Neutral Citation Number: [2020] EWHC 2287 (Admin)

Case No:CO/943/2020

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

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BG

Date: 19/08/2020

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

THE QUEEN (ON THE APPLICATION OF MRS AB)	**Claimant**
- and -	
(1) NORTHUMBRIA HEALTHCARE NHS FOUNDATION TRUST	
(2) CUMBRIA, NORTHUMBERLAND, TYNE AND WEAR FOUNDATION TRUST	**Defendants**

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Mrs AB appeared in person
Mr Gethin Thomas (instructed by DAC Beachcroft LLP) for the Defendants

Hearing dates: 14 August 2020

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Approved Judgment

Covid-19 Protocol: This Judgment was handed down by the Judge remotely by circulation to the parties' representatives by email (and the Claimant direct) and release to Bailii. The date and time for hand-down will be deemed to be 2.00pm 19/08/2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.leeds@hmcts.x.gsi.gov.uk

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His Honour Judge Davis-White QC :

1. This is a renewed oral application for permission to apply for judicial review. Permission was refused on the papers by His Honour Judge Saffman sitting as a judge of the High Court on 30 April 2020. I also have to deal with an application by Mrs AB to adduce further evidence.

2. The hearing was conducted before me by way of Skype for business. At the outset of the hearing I made an order imposing reporting restrictions pursuant to s39 Children and Young Persons Act 1933. This judgment has been anonymised in parallel with that order. This case revolves around the medical records of a 17 year old, ("V") with certain disabilities. The medical records contain inaccurate information concerning his sexual behaviour. His mother (Mrs AB) seeks judicial review to have the inaccuracies deleted, though deletion of inaccuracies would still leave references to his sexual behaviour in them. Mrs AB indicated that she, and V, would like to be able to take the story to the press. I explained to her the effects of a s39 Order and her (or Vs ability) to apply to the Court to relax the terms of the order. She was content that the order be made. I have to consider the interests of V, not least because Mrs AB is not his legal friend and he is not a party to the proceedings. Whilst I am sure that Mrs AB considers that she is acting in V's best interests I do not as a matter of procedure have anyone before the Court appointed to act on his behalf before the court. Accordingly, I considered in principle that the question of reporting restrictions should be considered. Mr Thomas, for the Defendants, did not oppose such an order or suggest that it was inappropriate. I then carried out a balancing exercise weighing the relevant interests as best I could. I considered that the balance was in favour of making the Order and accordingly did so.

3. The claimant, Mrs AB, appeared in person. Prior to the hearing Mrs AB by way of a written skeleton argument submitted a diagnostic assessment report undertaken in relation to her confirming that she was assessed as meeting the diagnostic criteria for an autism spectrum disorder. The report dated 6 August 2012 did not in terms identify specific adjustments that would be helpful to be made for the purposes of the hearing. In her skeleton argument she asked for patience if she needed to ask questions to ensure that she had understood the points being made. I hope that I enabled her to participate effectively in the hearing. That was my impression. Given the importance of paperwork in this case some comfort is to be gleaned from one of the recommendations in the report, which refers to her cognitive abilities as being in the average and above average range although with a significant discrepancy between her verbal understanding and word processing speed (average range) and her non-verbal perceptual reasoning and working memory skills (superior and above average range). She informed me that among other matters she is currently working towards a PhD.

4. The two defendants appeared by Mr Gethin Thomas of Counsel.

5. I am grateful to both Mrs AB and Mr Thomas for their helpful submissions, both written and oral.

6. The relief sought by the claim form is a mandatory order directing each defendant to erase from the medical records of the claimant's son, V, a document said to be both highly inaccurate and damaging to her son. V is 17 years old. He has a diagnosis of

Autism Spectrum Disorder (ASD) and Attention Deficit hyperactivity Disorder (ADHD). From about 2008, he had been under the care of the first defendant, the Northumbria healthcare NHS foundation trust ("Northumbria Trust"), primarily through the Child and Adolescent Mental Health Services. His consultant was Dr Sandy McCauley. At the relevant time he was attending for specialist ASD provision at a local school.

