Essex CHAMBERS

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

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SEN: all change, no change

1. Despite the fact that the SEN provisions of the **Children and Families Act 2014** largely came into force in September 2014, 2015 saw decisions in the Upper Tribunal which were principally referable to Part IV of the **Education Act 1996**. That is beginning to change. Nevertheless, it is still worth considering those decisions because the wording of the new provisions mirrors in many respects that of the old statutory provisions. Section 9 of the 1996 Act will also apply to the new provisions (albeit in a more limited way in some cases) and it is worth understanding the latest case law in order to consider how it may be applied in the future.

A. <u>SEN decisions in the last year</u>

2. ***LW v Norfolk County Council (SEN)*** [2015] UKUT 0065 (AAC) is a cautionary tale about the review jurisdiction of the Upper Tribunal and First tier tribunal (“FTT”). The original appeal to the Upper Tribunal included a number of issues including an alleged error of calculation of costs. The Upper Tribunal Judge reviewed the decision (perfectly proper according to the rules) but committed 2 errors: (i) he had a lengthy discussion with the FTT judge about the evidence that was before the panel and concluded (based on what she said) that there was sufficient evidence on some matters; (ii) he was unclear about the outcome of the review process. As a result of the ‘review’ by the Upper Tribunal judge the FTT purported to take the decision again but did so on the basis of incomplete evidence having refused further documents from the appellant. So what is there to learn? Essentially, if the Upper Tribunal purports to conduct a review, scrutinise the rules, get some advice. A lot of time could have been saved in this case if the decisions had been subjected to the requirements of the rules.

3. In ***MA v Borough of Kensington and Chelsea (SEN)*** [2015] UKUT 0186 (AAC) the appeal turned on whether an ASD unit attached to a mainstream primary school should be considered as a separate special school or part of the mainstream primary school. The first –tier tribunal had recorded that the unit had no head or management structure of its own, there was no separate governing body or funding, there was a small allocation from the funds to buy ASD relevant items, there was no separate Ofsted inspection and no separate roll, pupils being on the roll of the primary school. Referrals were made by other schools in the area but were considered by the deputy head who was also the SENCO coordinator and admissions were through primary procedures. The unit could not accept pupils itself. The unit was monitored by the head and deputy head who had to approve performance records, lesson planning etc. The fundamental purpose of the unit was to prepare its pupils for integration into the main primary school. The Upper Tribunal judge considered the nature of a 'school' within the meaning of section 4 of the 1996 Act with reference to the case of ***TB v Essex County Council*** [2013] UKUT 0534 (AAC) and concluded that he could see "no basis for saying that the FTT's conclusion about the nature of [the unit] was wrong in law. It was entitled (and perhaps obliged) to take account of all the facts of which it did take account, and I would be surprised if any reasonable panel of the First-tier Tribunal with appropriate expertise could have reached any other conclusion on the facts of this particular case".

4. ***KC v LB Hammersmith and Fulham (SEN)*** [2015] UKUT 0177 (AAC) the appellant's counsel was arguing for his client to "have her cake and eat it" according to the Upper Tribunal judge. This is a situation which arose a great deal under the 1996 Act and is set to continue given the wording of the 2014 Act. The parents argued for an expensive independent school. The LA wanted to name a maintained special school. In the event that the first parental choice failed, the parents sought to have a mainstream school named so as to trigger section 316 of the 1996 Act which creates a presumption in favour of a mainstream school unless it is (i) incompatible with the wishes of the pupil's parent or (ii) incompatible with the provision of efficient education for other children. The FTT conducted the section 9 test and held that the parent's first choice constituted unreasonable public expenditure and therefore could not be named. The tribunal then claimed it did not have jurisdiction to name the parent's fallback position (mainstream). The Upper Tribunal made clear that the tribunal erred which it considered it did not have jurisdiction to name the parent's second choice of school. Mr Friel argued that the tribunal should have gone on to consider the fallback position school and then compare that school for section 9 purposes against the parent's first choice of school. As the judge put it – "on the one hand she wishes to assert a (fallback) preference for mainstream education so as to defeat under section 316 the authority's proposal of a maintained special school, on the other she wishes to ignore that fallback preference so as to be

able to claim a comparison with her original choice". The judge held section 9 was still live for section 316 purposes in a general sense but did not bite in this case as both the parent and the LA were agreed on the mainstream school required by section 316.

5. ***In The Royal Borough of Kensington & Chelsea v CD (SEN)*** [2015] UKUT 0396 (AAC) the Upper Tribunal judge set aside a decision of the FTT and remitted the case to a differently constituted tribunal because the tribunal had refused to consider and make findings on acoustic evidence because "the contents of the reports had not been agreed and the subject matter of the reports was highly technical". The Upper Tribunal judge made some useful observations on how 'non-standard' expert evidence (i.e. not EP, SALT and OT) could be dealt with prior to a hearing at paras 32 – 37 and if they arose at a hearing at para 30.

6. ***H v A London Borough (SEN)*** [2015] UKUT 0316 (AAC) explores the difference between educational and non-educational provision in the context of provision to address a pupil's harmful sexual behaviour. It very much turns on its own facts but is a useful place to look for the correct test when considering the question of whether something is educational provision and should be in Part 3.

7. ***Cambridgeshire County Council v SF (SEN)*** [2015] UKUT 0231 (AAC) is largely a reasons challenge which turns on its own facts but it is useful reading for LAs on the following issues: transition plans; role of TAs; suitability of the parental choice of school.

8. ***MC v Somerset County Council (SEN)*** [2015] UKUT 0461 (AAC) is a case under the 1996 Act in relation to a refusal to assess. It is worth keeping as a reference as the wording is materially the same in the 2014 Act and the refusal to assess was upheld in both the FTT and the Upper Tribunal.

9. ***GO and HO v Barnsley MBC (SEN)*** [2015] UKUT 0184 (AAC) contains a successful reasons challenge but is of more interest because of the finding that the FTT was unlawfully constituted. The case started with a three person panel but after it was adjourned, the panel was made of the same judge and one side member but a different side member took the place of the original panel member so that 4 people heard the evidence in the case. The judge relied on ***MB and others v SSWP (ESA and DLA)*** [2013] UKUT 111 (AAC).

10. ***Hammersmith & Fulham LBC v (1) L (2) F (3) O and (4) H v Lancashire CC*** [2015] UKUT 0523 dealt with the question of which costs should be included for the purposes of the section 9 balancing

test. It remains useful as section 9 applies to the 2014 Act[1] and it contains a helpful summary of all the relevant case law, including that relevant to the test of 'efficient use of resources' which is in the 2014 Act. The judge set out a helpful summary of his findings as follows:

- Generally, a comparative cost analysis of an independent school and a special school, for the purposes of section 9 of the Education Act 1996 (EA 1996), is to proceed on the basis that, where the special school has a vacancy, its place funding is not to be treated as an additional cost. The same approach is to be taken when comparing the costs of an independent school with a maintained school with SEN-reserved places (a specialist unit). In both cases, AWPU-funding (Age-Weighted Pupil Unit) is irrelevant (there is no AWPU). But, in line with the Court of Appeal's decisions in Oxfordshire and Kent, local authority 'top-up' funding for the child's placement is an additional cost to be taken into account.

- Where the choice is between an independent school and a maintained mainstream school without reserved places, the AWPU normally represents an additional cost for the purposes of section 9, in accordance with Kent. Further, any additional funding required in order to meet the child's needs is to be taken into account as required by both Kent and Oxfordshire.

