Community Care Law Update

Garden Court Chambers

30 January 2023

Education Law in 2022

Ollie Persey, Garden Court Chambers

30 January 2023

Topics

- Damages for disability discrimination claims against schools
- Relationship and Sexuality Education ('RSE') in Wales
- New EHRC guidance and upcoming PSED cases

Damages for disability discrimination claims against schools

AA v Secretary of State for Education [2022] EWHC 1613 (Admin)

Issue: Does the exemption for damages for breaches of the Equality Act 2010 in disability discrimination claims against schools breach Article 14 ECHR?

Answer: No

Damages for disability discrimination claims against schools

Article 14 ECHR

Ambit 

Difference in treatment? 

Status 

Justification 

Damages for disability discrimination claims against schools

Difference in treatment?

Comparators

- Other school complainants
- Those in higher education

Package principle = shift in focus

from £££

Damages for disability discrimination claims against schools

Justification

- Intensity of review: “suspect ground”
- Detailed consideration by Parliament
- Legitimate aims:
  - Effective educational remedies that prioritise good outcomes for disabled pupils
  - Benefits to the wider group of disabled pupils in the school and its potential pupils
  - Maximum public value from resources
  - The system remains informal / non-adversarial

Damages for disability discrimination claims against schools

Number of disability discrimination claims filed 01/09/20-31/08/21 – 167

-Upheld: 36

-Dismissed: 25

-Withdrawn: 48

Numbers not noticeably affected by pandemic

Compare with SEND tribunal (EHCP appeals etc): 8579 appeals registered over the same period

Relationship and Sexuality Education in Wales

R(On the Application Of) v The Welsh Ministers [2022] EWHC 3331 (Admin)

The case concerned Relationships and Sexuality Education ('RSE') as a mandatory element of the new curricula for maintained schools in Wales, under the Curriculum and Assessment (Wales) Act 2021 ('the 2021 Act').

- The Curriculum for Wales – Relationships and Sexuality Education Code ('the Code') and
- The Relationships and Sexuality Education (RSE): Statutory Guidance ('the Guidance').

Issue: Were the code and guidance unlawful? No

Relationship and Sexuality Education in Wales

Multiple grounds of challenge. All failed. Will focus on two:

Ground 1(a): Does the *common law* provide for the constitutional parental right of excusal for which the claimants contend?

Ground 3: Breach of Article 2 of Protocol 1ECHR (right to education)

Relationship and Sexuality Education in Wales

If a common law right of excusal exists, what does it look like?

““…to *ensure that their children are not educated contrary to their philosophical or religious beliefs*”; “*to determine the content of what their children are taught*”; and as encompassing: (a) “*a right to be informed as to the content of any education provided and access to the materials used*”, as otherwise any exercise of the right of excusal would be rendered nugatory; (b) “*a right to object without prejudice to them or their child*”; (c) “*a right to have their objections addressed reasonably, either by withdrawal of material offensive to them or explanation of how its use has had due regard for their own opinions and properly balanced their rights and is not presented as the single ‘truth’*”; and (d) “*an ultimate right to excusal if their objections are not reasonably addressed*”.

Relationship and Sexuality Education in Wales

Court's conclusion on common law right of excusal:

- Claimants arguing for a constitutional right against the State
- Not just a choice about whether to enter system of education, but a positive right to determine course content
- Far-reaching consequences
- Caveats of reasonableness akin to legislation rather than common law right
- Courts should be slow to develop such rights in a field that Parliament has legislated in

