

Case No: CO/256/2014

Neutral Citation Number: [2015] EWHC 1081 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2015

Before :

HIS HONOUR JUDGE SYCAMORE
(SITTING AS A JUDGE OF THE HIGH COURT)

Between :

THE QUEEN ON THE APPLICATION OF PERRY CLARKE	<u>Claimant</u>
- and -	
LONDON BOROUGH OF SUTTON	<u>Defendant</u>

Mr Stephen Cragg QC (instructed by **Cale Solicitors**) for the **Claimant**
Mr Hilton Harrop-Griffiths (instructed by **South London Legal Partnership**) for the
Defendant

Hearing dates: 3 March 2015

Judgment

His Honour Judge Sycamore:

1. This is a claim for judicial review brought by Perry Clarke (“the claimant”) against the London Borough of Sutton (“the defendant”). Permission was granted on the papers by Her Honour Judge Coe QC sitting as a Judge of the High Court on 14 March 2014.
2. The claimant, who is 27 years of age, suffers from severe epilepsy and has a number of mental health and behavioural difficulties. Supported living care was provided for him by the London Borough of Enfield between 2011 and 2013. In 2013 the claimant became “ordinarily resident” in the defendant’s area and as such the defendant became responsible for the claimant’s care in place of the London Borough of Enfield.
3. The main issue in this case is in relation to the defendant’s decision not to continue to fund the specialist placement funded by the London Borough of Enfield and as to the lawfulness of the assessment as to his needs.
4. These proceedings were lodged on 20 January 2014. On that date Supperstone J granted interim relief in the following terms:
 - i) The defendant shall continue to arrange for and fund the provision to the claimant of the care package provided by Independence Homes to the claimant at the claimant’s home at Charsley House, Albion Road, Sutton, Surrey.
 - ii) The defendant shall be restrained from removing the claimant from his home at Charsley House.
 - iii) There be liberty to the parties to apply to vary or discharge this order on 24 hours notice in writing.
5. The claimant continues to reside at the specialist placement staffed by Independence Homes. No application has been made by the defendant to vary or discharge the order made by Supperstone J.
6. That a claimant has a heavy burden to establish that an assessment is unlawful is clear, see for example R (Ireneschild) v London Borough of Lambeth [2007] EWCA Civ 234, a case concerning a community care assessment, per Hallett LJ:

“44 Mr Drabble further conceded that the respondent, having brought the proceedings to review the assessment judicially, bore the heavy burden of establishing that the assessment was unlawful. He did not attempt to persuade this court to ignore the strictures of Lord Brightman in Puhlhofer v Hillingdon London BC [1986] 84 LGR at 413 -414, put before us by Mr Bear. Lord Brightman said this:

“My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their function under the [Housing Act 1977]. Parliament intended the local authority to be the judge of fact. The Act abounds with the formula when, or if, the housing

authority is satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative decision discretion is abuse of power – eg bad faith, a mistake in construing the limits of the power, a procedural irregularity or unreasonableness in “Wednesbury” sense – unreasonableness verging on an absurdity: see the speech of Lord Scarman in R v Secretary of State for the Environment, ex-parte Nottinghamshire County Council [1986] 84 LGR at 309. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.”

Those remarks may have been directed at a different statutory function, in a different era, but, to my mind, they are as pertinent today as they were in the 1980’s.

The community care is provided to the claimant by way of provision of domiciliary services in his own home, as the claimant has a tenancy and services are provided separately. His rent is paid by way of housing benefit.

7. Section 47 of the National Health Service and Community Care Act 1990 (“the 1990 Act”) creates a statutory duty on local authorities to assess those who appear to be in need of “community care services.” Having regard to the results of the assessment the local authority must then decide whether his needs call for the provision by it of any such services.
8. Section 46 (3) of the 1990 Act provides that community care services can include those services provided by a local authority under Part III of the National Assistance Act 1948 (“the 1948 Act”). By section 29 of the 1948 Act in combination with section 2 of the Chronically Sick and Disabled Persons Act 1970, a local authority can have a duty to provide non-residential or domiciliary care for a disabled person if it is satisfied that it is necessary to do so in order to meet his needs.
9. In order to establish if it is so satisfied the local authority carries out an assessment as to whether the person concerned has “eligible needs” and in doing so must act in

accordance with the statutory guidance issued by the Department of Health *“Prioritising Need in the Context of Putting People first: A whole system approach to eligibility for social care Guidance on Eligibility Criteria for Adult Social Care, England 2010”*. (*“The Guidance”*).