7. The claim is that the keeping of the record and its non-deletion amounts to a breach of the General Data Protection Regulation ("GDPR") and the Data Protection Act 2018. Further, it is said that there is, or are, a breach, or breaches, of the Equality Act 2010.

The First Referral: 20 August 2018

8. The document of which erasure is sought is a written referral from the Northumbria Trust to the second defendant Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust made on 20 August 2018 (the "First Referral") The First Referral was one made to Forensic Child and Adolescent Mental Health Service ("F-CAMHS") within the Second defendant. I shall refer to the second defendant as the "CNTW Trust".

9. The circumstances in which the First Referral came to be made can be shortly summarised. In July 2018, V's then school raised concerns with his mother about his conduct. Mrs AB had discussions with staff of the Northumbria Trust and it was agreed that a referral should be made to F-CAMHS within the second defendant.

10. As is accepted, regrettably the First Referral was inaccurate in two respects. First, in suggesting that V had been observed looking at images of naked babies, when in fact the babies had been clothed or wearing nappies. Secondly, regarding the frequency with which V had masturbated himself; rather than twice a day the incidents were at most two in all.

11. On 6 November 2018, the claimant had an informal meeting with the Child Health Operational Service Manager of the Northumbria Trust to discuss her concerns about inaccurate information within the First Referral. In an email sent on 9 November 2018, Mrs AB asked for a new referral to be made but with "accurate information only" and, regardless of whether a new referral was written, the false statements in the First Referral "to be corrected".

The Second Referral

12. By letter dated 13 November 2018 a second referral was made by the Northumbria Trust to the CNTW trust (the "Second Referral"). The letter said in terms that Mr and Mrs AB wanted the First Referral to be retracted and another referral to be sent to the team. Their concerns were said to be in the course of investigation. Further matters were raised regarding concerns of V's parents with regards to his current difficulties. These matters were different to the matters in the First Referral. However, as Mrs AB fairly set out in a chronology that she provided to the Court, she had been told by F-CAMHS that she would need to tell V what had happened regarding the First Referral and the inaccurate matters set out in it. When V was told about this he had a "meltdown" which ended up with police intervention. As I understand matters, although the written materials before me do not make this clear, the "meltdown" and

circumstances surrounding it are part of the matters set out in the Second Referral regarding V. In particular, it was said that he had described himself as a "school shooter" and left the family home with a knife which resulted in the police intervention. Mrs AB pointed out that the Second Referral did not in terms link the matters there set out with the communication to V of the fact of the inaccuracies in the First Referral. However, I have not seen his whole medical record and would have thought that the circumstances in which the conduct covered by the Second Referral came to take place would be likely to have emerged in an investigation of the incident. In any event, my impression from the material that she has placed before the court is that the fact that the First Referral had been made containing the relevant false information and that that had been on his medical records was something that has had an ongoing impact on her, the family generally and V in particular. In the "Timeline" included with the Claim Form, Mrs AB refers to V and herself presenting with "symptoms of anniversary trauma" in December 2019 and to each of them starting private psychotherapy to deal with the same.

Result of D1's review of the accuracy of the First Referral and steps to be taken

13. By letter dated 6 December 2018, the Northumbria Trust sent a careful letter to Mrs AB apologising about the distress and upset felt by her and setting out the result of the investigation carried out in the light of the earlier meeting on 6 November 2018 and Mrs AB's email of 9 November 2018. It confirmed the position regarding the Second Referral. As regards the inaccuracy of the First Referral it stated:

> "We apologise that the information within the original referral to F – CAMHS does not appear to be fully accurate in relation to the babies state of un-dress and the number of times the incident took place and that at some point there looks to have been an accidental relaying of mis-information between professionals. CAMHS can write a letter to F-CMAHS stating this and updating with the correct information/"
>
> In the first paragraph under the heading "conclusion". The letter said (among other things) "we will write a letter to F-CAMHS and the GP to correct the facts about the frequency of masturbation and the state of dress of the baby."

14. By letter dated 19 December 2018 the Northumbria Trust wrote to the CNTW trust providing updated information about the First Referral and correcting the two points concerning the babies not being naked and the incidence of masturbation. The writer asked, "At the request of Mrs AB, I would be grateful if the initial referral to the forensics team could now be deleted from your systems and this updated information and the information outlined in my letter of 13 November 2018 now be considered as a referral to the Forensics CAMHS Team." The letter was copied to Mr and Mrs AB among others.

