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The Care Act: wellbeing and human rights

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THE CARE ACT: WELL-BEING AND HUMAN RIGHTS

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Topics

- How the wellbeing principle shapes the legal duties owed to people with needs for care and support
- How consideration should be given to providing care and support to a person whose needs assessment is pending
- What consideration of human rights is necessary where a person is not eligible for care and support under the Care Act

Law Commission

*Not only should there be consistency between each of the individual principles, but that taken as a whole **the principles should establish a coherent purpose for adult social care...**Currently the law does not provide a core definition of adult social care....Adult social care is defined largely by reference to what services are not being provided by other organisations under different legislation. We believe there is considerable merit in providing a single unifying purpose around which adult social care could be organised.*

Law Commission

A primary well-being principle would provide a positive statement about the nature and purpose of adult social care. This principle would operate on two levels. First, when general decisions are being made under the legislation which do not relate directly to an individual (such as when local authorities commission services or set their eligibility criteria), decision makers would be required to ensure that in a broad sense adult social care promotes the well-being of individuals. Second, the principle would also apply when decisions are being made in relation to individuals.

S.1 Care Act 2014

S.1(1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.

S1(2) ‘Well-being’, in relation to an individual, means that individual’s well-being so far as relating to any of the following—

(a) personal dignity;

(b) physical and mental health and emotional well-being;

(c) protection from abuse and neglect;

(d) control by the individual over day-to-day life (e) participation in work, education, training or recreation;

(f) social and economic well-being;

(g) domestic, family and personal relationships;

(h) suitability of living accommodation;

(i) the individual’s contribution to society.

(3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular—

(a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;

(b) the individual's views, wishes, feelings and beliefs;

(c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;

(d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);

(e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;

- (f) the importance of achieving a balance between the individual's well-being and that of any friends or relatives who are involved in caring for the individual;*
- (g) the need to protect people from abuse and neglect;*
- (h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised.*

Eligibility Under the Care Act

- S.18/20: People are entitled to care or support from the local authority if they meet the eligibility criteria
- S.13: Eligibility to be determined by regulations

Regulation 2.—(1) An adult's needs meet the eligibility criteria if

(a) the adult's needs arise from or are related to a physical or mental impairment or illness;

(b) as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2); and

(c) **as a consequence there is, or is likely to be, a significant impact on the adult's well-being.**

Guidance - People with care and support needs

‘6.110. The term “significant” is not defined by the regulations, and **must therefore be understood to have its everyday meaning.**

Local authorities will have to consider whether the adult’s needs and their consequent inability to achieve the relevant outcomes will have an important, consequential effect on their daily lives, their independence and their wellbeing.

6.111. In making this judgment, local authorities should look to understand the adult’s needs in the context of what is important to him or her. Needs may affect different people differently, because what is important to the individual’s wellbeing may not be the same in all cases. **Circumstances which create a significant impact on the wellbeing of one individual may not have the same effect on another.’**

Consultation on Draft Regulations

“It is important that the eligibility regulations are considered in conjunction with the guidance. For example, many submissions called for a definition of ‘significant impact on wellbeing.’ However, as wellbeing is not the same for everyone, in our subsequent discussions with stakeholders we concluded that it would not be meaningful to define this. Instead, we have set out case examples in the draft guidance to show what is meant by ‘significance’ and wellbeing.”

s.9 Care Act: Assessment of an adult's needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—

- (a) whether the adult does have needs for care and support, and
- (b) if the adult does, what those needs are....

(4) A needs assessment must include an assessment of—

- (a) the impact of the adult's needs for care and support on the matters specified in section 1(2),**
- (b) the outcomes that the adult wishes to achieve in day-to-day life, and**
- (c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.**

The well-being principle

- Judicial reviews Care Act have tested power and impact of the well-being principle
- Akin to the division set out by the Law Commission, this has been explored both in respect to general decisions, and decisions in relation to individuals

Duty to meet needs

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin) and [2017] EWCA Civ 1308

- Most notable case on the duty to meet eligible needs following the introduction of the Care Act
- Deals with a number of issues relating to needs assessments, well-being principle and obligation of local authority to seek to reach agreement with the person in meeting needs