Relationship and Sexuality Education in Wales

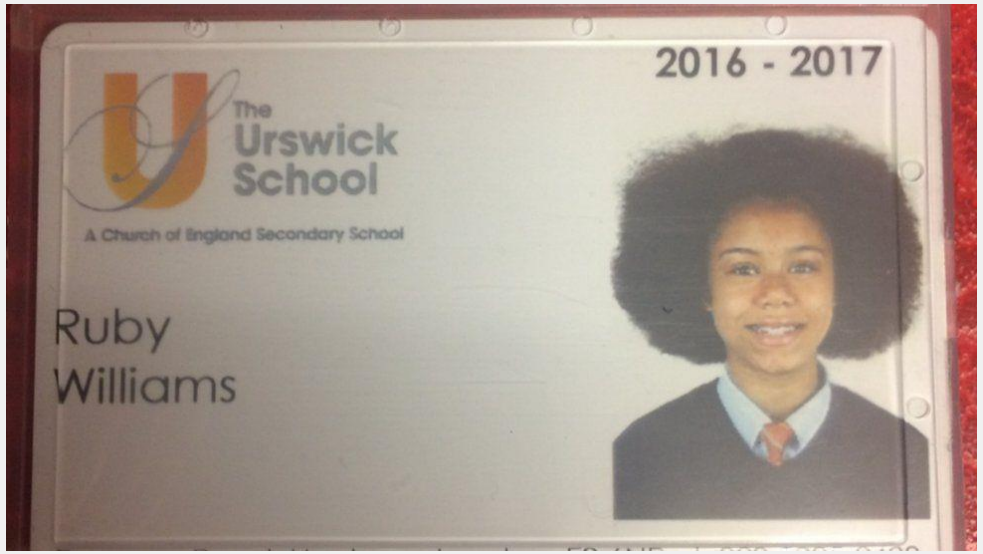
Article 2 of Protocol 1

- Teaching is conveyed in an objective critical and pluralistic manner, and does not breach the prohibition on indoctrination
- Difference between teaching children that LGBTQ+ people exist ("an incontrovertible fact") and "promoting" or "encouraging" sexual identity or lifestyle. "
- "It cannot be incompatible with A2P1 to teach children that [LGBTPQ+ people] exist, and that they should be treated equally and with respect."

New EHRC guidance documents + PSED cases

EHRC guidance on hair discrimination in schools (here)

Public Sector Equality Duty: Guidance for Schools (here)



PSED Cases

1) Upper Tribunal guidance on jurisdiction of the First-tier Tribunal to consider the PSED in disability discrimination claims in determining the issue of justification.

2) PSED compliance in securing provision under section 42 of the Children and Families Act 2014

3) Upcoming hearing on what PSED compliance requires in the context of a permanent exclusion of a Black and disabled child

Thank you

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Community Care Law Update: Age Assessments

Nadia O'Mara, Garden Court Chambers

30 January 2023

Contents

(1) Recent cases:

- *R (MA & HT) v SSHD* [2022] EWCA Civ 1663
- *R (HAM) v London Borough of Brent* [2022] EWHC 1924 (Admin)
- *Darboe and Camara v Italy* (Application no. 5797/17)

(2) Nationality & Borders Act 2022, Part 4: Age Assessments

R (MA & HT) v SSHD [2022] EWCA Civ 1663

Facts

- Judicial review challenging the lawfulness of SSHD's 'KIU Guidance' relating to "short-form" assessment of the age of unaccompanied asylum seekers by social workers in the Kent Intake Unit ('KIU'), the short-term holding detention facility in Dover.
- KIU Guidance came into force in September 2020 with the result that hundreds of unaccompanied YP arriving in Kent were detained by the SSHD for the purposes of carrying out a truncated age assessment. Guidance withdrawn in January 2022 – unrelated to litigation.
- This was the result of Kent County Council refusing to provide newly arrived unaccompanied YP statutory care under the Children Act 1989.
- KIU Guidance – provided for the detention and processing of newly arrived young people through an age assessment process where the SSHD could not be sure that the young person is not a child but an adult.
- MA & HT challenged the Guidance on the grounds that it was unlawful and in breach of s. 55 of the BCIA 2009.
- Guidance required age assessment to be conducted in immigration detention shortly after arrival; social workers only carried out truncated age assessments (1 hour) and the process derogated from the well-established procedural safeguards in *Merton*.
- Claimants said the Guidance was incompatible with the SSHD's own policy on age assessments which prohibits detention of young people.

R (MA & HT) v SSHD [2022] EWCA Civ 1663

High Court judgment: *MA & HT v SSHD* [2022] EWHC 98 (Admin)

Henshaw J concluded that the KIU Guidance, and the decisions made as to the ages of the two Respondents, MA and HT, were unlawful, and that their detention was also unlawful insofar as it was lengthened for the purposes of carrying out the KIU age assessments (§17). Crux of the judgment set out at §113.

R (MA & HT) v SSHD [2022] EWCA Civ 1663

Permission to appeal granted on one ground:

Whether the Judge misdirected himself on the correct approach set out by the Supreme Court in *R (A) v SSHD* [2021] UKSC 37, [2021] 1 WLR 3931 and *BF (Eritrea) v SSHD* [2021] UKSC 38, [2021] 1 WLR 3967 in cases where a policy is alleged to be unlawful by reason of what it says or omits to say about the law.

