Neutral Citation Number: [2010] EWHC 1652 (Admin)

Case No: CO/2582/10

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

07th July 2010

Before :

THE HONOURABLE MR JUSTICE KENNETH PARKER

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Between :

THE QUEEN on the application of A	**Claimant**
- and -	
LONDON BOROUGH OF LAMBETH	**Defendant**

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(Transcript of the Handed Down Judgment of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

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Ian Wise QC (instructed by **Maxwell Gillott**) for the Claimant
Hilton Harrop-Griffiths (instructed by **London Borough of Lambeth**) for the Defendant

Hearing date: 25 June 2010

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Judgment

Mr Justice Kenneth Parker :

1. This is an application for judicial review in which the Claimant, A, seeks a declaration that the Defendant, The London Borough of Lambeth, has failed to assess A's needs and to produce a pathway plan as required by The Children (Leaving Care) (England) Regulations 2001 ("the Regulations"), and further a mandatory order requiring the Defendant to assess A's needs and to produce a plan as required by the Regulations.

2. A was born in 1991; he is currently 18 years old and will become 19 in December. His parents came to the UK from Eritrea, and A was born in the UK. His parents separated and he, together with younger siblings, remained with his mother. From the various reports made about him it appears that the family is close knit and supportive and that he regards himself as the male head of the family, a role that carries responsibilities, particularly given the poor health of a younger sister and his mother's reliance on his English language ability.

3. He has had, however, a troubled youth. He did complete his GCSEs with 5 passes, and he later enrolled in a course with The Prince's Trust at Oval, but dropped out following poor attendance. It appears, nonetheless, that he became a member of a

gang in Lambeth, and he had various brushes with the criminal justice system, having been remanded in Feltham Young Offenders Institution in connection with allegations of criminal disorder and violence; and having been convicted for possession of cannabis, receiving a 6 month supervision order ending in February 2010. He had previously received a community punishment and rehabilitation order which ended on 28 November 2009. In March 2008, apparently as part of inter-gang strife in Lambeth, A and a friend were shot at, with A's friend being killed; then in April 2009 A and another friend were attacked, the friend was killed and A received multiple stab wounds. In February 2010 A's attacker was tried for murder and attempted murder. A gave evidence for the prosecution at the trial. On 18 March 2010 the defendant was convicted. During this period, and subsequently, there were concerns for A's safety. The police considered that A was at risk in Sydenham, Lewisham, Bromley, Southwark and Lambeth. Initially A did return, despite the risks, to his mother's address in Lambeth. On 22 March 2010 an interim ASBO was made in respect of A, and renewed on 29 March 2010. The terms of the ASBO forbid the Claimant from entering the Stockwell estate where he grew up and where his mother and family live.

4. A at present lives in a ground floor flat in another part of London. This accommodation is provided by Klearwater Housing who also provide a keyworker and manager. It appears that Klearwater identified a suitable property for A in Mitcham but the police assessed the risk to A in that location as unacceptable.

The Legislative Framework

5. Part III of the Children Act 1989 is concerned with "Local Authority Support for Children and their Families". The Act provides, at section 17, a general duty to provide services for "children … in need". A child in need is defined as a person under the age of 18 who "is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part". "Development" is defined in section 17(11) as meaning "physical, intellectual, emotional, social or behavioural development" and "health" is defined by that subsection as meaning "physical or mental health".

6. Section 20 of the 1989 Act is concerned with "Provision of accommodation for children". It casts a *mandatory* statutory duty upon a local authority to accommodate a child in need if the circumstances prescribed in one of its three subsections are met.

7. Section 20(1)(c) of the Children Act 1989 provides that:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> …..
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

8. Section 20(1)(c) has been given a broad interpretation, see *R(G)-v-Barnet LBC* [2004] 2 AC 208. It was under this duty that the claimant was accommodated by the defendant as a child.

