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CHILDREN & FAMILIES

CARE PROCEEDINGS & CHILD PROTECTION

In the Matter of A (Children) – separate representation of children in care proceedings

This decision may herald a reduction in the number of cases in which children are separately represented in care proceedings.

A 12 year old child was in care. He had contact with his parents during alternate months. The local authority were concerned that, during contact sessions, the child's mother was causing the child distress. The authority applied for an order terminating contact. The child's guardian was largely supportive of that application although that support did come with caveats, in particular that contact should be resumed if the mother could be relied on not to upset the child during contact sessions. This meant that the guardian's stance was not wholly in accordance with the child's wishes who, while he had expressed concern about his mother's behaviour during contact sessions, wanted contact to continue.

As a result of the guardian's stance, the child expressed a desire to instruct a solicitor himself (rather than simply relying on his guardian to give instructions to a solicitor). The circuit judge in charge of the case said that the test to be applied was whether "the child wishes to give instructions which conflict with those of the children's Guardian, and is able, in the light of his understanding, to give such instructions" (Rule 4.12(1)(a)). The judge held that the child was not mature enough to be able to weigh all the complex considerations that had to be taken into account in a case like this, and that there was no conflict of interest as between the child and the guardian. Accordingly, the application for separate representation was refused.

The circuit judge's refusal was upheld by the Court of Appeal. The Court held that the circuit judge's conclusion could not be characterised as irrational and so it would stand. Thorpe LJ went on to express the opinion that first instance courts should be slow to order separate representation given the additional costs it entails:

"There are cases involving children in post-pubertal adolescent rebellion for whom it is very difficult for a Guardian to act. Their position, their wishes, their feelings, their opinions so conflict with an objective view of welfare that there has to be a parting of the ways, and our system generously provides for two distinct and equally constituted litigation teams thereafter. That is an extremely expensive solution, and in present days when the Family Justice system is obliged to seek economy wherever and whenever it can, orders granting separate representation under this rule should in my opinion be issued very sparingly".

The Court of Appeal gave its decision in *In the Matter of A (Children)* on 9 February 2010: [2010] EWCA Civ 208. The Court was comprised of Thorpe and Arden LJ.

In the Matter of B (a Child) – court right to refuse to adjourn for 12 months for parenting assessment of father

Care proceedings were brought in respect of a six year old girl. The girl's mother had ruled herself out as a long-term carer. As the proceedings were coming close to a final hearing, and following the judge having concluded that the s.31 'significant harm' threshold was met, the father put himself forward as a possible long-term carer. However, he accepted that his case was a difficult one given the threshold findings in this case: history of violence between himself and the mother; difficulty in managing his anger; inability to understand the needs of the child. But, despite this, it appeared that the father had recently made some progress in addressing his volatile temperament. The father therefore suggested that, instead of the court approving the local authority's care plan for adoption, the court adjourn for 12 months the authority's application for a placement order during which time he could be further assessed with a view to demonstrating his suitability as a long-term carer.

The judge hearing the care application refused to follow the course suggested by the father. The judge approved the authority's care plan and made a care order and placement order in respect of the child. The father sought permission to appeal from the Court of Appeal.

The Court of Appeal refused to grant permission. The judge below had been entitled to conclude that the father's proposal posed too great a risk for the child in that, if there were a further delay of a year, the child may become effectively 'unadoptable'.

The Court of Appeal gave its decision in *In the Matter of B (a Child)* on 27 January 2010: [2010] EWCA Civ 124. The Court was comprised of Thorpe, Wall & Rimer LJ.

Re SH & VW – Court of Appeal's limited powers to intervene with a court decision in care proceedings

In this case, the Court of Appeal repeated, as it has to do from time to time, that it has limited jurisdiction to allow an appeal against a decision to make a care order or placement order. On an application for permission to appeal made by the father of a child in respect of whom a placement order had been made, the Court said as follows:

"My powers are very limited. I look at the judgment given by the judge in the court below. I ask myself, firstly; has the judge made any error of law? Secondly, I look at the manner in which he exercised his discretion. Has he acted in such a way that his exercise of discretion is outside what lawyers call "the ambit of disagreement"? By this lawyers mean that the applicant has to show either that the judge's conclusion was not properly open to him on the material he had, or that he has exercised his discretion in a way which is, arguably, "plainly wrong": see *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647. If the judge has made no error of law, and if the conclusion is one which, on the facts, was properly open to the judge, there is nothing this court can do to intervene.





I can only give permission to appeal if I think that an appeal has a real prospect of success, or if there is some other compelling reason for there to be an appeal - see rule 52.3(6) of the CPR 1998 (the Civil Procedure Rules).

Furthermore, I am only concerned with the proceedings before the judge. I am not concerned with any complaint which Mr. H may have about the actions of the social workers or the local authority, or, indeed, anybody else".

The Court then proceeded to refuse permission to appeal, making the following points which may merit repeating:

- (i) the fact that a parent has been found not guilty by a criminal court of an offence against a child does not prevent a care court from concluding that the parent did the matters which were the subject of the criminal charge. This is because different standards of proof apply to the two proceedings;
- (ii) the fact that an expert witness altered his opinion following a meeting with other experts did not undermine that expert's evidence. The Court of Appeal judge observed that "some judges (myself included) take the view that a capacity to change an opinion demonstrates that the expert does not have a closed mind";
- (iii) the judge below "was entitled to find that the mother suffered from a "narcissistic personality disorder". He was equally entitled to find that therapy for the parents would not be effective within DH's timescale. This is a conventional finding for which there was abundant material".
- (iv) The judge was entitled to make findings in the proceedings about BW [separate proceedings concerning the instant child's brother], and to import them into the care proceedings relating to the child in question.

The Court of Appeal (Wall LJ) gave its decision, refusing permission to appeal against a care order, in *Re SH & VW* on 19 January 2010: [2010] EWCA Civ 6.

B v Reading DC – claim of misfeasance in public office arising out of a child protection investigation rejected

The rule that social workers and others involved in child protection investigations owe no common law 'duty of care' to parents suspected of abusing their children prevents a claim in negligence being brought against such persons (for further details, see issue 48). As a result, an aggrieved parent has to look for some other avenue of legal challenge, which is what happened in this case.

Briefly, the background was that in the 1990s a father was investigated on suspicion of having sexually abused his daughter. No charges were brought but the child was placed on the child protection register for a time. The father brought two different types of legal claim:

- (i) a claim that council officials had committed the serious civil wrong of misfeasance in public office; and
- (ii) a claim that police officers had breached a duty of care which the father asserted was owed by the police in the investigation of crime.

The father's claims were rejected by the High Court. He sought permission from the Court of Appeal to appeal against the High Court's decision. The Court of Appeal refused to grant permission, finding that there was no prospect of a successful appeal for the following reasons:

- (i) the High Court judge had correctly identified the elements that must be proven in order to make good a claim of misfeasance in public office, as follows:

"The defendant must be a public officer exercising a power as such, and in the form of the tort relied on here, so-called untargeted malice, acting, knowing or being subjectively reckless as to the fact that she has no power to do the act complained of, and knowing that the act will probably injure the claimant. The tort therefore involves subjective bad faith in the exercise of public powers." (taken from the leading House of Lords decision of *Three Rivers District Council v Bank of England Number 3* [2003] 2 AC 167);

- (ii) a video interview conducted with the child in question by social workers and police officers was "deeply flawed" and came nowhere near meeting Achieving Best Evidence standards. However, that fact was not in itself sufficient to establish a crucial element of the misfeasance test, namely that the officials knew or were reckless as to whether they had the power to do what they were doing. The High Court judge had been entitled to believe the officials concerned when they said that, throughout, they were solely concerned with the child's welfare and believed that they were acting properly and within the law and had not set out to 'frame' the father;
- (iii) as regards the claim of negligence in the investigation of a suspected crime, the general rule is that the investigation of suspected crime by a police officer does not give rise to a duty of care in negligence owed to individual members of the public: *Hill v Chief Constable of West Yorkshire* [1989] AC 53. The father in the present case argued that there were exceptions to the general rule in the case of "outrageous negligence" and that this was such a case. The Court of Appeal said that any exception would only apply where the actions of police had nothing to do with the investigation of crime. In any event the thrust of the case law was that the exception would only apply to benefit the victim of crime and not, as in the present case, a suspect (*Calveley v Chief Constable of Merseyside* [1989] AC 1228);

The Court of Appeal (Sir David Keene) gave its decision in *B v Reading BC, Wokingham DC & the Chief Constable of Thames Valley Police* on 8 December 2009: [2009] EWCA Civ 1515.





ADOPTION & FOSTERING

R (W) v a Local Authority – child does not have to be residing with a prospective adopter in order to have been 'placed for adoption'

The date on which a child is 'placed for adoption' is important because it marks a point of no return. This is because, as from that date, the law prevents a parent from applying for revocation of a placement order (s.24 of the Adoption & Children Act 2002). It is therefore surprising that there is no statutory definition of when a child is placed for adoption. That was the issue tackled in this case.

The events surrounding the child's placement

A placement order was made in respect of a child in September 2008. Nearly a year later, the following events took place:

- (i) on 3 August 2009 the local authority adoption agency's placement and permanency panel recommended a match with a prospective adopter;
- (ii) on 17 August 2009 the Agency's decision maker (an Assistant Director of Children's Services) approved that recommendation;
- (iii) also on 17 August 2009 the prospective adopter and the child met each other for the first time;
- (iv) on 24 August 2009, the child took up residence with the prospective adopter.

The child's mother had been kept fully informed of the progress being made towards securing an adoptive placement for her child. At a late stage in that process, however, the mother decided that she did not want the adoption to go ahead. In between events (iii) and (iv) above, on 21 August (a Friday) the mother's solicitor faxed the local authority lawyer with conduct of the case stating that the mother wanted to apply to the court for permission to make a revocation application and asking for confirmation that the child had not yet been placed for adoption. The fax was not received by the lawyer until 24 August (a Monday) by which time the child had taken up residence with her prospective adopter.