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

Background

- Luke Davey: in his 40s, quadriplegic, has cerebral palsy, severe physical disabilities, cannot bear weight or mobilise, uses a wheelchair, registered blind
- Has suffered from depression, persistent low mood and anxiety
- Requires assistance in all activities of daily living
- Receives considerable assistance from his family
- Lives in his own adapted bungalow

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- On the closing of the Independent Living Fund, LA made a major reduction in Mr Davey's personal budget
- Mr Davey argued that where his needs had not changed, LA was obliged to continue its prior funding
- LA argued that its offer was sufficient to meet his needs
- Primary issues were around how much time Mr Davey should spend alone and whether the changes to funding would break up his staff team, and whether this would negatively impact on his well-being

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- Prior to the JR, four hours of time alone was implemented
- Final review and support plan before hearing:
 - Assistive technologies were in place for when Mr Davey was alone
 - Mr Davey was no longer suffering from depression, and had only occasional bouts of anxiety
 - Had declined offers of counseling for anxiety
 - Mr Davey had not identified any additional risks to his well-being as a result of spending more time alone
 - LA felt that he was adapting to more time alone

- *The Claimant contends that the decision that the Claimant has an eligible need to spend more time alone was not made in compliance with the statutory purpose of the Act. The relevant "need" which is challenged is the statement in the September 2015 Assessment "provide the option for Luke to spend more time alone, safely, in his home, to develop his independence, and reduce anxiety".*
- Mr Davey said he did not want to be alone and it was not open for the LA to find it would be best for him when he rejected that idea

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- Historically, Mr Davey had been found to need 24-hour support due to concerns over anxiety and depression if he were left alone
- He valued the variety of his carers and did not want to live in a residential care setting, or with a live-in carer

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- Mr Davey argued that this violated the well-being principle – stated that it was ‘imperative to his well-being’ that no changes were made
- Argued that his well-being was routed in preserving his care arrangements (particularly his team) and not spending excessive time alone
- OCC conducted a review of its proposal that he spend 4 hours/day alone, and stated that it did not consider that there were additional risks to his well-being

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- The court considered that there were two distinct elements of s.1 Care Act:

The Claimant relies upon the duty to "have regard" under s.1(3) and in particular upon subsections (a) and (d). He also relies upon the duty under section 1(1) as being distinct from s.1(3) duty; and submits that there can be a breach of s.1(1) separate from s.1(3)...I agree with the Claimant. Section 1(1) and (2) impose a distinct duty upon the Defendant, in each individual case, to promote the individual's wellbeing, including physical and mental health and emotional well-being.

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- In relation to needs assessments:

First, the assessment duty is a duty upon the local authority and the assessment under section 9(1)(a) and (b) is an objective assessment made by the local authority (usually acting through its social workers or occupational therapist).

Secondly, under section 9(4), there is no duty to achieve the outcomes which the adult wishes to achieve; rather it is a duty to assess whether the provision of care and support could contribute to those outcomes. *On the other hand if, in the course of a needs assessment, the local authority does not assess the matters specified in s.9(4) (including the impact on wellbeing matters set out in s.1(2)) then there is a breach of the statutory duty. There is, thus, a duty on the part of the local authority to assess these factors.*

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- Duties under s.1(3) are to ‘have regard’ to person’s wishes
- A failure to consider the factors set out in the Care Act which must be considered will make the decision unlawful
- Factors which may but need not be considered will not make a decision unlawful
- Other factors ought to be considered because they are ‘obviously material’ to the relevant decision – this would include the person’s emotional and psychological health and wellbeing

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

Arguments as to whether the LA failed to consider the risk to the claimant's well-being in being left for more time alone:

- Risk had been well-documented over the years in previous assessments, including in claimant's self-assessment
- LA had not identified increased anxiety from being alone as a risk in the plan
- LA accepts that claimant does experience this anxiety
- LA contended that this ground has no basis in law, and effect on psychological health was not a relevant statutory consideration
- This factor had been considered, but anxiety was not outside of the normal range

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

In considering whether the LA failed to consider the risk to the claimant's well-being in being left for more time alone:

