interview rather than make further attempts to find an intermediary. The steps taken did not result in any action that could be categorised as involving any public law error or call for the grant of any public law remedy. Indeed, in our judgment, it is artificial to analyse what happened in that way.

Early Investigative Advice

78. Para 7 of the Director of Public Prosecution's Charging Guidance says this, so far as material:

> "Early Investigative Advice
>
> Prosecutors may provide guidance or advice in serious, sensitive or complex cases and any case where a police supervisor considers it would be of assistance in helping to determine the evidence that will be required to support a prosecution or to decide if a case can proceed to court.
>
> Specific cases involving a death, rape or other serious sexual assault should always be referred to an Area prosecutor as early as possible and in any case once a suspect has been identified and it appears that continuing investigation will provide evidence upon which a charging decision may be made. Wherever practicable, this should take place within 24 hours in cases where the suspect is being detained in custody or within 7 days where released on bail."

79. The context in which advice is to be sought concerns cases where a police supervisor considers he or she needs assistance in helping to determine what evidence was necessary (first paragraph) or where the investigation had reached the stage where a prosecutor needed to be involved to consider charging decisions (second paragraph). Here, the police knew what evidence was necessary and sought to obtain it, including by means of a video recorded interview. The police did not need to seek early investigative advice prior to conducting the interview. Nor had the stage been reached where charging was realistically contemplated. Mr Bowen is wrong in his submission that advice had to be sought within 7 days of CD being released following interview. That applies where the suspect is "released on bail". CD was not released on bail, but released pending further investigations. It is understandable that advice on charging needs to be taken where a person is bailed (particularly if bail is granted subject to conditions which restrict the person's freedom) and a decision on charging should be taken. That was not this case. Rather, the evidence available did not, in the view of the police officers involved in the investigation, justify charging at that stage. Prior to deciding to take no further action, the police did, sensibly, seek advice from the CPS. The steps they took were not inconsistent with the charging guidance.

Early Special Measures Discussion

80. Section 2 of the ABE Guidance deals with planning and preparation for an interview. Para 2.2 provides that "In some cases, it might be advisable for there to be a discussion with the CPS. Here, the police officer concerned consulted the NCA and spoke to the teachers of AB. The officer was satisfied that the arrangements for the interview would enable AB to give his best evidence. There was nothing inconsistent with the guidance and nothing that could reasonably be analysed as involving any public law error calling for a public law remedy. Nor does the other guidance relied upon by Mr Bowen indicate any different position.

Ancillary Matters

81. Mr Bowen drew our attention to a large number of documents with a variety of purposes, such as the Victims' Code, and certain paragraphs within those documents, with a view, presumably, to erecting an argument that there had been an unlawful departure from the guidance that they gave. No clear argument was mounted before us as to the status of these documents or of the legal implications for this case that any departure from their content might have. As it is however, and addressing the matter compendiously, it is our view that there was no inconsistency or none that was material. In brief, the officer who conducted the interview was adequately trained. The officers involved either believed that AB was a competent witness or proceeded on the basis that he was and that any question as to competence would be resolved later. As they were not reaching a decision that AB was not competent, there was no need to obtain medical evidence before taking such a decision. The police did not make a record of the video interview as best practice says they should (see, in particular, Annex P to the ABE Guidance). Such a record could assist in guiding officers and prosecutors through viewing the interview (something that, in this case, would not have been a material benefit) or in enabling a decision-maker to decide whether a witness is to be re-interviewed. Here the police were able to do that without the record. None of the other criticisms advanced demonstrate any illegality on the part of the police.

Duty of Adequate Investigation: issue (1)(c)

Submissions

82. Mr Bowen submits that failure by the police to investigate serious crimes against individuals amounts to a breach of Articles 3 or 8 of the Convention. He submits that the police failed to carry out an adequate investigation in the present case and that this amounted to a breach of Article 3 of the Convention. He accepts that on the facts, Article 8 did not give rise to any additional or different obligations and that it is only necessary to consider the issue by reference to Article 3. In this context, he relies principally on the absence of an intermediary for the video recorded interview and on the fact that the police did not conduct a further interview with an intermediary or seek early investigative advice within 7 days of CD being released or arrange a special measures discussion or seek evidence as to AB's competence to give evidence. He also relies on an alleged failure to conduct an effective identification procedure on 22 February 2018. He further submits that there had been a breach of Article 14, read with Article 3 or 8 of the Convention. The basis for this submission is that in its criminal investigation, the first defendant failed to treat differently persons whose situations were significantly different from other persons. See in this context *Guberina v Croatia* (2018) 66 EHRR 11 at paras 70 to 74, and *JD and A v United Kingdom* (Application nos. 32949/17 and 34614/17) a judgment given on 24 October 2019 at paras 83 to 89.