15. An oral discussion of the then position between the Northumbria Trust and the CNTW Trust on 19 December 2018 is set out in the latter's notes on that date.

16. Notes of the CNTW Trust show that on 7 January 2019 their progress notes were updated to refer to the letter from Northumbria Trust of 19 December 2018, setting out the inaccuracies in the information that had been provided and stating the correct position and that the letter was to be uploaded to "view documents".

Third Referral: April 2019

17. On 2 April 2019, a further written referral was made in relation to V by the Northumbria Trust to the CNTW trust. This third referral letter effectively repeated details from the second referral and details, this time accurately stated, which had been the subject of the First Referral.

The 18 June 2019 meeting: CNTW Trust and Mrs AB

18. On 18 June 2019, Mrs AB met with a representative of the CNTW Trust, Dr Kennedy, the lead consultant in clinical and forensic psychology and clinical lead at F-CAMHS. There is a dispute about what was said at that meeting (the "18 June 2019 Meeting").

19. Mrs AB maintains that Dr Kennedy's position was that he would not accept that the inaccurate information in the First Referral was inaccurate and to that extent untrue. Her understanding was that he was saying that he had to accept that the matters stated in the First Referral were true, unless and until judicial review required him to act otherwise. This understanding is confirmed by an email of the following day sent by Mrs AB to Dr Kennedy. In that email, having said that she was waiting for a response on her "first two questions" she said (among other things) that there was a further point that she wanted to get clarified:

> "A point we seemed to get stuck on yesterday was whether the first referral had "misrepresented facts" (your term) or whether it contained "untrue" facts (my term). I am still not sure what the difference is to you. I suppose to myself the term "misrepresented" implies that the facts are accurate but portrayed in a misleading way. My husband and I both find it troubling that someone else can read through all the correspondence and still be confused on this point. I do not wish to slow down the FCAMHS assessment, but I don't want my son to be seen by a clinician who still believes the first report contains accurate, but "misrepresented" information.
>
> **My question is**: Am I correct in understanding that without a judiciary review you are unprepared to accept that the first referral contains "untrue information"?"

20. The Defendants' position is that what was said by Dr Kennedy is as set out in a letter from him to Mrs AB dated 6 December 2019. In that letter he starts by saying that he is writing in response to Mrs AB's emails of 11 November 2019 and 3 December 2019:

> "in which you specifically ask if I can confirm what I said during our meeting on 18 June 2019 that a "judiciary review" of your son's original FCAMHS referral would be required in order for records to be amended.
>
> I am unable to recall or confirm verbatim our conversation, however in our discussions I would have explained that our organisation [the CNTW Trust] would not be able to remove clinical documentation or references contained therein without appropriate and formal direction, and that such may require legal advice, review and/or intervention in order for this to be achieved.

> I have reflected your position and had had conversations with [The Team Manager, Specialist Clinical Lead FCAMHS]to confirm that we have made notes on our system to identify that the information received by us is deemed to be inaccurate by yourself, that information held on V is third party from [Northumbria Trust] and we confirm that the information was not generated by [the CNTW Trust]."

21. According to the chronology or "Timeline" included with her claim form, Mrs AB says that she made a complaint to the Information Commissioners Office (the "ICO") in July 2019, though at the oral hearing her recollection was that this may have been in September 2019.

22. On 14 November 2019, Mrs AB contacted the Northumbria Trust's information governance team by telephone. Apparently she raised concerns about the accuracy of the First Referral. The response of the Northumbria Trust is contained in a letter to Mrs AB dated 9 December 2019. The letter refers to her request for rectification of the First Referral in light of its inaccuracy. The letter referred to the letter of 6 December 2018 being the findings of the investigation to deal with her concerns. In light of that, the Northumbria Trust recorded that it felt it had appropriately responded to her request and that it had been actioned in full. It also pointed out that although the Northumbria Trust had informed the CNTW Trust, they could not mandate the latter trust to change its records and that concerns in that respect would have to be raised directly with CNTW Trust.