- While the risk of harm to Mr Davey's emotional and psychological health and wellbeing was not specifically enumerated in the care plan, it was clear the LA was aware of the risk, and was taking steps to reduce or eliminate anxiety
- Evidence filed in proceedings makes clear the possible risks were considered and a professional judgment was reached that anxieties were within the normal range, and were limited and manageable

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

In relation to the timings of the PA attendance preventing claimant from engaging in social activities important to his wellbeing:

- LA said that it had taken claimant's social activities into account, and he would have support to engage in activities every day
- Court found he would be able to engage in activities regularly
- Would potentially affect his ability to engage in activities out of town – or have to store up time by spending increased time alone
- This represented a limited curtailment of the range of social activities, and did not violate the well-being principle or the UNCRPD

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWHC 354 (Admin)

- In considering the risk to claimant's well-being and mental health from the risk that team of PAs will be broken up:
 - Court found that LA was under a duty to 'have regard' to the particular circumstances of the individual
 - LA did record claimant's view on this issue
 - *The Defendant did not consider that a change in the team, even if it did occur, would have an adverse impact upon the Claimant's mental health and wellbeing...changes in the Claimant's current care team would be positive for the Claimant and his emotional wellbeing, enabling him to reduce dependence upon specific carers. This would be unsettling in the short term, but bring important benefits in the longer term. In this way, the Defendant, did, in general terms, take account of the importance of the existing team of carers.*

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWCA Civ 1308

On appeal:

- Court of Appeal accepted findings of the High Court that local authorities had duties under s.1(1) Care Act to promote well-being generally, and also to have regard to the specific principles of s.1(3) Care Act
- In this case, primary question was whether the LA had given appropriate regard to Mr Davey's having control over his day-to-day life under s.1(3)

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWCA Civ 1308

- Court of Appeal concurred that the duty to assess needs is an objective rather than subjective one, and there is no duty to achieve the outcomes the person wishes to achieve
- However, local authority is obliged to consider those outcomes in the assessment process, and in eligibility process, must consider the effect on the person's well-being

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWCA Civ 1308

Break-up of Mr Davey's staff team

- Argument that claimant's well-being would be significantly affected by the break-up of his current staff team, and the LA unlawfully failed to consider the effect on Mr Davey's wellbeing
- LA argued that there was no evidence that staff team would break up, and in any event, professionals took the view that the break-up of the team would be positive for Mr Davey

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWCA Civ 1308

Break-up of Mr Davey's staff team

- Court of Appeal accepted that LA had given consideration to this question, including the potential impact on Mr Davey's well-being. LA was plainly aware of Mr Davey's own views on the issue, but did not agree with him either that the staff team would break up, or that it would negatively affect his well-being if this occurred.

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWCA Civ 1308

- The court upheld the finding in the High Court that the personal budget's provision that Mr Davey was to pay market rates to PAs (rather than the above-market-rate payments he had previously been making) was lawful
- The court upheld the finding in the High Court that the personal budget's provision for Mr Davey's community access was lawful, even though it did not make provision for his taking trips out of the local town, and did not breach the well-being

principle

Davey, R (On the Application Of) v Oxfordshire County Council [2017] EWCA Civ 1308

- Focus is tightly on whether local authority has had regard to the well-being principle – little discussion of the provisions of s.1(1)
- Court was reluctant to interfere where the person's view had been considered at great length and detail, but ultimately a different decision had been made
- Power of the well-being principle sits within the assessment process above the general duty

R(JF) v London Borough of Merton [2017] EWHC 1519

- Case brought on behalf of JF by his mother, KF to challenge decision to change his residential care provision; assessment finding that JF's needs could be met in the new placement was also challenged
- JF was 24 years old and has Autism Spectrum Disorder and severe learning disabilities. Required 1:1 support in his placement, and 2:1 support in the community. Required significant therapeutic input, particularly from OT and SALT.

R(JF) v London Borough of Merton [2017] EWHC 1519

- Had been living at David Lewis College in Cheshire
- Parents were happy with the placement, and attributed the fact that he had not been sectioned to his residing there.
- In January 2016, parents were informed that the placement would be ending in March 2016, and an alternative placement would be identified for JF.
- No reasons were given at the time for the termination of the placement, but stated in oral arguments that cost was a major factor.

