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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.

ZK v London Borough of Redbridge [2020] EWCA Civ 1597

The Court of Appeal held that Redbridge was entitled to operate a decentralised system of specialist support, under which teaching assistants are employed directly by schools.

Case overview

This case concerned a 13 year old girl who is blind and partially deaf and requires a high level of support at her mainstream school in the London Borough of Redbridge. ZK challenged Redbridge's refusal to adopt a 'centralised' model of support, whereby the local authority recruits and employs specialist educational support teachers who are seconded to mainstream schools, arguing that the existing 'decentralised' model (in which the *school* employs a specialist teaching assistant if and when it has a child attending with that particular need) was irrational and unlawful.

In the High Court, Swift J rejected ZK's application for judicial review on all grounds. On appeal, ZK pursued three of her grounds. The Court of Appeal rejected each of these.

In relation to the issue of the time taken to recruit and train teaching assistants under the decentralised model (the 'time lag' issue), Simler LJ upheld the findings of fact made by Swift J in the High Court, and held that he was entitled to prefer the evidence of Redbridge over that put forward on behalf of ZK where there was conflict. Simler LJ also dismissed the challenges to the Judge's findings of fact in relation to issues concerning risk of redeployment and lack of cover, and choice of schools.

Ground 1: irrationality and illegality

The first ground of appeal constituted a challenge to the High Court's finding that there is no irrationality or illegality in the decentralised arrangements adopted by Redbridge.

Swift J had accepted that the arrangements put in place by Redbridge may not be perfect or fool-proof and acknowledged evidence that was critical of how educational matters had been addressed on occasion, but emphasised that this was a *systemic* challenge to the *general* arrangements in place. He concluded that at the generic level, the arrangements made by Redbridge were not irrational, nor did they give rise to any inherent likelihood that Redbridge would fail to comply with its legal obligations.

ZK argued that the Judge had erred because he, first, failed to apply the correct test, and second, erred in his interpretation of section 42 of the Children and Families Act 2014 (which imposes a duty on the local authority to secure special educational and health care provision in accordance with the EHC plan). The Court of Appeal rejected these arguments.

First, ZK submitted that Swift J was wrong to apply a test of whether the Redbridge policy was 'realistically capable of implementation… in a way which does not lead to, permit or encourage unlawful acts'. It was submitted that in light of cases decided after Swift J's judgment (including *FB (Afghanistan) v SSHD* and *BF (Eritrea) v SSHD*), the appropriate test for determining whether there is systemic illegality is to ask whether there is a real, rather than fanciful, risk of a breach by Redbridge of its section 42 duty for more than a minimum number of visually impaired children.

However, Simler LJ (with whom the rest of the Court of Appeal agreed) held that it was not necessary or useful to analyse the various cases. The Court of Appeal stated that context is important in determining the appropriate test to be applied. The test applied by Swift J was whether the arrangements gave rise to any inherent likelihood that Redbridge would fail to comply with its section 42 obligation: there had to be a risk of unfairness *inherent in the system* rather than one arising in the course of individual decision-making. The Court of Appeal held that this was correct, and emphasised that what matters in a systemic challenge of this kind is the need to distinguish between an inherent failure in the system and individual failings or unfairness. The court must distinguish between evidence that demonstrates a *systemic* problem from *individual* failures.

Simler LJ held that Swift J did this, and therefore she was satisfied that Swift J's analysis of the law was correct. Simler LJ therefore held that Swift J was 'amply entitled' to conclude that Redbridge's arrangements are sufficient when considered at a systemic level and do not entail any inherent likelihood that Redbridge will fail to comply with its section 42 obligations. Specifically, Simler LJ stated that 'While I can see the attractions of a centralised model which puts the local authority in full charge in terms of preparing to secure whatever provision is specified in a student's EHC plan no matter how complex and low incidence it might be, there is no evidence here of Redbridge's model putting constraints on early planning, or taking it out of the driving seat.'

