

All Change, no change: SEN, the Care Act and the “it makes no difference” defence

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Chair: Fenella Morris QC

Education

- ***LW v Norfolk County Council (SEN)***
- Review jurisdiction
- Procedural flaws
- Worth checking the rules

Education

- ***MA v Borough of Kensington and Chelsea (SEN)***
- Are specialist units attached to mainstream schools, special schools?
- Look at facts
- In this case, no

Education

- ***The Royal Borough of Kensington & Chelsea v CD***
- FTT and non-standard expert evidence
- Poor handling of expert evidence in the FTT

Education

- ***MC v Somerset County Council (SEN)***
- Refusal to assess
- Same wording as 2014 Act
- Refusal upheld

Education

- ***Hammersmith & Fulham LBC v (1) L (2) F (3) O and (4) H v Lancashire CC***
- Costs
- Section 9 (NB section 9 still applies under the 2014 Act)
- Children participating in hearings

Education

- Who assesses, who pays?
- Section 24 2014 Act
- Section 2(4) of the **Education (Areas to which Pupils and Students Belong) Regulations 1996** (which imports the notion of ordinary residence into some SEN cases) expressly states that
- “these regulations do not apply for the purpose of determining which authority’s area a child is in for the purposes of section 321(3) of the **Education Act 1996** and section 24 of the **Children and Families Act 2014**”.

Education

- Disability discrimination
- **X v The Governing Body of a School (SEN) & C v Governing Body of I School (SEN)**
- Not an impairment – tendency to physical abuse
- Even if the consequence of an impairment

Social Care: Accommodation

- **R (SG) (A protected party by her litigation friend the Official Solicitor) v London Borough of Haringey [2015] EWHC 2579:** services must be “accommodation related” and “Accommodation related care and attention” means care and attention of a sort which is normally provided in the home or will be “effectively useless” if the claimant has no home
- Is it right to apply the test from section 21 of the NAA 1948 to the Care Act?

Social Care: Who's responsible?

- **R (Cornwall Council) v Secretary of State for Health and another** [2015] UKSC 46.
- Ordinary residence – residence of the person itself that matters including where person lacks capacity. Consider the quality and duration of residence in any of the competing areas
- Policy of the NAA was that the placing authority should remain responsible; now see Care Act, section 39
- Remember Children Act 1989 – “within their

Social Care: Article 5, ECHR

- **AJ v A Local Authority** [2015] EWCOP 5 – LA must be pro-active in identifying potential DOL and facilitating a challenge
- **Re MN (Adult)** [2015] EWCA Civ 411; **North Yorkshire County Council v MAG** [2015] EWCOP 64 – COP is not a judicial review
- **Birmingham City Council v D and W** [2016] EWCOP 8 – Parental consent to a deprivation of liberty in respect of a 16/17 year old imputable to the state does not suffice as lawful authorisation

Social Care: Back to basics

- Has the authority considered the relevant evidence: **R (Perry Clarke) v London Borough of Sutton** [2015] EWHC 1081 (Admin); **R (MM) v London Borough of Hounslow** [2015] EWHC 3731
- Importance of clear record keeping, communication of decisions and evidence in judicial review: **O.H. v London Borough of Bexley** [2015] EWHC 1843 (Admin)
- Timely decisions: **R (D) (by his litigation friend SA) v Brent Council** [2015] EWHC 3224

It makes no difference....relief

Section 31 of the Senior Courts Act 1981 - in force on 13 April 2015.

“(2A) *The High Court—*

*(a) **must** refuse to grant relief on an application for judicial review, and*

(b) may not make an award under subsection (4) on such an application,

*if it appears to the court to be **highly likely** that the outcome for the applicant would not have been **substantially different** if the conduct complained of had not occurred.*

*Disregard if ‘**exceptional public interest**’*

R (Bokrosova) v Lambeth [2015] EWHC 3386

It makes no difference....permission

Section 31 of the Senior Courts Act 1981 - in force on 13 April 2015.

“(3C) When considering whether to grant leave to make an application for judicial review, the High Court –
*(a) may of its own motion consider whether the outcome for the applicant would have been **substantially different** if the conduct complained of had not occurred, and*
*(b) **must** consider that question if the defendant asks it to do so.*
*(3D) If, on considering that question, it appears to the High Court to be **highly likely** that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.*

*Disregard if ‘**exceptional public interest**’*

Questions?

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