Neutral Citation Number: [2019] EWHC 3404 (Admin)

Case No: CO/3233/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 12 December 2019

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN **on the application of AT and BT** **(by their father and litigation friend CT)**	**Claimants**
- and -	
LONDON BOROUGH OF BARNET	**Defendant**

- -
- -

David Lawson (instructed by **Simpson Millar LLP**) for the **Claimants**
Jon Holbrook (instructed by **HB Public Law**) for the **Defendant**

Hearing dates: 3 December 2019

- -

Approved Judgment

Philip Mott QC :

1. AT is a seven year old boy with autism. His brother, BT, is nearly ten years old. They live with their parents in the London Borough of Barnet. AT's placement at a special school was terminated in July 2018 because the school could not meet his needs. There was a difference of opinion between the parents and the local authority about a suitable replacement school. The parents disagreed with the provision in AT's Educational, Health and Care ("EHC") Plan and appealed to the First-Tier Tribunal ("FTT"). They also asked the FTT to make recommendations about the amount of social care provided.

2. The FTT heard the evidence and considered the case on 12 and 13 November 2018. Its decision was issued on 27 November 2018. In respect of schooling the FTT agreed with the parents that the school I shall refer to as "T" was appropriate, and that AT required the use of Applied Behavioural Analysis ("ABA"). It directed amendments to the EHC Plan, which were made, and AT started at T School. In respect of social care the FTT could only make recommendations, which it did. In general these supported the parents' submissions. These recommendations were incorporated into the EHC Plan, but have not been implemented. Instead the Defendant has produced further care assessments, culminating in one dated 30 May 2019, which offers more limited social care provision.

3. The Amended Grounds seek to challenge the decision of the Defendant not to implement the FTT recommendations, its failure to follow those recommendations, and the decision to offer more limited social care in its assessment of 30 May 2019. The claim is made on five grounds:

    i) Failure to respond to the FTT recommendations.

    ii) Failure to make a transparent decision and to have and apply policies and criteria.

    iii) The Defendant's Short Breaks Policy is unlawful because it purports to cap the financial cost and includes no eligibility criteria for accessing overnight provision.

    iv) The care plan for AT is perverse and unreasonable.

    v) The refusal to provide respite outside the family home in unlawful and unreasonable.

The FTT Decision

4. The proper starting point must be the FTT Decision of 27 November 2018. It comes from a specialist tribunal which had heard evidence.

5. AT's disability and behaviour are described in two passages from the Decision. Neither party suggested these descriptions were inaccurate. A short summary appears in paragraph 5, as follows:

> "His skills are significantly delayed in all areas of development, particularly in the areas of communication and learning to learn

> skills. He engages in behaviours that challenge and put him and others at risk of injury (and in fact he has on a number of occasions bitten, scratched and pinched those around him). He has recently started to become destructive of the fabric of his family home and he has started to lash out when he has become frustrated. He sleeps badly and is often awake for long periods at night. He has been taking medication for insomnia for some years. He exhibits what is described as "pica" behaviour, namely he puts inanimate objects and other things in his mouth such as glue, dirt, and, latterly, his own faeces. He has recently started smearing his own faeces on the walls of his home."

6. The following fuller description of AT comes from paragraph 96 of the FTT Decision, in due course included in the amended EHC Plan.

> "[AT] has a diagnosis of Autistic Spectrum Disorder (ASD). He is a little boy who presents with significant and severe communication difficulties and social interaction difficulties, significant attention and sensory difficulties and a history of motor mannerisms and repetitive behaviours. He has difficulty sleeping.
>
> [AT]'s needs are complex and having a direct impact on the entirety of the family and its functioning.
>
> In the home setting [AT] is constantly on the go. He has a very strong need for sensory input and his behaviour is difficult to manage. [AT] frequently climbs onto the furniture, and when he goes into the garden he moves between swinging, climbing and trampolining after a couple of minutes at each. Sometimes he runs into the house, swings on the patio door, and runs out again. He requires constant supervision as he shows limited awareness of danger or impulse control. He frequently pulls at his parents or attempts to bite them. He recently managed to open the front door and get out of the house.
>
> [AT] has significant sensory needs in the areas of movement (the vestibular system) and touch (the tactile and proprioceptive systems) and some auditory sensory processing difficulties. He has difficulty filtering information from the environment and can become overwhelmed by sensory stimulation around him and then can have difficulty calming down.
>
> He has frequent meltdowns which are unpredictable, unmanageable and can last for up to an hour.
>
> [AT] presents as sensory seeking (making sounds, biting, continually moving, swinging, jumping). He also appears to avoid some sounds. His difficulty with sensory regulation is having a significant impact on his ability to attend and engage in activities. His sensory difficulties can result in considerable