9. Further duties are imposed on authorities in respect of children whom they are "looking after" or have "looked after". A child is defined in section 22(1) of the 1989 Act as being "looked after" by a local authority if he has either been made subject to a care order (and is thus "in their care") or is being provided with accommodation by the authority in the exercise of one of various social services functions. Those "functions" include the provision of accommodation under Part III of the 1989 Act and in particular under section 20. There are therefore two routes to having been a "looked after" child under the Children Act 1989: (1) having been in care or (2) having been accommodated by the authority pursuant to its social services functions.

10. The Children (Leaving Care) Act 2000 extensively amended the Children Act 1989. The purpose of those amendments was "to improve the life chances of young people living in and leaving local authority care" (see Children (Leaving Care) Act 2000 Guidance para 1). The amended provisions apply to those who have been "looked after" by a local authority. The statutory guidance provides an outline of the full range of additional services local authorities were henceforth to provide for those children who had been looked after.

11. The Children Act 1989 sections 23(A) to 23(E) and Schedule 2 - read together with the Regulations - provide for three categories of "child": the eligible child, the relevant child, and the former relevant child.

12. Where: (1) a child aged 16 or 17 has been looked after by a local authority for more than 13 weeks; and (2) a part of that period was after the child's sixteenth birthday; then that child becomes an "eligible child" for the purposes of entitlement to leaving care provision.

13. If such a child is no longer looked after by a local authority, that child becomes a "relevant child".

14. An "eligible" or "relevant" child becomes a "former relevant child" following their eighteenth birthday. The Claimant became a "former relevant child" on his 18th birthday, that is, 9th December 2009.

15. Local authorities are obliged to assess the needs of an eligible child within three months of their sixteenth birthday - or after they have been looked after for 13 weeks (if that is later) - and to produce a Pathway Plan as soon as practicable thereafter.

16. The contents of the Pathway Plan are prescribed by regulation 8 and by the schedule to the 2001 Regulations. In particular the schedule sets out those matters to be dealt with "in the pathway plan and review". They include personal support for the young person, accommodation, education and training, employment, social support, practical skills, financial support and contingency plans.

17. A "former relevant child" is entitled to an updated Pathway Plan and a Personal Advisor until they are 21 years old. They are also entitled to assistance with education, training and employment and general assistance until they are 21. Support

may be provided up the age of 24 if the young person's Pathway Plan provides for him to remain in education up to that age.

18. When a looked after young person reaches 18 he may seek accommodation through the Housing Act 1996. A young person who has been looked after qualifies as a person in priority need for accommodation by virtue of article 4 of the Homelessness (Priority Need for Accommodation) (England) Order 2002.

19. The purpose of this new leaving care regime is set out in the introduction to statutory guidance issued on its implementation:

> "The main purpose of the Children (Leaving Care) Act 2000 is to improve the life chances of young people living in and leaving local authority care. Its main aims are: to delay young people's discharge from care until they are prepared and ready to leave; to improve the assessment, preparation and planning for leaving care; to provide better personal support for young people after leaving care; and to improve the financial arrangements for care leavers."

20. The detailed provisions of the Act and the Regulations have been considered by the courts on a number of occasions. It is important to emphasise that the scheme prescribes that the assessment and plan should deal with the following 9 matters (see Regulation 8 and the schedule to the Regulations).

> "1 The nature and level of personal support to be provided to the child or young person.
>
> 2 Details of the accommodation the child or young person is to occupy.
>
> 3 A detailed plan for his or her education or training.
>
> 4 Where relevant, how the responsible local authority will assist the child or young person in employment or seeking employment.
>
> 5 The support to be provided to enable the child or young person to develop and sustain appropriate family and social relationships.
>
> 6 A programme to develop the practical and other skills necessary for him or her to live independently.
>
> 7 The financial support to be provided to the child or young person, in particular where it is to be provided to meet his or her accommodation and maintenance needs.
>
> 8 The health needs, including any mental health needs, of the child or young person, and how they are to be met.

> 9 Contingency plans for action to be taken by the responsible local authority should the pathway plan for any reason cease to be effective."

21. In each of these areas there should be a "detailed operational plan" which sets out who is to do what, where and when (see *R(J) v Caerphilly CBC* [200] EWHC 586 (Admin); [2005] 2 FLR 860). The plan should look beyond the immediate needs of the young person and should deal with the imminent needs (see *R(K) v Manchester City Council* [2006] EWHC 3164 (Admin); [2007] 10 CCLR 87).