The judgment also contains interesting dicta on the need for children to be able to participate in FTT hearings should they wish to. The judge recommends that the FTT consider 'the wisdom of hearing SEN and school related disability discrimination cases in venues whose characteristics, such as formality, are likely materially to inhibit the participation of a child who wishes to give evidence and/or address the tribunal.

B. <u>Talking points – new SEN regime</u>

[1] The definition of "the Education Acts" in section 578 of the EA 1996 has been amended to include Part 3 of the 2014 Act. That Part is now one of the Education Acts and so the exercise of powers and duties under Part 3 of the 2014 Act must have regard to the general principle in favour of parental preference expressed in section 9 EA 1996. As the judge notes in the case however, in practice, however, section 9 may become less significant in school naming disputes because the statutory right to request a school, and the linked qualified duty to accede to a request, has been widened, as compared with Schedule 27 EA 1996, to include non-maintained special schools and certain independent special schools (section 39(4) of the 2014 Act).

Local offer

11. **R (LP) v Warwickshire** [2015] EWHC 203 (Admin) highlights how much information is needed from a local authority when publishing the local offer. The High Court judge refused relief despite the local offer not being complete.

Who pays for education post 19? The difference between ordinary residence and 'in the area' of a LA

12. Section 24 of the 2014 Act provides:

> "**24 When a local authority is responsible for a child or young person**
>
> (1) A local authority in England is responsible for a child or young person if he or she is in the authority's area and has been:
>
> (a) identified by the authority as someone who has or may have special educational needs, or
>
> (b) brought to the authority's attention by any person as someone who has or may have special educational needs.
>
> (2) This section applies for the purposes of this Part".

13. Section 36 of the 2014 Act provides:

> "**36 Assessment of education, health and care needs**
>
> (1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.
>
> (2) An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person.
>
> (3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan […]".

14. The plain meaning of the words 'in the authority's area' is that the young person will be living in the authority's area [2] whether or not they have been placed there by another authority.

15. Paragraph 6 of the recent Supreme Court judgement, **R (on the application of Cornwall Council) v Secretary of State for Health** [2015] UKSC 46 makes a distinction between a duty[3] based on 'the authority in whose area the child happens to be' as opposed to the notion of 'ordinary residence' which can be a more complex concept to assess. Part 3 of the 2014 Act makes no reference to ordinary residence (unlike other statutes). Instead it states clearly that the responsible authority is the one where the young person lives.

16. The **SEND Code of Practice** (January 2015) envisages a case (para. 10.8) in which a looked after child is placed in the area of another local authority with foster carers or in a children's home. The guidance states:

> "Local authorities who place looked after children in another authority need to be aware of that authority's Local Offer if the children have SEN. Where an assessment for an EHC plan has been triggered, the authority that carries out the assessment is determined by Section 24 of the Children and Families Act 2014. This means that the assessment **must** be carried out by the authority where the child lives (i.e. is ordinarily resident), which may not be the same as the authority that looks after the child".

17. Whilst the insertion of "i.e. ordinarily resident" in brackets is unhelpful[4], the paragraph states that the trigger for assessment is where the child (in this case young person) actually lives rather than the authority that is responsible for his care.

18. Further, 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**".

19. Note also that there appears to be a gap in the current recoupment regulations which make provision for recoupment for a looked after child placed by one authority in another authority's

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[2] See the case law on the analogous phrase 'within its area' in section 17 of the Children Act 1989 – **R (AM) v Havering LBC** [2015] EWHC 1004 (Admin); **R (J) v Worcestershire CC** [2014] EWCA Civ 1518

[3] The judge is referring to wording in **The Children Act 1989** – 'for any child in need within their area'.

[4] As a child placed in accommodation under section 20 of the **Children Act 1989** remains ordinarily resident in the placing authority.

area but not for a looked after young person: see Regulation 5 of the **Inter-authority Recoupment (England) Regulations 2013/492.**

C. Disability discrimination in schools

20. There were 2 important decisions in 2015 in relation to disability discrimination cases in schools: **X v The Governing Body of a School (SEN)** [2015] UKUT 7 (AAC) and **C v Governing Body of I School (SEN**) [2015] UKUT 0217.

21. Both cases centred on regulation 4(1) of the **Equality Act 2010 (Disability) Regulations 2010** which provides:

> "For the purposes of the Act the following conditions are to be treated as not amounting to impairments:
>
> (a) a tendency to set fires;
>
> (b) a tendency to steal;
>
> (c) a tendency to physical or sexual abuse of other persons;
>
> (d) exhibitionism; and
>
> (e) voyeurism."

22. In **X** the 3 judge Upper Tribunal held:

   a. that regulation 4(1) did apply to children;

   b. that it applied where the conditions specified therein arose in consequence of an impairment that was already protected under the provisions of section 6 of the 2010 Act;

   c. that a tribunal must approach the question of whether a person had 'a tendency to physical…abuse of other persons' by reaching conclusions on the evidence, and then explaining why the undisputed facts and those it had found led to its conclusion, having taken into account all the circumstances of the case. The judges set out detailed guidance at ¶¶ 114 – 121;

d. the FTT had erred in law as it had failed to consider what 'physical abuse' within 'tendency to physical abuse' might mean rather than focusing on the 'tendency'.

e. The decision of the FTT was set aside but the UT re-made it to the same effect.

23. This decision is highly material in permanent exclusion cases where a child has been excluded for violent behaviour. The case makes clear that even if the violent behaviour is as a result of an underlying disability (e.g. autism, ADHD etc) the child will still lose the protection of the 2010 Act if they are excluded for a tendency to physical abuse.

24. The **C** case was decided shortly after **X** and counsel were invited after the close of the appeal to make submissions on the effect of **X**.

25. Two interesting issues arise in **C:** (i) whether it was possible to argue that a failure to make reasonable adjustments directly led to the exclusion and was therefore a discriminatory exclusion and (ii) the question of when a 'tendency' to physical abuse arose.

26. The answer to (i) was held to be no with lengthy reasoning at ¶¶28 – 32.7.

27. The answer to (ii) looked at the guidelines set out in the **X** case and made clear that the **X** case decided on its facts what constituted 'sufficient' behaviour to fall within the definition of a tendency to physical abuse. The case did not decide what was 'necessary' in order to meet the threshold.

D. Transferring to off-site educational provision

28. Section 29A(1) **Education Act 2002** is a little known provision which provides:

> "29A Power of governing body in England: educational provision for improving behaviour
> (1) The governing body of a maintained school in England may require any registered pupil to attend at any place outside the school premises for the purpose of receiving educational provision which is intended to improve the behaviour of the pupil.
> (2) In subsection (1) "maintained school" does not include a maintained nursery school.
> (3) Regulations must make provision:

(a) requiring prescribed persons to be given prescribed information relating to the imposition of any requirement under subsection (1), and

(b) requiring the governing body of the school to keep under review the imposition of any such requirement.

(4) Regulations under this section may also make provision:

(a) requiring a governing body exercising functions under subsection (1) or under the regulations to have regard to any guidance given from time to time by the Secretary of State,

(b) prohibiting a governing body from exercising the power conferred by subsection (1) in such a way that any pupil is required to receive educational provision outside the school premises for a greater number of days in a school year than is specified in the regulations,

(c) requiring the governing body to request prescribed persons to participate in any review of the imposition of a requirement under subsection (1),

(d) about the time within which the first review must be held and the intervals at which subsequent reviews must be held, and

(e) in relation to any other matter relating to the exercise of the power conferred by subsection".