> difficulties for him in regulating his behaviour, so that excessive movement, reduction in verbal communication, refusal to cooperate with adult requests, and tantrums can result. These behaviours are also triggered when [AT] is not motivated to comply with adults' requests, or when he has to transition from one activity or location to another.
>
> [AT] presents with behaviours including aggression, hyperactivity, irritability, features of anxiety and frequent temper tantrums. He is very hyperactive and it is difficult to monitor his safety. He has no safety awareness.
>
> [AT] engages in behaviours that challenge which put him and others at risk of injury. He has ongoing behavioural challenges both at night and during the day.
>
> His sleep difficulties are severe and disruptive to himself and the family and not responsive to first- and second-line interventions. Despite referral to the Evelina Sleep Clinic last year there is still no clear improvement."

7. The FTT Decision deals with the disputes over social care provision as follows:

   i) In paragraph 56 it notes the statement of Ms Baylis that "respite provision tends to be allocated to children with profound difficulties and only after alternatives have been explored. This is because for any child (and particularly a very young child) being away from their parents can be distressing and this is compounded when the child has Autism". The FTT sought further explanation of that argument, but it was not forthcoming (paragraph 57).

   ii) An unsigned, undated and unattributed document produced by the Defendant set out the offer of short breaks provision, including support worker assistance in these terms (paragraph 58):

   > "[AT] is also receiving Disability Living Allowance of approximately £327 per week. This equates to around 7 hours of support worker assistance. The local authority propose an additional 3 hours support worker assistance at a direct payment rate of £12.02 per hour to allow for [AT] to receive support for 10 hours per week. This equates to 1 overnight respite for [AT]. This arrangement is only until [AT] returns to education or the sleep clinic concludes (whichever of these occurs sooner)."

   Counsel for the Defendant did not attempt to justify its inclusion of DLA funding, which in any event was £327 per <u>month</u>, not per week (paragraph 60).

   iii) In oral evidence Mr Chihwehwete "appeared to accept that one night of respite care, i.e. [AT] being cared for outside the home, was reasonable, but then he resiled from that acceptance" (paragraph 59).

8. The FTT used this evidence to assess what they thought it would be reasonable to provide by way of respite care under section 17 of the Children Act 1989 and section 2 of the Chronically Sick and Disabled Persons Act 1970 (paragraph 61). It issued the caveat (paragraph 97) that:

> "We were hampered in our deliberations on the amount of care provision that [AT] needs by the absence of a robust and relevant social care assessment of the needs of [AT], his brother [BT], and [their parents]. We therefore did the best we could to make recommendations for social care provision."

9. On this basis, the FTT recommended the following social care provision:

   i) Section H1 of the EHC Plan (social care provision which must be made under section 2 of the Chronically Sick and Disabled Persons Act 1970). [AT]'s parents are to be allocated 12.5 hours per week (i.e. for Monday to Friday) of support from a carer in the home or in the community during term times, to be used flexibly according to [AT]'s needs.

   ii) Section H2 of the EHC Plan (any other social care provision reasonably required by the learning difficulties or disabilities). Overnight respite one night per week during term time, one weekend per month (including weekends during school holidays), plus one week during the summer holidays.

10. For reasons which will become apparent as I go through the history of these proceedings, the only issue now is in relation to the overnight respite provision in Section H2. The parents would like this to be provided at a specialist residential unit I shall refer to as "BS", which does offer overnight residential respite care.

The status of the FTT recommendations

11. The Special Educational Needs and Disability (First-Tier Tribunal Recommendations Power) Regulations 2017 came into force on 3 April 2018. They broadly allow the FTT to make non-binding recommendations in respect of certain health and social care matters within EHC Plans. Where social care recommendations are made, regulation 7(1) provides that "the local authority must respond to the child's parent … within 5 weeks …". Such a response is required by regulation 7(3) to –

> "(a) be in writing,
>
> (b) state what steps, if any, the local authority has decided to take following its consideration of the recommendation, and
>
> (c) give reasons for any decision not to follow the recommendation, or any part of it."

