



Neutral Citation Number: [2023] EWHC 3162 (Admin)

Case No: AC-2023-MAN-00435

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Friday, 8th December 2023

Before:
FORDHAM J

Between:
THE KING (on the application of LHG) Claimant
BY HER LITIGATION FRIEND, HHG
- and -
BURY COUNCIL Defendant

Eliza Sharron (instructed by Irwin Mitchell) for the **Claimant**
David Pojur (instructed by Bury Council) for the **Defendant**

Hearing date: 8.12.23
Judgment as delivered in open court at the hearing
Order: 11.12.23

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

FORDHAM J

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

FORDHAM J:

Introduction

1. This is an application for interim relief and, if the Court considers it appropriate to deal with it today, permission for judicial review. I am quite satisfied that it is appropriate that I should deal with both permission and also interim relief. That is the course that the parties have both taken in assisting the Court with their submissions.

Anonymity

2. There is an issue of anonymity in this case. It arose rather later in the proceedings than it should have done. A directions order had already been made in this case, on the papers, without any anonymity. That was because no application for anonymity had been made. The lateness also meant that time was taken at today's hearing to deal with anonymity. But it is quite right that anonymity should have been sought. It is also quite right that the Defendant ("the Council") has not opposed anonymity. I am satisfied that it is necessary, to protect the legitimate interests of the 7 year old girl who is at the heart of this case (the Claimant), and the legitimate interests of her siblings, that there should be anonymisation. I announced towards the start of today's hearing that I was making an order for anonymity. As I also explained, I have included provision by way of a "liberty to apply". That means that any member of the press or public has the Court's permission to make an application, on notice to the parties, asking the Court to vary or discharge the anonymity order.

Excluding Evidence

3. There was a preliminary point about whether I should exclude from the Court's consideration today a section in the Claimant's mother's second witness statement and a reformulation of interim relief in Ms Sharron's skeleton argument (both filed on 6 December 2023). I am quite satisfied that the appropriate course is the one that I have taken: I have considered all of the documents provided to consider their relevance and the extent to which they assist the Court; without excluding anything; but having close regard to timing and questions of fairness to everybody. Mr Pojur, on reflection, did not press his objection recognising rightly that the course which I have described could properly be steered.

Permission for Judicial Review: The Way Forward

4. There are two aspects, of what I see as the four aspects in this judicial review claim, which I am satisfied today give rise to an arguable claim for judicial review. The two aspects are the position in relation to the funding of "Special Spirits" and the position in relation to school holidays. That is sufficient for the purposes of the grant of permission for judicial review in this case. It is also the basis on which I will be approaching the question of interim relief. The other two aspects are not arguable on a 'freestanding' basis and I make that clear. But given that there is the potential for 'overlap' and 'interrelationship' between the arguable points and those other aspects which do not have a 'freestanding' viability, I am going to direct that those other aspects be deferred on a "rolled-up" basis for consideration at a substantive hearing. I emphasise that the sole reason for doing that is so that the two viable aspects, which I have identified, can properly and fully be considered 'in the round' without any

artificial restriction, so far as any ‘overlap’ is concerned. In other words, the grounds on which I am granting permission cannot be defeated by the Council pointing to an ‘overlap’ with another topic which the Court has closed off.

Interim Relief: The Way Forward

5. There is a complication today, so far as interim relief today is concerned. The complication is that I am not satisfied that the parties have disclosed and provided to the Court the full documented clarity which is needed, on the position relating to Special Spirits. The course I am minded to take in those circumstances is this. I will revisit – and finalise – the question of the order for interim relief in this case next Thursday 14 December 2023 (or so soon thereafter as I am able). My provisional view, subject to being persuaded to the contrary when I have finished giving this brief ruling, is that that can properly be done ‘on the papers’ (without the costs of a further hearing). That means I will sit in my ‘judge’s room’ – and not a courtroom – and reflect on further information that has been provided and then finalise the order relating to interim relief.
6. I envisage therefore a very tight timeframe which, at the moment, would involve this: (i) disclosure by 4pm on Monday 11 December 2023 of any documented position relating to Special Spirits by the Claimant’s representatives; (ii) disclosure by 4pm on Tuesday 12 December 2023 of any documented position relating to Special Spirits by the Council’s representatives; (iii) a final opportunity to reply on the Claimant’s side by 4pm Wednesday 13 December 2023. Those are deliberately very tight time limits. That is for two reasons. Firstly, because I am focused in particular on the question of what the parties already know and can access and can provide. Secondly, because I am not prepared to allow this case to drag on at all in relation to interim relief. I am certainly not envisaging that the parties provide detailed submissions. I will allow the parties when complying with the directions to provide very short written ‘position statements’ should they wish to do so but I would expect those to be 5 pages long as a complete maximum.

