



Neutral Citation Number: [2023] EWHC 3138 (Admin)

Case No: CO/2843/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2023

Before :

MR DAVID LOCK KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

THE KING (On the application of W)

Claimant

- and -

HERTFORDSHIRE COUNTY COUNCIL

Defendant

The Claimant in person

Mr Timothy Straker KC and Arran Dowling-Hussy (Instructed by the Legal Department at Hertfordshire County Council) for the **Defendant**.

Hearing date: 5 December 2023

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email.. The date and time for hand-down is deemed to be 12.00am on 8 December 2023.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child who are the subject of these proceedings and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

1. This is a challenge to the failure of Hertfordshire County Council (“**the Local Authority**”) to discharge its duties to children who may have special educational needs lawfully under the Children and Families Act 2014 (“**the 2014 Act**”). There are some aspects of the claim by W’s father, who is the effective Claimant in this matter (and who I will refer to as the Claimant), which relate to how the Local Authority responded to W’s case and some wider systemic elements to his complaints about the way the Local Authority have acted. The Claimant also has a claim for damages to compensate him for costs he has incurred in providing services to his daughter which, he submits, were only necessary because the Local Authority failed to provide special educational for his daughter.
2. Under section 36(1) of the 2014 Act a parent who believes their child may have special educational needs is entitled to ask the Local Authority to carry out an assessment of their child. Section 36(3) provides:

“When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan”
3. Before making any decision, the local authority are required to consult with the parents: see section 36(4). It follows that, if a request is made, the local authority is required to consider whether the child “may” have special educational needs. That is a low test and will be met by any child where there is any realistic prospect that, following an assessment, the child may need special educational provision: see *R v Bristol CC v Penfold* [1998] COD 210, (1998) 1 CCL Rep 315.
4. If the child is someone who may have special educational needs, the local authority is required to carry out an assessment to determine whether the child does or does not have special

educational needs and, if the child does have special educational needs, whether “*special educational provision*” should be made for the child.

5. Section 36(5) of the 2014 Act sets out what should happen if the local authority refuses to undertake an assessment. It provides:

“Where the local authority determines that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan it must notify the child’s parent or the young person—

(a) of the reasons for that determination, and

(b) that accordingly it has decided not to secure an EHC needs assessment for the child or young person”

Hence, if a local authority makes a decision to refuse the request for an assessment, it must give its reasons to justify a decision that the low threshold has not been met.

6. In contrast, section 36(8) provides:

“The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan”

7. In this case the Claimant requested an assessment for his daughter, W, in 30 December 2022. The Local Authority replied by a letter dated 8 February 2023 which stated:

“The LA have carefully considered your request for an education, health, and care needs assessment for [W].

At this time the LA feel that there is a more suitable pathway to support the needs of W, in place of a needs assessment because:

Currently, we do not feel an assessment needs to take place because:

- The Local Authority note that [W]'s reading level at age related and school have identified needs and puts support in place.*
- There are clearly difficulties around work refusal and choosing not to attend school.*
- The information provided places [W]'s reading level as age appropriate and work examples indicate that she can access the curriculum.*
- The last attainment levels suggest [W]was on track but is now choosing not to engage with assessments.*
- The Local Authority note that the level of behaviour is not at the intensity and frequency expected to see when applying for an EHC needs assessment.*
- [W]'s[sic] can be met through Reasonable Adjustment and Quality First Teaching.*

8. I have set out that letter in this way because, as written, there is a strong case that it does not wholly make sense. It looks as if the Local Authority have a standard letter rejecting such an application and the person completing the letter is supposed to fill in the relevant details. Although the Local Authority list a number of documents that are supposed to have been considered as part of this decision-making process, the letter does not directly address the statutory test as to whether W “may” have special educational needs. The fact that some of her needs may be met in the ways suggested in the letter does not necessarily mean that she does not have special educational needs. Hence, a fair criticism of the letter was that it suggested that the Local Authority had failed to ask itself the question it was required to address under section 36. There are no documents disclosed by the Local Authority which explain who reached the decision that W did not meet the low threshold under the statutory scheme or why that decision was taken.
9. Any parent has a right to appeal to the First Tier Tribunal against a decision by a local authority not to conduct an assessment and then consider whether an EHCP is needed. The Claimant

first applied for a review of the Local Authority's decision not to do an assessment, pointing out that there was a history of ADHD in the Claimant's family. The Local Authority refused to review the decision. There are no background papers disclosed which explain that decision.

