Neutral Citation Number: [2020] EWHC 3326 (Admin)

Case No: CO/2342/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2020

Before :

MRS JUSTICE COLLINS RICE

- -

Between

L. KUMAR **Claimant**

- and -

LONDON BOROUGH OF HILLINGDON **Defendant**

- -
- -

Ms Lucinda Ferguson (instructed by **SinclairsLaw**) for the **Claimant**
Ms Peggy Etiebet (instructed by **Hillingdon Legal Services**) for the **Defendant**

Hearing date: 25th November 2020

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Judgment Approved

I direct that copies of this version as handed down may be treated as authentic.

Mrs Justice Collins Rice:

Introduction

1. Ms Kumar brings these judicial review proceedings in connection with her young son's education. He has complex special educational needs. He has an Educational and Health Care Plan (EHCP) maintained by Hillingdon London Borough, her local authority. Ms Kumar is in dispute with Hillingdon about the EHCP. She wanted to take the dispute to mediation, with a view to speedy resolution. She wanted to bring a lawyer to support her at the mediation. Hillingdon refused to agree. There has been no mediation. Ms Kumar says this is unlawful.

The Legal Framework

2. The Children and Families Act 2014 ("The Act") makes provision for families in dispute with their local authority over an EHCP. They have a right of appeal to the First-Tier Tribunal. There is also a right to mediation (section 52). Where a parent invokes that right then, by section 54(2), the local authority must arrange for mediation between it and the parent, ensure the mediation is conducted by an independent person, and participate in it.

3. Section 56 of the Act provides for regulations to be made about mediation, including about who may attend mediation (s.56(1)(d)). The Special Educational Needs and Disability Regulations 2014 are made under that power. Regulation 36 requires a local authority to arrange mediation within 30 days of being requested to do so by a parent. Regulation 38(1) provides:

   > The following persons may attend the mediation –
   >
   > (a) the parties to the mediation;
   >
   > (b) any advocate or other supporter that the child's parent or the young person wishes to attend the mediation;
   >
   > …
   >
   > (e) any other person, with the consent of all of the parties to the mediation, or where there is no such agreement, with the consent of the mediator.

4. The government issues a statutory Code of Practice to local authorities to give guidance on carrying out their functions in relation to children with special educational needs. It has a section on 'effective mediation' (paragraph 11.38). This says:

   > "For mediation to work well:
   >
   > - the mediation session should be arranged, in discussion with the parents or young people, at a place and a time which is convenient for the parties to the disagreement.

The body (or bodies) arranging the mediation must inform the parent or young person of the date and place of the mediation at least 5 working days before the mediation unless the parent or young person consents to this period of time being reduced

- the mediator should play a key role in clarifying the nature of the disagreement and ensuring that both sides are ready for the mediation session. The mediator should agree with the parties on who needs to be there

- mediators must have sufficient knowledge of the legislation relating to SEN, health and social care to be able to conduct the mediation

- the local authority and health commissioner representative(s) should be sufficiently senior and have the authority to be able to make decisions during the mediation session

- the parents or young person may be accompanied by a friend, adviser or advocate and, in the case of parents, the child, where the parent requests this and the local authority has no reasonable objection. In cases where parents are the party to the mediation and it is not appropriate for the child to attend in person the mediator should take reasonable steps (within terms of time, difficulty, expense etc) to obtain the views of the child. Young people with learning difficulties, in particular, may need advocacy support when taking part in mediation

- both parties should be open about all the aspects of the disagreement and not hold anything back for a possible appeal to the Tribunal on the SEN aspects of EHC plans

- where a solicitor has acted as the mediator, under the Solicitors' Code of Conduct (rule 3 Conflict of interests), he or she should not also represent either party at the Tribunal

- generally, legal representation should not be necessary at the mediation, but this will be a matter for the parties and the mediator to agree. If either party does have legal representation they will have to pay for it themselves"

5. A parallel Guide is also issued to help families; it covers the same ground from their perspective. It says that mediation is an optional choice for parents, but that: "Your local authority has to make an independent mediation service available to you.". It also says:

> "The mediation session will be run by an independent mediator who should have accredited training. It should be at a place and time that is convenient for you, and you will be told when and where the meeting will be at least 5 days before it happens. You can bring a friend, adviser or advocate to help you."

Factual Background

6. A child's EHCP is reviewed annually. Ms Kumar's son's plan had an annual review on 5th June 2019. The review report identified a need for changes to his plan. The report was sent to Hillingdon in July 2019. A local authority is required to issue a revised plan within four weeks. After months of delay, and the issue by Ms Kumar of judicial review proceedings, a draft revised plan was eventually produced on 4th March 2020. Ms Kumar was not satisfied that it properly reflected the review report's recommendations. After some correspondence, Hillingdon issued the plan in final form on 30th April 2020, advising her of her right of appeal and her right to mediation.