23. In the meantime, on 25 November 2019 the ICO wrote by email to the Northumbria Trust confirming that Mrs AB had complained that Northumbria Trust "may have refused to correct and delete inaccurate information that may be held about her son [V]". By email dated 9 December 2019, the Northumbria Trust replied to the ICO. It referred to Mrs AB having contacted the Northumbria Trust on 14 November 2019 and the formal response issued to her that day, as referred to above.

24. On 11 December 2019, Mrs AB had a telephone conversation with the head of information governance and medico legal/data protection officer ("DPO") for the CNTW Trust. The claimant raised concerns that the second defendant had received factually inaccurate information in relation to her son. The officer confirmed that the concerns would be investigated. The officer advised that the trust would require confirmation from the source of the factual inaccuracy to enable them to correct these records. In the absence of confirmation Mrs AB was advised that the Trust could supplement these records with a statement from her articulating what she believed to be inaccurate and what she felt was the correct position. She was advised that the Trust could not delete health medical records of their legal documents and leave of the court via a court order would be required for the Trust to delete information from her son's health record.

25. By email dated 31 January 2020, the ICO emailed Mrs AB following an internal case review within the ICO of her complaint. This is the final stage of the ICO's case handling process. Referring to the letter from the Northumbria Trust to Mrs AB dated 9 December 2019, the Team Manager at the ICO said:

> "It would therefore appear to be the case that any inaccurate information had now been corrected. This would not necessarily result in the deletion of the referral

form as it may be required to show why actions were taken. Providing the document is marked as being inaccurate and not used further, this would be sufficient."

26. As I shall explain, one of Mrs AB's points now, and apparently to the ICO, was that the processing of the inaccurate data was unlawful. This was on the basis that processing depended upon consent and such consent had been withdrawn. The letter from the ICO said about this:

> "Turning to your concerns about consent, the Trust has confirmed in their correspondence to us that they are not relying on consent as the basis of their processing. They are instead processing data as part of their role as a public authority and for the provision of healthcare.
>
> Whilst I appreciate that there is a reference to your providing consent to the referral, this is not for the processing of data and as such you withdrawing consent would not require the Trust to delete the referral letter."

27. By letter dated 28 February 2020, the DPO for the CNTW Trust wrote confirming the details of the telephone conversation on 11 December 2019. The letter referred to the history that the Northumbria Trust had been in touch with the CNTW Trust on 19 December 2018 to advise of the inaccurate information and that in response to that the CNTW trust had updated these records on 7 January 2019 to correct the inaccuracy. In her role as DPO, the DPO confirmed that the CNTW Trust had taken appropriate steps in January 2019 to correct the record held by the Trust, she also referred to a system change to the electronic record patient record system which allowed an alert type "corrective entry" being added to the alert screen on the front page of health records and stated that such a corrective entry had been made to V's record on 20 January 2020.

Mrs AB's application to adduce further evidence

28. I indicated during the hearing that I would read the evidence sought to be adduced *de bene esse*, that is, in effect, provisionally while ruling on its admission into evidence later. The evidence is of transcripts of telephone conversations that Mrs AB said that she had first with the receptionist and secondly with the secretary of V's GP practice. The challenge before me is to the records kept by the two Trusts who are Defendants. It does not relate to the position to the GPs records. As the correspondence from the Northumbria Trust made clear, it could not direct either the CNTW Trust nor the GP practice as to the content or keeping of their respective records. Insofar as it therefore was adduced to show that V's GP practice had retained the First Referral and/or that it had not adequately flagged up in its own records that it contained mistakes, I indicated that I was not prepared to admit it into evidence. Mrs AB said that she also relied upon the evidence to show the concerns that she and V had about the retention of the First Referral by the Trusts. However, that concern is manifested adequately in the papers and I do not consider that the extra evidence sought to be adduced takes matters any further. I would not admit the evidence for that purpose. I indicated that if any other reason to rely on the evidence merged in the hearing I would consider it. No such reason did emerge. Accordingly, I dismiss the application to adduce the extra material being the transcripts.

Permission to proceed?