R (MA & HT) v SSHD [2022] EWCA Civ 1663

Judgment: discussion

Court of Appeal cites the judgment of Lords Sales and Burnett in *R (A) v SSHD*, at §46 which identified 3 categories of case in which it could be found to be unlawful *"by reason of what it says or omits to say about the law when giving guidance for others"* (§44):

(1) Where a policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in *Gillick*).

(2) Where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position, and

(3) Where the authority, even though not under a duty to issue a policy, decides to promulgate one and in so doing purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.

R (MA & HT) v SSHD **[2022] EWCA Civ 1663**

Judgment, Court of Appeal (summary)

"…I consider that on a proper application of the principle set out in Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 *… and explained by the Supreme Court in R (A) v SSHD and BF (Eritrea), the KIU Guidance was not unlawful, and the Judge was wrong to conclude otherwise"* (§5).

R (MA & HT) v SSHD **[2022] EWCA Civ 1663**

Court of Appeal agreed with the submission of the SSHD that the only category which could apply in the present case was (i) but that the KIU Guidance does not purport to provide a full account of the legal position – it cross-refers to other policies and directs the reader to consider the relevant case law, of which it provides examples that are *"plainly non-exhaustive"* (§45).

R (MA & HT) v SSHD **[2022] EWCA Civ 1663**

Court went on to consider the judgment in *BF (Eritrea)* and cites Lords Sales and Burnett at §48 as to the proper application of the *Gillick* principle, which involves *"comparing the underlying legal position and the direction in the policy guidance to see if the latter contradicts the former. It does not involve comparing a normative statement with a prediction of what might happen if the persons to whom the guidance is directed are given no further information … there is no obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law"* (§47).

R (MA & HT) v SSHD [2022] EWCA Civ 1663

Application of those principles to the present case (§§49-63)

- The KIU Guidance urged social workers/ KIU immigration officers to comply with legal duties, the primary duty being to treat a child as a child and the secondary duty being to ensure a fair procedure after appropriate enquiry (§49).
- No obligation on the SSHD to set out in the KIU Guidance a comprehensive statement of what was required to achieve this – onus on the social worker, taking into account factors in other policy guidance and *Merton* line of authorities.
- Guidance contains no positive statement of the law which is wrong, nor does it mandate action in conflict with legal duties (it does the opposite).
- Nothing in the Guidance mandated age assessments to be conducted without an AA or 'minded to' process.
- Guidance stipulated that, where for any reason, a social worker considered that a *Merton*-compliant age assessment cannot be carried out at the KIU, that assessment should not be proceeded with and the matter should be flagged with an IO.
- *"If the policy leaves room for the social worker (or Home Office official that the social worker is assisting) to make mistakes, that is no indication that the policy itself fails to comply with the Gillick principle"* (§54).

R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)

Key points:

- Important judgment on age assessments from Mr Justice Swift.
- The judgment 'resets' the age assessment procedure and what will or will not constitute a lawful assessment.
- Cause for concern: Mr Justice Swift limits what may be required for a fair process in some cases.
- However – a welcome clarification that *"fairness is a matter of function and substance, not merely form"* (§14)

R (MA & HT) v SSHD [2022] EWCA Civ 1663

The Court of Appeal found the following flaws in the Judge's reasoning:

- The proforma is not part of the KIU Guidance and the Judge was wrong to treat it as such (§56).
- The part of the Guidance directing social workers to use the proforma is not a direction of law, but an administrative instruction (§56).
- The proforma does not purport to provide an exhaustive checklist (§57).
- The Judge was wrong to regard the tick boxes on the form as indicating something was optional – it is a record of what happened, not a direction to social workers (§58).
- The absence of a specific provision on the form for a 'minded-to' process is not a positive direction to social workers not to given an individual a chance to comment on adverse matters (§59).
- No obligation for the KIU Guidance to comprehensively set out what was required of a *Merton*-compliant assessment (§59).
- The Judge erred in conflating the terms of the Guidance itself with the way in which it is or may be operated (§60).