29. The section is supplemented by the **Education (Educational Provision for Improving Behaviour) Regulations 2010.**

30. In **R (HA) by his father and litigation friend, AA) v The Governing Body of Hampstead School** [2016] EWHC 278 (Admin) the High Court held that while section 29A says that the power lies with the governing body, the headteacher can exercise the power under delegated authority. Despite holding for the school on the improper delegation ground of appeal, the claim succeeded because the school had breached notification provisions under the Regulations and failed to conduct a review as required by the Regulations.

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31. **R (SG) (A protected party by her litigation friend the Official Solicitor) v London Borough of Haringey** [2015] EWHC 2579 (Admin) appears to be the first reported decision of a refusal to provide accommodation under the Care Act. The claimant sought judicial review of the

defendant's decision to refuse to accommodate her pursuant to section 21 of the National Assistance Act 1948 and a subsequent decision that she was not eligible for care and support under the Care Act 2014, except to a limited extent, and in particular that she was not entitled to accommodation under the Care Act.

32. The claimant was an Afghan asylum seeker. She was provided with asylum support, including accommodation, pursuant to section 95 of the Immigration and Asylum Act 1999. She was a victim of torture, rape and emotional and physical abuse and suffered from severe mental health problems including complex PTSD, insomnia, depression and anxiety. She struggled with basic tasks including self-care, preparing and eating food, managing simple tasks and taking her medication.

33. The judge considered that the challenge to the decision under the NAA 1948 had become academic and so said little about the application of those provisions to the claimant's case.

34. Turning to the Care Act, the judge accepted that the claimant's first ground of challenge which was that the assessment was unlawful because the local authority had failed to arrange for an independent advocate to be available to represent and support the claimant (paragraphs 38 – 40 of the judgment). The judge appears to have been unimpressed by a submission that due to the novelty of the Care Act demand for such services outstripped supply. While the judge accepted that there would be cases in which it could be said that it was unlikely that the presence of an advocate would have made much difference, this was a paradigm case in which an advocate was required. As a result, the assessment would have to be quashed and redone. The judge was also somewhat concerned at a lack of formal consultation with the claimant's GP (see paragraphs 42 – 43) although the finding in relation to this is not very clear.

35. However, the bulk of the judgment is devoted to the claimant's argument that, under the Care Act, it would be irrational to reach any conclusion other than that the authority was obliged to provide accommodation under the Act.

36. Under the previous regime governed by section 21 of the National Assistance Act 1948 as applied in **R (M) v Slough** [2008] UKHL 52 and **R (SL) v Westminster City Council** [2013] UKSC 27, the test to be applied was (i) whether the person needs care and attention; (ii) whether the need arises by, amongst other things, disability; (iii) whether the needed care and attention is not available otherwise. That was then subject to the restriction that a person without immigration status could not be provided with accommodation if the need for care and attention had arisen solely because of destitution or the physical effects or anticipated physical effects of destitution.

37. There is no statutory language akin to that of section 21 of the National Assistance Act 1948 in the Care Act. Section 8 simply provides:

"(1)The following are examples of what may be provided to meet needs under sections 18 to 20—

(a)accommodation in a care home or in premises of some other type;

(b)care and support at home or in the community;

(c)counselling and other types of social work;

(d)goods and facilities;

(e)information, advice and advocacy."

38. Section 18 provides:

(1)A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—

(a)the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

(b)the adult's accrued costs do not exceed the cap on care costs, and

(c)there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met.

39. Nonetheless, the Judge considered that essentially the same principles would apply under the Care Act and, in particular that the following familiar propositions continued to apply (paragraph 47 of the judgment):

- The services provided by the council must be accommodation-related for there to be potentially a duty to provide accommodation

- In most cases the matter is best left to the good judgment and common sense of the local authority

- "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

40. It is not obvious, though, that reference to the case-law under the previous regime should be treated as being of particular assistance in relation to this issue. There is nothing in the language of the Care Act 2014 or the associated regulations that harks back to the language of section 21.

41. The claimant referred to the general duty to promote the well-being of the individual in exercising any function under the Act under section 1 of the Care Act 2014, noting that well-being includes the suitability of living accommodation. The judge did not consider that that took the claimant very far because "the general duty is worked out in many particular respects and most of them…when properly understood, accord a large measure of discretion to the local authority."

42. The Judge accepted that the local authority had not asked the right questions in conducting its assessment because it had neither asked itself expressly whether it was under a duty to provide accommodation or whether the services it had agreed to provide would effectively be useless without the provision of accommodation. But the Judge rejected the claimant's case that there was only one rational answer on the facts and that it was that the claimant must be provided with accommodation. The Judge considered the services on which the claimant relied to be as follows. The claimant was:

(a) Provided with assistance from her care coordinator on a regular basis, designed to improve her resilience

(b) Provided with assistance by her care coordinator in learning by rote certain journeys to and from her home

(c) Accompanied to appointments when she did not known the journey

(d) Visited at home by her care coordinator and her home environment checked

(e) Given nutritional and shopping advice by her care coordinator

(f) Assisted by a local shopkeeper with using money in the shop

(g) Given counselling and practical support and advice by Freedom from Torture

(h) Received assistance with general matters, including arranging and attending appointments, booking translators, learning English

(i) Assisted with domestic and practical tasks in the home by other women who lived there and her care coordinator

(j) Taken to a day centre by other women in the house

43. The judge did not consider that any of these forms of support other than (d) and (i) were truly accommodation related and in any event considered that it would be within the discretion of the local authority to conclude that it was not appropriate to meet these needs through the provision of accommodation.

44. In **R (Cornwall Council) v Secretary of State for Health and another** [2015] UKSC 46, the Supreme Court took on the vexed issue of ordinary residence and favoured a solution for which the parties had not contended.

45. P had multiple disabilities and lacked mental capacity. He was cared for by his parents until 1991, when Wiltshire Council placed him with long-term foster carers in South Gloucestershire. P's parents moved to Cornwall later that year. P continued to live in South Gloucestershire until he reached the age of 18 though he would visit his parents in Cornwall from time to time. Thereafter, a placement was found for him in Somerset. Wiltshire, South Gloucestershire and Cornwall asked the Secretary of State to determine where he had been ordinarily resident for the purposes of section 24(1) of the National Assistance Act 1948 when he had reached the age of 18. The Secretary of State determined that he was ordinarily resident in Cornwall, where his parents still lived. That was on the basis that he totally dependent on his parents and lacked capacity voluntarily to adopt an ordinary residence of his own. That decision was challenged by way of judicial review. The Court of Appeal considered that he was ordinarily residence in South Gloucestershire.

46. By a 4:1 majority, the Supreme Court decided that he was ordinarily resident in Wiltshire. Where a person did not have mental capacity to decide his place of ordinary residence for himself, it was not appropriate to establish his ordinary residence by reference to his "base" by reference to the ordinary residence of his parents or other decision makers. The residence of the person themselves was what mattered. The proper approach was to assess the duration and quality of the person's actual residence in any of the candidate areas in which he had lived.

47. The Supreme Court further held that the policy of the Children Act 1989 and the National Assistance Act 1948 was to leave the ordinary residence of a person provided with an accommodation by a local authority unaffected by the particular placement, in order to prevent one authority from essentially exporting its financial burden to another. On the facts, this meant that Wiltshire was the responsible authority: when it had placed him South Gloucestershire, this had not affected his ordinary residence.

