Procedural fairness and 'child in need' assessments (R (on the application of AC and another) v London Borough of Lambeth Council)

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Local Government analysis: Richard Hanstock, barrister at Cornerstone Barristers, who represented the defendant in R (on the application of AC and another) v London Borough of Lambeth Council, discusses the practical implications of the judgment and explores procedural fairness within the context of child in need assessments, suggesting the hallmark of procedural fairness is the giving of sufficient opportunity to comment on matters the applicant knows are important to the assessment.

Original news

R (on the application of AC and another) v London Borough of Lambeth Council [2017] EWHC 1796 (Admin), [2017] All ER (D) 133 (Jul)

The defendant local authority had failed to carry out an assessment of the first claimant as a child in need, despite the indications from his mother that he had needed support and the confirmation of those difficulties in an autism assessment. However, the Administrative Court held that it had not been unfair for authority not to have presented its provisional conclusions to the claimants' mother for her response.

What issues did this case raise?

The claimant children challenged a 'child in need' assessment carried out by the local authority pursuant to the section 17 of the Children Act 1989 (ChA 1989). The claim averred that:

- when considering whether the children were genuinely at risk of homelessness and destitution, the authority had failed to give the claimants' mother a fair opportunity to correct its adverse view of her honesty, and
- the authority had failed to reassess one of the two children after the claimants' solicitors forwarded a formal diagnosis of autism spectrum disorder

What did the court decide?

Although the claim succeeded on the second ground, the first ground (regarding procedural fairness in the assessment itself) was resolved in favour of the authority.

Procedural justice often entails a right to participate in administrative decision-making. The standard of fairness required turns to an extent upon the importance of that decision to the person affected, but also must be balanced against the resources the authority can be expected to devote to the decision.

In the present claim, the claimants argued that procedural fairness in this context required the assessing social worker to 'put to' their mother concerns as to her credibility, at a time when those concerns were no more than provisional. The authority argued this went beyond what was required, and would over-judicialise what was essentially a co-operative and inquisitorial process.

The court applied the hallmark of fairness as described by the Court of Appeal in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59, [2011] All ER (D) 12 (Feb) in the context of age assessments. That is, the court asked itself, on the facts of this case did the claimants have 'a fair and proper opportunity, at a stage when a possible adverse decision was no more than provisional, to deal with important points which may weigh against [them]'? Put another way, had the claimants' mother been 'deprived of a reasonable opportunity to explain matters material to the defendant's assessment'?

The court found that the standard of procedural fairness in this case did *not* require the defendant to 'put to' the claimants' mother provisional adverse conclusions for her to comment upon. While the authority bears a responsibility to carry out proper inquiries, the claimants' mother 'was responsible for cooperating fully with the defendant's assessment', bearing the burden of providing sufficient information to show that her family were genuinely destitute and at risk of homelessness. Failure to discharge that burden—for example, by providing scant information, or by leaving key questions unanswered—can rationally sustain a conclusion that an applicant is not genuinely destitute (see Leggatt J in *R (MN) v London Borough of Hackney* [2013] EWHC 1205 (Admin), [2013] All ER (D) 139 (May) at paras [44],[45]).

The court left open the question whether there may be circumstances in which fairness does demand that a provisional conclusion is 'put to' an applicant for comment, but the position is plainly less clear-cut than was previously ruled in *O v LB Lambeth* [2016] EWHC 937 (Admin), [2016] All ER (D) 16 (May), which states at para [20] that:

'…fairness of course demands that any concerns [arising from gaps in the evidence provided by the applicant] are put to the applicant so that she has a chance to make observations before any adverse inferences are drawn from [those gaps]'.

Rather, the approach taken by Cheema-Grubb J in the present case is in more in line with the principle in *R (Jaafer) v Westminster CC* [1997] Lexis Citation 3669, considered in *R (S&J) v LB Haringey* [2016] EWHC 2692 (Admin), that 'the essential question is whether the applicant was, in all the circumstances, treated fairly as regards being asked for her side of the story', rather than there being a rigid requirement to 'put to' the applicant a provisional adverse conclusion for comment.

