Neutral Citation Number: [2020] EWHC 2119 (Admin)

Case No: CO/1800/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

R (D)	**Claimant**
- and -	
Hampshire County Council	**Defendant**

- -
- -

Charlotte Hadfield (instructed by Sinclairs Law) for the **Claimant**
Ben Mitchell (instructed by Hampshire Legal Services) for the **Defendant**

Hearing date: 30 July 2020

Judgment as delivered at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM:

This hearing

1. This is a claim for judicial review which is at the permission stage. Permission for judicial review is contested and on 16 July 2020 Freedman J directed its consideration at an oral hearing. The hearing was a remote hearing by way of Skype for Business. The parties were satisfied, and confirmed, that that mode of hearing did not prejudice their positions, and I was also satisfied of that. I addressed my mind, as always, to the open justice principle and am satisfied that it has been secured. The hearing and its start time were published in the cause list, as was an email address for use by any member of the press or public who wished permission to participate. The hearing has been recorded and the recording will be preserved. My intention is to provide in the public domain a written version of this ruling. By having a remote hearing, we were able to eliminate any risk arising from anyone travelling to a court room or being physically present within a court room. Although we are in the post lockdown phase the High Court arrangements for remote hearings remain in place. I am quite satisfied that it was necessary and proportionate to use them in this case, and that any qualification of any right or interest or principle is justified as necessary.

Outcome

2. There are two grounds for judicial review in this case and I say, straightaway, what my conclusions are. On ground one, Mr Mitchell has persuaded me that the ground is not arguable and I will be refusing permission. On ground two, Ms Hadfield has persuaded me that the ground is arguable and I will be granting permission. On the face of it the timetable helpfully described, on a contingent basis, in Mr Mitchell's skeleton argument seems sensible but I will give Ms Hadfield an opportunity at the end of this ruling to address me on that.

What the case is about

3. The claimant is an 8 year-old who has not been to school since 27 September 2019. In these judicial review proceedings filed on 14 May 2020 he claims there is an ongoing breach of statutory duty by the local authority. The relevant statutory duty is found in section 19(1) of the Education Act 1996:

> Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

It is a statutory duty to make arrangements for education provision at school or otherwise than at school when a certain trigger is in place. The defendant recognises that it has the duty but says (a) that the trigger is not in place in this case and (b) that it has reasonably so concluded. The statutory trigger is whether for a child of compulsory school age – as the claimant is – "by reason of illness [the child] may not for any period receive suitable education, unless such arrangements are made". Illness is only one of the triggering situations within this statutory provision, but it is the relevant one in this case. The others are "exclusion from school" and then there is the third trigger category: "or otherwise".

4. Because this is a legal challenge to an ongoing situation and what is said to be an "ongoing" breach of statutory duty, with the remedies being a declaration of unlawfulness and a mandatory order, this is one of those cases where the court will appropriately look at the ongoing situation. The authorities in this area support that approach and I will say more about them later. The 'index decision' (as it has been described at this hearing) of the local authority in this case was dated 6 January 2020. Within that decision letter, the defendant expressed its conclusion that: 'it is reasonably practicable for the claimant to attend school'. It addressed a Consultant's report and letter, and explained that it did not accept the Consultant's conclusion that the claimant "is unable to attend school". That position has been maintained by the defendant in subsequent correspondence and subsequently in these proceedings. Paragraph 33 of the defendant's Summary Grounds of Defence explains that: "it was entirely appropriate for the council to conclude that the letters [I interpose, letters in January 2020] do not support an objective conclusion that the claimant is not reasonably able to attend school". That is the position that the defendant is defending in these proceedings and it is obvious that the practical nature and purpose of the proceedings, so far as any remedy would be concerned, involves the question of declaration and a mandatory order if appropriate, to deal with the claimant's educational position. Having said that, the defendant through Mr Mitchell told me today that there is an ongoing process of assessment which it intends to complete in the near future.

Ground one

5. The first ground for judicial review is that in the index decision letter the defendant materially erred in law in its approach to the statutory duty, or more particularly the trigger to the statutory duty. I am refusing permission for judicial review on that ground and therefore need to explain why. The index decision letter, as I have said, states the position that the defendant: "consider it is reasonably practicable for the claimant to attend school". Ms Hadfield says that, as a matter of law, that was the wrong question. She said the question is not one of "reasonable practicability" or of "reasonable possibility". She submits that tests qualified by "reasonably" are relevant, applicable and appropriate in relation to other triggers, or at least in relation to the third and "or otherwise" trigger under section 19. She submits that "illness" is different and the question is not "reasonably possible" or "reasonably practicable", but is rather a question of "possibility" or "impossibility". She says that is a question of a different nature. She says the defendant materially went wrong in law in its approach, accordingly.