10. Section 51(1) of the 2014 Act provides for appeals to the First Tier Tribunal ("FTT"). However, an appeal can only be made to the FTT in respect of one of the matters set out in section 51(2). It follows that, if a case comes within the categories set out in 51(2), a parent can appeal to the Tribunal about that matter. Conversely, if a matter is not within section 51(2), no appeal about that matter can be made to the Tribunal. Section 51(2)(a) provides that an appeal can be made in respect of:

"a decision of a local authority not to secure an EHC needs assessment for the child or young person"

11. In the case, the Claimant exercised his right to appeal to the FTT in respect of the Local Authority's decision not to undertake an assessment. On 5 April 2023, prior to the hearing of the tribunal case, the Local Authority changed its position and agreed to conduct an assessment of W's needs. There are no disclosed documents which show why the Local Authority changed its mind about whether W's needs met the statutory threshold. However, the data disclosed by the Local Authority shows that it was far from unusual for the Local Authority to have changed its mind about whether the threshold was met to require the Local Authority to undertake an assessment. This Local Authority conceded 79 out of 91 appeals in 2021/22. That suggests that, in the case of parents who sought to exercise their right of appeal to the FTT, the Local Authority accepted that it had made an erroneous decision in 86% of cases. Further, for those cases where the Local Authority failed to concede and the case went to the FTT, the FTT ruled that an assessment was required in all but one case.
12. I do not know how many requests by parents for assessments were sought by parents and granted without the need for the parents to exercise their right to appeal to the FTT. Equally, I do not know how many parents applied for an assessment and failed to appeal a negative response from the Local Authority. Nonetheless, the above figures strongly suggest that there are serious questions about the way in which the Local Authority carries out its initial decision-making functions given that something approaching 99% of appeals in a recent year were either conceded in advance of a hearing or lost at a hearing. That outcome strongly suggests something has gone seriously awry with the Local Authority's initial decision-making function.

13. To be fair to the Local Authority, it only conceded 43 out of 83 in the current year, but that is still indicative that, when challenged, it accepted that more than half of its initial decisions could not be supported. Further, for this current year, the Local Authority has failed in 16 out of 17 cases which have gone to the Tribunal.

14. Where the Local Authority agrees to a parent's request to undertake a needs assessment, Regulation 2 of the Special Educational Needs and Disability Regulations 2014 provides:

“(2) A local authority must send the finalised EHC plan to—

(a) the child's parent or to the young person;

(b) the governing body, proprietor or principal of any school, other institution or provider of relevant early years education named in the EHC plan; and

(c) to the responsible commissioning body,

as soon as practicable, and in any event within 20 weeks of the local authority receiving a request for an EHC needs assessment in accordance with section 36(1) of the Act, or of the local authority becoming responsible for the child in accordance with section 24 of the Act”

15. The primary duty on the Local Authority is to complete a finalised EHC plan “*as soon as possible*”. However, an outer limit is set for the period within which it has to be completed. That outer limit is set at 20 weeks from the date of the request being made, not the date when the Local Authority agrees to undertake the assessment and complete a finalised EHC plan. In this case the request was on 30 December 2022 and thus, once the Local Authority belatedly agreed to undertake the assessment, it only had a relatively short period before the 20 week period expired. I calculate the period of 20 weeks from 30 December expired on 12 May 2023. It seems to me that the Local Authority should have sought a consent order from the FTT that it should complete the assessment and complete a finalised EHC plan notwithstanding that it

had failed to do so earlier. If that had happened, the assessment and complete a finalised EHC plan would have to be completed within 14 weeks of the date of a direction being made by the FTT: see Regulation 44(2) of the 2014 Regulations.

16. However, if a local authority concedes that it should undertake an assessment and complete a finalised EHC plan but fails to obtain an order from the FTT to do so, it seems to me that the Local Authority puts itself instantly into a position where it will either only have a relatively short period of time to complete the assessment and prepare the EHC plan or may already be in default because the 20 week time period runs from the date of the original section 36(1) request.
17. In this case the Local Authority failed to complete the assessment for the Claimant's daughter by 12 May 2023. Indeed, it failed to complete it within 20 weeks of agreeing to do so, as it appeared to be working on the mistaken basis that the period of 20 weeks restarted from 5 April 2023. The Local Authority relies on the fact that the number of requests for EHC assessments has risen by 185% in the years since the 2014 Act was implemented, although the majority of that growth was in the early years and the growth last year was at 5%. They say, and I accept, there is a national shortage of educational psychologists to undertake the assessments and it is therefore very difficult to complete the assessments within the time periods specified in the Regulations. Whilst I accept that the Regulations place onerous obligations on local authorities, these are not duties to use "best endeavours" to complete assessments within defined periods but are hard edged legal duties. Subject to not coming within any of the very limited exceptions under Regulation 10(4), none of which are relevant here, the Local Authority will be acting unlawfully each time that it fails to complete an assessment and prepare the EHC plan within the time period specified in the Regulations.
18. When this breach was challenged in pre-action correspondence, the Local Authority made limited admissions. It said in a letter dated 19 July 2023:

"I have sought Instructions on the issues raised within your letter and can confirm as follows:

By failing to complete the assessment and issue the final EHC Plan within the statutory time limit the Local Authority has breached its duty under the Children and

Families Act 2014 and S13(2) of the Special Educational Needs and Disability (SEND) Regulations 2014.

This is accepted on behalf of the Local Authority who apologise that there has been considerable delay in the EHC Needs Assessment and consequently being able to provide a decision as to whether a draft EHCP or written feedback will be issued.

I am informed that the delay in preparing the EHC Plan has been caused by lack of information from both an Educational Psychologist and from CAMHS. In respect of the Educational Psychologists, those employed by the County Council have confirmed that [W] is on the list to be allocated but due to the overwhelming demand for their service at the present time, they cannot confirm when this will be. The Local Authority is investigating the possibility of outsourcing this assessment but this is not able to happen until September 2023”

19. It seems to me that this letter accepted the fact of the breach but then appeared to accord relatively little priority to the Local Authority taking action to remedy the breach. The approach demonstrated in this letter was not consistent with a public authority that recognised the seriousness of having breached its legal obligations and was determined to remedy them as quickly as possible.
20. The Claimant’s case is that what happened in his daughter’s case was not an isolated incidence but appears to have been a common experience of families who were struggling to secure EHC plans in Hertfordshire. It seems surprising that, after there have been so many significant delays for both the Claimant and others, the Local Authority was only able to say in July 2023 that it was “*investigating the possibility of outsourcing this assessment*”, and even then that a decision about adding capacity to deliver more assessments would not be possible before September 2023. By that time the Local Authority would have been in breach of its statutory obligations for 3 more months.
21. These proceedings were commenced after the 20 week period elapsed, at a time when the assessment had still not been completed. The Claimant’s case was, however, not limited to his daughter’s individual case. His case (although this was not made wholly clear in the documents the Claimant put before the court) is that what happened to his daughter was

typical and that the whole of the Local Authority's decision making processes are unlawful. He complains:

***“Systemic Non-Compliance:** The evidence shows that HCC has unlawfully breached the statutory time limit 1,209 times in the last 10 months alone. Such widespread and systemic non-compliance with statute amounts to unconstitutional behaviour and warrants exemplary damages to discourage this conduct.*

***Pattern of Deter, Defer, and Delay:** HCC's actions demonstrate a pattern of behaviour to deter parents from proceeding with assessments, cynically uses the tribunal process to defer and delay assessments, and rely on the complexity of seeking a judicial review as a barrier to enforcement. Exemplary damages are needed to deter HCC from continuing such manipulative practices”*

22. As the above passages show, the Claimant wishes to argue that there is a larger problem with unlawfulness than the Local Authority's response to his daughter's case. I explored the precise nature of the case he wishes to bring during the course of the hearing and it became clear that he wishes to assert that the Local Authority is acting in a systematically unlawful manner. The Claimant is acting in person and the I accept that full extent of his case was not wholly clear on the papers, although the basic structure of that case was present. It is not a claim to which the Local Authority have responded and, to be fair to the Local Authority, it is not a claim which was totally clear from the way in which this case was initially drafted.
23. Although it is not wholly clear from his present Statement of Facts and Grounds, the case that the Claimant wishes now to advance is that what happened to his daughter was not an isolated case of unlawful action by the Local Authority but was the consequence of an unlawful system. He says his case was typical because the Local Authority has been adopting an unlawful system in response to requests by parents for EHC Needs assessments. He acknowledges that the number of parents who are making these requests has increased and that this is putting added burden on the Local Authority, but says that the increases in numbers arises because of decisions made by Parliament and that local authorities have a duty to arrange their affairs so that they comply with their legal obligations.
24. As I understand the case he wishes to advance, his case is that, whatever the Local Authority says in its letters in response to initial requests by parents, it is in fact managing demand by

refusing a significant number of meritorious applications for assessments and only conceding the need for assessments after parents exercise their right of appeal. He then says that the Local Authority are acting unlawfully by operating systems which fail to complete those assessments in the period defined by the Regulations. He further complains that the Local Authority rely on the fact that, until an EHC plan has been produced, a parent cannot make a complaint to the FTT and thus is effectively stuck. He says that the consequence of this unlawful manner of operating is that children are left without special educational provision for extended periods when, if the Local Authority had complied with its legal obligations, those services would be in place and be benefitting the child. He says that the whole system is unlawful because the managements of the processes are designed to keep down the costs of the SEN system for the Local Authority, or at least that they have that foreseeable effect. He thus suggests that the Local Authority is deliberately operating systems which breach their legal obligations.