What are the practical implications of this case?

The right to participate in an assessment under ChA 1989, s 17 is to be assessed by reference to an overall standard of fair treatment, a barometer of which appears to be the giving of a reasonable opportunity for the applicant to provide their version of events, rather than requiring a rigorous 'putting to' the applicant of all provisional adverse conclusions for specific comment before they are finally drawn.

The position is likely to be different where, for example, facts obtained from third party reports are held against an applicant who has not been given an opportunity to consider and comment upon that third party information.

This will come as a relief to social workers who may have been concerned about over-judicialising the social care assessment process, shunning what could be described as a formalistic approach to procedural fairness in favour of a more holistic, common-sense standard.

As Hallett LJ observed of community care assessments in *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234 at para [71]:

'I return to the nature and purpose of a community care assessment. It is operational and inevitably judgmental. It must be carried out quickly. I accept the appellants' argument that a social worker preparing such an assessment cannot be expected to engage in a detailed analysis of the material obtained (often from many sources), decide what particular points have and have not been specifically addressed by the 'service user' thus far, and then take steps to ensure that any points which have been missed or not sufficiently addressed are drawn to the attention of the "service user" for his or her response.'

The claimants, by contrast, had pointed to the 'outline procedure' for ensuring fairness in age assessments that achieved judicial approval in *FZ v Croydon* (at para [21]), where it was suggested that a social worker should 'withdraw from the interview room at the end of the initial interview to discuss their provisional conclusions', recording these in writing, before returning to the interview room to put their concerns to the applicant—which may in turn lead to a further interview, after the applicant has had time to obtain documents, before the social workers withdraw again to consider the further answers and eventually reach their decision. While this may be appropriate in some circumstances, it would seem to go beyond the minimum standard required in cases of this nature.

To what extent is the judgment helpful in clarifying the law in this area?

The present court has confirmed that, at least in the context of child in need assessments, the hallmark of procedural fairness is the giving of sufficient opportunity to comment on matters the applicant knows are important to the assessment—to ensure the applicant for support 'is not taken by surprise' upon reading an assessment, even though they might be disappointed by the assessor's conclusion.

It will be remembered, of course, that the courts are concerned with policing minimum standards of procedural fairness, and public authorities may do well to aspire to exceed those minimum standards wherever their resources will allow. A pragmatic step, for example, could be for social workers to provide to an applicant for support a draft version of their written assessment, allowing them an opportunity to comment on the findings and provide any further evidence at a time before the final assessment is drawn up.

Nevertheless, there was partial success on the claim. During pre-action correspondence alleging various failures in the substantive assessment, further information was provided to the authority to the effect that one of the children had been diagnosed with a mental disorder, thereby rendering the child automatically a 'child in need' by operation of law (ChA 1989, ss 17(10)(c) and (11)). While it would still have been open for the authority to conclude that the child's needs were adequately met through the education system, and consequently no support or accommodation was appropriate under ChA 1989, s 17, the court found that the previous assessment had focused on the truthfulness of the mother's account of

need arising from destitution and homelessness, without showing any detailed consideration of the social needs of the child in question. Two practical points therefore follow:

- where the subject of a ‘child in need’ assessment has the background possibility of mental disorder which has not yet been confirmed, a child-centric assessment should consider any needs that might flow from that disability and this should be fully documented in the written assessment, and
- careful consideration should be given to the extent to which a new assessment might be required in light of new information provided over the course of a legal challenge to a previous assessment, even if the authority does not agree that the impugned assessment was legally flawed

As an aside, the claim was started quite late—ostensibly because of late disclosure of the social services file—necessitating an urgent application for interim relief. Beginning the claim in this way gave the authority an opportunity to ask for the first ruling on permission to take place at an oral hearing, which meant the merits would be scrutinised with the benefit of oral argument. In this case, this led to a considerable narrowing of the issues, which might not have been achieved on a paper review without the benefit of oral argument.

Interviewed by Susan Ghaiwal.

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