(a) Locus or standing

29. In each of their Acknowledgements, the Trusts object to permission being granted on the basis that any proceedings should properly be brought by V and not by Mrs A who has no standing in relation to her son's records. HH Judge Saffman would not have refused permission on this ground had it stood alone on the basis that questions as to status ought not, as a general rule, to be dealt with as a preliminary issue but at the substantive hearing. Before me, Mr Thomas did not persist with this point. In those circumstances, I can record that I share the serious doubts as to the standing of Mrs AB as enunciated by HH Judge Saffman but I do not need to decide the issue at this stage. I should also add that in her Skeleton Argument for the hearing before me, Mrs AB persisted in submissions to the effect that she did have standing. However, in her renewal application she also invited the court to join V as a joint claimant. V has no litigation friend appointed to act on his behalf (as HH Judge Saffman pointed out in his Order). If the claim was only defective or potentially defective for want of standing and if there was a real possibility of V being joined through a litigation friend I would in any event had adjourned the proceedings to allow that to take place. Finally, I note that s165 of the Data Protection Act 2018 provides a remedy by way of complaint to the ICO regarding alleged breaches of that Act "in connection with personal data relating to him or her". There is no evidence before me that the ICO rejected Mrs AB's complaint to it on the basis that the personal data was that of V and that it did not "relate to" Mrs AB.

(a) Delay

30. As regards the Northumbria Trust, Mr Thomas submits that the claim is way out of time and that permission should be refused on that ground.

31. Mrs AB relies on the letter of 9 December 2019 from the Northumbria Trust to her as being the "official response" of Northumbria Trust. She says that her claim issued on 9 March 2020 is therefore within (or, at the worst, one day outside) the three month time period provided for by CPR r54.5.

32. Mr Thomas submits that the letter of 9 December 2019 does not contain or record any contemporaneous decision. He says that the relevant decision letter is 6 December 2018. Accordingly, the claim is well out of time.

33. I have difficulties with Mr Thomas' submission regarding the letter of 6 December 2018. That letter does not in terms say what the Northumbria Trust was doing regarding its own records other than that it can be inferred that they were to be or had been "corrected". Given the request for deletion and the letter written to the CNTW Trust dated 19 December 2019 requesting deletion by that Trust, it seems to me that Mrs AB may justifiably have assumed that the First Referral had also been deleted (or that it would be deleted) by the Northumbria Trust from its own records. At its strongest I do not consider that I can at this stage determine the issue as Mr Thomas would have me do. As I understood him, Mr Thomas accepted that for the purposes of delay it must be communication of the decision (or a reasonable ability to find out the decision) which would "start time running" when considering the three month period and/or promptness.

34. As a fall back, Mr Thomas submitted that the history and correspondence regarding the ICO shows that Mrs AB was aware that there had been (or seemed to be) a decision by the Northumbria Trust not to delete the First Referral from its records. At the very least, he says, this is demonstrated by the ICO email to the Northumbria Trust dated 25 November 2019. However, it seems to me that the complaint seems to have been that the deletion "may" not have occurred (and "may have been refused").

35. Mr Thomas also submits that the claim was not brought "promptly" even if brought within the 3 month "long stop" date. I am not prepared to refuse permission on this ground. The Northumbria Trust itself says that a complaint to the ICO under s165 Data Protection Act 2018 is an appropriate alternative remedy to judicial review which should be exhausted before commencing judicial review proceedings. If that is correct, then it is the email of 31 January 2020 from the ICO to Mrs AB that becomes the relevant date from which judicial review would become available (subject to the argument there is a further alternative adequate remedy, as considered below). Even if, technically, a complaint to the ICO was not an adequate alternative remedy to judicial review which should have been exhausted first, given the Northumbria Trust's position that it was an adequate alternative remedy, I would not refuse permission at this stage because of any alleged delay prior to 31 January 2020. Further, I do not consider that permission should be refused on the basis of any alleged delay between 31 January and 9 March 2020.