22. I do not believe that it is necessary to describe the procedural history of this claim at any length. The Claimant maintains that he had to bring these proceedings in order to induce the Defendant to produce what was purported to be an assessment and plan on 16 March 2010. The Claimant was dissatisfied with the assessment and plan that was eventually produced on 16 March 2010, and continued the claim, seeking interim relief. The matter then came before Mr Robin Purchas QC (sitting as a Deputy High Court Judge) on 14 May 2010. After hearing counsel for both parties the judge granted permission to apply for judicial review "with respect to the Defendant's alleged failure to produce a lawful assessment and pathway plan for the Claimant". The judge also ordered the Defendant:

> "to produce a plan for the Claimant's future accommodation and associated support within 21 days…."

This was a somewhat exceptional order because the judge, although only granting permission for the claim to proceed, must have taken the view at that time that the plan was so deficient in respect of at least "accommodation and associated support" that a <u>new</u> plan was required to deal at least with these matters.

23. A further assessment and plan was finally produced on 15 June 2010 that did deal, among other things, with accommodation and associated support. The Claimant has, however, continued to pursue the claim. At the hearing before me Mr Wise QC, who appeared on behalf of A, focussed on the latest document, being the last word for the time being on the material elements of the assessment and plan.

<u>Preliminary Issue</u>

24. At the hearing before me Mr Wise QC raised a significant point that had only recently come to light and which could not, with the exercise of due diligence, have been raised earlier by the Claimant.

25. The "Pathway Plan" of 15 June 2010 records on the first page the details of A's personal adviser and of his social worker. It appears that the named social worker has left the employment of the Defendant and did not play a part in preparing the Pathway Plan of 15 June 2010. Certainly he was not the author of that plan. The only reasonable inference is that the personal adviser was the author of the plan. Mr Wise QC submitted that the personal adviser may not be the author of such a plan and the purported plan is fundamentally flawed on that ground alone. I invited written submissions on this significant issue which were helpfully provided by both sides after the hearing.

26. Under section 23B of the Act and under paragraph 19B of Schedule 2 of the Act it is "the local authority" that has the statutory duty to assess, respectively, a relevant child or eligible child and to prepare a pathway plan for him. Under Regulation 9 it is the "responsible authority" that has the statutory duty to "review" the pathway plan of each eligible, relevant and former relevant child if any of the conditions set out in Regulation 9(2) is satisfied.

27. Mr Harrop-Griffiths, who appeared for the Defendant, submitted, first, that the putative plan of 15 June 2010 was not a "plan", in the strict sense, but a "review" of an extant plan made under Regulation 9. Secondly, he contended that nothing in the legislation precluded the personal adviser from being the author of such a review.

28. I have some difficulty in accepting the first submission. The document is headed "Pathway Plan", and it is natural to assume that the description was chosen purposively. Furthermore, the document has all the hallmarks of a plan: it deals comprehensively with each of the essential areas and there is nothing on its face to suggest that it is a "review" of some earlier plan. Also the procedural history which I have recited tends to suggest that, in the light of the hearing on 14 May 2010, the defendant decided to produce a revised plan, rather than a review as such. I should perhaps add by way of caution that the actual nomenclature cannot be decisive: the court will look at the substance of the matter to determine whether the document constitutes a plan or a review: see *Caerphilly* at [22]. In my view, the document of 15 June is a primary plan and not a review.

