

Update: housing

**Victoria Pogge
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rounds up the year's
key cases affecting
the accommodation
of children



Unlawful pathway plans

The two linked decisions of Kenneth Parker J in *R(A) v Lambeth* [2010] EWHC 1652 (Admin) and [2010] EWHC 2439 (Admin) concerned a challenge by the claimant, an 18-year-old care leaver, to the London Borough of Lambeth's failure to assess his needs and produce a lawful pathway plan.

As a child previously looked after by Lambeth pursuant to section 20 of the Children Act 1989 for the prescribed period, the claimant qualified as a former relevant child who was entitled to a pathway plan, a personal adviser and a range of other support pursuant to sections 23A to E of the Children Act 1989 (as inserted by the Children (Leaving Care) Act 2000).

The judge held that it was unlawful for the personal adviser, whose role it is to act as an intermediary between the young person and the local authority, to be responsible for drawing up a primary pathway plan or a review of that plan (the pathway plan being subject to a requirement of at least six-monthly reviews). It was necessary for the social worker to draw up the plan and any review because it may involve making decisions on provision which could have budgetary implications, although the personal adviser might play an active role in the process. In making this decision, Kenneth Parker J followed the leading decision of Munby J in *R (J) v Caerphilly CBC* [2001] EWHC 586 (Admin).

In my experience, it is not uncommon for

the original pathway plan to have been drawn up with the input of a social worker, but for the six-monthly reviews of that plan to be delegated to the personal adviser with no input from a social worker – this case is, therefore, significant.

In his subsequent linked judgment, Kenneth Parker J held that the further plan produced by the defendant was deficient, in particular because of the inadequacy of the way in which the claimant's accommodation and financial needs were addressed criticising the document for doing little more than stating the present position without analysing what the claimant's future needs would be and specifying how these might be met.

The decision of *Dobbs J in R (Birara) v Hounslow* [2010] EWHC 2113 (Admin) concerned the issue of whether or not the claimant's pathway plan set out a programme of education giving rise to leaving care duties subsisting past her 21st birthday up to age 24.

In holding the pathway plan to be unlawful, Dobbs J held that a pathway plan should live up to its name, being a document which sets out the pathway to the achievement of an agreed goal, with each review of the plan showing the point along the path reached by the young person, an evaluation of progress made and further steps to be taken and modification of any steps or targets deemed necessary.

The court held that the defendant could not rely on "lacunae and deficiencies" in the pathway plans to justify its stance that the

claimant was not pursuing a programme of education as set out in her pathway plan.

The defendant operated a policy of only funding and supporting care leavers past 21 if the programme of education being pursued was one of higher education, subject to a discretion in exceptional circumstances. Unfortunately, in holding the plan unlawful, including because of the defendant's failure to consider whether the claimant fell within the exception to its higher education policy, the judge declined to rule on whether or not the policy was itself unlawful. It is submitted that it is. The legislation simply refers to a "programme of education or training" and there is nothing in the legislation, regulations or guidance which suggests that a local authority could restrict its leaving care duties only to those in higher education past 21.

Accommodation duty

In *R (SO) v Barking and Dagenham* [2010] EWCACiv 1101, the Court of Appeal considered the accommodation duties owed to care leavers. The justices held, in reversing the decision of the lower court, that section 23C(4)(c) of the Children Act 1989, which places a local authority under a general duty to provide a former relevant child with other assistance to the extent that his or her welfare requires it, could include a duty to provide accommodation. Importantly, this means that the accommodation duty is not restricted to circumstances where it is connected to the



young person's employment or education (as required by subsections 23C(4)(a) and (b)), but extends to any situation in which the young person's welfare requires accommodation. This would include, for example, a situation where the young person has been evicted from other accommodation or found to be intentionally homeless or not in priority need under the Housing Act 1996.

The Court of Appeal also held that in considering whether a care leaver's welfare required the provision of accommodation, a local authority is not permitted to take account of whether or not that care leaver might be eligible for accommodation and support from the Home Office pursuant to its asylum support functions (also referred to as NASS). This means that it is not permissible for a local authority to send former unaccompanied asylum-seeking minors looked after by it before turning 18 to NASS when they reach 18 even if they would otherwise be eligible for NASS support. This is likely to constitute a significant change in terms of how this category of young people is currently dealt with by local authorities.