83. Mr Basu submits that the steps taken by the police did ensure that there was a full and adequate investigation of the allegations. Furthermore, re-interviewing AB would not have resulted in the emergence of further or better evidence enabling a prosecution to be brought against any specific individual. The police had taken steps to address the specific needs of AB and did treat him differently in the way they interviewed him, in comparison with the way in which interviews would normally be conducted.

Discussion

84. The relevant principles in relation to this part of the case are set out in *D v Commissioner of Police of the Metropolis (Liberty Intervening)* [2019] AC 196. There is a general duty on the police under Article 3 of the Convention to undertake effective investigations into crimes which involve serious violence to persons (see para 48 of *D).* It is an obligation to take all reasonable steps to secure the evidence concerning the incident. That may include taking a detailed account of the allegations from the alleged victim, eyewitness testimony, obtaining forensic evidence and, if appropriate, medical reports. Simple errors or isolated omissions in the investigation will not, of themselves, give rise to a breach of Article 3. There needs to be "conspicuous or substantial errors in investigation". Expressed differently, minor errors would not give rise to a breach of Article 3 of the Convention, rather the errors "must be egregious and significant" to give rise to such a breach. See para 29 and also paras 31, 38 and 41 of the judgment of Lord Kerr in *D* with which Baroness Hale and Lord Neuberger agreed. See also, para 151(iii) of the judgment of Lord Mance.

85. In the present case, allegations of serious sexual abuse, possibly rape, of a vulnerable child were reported to the police. The police interviewed staff at the respite care centre where the incident was thought to have occurred. They identified as a potential suspect the person who had been on duty at the material time. They arrested and questioned that person but he denied the allegations. The police seized his phone and conducted searches for evidence, including evidence of a sexual interest in young children but there was no such evidence. He had no previous convictions or cautions. There was no evidence that the staff had witnessed any abuse.

86. Medical checks were carried out on AB but these did not demonstrate any evidence of injury to the genitals or anus. Of course this did not mean that abuse had not occurred; but it meant that there was an absence of forensic evidence to support its occurrence.

87. The police sought to interview AB. As recorded above, they made reasonable attempts to secure the services of an intermediary. When that did not prove possible, the officer consulted with the teacher who knew AB and his communication methods best. She prepared an interview plan which the teacher considered and thought acceptable. A video recorded interview was carried out with the teacher and the teaching assistant present. As already indicated, the people present, the communication methods used, and the way in which questions were asked meant that AB had the opportunity to give the best evidence he could. An intermediary is a person with skills in facilitating communication: in this case, the teachers fulfilled that function.

88. The results of the investigation were reviewed by a number of senior officers, who considered that on the basis of the evidence that had been gathered, no further action could be taken, and no prosecution could be brought. Their conclusion in this respect cannot be challenged in circumstances where Mr Bowen accepted in argument that the evidence gathered did not cross the evidential threshold to justify a prosecution. Advice was taken from the prosecuting authorities. The police were of the view that the video interview did not establish clearly what had happened and that the description of the man who AB called Growley and was believed to be the assailant did not correspond to the suspect, CD, who had been arrested. There was no other evidence available to supplement that evidence and, to put it colloquially, 'fill the gaps'. In those circumstances, the police considered that they could take no further

action. In our judgment, this was a view they were entitled to reach. On the facts of the case, the steps that were taken achieved, in substance, the aims underlying the use of an intermediary; and it was legitimate for the police to conclude that interviewing AB with an intermediary would not have resulted in the giving of better or different evidence.

