

Case note

R (CWR) v Flintshire County Council (2018)

Judicial Review proceedings (withdrawn as settled before final hearing) relating to the failure to assess and then meet the needs of a young person with additional needs and to take full account of her parent carers' willingness and ability to meet needs

Summary

C is a young adult of average intelligence with a diagnosis of autism spectrum disorder. She had a care package amounting to 8 hours of Direct Payments (DPs). Shortly before she finished in her part time educational placement her parents sought additional assistance with providing her care. Flintshire County Council (hereafter the LA) failed to respond to their requests for assistance. Her parents sought legal advice on her behalf. Legal aid was available. An assessment under the Social Services and Wellbeing Act 2014 was eventually obtained. This demonstrated a need for 24 hour support and care. A carer assessment was carried out on the mother. This demonstrated that the mother was no longer willing or able to provide the bulk of the care. No carer assessment was done on the father. Services amounting to just an additional 8 hours of directly commissioned support plus the 8 hours of DPs were offered. Proceedings were instituted for judicial review. One week before final hearing the Welsh LA agreed to provide a package of care amounting to 60 hours per week (240 hours per 4 week period) including provision for a full 48 hours of respite care per 4 week period. The LA also agreed to provide a formal apology and to make an award of damages for breach of C and her family's human rights.

Detail

C was born in 1996. She has diagnoses of autism, ADHD, anxiety and depression. She is severely underweight. She presents as a young child. She is dependent on others for all activities of daily living.

C's parents have provided the support she needs since birth. C was open to children's services and had a statement of special educational needs. When C reached adulthood her care transferred to the local Community Mental health Team (CMHT). Apart from attending the educational placement for 2 part days per week her mother received 8 hours of DP support for C per week. As the time for C to leave her educational placement approached the parents, supported by an advocate, approached social services through the CMHT requesting additional support. This was refused. Some considerable time later arrangements were

made for once per week art tutoring and eventually a support worker to support C with litter picking on a local beach (provided by way of carer relief). This meant that total support amounted to approximately 12 hours per week.

C's parents sought legal advice. C was eligible for legal aid.

In April 2017 a formal request was made for a full Social Services and Wellbeing (Wales) Act 2014 (SSWWA) assessment both of C's needs and of her parents' needs as carers and thereafter for Care and Support Plan(s) (CSP) to meet eligible assessed needs. The LA eventually advised in August 2017 that they had carried out an assessment pursuant to the Mental Health Measure 2011 and that this was sufficient. A letter was sent at the end of August pointing out the deficiencies and inadequacy of the Welsh Mental Health Measure assessment and once again requesting that a full SSWWA assessment be undertaken. This resulted in no action on the part of the LA so was followed by a formal letter before claim sent at the end of September. In October this resulted in a commitment within 21 days to carry out SSWWA assessments (on both C and her parents) and to arrive at provision decisions. An assessment under the SSWWA on C and her mother demonstrated on the part of C that her needs were such as to require 24 hour support, and on the part of her mother that she was not willing or able to continue to provide the level of support that she was having to put in by dint of no alternative being in place. No assessment was completed on C's father and the LA stated at this point (having previously committed to carrying out a carer assessment on him) that he was not considered to be a carer. No provision decision was made.

On 19 February proceedings for judicial review were issued. The grounds for the claim were:

- 1) Breach of statutory duties to C – including a) the failure to record actions to meet identified needs, b) the failure to make a determination around eligibility, c) the failure to provide adequate services to meet C's need for care and support, d) the failure to prepare a CSP, e) the failure to promote C's wellbeing and f) the failure to have due regard to the United Nations Convention on the Rights of Disabled People and the need to promote independent living.
- 2) Breach of statutory duty/irrationality/breach of legitimate expectation in relation to the failure to carry out a carer assessment on C's father.
- 3) Breach of statutory duty/illegality in respect of C's carers – including a) failure to identify how needs/outcomes will be met, b) failure to determine eligibility for support, c) failure to meet needs including taking proper account of their willingness or ability to meet needs, d) failure to prepare and maintain a CSP to address carer needs.
- 4) Breach of C's and her parents' Article 8 Right to private and family life (Human Rights Act).

The LA filed a defence. They indicated in their defence, amongst many other matters, that they would be preparing a draft CSP for C by early March. And that

they had written to C's father to offer him a carer assessment. In the event they failed to do either. They did provide a CSP about 10 days later with just 4 extra hours of support.

The Court considered the application and defence on the papers and permission was granted for the matter to be heard on an expedited basis. The hearing date was fixed for the end of April 2018.

In an attempt to try to find common grounds, a meeting was requested by C's mother and took place between C's mother, her solicitor and her advocate with representatives of the LA. It was once again made clear in that meeting that the parents were not willing or able to provide care essentially during working hours Monday to Saturday and that support to meet needs during those times would need to be provided. Following the meeting C's solicitor wrote setting out in detail what support would be acceptable.

Approximately 1 week before the hearing date C's lawyers were advised that the LA wished to settle the case on the basis that they would meet needs in full as requested, and on the understanding that this could subsequently increase at a pace acceptable to C. The care that would be put in place immediately would consist of:

- 48 hours of support per week, comprising by agreement partly of directly commissioned support and partly of DP funded support (totalling 192 hours per 4 weeks);
- Plus a further 48 hours in every 4 week period to enable a full break to be available to the parents;
- Hence a total of 240 hours per 4 week period.

They also agreed to pay C's reasonable legal costs.

Following further negotiations, the LA also agreed:

- To provide a formal apology to C and her parents in relation to delay, failure to properly assess and provide a CSP and to make eligibility and commissioning decisions;
- To pay damages to C and her parents under the Human Rights Act 1998;
- They also acknowledged that the care might need to increase and agreed to regular reviews of the CSP at least annually and more frequently if requested.

The case was withdrawn on the basis of a consent order reflecting these terms.

Conclusion:

In many ways it is a pity that this case did not come before the high court because it raised a number of significant issues on which it would have been helpful to have judicial guidance including:

- The crucial issue of the extent to which a local authority must have regard for an informal carer's willingness or ability to provide care;
- Who is or is not a carer;
- The relationship between assessments and support delivered under the Welsh Mental Health Measure and those delivered under the SSWWA;
- The time needed for the local authority to assess and come to provision decisions;
- The nature of the duty on a local authority to reach an eligibility decision and to meet *all* eligible needs;
- The nature of the duty on a local authority to draw up and maintain care and support plans
- The nature of the duty on a local authority to have regard to the various factors set out in Part 2 of the SSWWA and in the Codes of Practice;
- Whether failures to meet statutory duties in good time or at all may give rise to damages under the Human Rights Act;

However, it is clear from the action of the LA in this case, albeit very late and against the context of an imminent high court hearing, that this authority at least recognised that it had failed adequately to meet its statutory duties to C and her family.

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