R(JF) v London Borough of Merton [2017] EWHC 1519

- Parents taken to see a new placement, Aspen Lodge, in February 2016. Parents did not agree that it was suitable to meeting JF's needs, noting lack of OT and SALT support on site.
- Aspen Lodge produced a pre-admission assessment which concluded that it was capable of meeting JF's needs
- During all of this time, the LA had not completed any fresh Care Act assessment to evidence any change in JF's needs for care and support

R(JF) v London Borough of Merton [2017] EWHC 1519

- The court emphasised the duties under s.9(4) to consider the impact of the person's need for care and support on his well-being, and to prepare a care plan which specifies how the LA will meet the needs as determined in the needs assessment

R(JF) v London Borough of Merton [2017] EWHC 1519

The central elements of the framework are (1) the “well-being” principle (2) the assessment of needs (3) making the arrangements to meet those needs and (4) in certain cases, identifying the adult’s personal budget. There is a clear statutory theme placing the individual at the heart and centre of the process so that he or she is fully involved in decision making. This is emphasised by the duty to have regard to the wishes and preferences of the individual.

R(JF) v London Borough of Merton [2017] EWHC 1519

- Claimant's case was supported by reports from a consultant clinical psychologist and an independent social worker:
 - *The collective substance of these reports supports the contention that JF needs an on-site MDT, total communication environment and detailed and long term planning for any change in placement.*

R(JF) v London Borough of Merton [2017] EWHC 1519

- Grounds of challenge:
 - Failure to adequately assess JF’s SALT and OT needs, and to express a view on the need for an on-site Multi-Disciplinary Team with SALT and OT input
 - Failure to recognise the importance of continuity and impact of transition from one placement to another
 - Failure to comply with duty to promote JF’s well-being and to consider well-being in the needs assessment
 - *The suitability of any accommodation for JF must be considered at the needs assessment stage and not later because of the duty to promote JF’s wellbeing (which includes the impact of his needs on suitability of accommodation).*

R(JF) v London Borough of Merton [2017] EWHC 1519

LBM submits that in fact, all that has happened from a public law point of view, is that LBM has assessed JF's needs. The Act assessment process, for current purposes, involves two stages – (1) assessing the needs and (2) deciding how they should be met (i.e. provision). It submits that these proceedings were issued in between the assessment and the provision stage and that LBM has not yet decided how to meet JF's needs...

LBM submitted that it cannot be criticised for the quality of a third party's Report; such assessments are less detailed than those prepared when a resident actually moves in.

R(JF) v London Borough of Merton [2017] EWHC 1519

- Court considered that JF's SALT and OT needs had been sufficiently described and assessed, however...
- The assessment recorded JF's continuous MDT access and the significance of it, describing the daily support he receives from his on-site MDT. JF's SALT stated (in an assessment referenced by the Care Act assessment) that JF needs to live in a Total Communication Environment.
- Where parents had a clear view that on-site MDT access and a Total Communication Environment were required, the assessment was obliged to consider this question and state a conclusion on whether these were needed.

R(JF) v London Borough of Merton [2017] EWHC 1519

- Court was unable to conclude that assessment was rational or lawful; this was not remedied by a non-particularised statement from the social worker that *‘the local authority decided that JF did not require an on-site MDT’* and a Total Communication Environment.
- *The absence of information about the decision is contrasted with the information contained in various reports preceding and post-dating the Assessment which suggest an arguable need for both an on-site MDT and a TCE...it is not possible to tell when the decision was made that JF did not have these particular needs and by whom, it is not possible for the Court to be satisfied that the parents’ views (and JF’s wishes) were taken into account.*

R(JF) v London Borough of Merton [2017] EWHC 1519

It is also not possible to know whether in this respect, the defendant had regard, as it was required to, to the desired outcomes for JF or whether it assessed the impact of JF's MDT needs in the context of his well-being and suitable accommodation. The decision in question would in part represent a departure in the type of service provided to JF for the last 15 years. It is difficult to categorise a decision to reverse such a long standing provision (based presumably on need) as rational when I am not told who made it and I am not told the basis for it. In those circumstances, I am satisfied that the defendant failed to comply with its duties under sections 1(1) and (3) and section 9(4) of the Act.