89. There has been criticism of the identification procedure used. The difficulty was in obtaining evidence that the man AB referred to as Growley was CD when AB's answers during the course of the interview indicated that Growley had different physical characteristics in terms of height, weight and hair colour to CD and was therefore a different person. We understand why the police, who were seeking to do all they possibly could to establish the identity of the person they suspected, carried out a video identification procedure. However, though the procedure used resulted in AB identifying a photograph of CD as Growley, there were difficulties with that evidence, as amongst the images shown to AB only one was of a person who he knew, namely CD. Mr Bowen has not made submissions as to how on the facts of this case, an identification procedure could have been differently conducted in a way which could have made any difference. But in any event, whatever flaws there were in the identification procedure, the undertaking of an identification procedure of the sort used here does not begin to amount to a breach of Article 3.

90. Looking at all the circumstances, we take the view that the first defendant did conduct a full and effective investigation and there was here no breach of Article 3 of the Convention. The investigation led to a conclusion that there was insufficient evidence to justify charging any specific individual with any specific offence. The duty arising out of Article 3 is however a procedural duty, to carry out an effective investigation; it is not one to ensure a result, that is, that there is a prosecution or a conviction.

91. We do not consider either that there was a breach of Article 14 read with Articles 3 or 8 of the Convention. Article 14 guarantees the enjoyment of rights and freedoms set out in the Convention without discrimination on any one of a number of specified grounds or other status. It is well-established that discrimination includes treating persons who are in similar situations differently without objective justification. Discrimination can, in an appropriate, case include treating people who are in materially different positions in the same way without objective justification. The essence of the argument here appears to be that the police treated AB, who was a vulnerable child, in the same way as other non-vulnerable victims and that they failed to address factual differences or inequalities, between AB and other non- vulnerable witnesses.

92. We take the view that there is no conceivable basis for concluding that there was any unlawful discriminatory treatment of AB. From the very start of the investigation, the police knew that AB was a child with Down's Syndrome and autism and had very severe communication difficulties and sought to take steps which addressed AB's very specific needs. They did not treat him as they would a child witness who did not have such needs. They identified the need to address his communication needs. They sought the services of a registered intermediary, but none were available. They took advice on the best methods of interviewing AB from his teacher who knew him and his communication needs best and carried out an interview in the way that enabled him to give the best evidence he could. There is no basis for saying that there was any breach of Article 14.

Duty to make reasonable adjustments: issue (1)(d)

Submissions

93. Mr Bowen submits that the failure to obtain the services of an intermediary, to seek early investigative advice and to have a special measures discussion constituted a breach of the duty to make reasonable adjustments imposed by section 20 of the 2010 Act. This brief submission was not further developed in argument.

94. Mr Basu submits that there was no failure to make any reasonable adjustments. He submits that the focus should be on what was actually done to remove the disadvantage that a person had and the focus should be on the practicability and effectiveness of the adjustments made. Here what was done, in the form of obtaining the assistance of two teachers who knew AB did address the communication disadvantages faced by AB and that the use of an intermediary would not in fact have resulted in a different outcome. The same was true of the suggestions that the first defendant should have sought early investigative advice or had a special measures discussion with the CPS.

Discussion

95. In brief summary, there is a duty on a person or body who provides a service to the public or who otherwise exercises a public function to make reasonable adjustments for persons with disabilities: see section 29(7) of the 2010 Act. That duty applies to the police. AB has a disability within the meaning of section 6 of the 2010 Act. Sections 20 and 21 provide, so far as material:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at

> a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> …
>
> (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service
>
> …
>
> 21 Failure to comply with duty
>
> A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

96. In determining what is reasonable, a court shall take into account the Code of Practice issued pursuant to section 14 of the Equality Act 2006. We were shown the relevant provisions of the current code. Those provisions refer – in the language of that code - to the duty as placing service providers under an obligation to take such steps as are reasonable in all the circumstances of the case to make adjustments. That will vary according to, among other things, the type of service being provided, the nature of the service provider and its size and resources and the effect of the disability on the disabled person. Factors to take into account, amongst others, are whether taking particular steps would be effective in overcoming the substantial disadvantage faced and the extent to which it is practicable for the service provider to take the steps.