6. In my judgment, this ground is not arguable. In my judgment, there is no realistic prospect of this court concluding that the defendant authority went wrong in law so far as the approach to the statutory trigger is concerned, by using the language of "reasonable practicability". I accept the submissions of Mr Mitchell. As he submits, if and to the extent that there were a dichotomy with a different test where "impossibility" is used for "illness" and "reasonable possibility" or "reasonable practicability" used elsewhere, the true consequence of that – in logic – would be that it would be harder for a claimant in an "illness" case. To the extent that the authority of S [2007] EWHC 2135 (Admin) at paragraph 18 supports a "very high test" for illness, that "very high test" would, in my judgment, indeed support the conclusion that the trigger in illness cases is in that respect harder to satisfy. But, in my judgment, the real answer lies in Mr Mitchell's next point. Having said that, if different, the test if anything is harder for

illness cases, his principal submission is that there is no different legal test, but rather a contextual application in the circumstances relevant to the appropriate trigger. In my judgment, that is plainly right.

7. The starting point is with the decision of the Court of Appeal in G [2004] EWCA Civ 45 and in particular paragraph 42 which uses the language of "impossible" describing "illness" and then "reasonably possible" in the context of the third category: "or otherwise". That passage was the root of Ms Hadfield's submission that there is a dichotomy and two distinct tests. But, as Mr Mitchell submits, that paragraph is an analysis by the Court of Appeal explaining what the Court described as an 'ejusdem generis' approach to the three categories. In other words, the Court of Appeal was explaining a symmetry between the different triggering categories. In my judgment, it is clear, on the face of G, that the Court would just as much have used "reasonably" as a qualifier in relation to "possibility" and "impossibility", in the context of illness, as it did in relation to the third and "or otherwise" category. The crucial point concerns the question of the reasonable application of a "reasonably practicable" or "reasonably possible" test.

8. The point is well illustrated, in my judgment, by an example that Ms Hadfield gave. It concerned a situation where a child could physically be wheeled into school, notwithstanding their illness, but would nevertheless be incapable realistically of undertaking effective schooling in the school environment, by reason of the illness. That to my mind illustrate the importance of contextual application of a "reasonably possible" and "reasonably practicable" standard. I would accept that there may be different approaches to different considerations in the different triggering categories. But that is not a reason for identifying, in principle, a different test. To the extent, for example, that it is right to say that the reasonableness of the parents' position may have a different significance in an "illness" case where there is objective medical evidence, that also illustrates, in my judgment, the contextual application of a "reasonably possible" or "reasonably practicable" test. But not a dichotomy, involving a different test or standard.

9. So far as the remaining authorities are concerned, the case of S [2007] EWHC 2135 (Admin), in my judgment – and notwithstanding the reference to the "very high test" for "illness" (which, as I have said, if anything does not help Ms Hadfield) – goes on to discuss the importance of the "reasonably possible" or "reasonably practicable" approach at paragraphs 20 and 21. While referring to that authority I mentioned, in passing, that at paragraph 25 the court referred to the "close scrutiny" that would be appropriate in a judicial review case. The other authority that was cited as DS [2017] EWHC 1660 (Admin). So far as that case is concerned, I agree with Mr Mitchell that it supports his submission, and is not consistent with Ms Hadfield's submission. Paragraphs 40 and 41 of DS discuss another earlier case of the Court of Appeal in C [2006] EWCA Civ 728 quoting from paragraph 40 of that judgment, in what was an exclusion case: "The focus is … whether it is objectively unreasonable to expect the child to attend the school in question". Returning to DS, paragraph 45 identifies propositions as applicable to section 19, from the authorities. The first of these is: "Section 19 is intended to cover circumstances in which it is not reasonably possible for a child to take advantage of existing suitable schooling".

10. As a matter of principle, and authority, it seems to me – beyond argument – that there is no error of approach in considering the question of "reasonable possibility" and

"reasonable practicability" under section 19(1), including in an "illness" case. The critical question in this case is as to the reasonable and justified application of that principle, on the facts, in the circumstances and in the light of the evidence. That is ground two.

Ground two

11. On ground two, as I have explained, I am satisfied that this claim is properly arguable. Mr Mitchell has failed to persuade me that he has a 'knockout blow'. Naturally, I am not arriving at any conclusions in relation to the arguments on this issue, for the purposes of permission, other than that the point is reasonably arguable. In the light of the arguments in writing and orally, I will say a little more about the case and about the issue as I see it.