The local authority must send a copy of this response to the Secretary of State (regulation 7(4)).

12. There is non-statutory guidance issued by the Department for Education in March 2018. It includes the following:

> "Although any recommendations made by the Tribunal on health or social care elements of an EHC plan are non-binding and there is no requirement to follow them, the LA and/or responsible health commissioning body are generally expected to follow them. They are recommendations made by a specialist Tribunal and should not be ignored or rejected without careful consideration. Any reasons for not taking them forward must be explained and set out in writing as explained below.
>
> …
>
> Responses must be in writing and state what steps the health commissioning body or LA social care commissioner has decided to take following consideration of the Tribunal's recommendations. If a decision has been taken not to follow all or part of the recommendations, the health commissioning body or LA social care commissioner must give sufficiently detailed reasons for that decision."

13. I was referred to various authorities on the extent and cogency of reasons required for not following a recommendation from the Local Government Ombudsman (*Gallagher v Basildon DC* [2011] LGR 227, at [33]), the Parliamentary Commissioner (*Bradley v Sec of State for Work and Pensions* [2009] QB 114, at [91]), and other advisory bodies (*AT v Newham LBC* [2009] 1 FLR 311, at [71]; *R v Avon CC, ex.p.M* [1994] 2 FLR 1006, at p.1019; *R v LB Islington, ex.p.Rixon* (1996) 32 BMLR 136, at p.142). Although such recommendations can be rejected, or not followed, cogent reasons will be required for doing so. Such reasons will need to be even more cogent when the recommendation comes from a specialist Tribunal which has heard evidence and argument.

14. Mr Holbrook took me to authorities stressing the limited nature of this court's jurisdiction (*P v Essex CC* [2004] EWHC 2027 (Admin)), and the need to bear in mind that such documents are not generally prepared by a lawyer and should not be subject to nit-picking analysis (*Ireneschild v Lambeth LBC* [2007] EWCA Civ 234). In order to ensure that I treated his point as a good one, he referred me to one of my own judgments (*AT v Islington LB* [2013] EWHC 107 (Admin)). This is useful not for any new principle of law, or even analysis, but because it conveniently summarises other authorities, such as *McDonald v Kensington & Chelsea LBC* [2011] UKSC 33 and *B v Lambeth LB* [2006] EWHC 639 (Admin). I need not repeat that summary here.

15. I also take note of Mr Holbrook's post-hearing written submission that reasons should not be struck down unless their errors undermine the basis on which the decision was arrived at (see *Holmes Moorhouse v Richmond upon Thames* [2009] UKHL 7). However, as Mr Lawson points out in his written submissions in reply, it is clear that there must be enough to show that the local authority has fulfilled its statutory obligations (*Nzolameso v Westminster CC* [2015] PTSR 549, at [32]).

Events subsequent to the FTT Decision

16. In this case it is admitted by the Defendant that it failed to respond within 5 weeks. The first letter providing any sort of response came from Mr Munday on 25 January 2019, about 8 weeks after the FTT decision. It is quite clearly not a response complying with regulation 7, and it is accepted that at the time the Defendant was unaware of its provisions. Instead it promises an up to date assessment of AT's needs by 11 February 2019. As to overnight respite care, it merely repeats the offer rejected by the FTT, to top up the DLA money to cover one night a week overnight care in the home.

17. There is a child and family assessment dated 12 February 2019. In relation to the FTT recommendations on social care it makes the following assertions:

    i) "It is felt that some of the recommendations would not be in the best interest of [AT]"

    ii) "It is recommended that until the Evelina sleep clinic can review the effectiveness of the medication the family should be offered additional direct payments with the view that this can be used for a support worker one night a week equating to 10 hours of care for [AT] in the event that he wakes. It is recommended that this respite takes place within the family home in light of [AT]'s age and level of need. This direct payment will be in addition to Disability Living Allowance that the family can utilise as they wish."