R(JF) v London Borough of Merton [2017] EWHC 1519

The decision to terminate JF's placement cannot be said to be rational...On any view, it was made before the preparation of the Care and Support Plan. In those circumstances, it is difficult to see how the decision can have been in compliance with the statutory duties contained in section 1 and 9(4) of the Act and in Regulation 3 of the Assessment Regulations...No reasonable local authority would terminate the placement of someone with JF's complex needs without having conducted a lawful assessment of those needs and without having lawfully decided that suitable alternative accommodation was available that would enable them to meet his needs.

R(JF) v London Borough of Merton [2017] EWHC 1519

- Failure to provide a transition plan was not a stand-alone ground in respect of whether the decision to move him was lawful, and did not breach the well-being principle. Decision to move is taken first, then transition plan is to be developed to support needs in the interim.
- *If the Lodge reasonably can meet the needs, then the planning for that comes at a later stage when the Care and Support Plan is implemented. The relevance of the need to plan transitions properly is to the decision to move JF.*

R(JF) v London Borough of Merton [2017] EWHC 1519

- Finding of a failure to meet s.1(1) duties, but...
- Central findings related to the failure to properly assess prior to proposing a major change in provision, and
- Failure to meaningfully engage with parents' concerns, and demonstrate why the local authority took a different approach

R (Collins) v Nottinghamshire County Council [2016] EWHC 996(Admin)

- Judgement of Mrs Justice Patterson
- Application by three service users to challenge a decision to suspend Direct Payment Service Users Ltd. (DPSU) from a list of accredited providers
- Claimants had all used DPSU to help them manage their direct payments, and wished to continue to do so

R (Collins) v Nottinghamshire County Council [2016] EWHC 996(Admin)

- Local authority had carried out an investigation following a report by former employees of DPSU about its conduct and financial practices
- Trading Standards Department commenced a criminal investigation, finding that the DPSU had committed fraud
- DPSU refused to provide information to the local authority when presented with the concerns
- The local authority suspended the DPSU's accreditation

R (Collins) v Nottinghamshire County Council [2016] EWHC 996(Admin)

- Argument that defendant local authority was not entitled to take the action it took:
- *Section 1 of the Care Act imposes a general duty but one which is focused upon the well-being of an individual. In exercising a function under Part 1 of the Care Act a local authority has to have regard to the various criteria set out in subsection 1(3) of the Care Act, which include the need to ensure that any restriction on an individual's rights or freedom of action that is involved in the exercise of the function under section 1 is kept to a minimum necessary for achieving the purpose for which the function is to be exercised.*

R (Collins) v Nottinghamshire County Council [2016] EWHC 996(Admin)

- Defendant argued in response that well-being principle takes account of both the person's choice, but also the need to keep people safe from abuse and neglect
- Local authority is also obliged to ensure that direct payments are appropriately used

R (Collins) v Nottinghamshire County Council [2016] EWHC 996(Admin)

- Court rejected challenges that:
 - The well-being duty to give the person choice and control over his or her care outweighed the ss.31 and 32 duties regarding direct payments
 - The local authority was not entitled to conduct a safeguarding investigation because ‘there was no evidence to show that service users were unable to protect themselves’
 - It was a breach of Article 8 to suspend the provider without consulting service users

It is quite right that, in the face of the statutory guidance, to restrict a choice to accredited providers is not consistent with the new approach to social care provision. However, guidance is there to be departed from if, and only if, there is good reason. As the defendant submits, it was dealing with an exceptional circumstance here and, in that situation, it was entirely appropriate for it to take the action that it did in seeking to move on the service users to other providers who were within the list maintained by the local authority. What the local authority was doing was seeking to protect the well-being of the service users in a very difficult position.

- Well-being principle provides an important grounding and basis for statutory obligations to provide care and support
- S.1(1) duty is a general one, and courts have preferred the specific requirements of the act over the general duty, in the context that all Care Act duties are about promoting well-being
- More meaningful power around the principles, and the need to truly engage with the person in the assessment process
- Need for a local authority to be on firm evidentiary ground if it is departing from the person's wishes.