Second, ZK submitted that Swift J misunderstood the mandatory nature of the section 42 duty, importing into it a 'reasonable endeavours' or 'best endeavours' defence. The Court of Appeal held that this was a misreading: Swift J's reference to 'reasonable forward planning' did not import a reasonable endeavours defence, nor did Swift J dilute the duty by concluding that 'secure' means 'provide and maintain'.

Ground 2: unlawful discrimination

The second ground of appeal was that Swift J erred in dismissing ZK's discrimination grounds by finding that the decentralised model did not inherently disadvantage children with severe visual impairment. The Court of Appeal rejected this.

Simler LJ reasoned that Swift J 'made no findings of specific failings or breaches and was not invited to do so' in relation to section 42 of the 2014 Act, and the Court of Appeal could not either. Swift J's focus was at a generic level, and he was satisfied that the Redbridge arrangements made sufficient allowance for the differences between pupils with special educational needs requiring specialist teaching assistants and other pupils. Simler LJ found that there was evidence to support Swift J's conclusions. Further, Swift J had expressly addressed the contention that ZK's choice of school was narrowed by the decentralised model and, in light of the evidence, concluded that it was not. Simler LJ found that he was entitled to conclude this.

Ground 3: the section 149 public sector equality duty

The premise for the claim regarding the public sector equality duty was that Redbridge failed to have due regard to the special educational needs of pupils and the need to eliminate discrimination between such pupils in mainstream schools, by maintaining the decentralised model. Swift J rejected this, because the very purpose of the arrangements Redbridge puts in place is to seek to eliminate discrimination between visually impaired pupils and other pupils who do not have special educational needs. ZK argued that the Judge had been wrong to infer compliance with the PSED. The Court of Appeal rejected this.

Simler LJ held that Redbridge had not needed to refer expressly to the public sector equality duty in order to comply with it. Where a public body is discharging its functions under legislation expressly directed at the needs of a protected group, it may be unnecessary to refer expressly to the PSED or to infer from an omission to do so, a failure to have regard to that duty. The nature of the duty is informed by the particular function being exercised. Therefore, the Court of Appeal held that the Judge had not erred in his approach.

What this means for children, young people and families

This case holds that local authorities can adopt decentralised systems of specialist support, in order to meet their obligations regarding EHC plans. A system will not be found to be irrational or illegal merely on the basis of individual complaints: there must be, at a general or systematic level, an inherent risk of unfairness or failure to comply with statutory duties (here the section 42 duty).

However, the Court of Appeal emphasised the mandatory nature of the section 42 duty to secure and arrange the education and health provision in every child and young person's EHC plan. Simler LJ held that 'the duty has no "reasonable endeavours" escape clause available to excuse failure to secure the provision specified.' Any failure to comply with the section 42 duty in an individual case can be challenged by way of judicial review, focussing on the facts of that case.

Implications for local authorities and other public bodies

This decision will be welcomed by almost half of all local authorities (45%) who currently operate decentralised models of specialist support. However, the decision emphasises that local authorities need to ensure that systems do not have an inherent risk of unfairness and that systems must make sufficient

allowance for the differences between pupils with special educational needs and other pupils at mainstream schools. Therefore, where a model can be shown to disadvantage pupils or there is evidence of systemic failings or unfairness, a court may reach a different conclusion if a 'systemic' challenge is brought.

The judgment emphasises that the duty imposed by section 42 of the Children and Families Act 2014 is mandatory: there is no reasonable endeavours defence. As such all though 'systemic' challenges may be difficult in the light of this judgment, local authorities can be successfully challenged via judicial review if they are failing to make the provision in section F of an EHC plan in an individual case. The same applies to CCGs who are failing to arrange any specified health provision in a plan.

The Court of Appeal further emphasised the trend in recent judgments that the public sector equality duty may not need express consideration where a public body is discharging its functions under legislation expressly directed at the needs of a protected group.