36. As regards the Second Defendant, the CNTW Trust, the submission of the Claimant is that the letter informing her of the refusal to delete was that dated 6 December 2019. The three month period is therefore only just transgressed. Further, if complaint to the ICO is (or might reasonably be considered) an adequate alternative remedy that should be exhausted first then, as regards the three month period and the issue of promptness, time only starts running from 31 January 2020 (see above). I say this notwithstanding that the actual complaint to the ICO was only made with regard to the Northumbria trust. Mrs AB's position before me was that there was no point in complaining to the ICO regarding the CNTW's Trust position on non-deletion once the decision of the ICO was communicated to her by email of 31 January 2020. Quite simply, the same position would obviously apply. She made this submission in the context of an allegation that she has failed to exhaust the adequate alternative remedy of complaining to the ICO regarding the second defendant's records and refusal to delete the First Referral. It seems to me, however, that she would have been entitled to await the ICO decision on the Northumbria Trust before commencing judicial review in relation to the Second Defendant.

37. Mr Thomas submits that the relevant date for considering the three month period and absence of promptness is the meeting on 18 June 2019. Leaving aside the ICO issue, the difficulty that I have with that submission is that the day after that meeting it is clear that Mrs AB thought that Dr Kennedy was saying that judicial review would be needed to cause him, as clinician, to ignore the inaccurate data in the First Referral and not that it was relevant to deletion of inaccurate material from Vs medical records. That point was only clarified by the letter of 6 December 2019.

38. Given the uncertainties about the 18 June 2019 meeting and the position regarding the ICO, I would not refuse permission on the ground of delay or lack of promptness in bringing the proceedings as regards the Second Defendant.

(b) Adequate alternative remedy

39. It is well established that judicial review is a remedy of last resort and that where there is, or was, an adequate alternative remedy, that remedy should be, or should have been, pursued and that route exhausted before deploying judicial review proceedings. In this respect I was referred to a number of cases including those at paragraph 54.4.4 to the White Book, paragraph 5.3.3.1 in the Administrative Court Guide citing, among other cases, *R (Archer) v Commissioners for Her Majesty's Revenue and Customs* [2019] EWCA Civ 1021 and *Kay v London Borough of Lambeth* [2006] UKHL 10 at [30].

40. As I have said, a complaint to the ICO under s165 Data Protection Act 2018 is relied upon both by Mrs AB and the Defendants as providing an adequate alternative remedy to judicial review. As I have said, Mrs AB submits that exhaustion of this remedy is a reason that she has not failed to act promptly or to bring proceedings within the three month longstop as regards the First Defendant. The CNTW Trust says that this remedy has not been pursued against it at all (but only against the First Defendant). In my judgment, complaint to the ICO is on the facts of this case, an adequate alternative remedy which should have been pursued first. (Even I am wrong about this, it would reasonably have been viewed as such with the consequence that the claim should not be prevented from proceeding because of delay while that avenue was pursued.) However, I also consider that Mrs AB is right in saying that there is little point in pursuing a complaint to the ICO with regard to the second defendant given the same basis of the complaint in each case and the ICO's decision regarding the complaint about the first defendant. I would therefore not have refused permission in relation to the second defendant on the basis that a complaint to the ICO has not been pursued against it. I should add that the remedy has been exhausted. Mr Thomas confirmed that proceedings may be taken to compel the ICO to reach a decision under s166 Date Protection Act 2018, but there is no appeal to the First Tier Tribunal against its decision.

41. Both Defendants say that in addition there is an (or possibly two) adequate alternative remedies which encompass Mrs AB's complaints. The first is an application to the Court under ss167-168 Data Protection Act 2018. The other is an application to the court under s114 Equality Act 2010 with regard to any aspect of the claim that raises breach of Part 3 of the Equality Act 2010. Mrs AB did not have a positive case that these routes were not available or that they did not provide an adequate remedy. Rather, she says that she had pursued the judicial review route because of what Dr Kennedy has said.

42. I am satisfied that there is an alternative adequate remedy that should be pursued first and the existence of which means that permission to proceed with judicial review should not be granted. I do not need to decide whether or not separate proceedings under s114 Equality Act 2010 would be necessary or whether that aspect can be brought within any claim under ss167-168 Data Protection Act 2018, in either event there is an adequate alternative remedy.

43. Having decided that permission should not be granted given the availability of an adequate alternative remedy, I turn for completeness to the merits of the position, which I can deal with quite briefly.