18. It is quite apparent that this assessment does not purport to comply with regulation 7, nor is it suggested that it does so. It simply restates the local authority's view which was before the FTT (paragraph 56), without doing anything to explain the reasoning as sought by the FTT during the hearing (paragraph 57). In relation to the sleep clinic, it is apparent from paragraph 96 of the FTT Decision that the referral had taken place in 2017 and there was "still no clear improvement".

19. The parents sought further legal advice, and a letter was written on 1 March 2019 complaining of the inadequacies in the provision offered. As it said, "The local authority appear to have completely failed to deal with the tribunal recommendation that one night per week respite is provided during term time or that one weekend per month is covered during term time".

20. That was followed by a pre-action protocol letter on 3 April 2019, which specifically drew the Defendant's attention to the requirements of regulation 7. The reply made no reference to this, but promised a further assessment within 28 days of 3 April 2019, when AT was referred to the Defendant's 0-25 team.

21. That further assessment was completed on 30 May 2019. Its author is Ms Baylis, whose statement was considered by the FTT, or a social worker under her. It contains the following key passages in relation to overnight respite care:

    i) "[The parents] have repeatedly requested respite stays outside of the home for [AT]. When the social workers have raised concern about the impact that this would have on [AT, his mother] has said it would be fine. Removing [AT] from his home environment will not benefit [AT] and may actually contribute to his anxieties when he is back home. He will be in a strange environment with unfamiliar adults caring for him, different routines and with an ever

changing unfamiliar peer group. His level of social understanding is likely to make this a confusing and possibly distressing experience for [AT]. Research by the National Autistic Society 2016, which has included views from adults with ASD. This indicates that children with ASD find the world very confusing and very unpredictable and big changes to their routines can exacerbate anxiety. The same research advises that the need for routines and sameness is very important in providing predictability for the children and reducing anxiety. The social worker acknowledges the concerns of the parents but it is important the solution also meets [AT]'s needs. Therefore the social worker is exploring the possibility of a bespoke respite fostering arrangement. [AT] would go to the same place each time and have one consistent carer he could get to know."

ii) "These parents appear intent on their preference in having [AT] sleep out of the home overnight once a week. [AT] is only 7 years of age and as an autistic child, with some specific sensory needs, will require a quiet and familiar environment. It has been noted by both [AT]'s parents and by his school that progress in [AT]'s behaviour is being made. I am concerned that if [AT] attends the respite provision identified by [his parents] this will be detrimental to this progress and to his future wellbeing. Overnight respite, in my view, is best met in [AT]'s home. If, having tested overnight provision in the home, this is not found to be effective then the Local Authority would want to identify a foster family that could offer respite. This would promote the development of a relationship between [AT] and a family with whom he would become familiar and who would be in a position to meet his emotional needs. I would hope that [his parents] would recognise this as preferable to the likely changing and unpredictable environment in a 'residential' type setting."

22. This assessment goes further in explaining why the Defendant does not propose to follow the recommendation on overnight respite care, but does not clearly set out what provision is to be offered in its place. Within the home it appears to be for one night per week, but no frequency is specified for overnight respite care with a foster family, even as a maximum figure. Since it is now apparent that the Defendant accepts the need for overnight respite care once a week within the home, but not if that care is provided outside the home, that omission is important.

23. It may be that this could be a starting point for a proper, cogent and transparent response. But this assessment does not purport to be a document complying with regulation 7, nor does it by itself provide the sufficiency of reasons required.

24. In the absence of any substantive response to the original pre-action protocol letter, and specifically the reference to regulation 7, a further such letter was sent on 5 July 2019. The response on 30 July 2019 alleged that the claim was time-barred, an argument not raised before me. On the substance of the claim, the response (although not wholly clear) appears to assert that Mr Munday's letter of 25 January 2019, coupled with the subsequent social care assessments, are sufficient to comply with the regulation 7 duties. That argument also was not pursued before me.

25. As a result, these proceedings were launched on 16 August 2019. Summary Grounds of Defence were served on 10 September 2019. Permission was granted on the papers on 17 September 2019, with an order for an expedited hearing.

The letter of 12 September 2019

26. It was not until 12 September 2019 that a letter was produced which purported to comply with regulation 7. In relation to overnight respite care it stated that 10 hours a week was being provided. However, this was used for daytime assistance when the children were home from school and before the father returned from work, as the Defendant well knew. Moreover, such daytime assistance was reasonable, as the FTT found (paragraph 98), albeit for a shorter period each day than had been claimed by the parents. It was therefore disingenuous to assert that overnight care was being provided.