7. Ms Kumar told Hillingdon on 7th May that she wished to pursue mediation, and contacted the mediation service on 8th May. She wanted her lawyer to attend the mediation with her. On 20th May the mediation service informed her that Hillingdon would not attend a mediation with her lawyer present; they saw mediation as a less formal process and would only have lawyers involved if it was part of a Tribunal process. Ms Kumar responded on 26th May that she had been advised that mediation was obligatory on request, and that she was entitled to have her legal adviser there. The mediator replied the following day that 'as mediation is an informal and non-legalistic process, unless both parties agree to the attendance of legal representatives, we will not be able to facilitate the meeting'. They attached their policy document on legal representation at mediation, to support that position. That document referred to the final bullet point of paragraph 11.38 of the SEND Code of Practice.

8. Ms Kumar issued a letter before action on 28th May challenging Hillingdon's position and asserting a right to bring a lawyer to mediation under Regulation 38(1)(b). The mediator responded on 1st June, offering an unreserved apology and confirming immediate revision of their policy. They said their original rationale had been to protect unrepresented families from feeling compelled to take part in mediation as an alternative to Tribunal proceedings.

9. Hillingdon, however, replied directly on 11th June maintaining its position. It said that Regulation 38(1)(b) does not entitle a parent to have a lawyer at a mediation. If a parent wishes to bring a lawyer to mediation they must rely on Regulation 38(1)(e), which requires the consent of the local authority or, if it does not consent, the consent of the mediator. It was not prepared to consent or participate if the parent sought to bring a lawyer with them without the consent of the mediator pursuant to Regulation 38(1)(e). It is this position which Ms Kumar challenges in these proceedings.

Analysis

(i) General

10. This case was said to raise a single issue about a parent's rights under Regulation 38: is a parent entitled to bring a lawyer to mediation by virtue of Regulation 38(1)(b), or does it require the consent of the local authority (or failing that the mediator) under Regulation 38(1)(e)? That in turn is said to depend on whether 'any advocate' in Regulation 38(1)(b) does or does not include a lawyer. It is on that point of statutory interpretation that the case was said to turn.

11. Where a case is said to turn on single point of statutory interpretation, it is often important to take care with what the question is, before attempting to answer it. This case is about parents' rights. It is also, of course, about local authorities' duties and obligations. Most importantly of all, it is about a child's educational needs, and how matters are to be handled when his parents and his education providers cannot agree about what they are and how they are to be met.

12. It is also wrong, if not impossible, to try to resolve any question of statutory interpretation in isolation from its wider statutory context. The Act is a substantial piece of legislation setting out a large and complex scheme to deliver some important social policy aims. These are about the support and protection of families and children who have significant needs which might not otherwise be met. Local authorities are given their parts to play in achieving these aims, as are other agencies, bodies and individuals.

13. Where the interpretation of Regulations is concerned, it is particularly important to have regard to the scheme of the parent statute – not just the Regulation-making power itself, but also the context in which that power arises.

14. I keep these general points in mind. They are not controversial.

(ii) The Meaning of 'Advocate'

15. 'Advocate' is not a defined term in the statutory scheme. What is said on behalf of Ms Kumar is that the ordinary and natural meaning of the word 'advocate' in Regulation 38(1)(b) is clearly apt to include a lawyer. There is no ambiguity about it. If there were any conceivable doubt, then the formulations 'any advocate' and 'or other supporter' would remove it. There is no basis whatever, it is said, for a reading of Regulation 38(1)(b) which is exclusive of advocates or other supporters who are lawyers. On the contrary, a lawyer is an 'advocate or other supporter' par excellence. It is as simple as that.

16. Hillingdon's position is more complex. It says in the first place that 'advocate' is at least capable of having different meanings in different contexts. It then has two strands of argument which it says limit the meaning of 'advocate' in this particular context.

17. The first – I call it the positive technical argument – is that 'advocate or supporter' and 'advocacy and support' have a special usage in the scheme of the Act. I was taken to a number of examples. They all concerned provision of advocacy and support services by local authorities to children. I am entirely satisfied that those references envisage that obligations to provide such services can be, and are, met by deploying trained supporters

who are not (necessarily) legally qualified. I am satisfied that where local authorities have duties to provide advocacy and support services they have no duty to provide a lawyer. However, it was not argued that they have *no power* to do so – that they are forbidden from providing someone who is legally qualified. The argument from the duty to provide advocacy services is an argument for a broad meaning of 'advocate', not an exclusive one.

18. In any event, I am not persuaded that looking at a local authority's duty to provide advocacy services is helpful in deciding whom a parent may bring to a mediation. The Regulation-making power, section 56 of the Act, addresses separately who may attend a mediation (s.56(1)(d)) and the provision of advocacy and other support services for a parent or child in a mediation (s.56(1)(f)). That does not encourage me to look at the Act's provisions about the latter for help in understanding the former.