R (HAM) v London Borough of Brent **[2022] EWHC 1924 (Admin)**

Facts:

- C = Sudanese national who arrived in the UK in May 2021 with a claimed age of 17 years old.
- C was assessed by the KIU to be 23 years old, and was then assessed by LB Brent to be 23 as well.
- LB Brent undertook a "short form assessment" but instead of considering C "clearly and obviously" an adult, he was interviewed and Brent concluded, based on his physical appearance and answers, that he was an adult.
- Not all the discrepancies in his account relied upon were put to C.

R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)

Judgment: Fairness and procedure

- A lawful age assessment decision must be the product of a fair procedure. Swift J revisited the landmark judgment of Stanley Burton J in *R (B) Merton LBC* [2003] 4 All ER 280 and the elements of a fair procedure (§§10-11):

> (1) When a LA needs to determine whether a person is a child for the purposes of its duties under the Children Act 1989, there is no burden of proof and no assumption that a person is a child or an adult.
>
> (2) The assessment decision must be based on a *Tameside* duty of enquiry: the LA *"must take the steps reasonable in the case in hand to obtain the information needed to take the decision it is required to take"*.
>
> (3) Where further enquiry requires an interview: (i) interviews must be undertaken fairly, (ii) credibility issues dealt with head-on, (iii) where a person is considered to be lying, that must be put to them, and an opportunity given to respond.
>
> (4) What is fair depends on the particular circumstances of each case; there is no strict set of requirements and no "check-list" (as in *V v Home Office* [2014] EWHC 2483 (QB) and *R (AB) v Kent County Council* [2020] PTSR 746): *"fairness in this context, as in any other, is a matter of substance and not simple form"* (§13).

R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)

Judgment: Fairness and procedure (continued)

Swift J went on to address to particular requirements:

(1) Obiter: fairness does not always require there to be two social workers (§19).

(2) Fairness does not always require an appropriate adult to be present, though he reached this conclusion *"not without considerable hesitation"* (§20).

Comment: *this does not mean that age assessments should not have two social workers or an appropriate adult present, but that fairness will not always require it.*

Darboe and Camara v Italy

Facts

- A arrived in Italy in 2016. Initially treated as a 17-year-old, but LA requested a medical examination to determine age. Doctor x-rayed his hand and determined he was 18-years-old.
- Doctor made no reference to margin of error (between 6 months and 2 years).
- A was housed in adult asylum reception accommodation (designed for 542 people, housing 1400) – very limited medical care and other facilities.
- A found lawyers – Rule 39 application for interim measures to Strasbourg – granted and A was transferred to reception centre for children.

R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)

Judgment: Fairness and procedure (continued)

What is required is such an investigation as is reasonable on the facts of the case. The purpose of the investigation is so that the local authority has an appropriate (in public law terms) basis to decide whether the person concerned is a child. If an interview or interviews are required as part of the investigation, then those interviews must be conducted fairly (§24).

Darboe and Camara v Italy

Article 8 ECHR

- A8 includes positive obligations to comply with the requirements of international law regarding the asylum and age assessment processes.
- A person's age = part of their personal identification, and recognition of a person's status as a child is crucial for protecting their rights.

Procedural failures of the Italian system

- ECtHR focused on procedural failures rather than substantive decision in the case.
- Failure to promptly appoint legal guardian/ representative.
- Domestic court failed to provide a decision re legal guardian/ representative.
- Initial medial report completed using x-ray analysis was not served on A.
- No proper decision was issued, preventing A from launching an appeal.
- Point of frustration – Court did not investigate in more detail some of the failures, including initial decision to rely on x-ray.

Darboe and Camara v Italy

Article 3 ECHR

- A spent 4 months in adult reception centre – no suitable reception centre and no way to complain about reception conditions.
- ECtHR accepted that the 4 month stay constituted a breach of A3.
- Court recognised Italian government's concerns re influx of asylum seekers but emphasized the absolute nature of A3.

R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)

Short-form age assessments

- Helpful clarification from Swift J that the distinction between 'short-form' age assessments and full Merton-compliant assessment is a *"legally irrelevant"* distinction (§31) and people can reasonably disagree on the limits of the class of an obvious case (§42).
- Short-form age assessments derive from assessments carried out by the SSHD for immigration purposes and = *"a means to an end in a particular context"*.
- None of the features of these assessments *"reads over"* to assessments by LA's for purpose of duties under Children Act 1989 (§27).
- Starting point is always the principle from *Merton* of a reasonable investigation and fair process (§32).
- What that looks like will depend on the circumstances of each case.

