R (RO) v East Riding of Yorkshire Council:
Court of Appeal judgment on inter-play between s20 Children Act 1989 and Part IV of the Education Act 1996

On 2nd March 2011, the Court of Appeal handed down its judgment in R(RO) v East Riding of Yorkshire Council (link to judgment forthcoming) allowing the Appeal and quashing the Council's decision. The Appellant is a vulnerable 15 year old boy with severe autism and severe attention deficit hyperactivity disorder. The decision challenged was the termination of his "looked after" status under s.20 Children Act 1989 ("CA89") on the basis that a suitable residential school had been named in part 4 of his statement of special educational need issued under s.324 Education Act 1996 ('EA96'), an institution capable of meeting his social as well as his educational needs.

This appeal presented the first opportunity, at appellate level, to explore the relationship between the CA89 and EA96, particularly the inter-play between the 'Looked After Child' regime under ss20, 22 and 23, CA89 ("LAC status") and when and how the duty to accommodate children could be lawfully terminated under s20, CA89. The Secretary of State for Education intervened against the Appellant.

Although s20, CA 89 has been the subject of much litigation in recent years, it has to date been limited to consideration of the inter-play between the CA89 regime and the Housing Act 1996.

The Court has now decided that the EA96 does not and cannot in these circumstances supplant and supersede the CA89 LAC Regime.

The Appeal
The Appeal to the Court of Appeal (Rix, Smith and Richards LLJ) raised two important questions:

(i) What is the test for determining the termination of a duty under s20, CA 89?
(ii) Can a Statement of Special Educational Needs made under s324, EA 96, naming a specialist residential unit, supplant and supercede an existing duty under s20, CA 89 to accommodate a vulnerable child in need?

Summary of Outcome:
The Appeal was allowed for the following reasons:

(i) It is the Children Act 1989 which is intended to provide the holistic support for children in need who have, because of the provision of accommodation to them, come within the regime and status of being looked after children: §117 of the judgment.

(ii) Albeit the test of a looked after child is not the more general one of being in need to be looked after, rather than the more specific test of being both in need *and* taken into care or being provided with accommodation in the defined circumstances set out in s20, *"once one of those gateways, of care or accommodation, has been met and the LAC status has been triggered, the purpose and function of that status is to ensure that the child's welfare is preserved and promoted"*: §117.

(iii) Although the provision of accommodation is (with being taken into care voluntarily or by way of a care order) one of the two touchstones of a child entering into 'Looked After Child' status under CA 89, the provision of accommodation is not mentioned in Part IV, EA 96, which governs special educational needs: §97.

(iv) The importance of education to children with LAC status has been specifically underlined by the insertion of s22(3A) into CA 89 by way of s52, Children Act 2004. As the Court of Appeal held at §98, *"not surprisingly, for education is an important part of the life of a child, the question of education is to be specifically considered as part of the 'corporate parents'' role which an authority has to undertaken where a child enters into the LAC regime."*

(v) Statutory guidance has been issued under s22(3A), which on consideration of the relevant extracts (see §99), reflects the primary role which the Children Act plays, where a looked after child is concerned, to provide for the right educational help.

(vi) S85, CA 89 does not provide an answer to how a local authority might terminate the LAC status of a child by virtue of terminating the provision of his accommodation under s20, CA 89. S85 exists to underline the need for a joined up / holistic approach to the problem of children with needs in circumstances where this did not exist: §101.

(vii) The question of whether accommodation is to continue being provided under s20, CA 89 or by way of the naming of a residential school in a SSEN must be and can only be determined by a lawful assessment of the needs of the child. The child's needs in all areas, including social care, health, and special educational needs should be taken into account, as should the wishes and feelings of the child and his family: §92. See also §119.

(viii) In circumstances where the child with LAC status remain in need of accommodation for reasons relating to his developmental, behavioural, emotional, social and educational needs, and those needs require the provision of a residential environment, it would be unlawful for the local authority to attempt to side-step / avoid its duty to continue providing such accommodation under s20, CA 89. The CA 89 regime and the EA 96 can in these circumstances lie side by side: §§102 & 114-116.

Facts of the Appeal

The detailed background of this Appeal has been carefully set out at §§6-67 of the judgment. In reality, the facts relevant to the appeal were quite straightforward:

(i) RO was, and remained at the time judicial review proceedings were issued, a child in need in light of his disabilities and associated complex needs;

(ii) RO was provided with respite care under s20, CA 89 from around June 2007 and continuing when judicial review proceedings originated in August 2008.

Two essential factual disputes arose:

(i) Whether the respite care that was provided to the Appellant was provided under s20(1)(c) or s20(4), CA 89 as the Respondent contended at trial that if it was made under a power to accommodate, the Respondent was entitled to cease exercising that power when it named a residential school in the Statement of Special Educational Needs.