19. Hillingdon's second argument – I call it the negative technical argument – is that the scheme of the Act makes clear that the whole point of mediation is, as the Code puts it, that it is 'an informal, non-legalistic, accessible and simple disagreement settlement process run by a trained third party and designed to bring two parties together to clarify the issues, and reach a resolution'. I agree that what the Act wants to achieve is for mediation to work for all families, however disadvantaged, particularly those for whom the alternative legal processes of a Tribunal appeal are daunting if not prohibitive. Indisputably, mediation is intended to be accessible and effective for all parents, whether or not they are confident advocates in their own cause, and whether or not they have access to professional advocates (legal or otherwise).

20. Hillingdon, however, goes a stage a further in maintaining that for mediation to work it is not only unnecessary to have a lawyer, it is necessary not to have a lawyer, unless the local authority agrees or the mediator consents. A lawyer advocate is likely to be objectionable, it is said, and contrary to the spirit and place of mediation in the statutory scheme, because they inevitably formalise mediation proceedings, introduce an adversarial approach, and put a strain on local authority resources in requiring the deployment of their own legal team to ensure equality of arms. There is some evidence that Hillingdon has a policy or at least a practice of participating in mediation only on the basis that no lawyers attend.

21. That, it says, is why the scheme of the Act points to the attendance of lawyers at mediation being a case for Regulation 38(1)(e) agreement, not 31(1)(b) entitlement. The requirement for local authority or mediator consent for lawyer presence at mediation is, it is said, an important safeguard to ensure that mediation is a success. It draws support for this from paragraph 11.38 of the Code, set out above. It points to the fifth bullet point as mirroring Regulation 38(1)(b) and the eighth as mirroring 31(1)(e). It is the eighth which says that 'generally, legal representation should not be necessary at the mediation, but this will be a matter for the parties and the mediator to agree.'.

22. Hillingdon refines its point to a proposition about practising professional lawyers *acting in that capacity*. But that, of course, makes the question less about the identity (or at any rate qualifications) of the advocate, than about their conduct. The conduct of mediation, keeping it constructive and problem-solving, facilitating everyone's contributions, and, above all, focusing on the child, is the job of the mediator. It is a skilled job, and no doubt routinely faces many challenges. A lot is at stake for the life chances of a vulnerable child, every day of whose education matters; views may be strongly held and

sometimes strongly expressed. But it is the independent mediator that must make a success of mediation. It is not obvious that there is an implicit role for a local authority to pre-check on a case by case basis whether any particular lawyer is going to help or hinder the process. It does not pre-check other advocates, friends and supporters where, it might be thought, the risk of unhelpfully partial or confrontational conduct is at least as high if not rather higher.

23. It is said on behalf of Ms Kumar that in any event this line of argument is an entirely wrong-headed equation of professional lawyers with confrontational adversarialism. Lawyers can and do act as *mediators* in this and other contexts - a clear indication to the contrary. They can and do support families in all sorts of informal problem-solving contexts involving the needs of children. Very many such contexts are non-adversarial; that is the standard modern approach to resolving disputes about children's needs.

(iii) The Parties' Rights and Duties

24. It is true that 'advocate' can mean more than one thing, depending on context. Most words can. It does not follow that in any given context they are necessarily ambiguous. Nor does it follow that different meanings are necessarily mutually exclusive.

25. It is also true that this case raises a question of law in an unusually pure sense, rather than looking at the application of legislation to particular facts, or its effects in particular circumstances. That does not necessarily make it an abstract or subtle question of law.

26. Hillingdon made efforts in this case to establish that my task was to resolve the meaning of a word which is 'ambiguous'. I was offered a restricted meaning of 'any advocate or other supporter that the parent wishes' as establishing ambiguity. I was then taken via some of the modern authorities on statutory interpretation all the way to ***Pepper v Hart*** **[1993] AC 593** and thence invited to check from **Hansard** what a government minister thought about mediation during one of the Bill stages of the 2014 Act. I am not tempted down that path. It is a journey of last resort. These are authorities on the correct approach to difficult questions about the interpretation of primary legislation. My task is the interpretation of secondary legislation, where the first port of call is the scheme of the parent Act.

27. The Act creates a legal *right* to mediation and a corresponding legal *duty* on a local authority both to arrange mediation and to participate in it. That is my starting point. The Regulation-making power envisages practical provision for the exercise of that right and the fulfilment of that duty. Of course it necessarily places some practical limitations on both, as well as spelling out some of the detail. But there are inherent limits on how far it can do so, consistently with respecting the integrity of the rights and duties in the first place. That is relevant to understanding the detailed provision the Regulations make.

