

CDC case law update – January 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. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

R (MIV) v LB Newham [2018] EWHC 3298 (Admin)

The High Court rejected a claim that a failure to provide suitable accommodation to a disabled child breached his human rights.

Case overview

The case concerned a five year old disabled child who is a national of India, as are his mother and father. The family had no leave to remain in the UK, and therefore could not access social housing or mainstream welfare benefits. The family issued a claim for judicial review against the relevant local authority, challenging a failure to provide suitable accommodation for them and the failure to assess the child's needs. After the claim was issued, the local authority provided the family with suitable accommodation and increased the financial support being provided to them. The key issue for the Court was therefore whether the local authority had breached the child's human rights by failing to provide suitable accommodation at an earlier date.

The family argued that the impact on the child of being housed in unsuitable accommodation was of such severity that it breached his right to private and family life, as protected by Article 8 of the European Convention on Human Rights. Having considered the previous case law, the Judge held that in relation to an individual's private life rights (including the right to 'physical and psychological integrity'), unless the individual's predicament is sufficiently severe to engage Article 3 ECHR (prohibiting inhuman and degrading treatment), it is hard to conceive of a situation in which Article 8 will impose a positive obligation to provide welfare support. However where the right in issue is the right to family life, there may be a positive obligation under Article 8 to provide welfare support even though the lack of such support would not breach Article 3.

It made no difference to the test if (as here) the individual was particularly vulnerable by reason of disability, although disability will be an important factor in assessing whether Article 3 is engaged on the facts of the case. For example in *Bernard v Enfield*, the deplorable conditions in which a disabled person lived for a

lengthy period engaged Article 3 and gave rise to a positive obligation to provide support under Article 8, even though Article 3 was not itself breached.

Furthermore the Judge held that to find a breach of Article 8 the Court must be satisfied that:

1. There has been a failure to provide the claimant with some sort of benefit or advantage to which they were entitled as a matter of public law
2. There are grounds for criticising the public body's failure to act, 'such that there is an element of culpability'
3. The impact on private or family life of the public law failure is serious and has caused substantial prejudice to the claimant

On the facts, the Judge held that the provision of the previous accommodation had not breached the child's Article 8 rights. There was no arguable claim that the right to family life was breached. The issue was the child's right to private life and his physical and psychological integrity. Given the case law (summarised above), this pointed strongly against the likelihood of a positive obligation being owed.

The accommodation was provided by the local authority as a children's services authority, not a housing authority. It was provided with commendable speed to prevent the family being street homeless and was accompanied by financial subsistence payments. Moreover during the eight months the family lived in the previous accommodation, the child was attending a school with a specialist resource full time where his special needs were catered for.

With hindsight, it would have been better if the search for alternative properties for the family had been broadened earlier. However the failure to offer alternative accommodation at an earlier date was not unlawful as a matter of public law or in breach of Article 8.

Finally, the local authority's culpability was low and the impact of living in the previous accommodation did not cause substantial prejudice to the child's private life. As such the claim under Article 8 ECHR was dismissed.

What this means for children, young people and families

The judgment provides important guidance on when human rights obligations may require a public body to provide welfare support to a disabled child. In essence, where the issue is the impact on the child's well being (or more formally their physical and psychological integrity), the question is whether the situation of the child is so bad as to engage Article 3 ECHR, which prohibits inhuman and degrading treatment. The nature of the child's impairments will be relevant to this assessment. If however the issue is the child's right to family life, for example their

ability to live with their parents, there may be a positive obligation to provide support even if the circumstances do not engage Article 3.

However in either case an important part of the test is whether there is a public law obligation to provide the necessary support. As such it will be difficult to establish a free-standing right to welfare support under the Human Rights Act 1998, where such support is not already required as a matter of public law. Children, young people and families will therefore need to get advice on whether there is a duty (in legislation or under the common law) on the relevant body to provide them with the support they need, not merely assert a 'free standing' human rights obligation.

Implications for local authorities and other public bodies

The judgment emphasises that local authorities and other public bodies must respect the human rights of disabled children (in accordance with section 6 of the Human Rights Act 1998), but also that the threshold for there to be a human rights obligation to provide welfare support is a high one. Local authorities should however be particularly careful to ensure that the services they provide to disabled children respect the child's right to family life, because in that context there can be a human rights obligation to provide support even if the circumstances do not come close to the kind of 'human and degrading treatment' required for a breach of Article 3 ECHR. As a very general rule however, local authorities which comply with their public law duties to disabled children will be respecting their rights under Article 8 ECHR.