The mother claimed judicial review of the authority's decision to place the child for adoption which she alleged was improperly designed to frustrate her attempt to apply for a revocation order. It will be seen therefore that this case bore some similarities to that considered by the Court of Appeal in *Re F* [2008] EWCA Civ 439 (see issue 57) in which that Court gave some of its strongest ever criticism of a local authority's conduct because it placed a child for adoption in order to undermine a father's attempt to revoke a placement order.

An initial issue for the High Court in the present case, therefore, was to decide when the child had been 'placed for adoption'. If this had actually occurred prior to the fax being sent by the mother's solicitors on 21 August, the mother's claim was doomed to fail. If by that time the child had been placed for adoption, making a revocation application impossible, the mother's argument that the placement was designed to stymie her revocation of placement order application would be nullified.

When was the child placed for adoption?

The Court decided the initial issue against the mother. The Court held that the child was placed for adoption before she physically took up residence in the prospective adopter's home. The placement date was 17 August 2009, the day on which the adoption agency approved the 'match' and on which the child and prospective adopter met each other for the first time.

In arriving at this conclusion, the Court made the following findings:

- (i) a child is not placed for adoption simply because a panel has made a recommendation that a child is matched with a particular prospective adopter. So, in the present case the child was not placed for adoption on 3 August 2009, the date on which the panel recommended a particular match. The Court added:

"For one thing, the process requires the Panel decision to be approved by the Agency decision-maker, and accordingly, until that approval occurs, it cannot be said that the child has been placed for adoption";

- (ii) it is not, however, a pre-condition of placement that a child has permanently moved in with a prospective adopter;
- (iii) what was of particular importance in the present case was that, as well as decision-maker approval, the process of introductions had begun on 17 August 2009:

"the process of Introductions was a very important element of the relationship between J and her prospective adopters. It was the beginning of that relationship: a process occurring after the placement had become a legal certainty and, in order best to safeguard her interests, before she took up permanent residence...the Introductions process is not a process that takes place before the child in question has been placed for adoption: it is the first step in the relationship between the child and the prospective adopters after the child has been 'placed for adoption' by the authority."

The High Court (Coulson J) gave its decision in *R (W) v a Local Authority* on 9 February 2010: [2010] EWHC 175 (Admin).





In the Matter of R (a Child) – a change of circumstance does not automatically mean that an application for permission to apply to revoke a placement order will be granted

A placement order was made in respect of a mother's two children. Following that order, the mother took steps which clearly helped her case that she was a good enough parent. She separated from a very violent partner and took a number of self-help and childcare courses. As a result, the mother sought permission under s.24 of the Adoption and Children Act 2002 to apply for revocation of the placement order.

As the children had not yet been placed for adoption, the mother's application was not doomed to fail but had to first show that there had been a relevant change of circumstance. The court which heard her application accepted that there had been a change of circumstance, given the way in which she had turned her life around, and so that threshold was crossed. That, however, was not the end of the matter. The court still had a discretion as to whether or not to grant permission to apply for a revocation order. The court refused to exercise its discretion. The court was concerned that it would take many months before any application could be heard and prospective adopters had already been identified. The delay in settling the children's future which would be caused by granting the mother permission, together with the fact that the mother still had more to do to show that she could be a good parent, led the court to refuse to exercise its discretion to allow the application to be made.

The mother sought to overturn that decision before the Court of Appeal. She was unsuccessful with that Court holding that the court below had been clearly right to refuse to grant permission.

The Court of Appeal (Ward LJ) gave its decision in *In the Matter of R (a Child)* on 14 January 2010: [2010] EWCA Civ 187.

Wakefield MDC v the Media & Others – parents granted limited permission to publicise their experience of having their children adopted

A mother and father's three children were taken into care at birth and subsequently adopted. In the present case, the High Court said that this was because "it was considered that their birth parents could not parent them adequately due to a combination of the birth father's unusual personality and the mother's low intelligence".

When the initial care proceedings were underway, the children's birth parents were interviewed by local newspapers about their experiences and articles were published which included the parents' photographs. As a result, in 2005 the local authority concerned, Wakefield MDC, obtained an injunction which prevented the parents from "discussing, or otherwise communicating, or encouraging, or suggesting to any other person to publish any matter relating to the care or family circumstances, including proceedings before any court relating to the children", other than to certain very limited categories of person such as their legal advisors. That injunction was directed solely to the parents and not to any media organisation. The injunction was of infinite duration and, despite the fact that the children have been adopted, is still in force.

The birth parents continued strongly to feel that they were the victims of a great injustice. They wanted to speak to media organisations about what has happened to them and the father also wanted to write and publish a book. As a result, the parents applied for the injunction against them to be discharged. The High Court insisted that the children's adoptive parents be contacted so that they could give their views on the application to discharge the injunction. They were very strongly opposed to the injunction being discharged.

Wakefield MDC also resisted the application to discharge the injunction. Further, they applied for the injunction to be expanded so as also to restrain the media from reporting any details of the case.

The legal issue

Essentially, this was a human rights case. Two opposing sets of rights under the European Convention on Human Rights were in play:

- (i) the Article 8 rights of the children and their adoptive parents – that Article provides that everyone has the right to respect for their private and family life; and
- (ii) the Article 10 rights of the birth parents and the media – that Article confers a right to freedom of expression.

This is the typical clash of rights that takes place when some person or organisation wants to publicise what has happened in the family court system. In general terms, the approach to be taken in order to resolve the conflict was set out by the House of Lords in *In Re S (FC)(a child)(Appellant)* [2004] UKHL 47 where Lord Steyn said:

"neither Article has as such precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test".

The relevant factors

The High Court identified the following factors for and against the parents' application:

- (i) The birth parents' desires to 'tell their stories' was legitimate and should be accommodated in so far as it could be achieved "without causing or risking damage, disruption or upset to the children and their adoptive families". The Court went on:

"There is undoubtedly considerable and important public interest in, and debate about, the interference of the state, including courts, in the lives of families, and that debate can only be informed by concrete examples. Human beings do feel a need to get things off their chest and, subject to protecting the welfare, rights and freedoms of others, should not be prevented from doing so".





- (ii) It was imperative that nothing be published which might identify the children as the natural children of the birth parents. Indeed, this was accepted by the birth parents.
- (iii) The Court accepted that the media would have a legitimate reason for wanting to identify the parents in any story about them: "a report of a story without revealing the identity of the subjects would be a very much disembodied story, likely to be of less interest to readers and given less prominence by editors."
- (iv) The children, as is common practice, had life story books and memory boxes the contents of which included photos of their birth parents. This was a factor in favour of prohibiting identification of the birth parents. The Court said:

"quite apart from any risk of the children being identified by third parties as the children of these birth parents, there is, in relation to all three children in both adoptive homes, a profound fear by their adoptive parents that one or more of the children themselves might see a birth parent depicted in a magazine, newspaper or on television and realise that it is their own birth parent, with unpredictable and possibly profound consequences".

- (v) Related to that previous point, the Court also accepted the guardian's concern that, were the parents to be identified in a media story, the adoptive parents might become reluctant to maintain their current healthy practice of allowing the children free access to their memory boxes.

The balancing exercise and the result

The Court set out its main concern in this case as follows:

"the highest importance in this case does attach to the welfare of each of these children and to the need not to destabilise or disrupt any of them in their adoptive placements. They are young, needy, innocent and defenceless. Whatever the shortcomings or failures of the child protection system, it does no service to society or the public to victimise children in the name of exposing such actual or perceived or alleged shortcomings or failures".

However, the birth parents' desire to tell their story was legitimate. Accordingly, "restrictions should go no further than are actually necessary, justifiable and proportionate to protect the children and the Article 8 rights of themselves and their adoptive families". In the light of that the High Court ruled as follows:

- (i) publication of the birth parents' names was absolutely prohibited. It was vital that no one within the adoptive parents' social circle, nor the adoptive children themselves, realised that the persons communicating their experiences with social services were the birth parents of these children;
- (ii) publication of recognisable images of the birth parents is also prohibited, but properly disguised images, using for example pixellation or rear-views, may be published;
- (iii) since there was no evidence that any of the children would or could recognise a birth parent's voice, the Court did not require that their voice or speech be disguised or distorted;
- (iv) publication of the children's date of birth was prohibited, as it was an obvious identifying feature, but publication of their general ages was not prohibited. On this point, the judge said "it is, in my view, unreal and a disembodiment too far not to anchor any published story to approximate time; and unreal, therefore, to preclude reference, expressed as a whole year to age";
- (v) the children's gender may not be published. There is nothing gender-specific about this case and so there is no need for that potentially identifying information to be published. The Court said that "precise reference to gender adds a small piece to the jigsaw which just might lead to a third party in the localities in which any of these children live surmising that an article or programme in the press or on television related to that child or these children";
- (vi) there was no justification for prohibiting mention of the local authority concerned, Wakefield MDC, or members of its staff or other public officials who had been involved in this case:

"there is absolutely nothing to connect any of these children in their current circumstances with Wakefield or with any social worker, judge or children's guardian who was involved at the time of the care or adoption proceedings. The rights and interests to be protected are those of the children and their adoptive families. Neither local authorities, nor judges, nor guardians, nor social workers who work in this public field can claim any immunity or protection from their names being mentioned in legitimate media reporting."

The High Court (Holman J) gave its decision in *Wakefield MDC v the Media & Others* on 5 February 2010: [2010] EWHC 262 (Fam).

Catholic Care (Diocese of Leeds) v the Charity Commission for England and Wales: whether it is lawful for an adoption agency only to provide services to heterosexual couples

This high profile case has been the subject of much misreporting. The High Court's decision does not mean that adoption agencies are free to exclude homosexual prospective adopters. It simply means that an error of law was made by the Charity Commission when assessing whether a Catholic adoption agency could alter its charitable instrument in order to allow it to provide a service to heterosexuals only.