12. Mr Mitchell for the defendant submits that, in an "illness" case, a letter from a clinician which states the conclusion that, in their view, a child is "unable by reason of illness to attend school" does not serve to act as what he called "a sick note". In other words, it does not necessarily constitute the determinative answer to the issue for the local authority. He submits that the defendant in this case was entitled reasonably to express concerns that it had about views expressed, and in particular a conclusion in a letter of that kind. He submits that the defendant was not obliged simply to adopt the clinician's expressed conclusion. He emphasises that the local authority was in close contact with, and aware of the position of, the school in this case. He emphasises the previous arrangements which have been in place for the claimant, up until 27 September 2019. He emphasises that the local authority expressed itself as being willing to adopt a "staged approach", with relevant meetings, and that the local authority expressed itself confident in what he calls "the real reason" for the decision: that a "staged approach" with speedy return to school would work in this case, and would be in the claimant's best interests. As I understood it, and as I saw it, Mr Mitchell encapsulated the essence of the defendant's position ultimately in this submission: that the defendant authority was reasonably satisfied that previous support 'had worked', and was ready, willing and able to set up 'what it knew would work' for the claimant.

13. The question is not whether there is an arguable defence, but whether there is an arguable claim with a realistic prospect of success. I recognise immediately that the Court has a supervisory jurisdiction and that the primary decision-maker is not the Court but the defendant local authority. This is not an original jurisdiction, or a merits appeal, or a best interests jurisdiction. It is a review of the reasonableness of the local authority's position. One footnote to that is the question of whether "close scrutiny" is appropriate and I have already cited a passage from one authority which may give some support to that. One possibility, recognised by the parties but not currently pleaded, is that this case may touch on the Human Rights Act 1998 right to education, with the accompanying scrutiny. But Mr Mitchell is entitled to say that the claimant and the claimant's lawyers chose not to tick the Human Rights Act box in the claim form (Form N461) or plead any Human Rights Act point. For the purposes of arguability and permission, I put that to one side and assume the case is simply to be approached by way of the conventional reasonableness standard.

14. The points that have led me to conclude that the case is arguable really start with the position of a consultant psychiatrist (the Consultant, as I will call him). The Consultant had, on the evidence, become involved on a referral by the claimant's GP. Ms Hadfield

describes the Consultant as "a consultant child and adolescent psychiatrist with expertise in mental health disorders". The Consultant wrote a report on 3 December 2019 which he followed up the next day with a letter dated 4 December 2019. In extremely short summary the thrust, as I saw it, of that material was that the Consultant was recognising that the claimant has a condition of ASD (autism spectrum disorder) and probable PDA (pathological demand avoidance), has a need for support and assistance before any school placement could take place, and – as the letter, in terms, puts it – is "currently unable to attend school". The index decision letter of 6 January 2020 took the position of not accepting that conclusion, concluding that the local authority considered it reasonably practicable for the claimant to attend school. It is arguable, in my judgment, that the defendant's reasons, explained in that letter and in subsequent materials, do not constitute a reasonable justification for rejecting that view of the Consultant and for supporting that position taken on the part of the local authority.

15. Woven into the picture, as the next feature of the case, is the referring GP. The GP had attended a professional meeting on 16 December 2019. The draft minutes of the local authority, which it attached to the index decision letter, record the GP as having said at the meeting that she, the GP, "read the report from the Consultant and did not think it suggested the claimant was unfit for school". That is a description of the GP, characterising the position as communicated by the Consultant. The claimant's parents contested the accuracy of that description in the minutes and there followed, shortly afterwards, an email communication from the GP Surgery which on its face vindicated that concern. The email says this: "I said I did not think that [the Consultant] categorically stated in his [report] that the claimant could not go to school *ad infinitem*. I think he was referring to the point in time when he saw the claimant". That, on the face of it, is the GP recording that the position she actually communicated, at the meeting, was that the Consultant was not supporting or stating the view that *as a permanent and indefinite position* the claimant was unable to attend school. Looking at the Consultant's report of 3 December 2019 it is very clear that the Consultant was envisaging support with a view to a return to school, and that report described that possibility of being able to return to school as one which could eventuate in the relatively near future. The point relating to the GP goes further. A prominent point made in the index decision letter of 6 January 2020 concerns what the GP is recorded there as having said. The decision letter says this, that the GP "advised that she had read the report from the Consultant but did not agree that she believed the claimant was unfit for school". That is not the point described in the draft minutes and I have been unable to find in the document anywhere where it is recorded that the GP had expressed the view that she believed the claimant was fit for school (or put another way did not believe that he was unfit for school). This is a case in which it is important to focus on what may be two stages. The local authority describes in the index decision letter what it calls a "staged approach". The Consultant had described in the report the need for help prior to any school placement. Ms Hadfield is able to point out that, for the purposes of the statutory provision section 19(1), Parliament has emphasised that it is sufficient if "for any period" a child of compulsory school age is not receiving suitable education by reason of illness.