48. The Care Act continues to use the concept of ordinary residence. Section 39 of the Care Act 2014 makes more detailed provision about the determination of responsibility in situations where a person may have been placed in specified types of care accommodation outside the area in which they are ordinarily resident. Section 39 provides:

(1)Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident—

(a)in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or

(b)if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.

(2)Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not of the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.

(3)The regulations may make provision for determining for the purposes of subsection (1) whether an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in the regulations.

(4)An adult who is being provided with accommodation under section 117 of the Mental Health Act 1983 (after-care) is to be treated for the purposes of this Part as ordinarily resident in the area of the local authority in England or the local authority in Wales on which the duty to provide the adult with services under that section is imposed; and for that purpose—

(a)“local authority in England” means a local authority for the purposes of this Part, and

(b)“local authority in Wales” means a local authority for the purposes of the Social Services and Well-being (Wales) Act 2014.

(5)An adult who is being provided with NHS accommodation is to be treated for the purposes of this Part as ordinarily resident—

(a)in the area in which the adult was ordinarily resident immediately before the accommodation was provided, or

(b)if the adult was of no settled residence immediately before the accommodation was provided, in the area in which the adult was present at that time.

(6)“NHS accommodation” means accommodation under—

(a)the National Health Service Act 2006,

(b)the National Health Service (Wales) Act 2006,

(c)the National Health Service (Scotland) Act 1978, or

(d)Article 5(1) of the Health and Personal Social Services (Northern Ireland) Order 1972.

(7)The reference in subsection (1) to this Part does not include a reference to section 28 (independent personal budget).

(8)Schedule 1 (which makes provision about cross-border placements to and from Wales, Scotland or Northern Ireland) has effect.

49. Under the **Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014**, the specified accommodation comprises care home accommodation, shared lives scheme accommodation and supported living accommodation but only if the care and support needs of the adult are being met while the adult lives in that type of accommodation.

50. The Department of Health does not yet appear to have published updated guidance on ordinary residence in light of the decision in this but a note of October 2015 indicates that such guidance will be forthcoming.

51. In **R (D) (by his litigation friend SA) v Brent Council** [2015] EWHC 3224 (Admin), the claimant was a vulnerable 23 year old with autistic spectrum disorder and severe communication difficulties. Until the end of July 2015 he attended an independent residential special school in Brighton. He then returned to the care of his mother. In May 2015, Brent Council assessed the claimant as having a need for suitable care and accommodation in Brent to be identified by July 2015. The

assessment concluded that he would best be supported in a structured, supported setting similar to the residential school he had attended. No arrangements had been identified by the time he returned home. A number of referrals were made. The claimant sought a placement at the London Care Partnership. The defendant did not rule out a placement there but was seeking alternative providers and considered that supported living was also a possibility.

52. The claimant contended that the local authority had been under a duty to make a decision regarding the most suitable way of meeting the claimant's assessed needs by no later than when the claimant finished his time at school (July 2015). The defendant accepted that it was under a general public law duty to make a decision within a reasonable period of time but what that time was would depend on all the circumstances of the case. There remained an alternative to LCP to be explored, CMG which might be both cheaper than LCP and more suited to the claimant. The claimant's mother was reluctant to allow assessment at CMG and considered that it had been advanced at far too late a stage.

53. The Judge did not accept the claimant's argument that there was a "final deadline" for a decision to be taken at the end of July 2015 or shortly thereafter. The defendant was entitled to pursue the option of supported living even after that time. IT would have been advisable for the defendant to have identified more providers as possible options in June or July but the failure to do so had not been unreasonable in the public law sense. Responsibility for the delay had, at different times, fallen on the defendant, third parties and the claimant's mother.

54. **R (Perry Clarke) v London Borough of Sutton** [2015] EWHC 1081 (Admin), is an example of a successful challenge to the assessment of the claimant's needs. The claimant was a young man who suffered from severe epilepsy and had a number of mental health and behavioural difficulties. The London Borough of Enfield had provided him with supported living at a specialist epileptic placement. In 2013, he became ordinarily resident in the London Borough of Sutton. Following a re-assessment of his needs, Sutton decided that he no longer needed a specialist placement. Sutton was provided with medical evidence from the consultant neurologist responsible for the claimant's treatment which supported placement in a setting that could provide support 24 hours, 7 days a week if needed and an epilepsy nurse specialist from the placement who noted that his seizure activity was unpredictable and he had nocturnal seizures. Sutton appears to have relied on the assessment of its social worker but did not commission its own medical evidence. The support plan was updated in response to correspondence from the medical professionals involved but without further consultation with the claimant. Amongst other things, the support plan provided for three nights of waking night support per month on the basis

that the claimant was anticipated to have up to three nocturnal seizures per month although it seems to have been explained that this meant a payment that would be made to a member of staff who would otherwise be asleep in the event of their being woken. However, the claimant's seizure activity was unpredictable and the medical evidence was to the effect that such an arrangement would provide insufficient time for provision of the claimant's medication in the event of a nocturnal seizure.

55. The Court acknowledged that, applying **R (Ireneschild) v London Borough of Lambeth** [2007] EWCA Civ 234, the claimant had a heavy burden to establish that an assessment was unlawful. Nonetheless, having regard to the fact that this was a case in which the claimant was seeking the continuance of services he had received and where his needs had not decreased, and to the medical evidence, the Court considered that the threshold had been met and Sutton's decision was quashed. The Court also considered that Sutton's proposal would have resulted in an unlawful interference with the claimant's right to private and family life under Article 8, ECHR, having regard to the fact that the specialist placement was the claimant's home where he had had a tenancy for 4 years and in the absence of satisfactory evidence that an appropriate alternative was on offer.

56. In **O.H. v London Borough of Bexley** [2015] EWHC 1843 (Admin), O successfully challenged a local authority's review of his needs following the end of his time at a residential special school. The factual background to the case is somewhat involved and of little general application. The Judge was critical of the local authority for having failed to carry out its duties to assess and review the claimant's care package in a manner that was clear and transparent. On the basis of the documents before him, the Judge rejected the local authority's account of the assessment process it claimed to have followed and found that it had failed to review the claimant and supply a revised support plan for him; failed to give reasons for a reduction in his care; and failed to take reasonable steps to reach agreement as to his care. It is of course difficult to know from reading the judgment without seeing the underlying documents whether the various criticisms were warranted but the case underscores the importance of maintaining a clear document trail of what has been proposed, assessed and agreed.

57. **R (MM) v London Borough of Hounslow** [2015] EWHC 3731 (Admin) also deals with a claim that the local authority failed to produce a lawful assessment of an autistic 15 year old's needs and to the extent that the assessment lawfully identified his needs and those of his mother as his carer, it was alleged that the local authority failed to make adequate provision for how those needs were to be met.

58. Local authorities are under a duty to "take reasonable steps to identify the extent to which there are children in need within their area" (see para 1(1) of Schedule 2 to the **Children Act 1989**). The judge cited the **Ireneschild** case cited above as authority that judges should not subject such assessments to an over-zealous textual analysis.