27. A number of reasons were put forward for departing from the FTT recommendations.

    i) AT had settled at his new school. Although it was known that he would attend this school, it was not known how successful this would be. This is a fair point, but Mr Holbrook could not direct me to any evidence that the overnight disturbance had also settled as a result. If not, AT's settling into his new school is comforting but does nothing to remove the need for overnight respite care.

    ii) The FTT had no "robust and relevant social care assessment", which hampered its deliberations. This had now been remedied. That is true, but the new assessments do not provide new evidence to undermine the FTT decision. They merely repeat the assertion which was before the FTT that overnight care outside the home would be distressing for AT.

    iii) The Defendant had not been permitted to call evidence from a manager from the 0-25 Disability Team. There is nothing in the FTT Decision to suggest that such an application had been made to it. In relation to another area where the Defendant had failed to provide evidence, its counsel pointed to the standard directions limiting the number of witnesses. The FTT Decision, at paragraph 54, is scathing about this excuse, making it clear that such additional evidence would have been allowed. The same must have been true for evidence about overnight respite care, especially as the FTT itself had asked for elucidation (paragraph 57).

    iv) The effect of implementing the FTT recommendation would be unfair on other service users. It is right that a local authority can lawfully take account of its resources when making an assessment of needs under section 17 of the Children Act 1989 (see *G v Barnet LBC* [2004] 2 AC 208; *McDonald v Kensington & Chelsea* [2011] PTSR 1266). This applies to the provision of services under Section H2 of the EHC Plan, although it would not necessarily apply to services under Section H1. But although the cost of provision may be relevant to its nature and extent, the lack of funds cannot properly be used in a case such as this as an argument to refuse any provision at all. If a proper conclusion here is that some form of overnight respite care outside the home is needed, there must be a way of providing it even if the form is not exactly the parents' preference.

    v) The FTT did not expressly state that it was focussing on AT's needs rather than those of his parents. This is wrong. Paragraph 61 makes it clear that the

FTT was looking at respite care warranted by section 17 of the Children Act 1989 or by section 2 of the Chronically Sick and Disabled Persons Act 1970. Those require attention to be focussed on the child or disabled person's needs. In any event, the distinction is a nonsense. If the parents are too exhausted to be able properly to care for their child, the child will suffer directly. AT's needs included the needs of his parents.

vi) The FTT did not give reasons why this amount of respite care is reasonable. The reasons appear from a reading of the Decision as a whole. There are descriptions of the behaviour of AT, his extremely short sleeping times, and the effect on his parents. There are the concerns about the risks posed to AT himself and others in the house by his conduct. Ms Morris, a Special ASC Advisory Teacher called as a witness by the Defendant, had written a lengthy report on AT. She stated (as reproduced in paragraph 27 of the FTT Decision), "During the visit I was extremely concerned by the behaviour [AT] was exhibiting, his levels of activity, and by the parental reports.", and later "I felt strongly that [AT] was extremely vulnerable, and that his family were, understandably, struggling to manage his needs. I was concerned about the potential risks to [AT] himself, but also about the impact on the family as a whole … I referred [AT] to social care the same day as I felt that the family were in need of further support, including a need for respite care". As to the amount of care, this was a specialist Tribunal whose members were entitled to use their own skill, experience and judgment.

28. For these reasons, I conclude that the letter of 12 September does not provide a rational and lawful basis for rejecting the FTT recommendations.

Further events after 12 September 2019

29. On 25 September 2019 there was a professionals meeting which considered the parents' desire for overnight respite care. It was thought that BS was not necessarily in AT's best interest. The behavioural consultant at T School reported that AT's mother had asked to visit the school, and for the consultant to visit the home, so that mother could learn behaviour management strategies. That consultant was concerned that the parents' lack of sleep should be treated as a priority. She said that caring for a child 24/7 could be very stressful for parents. Their ability to put things in place when sleep-deprived was limited.