16. In the light of what is necessarily an ongoing picture, involving the prism of the primary decision-making authority maintaining its position, it is also relevant to consider the report of the Educational Psychologist (as I shall call her) which is before the court and

is dated 30 April 2020. The existence of that report has a particular resonance when two things are recalled. The first is that the Consultant himself referred to the appropriateness of an educational psychologist's report. But the second is that in the index decision letter the local authority made a number of points which, on their face, appeared to be criticisms of the Consultant's report and its veracity or reliability. One of those criticisms was that the Consultant "is not an educational psychologist". As I have said, there is now before the Court a report of the Educational Psychologist. It describes the claimant as not having the skillset or emotional resilience to be able to access and manage learning within a mainstream setting. It describes significant barriers to learning impacting upon his ability to maintain a school placement. And it states expressly that, in the meantime prior to a suitable placement being identified which he can access at a specialist school, the claimant "will require the local authority to provide home tuition until a suitable school placement is found". That, on the face of it, is evidence which supports the position of objectively that the claimant is someone who is unable to attend school by reason of illness, until such time as he has received necessary assistance, in conjunction with which educational provision is appropriate. The question under ground two will be whether the defendant has reasonably justified the position it has taken on the trigger question. I am satisfied, in the light of all the materials and the submissions that I have read and heard, that it is arguable that it has not reasonably justified that conclusion and decision.

Observations

17. I will turn shortly to case management, which was another reason why permission was adjourned to an oral hearing in this case. I have said that, provisionally, I am attracted to the timetable set out in the defendant's skeleton argument. I am also conscious that reference has been made to expert evidence and permission for expert evidence. I have not yet heard submissions in relation to that. But I do first want to make some observations for the assistance of the parties before I consider timetable with the parties. The observations I make are these.

18. In principle, as it seems to me, this is a case in which a Court will receive updating evidence from the parties. That evidence can cut in either of the two directions. An example would be material from the defendant authority that says it has reconsidered the position and there could be material from the defendant that gives new reasons for a decision that it is maintaining. There could be further enquiry and further material that it has elicited. For that matter, there could be material that the claimant has elicited. In this case the Educational Psychologist's report, obtained by the claimant in the light of what was said in the index letter, and sent by the Consultant is a good example. So is a further letter from the Consultant who updated the Court as to the position, in a letter that is before the court and is dated 11 June 2020. Materials of that kind may show the Court that the case for a remedy by way of judicial review has changed: it may have weakened; it may have strengthened. The design of the judicial review claim is to challenge an "ongoing" failure to discharge a statutory duty. The purpose of the claim is to seek to obtain declaratory relief and a mandatory order. In principle, and provided that proper discipline is brought to bear and a timetable is identified and adhered to, I can see no objection to the parties updating each other and the Court. In principle, there is no need for an amendment of the grounds every time the position is maintained – if it is – by the local authority, with the thrust of the submission remaining the same. I repeat: that does not turn the court into a merits jurisdiction, or merits appeal, or best

interests jurisdiction. Material which update the position – including for example in relation to Covid 19 and remote access education about which I have heard submissions, and including in relation to the autumn term and the practicalities for that – can appropriately be put forward. But the primary prism, for consideration of all materials of that kind, has to be the defendant local authority. It is to the local authority that Parliament has entrusted the evaluation of the trigger questions, and it is the local authority that owes any duty to make arrangements that arise out of that. The court's review is and remains a supervisory review.

19. The parties may be assisted, in relation to the concept in principle of a 'rolling judicial review', by some observations I made in Raja [2020] EWHC 1456 (Admin) at paragraphs 18-21. I have noted in the authorities cited by the parties that in at least two of the cases the judicial review court received updating materials and was anxious to consider the position on a fully up-to-date basis. That was the position in the case of S at paragraphs 12 and 13 but it had also been the position in the Court of Appeal case of G: see, for example, paragraph 70. When one steps back from what this case is about, the circumstances reinforce the need to focus on reality and practicality and the up-to-date position. This is, in the end a case – as Freedman J observed in thoughtful observations when adjourning permission – about a child now aged 8 who was been out of mainstream education since 27 September 2019.