97. In the present case, we are satisfied that the first defendant did make reasonable adjustments in the way in which its officers conducted its investigations and arranged and conducted the interview of AB. The steps taken were effective in overcoming, so far as possible, the disadvantages that AB had in communicating what had happened to him. The steps taken included the preparation for the interview by a trained officer from the child abuse team and the involvement of the teacher in planning the interview. They included conducting the interview in a familiar environment (AB's school) with the presence of AB's teacher and teaching assistant who could and did assist in facilitating communication both by words and the use of communication aids (the PECs). Use of an intermediary was not necessary on the facts of this case to fulfil the duty of making reasonable adjustments. The steps taken achieved the same essential aim that use of an intermediary would have done. Further, it was not practicable for the service provider (the police) to provide an intermediary able to assist with AB's particular communication needs. Responsibility for providing registered intermediaries lay with a different service provider, the NCA, and they were

unable to provide a registered intermediary. The making of reasonable adjustments did not require attempts to secure the use of a non-registered intermediary.

98. There is an issue between the parties as to whether the obtaining by the first defendant of early investigative advice from the CPS or having an early special measures discussion with the CPS, involved the provision of an auxiliary aid (which includes an auxiliary service). We do not consider it necessary to resolve this issue. We are satisfied on the facts of this case that the duty to make reasonable adjustments did not require the police to seek early investigative advice before they did. Nor did it require the officers of the first defendant to have an early special measures discussion with the CPS.

The 2004 Act and section 149 of the 2010 Act: *issue (1)(e)*

Submissions

99. Mr Bowen submits that the first defendant was in breach of section 11 of the 2004 Act. He also seeks to amend the detailed statement of grounds to allege that the first defendant was in breach of the public sector equality duty imposed by section 149 of the 2010 Act, to have regard to certain specified matters when exercising its function of investigating crime.

Discussion

100. We can deal with these matters shortly. Section 11 of the 2004 Act requires the first defendant, amongst others, to make arrangements for ensuring that their functions are discharged "having regard to the need to safeguard and promote the welfare of children". It is clear that the arrangements put in place both generally, and in this case, were done precisely to safeguard and promote the welfare of children, including those with disabilities such as AB. The arrangements include ensuring that trained officers in the child abuse team identify potentially vulnerable children, including those with disabilities and making arrangements to try to secure the services of intermediaries where appropriate. Here, the arrangements included taking steps to ensure that those with the necessary knowledge of AB and his communication skills were involved in preparing for AB's interview and facilitating communication by AB. We are satisfied there is no basis for suggesting that the first defendant was in breach of section 11 of the 2004 Act.

101. We take the like view in relation to the claim now advanced by reference to section 149 of the 2010 Act. In broad terms, section 149 of the 2010 Act imposes a duty to have due regard to certain specified matters including eliminating discrimination and advancing equality of opportunity in the exercise of functions. This includes having due regard to the need to remove or minimise the disadvantages suffered by, amongst others, persons with a disability and to have due regard to the need to take steps to meet the needs of persons with a disability: see sections 149(1) and (3) of the 2010 Act. It is not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, having regard to the substance of the decision and the public authority's reasoning. Here is it clear that the first defendant's officers had due regard to those matters throughout. The officers were aware from the outset of AB's needs and sought to accommodate them.

The Lawfulness of the decision to take no further action: issue (2)

Submissions

102. Mr Bowen submits that the decision of Detective Superintendent Barton contained in the letter of 21 November 2018 to take no further action following a review of the case, is unlawful. As we understand it, it is said that Detective Superintendent Barton wrongly assumed that no further investigative work would change the fact that the evidential threshold had not been reached. In particular, that he failed to take into account the possibility that a further ABE interview conducted through a registered intermediary would lead to better evidence or wrongly assumed that the use of an intermediary would not lead to better evidence. Mr Bowen advances a number of other reasons for suggesting the decision was flawed viz. Detective Superintendent Barton did not review AB's video recorded interview, he did not view the video taken by AB's parents, he was wrong to say there were no disclosures made when some disclosures were made and AB had identified CD in the PROMAT procedure. Mr Bowen also criticises aspects of Detective Superintendent Barton's witness statement. He submits that Detective Superintendent Barton erred in requiring there to be corroboration of AB's evidence before action could be taken. He submits that there was no requirement for corroboration and, further, that to require a disabled person's evidence to be corroborated when that was not required in the case of evidence from a person without AB's disabilities was discriminatory. He submits that Detective Superintendent Barton's decision was affected by the view of the CPS lawyer that AB lacked competence, a conclusion the lawyer could not reach without medical evidence. He made further criticisms of comments made in the witness statement. Mr Bowen also submits that, as Detective Superintendent Barton's decision replaced the earlier review decision of Detective Chief Inspector Bitters, it was not necessary to review the lawfulness of her decision. If, however, it was necessary to do so, he submits that her decision too was legally flawed.

