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IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT (Manchester)

Civil Justice Centre

1 Bridge Street West

Manchester M60 9DJ

Date: 14th October 2013

Before:

HIS HONOUR JUDGE PELLING QC

SITTING AS A JUDGE OF THE HIGH COURT

Between:

THE QUEEN

On the application of

DEBORAH BHATTI

Applicant

- and -

BURY MBC

Defendant

Mr Adam Fullwood (instructed by Stephensons Solicitors LLP) for the **Applicant**

Ms Joanne Clement (instructed by Bury Council Solicitor) for the **Defendant**

Hearing date: 11th October 2013

Judgment

HH Judge Pelling QC:

Introduction

1.

This is the hearing of an application by the Claimant to reinstate Judicial Review proceedings commenced by a Judicial Review Claim Form issued as long ago as the 25th September 2012; for permission to amend the Grounds by reference to a decision taken after the issue of the Claim Form and for permission to continue the proceedings on the basis of the amended Grounds.

Background

2.

The Claimant suffers from a number of very serious chronic medical conditions that have resulted in her being assessed as needing community care services. The Defendant local authority ("the Council") carried out a financial

assessment, it is alleged at the request of the Claimant, for the purpose of ascertaining the maximum contribution that she would be required to make for the provision of care services by the Council to her. This assessment was carried out prior to an assessment of her care needs. The Council maintain that this exercise was unusual, would not normally be carried out until after a full assessment of need had been completed and was done on this occasion only because the Claimant had requested it. The result was that the Council assessed the Claimant's maximum contribution at £132.27 per week.

3.

The Claimant's case is that she cannot afford such a contribution. This led to a request by her for a review of the assessment which led in turn to (a) confirmation of the maximum contribution in the sum originally assessed and (b) a decision that personal indebtedness not directly related to the Claimant's disabilities would not be taken into account for the purpose of reducing the contributions that the Claimant was otherwise required to make. It was this last mentioned decision that led to the commencement of these proceedings.

4.

An Acknowledgement of Service was filed by the Defendant on 19 October 2012 and the application for permission to continue the proceedings came before me as a paper application on 12 November 2012, when I gave permission to continue them on one ground. I gave detailed case management directions for the future conduct of the claim that contemplated a substantive hearing lasting 3 hours a minimum of 11 weeks after the date of service of that Order. In the ordinary course of events that would have led to final determination of these proceedings (subject to any appeal) in February 2013.

5.

On or shortly after 23 January 2013, the parties submitted a Consent Order to the ACO in Manchester ("the Consent Order"). It was approved on 5 February 2013 by an official acting under delegated powers. The recitals referred to my earlier order expressly as one "*… granting … permission* ", to correspondence that was not produced when the Order was submitted for approval and to an agreement by the Claimant to " *… cooperate fully with the Defendant's assessment process …"* before then providing:

> "IT IS ORDERED THAT:
>
> 1.The Claimant's claim for judicial review … be stayed until 26th March 2013.
>
> 2.The Defendant is to commence re-assessment of the Claimant's needs on 29th January 2013, to be completed by 26th February 2013 and complete a fresh financial assessment of the Claimant's contribution towards care provision, if needed, by 12th March 2013
>
> …
>
> 4.The Claimant is to inform the Court by 4 p.m. on 26th March 2013 if she wishes to reinstate her claim, in the event that the matter is resolved then a further consent order … be provided by the same date
>
> 5.In the event that the Claim is reinstated:
>
> (a)The Claimant do file and serve any amended grounds by 4 p.m. on 2nd April 2013 if so advised;

(b)The Defendant do file and serve any response to the amended grounds by 4 p.m. on 16th April 2013;

(c)The Claimant do file and serve a trial bundle ot less than 21 days before the date of the hearing for judicial review

(d)The Claimant do file and serve a skeleton argument not less than 14 days before the date of the hearing of the Judicial Review;

(e)The Defendant do file and serve a skeleton argument not less than 7 days before the date of the hearing of the Judicial Review;

(F)The Claimant do file and serve an agreed bundle of authorities not less than 3 days before the date of the hearing of the Judicial Review …"

A particular feature of the Consent Order is that if and to the extent that it contemplated a challenge being made in these proceedings to any of the fresh decisions referred to in Paragraph 2, it entirely circumvented the permission stage by ignoring the fact that permission had been granted only in relation to a decision that would become of historical interest only once the further decisions referred to in Paragraph 2 had been taken. This somewhat startling result would not arise if the power to restore was limited to restoration in the event it became necessary to continue with the challenge to the original decision.