29. Untrammelled by authority, I would not have thought that a personal adviser, even if employed by the authority, may on his own discharge the statutory duty of carrying out an assessment or of making a plan. Under regulation 12(b) the personal adviser may only "participate" in the discharge of these functions. However, that question was considered by Munby J as he then was in *Caerphilly*:

> "**[26]** Mr Wise has two complaints. First, he submits that it was wrong in principle to appoint a member of the local authority's own staff to act as J's personal adviser. Secondly, he complains that the local authority and indeed Mr S himself misunderstood his role, not least in the process leading up to the preparation of the pathway plans. In my judgment there is no substance in Mr Wise's first point. Unhappily there is all too much substance in his second.
>
> **[27]** In my judgment there is nothing either in the general law or in the relevant legislation which makes it either unlawful or necessarily undesirable to appoint as the personal adviser of a child in care an officer or employee of the local authority which is the child's statutory parent. On the other hand, if such a person is appointed, it is important that both he or she and the local authority should recognise that the personal adviser is indeed acting in that role and not in some other, let alone conflicting, role. That, unfortunately, seems not to have been appreciated in the present case.
>
> **[28]** Mr S, as I have said, was appointed as J's personal adviser in March 2004. Yet the minutes of the LAC review on 1 April 2004 record him as being present as a member of the Leaving Care Team. Now that is accurate so far as it goes, but it might be thought that he should have been recorded as being present not as a member of the Team but as J's personal adviser. The point may be thought

to be trivial, even pedantic. But it is, as it seems to me, a small but telling illustration of an approach which ran the risk of obscuring or confusing Mr S's true functions. A personal adviser has important functions, spelt out in regs 7 and 12, and it is important when a personal adviser attends a meeting such as the LAC meeting on 1 April 2004 that no one (including the personal adviser) should be left in any doubt as to the capacity in which he is there and the capacity in which he is speaking.

[29] Unhappily, there is a more fundamental respect in which this ambiguity as to Mr S's true role and function has led to difficulties: the role which Mr S adopted in the process leading up to the preparation of the pathway plans. The pathway plans were prepared – drafted and completed – by Mr S. Mr Wise complains that this was wrong. I agree. The point is a short one, but compelling. reg 12, as we have seen, identifies the functions of a personal adviser as including (reg 12(2)(b)) to "participate" in the child's assessment and the preparation of the pathway plan and (reg 12(2)(d)) to "liase with the . . . local authority" in the implementation of the pathway plan. Moreover, reg 7(5), as we have seen, requires the local authority – and it is the local authority, after all, which has the statutory duty of undertaking the assessment and preparing the pathway plan – to "take into account the views" of the personal adviser. All this, says Mr Wise, shows that the assessment is to be undertaken and the pathway plan is to be prepared by someone other than the personal adviser. I agree.

[30] It is not part of the personal adviser's functions to undertake the statutory assessment or the preparation of the pathway plan, nor should he do so. The Regulations, in my judgment, show that it is not permissible for him to do so. It is in any event undesirable that he should do so. Part of the personal adviser's role is, in a sense, to be the advocate or representative of the child in the course of the child's dealings with the local authority. As the *Children Leaving Care Act Guidance* puts it, the personal adviser plays a "negotiating role on behalf of the child". He is, in a sense, a 'go-between' between the child and the local authority. His vital role and function are apt to be compromised if he is, at one and the same time, both the author of the local authority's pathway plan and the person charged with important duties owed to the child in respect of its preparation and implementation."

30. I gratefully adopt this reasoning and hold that the plan of 15 June 2010 is not a plan that has been prepared in accordance with the legislation, being a purported plan that was drawn up by A's personal adviser.

31. Even if I had found that the document of 15 June 2010 was genuinely a "review", I would have had serious doubts whether it had been lawfully carried out, being the exclusive product of the personal adviser.

32. Mr Harrop-Griffiths drew my attention in this context to certain paragraphs of the Leaving Care guidance ("the guidance"). The guidance has been issued under section 7 of the Local Authority Social Services Act 1970, and it must be followed by local authorities unless there are exceptional circumstances to justify a departure.

33. Paragraph 50 of chapter 5 [AB7/46] refers to regulation 9(3) and then states:

> “This means that those involved in the review should be the personal adviser, the case holder (if different), the social worker (if applicable) and the young person. It may also be appropriate for other people also to attend ...”

34. Paragraph 54 of the same chapter [AB7/46] states:

> “The responsible authority might expect the personal adviser to take charge of setting up the review and to be responsible for recording the outcomes. However this need not always be so. It will be a matter for each local authority how it runs its leaving care service and it might be that someone other than the personal adviser has case responsibility – especially in the case of an eligible child who will still have a social worker. Under such circumstances it might be that the case holder is best placed to run the review.”