59. The February 2015 assessment under challenge was described by the judge as a comprehensive document which had taken a great deal of effort and concluded that the various claims against the lawfulness of the assessment were not made out. A key element of the challenge was the claim that the assessment unjustifiably concluded that MM's mother had exaggerated MM's needs for the purposes of the assessment. That was rejected. The local authority had reached that conclusion in part by comparing the account given by MM's mother of his needs to the SENDIST in connection with an appeal about his school place (which was dismissed; and MM thereafter decided to teach him at home) and in part by comparing MM's mother's account with what it's professionals had witnessed of MM. The Judge, accepting that there were discrepancies in the account given and in what had been witnessed, considered that the local authority's conclusion as to MM's needs was one that was reasonably open to it. The Judge also accepted that, in considering the amount of support that MM needed, the local authority was entitled to have regard to the fact that its professionals recommended that he should be attending school, and that MM refused for him to attend. The local authority was entitled to have regard to the fact that, if MM's mother sent him to school, she would not have to spend as much of her own time as she did in caring for him.

60. A further issue that arose concerned the creation of a care plan. The local authority had not produced a care plan for MM. The local authority maintained that this was because MM's mother would not cooperate in the preparation of the plan; she had indicated that she disagreed with the assessment, was taking legal action to challenge it and wanted any paperwork to be provided to her solicitors. The Judge did not characterise MM's mother's behaviour as non-cooperative but agreed that there was no need to produce a care plan in circumstances where the assessment may have been quashed. However, the Judge also considered that the local authority's resource allocation panel could not properly have determined the number of hours support that MM needed before a detailed care plan had been provided to it; and so the resource allocation panel would need to give a further consideration to that question once a care plan was produced after the claim for judicial review had been dismissed. A challenge to the eligibility criteria that the resource allocation panel applied failed but it is important to note that this was in part because those criteria were stated to be guidelines only and not prescriptive.

61. In **R (Walford) v Worcestershire County Council** [2015] EWCA Civ 22, a divided Court of Appeal considered the circumstances in which the value of a house is to be disregarded in calculating liability to pay for care on the basis that a relative occupied it as their home under paragraph 2(1)(b) of Schedule 4 to the National Assistance (Assessment of Resources) Regulations 1992. The claimant rented a flat in London, where she was registered to vote and pay council tax. Her mother lived in Worcestershire. The claimant maintained a bedroom and a downstairs office at her mother's home and since her father's death in 1983 she had been completely responsible for maintaining the house and garden. In 2006, her mother entered long-term residential care at a care home managed by the defendant. The claimant asked the authority to disregard her mother's house on the basis that the claimant occupied it as her home. The authority ultimately refused to do so on the basis that she had not been a permanent resident at the house at the time that her mother had been assessed and admitted into care. A divided Court of Appeal held that the authority had been right not to disregard the home. The majority considered that the purpose of the disregard provided for by paragraph 2(1)(b) was to protect certain family members from the risk of losing their home in the event that it was taken into account as part of the assessment and then had to be sold to pay for care. The disregard therefore applied only if the relevant family member was in occupation of the property at the time the resident first went into care. The fact that they might move into the property thereafter would not require the authority on a review of its assessment from time to time to apply the disregard to the property at a later stage. McCombe LJ dissented, considering that the interpretation supported by the majority was inconsistent with the statutory language.

62. Under the Care Act 2014 and the associated regulations, a mandatory disregard will apply only where the property has been continuously occupied since before the person went into a care home. There is a discretionary power to disregard property in other circumstances, Annex B of the Care Act guidance providing:

63. A local authority may also use its discretion to apply a property disregard in other circumstances. However, the local authority will need to balance this discretion with ensuring a person's assets are not maintained at public expense. An example where it may be appropriate to apply the disregard is where it is the sole residence of someone who has given up their own home in order to care for the person who is now in a care home or is perhaps the elderly companion of the person.

64. In **NA v Nottinghamshire County Council** [2015] EWCA Civ 1139, a local authority faced a claim for negligence in relation to the exercise of its powers in placing the claimant in foster care with

two different couples. The claimant faced physical abuse by one member of one couple and sexual abuse from one member of the other. The events occurred between 1985 – 1988 and the Court of Appeal emphasised that it was concerned with where matters stood under the legislative framework in place at the relevant time and might not necessarily be the same under the present framework. Nonetheless, the case may be of some significance in view of the attention now focussed on cases of historic abuse.

65. The local authority had succeeded in obtaining summary judgment against a claim that the local authority and its social workers had failed to exercise reasonable care in selecting or supervising the foster parents The claimant argued that the defendant local authority was liable either because it was vicariously liable for the torts of the foster carers or because it owed her a non-delegable duty of care to ensure that she was protected from harm. The judge rejected both arguments at first instance and the Court of Appeal upheld his decision. A key point was that under the arrangements then in place the local authority had no day to day control over the way in which the foster parents provided care for the child, which was a matter for the foster parents. The Court considered that micro-management of the day to day family life of foster children or of their foster parents in the manner in which they create the day to day family environment would be inimical to the purpose of fostering in creating a day to day family environment; and therefore there was not a sufficient degree of control for vicarious liability. As to the issue of a non-delegable duty, the Judge considered that it would not be fair, just and reasonable to impose a duty of care for a number of reasons including the possibility that the child would have a claim against the foster carer; the risk of an unreasonable financial burden on local authorities if compensation for historic cases took money from current resources; that imposition of a non-delegable duty may encourage "risk averse" foster parenting; the lack of control over day to day life that a local authority has in relation to a foster placement; it would be difficult to draw a line between liability for abuse committed by foster parents and abuse committed by natural parents with whom a child was allowed to live. Each of the justices had slightly different approaches to rejecting the non-delegable duty of care. Tomlinson LJ rejected the argument on the basis that there had been no delegation by the local authority of a positive duty which the local authority itself assumed; the local authority did not assume a duty to provide family life as such and had not delegated that duty. The local authority had not delegated to the foster parents its duty to keep the children safe from harm; that duty it had continued to exercise through taking reasonable care in the selection and supervision of foster parents. Burnett LJ expressed support for the view that it would not be fair just and reasonable to impose a non-delegable duty of care but also considered that a non-delegable duty should not apply in relation to deliberately inflicted harm. Black LJ focussed on the

risk that imposing a non-delegable duty of care would be unreasonably burdensome for local authorities and, potentially, contrary to the interests of the children whom they have in care. There would be a risk of local authorities having to challenge even more resources into attempting to ensure nothing went wrong or insuring against risk as well as of defensive practices developing.

66. In **Menon and others v Herefordshire Council** [2015] EWHC 2165, the Court considered an interesting question as to disclosure in the context of a claim for misfeasance in public office arising out of actions taken by employees of Herefordshire Council in connection with the running of Rosedale Residential Home. The claimants were the shareholders of the company that operated Rosedale. Herefordshire had concerns about the quality of care being provided at Rosedale and stopped placing its service users there, without telling the claimants. Following the arrest of the claimants, Herefordshire took steps to remove individuals who had been placed there to other care homes. The claimant argued that the actions were unlawful and amounted to misfeasance in public office. There was a factual dispute as to whether the Defendant had removed residents or provided them with information about what had happened and the residents had then decided to take up residence elsewhere. The claimants' application for summary judgment failed.

67. The claimants sought an order requiring the local authority to disclose all documents showing and/or relating to the legal advice given by the local authority about the legality of what its employers/agents did in relation to Rosedale. The question whether that advice was privileged would turn on whether or not the individuals in receipt of it were in a lawyer-client relationship. The claimants argued, by analogy with the decision of the Court of Appeal in Three Rivers District Council v Bank of England (No 5) (2003) Q.B. 1556, that legal advice privilege applied only to confidential communications between persons personally charged by the local authority with the decision-making powers in question and the defendant's lawyers, but not communications between other employees and the defendant's lawyers.