6.

On 8 April 2013, the Claimant purported to file amended Grounds. This was 6 days after the date referred to in Paragraph 5(a) of the Consent Order. Paragraph 1 of the amended Grounds states that they "*… should be read in substitution for those previously filed and served by the Claimant"*. This is not surprising since the further decision making contemplated by Paragraph 2 of the Consent Order had occurred and thus the challenge to the original decision by reference to which these proceedings had been commenced had become entirely academic. The proposed amended Grounds relate solely to the decision contemplated by Paragraph 2 of the Consent Order. This is common ground between the parties. The court then listed the claim for a substantive hearing in accordance with the directions contained in the Consent Order.

7.

On 7 May 2013, the Council's solicitor wrote to the court suggesting that the listing of the claim for a substantive hearing was "*misconceived*". The letter continued:

"The Council … withdrew the decision challenged indicating the maximum possible financial contribution … This rendered the Claimant's challenge to the Council's alleged failure to consider debt when calculating the Claimant's financial contribution … academic.

This is accepted by the Claimant. Her amended … grounds … challenge a new decision namely the Council's recent community care assessment and care plan. Unsurprisingly, there is no challenge to the now withdrawn decision that was the subject of the initial challenge as such a challenge is now wholly academic not least because in light of the new assessment the Council has determined that Mrs Bhatti is required to make no financial contribution to the services provided.

The Council is of the view that permission to challenge the new decision should

be refused because the grounds are not arguable and Mrs Bhatti has an adequate alternative remedy available to her in the form of a complaints procedure… Mrs Bhatti does not have permission to challenge the new decision by way of judicial review. Therefore there is no basis for having a substantive hearing to consider the new grounds. The Council is of the view that the new challenge should be considered in the normal way …"

8.

The papers were referred to me by the ACO on 10 May 2013, when I directed:

"1.These proceedings be stayed;

2.Unless within 14 days of the date hereof either party files written notice of objection, these proceedings are to be dismissed with no order as to costs;

3.If either party objects to the dismissal of these proceedings pursuant to 2 above, then they are to be listed for a disposal hearing on the first available date thereafter with an ELH of 30 minutes;

…

5.Any claim by the Claimant for judicial review of the decision taken on 13th March 2013 is to be commenced in new proceedings"

I gave as my reasons for making this order that:

"The consent order … contemplated that the claim could be reinstated. It did not contemplate that the Claimant would be able to use these proceedings as a vehicle for a challenge to a fresh decision taken after the commencement of these proceedings; much less did it contemplate that she could thereby avoid the requirement to obtain permission. The Consent Order contemplates merely that the existing proceedings could be reinstated if for any reason it became necessary to continue the challenge to the original decision. It did not and could not reasonably be construed as entitling the Claimant to challenge a new decision.

The correct practice to be adopted where the original decision challenged has been withdrawn with a view to a new decision being taken is that the existing proceedings should be stayed withdrawn or dismissed by consent … leaving the Claimant to commence fresh proceedings if so advised in relation to any subsequent decision – see **Rathakrishnan** [2011] EWHC 1406 (Admin) *per* Ouseley J at Paragraph 9. The practical reasons for this approach are clearly and cogently set out there and are amply illustrated by what the Claimant has sought to do in these proceedings.

If the Claimant wishes to challenge the decision of the Defendant identified in Paragraph 12 of the amended Grounds, then she can and should issue a new claim. The question of whether permission to continue any such proceedings will then be considered by a Judge on paper as provided for by part 54 of the CPR."

9.

By a letter to the Court dated 17 May 2013, the Claimant's solicitors exercised the power conferred by Paragraph 2 of my Order and objected to this course. The Claimant's solicitors indicated that they considered that the Court should proceed as provided for by the Consent Order claiming to be entitled to rely on the decision of the Court of Appeal in R v. SSHD *ex p* Turgut [2001] 1 All E.R. 719 and maintaining that this present case was "*… not a case of maintaining the earlier decision whilst further challenges to further decisions are awaited …*". More tellingly the letter continued:

> "Furthermore it is highly unlikely that the Claimant would be granted public funding to pursue her claim if new proceedings were commenced. In such circumstances she would be effectively denied access to the Courts …"

10.