25. I can see that, if properly formulated, the argument that the wider “system” operated by the Local Authority was unlawful is a case that the Claimant may wish to bring and for which he would have standing. Such a case would involve an examination as to exactly how the Local Authority took decisions when requests were made by parents and, having examined the basis for decision making, would examine whether that process led to any significant risk of unlawfulness applying cases such as *R (A) v Secretary of State for the Home Department*, [2021] UKSC 37 and *R (BF (Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38. To be fair to the Local Authority, they accept that they have not been able to conduct assessments within the period defined by the Regulations, but they assert that this is a national problem due to the absence of psychologists and not due to a deliberate decision to slow down assessments so as to limit the costs to the Local Authority of making SEN provision. As I understand the case advanced by Mr Straker KC, the Local Authority deny that there is any policy of not considering initial requests in accordance with the statutory framework, although Mr Straker did accept that the number of cases which the Local Authority conceded before an appeal to the FTT suggested that additional level of scrutiny may be applied to each case at the appeal stage, in advance of an FTT hearing and with the assistance of lawyers, and that this can lead to initial decisions being reversed.

26. I would stress that I do not have the material before me today to make any judgment on the systemic case that the Claimant has indicated he wishes to bring. The Local Authority had not

interpreted the Claimant's case as involving a systemic challenge and have not either properly responded to it or, crucially, provided proper disclosure so that it could be adjudicated. That case could not be considered until the case is properly and clearly set out by the Claimant in writing, is responded to by the Local Authority and there is full disclosure by the Local Authority around how initial decisions were made and why such a large number of decisions were reversed on a later review. I will therefore concentrate on the individual case that the Claimant is bringing and make directions below to allow for the possibility that the Claimant wishes to maintain his wider review.

27. In contrast to the pre-action protocol response letter, the Acknowledgement of Service filed in response to the Claimant's Judicial review claim said that the Local Authority intended to contest the whole of the claim. Paragraph 8.3.5 of the Administrative Court Guide to Judicial Review states:

"Defendants and interested parties must not oppose permission reflexively or unthinkingly. In appropriate cases, they can and should assist the Court by indicating in the Acknowledgment of Service that permission is not opposed"

28. It seems to me that this is precisely what the Local Authority was doing in this case. It would have been far better if the Local Authority had accepted that it had not complied with its statutory obligations. That ambiguous position was also reflected at paragraph 4.2 of the Summary Grounds of Resistance said:

"The Defendant has at all times acted with regard to the applicable terms of the Children and Families Act (2014) and the Special Educational Disability Regulations (2014), Protocol 1 (Article 2) of the European Convention on Human Rights and indeed any other applicable legislation/ regulations"

29. The duty on a public body is to act in accordance with its statutory obligations or, if it has not done so, to make this clear. It cannot be right that the response of a public body to a judicial review claim is to say that it has *"times acted with regard to"* its legal obligations when, in fact, it knows that it has acted in breach of those obligations. The lack of a candid position by the Local Authority is, to say the least, unfortunate and is not consistent with its duties to the court.