10. There is no dispute between the parties that the claimant has eligible needs for non-residential care. As I have already observed the issue between the parties is as to the extent of the needs as assessed and the extent of care which is needed.
11. The community care package provided by the London Borough of Enfield involved the claimant being placed with a specialist epileptic care provider (Independence Homes) in the defendant’s area in February 2011. The arrangement is that the claimant has a tenancy in supported living accommodation with care services provided by Independence Homes. After the passage of time he was deemed to become “ordinarily resident” in the defendant’s area so that the defendant became responsible for his package of care.
12. The London Borough of Enfield carried out a review of the claimant on 27 March 2013 before handing over responsibility for care to the defendant. The report concluded with the following recommended actions:

“Mr Clarke’s needs could be banded as substantial in view of his medical condition and support he needs to ensure that risks associated with his medical condition are properly managed with appropriate specialised services that are currently being provided by Independence Homes.

It is recommended that Mr Clark’s support services be transferred to an appropriate local social service team in Sutton as soon as possible as he is now ordinarily resident in the area.”

13. In the event the defendant did not carry out an assessment until August 2013 and concluded that the claimant’s care could be provided in a non-specialist placement. A support plan which was dated 23 September 2013 costed this at £357 per week as compared with the care package with London Borough of Enfield at a cost of £1,300 per week.
14. Subsequent to the assessment the claimant’s representatives corresponded, on his behalf, with the defendant on the matter of the extent of the claimant’s needs relying, inter alia, upon the following evidence:

- i) Doctor Bridget MacDonald, the consultant neurologist responsible for the claimant’s treatment 17 October 2013 who said:

“.... By any standards this is significantly active epilepsy and he is unable to care for himself without support or clinic attendances, medications being kept etc. Active epilepsy is a risk factor for sudden unexpected death in epilepsy, going into status (especially if there is non-compliance) and injuries associated with the dangers of falling. He would best be cared for in a placement where there are staff trained in the care of

those with active epilepsy who can offer him the full medical and physical needs his complex condition requires. This needs to be 24 hours, 7 days a week. His current placement seems to provide the correct care for him. Often patients have worsening seizures and behaviour at times of change eg moving home. This needs to be kept in mind in his review”.

- ii) Julia Biggs, Epilepsy Nurse Specialist Independence Homes, 4 December 2013:

“.... Perry has a seizure protocol and description of seizures that staff follow. Staff do not need to inform myself or Doctor MacDonald when Perry is experiencing seizures as our staff are highly trained in the detection and treatment of all seizure types. I am on call 24 hours a day to provide emergency support and advice to staff regarding prolonged seizure activity. All of our staff are trained in the administration of all emergency medications including Buccal Midazolom. We also have a bespoke alarm system which detects all seizure types and every time Perry has a seizure this will be conveyed through the alarm systems, through a pager to alert staff and staff can respond in under a minute.

.... Perry has continued to experience 1-2 tonic clonic seizures (generalised seizures, during which he is unconscious) per month depending on triggers which can be anything from stress to self neglect or lack of money. This is however, always prone to fluctuation purely because epilepsy is not subject to a time table and seizures can occur at any time. Medication is not always effective and therefore his epilepsy remains active

Perry has nocturnal seizures and therefore requires waking night staff to check on him and an alarm system to ensure his safety. He has a major risk of death if he is not monitored during the night and also at risk of severe injuries due to falls during seizures if not supported correctly”

- iii) From the Independence Homes’ chart relating to the claimant which comments that:

“.... Perry is specifically in danger during the night due to nocturnal seizures Staff complete waking night checks every hour and ensure the use of his epilepsy alarms.”

15. By letter of 15 January 2014, in reply to a letter from the claimant’s solicitors, the defendant indicated that in the light of the information provided on behalf of the claimant it had reconsidered its decision about the amount of care and support the claimant needed and said this:

“ ... Whilst it does not accept that he needs as much as IH claim it has decided to increase the package. Therefore in addition to

appropriate assistive technology (including an epilepsy seizure alarm to alert staff) it considers he needs:

Sleep in support for 7 nights a week;

Waking night support for 3 nights per month, in anticipation that your client will have up to 3 seizures a month during the night;

Support for 3 hours for 7 days a week to assist him with taking medication, meal preparation, eating/drinking and showering/bathing;

Support for 3 hours a week to assist him with cleaning, budgeting and managing bills/correspondence.

