A rare successful claim for breach of Article 2 Protocol 1 – "Right to education"

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In *The King on the application of ZB, DB (by their mother and litigation friend Princess Bell) v London Borough of Croydon v NHS South West London* ICB (2) [2023] EWHC 489 (Admin) Jason Coppel KC sitting as a Deputy Judge of the High Court ("the Judge") dismissed a number of claims for quashing orders, mandatory orders and declaration but declared that Croydon had breached the Claimants' right to education.

Background

The claim was one of a number of proceedings attempting to secure adequate housing, education and social care provision brought by the Claimants.

DB is a 14-year-old boy and ZB a 12-year-old girl. Amongst other diagnoses, both DB and ZB have neurological conditions, global developmental delay, learning disabilities, four limb motor disorder, epilepsy, variable heart block, the heart condition long QT syndrome and low muscle tone. They are both registered blind, use non-verbal communication, are incontinent, fed by tube and use wheelchairs. In addition to this, both Claimants have high moving and handling needs, large equipment requirements, need hoisting for all transfers and are fully dependent on carers to meet all of their needs.

The family lived in housing provided by the London Borough of Lambeth, which was located in Croydon. The accommodation was described as "unsuitable" for Claimants' needs due to inaccessibility and issues with damp and mould. Proceedings were ongoing with regard to alternative accommodation. As such, the Claimants remained in their current unsuitable accommodation.

When the claimants moved to the Croydon area in December 2020, Croydon was informed by Lambeth that the claimants had moved into its area and accepted responsibility for them under s.24 of the Children and Families 2014 Act ("the 2014 Act"). Croydon also received the Claimants' current Education, Health and Care Plans (EHCPs).

Due to the difficulties in moving the children, they had been confined to their accommodation. The Claimants were also unable to attend school. It was stated that ZB had not attended school since 12 November 2018 and DB had not attended school since 11 March 2020. Although, some alternative education arrangements had been put in place through a small number of virtual lessons and music sessions each week.

The claimants wished to secure placements at the Children's Trust School ("CTS"), a non-maintained special school in Tadworth, Surrey which supports children and young people aged 2-19 who have a wide range of special needs. However, Croydon refused the placements due to cost, and maintained that they should attend Linden Lodge School ("LLS") in Wandsworth, a community special school for children with visual and sensory impairments, as day pupils.

Shortly after proceedings were issued, Croydon agreed to accommodate DB, pursuant to s. 20 of the Children Act 1989, temporarily at the Children's Trust ("TCT") and to refer him to be assessed for a residential placement there. TCT is located on an adjacent site to the school. It offers care to children with special needs, including by way of residential placements and can make limited educational provision for children but is not itself a school. Croydon's position remained that DB should be educated at LLS and so transported to and from LLS each day.

Croydon's assigned social worker was aware that the Claimants had not been to school for some time (in part due to Covid-19 disruption) but proceeded on the basis that they would attend LLS once transport was arranged (which was Croydon's responsibility). However, throughout, Croydon was disputing its responsibility for

providing an escort for ZB (which was only accepted after these proceedings were issued) and no solution at all had been proposed for DB to get to and from LLS.

In his Order dated 28 July 2022 granting permission for judicial review, Bennathan J granted interim relief requiring Croydon to also refer ZB for a short-term placement at TCT. Therefore, both DB and ZB moved into TCT on 2 November 2022. Consequently, at the time of the present proceedings, both Claimants were at TCT receiving some education (for two hours per day) and were progressing well.

The Claim

The claim before the High Court sought the following relief by way of final orders:

i) Quashing orders to quash what was characterised as "the Defendant's refusal to give lawful consideration to the placement of [DB] and [ZB] at the Children's Trust School ("CTS")" and "the Defendant's decision to propose that [DB] be looked after separately from [ZB] alone in a foster placement".

ii) Declarations that Croydon had been in continuing breach of its duty to secure lawful arrangements for the education of, and social care support for, DB and ZB since they were housed in Croydon's area in October 2020 or some subsequent date.

iii) A mandatory order that Croydon arrange for DB and ZB to be provided with a residential placement at the CTS.

iv) A mandatory order that Croydon provide a suitable care plan covering their transport to and from the CTS and ensuring that they could spend time in due course at weekends and during school holidays at the family home.

v) A declaration and damages reflecting Croydon's breach of the Convention rights of DB and ZB under Article 8 ECHR (the right to respect for private

and family life) and Article 2 of Protocol No. 1to the ECHR (the right to education).

The Claimants' mother had also lodged extended appeals in the First Tier Tribunal ("FTT"), pursuant to s.51 of the Children and Families Act 2014, against both EHCPs in relation to education health and social care needs and provision. Those appeals were to be heard in March 2023.

Determination of the issues

Claims i) – iv) were dismissed.

It was accepted by the Claimants that the FTT and not the Administrative Court, was the appropriate forum for the resolution of disputes regarding the contents of the EHCPs. Therefore, i), iii) and iv) (above) were not pursued. Noting that the FTT is the specialist forum for these types of disputes, the Judge noted that he would have refused to grant the quashing and mandatory relief sought even if they had been pursued.