30. The Summary Grounds of Resistance in this case belligerently argued that Judicial Review was inappropriate because sticking to the statutory time limit would interfere with the clinical judgment of the psychologists who were seeing and assessing children in order of priority. This seems to me to be a misconceived complaint. It is unfortunate that this line was advanced when the complaint was a failure by the Local Authority to comply with a hard edged time limit imposed by statute.
31. The primary defence advanced by the Local Authority to these proceedings in submissions was that the 2014 Act sets out a comprehensive statutory code and all matters should be dealt with by the Tribunal and that there was no room for judicial review. It was, in summary, an argument that the Claimant had alternative remedies and that no remedy should be granted to the Claimant because he has failed to make use of those alternative remedies.
32. That might raise an arguable defence if a parent was able to appeal to the Tribunal about the failure of a local authority to complete an assessment and prepare an EHC plan within the time period specified in the statutory scheme. Mr Straker KC on behalf of the Local Authority initially sought to argue that such an appeal was possible because, in effect, if the Local Authority failed to complete the assessment within the statutory time limit, the Local Authority should be treated as having made a decision not to undertake an assessment, and thus the case would come within section 51(2)(a). In my judgment that submission has no merit and is wrong. To be fair to the Local Authority, whilst Mr Straker KC was making that submission his clients, who clearly know a great deal about how the scheme operates, made their views clear that this not was how the process operated. Mr Straker KC then accepted that, where a local authority agreed to undertake an assessment but failed to complete it within the period specified in the statutory scheme, that failure could not be the subject of a complaint to the FTT.
33. That later concession seems to me to be have been rightly made because a case where the Local Authority accepts that an assessment should be produced but fails to comply with its duty to do so within a the statutorily defined time period is not within section 52(2)(a). It seems to me that, if there is no basis for a complaint about that type of unlawfulness to the FTT, there is “alternative remedy” by which a person with standing can complain about that unlawfulness and so no bar to bringing a judicial review claim.

34. It follows that, on the facts of this case, the could not have brought his complaint to the FTT even though the Local Authority was acting unlawfully. There is no dispute, that the Local Authority acted unlawfully in that it acted in breach of its statutory duty to complete a *“finalised EHC plan”* within 20 weeks. For the reasons set out above, that period of time ran from the date when the request was made by the Claimant on 30 December 2022, not from when the Local Authority agreed to do the assessment on 5 April 2023. The assessment and EHC plan has now been completed and so I do not have to consider whether I would have been prepared to make a mandatory order but I am prepared to make a Declaration that the Local Authority has acted unlawfully in failing to complete the finalised EHC plan within the statutory period.
35. However, as indicated above, it became clear during argument that resolving the case relating to the Claimant’s child is only a small part of the Claimant’s proposed overall challenge. I have indicated that the present wider, systemic challenge is alluded to in the papers but, at the moment, there is no response to it by the Local Authority and no disclosure to meet the systemic challenge has been provided by the Local Authority.
36. I should also record that Mr Straker KC has informed me that the Local Authority accept that they have been failing to comply with their statutory duties to children and their parents and have invested considerable additional resources in special educational needs assessments and provision for children who are found to have special educational needs. I was told that the Local Authority are committed to clearing the backlog of cases which have built up in recent years and are equally committed to managing the processes going forward in a way that ensures that decisions are made within the statutory time limits and that children are provided with the additional support they are entitled to receive as a result of this decision-making process. The Claimant asked if the Local Authority could say when the backlog would be cleared and when the processes would all be operating within the statutory time limits. The Local Authority is unable to say precisely when they will manage the processes so that decisions are made in a timely way and that, where required, support is provided to all children in accordance with their EHC plan. However, the Local Authority affirm that they are committed to making substantial investment and implementing changes to their systems with the result that they will be delivering a lawful service to their residents in this area.
37. Mr Straker KC helpfully suggested that if, despite the public commitment given by the Local Authority to invest additional resources so as to correct the matters about which he

complains, the Claimant wishes to continue this action he may wish to seek the assistance of the Bar Pro Bono Unit. That is a source of free, expert legal advice and the Claimant may be able to obtain assistance to understand the nature of the case that he wishes to bring and the potential costs consequences if he brings the case and fails at trial. It seems to me that this is a very sensible suggestion and the Claimant would be well advised to seek free, expert advice. I hope that, if he does so, this judgment will assist those advising him to understand the shape of the case he wishes to bring and to provide him with suitable advice. I will therefore adjourn the remainder of this judicial review claim for 28 days to allow the Claimant to seek advice, if he is so minded. If he wishes to advance the wider, systemic case, he should file an Amended Statement of Facts and Grounds which sets out that case clearly and explains precisely the way in which he contends the Local Authority is acting unlawfully. The Local Authority should respond to that case within 21 days and then the papers should go to a Judge for a decision on whether permission should be given for the wider, systemic challenge.

38. The Claimant also seeks damages. I make no comment on the merits of that case other than to say that breaches of most public law duties do not usually, of themselves, give rise to a right to damages but breaches of human rights can give rise to such a right. The sums claimed by the Claimant are relatively modest and thus, unless an agreement can be reached on this part of the case between the Local Authority and the Claimant, his case for compensation should be transferred to the Watford County Court and adjudicated upon within the Small Claims court. The case should be transferred once the public law aspects of the case have been concluded, which will either be after 28 days, assuming the Claimant elects not to pursue his wider, systemic challenge, or once that challenge has been resolved.