CDC case law update 41 – April 2019

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases, either for families or public bodies. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

NHS West Berkshire Clinical Commissioning Group v The First-tier Tribunal (Health, Education and Social Care Chamber) (interested parties: (1) AM; (2) MA; (3) Westminster City Council) [2019] UKUT 44 (AAC)

The Upper Tribunal rejected an application for judicial review challenging a decision by the First-tier Tribunal not to allow a clinical commissioning group to be joined as a party to an appeal which concerned the healthcare provision in a young person's EHC Plan. The Upper Tribunal emphasised that Tribunal recommendations on healthcare matters do not create any substantive legal obligations for CCGs.

Case overview

This case was brought under the Upper Tribunal's judicial review jurisdiction in relation to certain decisions of the First-tier Tribunal ('FtT') which cannot be appealed. The claim for judicial review was brought by a clinical commissioning group ('CCG') whose request to be joined as a respondent to an appeal had been refused by the FtT.

The Upper Tribunal noted that while healthcare provision may not be specified in an EHC Plan without the relevant health commissioning body's agreement, the FtT now has power to make healthcare-related recommendations. In this case, the CCG applied to be joined as a party to appeal proceedings before the FtT in order to make representations about the healthcare provision that could appropriately be made the subject of a recommendation. The FtT rejected the CCG's application.

The Upper Tribunal set out the history of a lengthy dispute between the CCG and the relevant local authority as to the provision to be made for the young person in question ('BB'). The Judge recorded that BB required an 'extraordinary amount of specialist care', stating 'I cannot recall a case about a child or young person with greater needs than BB'.

The Upper Tribunal noted that BB had been assessed as eligible for NHS Continuing Healthcare. The Judge held that 'If it is the case that BB's NHS Continuing Care decision effectively catered for his educational and training needs, there would arguably be no need to maintain an EHC Plan.' The Judge noted that 'If the underlying legal finding or assumption, by reference to which a Tribunal decides an appeal, is that a CCG is responsible for funding any required special education provision, that finding would not be binding on a CCG. A stalemate could arise with the loser being the young person. There would be no

EHC Plan yet the anticipated funder may disagree that its NHS Continuing Care obligations extend, or even permit it, to fund some or all of a young person's required special educational provision.' However in the Judge's view this potential statemate was more theoretical than real 'provided that the First-tier Tribunal is supplied with detailed information about the plan for delivering NHS Continuing Care services to the young person'. A local authority might dispute a CCG's legal assumptions about the scope of NHS Continuing Care but any such dispute would have to be resolved elsewhere because
the FtT cannot impose EHC Plan obligations on a CCG.

The appeals before the FtT in BB's case concerned two decisions; the decision to make an EHC Plan (in relation to which there was an appeal against the contents of sections B and F of the Plan) and a later decision to cease to maintain the Plan.

Applications made by both the local authority and the CCG for the CCG to be joined as a respondent to these appeals were refused by the FtT. On the CCG's application, the FtT held that adding the CCG as a second respondent would introduce unnecessary complexity and that local authorities and CCGs could be expected to resolve their internal disputes.

The CCG argued that as a matter of principle, CCGs are entitled to be made parties to proceedings in which healthcare recommendations are under consideration. Alternatively, the CCG argued that in the circumstances of BB's case, they were entitled to be joined as a party to the Tribunal proceedings. The CCG noted that both BB's parents and the local authority supported their application to be joined as a party.

In rejecting the CCG's primary case, the Upper Tribunal noted that if the FtT makes a healthcare-related recommendation then it is not binding. A recommendation does not determine a CCG's legal obligations under the NHS legislation. The direct legal consequences of a healthcare recommendation are that a CCG must consider a recommendation and supply written reasons if it decides not to follow it. Compliance with these procedural requirements is unlikely to be unduly onerous. As such fairness did not require CCGs to be made parties to tribunal proceedings in order to seek to avoid inappropriate procedural burdens.

The Upper Tribunal held further that if a healthcare-related recommendation is not followed by a CCG, that may have legal consequences. But this is not inevitable, depending, for example, on whether a claim for judicial review or complaint to the Ombudsman is brought. Moreover if a CCG's approach to a recommendation is consistent with the criteria applied by, for example, the High Court on a judicial review claim or the relevant Ombudsman, the claim or complaint will be dismissed. If not, the CCG will be rightly found to have failed to act in accordance with the applicable criteria. In either case, the fairness of the earlier tribunal proceedings is not dependent on CCGs being joined as parties to the proceedings.

Furthermore the FtT's case management powers allowed it to require submissions and/or evidence from a CCG as a non-party. As such it was not

necessary for CCGs to be parties in order for the FtT to make better informed decisions.

The Upper Tribunal held that insofar as the Department for Education's 'national trial' guidance might support the argument that CCGs are entitled to be joined as parties in healthcare recommendation cases, the guidance was either wrong or poorly drafted.
Nor on the particular facts of BB's case did fairness require the CCG to be a party. The Upper Tribunal held that in many respects the CCG's involvement in the proceedings was akin to that of a party. It was not necessary for the CCG to be able to send a representative to make submissions at the hearing in order for the proceedings to be conducted fairly. The CCG's interest in avoiding a flawed or inappropriate healthcare-related recommendation could not be considered such a vital interest that the requirements of fairness compelled it to be joined as a party to the appeal proceedings in addition to the steps already taken by the FtT.

What this means for children, young people and families

The Upper Tribunal's decision emphasises the limits to the legal consequences of healthcare (and social care) recommendations which families may obtain from the FtT under the 'national trial'. Put shortly, as the Upper Tribunal held, 'A healthcare recommendation…does not fix a CCG with any substantive legal obligation'.

Obtaining a recommendation from the Tribunal in relation to healthcare or social care needs or provision may well be a useful step for families in the process of obtaining suitable provision for the child or young person. However families should seek advice on whether another remedy is appropriate in cases involving disputes as to health or social care, most obviously an application for judicial review against the local authority and / or CCG where this is advised to be appropriate and where suitable funding can be obtained. Families should get such advice as early as possible, as applications for judicial review must be made promptly and so families may have to choose between bringing an application for judicial review or pursuing an appeal under the 'national trial'.

Implications for local authorities and other public bodies

Local authorities and CCGs will also note the clear guidance from the Upper Tribunal as to the limitations on the Tribunal's powers in relation to health and social care under the 'national trial'.

More specifically, CCGs are likely to find it very difficult in the light of this decision to challenge any refusal by the FtT to name them as respondents to appeals in relation to EHC Plans. The Upper Tribunal has held that there is no general right for CCGs to be a party to such appeals, and a CCG would have to show that their need to be a party was different and greater than the need put forward by the CCG in BB's case. Of course the FtT may still elect to join a CCG as a party under its broad case management powers. A CCG which wants to become a party to an FtT appeal will need to seek case specific advice on the prospects of such an application succeeding.