68. The local authority submitted evidence to the effect that it had an in-house legal department providing legal advice to all officers and staff working for and on behalf of it, on all matters as and when necessary, pursuant to the work they were carrying for and on behalf of the local authority. All members of staff were entitled to use the services of that department. Lewis J held that the employees in question were clients for the purposes of legal advice privilege. He rejected a further argument from the claimants that the Court should fashion an exception to legal advice privilege where the documents related to advice as to what an employee could or could not do in the context of a claim for misfeasance in public office. The claimants also sought an order for permission to rely on legally privileged material that had inadvertently come into their hands

through a failure to redact certain documents that were adduced in evidence before the FTT (in which the defendant was not a party). The judge rejected that application.

Article 5: Deprivation of Liberty

69. It is increasingly important for social care practitioners to have in mind the issues that arise where a person's care plan will involve a deprivation of liberty

70. First, local authorities have a duty to be pro-active in enabling a person to challenge a deprivation of liberty. **AJ v A Local Authority** [2015] EWCOP 5 is a good example of this. AJ was an 88 year old woman who suffered from vascular dementia. She was moved to a care home two days before her niece and nephew, with whom she had resided for over a decade, went on holiday for two weeks. Although this was notionally a respite placement, both her niece and the social worker had it in mind that if she settled she could remain at the care home on a permanent basis. AJ did not want to go or remain at the care home. Her niece had said as much to the social worker some three weeks before she was admitted. Despite this, no application was made for a standard authorisation prior to her arrival. An urgent authorisation was granted a day after her arrival. AJ's nephew was appointed as her relevant person's representative, despite the fact that he and his wife were clear that she could not return to live with them and that they believed it was in her best interests to remain at the care home.

71. AJ was subsequently moved to another care home. She was clear that she did not want to be there. An IMCA was appointed but they were under the impression that their organisation did not allow them to act as litigation friends and, besides, the IMCA was very busy. It was not until five months after the move of care home that he was able to contact AJ's nephew. It was not until several months after the move that a challenge was brought under section 21A of the MCA 2005. By that time, her condition had deteriorated and it was no longer considered possible for her to return home.

72. Baker J identified a number of failures:

- AJ's nephew should not have been appointed as her RPR in circumstances where it was clear that he was either unwilling or unable to represent or support AJ. The local authority should not rubber stamp the RPR proposed by the best interests assessment but must satisfy itself that the individual proposed will meet the criteria set out in regulation 3 of the Mental

Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 and the requirements of paragraph 140 of Schedule A1 of the Mental Capacity Act 2005. Care will be needed where the proposed RPR is a person who has been actively involved in arranging a move involving a deprivation of liberty and strongly supports the placement lest they should be unable properly to represent the individual as a consequence

- The IMCA had failed to act timeously to establish whether the RPR was going to challenge the deprivation of liberty and to take steps to initiate a challenge himself

- The appointment of an RPR and an IMCA does not absolve the local authority of its own duty to ensure that P's rights under Article 5, ECHR are respected. That may require the local authority itself to issue proceedings to enable a deprivation of liberty to be reviewed by the Court. The local authority must make sufficient resources available to assist an IMCA and ensure that reasonable steps are being taken to pursue P's Article 5 rights.

73. As a consequence of these failures, it was found that there had been an unlawful deprivation of liberty under Article 5, ECHR and a declaration was made that the local authority had failed to take adequate steps to ensure that AJ's challenge to the deprivation of her liberty was brought before the Court expeditiously.

74. Baker J emphasised that, ordinarily, a standard authorisation should be obtained before the deprivation of liberty begin. Only in truly urgent cases would it be appropriate not to seek a standard authorisation (or authorisation from the Court) in advance. He also warned that local authorities should avoid admitting people to residential care for "respite" when in fact the intention is that the move should be permanent, without making sure that there is a proper consideration of their rights under Article 5, ECHR.

75. Second, it is important for practitioners to be aware of the limits on the proper role of the Court of Protection. The Court of Protection exists to take decisions on behalf of a person who cannot do so themselves. The Court can only choose amongst the options that would have been open to that person. This was affirmed by the Court of Appeal in **Re MN (Adult)** [2015] EWCA Civ 411. Munby P said:

> 24 It follows, in my judgment, that in each case the correct approach was adopted by Charles J in In re S (Vulnerable Adult) [2007] 2 FLR 1095 , para 11: "He would have to choose between what was practically available and thus what was on offer" and in A Local Authority v PB [2011]

COPLR Con Vol 166 , para 22: “in exercising a welfare or best interests jurisdiction (to my mind, whether under the Children Act 1989 , under the inherent jurisdiction, or under the Mental Capacity Act 2005), the court is choosing between available options”, and by Bodey J in In re SK [2012] COPLR 712 , para 20: “where the only candidates for funding are the statutory authorities, the Court of Protection (being unable to take a judicial review type approach), is largely restricted to the option(s) which the two statutory authorities put forward”, and again in In re SK (Impact of Best Interests Decision on Queen's Bench Proceedings) [2013] COPLR 458 , para 10: “currently available or reasonably foreseeable options.” As the deputy judge said in R (Chatting) v Viridian Housing [2013] LGR 118 , para 99, “the fact that Miss Chatting is mentally incapacitated does not import the test of ‘what is in her best interests?’ as the yardstick by which all care decisions are to be made”.

76. The Court should not allow itself to impose improper pressure on a public body with regard to how a statutory function is to be exercised. However:

“36 In an appropriate case the court can and must “be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking”: see In re B-S (Children) (Adoption Order: Leave to Oppose) [2014] 1 WLR 563 , para 29. Rigorous probing, searching questions and persuasion are permissible; pressure is not.”

77. MN was considered by Cobb J. in **North Yorkshire County Council v MAG** [2015] EWCOP 64, in which he allowed an appeal against a decision of the Court of Protection that MN did not apply in cases where the issue was the right to liberty under Article 5, ECHR. MAG suffered from autism, ataxic cerebral palsy, hearing and visual impairment and a learning disability. He could not stand independently and used a wheelchair outdoors. He had 1:1 support at all times and 2:1 support when in the community. His flat was too small to accommodate a wheelchair as a result of which MAG had to move around on his bottom and using his hands and knees. This caused bursitis in both knees and calluses to his knees and ankles. There was no outside space. However, the local authority and the CCG considered that his needs were met in his current placement. NYCC accepted in the proceedings that it should use best endeavours to find suitable accommodation but considered that there was no available alternative accommodation that met the criteria it identified as suitable and less restrictive.

78. It was not disputed that, until a less restrictive environment could be found, it was in MAG’s best interests to reside in that environment. NYCC maintained that it had taken all the steps it would

have taken had MAG had capacity and that the Court could not direct it to take further steps. District Judge Glentworth considered that the steps taken were not adequate and refused to authorise a deprivation of liberty in his current premises, considering that, as a consequence, steps would have to be taken to find a suitable alternative.