30. On 1 October 2019 there was a further safeguarding alert from a professional, Dr Nasir, the Consultant Community Paediatrician dealing with AT. He reported that AT was hyperactive and difficult to contain in clinic, was aggressive towards his mother, biting her left upper arm causing a bruise and break in the skin. He said, "She appeared hopeless and helpless in containing him. He was climbing on furniture, the window sill and required full-time 1:1 to prevent him from accidentally injuring himself". He concluded, "I recommend an urgent assessment of his safety, his brother's safety, and parents' own mental health and coping, and their ability to keep him safe".

31. On 4 October 2019 Dr Nikki Teper, a clinical psychologist, wrote a letter in relation to BT. She said, "[AT]'s needs have had an increasing impact on family life, relationships within the family unit, and more recently, on [BT]'s mental health as

well as his behavioural and academic functioning". She added, "The needs of the whole family do not appear to be adequately met … In my professional opinion there is a clear need for increased practical help for this family".

32. On 15 October 2019 there was a meeting with the parents in which Ms Baylis was involved. The possibility of a link foster placement, for overnight respite care on occasions, was again raised. I say "again raised" because it first appeared in the May 2019 assessment, but seems to have been taken no further. Certainly it is not mentioned in the 12 September 2019 letter. The parents expressed a willingness to consider this. That is a sensible approach. The sadness is that between May and October there seems to have been no progress made in setting it up on a trial basis. Even with the difficulties caused by the parents preference for a Jewish family, that seems to be a long time lost.

The letter of 11 November 2019

33. This was the position when a final attempt at a regulation 7 letter was sent, on 11 November 2019. This specifically addressed each recommendation in Section H and answered it. At that stage the recommendation for 12.5 hours of daytime support per week was not accepted. During the course of the hearing before me that recommendation was conceded. As a result I believe that all the recommendations under Section H1 have now been accepted, and the only issue relates to overnight respite care.

34. In relation to overnight care, the letter purports to accept the first recommendation for one night a week during term time. But it quickly became apparent that this acceptance was not of what was being recommended. It is clear from paragraph 59 of the FTT Decision that it was looking at the need for respite care outside the home. The Defendant's offer is clearly limited to the provision of a night carer in the home. Since this recommendation is purportedly "accepted", no reasons are given in the letter for departing from what the FTT clearly meant. For that reason alone, the letter of 11 November 2019 fails to comply with regulation 7. The weekly overnight respite care is the single most important element of the recommendation, and the failure to explain that it is not accepted, or at least only accepted in part, is a major failing.

35. The extent of this failing became apparent during the course of argument. Mr Holbrook relied on the alternative of a link foster carer looking after AT outside the home. This was first raised in May 2019, was revived at the 15 October 2019 meeting with the parents, but gets no mention in the 11 November 2019 letter. It is clear that the purported acceptance of the FTT recommendation for weekly overnight respite care cannot refer to the link foster carer, as Mr Holbrook made clear that the Defendant was only considering such provision up to 24 nights per annum (twice a month). Any sufficient explanation would have to cover not only why a link foster carer was preferable to BS (in respect of which the view of the local authority can be found in other documents), but also why 24 days per annum is better than weekly provision (which explanation is found nowhere at present).

36. Reasons are put forward for not accepting the remaining recommendations, but it must be remembered that these relate only to holiday respite care.

i) It is not appropriate for AT, at the age of 7, to be removed from his home and family and placed in a respite unit. He would find this confusing and possibly distressing. This is difficult to follow, or at least to accept, since the removal would be limited to holiday periods when AT would not also be removed to school. In any event, by all accounts he settled very well and quickly at T School, so the removal from home cannot be universally negative.

ii) AT is still a young boy who needs proximity to his parents. The same comments apply, since this relates only to holiday respite care.

iii) Respite care would not tackle the underlying cause of AT's sleep issues. That may be so, but it would deal with the danger to AT from his parents extreme sleep deprivation. There is no reason why sleep management (which has been considered since at least the referral to the Evelina Clinic in 2017) should not be looked at alongside the respite care. It cannot be a case or one or the other, but not both.

iv) Respite support in the home should be the first option that is tried. This was an argument put to the FTT and rejected. The effect on the family of AT's sleep disturbance is too great.

v) The proposal is not reasonable when compared to what other service users get. I have dealt with this financial argument above.

37. The letter goes on to repeat the reasons in the 12 September 2019 letter, and to add further arguments in respect of these.