In those circumstances I would have expected that the Claim would have been listed for a hearing in accordance with Paragraph 3 of my Order. The papers were referred to HH Judge Davies sitting as a Judge of this Court on 13 June 2013 when he directed precisely that. He revised the ELH to 1 ½ hours and directed that the parties must be prepared to address the question whether or not the Claimant ought to be allowed to reinstate these proceedings so as to challenge the decision made on 13 March 2013 or must commence fresh proceedings. Judge Davies also extended the time for filing any new claim form to a date to be fixed at the hearing on 5 July 2013. The hearing on 5 July 2013 was listed before Turner J. He made no order other than to direct the hearing to take place before me for me to determine whether I had jurisdiction to entertain the application and if so what orders ought to be made. Although the Order does not say so in terms, I was told that Turner J was concerned that the Court had no jurisdiction to reinstate the proceedings either because they had been dismissed or because a notice complying with CPR r.3.3 did not appear in my Order of 10 May. I refer to this issue further below as the "*Jurisdiction Issue*"

11.

On 19 August 2013, the Claimant issued an application by which she applied for permission to object to the dismissal of the proceedings (even though as my order made clear the dismissal was not to take place if as had happened one of the parties objected to that course) on the ground that my Order did not contain a notice as required by r.3.3(5) of the CPR, for permission to rely on the amended grounds and for permission to continue the proceedings. That application was supported by a witness statement from Mr Pemberton, a partner in the solicitors' firm representing the Claimant. It concerns the issue first mentioned by Mr Pemberton in his letter to the Court of 17 May 2013 - that is the availability of legal aid for a fresh claim.

12.

Mr Pemberton is highly qualified to provide evidence on this issue for the reasons that he gives in his witness statement. He points out at Paragraphs 10 and 11 of his statement that in order for a person to obtain public funding for representation in court the applicant must pass both a means and a merits test. At Paragraph 16 of his statement Mr Pemberton points out that a separate legal aid certificate is required for each case issued out of a court. He adds that *"it would not be possible to launch a separate secondary judicial review under the scope of the first certificate."* He observes at Paragraph 20 that there would be likely to be problems in obtaining what he calls a secondary certificate. He does not in terms say what those difficulties might be but they appear to include the need to satisfy the LSC both under a means and merits test and because " *… there is likely to be resistance in the grant … if an existing certificate against the same defendant exists …*". He concludes:

> "I believe that a requirement to obtain separate public funding relating to the same case scenario following a tactical concession would be highly impractical and difficult for clients to achieve. They would have to go through the rigmarole of

> applying for further funding certificates/legal aid certificates and provide the ongoing evidence required.
>
> They would have to convince the Legal Aid Agency … that this did require separate funding to the ongoing scenario, which was already funded. The same certificate could not be used to launch a secondary challenge as the scope of the certificate is limited to the proceedings for which it was granted. …"

The Issues

13.
It was common ground that the following issues arose:

13.1.
The Jurisdiction Issue;

13.2.
Whether the Claimant was entitled in principle to apply to substitute new Grounds for the original Grounds or should ben required to start again;

13.3.
Assuming that in principle the Claimant was entitled to apply to substitute new Grounds for old, whether the Claimant should be granted an extension of time to do so given that the new Grounds were not filed in accordance with the directions contained in the Consent Order;

13.4.
Assuming those procedural hurdles could be overcome, whether permission should be granted in relation to the new Grounds, as to which the Council submits first that there is an alternative remedy available that is clearly adequate and in any event the Grounds relied on are unarguable.

At the conclusion of the hearing I asked the parties whether, if I concluded that the Claimant should be required to commence a new claim I should nevertheless decide the permission issue. Both parties positively asserted that I should. It was common ground between the parties that no timing difficulty would arise if I were to direct that new proceedings were required given the direction given by Judge Davies. I agree.