Darboe and Camara v Italy

Key points

- Significant judgment from Strasbourg on age-assessment process and rights of child asylum seekers.
- ECtHR found that Italy had breached Articles 3/8 ECHR re a 17-year-old from Guinea.
- Further breach of Article 3 right to an effective remedy.
- Judgment points to a litany of failures in the procedure – stemming from initial x-ray assessment from which a doctor concluded with apparent certainty that the A was 18-years-old.

R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)

Final points:

- Where an interview takes place, a person must be given a genuine opportunity to explain his position and respond to adverse matters; what is necessary must account for the person's circumstances and consideration must be had of whether an interpreter/ AA is required (§32).
- This does not require a separate interview (§52).
- Swift J rejected the concept of margin of error and benefit of the doubt but this does not make it legally irrelevant, but pragmatic caution is to be exercised (§39).
- The question of fairness is a matter for the court. However, it is for social workers to justify why steps were or were not taken (§34).

Darboe and Camara v Italy

Comment

- Important statement of principle from the ECtHR regarding the need for a proper age assessment process which complies with international law standards, including access to effective remedies where compliance is in doubt.
- UK context: judgment will be useful for ensuring that the age assessment process in the UK complies with international law requirements, even when not directly incorporated into domestic law.

Nationality & Borders Act 2022, Part 4: Age Assessments

Overview

- Part 4 is intended to bring age assessments within the statutory immigration system.
- Until now – age assessment process had developed in line with case law, i.e. the *Merton* line of authorities.
- Goes without saying – critically important to get the assessment of age right. Why? Detention of YP only permitted in *"very exceptional circumstances"* + numerous educational/ social care rights which arise (particularly for unaccompanied YP).

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 51: Persons subject to immigration control: **assessment for immigration purposes**.

- Section 51 applies when the SSHD needs to make a decision about 'immigration functions' in relation to an age-disputed person.
- A s. 51 assessment can be undertaken where s. 50 is not relevant (unclear how) OR before the LA has referred the individual to the SSHD/ SSHD doubts the judgment of the LA.
- S. 51 is binding on the SSHD for 'immigration functions'

Comment

- Section 51 is not binding regarding LA functions on the face of the Act – does this mean the LA could find the individual a child but the SSHD an adult?

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 50: Persons subject to immigration control: **referral or assessment by local authority** etc.

An age assessment under s. 50 applies when:

(i) A Local Authority needs to know the age of an age-disputed person, OR

(ii) The SSHD notifies the LA that is has doubts as to the age of an age-disputed person that the LA has exercised functions under the Children Act 1989.

When that occurs, the LA **must** either:

(i) Refer the age disputed person to a designated person (i.e. the NAAB)

(ii) Conduct an age assessment themselves

(iii) Confirm that an age assessment is not necessary

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 49, Interpretation of Part, etc.

Age Disputed Person

- An individual who requires leave to enter the UK.
- Who a Local Authority/ Public Authority/ Secretary of State has insufficient information to be *sure* of their age.

Designated Person

- An individual designated by the SOS to conduct an age assessment
- National Age Assessment Board – newly constituted – will consist of HO employed social workers

Comment

- New procedures will apply to all people who require leave, not just asylum seekers
- No clarification on what 'sure' means in this context – *sure* of age or sure a person is/ is not a child?

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 49: Definitions

Section 50: Persons subject to immigration control: referral or assessment by LA etc.

Section 51: Persons subject to immigration control: assessment for immigration purposes.

Section 52: Use of scientific methods in age assessments.

Section 53: Regulations about age assessments.

Section 54: Appeals relating to age assessments.

Section 55: Appeals relating to age assessments: supplementary.

Section 56: New information following age assessment or appeal.

Section 57: Civil legal services relating to age assessments.

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 50: continued

- When the 'designated person' conducts the age assessment on behalf of the SSHD, the outcome is binding on the LA but not the other way around.
- When the LA conducts an age assessment or confirms that one is necessary, it must provide evidence to the SSHD (on request) so that the SSHD can 'consider the decision'.

Comment

- Unclear what happens when the LA give the age disputed person an age that the SSHD disputes. Does the SSHD have the power to direct the NAAB to conduct a further assessment of age/take over the decision?
- Unclear what 'consider' the decision means.
- Standard of proof = balance of probabilities
- What about burden of proof? Under UNCRC – child is supposed to be given the benefit of the doubt – no assumption whether a child or an adult.

