CDC case law update 47 – November 2020

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. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

AT and BT (by their father and litigation friend CT) v London Borough of Barnet [2019] EWHC 3404 (Admin)

The High Court held that local authorities have to provide sufficient explanation for departing from the recommendations of the First-Tier Tribunal ('FTT') regarding EHCPs. Decision letters must properly engage with the recommendations of the FTT and, if they are not followed, explain why this is so.

Case overview

This case concerned a challenge to a local authority refusal to follow a FTT recommendation regarding social care. AT has autism and severe sleep difficulties. His parents disagreed with provisions in his EHCP and appealed to the FTT, which they asked to make recommendations about the amount of social care provided under its 'National Trial' jurisdiction.

The SEND (FTT Recommendations Power) Regulations 2017 allow the FTT to make non-binding recommendations regarding EHCPs in relation to health and social care needs and provision. Where social care recommendations are made, the local authority must respond to the child's parent within 5 weeks, stating what steps they have decided to take and giving reasons for any decision not to follow the FTT recommendations. Non-statutory guidance issued in 2018 states that local authorities are generally expected to follow FTT recommendations. In the present case, the High Court stressed that, though recommendations *can* be rejected, cogent reasons must be provided.

The FTT made recommendations regarding social care provision for AT, including overnight respite care. The FTT's recommendations were incorporated into the EHCP but were not implemented: further care assessments produced by the local authority (London Borough of Barnet) offered more limited social care provision.

The first further care assessment asserted that the local authority felt that some of the FTT recommendations would not be in AT's best interests. Instead, it recommended additional direct payments to be used for a support worker providing respite *within* the family home. The High Court held that this did not comply with Regulation 7: it simply restated the local authority's view which was put before the FTT. A second further care assessment went further in explaining why Barnet did not propose to follow the recommendation on overnight respite care, but it did not clearly set out what provision was to be offered instead. Accordingly, the High Court held that this did not provide the sufficiency of reasons required by Regulation 7 of the 2017 Regulations.

Subsequently, Barnet produced a letter in which it stated that, in relation to overnight respite care, 10 hours a week was being provided. This was the first document produced by Barnet which purported to give the reasons required by Regulation 7. However, the High Court held that this was disingenuous as this was used for daytime assistance, which Barnet 'well knew'.

The High Court rejected the reasons that Barnet put forward in this letter for departing from the FTT recommendations. As to Barnet's reasoning that AT had settled at his new school, the High Court noted that this did not remove the need for overnight respite care. A further reason presented by Barnet was that implementing the FTT recommendations would be unfair to other service users because of the cost involved.

The High Court stated that a local authority can lawfully take account of its resources when making an assessment of needs. However, while cost may be relevant to the nature and extent of provision, lack of funds cannot be used to refuse any provision at all. If it was concluded that some form of overnight respite care outside the home was needed, there must be a way of providing it, even if the form is not exactly the parents' preference. It is notable however that there is no discussion in the judgment of the conclusion in *R (JL) v Islington LBC* [2009] EWHC 458 (Admin) that overnight respite care cannot be provided under section 2 of the Chronically Sick and Disabled Persons Act 1970 (see para 98).

As such, this part of the judgment may need to be treated with caution in future cases Barnet then produced a further and final letter, which purported to accept the recommendation for one night a week of overnight care during term-time. However, the High Court found that this 'acceptance' was not of what was recommended by the FTT: the FTT was addressing the need for respite care *outside* the home, but the local authority's offer was limited to the provision of a night carer *in* the home. As the recommendation was purportedly 'accepted', no reasons were given for departing from 'what the FTT clearly meant'. Therefore, the High Court held that the letter failed to comply with Regulation 7. The Judge termed this a 'major failing' because the weekly overnight respite care was the most important element of the recommendation.

The High Court thus held that the letters did not show sufficiently cogent reasons for departing from the FTT recommendations. The Judge held that the reasons for departing from the recommendation were not only erroneous but non-existent. Barnet had not 'honestly and fairly dealt with the recommendations' but had 'pretend[ed] to accept a recommendation which was in substance rejected'.

The High Court concluded that Barnet was required to produce a fresh decision letter, which had to address the FTT recommendation regarding weekly overnight respite care provision and provide sufficient explanation of why it was not followed, if that was the case. The Judge observed that it was necessary for Barnet 'to grapple with those issues fairly, and to do so quickly. This family has been exhausted by trying to look after AT, and the apparent failure of the Defendant to take their predicament seriously despite safeguarding referrals from professionals in this field. A lack of collaborative progress now might compromise their ability to care for AT at home at all, thus leading to the need for permanent residential care.'

What this means for children, young people and families

This case highlights that recommendations of the FTT - a specialist Tribunal which has heard evidence and argument – in relation to social care (and health) are generally expected to be followed. Where local authorities decide not to follow FTT recommendations regarding social care provision, sufficient and cogent reasons are required. These reasons must be communicated to the family. The same must apply in relation to CCGs and health recommendations.

The decision highlights that if it is concluded that some form of social care is needed, a way must be found to provide it. However, this provision may not always be in the parent's preferred form. However, for the reasons discussed further below, this aspect of the judgment may need to be treated with some caution in future cases.

Implications for local authorities and other public bodies

Local authorities must respond cogently and transparently to FTT recommendations concerning social care provision, providing sufficient reasons for any decisions not to follow them. Importantly, the decision underlines that local authorities must engage honestly with the recommendations, rather than purporting to accept a recommendation while in substance rejecting it.

Local Authorities will need to note the Court's holding that 'the lack of funds cannot properly be used in a case such as this as an argument to refuse any provision at all. If a proper conclusion here is that some form of overnight respite care outside the home is needed, there must be a way of providing it even if the form is not exactly the parents' preference.' However, it is well established that even under the CSDPA 1970 (which does not apply to overnight short breaks / respite care), a local authority only has to meet needs which it considers it 'necessary' to meet, taking account of its resources; see for example the discussion in *JL v Islington*. Given that the overnight breaks in this case must have been provided under section 17(6) of the Children Act 1989, as an aspect of the general duty under section 17(1), it may be that this section of the judgment should be read as applicable to a 'proper conclusion' that it is *necessary* to meet the child's needs to provide some form of overnight respite care, not merely that there is *a* need in that area. Local Authorities will need to take case specific advice as to the relevance of their resources in any situation where this question arises in practice.