A Local Authority v GP (Capacity – care, support and education) [2020] EWCOP 56

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Summary

This decision concerned an application to the Court of Protection by 'A Local Authority' seeking interim declarations that GP lacked capacity to, *inter alia*, make decisions:

- "*to request or refuse an assessment of his education and health care needs for an education, health and care plan (EHC Plan) pursuant to s.36 (1) of the Children and Families Act 2014*" ("**the 2014 Act**");
- "*to make decisions about his education and health care needs pursuant to the 2014 Act*".

This was the first time that the Court of Protection had been asked to identify the relevant specific decisions that GP had to be able to make in relation to the aforementioned issues within the meaning of s3(1) and 15(1)(a) of the Mental Capacity Act 2005 ("**the 2005 Act**") and to consider what the relevant information in respect of each of those decisions was that GP must have been able to understand, retain, use or weigh in accordance with s3(1) of the 2005 Act.

Similar but competing positions were adopted by A Local Authority and the Official Solicitor, acting on behalf of GP.

In relation to the declaration regarding GP's capacity to request or refuse a s36 assessment, the Court found that the specific decision that it had to determine was whether GP had the capacity to *"request an EHC needs assessment under section 36(1) of the [2014 Act]"*. In particular, the court found that (as proposed by the applicant) the *"omission of the reference to GP deciding to refuse an EHC assessment"* was acceptable as *"if the obligation to carry out such an assessment is triggered under s36, GP would not be entitled to decide that it should not be carried out"*.

The court found that the information relevant to that decision was (as set out at paragraph 29 of the decision):

- *"An EHC Plan is a document that says what support a child or young person who has special educational needs should have"*;
- *"Other people will be consulted during the assessment process including parents, teachers and other professionals"*;
- *"If assessed as requiring an EHC* (sic) *the young person has enforceable right to the education set out within their Plan*;
- *"An EHC Plan is only available up to the age of 25 years."*

In respect of the declaration regarding GP's capacity to make decisions about his education, health and care needs, the court found that a simpler decision was required, namely, whether GP could *"make decisions as to his education".* It found that the reference to the 2014 Act was *unduly restrictive"* as education might be provided to GP *"outside the scope of an EHC Plan".* Further, that a reference to health and/or care needs *"might be misunderstood as one relating to consent to medical treatment and [was] therefore too wide"*.

The court found that the information relevant to the decision was (as set out at paragraph 34):

- *"The type of provision"*;
- *"The type of qualifications, if any, on offer"*;
- "*the cohort of pupils and whether P would match the profile of other pupils at the provision*";
- "*The P has additional rights up to the age of 25 because of his special educational needs*."

The court specifically rejected the idea that an additional piece of relevant information should have been that "*GP would need to understand there is a social and personal development opportunity available through education*" because "*to require GP to understand and weigh the nature and extent of the social and personal development opportunities which might be available to him would be…placing greater demands upon him than others of his chronological age/commensurate maturity and unchallenged capacity*."

Comment

This will be a welcome decision for local authority education departments who, for a significant time now, have been raising concerns with those advising them as to how the 2014 Act regime for over 18s and the 2005 Act regime intertwine. This decision has addressed one of the many

questions that local authorities have as to how they can go about determining whether an EHC Needs Assessment can be undertaken for those who it suspects of lacking capacity.

In relation to the first issue of an EHC Needs Assessment, the court has undoubtedly identified the correct question. Whilst the omission in relation to refusing an EHC Needs Assessment does fail to account for the fact that parents of children with special educational needs and young people can refuse to engage with a local authority process, in practice this rarely happens. Certainly the bigger source of angst amongst parents and young people is decisions to refuse to assess. There is a question mark over whether the relevant information should have made reference to the fact that a local authority can refuse to conduct an assessment resulting in a claim to the First Tier Tribunal. However, that it is not included is, in my view, correct and it is a secondary decision that would need to be considered fully after the issue of whether or not P has capacity to seek an assessment in the first place.

In relation to the second issue before the court, again, in my view the decision identified and the relevant information were correct. I do however, find the court's dismissal of health and care needs from the decision making process surprising when additional rights are proffered upon the holder of an EHC Plan where health and social care needs are identified within it. Further, the notion that considering health and social care needs in the context of whether an EHC Needs Assessment should be undertaken could result in confusion about whether or not there is consent to medical treatment seems entirely incorrect. EHC Plans do not outline any future medical treatment that the holder should have. At most they identify the medication currently taken. Moreover, they are documents designed to be used by educational staff, no clinician is going to defer to the contents of an EHC Plan when considering whether the holder has agreed to undergo medical treatment.

This judgment is a good start in clarifying the position as to decisions that need to be made under the 2-14 Act where the relevant beneficiary lacks capacity. Hopefully future judgments will engage with other difficulties that arise in practice between the two statutory regimes.

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