

Does the Judicial Review of a needs assessment under the Care Act 2014 matter in Wales?

Ann James and Luke Clements¹

*R (JF) v Merton LBC*² concerned a young man (JF) with complex needs. The High Court held to be unlawful: (1) an assessment undertaken by Merton LBC; and (2) a decision that he could be moved to different accommodation.

Summary

JF was 24 at the date of the judgment. He had lived in his current setting (a residential college) for many years. He is (among other things) non-verbal, highly anxious and this is exacerbated by any change to his routine or environment, however minor: ordinarily he requires 1:1 supervision (2:1 when in the community).

For over 15 years he has received support from a multidisciplinary team that includes speech and language therapy, physiotherapy, psychiatric input and other therapeutic and support provision.

The council decided that JF could be moved to an alternative setting and based its decision on a pre-admission assessment undertaken by the provider of the alternative setting (rather than undertaking a lawful and detailed assessment itself). The local authority accepted that its decision was motivated in part by a wish to cut costs.

Pivotal to the success of this claim is the failure of the Merton LBC to apply the 'well-being principle' in the Care Act 2014 section 1.

Importantly the court held (reiterating the regulations) that an assessment will be unlawful if it (para 47):

- fails to assess the impact [of the adult's] needs for care and support upon the factors of wellbeing listed in section 1(2) of the Act;
- fails to assess the outcomes that [the adult] 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;

¹ Ann James is a retired social worker, social work academic and more recently worked as a Manager in the Care Council for Wales. She was a carer for her son Rhydian; Luke Clements is the Cerebra Professor of Law and Social Justice at the School of Law, Leeds University

² *R (on the application of JF acting through his mother and litigation friend KF) v The London Borough of Merton* [2017] EWHC 1519 (Admin) at <http://www.bailii.org/ew/cases/EWHC/Admin/2017/1519.html>

- fails to have regard to the matters specified in Care and Support (Assessment) Regulations, regulation 3(2) [their wishes and preferences; the outcomes they seek; the severity and overall extent of their needs]; The court held that in relation to people such as JF, inevitably this meant that the local authority must have regard to the views expressed by his parents;
- is neither appropriate nor proportionate.

The court additionally found that (para 61):

- 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.

One problematic element to the judgment concerns the question of whether the local authority was required, in its assessment, to decide how the transfer from JF's current setting to the proposed setting would be managed (given that he was highly averse to change).

The court held that an assessment under Care Act 2014, section 9 is not required to deal with transitions of this kind: that it is a 'statement of static current needs' (para 56). This may be academic as the Care and Support Plan would have to deal with this issue – but arguably this is an inappropriately narrow interpretation. The direction of travel of the Act is that if an assessed need can be met in an alternative (cheaper) setting, a local authority can then take steps to terminate the current placement and 'transit' the individual to the other setting. However it is quite possible that some individuals might not survive the transition – or might suffer such harm as to make wholly unreasonable any attempt to move them: the mere fact that life can survive on Mars does not justify a journey that will kill them.

Is this case pertinent to Wales?

The judgment would appear to be equally applicable in Wales. The Social Services and Well-being (Wales) Act 2014 has the same genesis as the Care Act 2014 in England. The Law Commission in its report of 2011 recommended that the confusing patchwork of social care statutes be repealed and replaced by a single Act.³

The Social Services and Well-being Act 2014 is the Welsh Government's response to the report and consequently the replacement legislation in England and Wales have at its core the recommendations of the Law Commission though there are differences. It has been said that the main 'headline' difference between the two sets of legislation is that the Welsh Act applies to people 'in

³ Law Commission *Adult Social Care Law Com No 326*, HC 941 (Stationery Office 2011) para 3.2.

need' of any age and their carers, whereas the English Act is largely confined to the needs of 'adults in need' and their carers.⁴

A key principle underpinning adult social care in England and Wales⁵ is 'well-being'. The definition of well-being in relation to adults in both the Welsh Act and the English Act is essentially the same.⁶

There is little of substance distinguishing the principle (and detail) of the well-being duty in section 1 of the English Act and sections 2, 5 and 6 of the Welsh Act. The Welsh Act additionally creates a requirement to have due regard to the United Nations Principles for Older People in relation to an adult in need and to the United Nations Convention on the Rights of the Child with regard to a child in need. The Code of Practice on Assessment attends to the absence of the United Nations Convention on the Rights of Disabled Persons in the statute by requiring the assessment to have due regard to the Convention rights (and the English Statutory Guidance does much the same).

Concluding comments

The court in its judgment noted the limited legal authority relating to assessment under the Care Act 2014 and it is this which makes this case significant. The Court has confirmed that the local authority exercising its functions under Part 1 of the Act which includes assessment of need, has a duty to promote the well-being of the person being assessed and that in doing so must have regard to the dimensions of well-being set out in statute. The onus is on the local authority to demonstrate that it has had regard, not only to the individual's wishes but also to their circumstances.

The barrister acting for (JF)⁷ said at the conclusion of the proceedings 'this case is a recent and important example of a successful challenge to a needs assessment under the new statutory regime, and of the application of the 'well-being' principle in section 1 of the Care Act 2014 as an effective litigation device'.

The onus on local authorities in Wales to promote the well-being of individuals (adults and children) and have regard to the dimensions of well-being as set out in statute, make this judicial review of Merton LBC relevant to Wales.

⁴ Clements, L *The Social Services and Well-being (Wales) Act 2014: An overview* (2017) p.2.

⁵ In Wales in relation to children in need of care and support.

⁶ In relation to children the definition of well-being includes physical, intellectual, emotional, social and behavioral development, and 'welfare' as is interpreted for the purposes of the Children Act 1989.

⁷ [Alexander Line](#) of Outer Temple Chambers.