Consideration of needs pending assessment

Key case: *Raja v Redbridge*

1. A local authority has a power to provide urgent care under s.19(3) Care Act 2014 pending reassessments of care needs, as well as prior to initial assessments;
2. The power to provide urgent care must be exercised reasonably; and
3. In the absence of a reasoned decision to refuse support, it will be difficult to show that the power has been exercised reasonably

Consideration of needs pending assessment

Facts:

- Two young men being cared for by their mother in the family home, who looked after them with a direct payment and one night overnight respite
- Regular overnight needs
- June 2019: Mother said she was no longer able to care for them overnight due to her own health issues (w/ evidence from GP)

Consideration of needs pending assessment

- Mother asked for reassessment and immediate assistance in the interim to meet their overnight needs pending that reassessment
- August 2019: LA agrees to reassess, but does not provide any interim support
- By hearing of JR in April 2020 – reassessment still not completed

Consideration of needs pending assessment

"The central question which arose in this case, from June 2019 through to the hearing before me at the end of April 2020, was whether an urgent night-time care need had arisen, because the mother could no longer reasonably be expected to do this, with the sole justifiable response being the urgent interim care provision to allow for night-time carers, pending a full reassessment of needs."

- Court ordered that overnight care should be provided as an interim measure following JR in December 2019

Consideration of needs pending assessment

- No evidence from LA as to how it decided that interim support should not be offered
- No reasoned decision from any person at the LA
- Argued that it had discretion under s.19(3) Care Act as to whether to offer further support pending assessment, and it was not obliged to use that power in this case
- Court agreed challenge was difficult, and that LAs have ‘very significant latitude’ in ‘reasonable evaluative judgments’

Consideration of needs pending assessment

- Redbridge also argued that s.19(3) Care Act did not apply to reassessments of needs – only to initial assessments, and previous assessment would stand until it had been overtaken by a new assessment
- Rejected by the court – power to meet urgent needs on an interim basis applied to both assessments and reassessment (either under s.19(3) or s.27(4) Care Act)

Consideration of needs pending assessment

- Court agreed that the local authority had a lot of latitude in how to exercise a discretionary power...but....
- Local authority was able to make a change in a care plan pending assessment, using discretionary powers
- Powers must be exercised reasonably
- No assistance to the LA to argue that ‘health and safety’ concerns of paid carers prevented them from putting in care without assessment – these concerns would apply equally to the mother providing care

Consideration of needs pending assessment

- Key issue: claimants had provided their own expert evidence setting out that the need existed in October 2019
- These had set out a basis for both what care was sought and why it was needed on an urgent basis
- There was no evidence suggesting that these had been considered in a reasoned decision-making process by the local authority

Consideration of needs pending assessment

- In these cases, the court would look to see whether a *"reasoned decision document...involving the specialist and expert local authority officers conducting a s.19(3) reasoned decision, explaining how they have approached the urgency and the need and the alternatives, and giving the justification as to why their response is the appropriate response."*

Consideration of needs pending assessment

- If none is produced, while it is possible for a decision-maker to make a reasonable decision without such a document

"it will be the harder for the defendant to resist a reasonableness claim, invoking the built-in latitude applicable to it as the primary decision-maker, when it is unable to point to a document in which someone, having the statutory function entrusted by Parliament, grapples with the key questions and reasons out an adverse response."

Consideration of needs pending assessment

- Key points:
 - Discretionary power for the LA to meet needs pending assessment or reassessment
 - Must be exercised reasonably
 - Not reasonable to simply point to old assessment or care plan if there has been some cogent evidence put to the LA that needs have changed or moved on
 - Latitude for decision-maker to use evaluative judgment, but need to show the reasoning and weighing up of evidence – if evidence is rejected, why is it rejected?