The Judge further noted that the claim for a quashing order regarding Croydon's proposal that DB be accommodated in foster care (i) above) had not been proposed for some time and had been overtaken by events. There was also no suggestion at the hearing that foster care for DB would be pursued by Croydon in the future [18].
The Judge also concluded that it would be inappropriate for the Court to proceed to determine the claims for declarations ((ii) above). This was, amongst other reasons, because 1) there was a substantial overlap between these issues and the issues which were to be determined by the FTT; and 2) the declarations concerned historic alleged failings of Croydon which had either been superseded as a result of the placement of the children at TCT, or will be superseded by fresh decisions and fresh provision following the FTT proceedings.

The Claimants also pleaded that Croydon had failed to engage in appropriate inter-agency cooperation with Lambeth, resulting in delays in making appropriate provision for the Claimants. However, no specific relief was sought in relation to that alleged

failure and the Judge found that this also fell into the category of historic events which have been superseded.

The Article 2 Protocol 1- Right to education claim

The Judge stated that:

> *"Making all due allowances for the "weak" character of the A2P1 right and the difficulties which will ordinarily arise in establishing that a child has been denied education in breach of that right, these facts disclose, in my judgment, that Croydon acted in breach of the A2P1 rights of DB and ZB. The children were unable to attend mainstream education and there were only a handful of schools where education could realistically have been provided to them. It has been Croydon's committed view, maintained in the face of Ms Bell's advocacy for CTS, that they ought to attend LLS, where they were enrolled at the time that Croydon assumed statutory responsibility for their education in December 2020. Knowing that the children were not in fact attending LLS, nor receiving alternative educational provision (save for a handful of virtual sessions which nobody has contended were adequate "education"), Croydon's efforts to ensure that they were able to attend, and did attend, LLS can fairly be described as "completely ineffectual" (to use the phrase of Lord Kerr in A v Essex). [30]*

After considering the timeline of events, the Judge concluded that:

> *"More than 16 months after they moved into Croydon's area, the children were still unable to attend LLS for lack of adequate transport and accompanying escort arrangements. Although the delay in applying for transport to and from LLS was partly down to the Claimants' mother. Ultimately, once it became aware that the children were not attending school, Croydon had a primary responsibility to ensure that they did so, or at the very least that they were able to do so." [31]*

Findings were made that Croydon's period of breach of A2P1 commenced on 2 December 2020 when it assumed responsibility for the children and the end of the breach was on 19 April 2022, which was the date upon which Croydon formally offered to refer the children to its home tuition service. The Judge found that this represented at least a realistic proposal for the Claimants' education, "albeit a temporary and far from satisfactory one". This was in spite of the fact that no detail was given on 19 April 2022 as to how much tuition was being offered or whether it would be in person or

virtual, and it is unclear whether there was a waiting list or otherwise how quickly home tuition would have started.

The Judge concluded that the appropriate figure for compensation for each child was £10,000. He stated that *"This represents £600 per month for the 16.5-month period between 2 December 2020 and 19 April 2022. It places the awards at the upper end of the Ombudsman's scale, in light of the absence of any significant educational provision during the relevant period and the likely severity of the impact on the children given the very limited social contact which they otherwise had."* [40].

Maintenance of placement pending FTT Proceedings

The Judge refused to make a mandatory order prohibiting Croydon from terminating their placements at TCT before the conclusion of the FTT proceedings. This was because Croydon had not stated that it intended to move the claimants prior to the FTT proceedings and the Judge was "…*not in a position to say that it would necessarily be unlawful for Croydon to decide in the future that the children should be accommodated elsewhere, particularly as one cannot be at all certain when the FTT proceedings will conclude (and noting the possibility of an appeal against its ruling)*." [43]

"*Any decision of Croydon to that effect will have to be judged in the light of circumstances at the time that it is made.*" [44]

Comment

There are very few decided claims for breach of Article 2 Protocol 1 and this case acts a reminder that a *"highly pragmatic"* test will be applied to the specific facts of each case.

This case reiterates that the Administrative Court will be slow to interfere in issues which are ordinarily to be determined before the specialist FTT. This includes matters in relation to health and social care provision, in relation to which, the FTT can only make non-binding recommendations.

It also highlights that it is not usually the concern of judicial review to investigate historic failings which have already been, or are soon to be, put right (or at least overtaken by fresh decisions which may be subject to fresh, and different, challenge) [15].

The case is also a stark reminder that in comparison to most other Convention rights, Article 2 Protocol 1 is considered to be a "*weak*" guarantee.

> *"There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution …The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"*

(A *v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, Lord Bingham at (24))

It is also arguable that a breach has occurred if an authority responsible for providing education knows that that a pupil is not receiving it and engages in a completely ineffectual attempt to provide it (*A v Essex County Council (National Autistic Society intervening)* [2011] 1 AC 280 [161]

In terms of the level of the compensatory remedy, a 'backward-looking' analysis will be necessary. Factors for consideration will include the child's needs, the severity of the impact upon the child of being denied education, any educational provision made during the relevant period, whether additional provision can remedy some or all of the loss of education and whether the period was a significant one in the child's career.

In this case a quantum of damages commensurate with the payments recommended by the Local Government and Social Care Ombudsman ("the Ombudsman") in cases where maladministration has resulted in a child missing out on education was considered to be a plausible basis for calculating an award of compensation. As at January 2021 this was £200-£600 per month of missed education.

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