103. Mr Basu submits that Detective Superintendent Barton was entitled to conclude that a further interview would not result in better evidence. All that could be done to ensure that AB gave his best evidence had been done at the time of the video interview by those who knew AB best, namely his teacher and teaching assistant.

Discussion

104. Detective Superintendent Barton's decision is set out in full above. It needs to be read fairly, as a whole and in context. Read in this way it says, in summary, that there was no clear allegation made by AB and there was no other evidence available to support an allegation that criminality had occurred. The letter records that due to AB's communication difficulties, attempts had been made to ensure that AB could give his best evidence. The interview went ahead in the presence of the teacher but no clear disclosures were made. Further, there were difficulties over identification in that AB had given a description of the man he called Growley which was different from the suspect, CD. Against that background - i.e. a lack of a clear description of what had happened and the problems of identification – there was no other evidence to fill the gap. There were no witnesses to the abuse and no forensic or medical evidence of abuse. The officer noted the views of the paediatricians (that something sexual had occurred to AB) and the video footage but they did not provide evidence of an offence.

105. The officer was plainly entitled to conclude that the evidence available did not cross the evidential threshold for bringing a prosecution, and that a further interview with an intermediary would not result in obtaining better evidence of what exactly had occurred (or overcome the earlier difficulties in relation to identification) and that on the facts a further interview would not result in better evidence. We need not repeat the substance of these matters which are dealt with extensively above. On any fair reading of the decision, Detective Superintendent Barton was not imposing an additional requirement of corroboration but making the point that there had not been a clear account of what had happened and there were difficulties over identification. There was no other evidence to supplement or fill that gap and the case did not cross the evidential threshold for bringing criminal proceedings. It was not a case of needing to corroborate the statements of a witness with disabilities. There is nothing to suggest that Detective Superintendent Barton based his decision on any view that AB was not a competent witness. The difficulty was the lack of clarity as to what had happened to AB and the problems over identification. Furthermore, the officer has confirmed that he read the transcript of the video recorded interview and saw the footage taken by AB's parents. That was sufficient. Watching the video of the interview himself would merely have reinforced the conclusion that he had reached.

106. The decision to take no further action was not therefore legally flawed. It was a decision that Detective Superintendent Barton was entitled to reach on the material before him. We agree that there is no need to consider the earlier review decision of Detective Chief Inspector Bitters. We should say however for the sake of completeness, that we do not accept that any of the criticisms of her decision made in the amended claim form are well-founded.

E. Procedural Aspects of the Claim and Future Guidance

107. There are a number of respects in which the procedure followed by the claimant's legal representatives did not comply with the relevant rules of procedure or the practice direction. None of those matters has in any way affected our consideration of AB's case. We recognise that this is an important case for AB and for his parents. We recognise the very real fears that his parents have that AB may have been subject to some form of serious sexual abuse and the anguish this will have caused them. We have therefore considered all the arguments and evidence that has been adduced. Nevertheless, it is right that we address the way in which the claimant's legal representatives dealt with his case, firstly to make it clear to practitioners and litigants that in future other cases brought in the Administrative Court are not to be dealt with in a similar way and secondly to deal with the procedural issues that arise for decision in this case.

Preliminary Observations

108. A claim for judicial review is a claim to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. There are rules of procedure contained in civil procedure rules, in particular CPR Part 54 and Practice Direction 54A on Judicial Review. The rules and the relevant case law are summarised in the current Administrative Court Guide to which regard should be had by all those engaged in proceedings in the Administrative Court. We would make the following general observations. The rules are there to ensure fairness as between the parties, that is, the claimant, the defendant and any interested party and that the relevant issues are

properly identified and the relevant evidence is produced. This enables a court to determine whether a claim is established. The timetable laid down in the rules, and in any directions made by the court, enables the issues between the parties to be identified and the relevant evidence to be produced in a coherent sequence. The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims. Public law cases do not fall into an exceptional category in any of these respects. If the rules are not adhered to there are real consequences for the administration of justice.

109. In the present case, the rules relating to amendment and expert evidence were not followed by the claimant.

The Grounds for Judicial Review and Amendments

110. A claim form must include or be accompanied by, amongst other things, a detailed statement of the facts and grounds of the claim, and the remedies sought: see CPR Part 8.2 and 54.6 and paras 5.6 of the Practice Direction 54A. The claim form must be filed promptly and in any event within 3 months of the date when the grounds for challenge first arose: CPR 54.5.