In *R (TG) v Lambeth* [2010] EWHC 907 (Admin), the claimant sought a declaration that, because he was unlawfully accommodated pursuant to the Housing Act as a child, this accommodation should now be treated as section 20 Children Act 1989 accommodation and that he should now be declared a former relevant child.

McCombe J held that the involvement of a youth offending team social worker in referring a child for accommodation pursuant to the Housing Act 1996, but without any direct involvement by the defendant's children's services department, was insufficient for such a declaration to be granted. The judge stated that the duty was not triggered until the child came to the attention of the relevant division of the local authority, thus implying that in a case where the child had come to the attention of social services, who they had unlawfully failed to accommodate, the duty would be triggered.

In *R (C & ANR) v Nottingham* [2010] EWCA Civ 790, the Court of Appeal unfortunately declined to hear the case because the defendant had offered to provide the relevant leaving care services on a voluntary basis, without accepting that any duty was owed.

Age assessment disputes

Another area which has generated some important decisions in 2010 is age disputes. The cases below follow the Supreme Court's ruling in *R (A) v Croydon* [2009] 1 WLR 2557 that the decision as to whether or not a person was a child for the purposes of determining what, if any, support that person may be entitled to under the Children Act 1989 was a matter of precedent fact which was ultimately for the court to decide.

As far as I am aware, only three age assessment disputes have come before the court as 'full age trials' since the Supreme Court's judgment. These are *R (P) v Barnet* [2010] EWHC 1765 (Admin) (per Blake J), *R (MC) v Liverpool* [2010] EWHC 2211 (Admin) (per Langstaff J) and *R (A) v Camden* [2010] EWHC 2882 (Admin) (per HHJ McMullen QC sitting as deputy).

In *MC*, the court held, in considering the appropriate burden of proof, that it was not a question of attaching a burden, but a question of reaching the court's own assessment. *Camden* is the first case since the Supreme Court judgment which has considered a report prepared by the paediatrician, Dr Birch, and what weight should be given to it. It does not appear that an independent social work assessment had been obtained on the claimant's behalf in any of the cases.

In *R (NA) v Croydon* [2009] EWHC 2357, Blake J listed a number of aspects of good

practice which should be followed as essential requirements of fairness in the conduct of an age assessment. This included a requirement that the claimant had the opportunity of an independent adult being present at any assessment interview if he wished.

In *R (MSA) v Croydon* [2010] EWHC 754 (Admin), Cox J held that the policy of permitting an 'independent' adult to be present meant, as one might expect, an individual who was independent of the defendant but not necessarily of the claimant. The judge further held that there was no rational basis for excluding all legal representatives, their agents or associates from the interview, commenting that, on the basis of the defendant's own evidence, there seemed to be real benefits afforded by the presence of the interviewee's lawyer in terms of the fairness and transparency of the procedure.

It appears that a number of local authorities are unaware of the developments in the case law with respect to the entitlement to have an independent adult observer present of whatever category and the entitlement for this to be the interviewee's legal representative is potentially of considerable benefit, particularly in circumstances where the interviewee has no other suitable adult who could attend. It had been agreed between the parties that the observer's role would be limited to taking notes and requesting breaks.

Another important age dispute case is *R (PM) v Hertfordshire* [2010] EWHC 2056 (Admin). Here, Hertfordshire had sought to withdraw its earlier age assessment of the claimant and to follow the decision reached in respect of age by the First-tier Tribunal (Immigration and Asylum Chamber). Hickinbottom J held that a local authority was not bound by a simple finding of fact in respect of age by the First-tier Tribunal. He found that after such a finding had been made, in an appropriate case, it would be for the local authority to reassess the person's age taking into account any new evidence (including evidence before the tribunal) and giving due account to the basis and reasoning of the tribunal's finding, but without any requirement necessarily to follow it.

While the judgment in this case was in favour of the claimant, the decision could be used by local authorities in defending a decision to find an individual as being older than the age he or she was assessed to be by the First-tier Tribunal. It will be a matter of arguing what weight the local authority should give to the tribunal's findings of fact based on what evidence was before the panel and the cogency of their reasoning.

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