The status of the letters of 12 September and 11 November 2019

38. Mr Lawson submits that the only decision letter is that of Mr Munday in January 2019. The later letters cannot supplement or replace the reasons given then. He relies on the Court of Appeal decision in *R v Westminster City Council, ex.p.Ermakov* [1996] 2 All ER 302 and that of Stanley Burnton J in *Nash v Chelsea College* [2001] EWHC Admin 538.

39. I accept the principles in those cases, but in my view they do not apply directly to this case for a number of reasons.

i) This is not a case like *Ermakov* dealing with a prescribed statutory regime. Hutchison LJ made clear that the court's decision related only to that particular statutory regime.

ii) The recommendations in Section H2 relating to respite care come under section 17 of the Children Act 1989. That creates a general duty to assess need in children and provide appropriate services. Mr Holbrook rightly draws my attention to the analysis of Lord Neuberger in *Ahmad v Newham LBC* [2009] PTSR 632, at [13].

iii) Since *Ermakov* was decided Parliament has added sub-section (2A) to section 31 of the Senior Courts Act 1981. This requires me to refuse relief "if it appears to the court to be highly likely that the outcome for the applicant

would not have been substantially different if the conduct complained of had not occurred". In considering whether that is so, I am bound to consider the later purported decision letters, as I must the pleadings and arguments before me.

40. However, in my judgment the letters of 12 September and 11 November 2019 do not show sufficiently cogent reasons for departing from the recommendations of the FTT, as I have sought to explain above. The disingenuous claim that the recommendation about weekly overnight respite care is accepted, when it is clear that the FTT was referring to care outside the home and all the Defendant was prepared to offer was care within the home, means that the reasons for departing from that recommendation are not merely erroneous, they are non-existent.

41. Things might have been different if the Defendant had honestly and fairly dealt with the recommendations, rather than pretending to accept a recommendation which was in substance rejected.

42. I am not in a position to adjudicate on the relative merits of link foster care respite arrangements as opposed to specialist residential care at BS. Nor am I asked to do so in these proceedings. What is clear is that it is necessary to grapple with those issues fairly, and to do so quickly. This family has been exhausted by trying to look after AT, and the apparent failure of the Defendant to take their predicament seriously despite safeguarding referrals from professionals in this field. A lack of collaborative progress now might compromise their ability to care for AT at home at all, thus leading to the need for permanent residential care.

Conclusion

43. I return to consider the grounds.

44. Ground 1 is clearly made out. There was no response within the 5 weeks required by regulation 7. The letter from Mr Munday in January 2019 was not a valid response under the regulation because it simply put off the decision whether or not to follow the recommendations. The letters of 12 September and 11 November are capable of being out of time responses complying with regulation 7, but fail because they do not properly engage with the recommendations or properly explain why they are not being followed. It is not suggested that either of the assessments in February and May 2019 amount in themselves to a response complying with the regulation.

45. I should therefore quash those purported decision letters and require the Defendant to reconsider and produce a fresh response. In doing so I have considered the discretionary nature of such relief, and section 31(2A) of the Senior Courts Act 1981. The submission is that a quashing order would serve no purpose as the Defendant would simply re-send the 11 November 2019 letter. For reasons explained above, I consider that course is not open to the Defendant. It is now apparent that the purported acceptance of the weekly overnight respite care provision is not an acceptance of what the FTT was recommending. Any fresh decision letter will have to address this and provide sufficient explanation of why it is not followed, if that is the case.

46. In those circumstances it is not necessary for me to consider specifically the other grounds pleaded. To a large extent they are alternative ways of making the same

argument. Insofar as these other grounds appear to ask me to decide on whether overnight respite care should be provided outside the home, and especially at BS, I decline to do so. As Munby J emphasised in *B v Lambeth LB* [2006] EWHC 639 (Admin), the Administrative Court exists to adjudicate on specific challenges to discrete decisions, not to monitor and regulate the performance of public authorities. In fact Mr Lawson did not seek to persuade me to go that far, and accepts that relief would be limited to quashing the existing responses and requiring the Defendant to consider the recommendations afresh.

47. I will ask counsel to agree the form of order appropriate in the light of this judgment, including any issues of costs. If there are any matters of disagreement, I shall deal with them on written submissions.