The issue

While the aim of the adoption agency was to continue providing a publicly-funded adoption service to only heterosexual couples, its method of achieving that aim was to use the system for regulating charities. This is how the issue arose:





- (i) the general rule under the Equality Act (Sexual Orientation) Regulations 2007 is that it is unlawful for an adoption agency such as Catholic Care to refuse to offer its service to same-sex couples. Unless Catholic Care could take advantage of some kind of exception from the general position, it would therefore be acting unlawfully under the regulations by refusing to provide an adoption service to same sex couples;
- (ii) an exception to that general rule is made by regulation 18 of the 2007 Regulations. This provides that it is not unlawful for a body to provide "benefits" only to persons of a particular sexual orientation (such as heterosexuality) if, in so doing, it is acting in pursuance of the provision of a charitable instrument;
- (iii) Catholic care therefore decided to alter the terms of the charitable instrument under which it operated (its Memorandum of Association) so that it would provide that its adoption service would only be offered to heterosexuals;
- (iv) at this point, the Charity Commission enters the picture. A charity cannot alter its charitable instrument as it sees fit. The consent of the Charity Commission is required in order for a charitable company to alter its charitable objects;
- (v) the Charity Commission refused to consent. Therefore, Catholic Care remained prohibited from refusing to provide an adoption service to homosexuals. They appealed to the Charity Tribunal against the Commission's decision, but their appeal was refused. The Charity Tribunal held that reg.18 was concerned with purely private charitable activity and so of no use to Catholic Care most of whose activities were publicly funded. On this analysis, the change to Catholic Care's Memorandum of Association was pointless and so the Charity Commission had been justified in refusing to consent to it;
- (vi) Catholic Care brought a further appeal to the High Court.

The High Court's decision

The High Court set aside the Charity Tribunal's decision for error of law. It had failed to identify the purpose of regulation 18, which is to allow an exception to the prohibition on different treatment on the grounds of sexual orientation "wherever the public purpose being (or to be) achieved by the charity in question constitutes an Article 14 justification for that differential treatment". The reference to Article 14 is a reference to that article of the European Convention on Human Rights which prohibits discrimination in relation to enjoyment of the Convention rights. So, the real issue was whether the continuance by Catholic Care of a heterosexuals-only adoption service was justified under Article 14. Accordingly, the test that the Charity Commission should have applied was to ask whether the conferral of benefits by Catholic Care to a group with a particular sexual orientation, namely heterosexuals, was a "proportionate means of achieving a legitimate aim".

The matter was thus remitted back to the Charity Commission for it to reconsider according to the correct legal test set out by the High Court. The outcome is not a foregone conclusion in the light of the comments of the High Court. The Court accepted that respecting the beliefs of the Roman Catholic Church was not in itself a justification for permitting a service to be provided only to heterosexuals. But what is was far more significant, according to the High Court, was Catholic Care's track record in finding suitable placements for very 'hard to place' children. It has been used as an adoption agency of last resort by local authorities and so it seems fair to say that, without its services, a number of very damaged children will be deprived of a long-term family. That factor will have to be assessed by the Commission when deciding whether allowing Catholic Care to maintain its heterosexuals-only service is a proportionate means of achieving a legitimate aim.

The High Court (Briggs J) gave its decision in *Catholic Care (Diocese of Leeds) v the Charity Commission for England and Wales* (intervener: the Equality & Human Rights Commission) on 17 March 2010: [2010] EWHC 520 (Ch).

SPECIAL GUARDIANSHIP

Barrett v Kirklees MBC – council failed to justify paying Special Guardianship allowance at a lower rate than fostering allowance

This case was another legal blow to those councils who try to pay special guardianship allowance at a rate which is beneath the authority's fostering allowance.

How did the grandmother come to be a special guardian?

A grandmother was the special guardian of her grandson. She became the child's special guardian in 2006 having put herself forward as primary carer when care proceedings were brought in respect of the child. The evidence was that the child poses behavioural challenges possibly related to his poor start in life.

The grandmother's local authority, Kirklees MC, set its Special Guardianship Order Allowance (SGOA) at £94 per week. Its fostering allowance, however, was £142 per week. The grandmother did also receive Child Benefit in respect of the child but, even with this taken into account, she still received some £30 less per week than she would have received if she had fostered her grandson. She brought a claim for judicial review.

The background law: the statutory guidance and the Lewisham case

The Secretary of State has issued local authorities in England with statutory guidance about their functions in relation to special guardianship. This says, at paragraph 65, that "in determining the amount of any ongoing financial support the local authority should have regard to the amount of fostering allowance which would have been payable if the child were fostered". The guidance is issued under s.7 of the Local Authority Social Services Act 1970 which means it has strong legal force. The effect of this is that a local authority is required to follow the guidance "with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course": *R v Islington LBC, ex p Rixon* (1997-8) 1 CCLR 119 at 123.

In *B v London Borough of Lewisham* [2008] EWCH 738 (Admin) the High Court considered what the guidance means. In that case a council was





paying special guardianship allowance in the sum of £84 per week as compared to its fostering allowance of £278 per week. In Lewisham, the High Court held that while there is no legal requirement that the two allowance should be equal "those giving the Guidance intended that the local authority's fostering allowances would serve as a ranging shot for the local authority's consideration of what their special guardianship provision should be or at least be held firmly in mind when fixing that provision". The Court went on to hold that the council in that case had failed to justify its "radical departure" from the Guidance and so had acted unlawfully.

The decision in the present case

The High Court said that to pay SGOA at two thirds of the rate of fostering allowance was a departure from the Secretary of State's guidance which required justification in accordance with the *Rixon* ruling. The Court went on to say that the departure in the present case was particularly significant because the grandmother had stepped in during the care proceedings and thus prevented a child from having to be taken into care:

"One has to bear in mind that SGOA is intended to pay for the cost of bringing up a child who would not ordinarily be the responsibility of the special guardian; and also that children who are the subject of orders in public law proceedings all too often come from families who are economically on the margins of society. On this basis, the deviation in this case must inevitably be characterised as substantial and the required justification has to be proportionately powerful".

The essence of Kirklees' justification for paying SGOA at a lower rate than fostering allowance was that special guardians do not have the same range of obligations as foster parents, for example they are not under particular requirements as regards attending reviews and are not required to have a "high level of availability". The Court said, referring to this supposed justification, "as no mention is made of the fact that foster carers obtain remuneration, this cannot be a justification of paying a special guardian much less than a foster carer". Accordingly, the Court held that Kirklees had not been able to justify their departure from the guidance.

The High Court judge also rejected the argument that the fact that SGOA is a 'gateway' to other benefits justifies it being paid at a lower rate than fostering allowance:

"There is, in my judgment, nothing in this point. Under the relevant regulations, "in determining the amount of financial support, the local authority must take account of any other grant, benefit, allowance or resource which is available to the person in respect of his needs as a result of becoming a special guardian of the child": The Special Guardianship Regulations 2005 (SI 2005 No 1109), regulation 13(2). This is what [counsel] called a stage 2 consideration, which must be taken into account when setting the SGOA allowance to be paid to a particular guardian. It cannot, however, be a reason for setting, at stage 1, the initial ceiling on SGOA, that being a policy decision which is of general application and one which cannot take account of the different benefits (and different rates at which some of these may be payable) which may be available to individual guardians".

The High Court ordered the council to carry out a fresh assessment of the SGOA payable to the grandmother since 2006; and an order for the payment of any sums found due as a result of such assessment.

The High Court gave its decision in *Barrett v Kirklees Metropolitan Council* on 12 March 2010: [2010] EWHC 467 (Admin).

DISABLED CHILDREN

R (O) v East riding of Yorkshire CC – boy ceased to be a looked after child when he was placed in a residential school in accordance with his statement of SEN

The 14 year old boy at the heart of this case had an autistic spectrum disorder, together with ADHD, and his parents found it very difficult to cope with him at home. Initially, his council accepted that he was a looked after child by virtue of his being voluntarily accommodated by a local authority (in a registered children's home) under s.20 of the Children Act 1989 (s.22(1) of that Act provides that where a child is accommodated under s.20 for more than 24 hours s/he is a looked after child). Subsequently, however, a statement of special educational needs was produced which named a 52 week a year placement at a residential special school, an option which the boy's parents had been urging for some time. Accordingly, the local authority were obliged to, and did, fund the boy's placement at that special school under s.324 of the Education Act 1996.

The issue was whether the boy remained a looked after child following his move to the residential special school. His parents were keen for him to retain 'looked after' status. This would impose a range of obligations upon the local authority in relation to the boy's welfare as well as potentially lead to a future entitlement to leaving care services.

The High Court held that the boy was no longer a looked after child. He was being provided with a residential placement under the Education Act 1996. Therefore he was not being accommodated under a statutory provision, such as s.20 of the Children Act 1989, which activates looked after status. The High Court went on to reject the argument that, in providing the placement under the Education Act 1996, the local authority were improperly side-stepping an obligation to provide accommodation under the Children Act 1989:

"it does not make sense to me to describe what the Council has done as side-stepping their duties. It is significant, as I have said, that the residential school placement was what was sought by the claimant's mother and step-father from the second part of 2007. To suggest that the provision of [the residential special school placement] is an attempt by the Council to sidestep its obligations is quite contradictory. It is exactly what the family wanted, and the evidence before me is that they are pleased with it and that it meets the claimant's needs".

The High Court (Cranston J) gave its decision in *R (O) v East Riding of Yorkshire CC* on 11 March 2010: [2010] EWHC 489 (Admin).





Ombudsman criticises council for failing to secure an educational placement for a child with SEN placed out of county

Out of sight, out of mind. That phrase best sums up the way in which the local authority in this Ombudsman case omitted to secure education for a looked after child which it placed out of area. This case involved two councils and a looked after child who had a statement of special educational needs (SEN). Council A ("the home council") were responsible for looking after the child. The child moved to a children's home in council B's area which meant that he could no longer attend the school named in his statement of special educational needs.