20. It is obvious, and the materials on both sides recognise this, that there has been a breakdown in the relationship between the claimant's parents on the one hand and the local authority and school on the other. It is essential that the parties cooperate and act reasonably in relation to the ongoing pursuit of judicial review. In the case of G the Court of Appeal evaluated the reasonableness of the position adopted by the parents. It is – and this will be a matter for the analysis at the substantive hearing – at least possible that, notwithstanding the objective evidence relied on in this case, the Court will be in a position where it will wish similarly to evaluate the reasonableness of the position that has been adopted by the claimant's parents. It is possible always that the parties, of course, will be able to find a way to resolve their differences. It is not necessary or appropriate for me to say any more about that, other than to observe that there appears to be a consistent thread: in the Consultant's documents and the Educational Psychologist's report and the defendant's own analysis, so far as the appropriateness of a "staged approach" is concerned. The real debate, as it seems to me, is not so much about whether in the long-term the claimant should be in a school environment. As it seems to me, the critical question is all about what happens next and whether educational arrangements are needed, in the discharge of the statutory duty, because of what is currently a "reasonable impossibility" or "reasonable impracticability", by reason of illness, of the claimant being able to physically attend school. In the practical light of Covid-19, and given that we are now at the end of July, the necessary focus for that – as it seems to me – is going to be on the new academic year and the new term starting in September.

21. Those observations do not reflect any finding in this case, in any direction, other than that ground two is properly arguable. I have, however, given my reasons for the conclusion that I reached, together with observations which are intended to assist the parties. I will now deal, with the assistance of Counsel, with the question of case management and I will then record the order that I then made.

Costs

22. Mr Mitchell has applied for costs of part of his Acknowledgement of Service namely the part relating to ground one, on which I refused permission for judicial review. I am against him on that application for costs. I accept, of course, that permission has been refused on ground one. I do not accept that it was a point that was predominant, and it was necessary in any event to understand the nature of the statutory provision including its contextual application, and the relevant authorities in this field, and to traverse some of that ground. Ms Hadfield has succeeded at a contested oral hearing in getting permission for judicial review. In some other jurisdictions, that would lead for an application for costs of a hearing, as unnecessarily incurred because the defendant could have conceded permission. That is not the general course taken in the Administrative Court and she has not made any such application, nor would I have granted it if she had done. In all the circumstances, this is a case in which I am quite satisfied that it is sufficient and it is appropriate in the interests of justice to say costs in the case.

Expert evidence direction

23. Mr Mitchell submitted, in relation to the updating letter of 11 June 2020 of the Consultant, that it should be filed formally as expert evidence by reference to CPR Part 35 in these proceedings. That is not in my judgment necessary or appropriate. It would be odd if the fourth of a series of four reports and letters from the Consultant were treated in that way, simply because it is evidence which post-dates the commencement of the judicial review proceedings. It would be odd for that approach to apply to that follow-up letter of the Consultant, but not equally apply to the Educational Psychologist's report which was filed and to which no objection is made, just because the latter was provided prior to the commencement of proceedings.

24. The point of substance made by Mr Mitchell is that a formal opportunity arises under CPR Part 35 to ask questions of experts. I do not consider that that justifies taking this course, in relation to this single document. If the parties have questions and concerns which relate to the source of any evidence deployed on the other side, they have a duty to cooperate, they will be able to communicate and, if there is any unreasonable obstruction, that is something that can be brought to the attention of the Court at the substantive hearing, who can give evidence appropriate weight in the light of any such concern. I do not regard a direction for the purposes of formal expert evidence as necessary or appropriate in this case. Should the parties subsequently reach the view that such a direction is necessary, ahead of the substantive hearing, they will be able to – but will have to – make an application at the appropriate time. One possibility in this case is that if there is such a debate it can, without prejudice to either party's interests, be held over to the judge dealing with the substantive hearing. I am very well aware of the rigours identified in the authorities so far as concerns fresh evidence in judicial review and expert evidence in judicial review. I have already made observations about the nature of evidence, the prism for its consideration, and the Court's secondary and supervisory jurisdiction in this kind of case. Ultimately, what to make of the evidence, questions of relevance and questions of weight, will be matters for the judge dealing with the substantive hearing.

Order

25. I made the following order (in summary): (1) Permission for judicial review is granted. (2) Costs in the case. (3) Defendant's detailed grounds and any written evidence by 4pm 3 September 2020. (4) Claimant's skeleton argument, the trial bundle and any

application by the claimant to lodge further evidence by 4pm 15 September 2020 (5) Defendant's skeleton argument 29 September 2020. (6) Authorities bundle by 4pm 2 October 2020. (7) Hearing to be listed for one day, to be fixed for hearing in week commencing October 2020.