The authority considers that all of this support can be provided in a non-specialist placement. It represents a direct payment of £661 per week. Also, your client will be referred to the authority's Behaviour Management and Drug Project Teams for appropriate support. Should his needs change this package will be adjusted accordingly.

We re-iterate the authority's service provision decision is based on need and not on cost."

16. There was no consultation with the claimant before the provision of the updated support plan. By this time Doctor MacDonald had provided a further letter, dated 12 December 2013, in reply to a letter from the defendant's solicitors in which she said:

"Thank you for your letter....I have read through it in detail and the two main queries you seem to have is whether or not I think he has "significantly active epilepsy". The International League Against Epilepsy Classification of Epilepsy states that a patient has active epilepsy if they have ongoing seizures or is on anti-epileptic medication. So from that definition he clearly does have active epilepsy. It is significantly so as he has ongoing generalised Tonic Clonic Seizures each one of which puts him of sudden death in epilepsy, injury from falls etc.

The second question you pose is why I consider he has a complex condition. 70-80% of epilepsy goes into remission on the first drug you try. Perry does not fall into that category having tried at least two agents. Lamotrigine did not help him enough to keep going with but he is on Valproate as well as Midazolam when needed. The second point of complexity is that he has had cognitive and effective disorders from early life. (I am guessing clinically, that this from early life given how he behaved as a child and given his current problems. However, of

course, it could have come on later but he has no signs of brain injury on imaging to support such a theory). Neither is there anything in the medical history that makes me feel that he has sustained brain damage later in life. Given the problems particularly with memory of taking regular medication and keeping adequate care on health needs for one's self, there is a significant factor for his placement....”

17. It is clear that in the months which have elapsed since the report was prepared the claimant has continued to experience epileptic attacks. According to the epileptic nurse specialist Julia Biggs in a report dated 7 January 2015:

“...Perry's seizures are mainly nocturnal...Perry receives 24 hour waking night support and hourly checks throughout the night

In 2013 Perry experienced 13 tonic clonic seizures....In 2014 Perry experienced 34 tonic clonic seizures....

...Perry is prescribed Buccal Midazolam for prolonged tonic clonic seizures and clusters of seizures. In 2013, Perry required one dose of Midazolam, however, in 2014 Perry required seven doses of Buccal Midazolam. Buccal Midazolam is unlicensed in the community for adults. All of our staff are extensively trained in the administration of a large number of rescue medication.....”

It is clear from the Guidance that:

“...Professionals should fully involve the person seeking support by listening to their views about how they want to live their lives and the type of care and support that best suits them and by helping them to make informed choices. This includes identifying the support the person needs to make a valued contribution to their community...”

18. The updated support plan effectively repeated the information set out in the defendant's first support plan. As I have already observed, the defendant did not consult the claimant before producing the updated plan nor had it explained how it evaluated the claimant's needs producing the weekly figure of £661.
19. An analysis of the approach adopted by the defendant demonstrated it did not call for its own independent evidence, for example, from a consultant or other experts in the field of epilepsy treatment or care. Although it had available to it the opinions expressed by the claimant's consultant, GP, epilepsy nurse and care provider it effectively relied on the judgement of a social worker who does not claim to have any medical skills or qualifications.
20. In submissions on behalf of the claimant it was observed that the second assessment plan included provision for:

“waking nights support, for three nights a month, in anticipation that your client will have up to three seizures a month during the night.”

This was in the face of evidence that the claimant’s seizures are unpredictable and that it cannot be pre-determined on which nights they will occur. According to the consultant the claimant is at risk of sudden death if there is not appropriate monitoring. Sarah Cannavan of Independence Homes commented on this in her statement of 21 May 2014 in the following way:

“ 27 It is difficult to see how the original (or any subsequent) support plan was truly representative of Perry’s needs as it was so quickly and readily changed. It should also be pointed out, most importantly, that seizure activity cannot be anticipated and Perry has no warning signs when a seizure may occur. A waking night’s staff for three nights a month would put Perry in danger as it is nonsensical to suggest that assistance with medication is only needed some of the time. Additionally, Perry’s seizures are not limited to nights. They are whilst sleeping. This puts him at risk of death. So, he could easily (and often does) have a seizure whilst sleeping in the morning or early afternoon. That is why he needs 24 hour care. Sleep in support would not be able to respond to a seizure in time.”