There was poor liaison between the two councils, criticised as follows by the Local Government Ombudsman:

- (i) the home council did not inform council B that the child had moved into their area. Council B eventually learnt of his presence from the children's home;
- (ii) Council B agreed to locate suitable education for the child in their area but they did not progress this quickly enough. They did not start looking until four weeks after they received the child's file from the home council;
- (iii) the home council took no steps to contact council B to see how the search for education was progressing, nor did it take steps to secure alternative education for the child in the meantime;
- (iv) once a suitable school had been found, the home council (despite the fact that it was looking after the child) queried whether it was responsible for funding the educational placement. The funding question was referred to the Department for Children, Families and Schools who decided that the home council were responsible for funding but it still did not progress a solution to the child's education with sufficient urgency;
- (v) in total, the child was out of school for some 6 months, although towards the end of this period he was receiving home tuition of 10 hours per week.

The home council agreed to pay the child £2,000 and council B agreed to pay £500, to be held in trust for the child.

This decision was reported in the Local Government Ombudsman's October 2009 annual digest of cases.

Ombudsman criticises delay in securing alternative educational provision for a mentally ill child who could not attend mainstream school

In August 2007, a Year 11 pupil's mother informed her local authority that he would be unable to return to school in September 2007 due to mental illness, that inability being confirmed by the child's psychiatrist. The council's policy was that ill pupils should not be at home without education for more than 15 days.

No alternative provision was made for the child until February 2008 when he was provided with about 3 hours education per week in a local education centre. The authority concerned said that the hours would be increased as the child had exams coming up, but no such increase was forthcoming. As it turned out, the child did not sit the exams. The Ombudsman was critical of the failure of the council to secure adequate alternative education for the child. The council agreed to pay the child £2,000 compensation and his mother £500.

This decision was reported in the Local Government Ombudsman's October 2009 annual digest of cases.

LOOKED AFTER CHILDREN

R (P) v Nottingham CC – no costs order for solicitors acting for a boy whom a council agreed to accommodate under s.20 of the Children Act 1989

A firm of solicitors were acting for a 16 year old boy who had fallen out with his mother and left the family home. Initially, his local authority, Nottingham CC, denied that he was entitled to accommodation under s.20 of the Children Act 1989. A claim for judicial review was made. An interim order of the High Court required Nottingham to secure accommodation for the boy, which they did. Subsequently, the council accepted in their acknowledgement of service that the boy was entitled to s.20 accommodation and that the duty to provide such accommodation was being complied with.

Unsurprisingly, therefore, a High Court judge refused on the papers to grant permission for the claim to proceed because, by this time, the council had done everything that the boy's solicitors had hoped to achieve on the claim. The judge went on to make no order for costs. This came as a disappointment to the boy's solicitors because it meant that they would be remunerated at the relatively modest Legal Services Commission rate, rather than the higher rate that they would have received if the council had been ordered to pay their costs.

The solicitors sought permission from the Court of Appeal to appeal against the judge's decision not to make a costs order against the council. The Court refused to grant permission. It thought that the solicitors had not taken the most sensible course. Once they had received the council's acknowledgement of service, the "sensible course" would have been to notify the court that the claim was no longer being pursued. The Court of Appeal went on to say that "it would have been sensible at that juncture for the claimant to have lodged written submissions on costs or possibly sought directions about the lodging of written submissions on costs". Instead the application for permission remained before the court and the court was confronted with an application for permission to proceed with the entire proceedings and without any argument from anybody on the questions of costs. The Court of Appeal said that:





"it seems to me entirely unsurprising that in those circumstances the judge made the order which he did make. Nobody had developed any submissions on costs. He was quite rightly refusing permission to proceed with a claim which had become academic. Indeed any costs incurred by anybody after 24 April, it may be said, should fall upon the claimant because there was no need to pursue any proceedings after 24 April".

The Court of Appeal rejected the suggestion that the judge hearing the permission application should have "of its own motion invited further submissions on costs". The appeal against the no costs order had no reasonable prospect of success.

The Court of Appeal (Jackson LJ) gave its decision in *R (P) v Nottingham County Council* on 3 February 2010: [2010] EWCA Civ 157.

COMMUNITY CARE

***R (Cardiff CC) v the Welsh Ministers* – service user's move from a care home to independent living led to a change in the local authority responsible for funding her care**

A move from a care home to independent living in the community can lead to an unwelcome, from a local authority point of view, switch in funding responsibilities. This is what happened in this case. In fact, it is the second recent case in which a demonstration of independence on the part of a service user has led to a new local authority becoming responsible for funding the service user's care. The other case was *R (Manchester City Council) v St Helens Borough Council* [2009] EWCA Civ 1348 which we considered in the last issue.

The background

This is how this dispute arose:

- Originally, EK was an adult woman for whom the Royal Borough of Kensington & Chelsea were obliged to secure accommodation under Part III (s.21) of the National Assistance Act 1948 ("the 1948 Act"). The duty arose due to (a) the extent of EK's needs (learning difficulties, impaired mobility and "behavioural and emotional problems") and (b) the fact that she was ordinarily resident in the Kensington & Chelsea area. Kensington & Chelsea discharged this duty by placing the woman in a registered care home in the Cardiff area.
- While EK was placed in the care home, it was clear that the 1948 Act deemed her as still ordinarily resident in Kensington & Chelsea. This is because s.24(5) of the 1948 Act provides that, where residential accommodation is provided 'out of area', the service user is deemed to still be ordinarily resident in the area in which s/he was ordinarily resident before the placement was made. As a result, funding responsibility for EK remained with the placing authority, Kensington & Chelsea.
- In 2002, EK moved out of the registered care home to a one-bedroom flat under a tenancy granted to her by a housing association. She continued to receive care and support services at approximately the same level as those provided in the care home.
- EK's rent on the flat was met by housing benefit. Initially, her care was funded by Kensington & Chelsea.
- Subsequently, Kensington & Chelsea contended that EK was no longer ordinarily resident in their area. Their argument was that EK's flat was not residential accommodation provided under Part III of the 1948 Act. This meant, argued Kensington & Chelsea, that the deeming provision in s.24(5) of the 1948 Act no longer applied. As it no longer applied, general legal principles should be deployed in order to determine EK's ordinary residence with the result that she was ordinarily resident in Cardiff. If correct, this would mean that Cardiff council were responsible for funding EK's care (under s.29 of the 1948 Act).
- Cardiff council strongly disagreed with Kensington & Chelsea's analysis. As the relevant events in this case took place in Wales, the dispute as to EK's ordinary residence was referred to the Welsh Ministers (Welsh central government) for determination under s.32 of the 1948 Act.
 - The Welsh Ministers agreed with Kensington & Chelsea. They decided that EK's move into a flat of her own, which she held under a tenancy, meant that the provision of care and accommodation for EK had been "disaggregated". EK's accommodation was now being provided by a housing association which meant that her flat could not be residential accommodation provided by Kensington & Chelsea under s.21 of the 1948 Act. The deeming provision under s.24(5) of the 1948 Act did not therefore apply which meant that EK was ordinarily resident in Cardiff. As a result, Cardiff council were responsible for funding EK's care services.
 - Cardiff council claimed judicial review of the Welsh Ministers' decision. It is relevant to note that, while the dispute was ongoing, EK carried on receiving the same level of services. She was not in fact even made a party to the proceedings because the two councils involved agreed that, whatever the outcome, her service levels would be maintained.

The High Court's decision

The High Court rejected Cardiff's claim for judicial review and so they are now liable to fund EK's care package.

The Court said that its task was not to make a determination as to EK's ordinary residence. It was simply to decide whether the Welsh Ministers' decision that she was ordinarily resident in Cardiff was lawfully taken according to public law principles. The Court held that the Welsh Ministers' decision did comply with those principles because it was "not irrational, or unreasonable, or wrong in law". It was open to the Welsh Ministers to decide that EK's flat was not residential accommodation provided by or on behalf of Kensington & Chelsea. Accordingly, their decision which flowed from that, namely that EK was ordinarily resident in Cardiff, was lawful. This means Cardiff council are now responsible for meeting EK's care needs.

The High Court (HHJ Milwyn Jarman QC, sitting as a Deputy High Court Judge) gave its decision in *R (Cardiff County Council) v the Welsh Ministers & the Royal Borough of Kensington & Chelsea* on 3 June 2009: [2009] EWHC 3684 (Admin).





R (M) v Hammersmith & Fulham LBC; Sutton LBC – service user's 'sectioning' under the Mental Health Act 1983 led to a switch in funding responsibilities

This case was another example of responsibility for a needy service user switching from one local authority to another. It will cause concern amongst local authorities in whose areas service users from other areas tend frequently to be placed. In this case, funding responsibility shifted not because of a move to independent living but through the service user having a mental breakdown and being 'sectioned'.

What happened?

These were the relevant events in this case:

- 61 year old M had a history of serious alcohol abuse, which caused serious cognitive impairment and the amnesiac mental disorder Korsakoff's syndrome.
- For many years M lived in the area of Hammersmith & Fulham LBC and was clearly ordinarily resident there. Accordingly, any duties owed to him under the community care legislation were owed by Hammersmith & Fulham LBC.
- In December 2006, M was seriously injured in a road traffic accident. This led to him becoming entitled to residential accommodation under s.21 of the National Assistance Act 1948 (what is often called Part III accommodation). By reference to the s.21 statutory criteria, this must have meant that Hammersmith & Fulham LBC decided that he was in need of care and attention and that need could not be met without the provision of residential accommodation.
- Hammersmith & Fulham LBC placed M in a care home in the Sutton area. This had no bearing on responsibility for M under the community care legislation because s.24(5) of the 1948 Act deemed M to continue to be ordinarily resident in the area of Hammersmith & Fulham.
- In January 2008, M was compulsorily admitted to the Sutton hospital for 28 days assessment under s.2 of the Mental Health Act 1983. He was discharged to the Sutton care home. Hammersmith & Fulham did not contend that this admission led to them ceasing to be responsible for accommodating M under s.21 of the 1948 Act. Accordingly, they continued to fund his place at the Sutton care home.
- In April 2008, M was again compulsorily admitted to Sutton hospital. This time, however, he was admitted for treatment under s.3 of the Mental Health Act 1983. The fact that M was admitted under s.3 was highly relevant to the key issue in this case because it activated a new duty to provide him with services in the community upon his discharge from hospital, that duty arising under s.117 of the Mental Health Act 1983. By contrast, M's admission under s.2 of the 1983 did not activate the s.117 duty.
- In March 2009, M was discharged from the Sutton hospital to a placement in the area of Ealing LBC. A dispute arose between Hammersmith & Fulham LBC and Sutton LBC as to which of them was responsible for funding the Ealing placement. The dispute could not be resolved and so the matter came before the High Court on a claim for judicial review.

