The court's interpretation of the well-being principle (R (on the application of JF acting through his mother and litigation friend KF) v London Borough of Merton)

25/07/2017

Local government analysis: Alexander Line, a barrister practising from Outer Temple Chambers examines the implications of R (on the application of JF acting through his mother and litigation friend KF) v London Borough of Merton, and says the case serves as a successful example of a challenge to a care assessment using section 1 of the Care Act 2014 (CA 2014) as a litigation tool.

Original news

R (on the application of JF acting through his mother and litigation friend KF) v London Borough of Merton [2017] EWHC 1519 (Admin)

What issues did this case raise?

The claimant was a young adult with complex and severe needs arising from a diagnosis of autistic spectrum disorder. He required a high level of support and assistance within a specialist residential setting. His care needs were met within a residential provision, David Lewis College (DL College), which he had attended since 2012. The claimant's family were of the view that DL College was suitable and was adequately meeting his needs. This provision included an onsite multi-disciplinary team (MDT) and total communication environment (TCE), which was an approach the claimant had also received at previous placements for a considerable period of time.

The defendant undertook a needs assessment, pursuant to its duties under CA 2014, s 9, which was finalised on 17 July 2016. It also proposed to transfer the claimant from DL College to an alternative residential care setting, Aspen Lodge (the Lodge), which it contended could also meet his needs on a more affordable basis (it had also indicated its intention to do so in an earlier draft assessment provided in January 2016).

In his claim for judicial review, the claimant claimed that the assessment of his needs by the defendant (ground 1), and the defendant's decision to transfer him to an alternative care home (ground 2), were unlawful. The defendant disputed this, and further contended that it had not yet made any decision about the proposed change of residential provider.

The claim under ground 1 succeeded on the basis that the assessment report was silent about whether there was a need for an onsite multi-disciplinary and total communication environment (in relation to which there was a significant body of evidence available), and was therefore unlawful and in breach of CA 2014, ss 1(1), (3) and 9(4). In particular, at para 54 the court noted:

'The absence of information about the decision [of the defendant that there was no need for MDT] is contrasted with the information contained in various reports preceding and post-dating the assessment which suggest an arguable need for both an on-site MDT and a TCE and a definite requirement to consider whether JF has such needs. It also sits alongside the clearly-stated views of JF's parents who speak for their son because he cannot speak for himself.

'Their views were recorded on the face of the assessment but as it is not possible to tell when the decision was made that JF did not have these particular needs and by whom, it is not possible for the court to be satisfied that the parents' views (and JF's wishes) were taken into account. It is also not possible to know whether in this respect, the defendant had regard, as it was required to, to the desired outcomes for JF or whether it assessed the impact of JF's MDT needs in the context of his well-being and suitable accommodation.

'The decision in question would in part represent a departure in the type of service provided to JF for the last 15 years. It is difficult to categorise a decision to reverse such a long standing provision (based presumably on need) as rational when I am not told who made it and I am not told the basis for it.'

The claim under ground 2 also succeeded. The court rejected the defendant's argument that it had not yet made a decision that was capable of public law challenge, (for which see paras 58 and 59). The court further found that the defendant had taken a decision to terminate the placement at DL College, and that the claimant should be transferred to

Aspen Lodge. The court then went on to hold that the defendant's decision to terminate the existing placement was unlawful because it was taken at a point before the assessment and planning process had been completed. See para 61, at which the court found:

'No reasonable local authority would terminate the placement of someone with JF's complex needs without having conducted a lawful assessment of those needs and without having lawfully decided that suitable alternative accommodation was available that would enable them to meet his needs. I have found that the assessment was not lawful for the reasons given above. The decision to terminate can therefore not stand, regardless of the date on which it was taken.'

Arising from its conclusions, the court quashed the care assessment and the defendant's decisions to terminate the placement at DL College and to assess that the Lodge as suitable to meet the claimant's needs. It also ordered that a further assessment be undertaken.

Does the judgment help to clarify the law in this area?

This case is helpful as was noted at para 33 of the judgment, there is still very little case law concerning CA 2014, Pt 1. This remains a developing area of jurisprudence. The most notable authority before this case, which is also recently decided, is *R (oao Luke Davey) v Oxfordshire County Council* [2017] EWHC 352 (Admin). This case was a challenge to a care plan rather than a care assessment (as was the case in *JF*). The High Court in *Luke Davey* provided important guidance as to CA 2014, s 1, which contains the well-being principle (although the judicial review in that case ultimately failed). The court in *JF* followed the High Court's analysis in *Luke Davey* and accepted that ss 1(1), (2) and (3), which define the scope of the well-being principle, create distinct duties on local authorities to promote well-being (see para 33). The judgment at para 47 provides a helpful summary of the position:

'In my judgment the needs assessment must specify what JF's needs are and it must do so on a rational basis. If the assessment failed to assess the impact of JF's needs for care and support upon the factors of well-being listed in s 1(2) of the Act, then it is an unlawful assessment.