111. In the present case, the claimant filed a document headed Interim Statement of Grounds and sought an extension of time for filing a statement of detailed grounds. That is not a procedure provided for by the CPR. The claimant is required to provide a detailed statement of grounds. If the claimant subsequently wishes to amend the grounds, he or she may apply for permission to amend. If the claimant is not in a position even to file a claim form with detailed grounds within the time prescribed by CPR 54.5, then the claimant will have to file the claim later and apply for an extension of time for bringing the proceedings. In this case, a lawyer exercising delegated powers, did grant an extension of time and a document dated 22 March 2019 entitled detailed grounds was filed.

112. The claimant then produced a document headed "Claimant's Amended Statement of Facts and Detailed Grounds" (the Amended Statement) dated 14 October 2019. We accept that the claimant had been given permission to reply to the first defendant's detailed grounds and evidence. The Amended Statement could not however simply be characterised as a reply, as Mr Bowen suggests. It added a large number of new factual allegations, said to be expansions of the existing grounds, and a new ground of challenge alleging a breach of section 11 of the 2004 Act. No application to amend the grounds to reflect the content of the Amended Statement was ever made. The claimant's legal representatives simply assumed that the amended grounds would form the grounds of challenge, rather than applying for permission to amend in accordance with the rules: see para 113 below. In the event, the first defendant did not object to the procedure adopted by the claimant; and, exceptionally, during the course of the hearing, the court permitted the claimant to amend his grounds to reflect the grounds in the Amended Statement.

113. The claimant then sought to add a further ground of challenge in his written skeleton argument dated 7 November 2019, namely that the first defendant had breached the public sector equality duty imposed by section 149 of the 2010 Act. That is not an appropriate means of seeking to amend to rely on additional grounds of challenge. The

claimant should have made an application to the court, accompanied by a draft of the proposed amendments to the claim form and supported by evidence, explaining the reason for the proposed amendment and any delay in making it: see CPR 17.1 read with PD para 17.1 and CPR 23.6 read with PD23A para 9.1. See further, CPR 8, CPR 54.1, PD54A para 5.6 and CPR 2.3.

114. We must emphasise that it cannot simply be assumed by those engaging in this type of litigation that permission will be given in the absence of compliance with the rules; and in the event, we refuse permission to amend the claim form to include this further ground of challenge for each of two separate reasons. First, the ground of challenge is unarguable. There is no basis for suggesting, even arguably, that the first defendant breached his duty under section 149 of the 2010 Act for the reasons we have set out above. Secondly, and separately, it would not be appropriate now to allow a challenge to events that occurred over a year or more ago, or to a decision taken in November 2018. The claim form, together with the grounds of claim, are required to be filed promptly and in any event within three months of the grounds of challenge first arising. The claimant did not include this ground in the claim form or in the first detailed set of grounds produced in March 2019 nor in the amended grounds set out in the document dated 14 October 2019. It is too late to raise this matter now.

The Application for Leave to Apply for Judicial Review

115. We grant leave to apply for judicial review on the grounds set out in paras 106.1, 106.2 and 106.4 of the amended statement of facts and detailed grounds dated 14 October 2019, that is, the grounds alleging that there was a failure to conduct an effective investigation contrary to Articles 3 and 8, or read with Article 14 of the Convention, that the first defendant allegedly failed to comply with relevant guidance without good reason, and that he allegedly unlawfully discriminated against AB in the discharge of his public functions. We refuse permission to apply for judicial review on the ground set out in para 106.3, namely that the first defendant allegedly breached his duty under section 11 of the 2004 Act. That ground is unarguable for the reasons we have set out above.

Expert Evidence

116. The claimant sought to adduce expert evidence in the form of a report from Professor Cooper dated 19 March 2019, an addendum report dated 24 September 2019 and a witness statement from her dated 8 November 2019. The claimant did not make any application for permission to adduce any of this expert evidence at any stage of these proceedings, until the issue of the absence of permission was addressed during the course of oral submissions.