The legal framework

As mentioned above, M's placement by Hammersmith & Fulham in the Sutton area did not alter his ordinary residence for the purposes of the National Assistance Act 1948. He was deemed to remain ordinarily resident in Hammersmith & Fulham.

Upon his discharge from the Sutton hospital, however, M became entitled to aftercare services under s.117 of the Mental Health Act 1983, that entitlement arising because he had been detained for treatment under s.3 of the 1983 Act.

Aftercare services may take the form of residential accommodation, if that is called for by a person's particular needs (*Clunis v Camden and Islington Health Authority* [1998] QB 978). And it is clear that a decision was taken in this case that M required residential accommodation as an aftercare service. The key issue therefore was who was responsible for funding the s.117 residential placement for M.

Section 117 says that the duties it imposes in respect of a particular patient are duties of:

- (i) the council in whose area the person "is resident". This means the council in whose area the person resided before being admitted to hospital: *R v Mental Health Review Tribunal and others ex parte Hall* [1999] 3 All ER 132; or
- (ii) if no council can be identified as that in which the patient resided pre-admission, the council for the area to which the patient is sent on discharge.

What did the Court decide?

The Court began its analysis by considering where M was "resident" before he was admitted to hospital under s.3 of the Mental Health Act 1983. It said that the task here was to consider the area in which M had a "settled presence" adopted without compulsion. The Court held that, on that test, it was clear that M was resident in Sutton before he was admitted to hospital under s.3 of the 1983 Act:

"M was unquestionably resident at [R House in Sutton] when he was admitted to Sutton Hospital under section 3 of the 1983 Act. He had lived there for about a year, apart from the period when he was admitted to Sutton Hospital for five or so weeks under section 2 of the 1983 Act. He had abandoned his tenancy of the one bedroomed flat in Hammersmith. He had nowhere to live in Hammersmith. If anyone had asked him the question, and he had been capable of giving a rational answer to it, "where do you now reside?" on 9th April 2008, his answer could only have been "in [R House]". If he had been asked "do you reside in Hammersmith and Fulham?" he might have said "I wish I did", but he could not sensibly have said "I do".

So, applying common sense it was clear that M was resident in Sutton before his admission to hospital. This meant that Sutton's task was to try and persuade the High Court that the ordinary residence deeming condition in the 1948 Act intervened to prevent that common sense result





operating so as to fix Sutton with responsibility for M under s.117 of the Mental Health Act 1983. Sutton failed in that endeavour. The deeming condition in the 1948 Act applies only for the purposes of that Act. It has no part to play in deciding where, as a matter of fact, someone is "resident" for the purposes of another piece of legislation, s.117 of the Mental Health Act 1983. In the Court's words:

"Section 24(5) [of the 1948 Act] expressly provides that a person provided with residential accommodation is only to be deemed "for the purposes of this Act" to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the accommodation was provided for him. Those words are unequivocal. What is deemed to occur for the purpose of the 1948 Act cannot be transposed into the 1983 Act".

The Court acknowledged that this result may cause difficulty for local authorities which, following a service user's mental health crisis, suddenly find themselves responsible for 'out of area' service users. That, however, could not change the clear meaning of the statutory provisions:

"that construction creates considerable practical problems for those charged with the management of discharged patients. I acknowledge that it does, but the fact that it does cannot lead to a construction of primary legislation which the wording of the legislation does not bear... If there is an anomaly it is for Parliament to correct".

Inconsistent statutory wording about 'residence' – does it matter?

It will be observed that the 1948 Act and the Mental Health Act 1983 use slightly different terminology to describe the geographic link between a person and a public body's area in order to decide whether that public body has a duty to provide services. The 1948 Act uses "ordinarily resident" whereas the 1983 Act uses "resident". In this case the High Court held that there was no real difference between the two concepts

"It is now, and has been for many years, settled law that those words, absent a particular statutory context, have their ordinary English meaning and indeed that there is little, if any, perceptible difference between them".

In fact, the High Court also said that another related phrase that is sometimes encountered – "normally resident" – has also essentially the same meaning:

"There seems to me to be no perceptible difference between the three phrases, "resident", "ordinarily resident" and "normally resident". All three connote settled presence in a particular place other than under compulsion".

What about the intra-local authority ordinary residence agreement?

In 1988 the Association of Metropolitan Councils and the Association of County Councils entered into an agreement entitled *Services for mentally ill and mentally handicapped people responsibility for costs of accommodation and day care services*. As the High Court said, in the present case applying those rules would have fixed Hammersmith and Fulham with responsibility for funding M's placement following his discharge from hospital. Sutton argued that they had a public law 'legitimate expectation' that those rules would be followed by Hammersmith & Fulham. The High Court held that Sutton had not made good their case on legitimate expectation:

"It may be that there is material which, if put before a court, would persuade a judge that the agreement has been universally and consistently fulfilled over the years, so as to give rise to that legitimate expectation, but the material which I have simply does not permit me to reach that conclusion".

This argument could also have been criticised on the basis that it conflicts with the will of Parliament, as expressed in s.117 of the Mental Health Act 1983. On the analysis of the High Court in this case, Hammersmith & Fulham were not simply being awkward, they actually had no power to provide s.117 services to M because he was neither resident in their area prior to hospital admission nor was he sent to their area on discharge. And no one can have a legitimate expectation that a public body will act outside its powers.

The High Court (Mitting J) gave its decision in *R (M) v Hammersmith & Fulham LBC & Sutton LBC; R (Hertfordshire CC) v Hammersmith & Fulham LBC* on 3 March 2010: [2010] EWHC 562 (Admin).

PERSONALISATION

R (Savva) v Royal Borough of Kensington & Chelsea – decision to allot a service user a particular personal budget quashed for failure to give reasons

This was the first opportunity for the High Court to consider the lawfulness of the Resource Allocation System (RAS) approach that many councils are now using to quantify a service user's 'personal budget'. Under the personalisation initiative, the service user is then given a degree of control over the type of services that are purchased using that budget. While the High Court rejected the argument that the use of RAS was inherently unlawful, it did hold that service users should be given an explanation of why a council considers that a particular personal budget is sufficient to meet a service user's needs.

The factual background

This is what happened in this case:

- The case concerned a 70 year old woman, Ms S, who, 10 years ago, suffered a stroke. She also had arthritis and a heart condition. She lived in a flat on her own and was unable to leave it without assistance.
- In July 2009, Ms S, with the assistance of a support worker, completed a "Personal Budget Supported Self-Assessment Questionnaire" (SAQ). This led to Ms S being given 16 'points' under her local authority's RAS.





- Under that RAS, the 16 points score was converted into a personal budget allocation for Ms S of £82 per week. However, this was only what the authority concerned called an 'indicative' budget and in fact Ms S's actual allocated budget was increased significantly to £170 per week.
- In the autumn of 2009, Ms S was admitted to hospital. Upon discharge, she completed a fresh SAQ which converted into a higher RAS score of 28 points.
- That 28 point RAS score translated into a personal budget allocation of £112 per week. Again, that figure did not become an actual personal budget of the same amount. Instead, in December 2009 Ms S's indicative personal budget was set at £140 per week and her actual personal budget was set at £170, i.e. the same as it was before she went into hospital even though there was good evidence to suggest that Ms S's needs had increased.
- Ms S claimed judicial review of the December 2009 decision.

The council's use of RAS was not inherently unlawful

The first ground of challenge in this case was that the council's RAS was not designed to ensure that a service user's eligible needs were met. In other words, it was argued that it constituted an "unlawful cap" on spending so as to prevent a council from discharging its duty to provide services to meet eligible needs. It appears that the particular objection was the relative (or "non linear" as the High Court described it) nature of this council's RAS, in that the personal budgets generated in a particular case were informed by the current distribution of care packages being delivered across the authority.

This first ground of challenge was rejected by the High Court. The Court accepted that there would be force in this ground of challenge if it were the case that the RAS-generated personal budget was always formulaically converted into an actual personal budget. However, the evidence showed that the RAS-generated budget was treated as only an indicative personal budget. As the facts of this case showed, the authority retained discretion to increase the budget if that was considered necessary in order to meet a service user's eligible needs for community care services. The RAS budget was only a "starting point" and:

"The [local authority] has not taken the indicative budget and said that that is the final figure. Rather, it has used a relative and non-linear approach, which it considers provides, as a starting point, a better reflection of the way in which care needs and costs are distributed to all those service users across the authority...I agree...that the use of the RAS by the [local authority] is not unlawful".

What does this aspect of the Court's decision mean?

So, what was the High Court really saying here? The legal cornerstone of community care is that, once a council has decided that services should be provided to meet a particular need, it becomes an eligible need that must be funded (this is derived from the decision of the Law Lords in *R v Gloucestershire CC, ex parte Barry* [1997] AC 584). This must be done either by giving a service user a direct payment of an amount which will allow him/her to purchase a service to meet the need or by the authority purchasing services to meet the need directly (whether or not under the badge of a personal budget).