Discussion

The Jurisdiction Issue

14.
Neither party sought to argue that I did not have jurisdiction to determine Issues 2 to 4 above. As I understand it this point depended on the view that the Claim had been dismissed by my Order of 10 May 2013. At the start of the hearing I indicated that it was my provisional view that this was not the case because the dismissal referred to in Paragraph 2 only took effect if neither party gave notice of objection within 14 days of the date of the Order. The Claimant gave such notice by the letter of 17 May and thus the claim was stayed by operation of Paragraph 1 of my Order save for the purpose of resolving whether it should be dismissed. Ms Clement informed me on instructions that she did not have any submissions to make concerning jurisdiction. I asked the parties whether either of them required me to give a reasoned judgment relating to the Jurisdiction Issue. Both told me (respectively on instructions) that they did not. In those circumstances I would add only this – although my Order does not contain a provision saying in terms that either party is entitled to apply to vary it or set it aside, I did not consider that to be

necessary because of the detailed provisions within the Order enabling any party affected to object both to the dismissal and to the costs order referred to in Paragraph 2.

Should the Claimant be permitted to challenge in these proceedings a new decision taken after the commencement of these proceedings or should she be required to commence new proceedings?

15.

The Claimant's case is that she ought to be permitted to proceed to challenge the new decisions taken by the Council by filing substitute Grounds applying the principles set out in Turgut (ante) and / or because the issue is one of discretion and I ought to permit that course given the difficulties referred to by Mr Pemberton in his witness statement and/or because the course that she wishes to adopt is permitted by the Consent Order. The Defendant maintains that this approach is entirely mistaken and that in all save exceptional cases, a new challenge to a new and subsequent decision ought to be challenged in new proceedings that is then subjected to judicial scrutiny on paper. The Defendant does not accept that it was intended that the Consent Order should be used in the manner that the Claimant now seeks to use it, does not accept that the withdrawal of the initial decision was in any sense a tactical concession and does not accept that there is any special circumstances in the facts of this case that justifies a departure from what is contended to be the correct procedure.

16.

In support of her contention as to the correct course to be adopted, the Claimant relies on the guidance of Schiemann LJ in Turgut (ante). The facts of that case are not centrally relevant. The guidance on which the Claimant relies is to be found at the end of Schiemann LJ's judgment. In summary that guidance is that where the decision maker (in that case the SSHD) is given permission to adduce evidence that he has made a new decision in light of evidence filed in the proceedings by the Claimant, but the decision is the same, it will generally be convenient to substitute the subsequent decision for the first decision as the decision that is being challenged.

17.

In my judgment the key elements that led Schiemann LJ to reach the conclusion he did were (a) the new decision was based on evidence filed by the Claimant in the proceedings and (b) the subsequent decision is to the same effect as the decision that led to the commencement of the proceedings. That is not this case. Here the Council did not merely reconsider the decision previously taken in the light of further evidence supplied by the Claimant in these proceedings and then reach the same conclusion on the same issue. Here, in light of the challenge made, the Council withdraw the decision it had taken, it says at the request of the Claimant, and them embarked on entirely different decision-making first by assessing her needs and then considering what if any financial contribution was required by the Claimant. The decision that is now challenged is not the decision concerning financial contribution but the effect of the assessment as to her needs.

18.

The effect of Turgut was considered by Ouseley J in Rathakrishnan [2011] EWHC 1406 (Admin). The case was concerned with a claim where permission was given by a Judge, following a renewed application for permission. The SSHD then decided that she would no longer rely on the challenged decision. She then proceeded to issue a further decision letter dealing with the issues that led to permission being granted and some further evidence produced after the SSHD's original decision had been taken. The SSHD invited the claimant in those proceedings to agree to the original decision being quashed and that she be ordered to reconsider the position. This had been resisted by the Claimant relying on Turgut on the ground that there was a disadvantage to a claimant if a decision was quashed thereby putting an end to the proceedings because in that event it would be necessary to launch a new challenge in new proceedings. Ouseley J rejected this submission. He concluded that the course set out by Schiemann LJ in Turgut was the exception rather than the rule. At paragraph 9 of his judgment he said this:

> "It would be a wholly exceptional case in which a claimant could postpone the effective quashing of the decision which he sought to have quashed in order that he might at some later stage bring a different challenge in respect of a different decision based on different evidence without having to go through the necessary applications including the payment of fees for the purpose of challenging that further decision and should thereby evade the filter mechanism and simply take his place on a seemingly adjourned renewal application.
>
> …
>
> It is too often that these cases have come before the court at a point where the hearing is no more than an interruption in the process of the exchange of correspondence between the Secretary of State and the claimant. This makes for a wholly unsatisfactory process of litigation."