21. At the hearing before me counsel for the defendant sought to explain, in the absence of any evidence, that the basis for that provision related to the payment to be made to a member of staff who would otherwise be asleep but was actually awoken to attend to the claimant when he was having a sleep related seizure. As was observed on behalf of the claimant that formula, on the basis of the evidence available, would provide insufficient time for provision of the necessary medication in circumstances in which the claimant himself is unable to activate the alarm when unconscious.
22. In the present care package, as is apparent from the evidence of Julia Biggs, waking night staff are an integral part of the care package as seizures are unpredictable. Julia Biggs dealt with this in her letter to the claimant of 12 December 2013 in the following way:

“...We also have a bespoke alarm system which detects all seizure types and every time Perry has a seizure this will be conveyed through the alarm systems through a pager to alert staff and staff can respond within under a minute.

...Purely because epilepsy is not subject to a time table and seizures can occur at any time....

...Perry has nocturnal seizures and therefore requires waking night staff to check on him and an alarm system to ensure his safety. He is at a major risk of death if he is not monitored during the night and also at risk of severe injuries due to falls during seizures if not supported correctly....”

23. It is also the case that although the defendant's social worker (Elizabeth Iweha) has indicated that the proposed non-specialist care provider (Allied Care) can provide services in line with the support plan, as can be seen from her statement of 28 April 2014:

"75 Allied Care arranged a further assessment visit for 19 February and although the meeting took place PC was clear that he did not want to move to Ashlong House and wanted to stay at Prospect Court.

76 Allied Care has attempted to progress the assessment process and in the absence of being able to complete this, they have confirmed that they are able to meet PC's needs at Ashlong House in accordance with LBS's support plan. Allied Care are confident that they can meet PC's needs and have now confirmed that when the time comes for PC to move from Prospect Court they will formally assess him."

There has been no final assessment by Allied Care nor is there any direct evidence from them as to their ability to provide the required services, for example as to how sufficiently trained staff will be available for the provision of rescue medication in the event of a sleep related seizure.

24. The defendant accepted that in the circumstances of this case, article 8 is engaged.
25. I take as the starting point the test identified in *Ireneschild*. The burden on the claimant is a heavy one, that is to say procedural irregularity or unreasonableness verging on absurdity.
26. It is important to keep in mind that this is a case in which the claimant has been in receipt of these services for a number of years in circumstances in which his medical team and care providers have made it clear that his needs have not decreased. It is to be distinguished from the type of case in which a claimant is seeking services which he has not had in the past.

In my judgment the assessment by the defendant demonstrates a failure to understand and address the claimant's medical and support needs. This is most apparent in the approach adopted by the defendant to the provision of support to provide three nights waking care a month against a background of medical and other evidence which demonstrates the need for 24 hour care in circumstances in which seizures, including sleep related seizures are unpredictable and cannot be pre-determined. The explanation as to the basis upon which three waking nights care a month are included within the package as offered in the hearing before me simply does not make sense and does not address the needs identified in the reports from the medical and other professionals.

27. It is also the case that the claimant has a tenancy at his current placement which has been his home for more than four years and there has been no care plan produced from the proposed non-specialist care provider. As I have already observed there is no direct documentary evidence from the care provider as to how it would ensure the availability of sufficient trained staff to provide the necessary support identified by

the professionals currently responsible for the claimant's care, in particular in terms of the provision of rescue medication.

28. I conclude on the particular facts of this case, notwithstanding the high hurdle faced by the claimant, that the decision by the defendant failed to give appropriate weight to obviously relevant material and relied excessively on the non-expert view of a social worker in a face of a wealth of evidence to the contrary from appropriately qualified and experienced experts. I find that those opinions have not been given sufficient weight in the decision-making process and that in those circumstances the defendant should re-assess the claimant's needs and the extent of care that as a consequence is required.
29. As I have already observed it was accepted that article 8 was engaged. In the light of my conclusions and the need for a reassessment by the defendant I am satisfied that the defendant's decision that the claimant should be expected to move from his home at which he has a tenancy, to a placement of the defendant's choosing in circumstances in which no care plan has been provided by the proposed non-specialist care provider does amount to an unlawful interference with the claimant's rights to respect for home and private life. On the basis of the assessment, which I have deemed to be inadequate, it cannot be said by the defendant that suitable alternative accommodation and care is available nor was the claimant sufficiently involved in the defendant's decision-making process.
30. In all of those circumstances I am satisfied that it is appropriate to quash the decisions of the defendant to terminate the claimant's package of care and its decision in relation to the claimant's assessed needs and the services to be provided.
31. I will deal with relief, consequential matters and costs by way of written representations from the parties.