The point being made by the High Court in the present case was that the RAS computer program was not the dominant factor in this council's decision-making process. It simply gave an 'indicative allocation' of a sum of money but under the council's particular decision-making arrangements the computer was not fully 'in control'. It was left to real people, taking real decisions on behalf of their employing council, to decide whether the indicative allocation was sufficient to allow for the purchase of services that would meet the service user's eligible needs. This is why the argument that the RAS approach used by this council necessarily led to unlawful decisions being taken failed. So, for those who are concerned that the RAS is taking over community care decision making to the detriment of service users, this was really the 'wrong' case with which to challenge that development.

The authority gave inadequate reasons for its determination of a personal budget

The claimant's second ground of challenge was successful. This was that the council were required to give, but had not given, reasons for having decided to fix S's personal budget at £170 per week.

The High Court held that the council had been obliged to give reasons for its decision to allocate S a personal budget of £170 per week. The Court accepted that there was no duty under the community care legislation to give reasons. However, the Court stressed that a key element of the personalisation initiative is transparency. That called for a clear explanation of the reasons for personal budget allocations:

"without being able to properly understand the use made of the RAS, the service user and anyone acting on her behalf, is left totally in the dark as to whether the monetary value of £170.45 is adequate to meet the assessed need of a 28 point score. The process of conversion made by the [decision making] Panel is not explained to the service user. It should have been underpinned by an evidential base, and it was not".

The council's decision to allocate a particular personal budget in December 2009 was therefore flawed. The High Court quashed it and ordered the council's decision making panel to reconsider S's personal budget and give her reasons for the allocation it arrives at on that reconsideration.

The High Court (HHJ Pearl, sitting as a Deputy High Court judge) gave its decision in *R (Savva) v Royal Borough of Kensington & Chelsea* on 11 March 2010: [2010] EWHC 414 (Admin).





SOCIAL CARE – GENERAL ISSUES

DISABILITY EQUALITY DUTIES

R (Equality & Human Rights Commission) v Secretary of State for Justice – without supporting documentary evidence, a public authority will have difficulty showing that it complied with general equality duties

Some public bodies are continuing to find it very difficult to comply with their general duties under the equality legislation, such as the general disability equality duty. This latest finding of non-compliance shows that, without supporting documentary evidence, a public body will find it difficult to convince a court that, when it took a strategic decision, it paid due regard to the 'needs' incorporated within the general equality duties.

The background

In May 2009, the National Offender Management Service (NOMS) and the UK Borders Agency entered into a Service Level Agreement "to support the effective management and speedy removal of Foreign National Prisoners". This involved the transfer of male foreign national prisoners to certain UK prisons.

The Equality & Human Rights Commission brought a claim for judicial review in which they argued that NOMS and the UK Border Agency had, in entering into the Service Level Agreement, failed to comply with their general race and their general disability equality duties. Those duties require public bodies in carrying out their functions to pay due regard to a range of needs, such as the need to promote equality of opportunity between disabled persons and other persons. The Human Rights Commission pointed out that none of the records of the officials' meeting prior to the entering into of the Service Level Agreement referred to the general equality duties. The public bodies involved accepted that the race and disability duties applied to them when they were making decisions about entering into the service level agreement but they denied that they had failed to pay due regard to the needs set out in the duties.

The law

In the last issue, we provided a detailed run down of the current state of the case law about the way in which the general equality duties operate. As a result, we will not dwell on the case law in-depth here. The key point from the case law for the purposes of the present decision is that, while an express reference to the equality duties is not required as a matter of law, it is clearly sensible for a public body expressly to refer to the duties in its decision making records and to set out how it has paid due regard to the 'needs' referred to in the duties. Otherwise, it is difficult for a public authority to show that it has discharged the duties "in substance, with rigour and with an open mind" (*R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin)).

The decision

The High Court held that the public bodies involved in this case had not paid due regard to the various needs set out in the general equality duties when entering into the service level agreement. Accordingly, they had failed to comply with those duties.

Officials of the public bodies involved asserted that they had paid due regard to the equality needs but that was not supported by the contemporaneous evidence. The fact that the evidence did not refer to the duties was not determinative. But what was determinative was that the evidence disclosed no mental engagement with any of the 'needs' referred to in the general equality duties. In arriving at its overall conclusion, the High Court also relied on the fact that no impact assessment was carried out prior to the entering into of the service level agreement. While the general duties are capable of being complied with even if formal impact assessments have not been carried out (see the decision in *Brown*), the absence of an assessment makes it difficult, especially where strategic decisions affecting large numbers of people are concerned, for a public body to show that it did pay due regard to the needs sets out in the general equality duties.

The High Court (Wyn Williams J) gave its decision in *R (the Equality & Human Rights Commission) v the Secretary of State for Justice & the Secretary of State for the Home Department* on 17 February 2010: [2010] EWHC 147 (Admin).

SOCIAL CARE SERVICES FOR PERSONS FROM ABROAD

R (Zarzour) v Hillingdon LBC – council obliged to accommodate a blind person seeking asylum

Admittedly, a recent decision of the Law Lords restricted the range of persons seeking asylum who are entitled residential accommodation from local authorities (*R(M) v Slough BC* [2008] UKHL 52, see issue 51). However, the *Slough* decision does not mean that this avenue of support has been closed off. As this case shows, more disabled individuals seeking asylum are likely to remain entitled to local authority accommodation provided under s.21 of the National Assistance Act 1948 and, as a result, do not have to look to the National Asylum Support Service/New Asylum Model for accommodation and related support.

What led to this case?

Z, an adult male, arrived in the UK from the Lebanon on March 2008. He claimed asylum. His claim was rejected but he appealed and as a result remained an "asylum seeker" for the purposes of the asylum support and community care legislation.

Z was blind. He had no settled accommodation but two friends, acting out of goodwill, allowed him to stay with them in a studio flat in the



Hillingdon area. However, this was a temporary arrangement and Z was at risk of being asked to leave at any time. Hillingdon social workers carried out an assessment of Z's needs. Following that assessment, Hillingdon refused to offer Z accommodation under s.21 of the National Assistance Act. They said that they were willing to offer him personal care services but they took the view that he was not entitled under s.21 because he did not need "24 hour residential care or a full time carer".

Local authority duties towards persons seeking asylum

Two conditions must be met in order for a person seeking asylum to be entitled to accommodation under s.21.

Condition 1 – the ordinary conditions

The first hurdle is the same for all regardless of immigration status. S.21 of the NAA 1948, as interpreted by the Law Lords in the *Slough* case, imposes the following sub-conditions:

- (i) the person seeking accommodation must be aged over 18 and in need of care and attention. Baroness Hale held in *Slough* that a requirement for "care and attention" can be equated with a requirement for looking after(a). As a result, in the words of Baroness Hale "a mere need for housing and financial support is not a need for care and attention". Lord Brown added: "a person must need looking after beyond merely the provision of a home and the wherewithal to survive... The looking after required does not have to be for either nursing or personal care. It must, however, be of such a character as would be required even were the person wealthy";
- (ii) the need for care and attention must arise because of age, illness, disability or "other circumstances";
- (iii) the need for care and attention must be such that it can only be met if residential accommodation is provided. If the need can be met without the provision of accommodation (e.g. through care in a person's own home), there is no entitlement under s.21;
- (iv) in *Slough* it was also pointed out that a local authority faced with an application for support from an asylum seeker was not obliged to look into the future and consider whether s/he would meet the above three conditions if s/he were destitute and living on the streets. It is really for this reason that the *Slough* case reduced the resource burden on local authorities of supporting asylum seekers. It means that local authorities are under no obligation to anticipate whether a person seeking asylum would have a need for care and attention in the future. As a result, many who previously were thought to qualify for s.21 accommodation do not, under the *Slough* ruling, qualify and instead have to turn to the National Asylum Support Service for accommodation. These individuals fall at the first hurdle because at the time they seek accommodation they do not need to be looked after in a way which can only be achieved by the provision of residential accommodation.

Condition 2 – the extra condition for persons seeking asylum

The second hurdle, contained in s.21(1A) of the 1948 Act applies to persons seeking asylum and certain other groups subject to immigration control. This condition focuses attention on the reason for the person's need for care and attention (there must have been such a need in order for the first hurdle to have been crossed). That need must not have arisen "solely" because the person is destitute or because of the physical effects, or anticipated physical effects, of being destitute.

The s.21(1A) test was interpreted by the Court of Appeal in *R v Wandsworth London Borough Council, Ex parte O, R v Leicester City Council, Ex parte Bhikha* [2000] 1 WLR 2539. In that case it was held that the test (often referred to as 'destitution plus') is met where "an applicant's need for care and attention is to any material extent made more acute by some circumstance other than the mere lack of accommodation and funds".

Why was Hillingdon's decision quashed?

Hillingdon had not properly analysed Z's case alongside the condition 1 criteria mentioned above. If they had looked at his case correctly, they would inevitably have concluded that he met all the condition 1 criteria. The High Court held that Z's blindness meant that he clearly needed 'looking after' because he needed "someone to assist with, or to perform, tasks he could not or should not cope with on his own". The instability of Z's current accommodation and the fact that there was clearly no guarantee that his friends would continue to help him meant that his care needs could not with confidence be met there. Accordingly, all the condition 1 criteria were met. It was also clear that the condition 2 criteria were met. Z's needs were nearly all as a result of his blindness and had little, if anything, to do with destitution.

The High Court declared that Z was entitled to accommodation under s.21 of the National Assistance Act 1948. Hillingdon unsuccessfully appealed to the Court of Appeal, which upheld the High Court's decision.

The High Court (Timothy Brennan QC, sitting as a High Court judge) gave its decision in *R (Zarzour) v Hillingdon LBC* on 1 May 2009: [2009] EWHC 1398 (Admin.).

The Court of Appeal gave its decision in *R (Zarzour) v Hillingdon LBC* (interested party: Secretary of State for the Home Department) on 17 December 2009: [2009] EWCA Civ 1529. The Court was comprised of Laws and Etherton LJ and Lewison J.