19.

In relation to Turgut, Ouseley J said that the court in that case was concerned to avoid procedural complexity *"… where at the time the court was dealing with a particular decision, there had been a further decision by the Secretary of State upon which the Secretary of State was relying instead and against which the claimant was seeking to raise the same or additional points of challenge."*. I respectfully agree. That is not this case. In this case the original decision has been withdrawn and replaced with entirely different decisions in respect of which entirely different challenges are made. As Ouseley J added at Paragraph 12 of his judgment:

> "Turgut was not and did not purport to be authority for a general proposition that where proceedings challenging a decision … had begun, those proceedings were to remain on foot or stayed until such time as any further challenges to further decisions which may be issued at future dates have been finally concluded."

20.

Ultimately the court retains a discretion as to whether to permit amendments. To an extent, each case will be fact specific. Subject to that qualification, Ouseley J has identified in Rathakrishnan the approach that generally will be adopted in cases such as the present. That approach is not only obvious for the reasons identified by Ouseley J in Paragraph 9 of his judgment, but is supported by the decision of the Court of Appeal in R v. SSHD *ex p* Al Abi, referred to by Ouseley J in Paragraphs 13 and 14 of his judgment. There the issue was what should be allowed to happen where the SSHD agreed to issue a fresh decision following the grant of permission and not to rely on the earlier decision in respect of which permission had been granted. The conclusion reached was that the proceedings should not be allowed to continue save where the point that arose was of general importance and the point which was at issue in relation to the initial decision challenged would remain an issue in relation to the subsequent decision. Again that is not this case.

21.

As Munby J (as he then was) said in Paragraph 33 of his judgment in R (on the application of P) v. Essex County Council [2004] EWHC 2027 (Admin), it is not part of the function of the Administrative Court to *"… monitor, regulate or police the performance by the County Council of its statutory functions on a continuing basis …the function of the Administrative Court is … to review the lawfulness of a decision action or failure to act in relation to the exercise of a public function. In other words the Administrative Court exists to adjudicate upon specific challenges to discrete decisions …"* The approach that Ouseley J has identified in Rathakrishnan is a means by which this approach to the function of the Court is delivered.

22.

In my judgment Ouseley J's approach represents the correct general approach to be adopted unless the case is one that falls within the exception identified by the Court of Appeal in Turgut being that referred to in Paragraph 19 above or is otherwise exceptional in the ways identified in Al Abi. Thus I conclude that the correct course that ought in principle to have been adopted in this case is that at once the Council had embarked on the fresh decision making referred to in Paragraph 2 of the Consent Order, either it should have been withdrawn or dismissed in either case subject to any submissions concerning costs. Whilst the decision is one ultimately of discretion there is nothing in the facts of this case that leads me to think that the discretion should be exercised differently from that indicated by Ouseley J as applicable in the generality of cases, other than the impact of the availability of legal aid which I consider at the end of this section of this judgment.

23.

The issue that remains however is the effect of the Consent Order. If the parties are to be treated as having consented to a course that would not otherwise be ordered, effect should normally be given to that agreement subject to the obvious qualification that the parties cannot generally confer jurisdiction on a court that it would not otherwise have. The issue I am now considering does not go to jurisdiction in that sense so the question is one that turns on the true construction of the Consent Order.

24.

On the material that was before me when I made the 10 May Order, the effect of the Order seemed to me to be clear. The Order contemplated that the existing claim might be reinstated and if it was the directions set out in Clause 5 were to apply. There was no provision for permission issues to be resolved and the order rehearsed that permission had already been granted. Thus looking at the order on its face I considered then and consider now that it contemplated the reinstatement of the original challenge if necessary. That might have been necessary for example if the Council failed to carry out the assessment identified in Paragraph 2 or did not disclose the material referred to in Paragraph 3 or concluded that the financial assessment previously made and which was the subject of the original challenge was to be maintained. Each of these possibilities was consistent with the notion that amended grounds might be filed. There was nothing on the face of the order that supported the notion that the existing proceedings might be used as a vehicle for challenging the decisions that the Claimant now wishes to challenge. Not surprisingly, Ms Clement in the course of her submissions placed very strong emphasis on the absence of any mechanism by which permission was to be sought from the Court in relation to an entirely new challenge to an entirely new decision.