Care needed to prevent breaches of human rights

- Certain people are not allowed to support under the Care Act unless it is necessary to prevent a breach of their human rights
- Most typically arises for failed asylum-seekers, but several categories of people fall within this framework
- When is care required to prevent a breach of a person's human rights

Care needed to prevent breaches of human rights

- Articles 3 and 8
- Article 3: people have an absolute right not to be tortured or to be subject to inhuman or degrading treatment
- Article 8: people have a qualified right to private or family lives, but that can be abridged in accordance with the law as is necessary for ‘the economic well-being of the country’

Care needed to prevent breaches of human rights

- Usually – key question is Article 3, but Article 8 questions can't be entirely ruled out
- Very unusual to see an Article 8 breach without an accompanying breach of statutory duty
- *Idolo*: breach of Article 8 very unlikely to be found w/o:
 - A breach of statutory duties relevant to such a breach, or
 - A lack of respect for human rights and/or culpable delay in action to address needs which engage Article 8

Care needed to prevent breaches of human rights

- *Aburas v London Borough of Southwark* [2019] EWHC 2754 (Admin)
- Failed asylum-seeker
- breaches of convention rights are only likely to arise where there is *'an imminent prospect of serious suffering caused or materially aggravated by the refusal.'*
- Mr Aburas was in the process of

Care needed to prevent breaches of human rights

- *Aburas v London Borough of Southwark* [2019] EWHC 2754 (Admin)
- Failed asylum-seeker
- Was seeking accommodation and care from the local authority

Care needed to prevent breaches of human rights

- What are relevant needs for the purposes of the Care Act?
- ‘Looked-after’ needs, in line with pre-Care Act framework

Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list.

Care needed to prevent breaches of human rights

- When is accommodation required under care legislation?
- Accommodation + care can be a way of meeting needs – question is whether accommodation ‘is the necessary and appropriate conduit for the practical and effective delivery of care and support to the relevant looked-after needs’
- Neither accommodation or destitution is, without more, a ‘looked-after need’ – key is ‘solely’ arising out of destitution
- ‘Accommodation-plus’ – the plus being specific actions to address the looked-after need
- Disciplined focus on ‘looked-after need’

Care needed to prevent breaches of human rights

- Human rights framework is not the same as the Care Act eligibility framework
- Local authorities have s.19 Care Act powers to meet non-eligible needs
- *‘Convention rights which relate to ‘looked-after needs’, if not met through the section 18 duty and “eligible needs”, must be secured through the exercise of the section 19 power.’*

Care needed to prevent breaches of human rights

- Could have a situation in which a person had a looked-after need, which, if not met, would result in a breach of human rights, but that this did not fall under the Care Act eligibility framework
- Example: severe need in a single domain, not triggering two domains under eligibility regulations
- *‘Section 19 is read as imposing a duty in such a case in order to secure a Convention rights-compatible interpretation of [Care Act], in accordance with HRA98 section 3.’*

Care needed to prevent breaches of human rights

- What is an Article 3 breach: *'is there an imminent prospect of serious suffering caused or materially aggravated by the refusal?'*

It can be asked, of the relevant 'looked-after need' whether "it appears on a fair and objective assessment of all relevant facts and circumstances that [he] faces an imminent prospect of serious suffering caused or materially aggravated by [the] denial"; whether that denial is of "the most basic necessities of life"; and remembering always that "[m]any factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."

Care needed to prevent breaches of human rights

- If so:
 - Provision of care
 - In some cases, may be able to prevent a breach of human rights by supporting the person to return to their home country:
 - *However, more importantly, any impact on the claimant's Convention rights can be avoided by his returning to Lithuania. The defendant has offered to pay his fare and to support him for a short time while travel and reception arrangements are made. The claimant has no family in the UK and he is in contact with his family in Lithuania. He would receive at least a basic level of welfare and health provision in Lithuania. There is no suggestion that he would be subject to inhuman or degrading treatment in Lithuania.*

Care needed to prevent breaches of human rights

It follows that even if the claimant were to be destitute in the UK, this would be a result of his choice not to return to Lithuania rather than any treatment of him by the defendant. Moreover, any interference with the claimant's right to respect for his private life under article 8 as a result of having to leave the UK is justified in the interests of economic well-being. The defendant has scarce resources and it is entitled to refuse to support the claimant, in circumstances where his connection with the UK is slight and he is entitled to support in Lithuania

R(AR) v London Borough of Hammersmith and Fulham [2018] EWHC 3453 (Admin)

Any questions?

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