HOUSING

MENTAL ILLNESS

Barber v Croydon LBC – Court of Appeal holds possession proceedings against mentally ill non-secure tenant unlawful because a housing department failed to make inquiries into the tenant's vulnerability

Mentally ill tenants were helped by the Court of Appeal in this case. The decision lessens the impact of a recent decision of the Law Lords which deprived the Disability Discrimination Act 1995 of much of its utility in terms of protecting disabled householders from eviction. Here, the Court of Appeal held that a council's decision to seek possession against a mentally ill tenant was unlawful because it failed properly to take into account the tenant's vulnerability. This was particularly significant in the circumstances of this case because it involved a tenant without any statutory security of tenure.



What happened?

The background to this case was as follows:

- A tenant of Croydon LBC was unfortunate in that he had a non-secure tenancy. His tenancy was granted to him in order to discharge a duty owed to him under the homelessness legislation in Part VII of the Housing Act 1996 and had not been converted into a secure tenancy (the usual form of local authority tenancy). This meant that, as a matter of landlord and tenant law, the council were entitled to terminate the tenancy without having to show any statutory 'grounds' and without having to convince a court to whom an application for a possession order was made to enforce their right to possession that it would be reasonable to grant possession.
- The tenant had a history of severe mental illness. In fact, during an earlier period of homelessness (which ended when he was granted the tenancy referred to above), the tenant had a psychotic breakdown which appeared related to the stress of being street homeless. That breakdown was so serious that the tenant was compulsorily admitted to hospital under the Mental Health Act 1983.
- Until the event described below, the tenant had not posed any management difficulties for his council landlord.
- The key event occurred in 2007. Apparently, the tenant was annoyed that some broken glass near his flat had not been removed. He approached a caretaker and swore at him for having failed to clean up the glass. A short time later, the tenant confronted the caretaker again, who alleged that the tenant spat at him and kicked him in the knee causing a soft tissue injury. The tenant denied that he had spat at or kicked the caretaker, but he did subsequently accept a police caution for causing the caretaker harassment, alarm or distress by using abusive or threatening language.
- The council decided, without speaking to the tenant, to serve him with a notice to quit. Following expiry of the notice to quit, the council brought a possession claim to secure the tenant's eviction. For the purposes of those proceedings, a psychiatric opinion was sought. The psychiatrist's report said that any social interaction was stressful for the tenant and resulted in panic and even incontinence. The report concluded that the tenant was exceedingly vulnerable to another psychotic episode were he to become homeless and that, if that happened, his "life would descend into chaos" and "his life would be placed at considerable risk".
- The council considered the report, but they proceeded with their possession claim. Essentially, this was because the council were applying their policy of 'zero tolerance' of abuse against their staff.
- The county court granted the council a possession order.

What was the key legal issue?

As mentioned above, because the tenant had a non-secure tenancy the court hearing the possession claim did not have to be satisfied that it was reasonable to grant possession before making a possession order. That did not mean, however, that the tenant's council landlord had an entirely free hand to secure his eviction as and when they saw fit. A recent decision of the House of Lords has reminded social landlords that are public bodies that, in making possession decisions, they are subject to the principles of public law (*Kay v Lambeth LBC* [2006] 2 AC 465). For example, they should take into account obviously relevant factors when making possession decisions and must not make decisions that are what is known as '*Wednesbury*' 'irrational' (outside the range of decisions that a reasonable council could take). If a possession claim is based on a decision that is flawed in public law, the court hearing the resultant possession claim should refuse to grant the authority the possession order sought.

The tenant argued that Croydon council's decision to bring possession proceedings or, alternatively, to continue to pursue the proceedings once they had received the psychiatrist's report was flawed as a matter of public law.

The relevance of social landlords' anti-social behaviour policies

A general issue addressed by the Court of Appeal was whether a local authority's anti-social behaviour policy (which an authority is required to have by virtue of s.218A of the Housing Act 1996) might have a bearing on the legality of its decision to seek a possession order against a tenant. The Court found that such policies were legally relevant and that a failure to follow them could render unlawful a decision to bring a possession claim on the basis that it was a decision that no reasonable public body could have taken.

In other words, Croydon's anti-social behaviour policy was highly relevant when considering whether they had acted reasonably. Two aspects of that policy should have influenced their response:

- (i) the first was a recognition that tenant vulnerability should be taken into account when considering the appropriate response to anti-social behaviour. The policy said "our staff are trained to work with other statutory and voluntary agencies in order to ensure the needs of our vulnerable complainants and perpetrators (alleged or proven) are considered" but that "vulnerability in itself will not prevent Officers from taking action to bring an end to complaints of anti-social behaviour". Importantly, however, the policy also said that "The Tenancy Team will always refer ASB cases to the IMHS [integrated mental health service] to ensure that vulnerability is considered when action is taken". On this topic, it is important to note that the Court of Appeal said that, even if the policy had been silent on tenant vulnerability, this is something that a reasonable public authority would be bound to consider when taking possession decisions;
- (ii) the second highly relevant aspect of Croydon's policy was its graduated response framework. The policy created three categories of behaviour, according to seriousness. The behaviour of the tenant in the present case fell within the most serious category, category 3 which actually contained a multitude of sins and was defined as: "one-off serious incidents or crime, physical assault or threats of violence and gun and knife related crime". The policy said that, where ASB is in category 3, it "will almost always result in legal action either in the form of an application for an ASB injunction (or ASBO) or for an outright possession order".

The Court of Appeal also made the important point that the contents of a council's anti-social behaviour policy cannot be the only criteria by reference to which the lawfulness of possession decisions are to be judged. The Court identified other criteria that were obviously relevant in this case and ought to be, it is suggested, relevant in other similar cases:

- (i) "there must inevitably be an analysis of the cause of the ASB before the correct response can be decided upon";



- (ii) the need to prevent similar conduct in the future should be a relevant factor for a council when deciding how to respond. The implication is that if a tenant appears unlikely to 're-offend' or is susceptible to changing his/her behaviour if support services are provided then the response should take account of those factors.

The outcome – the council acted unlawfully in seeking to evict their mentally ill tenant

In this case, the council did not follow their own policy. They did not refer this tenant's case to the integrated mental health service as part of their decision on how to respond to the tenant's behaviour. This failure was described by the Court of Appeal as follows:

"it was unreasonable for [the council's tenancy enforcement officer] to proceed without applying the Council's policy on vulnerable people set out earlier. This would have involved him or his department liaising with IMHS and social services to see whether or not an alternative strategy to seeking possession could be followed in order to prevent any repetition of the ASB by [the tenant]. A supervised ABC [anti-social behaviour contract] is one obvious alternative".

This failure was even more serious given that it was maintained after the psychiatrist's report became available. As the Court of Appeal said, "there was also no apparent consideration of the possible consequences for [the tenant] of losing his flat which [the psychiatrist] considered would cause his life to descend into chaos". Even after receipt of the psychiatric report on the likely consequences of eviction for the tenant, the housing official in charge of the case failed to consult local mental health services. This was wrong:

"it was, I think, incumbent upon [the official] to consult the other agencies and to take advice as to whether some alternative remedy such as an ABC would solve the problem. As I read it, the Council's policy is not (and certainly ought not to be) that incidents of ASB involving persons with mental disabilities should be handled without regard to the existence of those disabilities and their responsibility for the conduct in question".

The housing official, on behalf of Croydon, also failed to recognise that 'category 3' covered a wide range of violent conduct, ranging from a single kick with threats, as in this case, to organised gun crime. The official should have appreciated that the tenant's behaviour, while serious, was towards the lower end of the scale and so did not call for as drastic a response as persistent and serious violent behaviour. The official should also have taken into account the fact that the present incident appeared isolated, not having been preceded or followed by any similar incidents.

Accordingly, the council's decision to pursue possession proceedings following receipt of the psychiatrist's report was legally flawed. It removed the possession claim's legal basis and so the county court should not have granted Croydon their possession order. That order was set aside and so the tenant remains a non-secure tenant of Croydon council.

Was the Disability Discrimination Act 1995 of any assistance to the tenant?

The parties in this case agreed that the tenant was "disabled" for the purposes of the Disability Discrimination Act 1995 (DDA). However, that provided him with no real assistance in his attempt to prevent his landlord from evicting him. Following the decision of the House of Lords in *Lewisham LBC v Malcolm* [2008] UKHL 43, the DDA only really protects disabled occupiers who have been the victims of direct discrimination. In this case, the county court decided that Croydon would have taken the same action as they took against this tenant against a non-disabled tenant who behaved in the same way. Accordingly, Croydon's pursuit of possession proceedings against this tenant did not amount to disability discrimination contrary to the DDA. The Court of Appeal held that that finding of the county court was "not open to serious challenge".

The Court of Appeal gave its decision in *Barber v Croydon LBC* on 11 February 2010: [2010] EWCA Civ 51. The Court was comprised of Rix, Richards & Patten LJ.

HUMAN RIGHTS

Tomlinson v Birmingham CC – Law Lords hold that restricting appeals against homelessness decision to points of law is compatible with the Human Rights Convention

The message from this decision of the Law Lords is that it is 'no change' when it comes to the mechanisms for challenging homelessness decisions. The current system is compatible with the European Convention on Human Rights.

Homelessness decision-making: the domestic legal framework

The operation of the homelessness legislation contained in Part VII of the Housing Act 1996 requires various decisions to be taken by councils/their staff, e.g. as to whether accommodation is suitable for an applicant or whether an applicant has been informed of various matters about which s/he must be informed in order for duties under the legislation to disappear.

Where a person is dissatisfied with various key original (i.e. caseworker) decisions, s/he has two opportunities to try and have the decision altered:

- (i) by exercising the right to have the decision reviewed internally, under a which a more senior officer than the caseworker will reconsider the matter; and
- (ii) thereafter, by exercising the right to appeal to the county court on a point of law.

It can be seen that the right to appeal to the county court is limited to questions of law. This limitation lay behind the current legal challenge and so, to put it in context, we should set out what sort of challenges may be made where a person is given a right to appeal against a decision on a point of law. The Court of Appeal, in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, recently gave the following description of what amounts to an error of law

- (i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;



- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome".