25.

Mr Fullwood responded to this by submitting that like all documents, the Consent Order had to be construed by reference to the factual matrix that surrounded it. That said, the only material that Mr Fullwood drew to my attention as relevant to this issue was a letter from the Council to the Claimant's solicitors dated 18 December and the correspondence that followed down to the date when the Consent Order was signed. That correspondence does not in my view lead to the conclusion that there was a joint intention or understanding that the purpose of the Consent Order was to enable the Claimant to embark on the course she has adopted. By its letter of 10 December 2012, the Council made it perfectly clear that it considered the proceedings to have become entirely academic by reason of the withdrawal of the original decision and on that basis invited the Claimant's solicitors to withdraw the claim. This they refused to do by their letter of 18 December 2012, in which they said, in summary, "*… we stand by our grounds for this claim and hold with our original argument. We are however, in the light of your letter, willing to propose a stay in these proceedings pending the outcome of the reassessment within an agreed time frame and will proceed to draft a consent order in such terms if you are agreeable to the same*". This did not suggest that the purpose of the stay was to enable a new challenge to a new decision to be advanced, but was expressly for the purpose of enabling the old claim to be reactivated. This resulted in a response from the Council dated 8 January 2013. The

only comment made in relation to the proposed stay was that "*… I do not agree with all the points raised in your letter; however I do agree that the matter should be stayed with a consent order …*". This was the only factual matrix material drawn to my attention. It does not even arguably support the conclusion that the joint understanding or intention of the parties was that the stay was to enable the Claimant to challenge the new decisions when made.

26.
In the result therefore I consider that the terms of the Consent Order do not entitle the Claimant to advance a new claim in relation to the new decisions. The proper course, consistently with that identified by Ouseley J in Rathakrishnan, was that the proceedings should have been withdrawn or dismissed (subject to any claim by the Claimant for costs) at the latest once the Council had completed the new decision making identified in Paragraph 2 of the Consent Order.

27.
There is one final point that I ought to make before leaving this part of the case. I have drawn attention to the evidence filed on behalf of the Claimant concerning the steps that have to be taken in order to obtain legal aid. I do not consider that evidence is at all material to the issue that I have to decide, at any rate in the circumstances of this case. The steps that have to be taken by a party seeking legal aid are established by the primary and secondary legislation that governs its availability. I do not see how it can be at all appropriate for the Court to be invited to adjust its procedures in order to assist a party in receipt of legal aid to avoid the requirements of that legislation. In any event, I do not see how an application for legal aid to bring a new claim in relation to a new decision can be described as a secondary claim or why the first certificate need be continued once the proceedings to which it relates have been either dismissed or discontinued or a consent order quashing the decision challenged has been made. Finally as I have noted earlier, Mr Pemberton refers on more than one occasion in his evidence to a "*tactical concession*". There is no evidence at all to support the suggestion that the withdrawal of the decision in this case is in any sense "*tactical*". I do not suggest that there can never be cases where something of that sort occurs, although it is likely to be rare in a public law context. Nothing in this judgment is intended to suggest that where such conduct is demonstrated to have occurred the Court cannot or will not adjust its procedures to meet those circumstances. However, that is not the position in this case.

The Procedural Bar Issue

28.
In light of the conclusions I have reached so far this issue does not arise. In those circumstances I set out my conclusions on this issue shortly. The Court is likely to take a much stricter approach to a failure by a party to comply with Rules directions and orders now than in the past following the amendment of CPR r.1.1(2) and r.3.9. Even before those amendments took effect the Court had made clear that compliance was not aspirational but was obligatory, that the obligation to comply with Rules and Orders was if anything more not less important in public law cases than in general litigation and that "*… where a party without proper good cause fails to comply with orders or take action to ensure that time limits are extended and hence orders not breached, they can expect from this court little sympathy and condign sanctions*" – see R(SM) v. SSHD [2013] EWHC 996 (Admin) *per* Hickinbottom J at Paragraphs 25 – 27. I respectfully agree.