'Likewise, if it failed to assess the outcomes that JF's wishes to achieve in day-to-day life, and whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes, it is unlawful. If it fails to have regard to the matters specified in reg 3(2) as set out in para 30 above, it is unlawful. If the author failed to have regard to the wishes and preferences of the individual (expressed here to a degree by the guardians, his parents), then it is unlawful.

'If it is neither appropriate nor proportionate then it is unlawful. This judgment will not address all of JF's needs, merely those referred to in the statement of facts and grounds in order to determine whether they were lawfully considered applying these principles.'

The court also noted at para 32 of the judgment that:

'There is a clear statutory theme placing the individual at the heart and centre of the process so that he or she is fully involved in decision making. This is emphasised by the duty to have regard to the wishes and preferences of the individual.'

JF therefore is an important case which is to be read in the context of the *Luke Davey* decision, both of which demonstrate the development of the court's interpretation of the well-being principle. It also stands as a successful challenge to a community care decision applying this principle.

Are there any grey areas or unresolved issues practitioners should be aware of?

The court in JF made reference to well-known authorities cited by the defendant, such as *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, [2007] HLR 34, to demonstrate that courts should in general be slow to interfere with the assessments of social workers in community care matters (see paras 34 to 37). Such authorities were also considered in *Luke Davey* and were held to remain relevant under the CA 2014.

However, what is clear from the *Luke Davey* and *JF* judgments is that CA 2014, s 1, through the well-being principle, creates distinct statutory duties and failures by local authorities to comply with these duties in the care assessment and

planning process will lead to successful public law challenges (notwithstanding the strength of the older authorities which indicate that deference should afforded to the judgment of social workers). It is arguable that there is a tension between the restrictive nature of these older authorities and the new statutory regime, which (as is clear through s 1) places a person's well-being at the forefront of the assessment and planning process.

Will courts continue to show the same level of deference in community care cases? As things stand, authorities such as *Ireneschild* remain good law but it is possible that this will be an area for future consideration. In any event, it is evident that s 1 can be used as an effective litigation tool by claimants in litigation where it can be shown that the duty has not been complied with, which JF stands as testament to.

Further, the court in *JF* relied on the principle that the intensity of review depends on the profundity of the impact of the determination, which arises from *R (KM) v Cambridgeshire CC* [2012] UKSC 23, [2012] MHLO 57. In the *Luke Davey* case the High Court was invited to reach a view on whether this approach should be followed on the basis that it arose from an obiter comment, but the High Court declined to reach a determinative view on this.

No such point was taken by the defendant in *JF*, and the court accepted that a high level of review was required (as is demonstrated by the depth of analysis in the judgment). Accordingly, the KM principle remains a useful one for claimants, but it is arguable that the extent of its application remains unresolved.

What are the practical implications of this judgment?

It is certainly the case that, arising from *JF*, local authorities will need to exercise caution at both the assessment and planning stages of the CA 2014 to ensure that the well-being principle as defined in s 1 has been in all respects complied with.

A further implication relates to the timing of the claim. Many claims of this nature relate to the content of care plans, as per *Luke Davey*. In *JF*, the claimant took the decision to challenge the assessment outcome (which would serve to inform the content of the care plan and so arises at an earlier stage in the care planning process).

The predominant implication of this judgment is that it serves as a successful example of a challenge to a care assessment using CA 2014, s 1 as litigation tool. It builds on, and therefore develops, some of the principle emanating from the recent *Luke Davey* case.

What are the direct implications for practitioners, and what will they need to be mindful of when advising clients?

For those advising claimants, *JF* demonstrates the importance of carefully pleading breaches of the CA 2014 with detailed reference to particular facets of the well-being principle. It also shows that tactical consideration should be given to the timing of a challenge, because for some clients there may be benefit obtained from challenging at the assessment stage as opposed to awaiting a challenge to the care plan.

For those advising defendants, the importance of properly assessing well-being is obvious from the judgment, and the assessment process can be undermined by such failures leading to wasted time and cost for local authorities. There are also important implications from an evidential perspective. In *JF* the defendant produced a witness statement written by a social worker very close to the hearing. In particular, this statement gave important but vague evidence concerning the operation of local authority decision making about the claimant's need for a multi-disciplinary approach and about funding panels. The claimant made various criticisms of it, and while the court took it into account it is also clear that it was not overly persuaded by its content and therefore only attached limited weight to it (see paras 24 and 54).

What are the current trends in this area of law? Do you have any predictions for future developments?

As above, jurisprudence in relation to the assessment and planning aspects of the CA 2014 is still developing and so there is a need for further judicial analysis.

Alex specialises in the areas of public law (in particular education and social welfare) and employment law. He is well placed to act in public law claims in the education context and has advised on and acted in public law claims involving

school exclusions, school admissions, failures by local authorities to implement special educational provision, and decisions of higher education institutions. In JF Alex was counsel for the claimant.

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This article was first published on Lexis®PSL Local Government on 25 July 2017. Click for a free trial of Lexis®PSL.
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