(ii) Whether the Appellant's needs were such that as at December 2008 when the Respondent decided to terminate the Appellant's LAC status on the basis that all of his needs can be met by an education placement.

The Appellant's contention has always been that the Council had been accommodating the Appellant part-time as a looked after child and ought to continue to do so, but full-time in a specialist residential placement in view of his disabilities and associated complex needs: see §64 of the judgment.

The Legal Issues

The question of law before the Court of Appeal was whether the council in finally agreeing to place the Appellant at a specialist residential unit, which it acknowledged was necessary to meet his emotional, social, psychological and educational needs, was entitled to terminate the Appellant's LAC status on the basis that it had named the residential unit of the parents' choice in Part IV of the Appellant's Statement of Special Educational Needs?

The submissions of both parties are outlined at §§104-107 (Appellant's submissions) and §§108-109 (Respondent's submissions).

Factual Findings

On the facts of this Appeal, the Court of Appeal held that:

(i) There was no doubt during the course of 2007 and 2008 when LAC Reviews were held, the Appellant's needs, including the requirement of a residential placement, was plain to and plainly acknowledge by the council: §112. This is clearly stated in the core assessment carried out by the Respondent in December 2008.

(ii) It was plain to the council that the Appellant required full-time accommodation in his specialist placement in order to give him the care as well as the educational assistance, which his needs and his parents' inability to cope with and control him demanded: §114.

(iii) The fact that his parents were willing to have him at home at weekends and during the holidays did not detract from that conclusion and that appearance to the council: §114.

(iv) It is irrelevant whether the Appellant's pre-residential placement LAC status was based on s20(1)(c) or s20(4). The exercise of the council's power under the latter subsection was demanded by what the council recognised as the Appellant's needs and the limits of his parents' coping abilities and in any event going forward, the council recognised that those needs and those limits meant that the Appellant required a residential placement: §115.

(v) Where the facts and the council's recognition of the facts come within s20(1)(c) it is wrong to regard the council to have been exercising a mere power than a statutory duty: §115. To do so would clearly be mis-labelling the situation and to be side-stepping their Children Act responsibilities.

(vi) Equally to state that the parents required only respite care and the ending of that respite care brought to an end the Appellant's LAC status is a "profound mis-reading of the situation": §116.

(vii) The Court used the word "impossible" five times in rejecting the authority's main argument that it could meet its CA89 duties via part 4 of the statement of special educational need. It was *"on the acknowledged facts, an erroneous, impossible, irrational and unlawful view to take"* for the authority to assume that the education placement supplanted and superceded the Appellant's LAC status simply on the basis that it would meet his social as well as educational needs: §114, 117, 118 & 125.

(viii) The authority failed to ask the correct question – that is whether the Appellant's needs and the parents' inability to cope with them, with or without respite, took them / kept them in the light of the accommodation at the residential placement, within s20: §119.

What does this mean?

This is an important judgment for four reasons:

(i) It is the first judgment of its kind to clarify how the Children Act 1989 and the Education Act 1996 fit together for children who are in care or being looked after under s20, CA 89.

(ii) It is the first judgment to affirm the nature and scope of the duty under s22(3A), CA 89 as to the duty to promote the educational achievement of children with LAC status.

(iii) It lays down for the first time the correct test to be applied in considering whether a placement under s20, CA 89 should be terminated: that is it must be based on a lawful and holistic assessment of the child's needs, including social, behavioural, emotional, psychological and educational.

(iv) In circumstances where the criteria under s20, CA 89 remains met, it is unlawful for the local authority to mis-label the situation and to side-step its duties under the Children Act 1989 by calling the residential placement an education placement. The EA 96 does not and cannot in these circumstances supplant and supercede the CA 89 LAC Regime.

The test as to termination is a test that is equally applicable across all types of s20, CA 89 scenarios and is not limited to situations where there is an inter-play between the CA 89 and EA 96.

This case will be of interest to both community care and education lawyers. It is an area which has been habitually misunderstood by many local authorities. East Riding Council and the Secretary of State acknowledged "the interconnectedness of the two regimes" but the Court of Appeal felt able to describe the decision to terminate the Appellant's LAC status (and therefore the learned judge's finding that it was a lawful decision) as "surprising and counter-intuitive": see §102.

It will be interesting to see how the Secretary of State for Education responds to this judgment.

Unless this judgment is successfully appealed it should now be clear that a local authority can no longer purport to contract out of its "looked after" obligations under CA89 when it decides to name a residential school in part 4 of a Statement of Special Educational Need.

We would be happy to discuss the case if there are any further queries concerning the outcome of this protracted litigation.

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