(c) **The merits**

44. The complaint is that the inaccurate data has not been deleted.

45. The first ground of complaint is an alleged breach of the GDPR and the Data Protection Act 2018. Mr Thomas submits that the right to rectification under article 16 has been given effect to. As regards the question of erasure, he submits that the processing in question is permitted under article 6(1)(f) and/or article 6(1)(e) and 9(2)(h) of the GDPR (and s10 and Schedule 1 of the Data Protection Act 2018), that none of the grounds in article 17(1) giving a right to erasure apply and that, in any event, article 17(3) would remove any right to erasure that would have arisen if a ground under article 17(1) did apply. He submits that it is important to recognise (as did the ICO) that although the data may only have been collected originally by virtue of, or as part of consent to, a referral, once it was collected then it was legal for the information to be retained (provided there are adequate notes of correction to any inaccuracies) because of the relevant health grounds referred to in articles 9(2)(h) and 17(3) and that such processing does not depend upon consent. A major plank of Mrs AB's case is that the processing relies for its lawfulness upon consent which has now been withdrawn.

46. So far as Mrs AB raises equality issues, in part they appear to be raised regarding the conduct of persons in their approach to the referral or the underlying matters rather than being strictly relevant to the question of the admittedly inaccurate data. As such, they do not impinge upon the question of erasure.

47. So far as Mrs AB raises an issue regarding equality which does appear to be relevant to the question of deletion that appears to be connected with the circumstances in which she asserts consent has been ignored or improperly applied. However, as I have said, consent is irrelevant to the particular processing in this case.

48. The second ground of complaint are based on alleged breaches of European Convention on Human Rights. As regards that, I do not consider that there is any merit in these points. Prima facie the normal expectation would be that compliance with the GDPR and the Data Protection Act 2018 should not involve any breach of human rights. I cannot see that anything that Mrs AB identifies as a relevant breach takes the case outside what I have described as the normal expectation. Indeed, at least one of the points (that there is unlawful discrimination and a breach of human rights because there is a lack of reliance on consent) is, in my judgment, a bad one: consent is not relied upon because health grounds are relied upon and that would be the same for any referral in these circumstances even if not taking place in a the context of mental disability/health.

49. The third ground of complaint is said, in effect, to be that the defendants have adopted an unlawful policy of refusing erasure on the basis that health records should be entire, even if inaccurate, as long as the inaccuracy is corrected on their face. I do not consider that such a general policy (subject to review in any particular case) is demonstrated. Even if there were such a policy or that the motivation in this case was tainted by a desire not to "open the door" on other cases, as suggested in Mrs AB's third ground, and such were unlawful, I do not consider that that would affect the overall result in this case. As I have explained, the context of the Second Referral was a reaction to communication of the fact of the First Referral had been made,

including the inaccuracies that it contained. Whatever the general position, that demonstrates the importance of the medical records containing the First Referral so that it can be seen precisely what it was that the reaction was to. Mrs AB in her skeleton argument (paragraph 51) suggests that a "better way" to deal with the matter would be to remove the First referral and the inaccurate information it contains but then "add a note explaining the likely trigger for the meltdown in October 2018." In my judgment, to be effective that would require there to be a record of the inaccurate information which was communicated and the best way to explain that is to have the inaccurate information as it stood on the file rather than summarising it or restating it in a different format.

50. Accordingly, even had I decided that there was not one or more adequate alternative remedies and that permission should be refused on that ground, I would have decided, as did HH Judge Saffman and essentially for the same reasons, that the judicial review has no real prospects of success on its merits and that permission should be refused for that reason.

51. I have been asked to certify the application as being totally without merit but decline to do so.

52. In the light of my judgment, I hope the parties will be able to reach agreement as to the form of order, including consequential orders that should follow. To the extent that agreement is not possible regarding any particular matter a further hearing will have to be arranged, but that should not prevent agreement on as much as possible. In the event an agreed order has not been put before me by the time this judgment is handed down then I will adjourn all consequential matters to such further hearing and extend the time for lodging a notice of appeal until 21 days after judgment on that hearing or the making of an order which completes all outstanding matters in the meantime.