79. Cobb J. overturned that decision. He considered that DJ Glentworth had asked the wrong questions. DJ Glentworth had asked: (1) whether the elements of the care package which involved a deprivation of liberty were lawful; (2) whether the deprivation of liberty should be authorised by the court; (3) the nature and frequency of the ongoing reviews of the care package by the court. Cobb J considered that this failed properly to apply the best interests test. The questions to be asked were (i) whether it was in MAG's best interests to live at the property, noting that although he was deprived of his liberty, there was no alternative available which offered a lesser degree of restriction; (ii) whether the accommodation provided to MAG was so unsuitable as to be unlawfully so provided so as to violate Article 5, ECHR. Cobb J considered that, asking those questions, the answer to the first would have been yes, and the answer to the second would have been no. Neither his property nor the manner of his care was so unsuitable as to be unlawful: a high threshold would have to be crossed before Article 5, ECHR would be violated by the conditions of detention. The place and conditions would have to be "seriously inappropriate".

80. A case that may have significant ramifications for both social care and education practitioners is **Birmingham City Council v D and W** [2016] EWCOP 8, which considers the circumstances in which there will be a deprivation of liberty of a young person.

81. By way of background, in **A v X and A Local Authority** [2015] EWHC 922 (Fam), Keehan J. held that a 15 year old boy who had been diagnosed with ADHD, mild learning disability, Asperger's syndrome and Tourette's syndrome was "objectively" deprived of his liberty in a psychiatric unit in that he was under continuous supervision and control and he was not free to leave. However, his parents had consented to his being placed there and Keehan J. considered that to be a lawful exercise of parental responsibility sufficient to amount to "consent" to the arrangements such that there was no need for the Court to authorise the deprivation.

82. In D and W, the same child had turned 16 and lived at a residential unit, with his parent's consent, under section 20 of the Children Act 1989. He was taught at an educational facility on site. It was agreed that he was under continuous supervision and control and was not free to leave so the acid test for a deprivation of liberty was met. Keehan J. remained of the view that, until he was 16, his parents could lawfully authorise the deprivation provided that it was an appropriate

exercise of parental responsibility. However, upon turning 16, he fell within the scope of the Mental Capacity Act 2005. Keehan J. said that:

> “105…whilst acknowledging that parents still have parental responsibility for their 16 and 17 year old children, I accept that the various international conventions and statutory provisions referred to, the UNCRC and the Human Rights Act 1998, recognise the need for a greater degree of respect for the autonomy of all young people but most especially for those who have attained the age of 16 and 17 years. Accordingly, I have come to the clear conclusion that however close the parents are to their child and however cooperative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of the young person’s liberty”

83. Furthermore, on the facts, the deprivation of liberty was imputable to the state and could not be considered to be a purely private arrangement. The local authority “identified the unit, assessed D’s needs and care regime, approved the package of care provided by the unit and the regime under which D would reside there and the fact that it pays all the costs of his placement and education at the unit.” Alternatively, there was a positive obligation on the local authority and it had to make an application to the Court for a determination as to whether there was a deprivation of liberty and whether it should be authorised.

84. It should be noted that the safeguards under Article 5, ECHR apply to all persons under the age of 18 who are subject to a care order: the scope of parental responsibility pursuant to a care order does not extend to consenting to a deprivation of liberty (**A Local Authority v D** [2015] EWHC 3125).

The ‘it makes no difference’ defence

(*with thanks to Fenella Morris QC, Benjamin Tankel and Annabel Lee*)

85. Where challenges on grounds of consultation or PSED have succeeded, there remains a question of the appropriate relief to be granted. It has always been open to local authorities to argue that even if there was unlawfulness in the decision-making process, the unlawfulness would have made no material difference to the outcome. That test has been placed on a firmer

statutory footing in section 31 of the Senior Courts Act 1981 which came into force on 13 April 2015. It provides:

> *"(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.*
>
> *(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.*
>
> *(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.*
>
> *[…]*
>
> *(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.*
>
> *(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.*
>
> *(3F) If the court grants leave in relation on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied."*

86. The “no difference” defence is particularly pertinent where the alleged unlawfulness is a procedural failing such as failure to consult or failure to have due regard to matters under the PSED. As is demonstrated by cases below, the courts have generally been reluctant to quash decisions based upon purely procedural failings unless there was a potentially tangible impact on the substantive decision.

87. Two examples of the court granting a quashing order are ***West Berkshire District Council*** [2015] EWHC 2222 and ***R (Diocese of Menevia) v Swansea Council*** [2015] EWHC 1436. In ***West Berkshire District Council*** the challenge succeeded on grounds of PSED and the appropriate remedy was a quashing order rather than the mere grant of declaratory relief. Mr Justice Holgate acknowledged the availability of the “no difference” defence in circumstances where there has been a failure to comply with the PSED but was ultimately not persuaded to withhold a quashing order in the circumstances:

> *“Where a decision-maker purports to carry out an assessment applying the requirements of the PSED after having taken his decision, the Court may withhold a quashing order in the exercise of its discretion. Where a subsequent assessment is unchallenged, or any legal challenge to it is rejected by the Court, it may be possible for the Court to conclude that the prior decision would* inevitably*, and not merely probably, have been the same if the necessary assessment had been carried out at the correct time and so refuse a quashing order of that decision”*

88. In ***R (Diocese of Menevia) v Swansea Council***, the court made a quashing order where the challenge succeeded as the decision was discriminatory. The court rejected the defendant’s argument that only declaratory relief should be granted. The court was not persuaded that the error of law was immaterial to the decision itself. In other cases, the court has been more reticent to quash the decision and has granted declaratory relief only.

89. In ***R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs*** [2015] EWHC 1953 (Admin) there was a challenge to employee benefits for government staff working in Afghanistan. The main issue was about the territorial scope of the Equality Act 2010. Because the policy had been formulated in the UK, the PSED applied to the formation of the policy. The court found that the government had not had due regard to the PSED because it failed to undertake an equality analysis before the policy was put in place.

90. On relief, the court held that it would not be right to quash the policy and the appropriate remedy was a declaration only:

"62 It would not be appropriate to quash the Afghan Scheme (or either of the policies comprised within it) on account of the failure to undertake an equality analysis before it was put in place. On any view, quashing the scheme would have an adverse impact on those who might wish to take advantage of the Intimidation Policy or who are currently in receipt of the training package with continuing financial support. Something temporary would have to be put in place immediately. Furthermore, given the analysis that has now been done, which additionally covered aspects of the scheme which I have concluded fall outside the scope of the PSED, it does not seem to me that, as a matter of discretion, a quashing order is necessary. Equally, a mandatory order requiring a fresh analysis limited to the aspects which should have been covered would serve no useful practical purpose. The appropriate remedy for the failure to have due regard to the matters in section 149(1)(b) and (c) of the 2010 Act is a declaration to that effect."

91. Similarly, in ***R (Logan) v London Borough of Havering*** [2015] EWHC 3193 (Admin) it came to granting relief, the court decided not to quash the decision. It said that there would be sufficient vindication of the public interest and the claimant's rights for that conclusion to be stated in a declaratory judgment and no other formal relief was needed. In reaching its decision on relief, the court took into account the newly introduced section 31(2A) of the Senior Courts Act. The court also commented on the test in section 31(3D) which applies at the permission stage. Mr Justice Blake said at paragraph 59:

"…I do not rejoice in the prospect of having to make such assessments in cases like the present at the permission stage. It seems to me to have the potential for increasing the length, cost and complexity of the proceedings and bringing an unwelcome constraint on the court's flexible assessment of the interests of justice. In the absence of clear pointers at the time that the flaw was a technical one that made no difference, the court will inevitably be drawn into some degree of speculation or second guessing the decision of the public authority that has the institutional competence to make it."