35. Paragraph 4 of chapter 6 [AB7/47] states:

> “The personal adviser will play a key role in the assessment and pathway planning process although it is not envisaged that they will necessarily take responsibility for its conduct and management. Since the assessment and pathway plan will build on the young person’s existing care plan it is open to the social worker to continue to take responsibility. In this circumstance, the personal adviser is likely to play a negotiating role on behalf of the young person, ensuring that the plan is realistic and deliverable whilst meeting assessed needs. Whilst there is an element of advocacy in this, it would be wrong to construe the role primarily as that of an advocate. Moreover, the personal adviser’s role is likely to change, particularly when the young person cease to be an eligible child and becomes a relevant child (i.e. when the young person leaves care). It is likely that at this point the personal adviser will take on the responsibility for the maintenance and review of the pathway plan from the social worker.”

36. Paragraph 5 of the same chapter [AB7/48] states:

> “In the cases of most relevant and former relevant children it is likely that the personal adviser will convene review meetings and take responsibility for communicating the outcomes to other agencies and individuals as necessary.”

37. However, Regulation 12 uses the same concept, namely, “participation”, whether the function is the making of the primary plan or the review of such a plan. Secondly, the ratio of Munby J’s judgment in *Caerphilly* would appear equally applicable to the review function. The personal adviser is an intermediary between the child and the local authority:

> "his vital role and function are apt to be compromised if he is, at one and the same time, both the author of the local authority's pathway plan and the person charged with important duties owed to the child in respect of its preparation and implementation."

38. It is also important to bear in mind the purpose of reviews. At Chapter 5 of the guidance paragraph 54 states:

> "The purpose of regular review is to check that the goals and milestones are still right for the young person, and that they are being met. It will make sure that levels of support, both financial and other, are adequate and are being delivered according to plan. It will take account of any unexpected developments and will revise the Plan accordingly. For example, a young person may do better in exams than expected and wish to undertake higher education ...."

39. It may well be that changing circumstances require substantial adjustment of an existing plan in respect of, for example, accommodation, but it is difficult to see how a personal adviser could properly make changes to an operational plan (which may require budgetary provisions) to deal with such changes in circumstances.

40. I accept that paragraph 4 of chapter 6 states that when the young person becomes a relevant child the personal adviser may take on responsibility for the maintenance and review of the pathway plan from the social worker. However, in the context and taking account both of the statutory language and purpose (particularly as explained by Munby J in *Caerphilly*), I would interpret that guidance to mean that the personal adviser may legitimately take the initiative in relation to a review, and may play a very active role in such a review. I do not interpret the guidance to be saying that the personal adviser may on his own carry out the review. Such an interpretation would be inconsistent with the statutory language and purpose, and would also conflict with the reasoning of Munby J in *Caerphilly*.

41. For these reasons, even if I had concluded that the document of 15 June 2010 constituted a "review", I would nonetheless have held that the personal adviser alone could not lawfully have carried out such a review.

42. In my view, therefore, the plan of June 2010 is not in conformity with the legislation and is unlawful.

43. I have considered nonetheless whether I should examine the detail of the June 2010 plan to determine whether in substance it meets the requirements of the legislation. However, I do not believe that I should do so. It is not appropriate to examine the substance of a plan that has not been prepared in accordance with essential procedural criteria. Nor, in my view, is it appropriate to examine the substance of the March plan because, for the reasons given, that plan has been superseded by the document of June 2010. In these circumstances it is incumbent on the Defendant to produce a plan that has been lawfully prepared. I regret that this may delay the proceedings because, before the new issue arose, I had intended to give early judgment on the substantive challenge. I would invite counsel to propose an expeditious timetable for the

production of a new plan and for the further conduct of this claim. It may be that if the claimant remained dissatisfied with any such new plan I would be able to determine any substantive challenge on the basis of short written submissions without the necessity for a further oral hearing.