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 52: continued

Scientific methods may only be used with 'appropriate consent' **BUT**

s. 55(7) provides:

"In deciding whether to believe any statement made by or on behalf of the age-disputed person that is relevant to the assessment of their age, the decision-maker must take into account, as damaging the age-disputed person's credibility [...] the decision not to consent to the use of the specific scientific method".

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 52 – use of scientific methods

- S. 52 permits the SSHD to make regulations specifying scientific methods that may be used.
- S. 52(2) provides a lot of detail on what these may constitute, e.g. 'imaging technology', analysis of DNA derived from cells, saliva, other samples.
- SSHD must 'seek specific advice' before deciding that a method is appropriate.

Comment

- What is 'imaging technology' (x-ray)?
- What does 'seek scientific advice' mean in practice? Who has to be consulted?
- What about where there is no scientific consensus?
- Is the duty to seek and act in accordance with scientific advice or just seek it?

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 53: Regulations

- General power to make regulations regarding age-assessments.
- Very broad power, including:
- Evidence that must be considered and *the weight to be given to it*.
- The consequences of a lack of cooperation with the age assessment process, which *may include damage to the person's credibility*.

Comment

- How will this interact with the requirement for a fact-specific assessment of all the circumstances in an individual case?

Nationality & Borders Act 2022, Part 4: Age Assessments

Section 54/55: Appeals relating to age assessments

- **Key point**: statutory right of appeal created – to the First-tier Tribunal.
- A date of birth must be assigned.
- Where an individual leaves the UK – appeal is abandoned.
- Pending the outcome of the appeal – YP to be treated as claimed age.
- FTT determination binding on LA and SSHD.

Section 56

- Where 'significant new information' comes to light, a fresh age assessment must be undertaken. Test - 'realistic prospect' that it would change the outcome of the original assessment of age.

Section 57

- Legal aid for age assessments.

Nationality & Borders Act 2022, Part 4: Age Assessments

Final points

- As set out, many points requiring clarification and interpretation by the courts/ guidance from the SSHD.
- 'Scientific methods': invasive/ retraumatising – possibility of challenges under Articles 3/ 8 ECHR.
- Age assessments by NAAB – still conducted by social workers – still required to comply with *Merton* guidelines? How much will change in practice?
- Not yet in force – watch this space.

Community Care Law Update

Sections 17 and 20 of the Children Act 1989

Tessa Buchanan, Garden Court Chambers

30 January 2023

Statutory provisions

Section 17 Children Act 1989: the duty

- Imposes a *"**general duty**"* on LAs to (a) **safeguard and promote the welfare of children within their area who are in need** and (b) so far as is consistent with that duty, **promote the upbringing of such children by their families by providing a range and level of services** appropriate to those children's needs: s17(1) CA 1989.
- Although a *"general duty"*, **LAs must act so as to promote the object of the statute** and a refusal to provide services needed will be subject to *"strict and, it may be, sceptical scrutiny"*: *R (VC) v Newcastle CC* [2011] EWHC 2673 (Admin).
- Assistance may be provided to the **family** of a child in need, may include **accommodation**, **assistance in kind**, and/or **cash**, and may be **unconditional or subject to conditions** as to repayment: s17(3), (6), and (7) CA 1989.
- **LAs must assess the needs of a child** in their area who appears to be in need: *R (G) v Barnet LVX* [2003] UKHL 57 at §77, applying s17 together with Sch 2, para 3 CA 1989.

Section 17 Children Act 1989: children in need

- A child is in need if:
  - He or she is **unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him or her of services** by an LA under Part 3 CA 1989;
  - **His or her health or development is likely to be significantly impaired or further impaired without the provision of such services**; or
  - He or she is **disabled**, defined as being *"blind"*, being *"deaf or dumb"*, suffering from *"mental disorder of any kind"*, or being *"substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed"*.

  S17(10) and (11) CA 1989

Section 20 Children Act 1989

- LAs must provide accommodation for **any child in need in their area** who appears to them to **require accommodation as a result of** there being **no person who has parental responsibility** for him or her; his or her being **lost or abandoned**; or the **person who has been caring for him or her being prevented from providing suitable accommodation or care**: s20(1).
- **LAs must provide accommodation for any child in need in their area who is 16 or over** and whose **welfare** the LA consider is likely to be **seriously prejudiced** if they don't provide accommodation: s20(3).
- The LA must ascertain and give due consideration to the **child's wishes and feelings**: s20(6) CA 1989.
- An LA **may not provide accommodation if the child is under 16 and a person with parental responsibility objects** and is willing and able to provide accommodation: s20(7) CA 1989. It is **unlikely to be reasonable to force a capacitous and fully-advised child to accept accommodation under s20 CA 1989** against his or her will: *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14.