28. That includes what the Regulations provide 'about who may attend mediation'. At one end of the spectrum, the parties obviously have a right to attend, otherwise the right to mediation would be substantially abridged. At the other end of the spectrum, clearly all and sundry cannot turn up, otherwise the process would be unmanageable. Regulation 38 puts 'any advocate or other supporter that the parent wishes' second in its list, after the parties themselves. The right of a family to bring a chosen supporter with them is key to

the exercise of the right to mediation itself. No exception is expressly placed on it, and a Court should be slow indeed to read one in.

29. The whole scheme of the Act in general, and of the Part dealing with special educational needs in particular, is to support and protect the interests of needful families and children in contexts in which they are vulnerable and at a disadvantage. As well as the specific duties on local authorities to provide that kind of support themselves (including through advocacy services), they are under general duties (section 19) in the exercise of all of their functions to have particular regard to the 'views, wishes and feelings' of parents, the importance of families participating 'as fully as possible' in decisions involving the exercise of those functions, and supporting families to facilitate the development of the child and help him achieve the best possible educational and other outcomes.

30. Nowhere in this scheme is there any suggestion that a local authority is entitled to control whom a parent wishes to bring to an independent mediation for support. The fact that it is someone the parent wishes to have there for that purpose is enough, and important in its own right. That person – whoever they are - may or may not prove an asset to the mediation process or make the mediator's job any easier. That is not the point. The point is that the parent is not alone, and has someone there of their choosing, a choice entirely up to them.

31. Although the Act makes local authorities an important part of the solution to the needs of families with vulnerable children, it requires them to be mindful of the inevitable risk that they become, or are seen to become, part of the problem. Local authorities have huge powers over the lives of families with children who have special needs, making decisions with potentially lifelong consequences. Where parents are unhappy with those decisions, there is a fundamental and frightening inequality of power. That is why there is not only a legal right of appeal, and a legal right to independent mediation, but also a legal right to have someone there for moral support in whatever way a parent wishes – emotional strength, help with understanding what is going on, or help with articulating what they want to get across. Parenting a child with special needs is demanding enough; disputing with a local authority is daunting for the most confident and best-equipped parent; the right to have a supporter is just that. It does not matter who they are, lawyer or not. It is none of the local authority's business.

32. Returning then to the scheme of Regulation 38, the only visible limitation on Regulation 38(1)(b) is singularity. There is a right to one supporter. That is the practical restriction that the secondary legislation places, in order to make mediation workable. Any more than that – or someone there for another special purpose whether at the instigation of the parent or the local authority - has to be agreed all round. Regulation 38(1)(e), at the end of the list, is the usual sort of residuary power to make additional provision.

33. I am not convinced that paragraph 11.38 of the Code of Practice suggests anything else. This is a paragraph which is about making mediation *work well* – best practice, in other words – and not in my view capable on any reading of seeking to limit the Regulation. 'Legal representation' *over and above* the entitlement to a single supporter – or, more specifically, whether that is ever 'necessary' – may well be a matter for negotiation. Sometimes support may be an either/or choice. If it is, it is worth noting in passing that, where the consent of a local authority to additional attendance at mediation under Regulation 38(1)(e) is required, that is a discretion which must in any event be exercised

properly on a public law basis, taking particular account of the matters set out in section 19 of the Act, including the wishes of parents.

34. If paragraph 11.38 does say anything else, I decline Hillingdon's invitation to read it back into the Regulation. In the hierarchy of interpretation, the meaning of secondary legislation must be sought in its parent Act, and the meaning of a statutory code must be found in the primary and secondary legislation on which it gives guidance – not the other way around.

35. I was invited in this case to reflect on the meaning of the word 'advocate'. The real question in my view is whether there is legal authority to be found in the 2014 Act, or the Regulations made under it, for a local authority to control whom a parent wishes to bring with them to an EHCP mediation for support, and to refuse to arrange for or participate in mediation if it does not approve of that person, on the grounds that they are a lawyer or for any other reason. The answer is no.

Conclusion

36. Ms Kumar is entitled to mediation of her EHCP dispute with Hillingdon, and Hillingdon has reciprocal legal duties to arrange, and participate in, that mediation. Ms Kumar is entitled to bring along any supporter she wishes. That supporter may be her lawyer, or anyone else she chooses. In refusing to accommodate her choice, and in refusing to arrange and participate in mediation, Hillingdon is in breach of its statutory duties.

37. I said above that this case raises a question of law in an unusually pure form. But at the heart of it all is a child with special educational needs, whose mother has had to persist for months to get their local authority to do its duty by him. Every month in that child's life matters. Local authorities are hard pressed, never more so than in this year of 2020, and every SEN child is a priority. But the case for getting this mediation back on foot and resolving Ms Kumar's son's EHCP is pressing, and Hillingdon must now do so.