117. A claimant needs to give careful thought to attempts to rely upon expert evidence in claims for judicial review. First, as is well recognised in the case law, it follows from the very nature of a claim for judicial review that expert evidence is rarely reasonably required in order to resolve such a claim. The court will be engaged in determining whether a particular exercise of public functions is lawful in public law terms. It will not be determining the underlying merits of any course of action. While there will be some occasions when expert evidence is needed on some technical issue, the views of

experts on whether or not a decision is rational or otherwise lawful in public law terms will not be admissible. See generally the observations of the Divisional Court in *R (Law Society) v Lord Chancellor* [2018] EWHC 2090 (Admin) at para 36.

118. Secondly, a claimant requires the permission of the court to rely on expert evidence: see CPR 35. As Mr Basu pointed out in argument, these rules have been in place for some considerable time. We would observe, once again, that there is no special dispensation from compliance for public law cases, and the rules must be observed. They enable the court to determine, in the first instance, whether expert evidence is needed in order reasonably to resolve the claim and, if so, the most appropriate and cost-effective means of adducing it for the fair resolution of the claim. As the Divisional Court said in *R (Law Society) v Lord Chancellor* at para 44, an application for permission to rely on expert evidence, and for appropriate consequential directions, should be made at the earliest possible opportunity.

119. As we have said, the claimant here did not apply for permission to rely on expert evidence in relation to the two reports and the witness statement but simply produced them at various stages and sought to rely on them at the hearing. We have in fact considered that evidence and set out why the criticisms made by Professor Cooper are, in our view, unfounded. We doubt in any event whether her evidence is admissible.

120. We consider that the evidence is not reasonably required to resolve the disputes that arise in the claim against the first defendant. It does not provide evidence necessary to understand technical matters relied on in the making of the challenge. Nor does it provide technical or professional expertise on issues of proportionately, as submitted by Mr Bowen. The first report, so far as relevant to the claim, offers the witness's opinion as to the adequacy of the steps taken to find a registered intermediary. There is no basis for admitting that evidence. The addendum report of 24 September 2019 consists largely of the witness's views of what an intermediary could have done in connection with the interview process. We have carefully considered the witness's criticisms of the interview process and found them to be unjustified for the reasons given above. We doubt that this report was reasonably necessary to resolve the issues that arose in the claim. The statement of Professor Cooper dated 8 November 2019 largely offers her view of whether three registered intermediaries working at Triangle had the necessary skills to assist AB. That again was not reasonably necessary for resolving any issue in dispute and we would not admit that statement.

F. Disposal of this case

121. For the reasons given above, the grounds of claim have not been established. Counsel for the claimant relied upon a considerable volume of documentation and made many points and referred to a large number of authorities in the course of his written and oral submissions. We have considered all the documents, arguments, and authorities relied upon. We have set out our conclusions on the principal issues raised on behalf of the claimant. It is not necessary, and it would be disproportionate, to deal with each and every one of the many points made or to refer to every document or authority relied upon. The claimant and his family can be assured that we have considered each of them.

G. Conclusion

122. This claim concerns a criminal investigation into alleged sexual abuse of a vulnerable individual. We fully understand why AB's parents fear that AB may have been the victim of a serious sexual assault in early August 2017. They were, of course, right to report the matter both to the social services department and the police. All individuals, especially vulnerable individuals, are entitled to have allegations made by them properly investigated by the police and, where possible, to have the alleged perpetrators tried in a criminal court. Here, the police did carry out a full investigation into the allegations as we have described above. They did what they reasonably could to establish whether criminal offences had been committed and, if so, who might be responsible for those offences. They decided that they could take no further action. The claim that the first defendant acted unlawfully has not been established. The claim for judicial review against the first defendant is therefore dismissed.

H. Reporting Restriction Order

123. The material parts of the order are as follows:

> "1. Until further order, the identities of the Claimant, and his mother and litigation friend, his father and sister and the Interested Party must not be disclosed and the Claimant shall be identified as 'AB' and the Interested Party as 'CD'.
>
> 2. To the extent necessary to protect the identities of the Claimant and Interested Party, any other references, whether to persons or to places or otherwise, be adjusted appropriately, with permission to the parties to apply in default of agreement as to the manner of such agreement as to the manner of such adjustment.
>
> 3. A non-party may not obtain access to any statement of case relating to this claim. Any application by a non-party for access to documents on the court file must be made on notice to the Claimant.
>
> 4. Liberty to apply".