Looking back: a review of the case-law from the last year

R (Article 39) v SSE [2022] EWHC 589 (Admin), [2022] 1 WLR 4240

- Care Planning, Placement and Case Review (England) Regulations 2010/959 regs 27A and 27B provided that a looked-after child under 16 may not be placed in *"other arrangements"* under s22C unless:
  - The placement is specified in reg 27A(a) (hospital, care home etc.); or
  - The child was age-disputed; claimed to be 16 or 17; and was later assessed as being under 16, in which case they may remain in the *"other arrangements"* for 10 working days.

- Article 39 sought judicial review of the failure to extend this prohibition to 16 and 17 year olds.

- Held:
  - Nothing in CA 1989 requires all care for a looked-after child to be in a care home or regulated accommodation, so it is not ultra vires to place such a child in *"other arrangements"*.
  - It was not irrational to distinguish between children under and over 16, as there was evidence that unregulated accommodation was unsuitable for all under 16s but not necessarily all over 16s.
  - The PSED did not require the SS to have regard to the equality implications of something which was not part of his proposal (namely extending the prohibition).
  - The SS did not have to seek views specifically on extending the prohibition, as the consultation had made clear that the status quo would be maintained for 16 and 17 year olds.

R (LB) v Surrey CC [2022] EWHC 772 (Admin), [2022] AC 56

- C had complex needs arising from ASD and ADHD. She had been attending a full-time residential school placement but returned home on 8 April 2022. She temporarily moved to another placement in June 2021 but moved home again on 18 October 2021.

- Held:
  - D had failed to comply with s20 CA 1989. It was not disputed that the duty was owed or that it would not be consistent with C's welfare for her to live with her mother and therefore D had not discharged the s20 duty by placing C in her mother's home.
  - D had failed to carry out an assessment of C's needs under s17 CA 1989 and had failed to comply with its duty to review C's care and placement plans pursuant to Care Planning, Placement and Case Review (England) Regulations 2010/959 reg 6. There was a continuing duty to review the provision of services under s17. The fact that C had moved home was a material change of circumstances since the original care and placement plans had been produced. D had failed to keep the care plans under review.
  - D had also failed to comply with its mandatory duty under s17ZD to carry out a parent carers needs assessment within a reasonable period and had failed to comply with various of its education duties under the Education Act 1996 and the Children and Families Act 2014.

R (BCD) v Birmingham Children's Trust [2023] EWHC 137 (Admin)

- C brought a judicial review claim challenging the support provided by D under s17 CA 1989 for families who have No Recourse to Public Funds.
- C argued that paying families with British children the same amount as families with non-British children amounted to unjustified *Thlimmenos* discrimination.
- D argued that it treated British and foreign national children the same as their needs were the same.

- The Court upheld the claim:
  - The case fell within the ambit of A8 given the effect of limited financial support on C and his family.
  - C had a relevant status: British/non-British children with a NRPF foreign carer with leave; British/asylum-seeking or other precarious immigration status children with a NRPF foreign carer with leave; children with foreign national carer with leave/without leave.
  - The treatment of C and the comparator group(s) was the same.
  - There was a relevant and significant difference between C and the comparator group(s): NRPF British children have a need for equal treatment with other British children.
  - The treatment was unjustified.

A few guest appearances

Equivalent duty in Wales

- ***R (Patton) v HM Assistant Coroner for Carmarthenshire and Pembrokeshire* [2022] EWHC 1377 (Admin), [2022] ACD 89**: this was a challenge to the Coroner's decision that the duty under s76 Social Services and Well-being (Wales) Act 2014 had not arisen. The claim was upheld. The Coroner had not engaged with whether K's accommodation had been suitable; had potentially wrongly treated the council's view that the duty had not arisen as determinative; and had not provided adequate reasons for conclusion but simply restated the statutory test.

