CDC case law update 16 – December 2016

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.

***R (O) (by her litigation friend H) v Peterborough City Council* [2016] EWHC 2717 (Admin)**

Child protection decisions by local authorities need to be based on a proper understanding of key legal concepts, including 'neglect', and must be supported by the necessary evidence to show that the relevant legal test is met.

Case overview

The High Court quashed a local authority's decision to place a child on a child protection plan because the local authority had failed to understand the concept of 'neglect', or alternatively the application of that concept in the case had been irrational.

Decision

This case is a rare and important example of the High Court quashing a decision made by a local authority exercising its child protection functions. It emphasises that although the courts will place significant weight on the professional judgment of social workers and others involved in these decisions, Judges will intervene if the decisions breach public law principles such as rationality.

The case concerned O, a girl born in December 2007 who in 2013 started to refuse to eat or drink, meaning she had to be fed through a nasogastric tube. O was initially treated as a child 'in need' pursuant to section 17 of the Children Act 1989. However a dispute arose between the local authority and O's mother about appropriate medical treatment for O and in due course a decision was taken by the local authority that a child protection plan needed to be put in place under the category of 'neglect'. O and her mother challenged that decision through an application for judicial review. The child protection plan remained in place for a year before it was withdrawn in March 2016. A challenge to the initial decision to instigate enquiries under section 47 of the Children Act 1989 was also made, but permission to apply for judicial review was refused on this ground.

The court considered the relevant provisions of the statutory guidance, *Working Together to Safeguard Children* (March 2015). The Judge emphasised that under the guidance, decisions to place a child on a child protection plan are to be made at a child protection conference. The test for a plan to be put in place is that the child is likely to suffer significant harm (see flowchart 4, p38 of *Working Together*).

Importantly for the outcome of the case, *Working Together* defines 'neglect', being the relevant category of potential harm in this case, as 'The persistent failure to meet a child's basic physical and / or psychological needs, likely to result in the serious impairment of the child's health or development'. An example of 'neglect' given in the guidance is failing to 'ensure access to appropriate medical care or treatment'.

The Judge reiterated that a decision to place a child on a child protection plan is 'in principle amenable to judicial review'. He cited an earlier case, *R v Hampshire CC ex p H* [1999] 2 FLR 359, for the principle that such challenges are likely to be rare and may need to be confined to 'the exceptional case which involves a point of principle'. This is because 'all concerned in this difficult and delicate area should be allowed to perform their task without looking over their shoulder all the time for the possible intervention of the court'.

The Judge accepted the submissions for O's mother that the fact the plan had been withdrawn did not make the claim academic. This is because the fact that a plan had been put in place could have ongoing detrimental effects for the mother, who may have wanted to work with children.

The Judge held that even making 'due allowance' for the nature of the documents challenged and 'the wide margin of appreciation which a [local authority] enjoys in this important area of child protection, nevertheless at the end of the day the defendant still has to ask the right questions and arrive at conclusions in answering those questions which are not irrational.'

Neither of this principles had been met in this case. The Judge held that there was 'no evidence' that what had happened was neglect by the parents. The only concern was the dispute as to O's need for treatment, in particular whether she should be admitted to a particular residential facility. The Judge held that 'far from being neglectful...the claimant's parents had done everything they could reasonably be expected to do to take forward the agreed step that a second opinion should be sought'.

The Judge therefore quashed the decision to place O on a child protection plan. He also declared that the decision and plan were 'null and void and

of no effect'. This declaration was made in particular to help O's parents deal with any concerns which could arise in future in relation to the previous existence of the plan. The Judge however refused to make a mandatory order requiring the defendant to remove all reference to the plan from the records and notify other bodies that it was not lawfully imposed.

What this means for children, young people and families

Families with disabled children sometimes find that disputes with local authorities as to how to meet their children's needs may result in child protection concerns being raised. This case emphasises that it is possible for families to challenge local authority decisions in the child protection context through judicial review, where (for example) the local authority has misunderstood the legal test or there is no proper evidence to support one or more key conclusion(s).

However families need to bear in mind that the 'wide margin of appreciation' that local authorities are given by the Administrative Courts in child protection cases means that a clear error of law will be needed for a successful challenge. Simple disagreement with the conclusions of (for example) a child protection conference will be nowhere near sufficient for a claim to succeed.

Families who meet the financial threshold should be able to access legal aid to fund advice and representation in any such challenges, via solicitors with the relevant contract from the Legal Aid Agency.

Implications for local authorities and other public bodies

Local authorities will be reminded by this judgment that decisions in the child protection context are not somehow outside the scrutiny of the Administrative Court. Importantly, the Judge in this case did not identify any wider point of principle but allowed the application for judicial review because of clear public law errors in the local authority's approach on the facts of the individual case.

As such local authorities need to ensure that child protection decisions are made with a proper understanding of the relevant legal test, informed by the relevant guidance. There must then be sufficient evidence to show that the test is met. It is vital that a clear distinction is made between cases where children are supported as 'in need' and cases where the evidence of risk of significant harm justifies a child protection plan. It is also of the utmost importance that proper records are kept to support the lawfulness of decisions in the event of a later challenge. In this case the

Judge commented on the lack of clarity in an important aspect of the minutes from the child protection conference.

Local authorities will note that the challenge to the decision to instigate enquiries under section 47 of the Children Act 1989 failed at the first stage, i.e. permission to apply for judicial review was refused. This strongly suggests that the courts are more likely to intervene later in the process, for example a decision to put in place a plan with specific actions to protect the child, than they are to stop investigations at the outset.