92. In ***R (Robson) v Salford City Council*** [2015] EWCA Civ 6, Lord Justice Richards addressed the question of relief even though the consultation challenge failed. At paragraph 36 he said:

"36 It may be helpful for me to indicate that if I had found that the consultation was unfair, I would have favoured limiting relief to the grant of a declaration, refusing the quashing order sought by the appellants (just as the Supreme Court in Moseley

declined to grant a quashing order in the particular circumstances of that case). The individual users and carers who are at the heart of the present case have had their interests substantially protected by the individual assessment process, with the possibility of challenge to the resulting decisions if they are aggrieved by them. All but a small number of former users of the PTU service have now been moved to different arrangements. In consequence, the PTU itself now exists only in heavily cut-back form. In my judgment it would not be appropriate in these circumstances to require the Council to go back to square one and to conduct a fresh consultation exercise."

93. Similarly, Mr Justice Blake in ***R (Hall) v Leicestershire County Council*** [2015] EWHC 2985 (Admin) would not have required the local authority to conduct the consultation exercise again if the consultation challenge had succeeded:

> *"91… If I had been persuaded that the terms of the consultation were in the end inadequate or unfair… I would nevertheless not have granted the claimant any relief other than a declaration in these proceedings.*
>
> *92 In my judgment, this application had not been made promptly, albeit just inside the three months, and there would be a prejudice to good administration in deferring the decision to close the museum and start the process again where it is planned to make staff redundant shortly after 31 July 2015…*
>
> *94 Further, there would be no benefit now in directing that a further consultation take place…."*

94. In ***R (Hunt) v North Somerset Council*** [2015] UKSC 51 there was an issue as to whether the court should have granted declaratory relief of its own motion. This was an appeal which started back in 2012. The local authority decided to reduce its spending on youth services in its budget for the financial year 2012/13. As a result of the budget cut, a youth club was threatened with closure.

95. The claimant challenged the decision on grounds of PSED. The claim was dismissed at first instance but upheld in the Court of Appeal. However, by the date of the Court of Appeal judgment, the financial year had nearly expired and the court concluded that it was too late to quash the local authority's budget. The claimant did not ask for any declaratory relief and the court dismissed the appeal. The Court of Appeal treated the local authority as the successful party and ordered the claimant to pay half the local authority's costs.

96. On the point of relief, the Supreme Court said that the Court of Appeals judgment would be no greater by making a declaration in the form of an order to the same effect. However, where a public body had acted unlawfully but it was not appropriate to make a mandatory, prohibitory or quashing order, it would usually be appropriate to make some form of declaratory order to reflect the court's finding. To simply dismiss the claimant was likely to convey a misleading impression and leave the claimant with a sense of injustice. Nevertheless, if a party had the benefit of experienced legal representation and did not seek a declaratory order, the court was under no obligation to make one, or to suggest that one be made. Lord Toulson said:

> *"12 I would reject the appellant's complaint that the Court of Appeal was wrong not to make a declaration of its own initiative. The complaint is redolent of hindsight. It is no doubt triggered by the court's decision on costs, but they are separate matters. The judgment of the Court of Appeal itself ruled that the respondent acted unlawfully, and the authority of the judgment would be no greater or less by making or not making a declaration in the form of the order to the same effect. However, in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no "must" about making a declaratory order, and if a party who has the benefit of experienced legal representation does not seek a declaratory order, the court is under no obligation to make or suggest it."*

97. The Supreme Court overruled the Court of Appeal's decision on costs. The Supreme Court said that the local authority had only been "successful" in the limited sense that the findings of failure came too late to do anything about what happened. The claimant had in fact been successful on the substantive issues regarding the statutory obligations and there were also wider public factors to consider. The ruling of the court, particularly under section 149, contained a lesson of general application for local authorities regarding the discharge by committee members of the equality duty.

98. The case of **Bokrosova v London Borough of Lambeth** [2015] EWHC 3386 (Admin)was a challenge to Lambeth's decision not to bring the Cressingham Gardens Estate up to the

Lambeth Housing Standard but instead to seek to bring forward a regeneration proposal for the estate. There were four options. The first was to refurbish the properties. But that option would have a substantial impact on residence and require further work to be done in future, for which there was no budget. The second was to demolish 19 homes and rebuilt 38 new homes, the idea being that this would generate a small surplus which could subsidise the cost of refurbishing the remaining properties. A third option also involved a mix of demolition and construction, albeit a different mix. The fourth option was described as a "medium intervention refurbishment" and the fifth was considered clearly unaffordable. The factual background is quite involved but ultimately the Council withdrew the first three options from consideration in the midst of a process that it had put in place under section 105 of the Housing Act 1985. Section 105 of the Housing Act 1985 provides that a landlord authority shall maintain such arrangements as it considers appropriate to enable those of its secure tenants who are likely to be substantially affected by a matter of housing management to which the section applies to be informed of the authority's proposals in respect of the matter and to make their views known to the authority within a specified period of time; and that the authority must consider any representations made in accordance with those arrangements before reaching a decision. The authority is also obliged to publish the arrangements. What arrangements should be made was, in the first instance, a matter for the authority, subject to review on ordinary public law grounds. However, section 105 was, in substance, a statutory obligation to consult; and, as such, the consultation process had to comply with common law standards of fairness (applying *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56).

99. In the event, the authority embarked on a process under section 105 but withdrew options 1 – 3 before that process was completed i.e. it stopped consulting on options 1 – 3. The authority argued that, once it became clear that those options would not be affordable, it was entitled to do so. Laing J. was prepared to assume, without deciding, that, in principle, the authority was entitled to stop consulting on certain options if there had been a sufficient change in circumstances between the initial decision to consult on those options and the withdrawal of those options. On the facts, however, she was not satisfied that there had been such a change. The affordability of options 1 – 3 had always been in doubt; but having decided that it was nonetheless important to get residents views in relation to them in the knowledge that that was the case, the affordability issue did not amount to a sufficient change in circumstances.

100. The Judge went on to consider the section 31(2A) question. She considered that it was for the authority to establish that it would have made no difference. The authority argued that the question was whether on any reconsideration the authority would make the same decision. The claimant contended that the question was whether, if the authority had not acted unlawfully in the way that it did (i.e. by ceasing to consult on options 1 – 3), nonetheless it would have made the same decision. The judge said at paragraph 90:

> "What section 31(2A) seems to be asking, albeit not clearly, is whether, if the defendant's unlawful conduct is taken out of the equation, that would make any difference to the outcome for the claimant. If the section 105 arrangements had not been breached, the financial position would have been much more fully before the Council. In simple terms, it does not appear to me, if that had been the position, that it is highly likely that the decision would have been the same. I do not consider that the test in section 31(2A) is met. I am therefore not required by section 31(2A)(a) to refuse relief"

101. The Judge did go on to consider whether, if the test had been met, it would nonetheless have been appropriate to grant relief for reasons of exceptional public interest. She considered the factors to be finely balanced. On the one hand, there was the Council's difficult financial position, the balance to be struck between residents of this particular estate and residents of the Council's other tenants and those on the waiting the list, the urgent need for works to be done and the need for certainty. On the other hand, was the need to hold a public body to account for its promises about how it would involve tenants in decision making about an important decision affecting their homes. On balance, the public interest factor in not granting relief would have outweighed the need to hold the Council to its promises so it would not have been appropriate to grant relief on public interest grounds.

102. Having found that section 32(2A) did not apply, the Judge did not consider that there was any principled basis on which she could refuse the relief sought by the Claimant in the form of a declaration and quashing order.

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