Welfare benefits

- ***SSWP v AT* [2022] UKUT 30 (AAC)**: AT was refused Universal Credit. FTT allowed her appeal on the grounds that, without UC, AT and her child would not be able to live in dignified conditions and the Tribunal was therefore bound to disapply the relevant provision of the EU (Withdrawal) Act 2018, applying *CG v Department of Communities for Northern Ireland* [2022] 1 CMLR 26. SS relied on the availability of support under s17. UT held that it *"will not be permissible to rely on a generalised assertion of the availability in principle of support under s17"* and what matters is *"whether such support will actually be provided by a local authority"* (at §134). The evidence showed that AT had tried and failed to obtain support under s17.

A few guest appearances

Interaction between s20 CA 1989 and care orders under s31 CA 1989

- ***Lancashire CC v PX* [2022] EWHC 2379 (Fam)**: court declined to make a care order where child was accommodated under s20. Initial dispute over whether child was accommodated under s17 or s20 was resolved with parties agreeing it was s20.
- ***Re S (A Child) and Re W (A Child) (s20 Accommodation)* [2023] EWCA Civ 1**: accommodation under s20 CA 1989 can be provided on a long-term basis. Courts below had erred in making care orders when s20 arrangements were in place.
- See also ***Oxfordshire CC v A Mother* [2022] EWFC 141** on the main differences between a care order and s20 accommodation (at §§28-43).

A few guest appearances

Negligence

- ***HXA v Surrey County Council* [2022] EWCA Civ 1196, [2023] 1 WLR 116**: CA allowed appeals against decisions to strike out Cs' claims in negligence. C1 argued that in deciding to carry out an assessment and to carry out "keeping safe" work, D1 had assumed responsibility for protecting her from harm. C2 relied on the provision of accommodation by D2 under s20 CA 1989. CA held that the circumstances in which an LA might assume responsibility so as to give rise to a duty of care were not limited to where it had acquired parental responsibility and would depend on the facts.
- See also ***Rafiq v Thurrock CC* [2022] EWHC 584 (QB)**: this was a claim for damages under the Human Rights Act 1998 arising from the council's failure to provide accommodation to C as a former relevant child. C's application for extension of time to bring claim was refused.

Looking ahead: themes and issues

Accommodation of UASC in hotels: the problem

- Minister for Immigration's answer to urgent question on 24.1.23:
  - Over 4,600 children had been accommodated in hotels since July 2021.
  - There had been 440 missing *"occurrences"*. 200 children remain missing of which:
    - 13 are aged under 16.
    - 1 is female.
    - 88% are Albanian, with the remaining 12% from Afghanistan, Egypt, India, Vietnam, Pakistan, and Turkey.
  - *"We had no alternative but to temporarily use specialist hotels to give some unaccompanied minors a roof over their heads whilst local authority accommodation is found".*
- Concerns have been raised about children being abducted/trafficked into gangs.
- More than 100 charities have criticised the use of hotels for children and called for an end to the practice.

“Choice” under s20 CA 1989

- S20 CA 1989 is a *“service, not a coercive intervention”*, and it is unlikely that Parliament intended local authorities to be able to force s20 accommodation on a competent child: *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14 at §43 and *R (G) v Southwark LBC* [2009] UKHL 26 at §28.

- However, the YP must have been *“properly and fully advised of the implications”* of rejecting s20 and must have capacity to reach a decision; the information should be provided in a *“young person friendly”* format and be made available for the YP to take away for advice; and the YP should have access to independent advocacy and support: *Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation*, paras 3.13, 3.38-3.50.

- What choice is the YP being asked to make? Is it lawful?

Accommodation of UASC in hotels: is it lawful?

By the Home Office?

- SSHD may accommodate destitute asylum-seekers under s95 IAA 1999 or failed asylum-seekers under s4 IA 1999, but an asylum-seeker is defined as a person over 18: s94(1) IAA 1999.
- UASC should be accommodated by local authorities under s20 CA 1989.

By local authorities?

- Looked-after children under the age of 16 may not be placed in unregulated accommodation (unless he or she was age-disputed and has been assessed as being under 16, in which case he or she must not be left there for more than 10 working days): Care Planning, Placement and Case Review (England) Regulations 2010/959, regs 27A and 27B .
- Statutory guidance states that hotels are not suitable for any 16 or 17-year-old: *Prevention of homelessness and provision of accommodation for 16 and 17-year-old young people who may be homeless and/or require accommodation*, para 5.10.

Thank you

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