29.
In this case the mitigatory factors relevant to the exercise of discretion include the relatively short time that had been allowed to elapse, and that the failure to serve the proposed amended Grounds earlier had not led to any prejudice being suffered by the Council, to a waste of public resources by rendering a hearing date ineffective or delay to other litigants. The 6 days of delay that has occurred in this case is of a different order of magnitude from that in SM where the delay was 5 months and resulted in a consequential failure by the Claimant to comply with a direction concerning the filing of skeleton submissions. Even in those circumstances, the Defendant was not debarred from

participating in the proceedings. In the circumstances of this case, had I concluded that the appropriate course was to permit the Claimant to amend her Grounds in these proceedings, I would have extended time by six days to enable her to do so.

Permission – Adequate Alternative Remedy.

30.

It is common ground that the Court will exercise its discretion by refusing permission to continue proceedings where there is an adequate alternative remedy available to the Claimant. I address this issue first because the parties respectively took that course and also because if I conclude that there is an adequate alternative remedy available to the Claimant, then it would be wrong for me to comment further on the merits of her other challenges because those would be matters to be addressed in the first instance using the available alternative.

31.

The Council maintains that if the Claimant is not satisfied with the assessment that it has made whether on the Grounds identified in the draft amended Grounds or otherwise then her proper first course is to make a complaint using the procedures established by the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 ("the Regulations") It is common ground that the Claimant is a person entitled to make a complaint under the Regulations. It is also common ground that the time limit that applies for the making of a complaint (12 months) has not yet expired

32.

The predecessor to the Regulations was considered in R (F and others) v. Wigan Borough Council [2009] EWHC 1626 (Admin). That case was concerned with challenges to care assessments by the local authority. It was not suggested that the new regulations are materially different from those considered in that case. It was submitted by the Claimants that the local authority in that case had failed adequately to identify need and evaluate it against its own eligibility criteria. In that case it was submitted on behalf of the local authority that the statutory complaints procedure provided an adequate alternative remedy and relied ought to be refused. McCombe J (as he then was) upheld that submission at Paragraph 75 and following of his judgment where he said:

> "While the Administrative Court is astute to correct any illegality of approach on a public authority's part, it is not the proper forum in which to probe into the adequacy of community care assessments in the manner that Mr Prescott belatedly sought to do in this case. Once the point of principle … was abandoned there was no true issue of law in the case that was properly amenable to judicial review. … If a Claimant has a true claim that his or her eligible needs are not being met by the Council, there is a full and adequate complaints procedure in which that can be resolved. … Even in cases in which such a proper claim exists, the courts have pointed out on many occasions that the remedy of judicial review will not be granted where there is an alternative remedy … If any of the assessments or care plans is truly inadequate … and such inadequacy is giving rise to a true failure on the part of the Council to meet an eligible need, then the relevant claimant has a proper remedy through the statutory complaints procedure."

33.

In response to this submission, Mr Fullwood submits that the complaints procedure is not an appropriate means for resolving the issues identified in the amended Grounds which are concerned with failures by the Council to discharge its statutory duties or follow statutory guidance. The complaints procedure is one that is suitable for errors

of a factual nature and in any event the Claimant would not be entitled to legal representation to assist her in such a complaint.

34.
In my judgment the Defendant's contention that the challenges set out in the draft amended Grounds are ones that can and ought to be made subject to the statutory complaints procedure is made out. Ground 1 involves an assertion that reliance by the Council on the Community Mental Health Team ("CMHT") was erroneous. The issue between the parties appears to be whether the Claimant has been discharged by the CMHT or whether, as the Council maintain, the Claimant has failed and refused to see or engage with them. That is not an issue that is suitable for or amenable to judicial review. If the factual premise on which reliance by the Council on the availability of care from the CMHT is based is misplaced then that is classically an issue that can and ought to be resolved using the statutory complaints process. It is entirely inappropriate that the Administrative Court should be asked to resolve it. It is manifest that there is available an adequate alternative remedy. It was submitted that the reliance placed by the Council on the availability of care from the CMHT was an error of law because the Council has failed to secure services for the Claimant that meet her identified needs. That is only so however if the factual premise on which the Council have proceeded is wrong. That as I have said is something which plainly ought to be resolved through the statutory complaints procedure.

