

CDC case law update – April 2021

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.

R (AK) (by her mother and litigation friend GK) v LB Islington and North Central London CCG [2021] EWHC 301 (Admin)

The High Court held that a discharge care plan approach (DCPA) produced by the London Borough of Islington and North Central London Clinical Commissioning Group was unlawful.

Case Overview

This case concerned AK who is 16, has an autism diagnosis and a range of severe mental health issues resulting from a serious sexual assault. She was due for discharge from a secure psychiatric hospital to a specialist residential placement, to which she subsequently moved at a cost of approximately £250,000 a year. AK claimed that her Council and Clinical Commissioning Group (CCG) had failed to adequately assess and plan for her needs following her discharge from the hospital, pursuant to section 117 of the Mental Health Act 1983 (MHA). AK also sought permission to argue a secondary claim under section 17 of the Children Act 1989.

At issue was the adequacy and thoroughness of the s.117 MHA assessment, namely whether the assessment was undertaken in accordance with the duties and responsibilities that both defendants owed to AK, in particular in relation to the MHA Code of Practice (“the Code”). Local authorities must have regard to the Code, and must record the reason for any departure from the Code. In relation to commissioners of health services, the Code is not statutory guidance but is described as being beneficial to them in carrying out their duties.

The first issue concerned the application of the Code. The Judge reasoned that where two bodies are responsible for the welfare of an individual, particularly a vulnerable child, and are working together for the purposes of s.117 MHA, responsibilities imposed on the local authority in the form of statutory guidance must be the applicable standard. It would make ‘no logical sense to either dilute or reduce the status of the Code or to reduce the overall obligation to apply the guidance in such cases’.

Second, the Judge considered the degree of scrutiny needed. The case law in this area largely centres on Children Act assessments and plans. The Judge surveyed the

caselaw and found that, while there were differences of emphasis in some of the cases, there was a clear line of authority as to the overall level of scrutiny that should be applied in determining whether there had been compliance with the Code. This led the Judge to set out the following questions to determine if the DCPA was a lawful assessment and plan.

- (i) Is there a clear identification and focus of what is needed, what has to be done, by whom and by when? Is there an analysis and evaluation of the nature, extent and severity of AK's needs, setting out in precise detail the manner in which those needs are to be met? Does the plan contain sufficient detail to demonstrate that the child's needs have been assessed and that there is a plan to meet those needs and ensure the child's welfare?
- (ii) Is the document a descriptive summary of strategic objectives rather than a plan designed to meet the assessed needs? Are the answers too general to be of any practical value?
- (iii) The court is required to scrutinise with care, ensuring that it does not take over the role of decision-maker. There needs to be an objective and evidence-based analysis. Analysis must not involve 'nit-picking' or unrealistic expectations.
- (iv) Has the Code been followed and applied as guidance?

The Judge emphasised that the DCPA is an important document. It is a bridging document and plan provided by those who had, or continue to have, responsibilities for a person under the MHA and other responsibilities and duties because the person is a vulnerable child. It sets out what a person needs, how those needs are to be addressed and by whom. A person reading it should be able to glean from it the key aspects of the plan going forward. There is 'no place for vagueness or lack of precision'. The DCPA is effectively a 'reference guide' to the person to whom it relates, to be used to gain important information and to guide care. It should be a 'tool for the assistance of professionals and practitioners on the ground'. As with all tools, the question is 'does it do the job it was designed to do?'

The Judge found that AK's discharge planning was considered, if not fully undertaken, before and after the date of the s.3 MHA admission. For a number of reasons, the date had to be changed. The Judge did not find a fundamental breach of the Code in this regard, emphasising that some flexibility must be necessary in the appropriate case.

The Judge held that the DCPA did not adequately identify AK's needs, how to meet them and who was to do that. The statutory guidance set out in the Code had not been followed and applied with sufficient rigour. The document was dated the day of discharge, so cannot have been discussed and considered 'in good time'. AK's mother did not sign the DCPA, indicating that she was not consulted nor provided with a copy in advance. The plan was not thorough: it lacked focus, detail and specificity. It did not set out in clear terms what was needed, what was to be done, by whom and by when.

There was some simplistic analysis and identification of the nature of AK's needs, lacking the necessary precision and detail as to how those needs were to be met. The plan contained broad aspirations, without setting out in detail the practicalities for AK's day-to-day care and support. For instance, in relation to key aspects of AK's mental health, the aim was 'to support AK to have a continued positive mood and engage in meaningful activity'. This was 'wholly inadequate' given AK's mental health history. There was no detail as to how this outcome was to be achieved; there was no plan even in outline.

The DCPA was also incorrect in parts. It stated that there were no concerns relating to AK's intellectual level, which was contrary to the cognitive assessment. AK had numerous issues with learning. This was a 'concerning omission': the need for detailed planning in this regard is a key aspect of AK's development and care. The Judge accepted that this falls within AK's EHCP but would have expected the issue to have been correctly noted in the DCPA.

Overall, the document did not provide a vital and important bridging link enabling the new care provider to gain a clear insight into the key aspects of the plan going forward. It was an 'unsuitable and defective tool'. Further, the guidance set out in the Code was not followed, and no reason was given for this.

The Judge therefore concluded that the DCPA was unlawful. AK was entitled to a mandatory order requiring that a new assessment be conducted.

The Judge dismissed the s.17 Children Act 1989 claim, holding that there was 'no obvious targeted decision that can be said to be unlawful in a public law sense'.

What this means for children, young people and families

This decision is significant because there is no previous reported case on the precise nature of the assessment and planning obligations under s.117 MHA 1983.¹ The judgment underlines the importance of DCPAs being detailed and thorough. A DCPA should identify and assess the individual's needs and precisely set out how those needs are to be met, by whom and by when. The young person, and their parents or carers, should be able to glean from it the key aspects of the plan going forward.

The decision also sits within a run of authoritative judgments which show how important specificity and precision is in planning for children with additional needs – whether the context is an EHC Plan, a child in need plan, a pathway plan for a young person leaving care or (here) a DCPA.

¹<https://www.monckton.com/michael-armitage-successful-for-claimant-in-novel-judicial-review-claim-concerning-mental-health-after-care-services/>

Implications for local authorities and other public bodies

Local authorities and CCGs should have regard to the principles and questions outlined by the High Court at [26], when considering whether a DCPA is lawful. A DCPA needs to set out what a person needs, how those needs are to be addressed and by whom. It should be seen as a reference guide to the individual and a practical tool. It therefore needs to be detailed and set out practicalities for the individual's day-to-day support, and not a mere description of strategic objectives or broad aspirations.

While the Code of Practice is not binding, it should be given great weight and public bodies need to provide clear and cogent reasons for any departure from it.