It can be seen that a number of challenges of a type that many applicants would like to make fall outside this list. For example, a challenge which asserts that the factual findings made as part of a homelessness decision were simply wrong is not permitted. As Lord Hope said in the present case, "the county court judge [who hears the appeal on a point of law] may not make fresh findings of fact. He must accept the conclusions on [applicant] credibility that have been reached by the reviewing officer".

Article 6 of the European Human Rights Convention and homelessness decision making

One of the purposes of Article 6(1) of the European Convention on Human Rights is to ensure that civil legal disputes are determined by courts rather than governments. It provides that "civil rights" are to be determined by an independent and impartial tribunal. The question in the present case, therefore, was whether decisions about a person's entitlement under the homelessness legislation amount to the determination of a person's civil rights.

If the answer to that question were – yes, decisions about entitlement under the homelessness legislation do determine civil rights – another question would arise. That question is whether the current system, with its limited grounds for challenging homelessness decisions before a court, complies with the requirements of Article 6. This topic has actually been before the UK's highest judicial body before, in the case of *Tower Hamlets LBC v Begum* [2003] UKHL 5. In that case, the Law Lords did not rule on whether making decisions about entitlement under the homelessness legislation amounted to the determination of a civil right. But they did hold that, even if they were, the current decision-making structure, involving an internal review with due process elements together with a right of appeal on points of law, was sufficient to comply with the requirements of Article 6. In making this finding, the Law Lords pointed out that, where a civil right is derived from a social welfare scheme, less is required by way of court oversight than in the case of determining some other categories of civil rights, such as a person's rights under a contract.

The issues in the present case therefore were as follows:

- (i) whether in legal fact homelessness decision making amounts to the determination of a civil right; and
- (ii) if it does, whether the current decision-making structure complies with the requirements of Article 6.

The key finding – Article 6 can be ignored in the operation of the homelessness legislation

The Supreme Court held that decisions about entitlement under the homelessness legislation do not amount to determinations of civil rights. The members of the Court noted that some systems for conferring benefits by the State, such as mainstream welfare benefits, do determine civil rights. The homelessness legislation, however, does not. Certain features of the scheme for homelessness assistance lift it out of the ambit of "civil right", in particular that it does not confer cash benefits and the criteria to be applied in deciding whether someone is to receive a benefit under the scheme are imprecisely expressed and require the application of judgement. In the words of Lord Hope (with whom Lady Hale and Lord Brown agreed):

"I would be prepared now to hold that cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, do not engage article 6(1). In my opinion they do not give rise to "civil rights" within the autonomous meaning that is given to that expression for the purposes of that article. The appellants' right to accommodation under section 193 of the 1996 Act falls into that category. I would hold that article 6 was not engaged by the decisions that were taken in the appellants' cases by the reviewing officer".

Lord Hope went on to point out that this finding applies to all aspects of homelessness decision making, even those involving pure questions of fact for example whether a particular statutory notice has been received. Accordingly, review officer determinations of fact may not be re-argued before the county court.

Application of this decision in other spheres

The Law Lords decision can be read across to other non-cash social welfare schemes, for example decisions about the Supporting People services that an individual is to receive or the community care services to which a person is entitled. In fact, the High Court has already expressed the opinion that the finding also applies to community care decision making. This was in the case of *R (Savva) v Royal Borough of Kensington & Chelsea* [2010] EWHC 414 (Admin), decided on 11 March 2010, where HHJ Pearl said:

"The creation of a personal budget [to be used to purchase community care services] and the manner in which a personal budget is utilised are matters that fall squarely within social welfare provision. Applying the judicial reservations advanced by...Lord Hope in *Tomlinson*, it is my view that this is not an area of law which engages Article 6".

The Supreme Court gave its decision in *Tomlinson Et Others v Birmingham City Council* on 17 February 2010: [2010] UKSC 8. The Court was comprised of Lords Hope, Brown, Collins and Kerr and Lady Hale.

PERSONS FROM ABROAD

Harrow LBC v Ibrahim – Somali citizen had a right to reside in the UK under European law while her children, whose father was a Danish citizen, completed their education

This is the first of two recent decisions of the European Court of Justice which are highly significant for economically inactive parents whose children are entitled to education in the UK under European law. The Court held that, in order to make the child's right effective, the parent must have the right to reside in the UK, a legal status which opens up the possibility of entitlement to accommodation under the homelessness legislation.



What lay behind this case?

In order to establish a right to assistance, such as accommodation, under the homelessness legislation, Ms I had to have a 'right to reside' in the UK under European law. She was a Somali citizen who had previously been living in Denmark and so hers was not a clear-cut case. The relevant sequence of events needs to be set out:

- (i) Ms I was a Somali citizen, married to a Danish national who was of course a European citizen;
- (ii) the husband came to the UK to work in 2003. It was accepted by all the parties that he was a "worker" for the purposes of European law;
- (iii) shortly after this, Ms I and her three children joined her husband in the UK. They had permission to enter the UK granted by the UK immigration authorities. Soon after arriving in the UK, Ms I gave birth to another child;
- (iv) while the husband was still a "worker", two of the children commenced State education in the UK;
- (v) in 2004, the husband left Ms I in the UK and went to live abroad. Their relationship broke down;
- (vi) in 2007, Ms I, who was not economically self-sufficient, sought accommodation under the homelessness legislation from Harrow LBC;
- (vii) Harrow LBC decided that Ms I was not eligible for assistance under the homelessness legislation because she did not have the right to reside in the UK under European law. The matter came before the Court of Appeal which referred the question to the European Court of Justice (ECJ).

The decision of the European Court of Justice

The ECJ held that Ms I did have the right to reside in the UK, a right which was derived from that of her children and so it seems inevitable that Harrow will have to decide that she is eligible for assistance under the homelessness legislation. The Court reasoned as follows:

- (i) in 2003, Ms I and her children, as family members of a European national who was working in the UK, had the right to "install" themselves in the UK under Article 10 of EC Reg. No. 1612/68, a right which they duly exercised. The ECJ pointed out that this right (now found in Directive 2004/38) is conferred regardless of nationality. Accordingly, Ms I had the right to install herself in the UK even though she was not a European citizen;
- (ii) once the children were "residing" in the UK, they had the right under Article 12 of EC Reg. No. 1612/68 to be admitted to the UK education system, a right which their parents exercised on their behalf;
- (iii) Article 12 has already been interpreted by the ECJ as conferring, in connection with its right of access to education, an independent right of residence upon a child (*Bambaust & R* [2002] ECR I-7091). This means that the child does not need to show that s/he has any kind of citizenship-based right to reside;
- (iv) the children's right of residence under Article 12, being independent, was not affected by changes in parental residence such as their father ceasing to reside in the UK;
- (v) so, the children had a right to reside in the UK in order to complete their education. This meant that Ms I, their primary carer, had to be given a linked right to reside. Otherwise, the children's right would be ineffective;
- (vi) the remaining question for the ECJ was whether it made any difference that Ms I, having no means to support herself financially, was entirely reliant on the State for subsistence. The ECJ held that this made no difference. Article 12 of EC Reg. No. 1621/68, unlike some other European legislation, does not operate so as only to confer entitlements upon persons who are economically self-sufficient.

The European Court of Justice gave its decision in *Harrow LBC v Ibrahim* on 23 February 2010: Case C-310/08.

Teixeira v Lambeth LBC – economically inactive Portugese national had the right to reside for so long as her presence was needed by her daughter in order to complete her education

On the same day as the decision in the *Ibrahim* case was given by the European Court of Justice, the Court also gave judgment in this similar case. The relevant facts of this case were as follows:

- (i) Ms T, a Portugese national, arrived in the UK with her husband in 1989. She worked until 1991 when she had a child who entered UK State education;
- (ii) over subsequent years, Ms T worked intermittently. She last worked in 2005;
- (iii) in 2007, Ms T applied to Lambeth LBC for assistance under the homelessness legislation, including as part of her household for the purposes of the application her dependent daughter (by this time she had separated from her husband);
- (iv) Ms T's application was rejected by Lambeth LBC on the basis that she was ineligible for assistance because she did not have the right to reside in the UK.

The question of whether Ms T had the right to reside in the UK came before the European Court of Justice, which decided as follows:

- (i) as in the previous case, Ms T's daughter had the right under Article 12 of EC Reg. No. 1612/68 to be admitted to the UK education system. The ECJ also held that, for this purpose, it did not matter whether or not a child's primary carer was a "worker" on the date on which the child began education:

"it is enough that the child who is in education in the host Member State became installed there when one of his or her parents



was exercising rights of residence there as a migrant worker. The child's right of residence in that State in order to attend educational courses there, in accordance with Article 12 of Regulation No 1612/68, and consequently the right of residence of the parent who is the child's primary carer, cannot therefore be subject to the condition that one of the child's parents worked as a migrant worker in the host Member State on the date on which the child started in education";

- (ii) the daughter's right of residence was independent. Accordingly, it was unaffected by the fact that her primary carer had ceased to be a "worker" for the purposes of European law;
- (iii) as in the previous case, in order to make the daughter's right to reside effective, her mother, as her primary carer, also had to be given the right to reside in the UK. For this purpose, it did not matter that the mother was not economically self-sufficient;
- (iv) the final question for the ECJ was to determine the duration of the daughter's right of residence (and therefore her mother's). Did it only last until the child attained 18? This was relevant because, while the daughter was only 15 when Lambeth rejected her mother's request for assistance under the homelessness legislation, she is now 18 and so an adult under the law of England and Wales. The ECJ's answer was as follows:

"the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education";

- (v) the question of whether the daughter in the present case "needs" the presence of her mother in order to pursue and complete her education is one to be answered by the domestic courts.

The European Court of Justice gave its decision in *Teixeira v Lambeth LBC & the Secretary of State for the Home Department* on 23 February 2010: Case C-480/08.

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