35.
Ground 2 is an allegation that the Council has failed properly or at all to address the level of risk to the Claimant's independence and well being if her identified needs are not met. This is said to be a critical error because of the reliance placed by the Council on others (the CMHT and other NHS services) to provide for those needs. The specific point made is an allegation that the Claimant has been on a waiting list for psychological services for over two years. Again although this Ground is formulated as a failure to comply with a statutory duty, the reality is that there is a dispute as to fact that underlies the issue. The Council maintains that the Claimant has been offered numerous psychological services over the last two years – see Paragraph 24 of the summary grounds of resistance ("SGR"). The statutory complaints procedure provides a plainly adequate alternative remedy to litigation in the Administrative Court for resolving these sorts of issues.

36.
Ground 3 is concerned with a challenge to the Council's conclusion that the Claimant's need for suitable services to meet her anxiety symptoms and inter personal difficulties can be met by her attending an identified social inclusion service on a regular basis. This is challenged on the basis that she has been excluded from the service identified. There is a dispute as to whether the Claimant was excluded from the service identified or not but in any event I was told that had been a further needs review by the Council at which the reference to this particular service was removed because it is no longer available. There is a dispute as to whether the Claimant needs assistance in accessing this sort of support and this ground also involves resolving the question whether the Claimant is on an NHS waiting list for psychological services or not. These are clearly issues that are suitable for resolution by the statutory complaints process. Only if that process breaks down or resulted in conclusions that could be shown to be irrational or unlawful ought it to be necessary to seek a remedy from the Administrative Court.

37.
Ground 4 is concerned with an allegation that the assessment is flawed because of its failure to consider whether a period of "*reablement or intermediate care*" should be made available contrary to the relevant statutory guidance. A failure to follow such guidance would be an arguable error of law. The Council's point is that this is not the first assessment carried out in relation to the Claimant and that it took full account of the information available from its past involvement with the Claimant and on the basis of that material was entitled to conclude that there was no need for a period of reablement or intermediate care. The Grounds do not put forward a positive case as to what it is said the Council should have but failed to propose. In any event, if and to the extent that it is contended that the Council

as wrong to proceed as it did then I am unable to see why that issue cannot properly be resolved using the statutory complaints process.

38.
All this leads me to conclude that the analysis of McCombe J in R (F and others) v. Wigan Borough Council summarised above applies with equal force to this case. There is a plainly adequate alternative remedy available to the Claimant which is suitable to resolve the issues between the parties that have arisen. If that process is engaged in then at that stage the Claimant will be able to consider whether she has grounds to challenge the conclusions reached in relation to her complaint.

39.
In those circumstances, it is not necessary that I consider the question of permission further, nor is it desirable that I attempt to do so. Each of the Grounds relied on conceals a factual dispute or disputes. If the Claimant engages with the statutory complaints procedure that process will enable the disputes that underlie the challenges that are being made to be resolved. Judicial review will only arise if that process results in conclusions that are themselves capable of challenge on public law grounds including unlawfulness and irrationality.

40.
Had I come to the conclusion that the statutory complaints procedure did not provide an adequate alternative remedy and the Claimant's claim was otherwise realistically arguable, I would have extended time for the issue of a new Judicial review claim form and would have granted permission for proceedings issued in accordance with that direction to be continued to a substantive hearing. However that does not arise for the reasons that I have explained.

Conclusions

41.
For the reasons set out above I conclude that

41.1.
I have jurisdiction to entertain the Claimant's application;

41.2.
It would be a wrong exercise of discretion to permit these proceedings to be used as a mechanism for a challenge to new decisions taken on a different basis following the commencement of these proceedings in circumstances where such a challenge does not involve even an incidental consideration of the decision originally challenged in these proceedings, and where there is no evidential basis for asserting that the withdrawal of the original decision was in any relevant sense "tactical";

41.3.
Had I concluded that these proceedings could in principle be used to challenge the new decisions, I would have granted the Claimant an extension of time of 6 days in which to file her amended Grounds but that point does not in practice arise; and

41.4.
Had I concluded that the Claimant had a realistically arguable claim available to her by reference to the grounds set out in the draft Amended Grounds, I would have extended time to enable her to issue a new Judicial review Claim form and given her permission to continue those proceedings once they had been issued, but she does not have a realistically arguable claim available to her because she has a plainly adequate alternative remedy available to her.

42.

In those circumstances, I conclude that the Claimant should not be permitted to re-instigate these proceedings and that the proper course is now to dismiss them.