The Context

7. The Claimant is a “child in need” for the purposes of the statutory schemes. Ms Sharron’s skeleton argument says this about her conditions. She has a rare genetic disorder (unbalanced translocation of chromosome 20Q 13.12 and Xp 22.23, including a deletion of the SHOX which affects growth). She has epilepsy, dystonia (a neurological disorder that makes muscles twist and spasm uncontrollably) and two heart conditions. She has global developmental delay and has complex needs arising from her conditions; she is largely non-verbal and doubly incontinent.
8. The Claimant’s representatives have been seeking to persuade the Council, and now the Court, that the applicable statutory duties had not been complied with by the Council in this case so far as concerns the assessment of need and provision for need. There were pre-action letters on 9 June 2023 and 29 September 2020. The latter followed on from an incident (on 15 September 2023) when the Claimant’s mother broke her foot.
9. A Needs Assessment was undertaken and is documented dated 17 August 2023. There is a witness statement filed in these proceedings from the social worker who

undertook and wrote that Assessment. The outcome was that the social worker's recommendation of "4 hours of direct payments" was implemented. The relevant support mechanisms in play in this case involve the option of the Council providing "direct payments" to the family, in terms of number of "hours", for the parents then to make choices in using. The materials, as I have understood them, tell me that the hourly rate was previously £10.90 but must have increased to £12.10. I say that because "4 hours" was previously described as £43.60 but is now described as being £48.40.

10. The function of the Council is an ongoing one. That is illustrated by the fact that there were follow-up decisions on 6 October 2023, following a home visit 3 days earlier, which added a further "4 hours" for each of the next 6 weeks. That was intended to reflect the period in which the Claimant's mother's broken foot was in a "cast". There was then another decision, about a week later on 13 October 2023, by which the Council decided that it would fund a further "4 hours" for each week in the school holidays.
11. There are really two statutory and policy frameworks in play. The first are the statutory and policy provisions which are helpfully and fully set out in the judgment in R (TS) v Hackney LBC [2023] EWHC 3063 (Admin) at §§50-60: s.17 of the Children Act 1989; the statutory guidance "Working Together to Safeguard Children" (July 2018); and the relevant provisions of the Chronically Sick and Disabled Persons Act 1970. The second relevant statutory framework is concerned with "short break" support. It includes the Breaks for Carers of Disabled Children Regulations 2011 and the departmental advice (March 2011) entitled "Short breaks for carers of disabled children".
12. Both parties' documents have made reference to other benefits which the family receives. The payments that are directly or indirectly linked to the Claimant are these. There is a disability living allowance which has a daily living component and a mobility component. I have been told that this is a welfare benefit referable to expenditure but not capable of covering the Special Spirits provision to which I will need to come. The weekly DLA amounts are £101.75 and £71 for those components. There is also a carers allowance reflecting the Claimant's mother's role as carer for the Claimant. This is described in the materials as a nominal "income replacement" payment. I understand this to be at the rate of £76.75 per week.

An Evening Personal Assistant

13. I am going to deal first with the two aspects of the claim which have not persuaded me that they constituted a viable claim on a 'freestanding' basis. The first of those relates to needs, in the evening, for what has been described as a personal assistant. This help is sought, for the period of time (on Thursdays and Fridays) that the Claimant comes home from school, or (on Mondays, Tuesdays and Wednesdays) from Special Spirits, through to the Claimant's bedtime. That includes the activities of feeding, bathing and giving medication. It includes the references – at least as a knock-on effect – of the broken nights because of events and difficulties during the night time. It includes the various statements made, to the Council and the Court, about the practical realities of each day for this family and the situation which the parents have graphically described, from their perspective, as "burnout".

14. I am leaving to one side Special Spirits and the provision for it to which I will need to return. Leaving that point to one side, I am not today persuaded that there is a ‘freestanding’ viable ground for judicial review, so far as the assessment and care package or response are concerned, in relation to these various matters. I would not be granting permission for judicial review today, nor interim relief, so far as concerns this part of the case. The reason for that is that Mr Pojur has, in my judgment, been able to show beyond argument that on these aspects (and leaving aside Special Spirits) there has been a proper, careful and lawful assessment of the relevant needs and circumstances. He points to the express contents of the Needs Assessment. It does, in my judgment, deal lawfully with the ‘evening personal assistant’ points. Given that this is a short judgment at an interim stage, and the Needs Assessment is available to the parties, I do not propose to quote here passages from that document.

15. Ms Sharron for the Claimant describes as arbitrary and/or unexplained the reference in the Needs Assessment to a recommended 4 hours support per week, spread flexibly, for the parents to choose how to use, and reference to the social worker’s recommendation that part of that support could be used on a Friday in relation to the family’s preparations for Shabbat. She submits that this reflects the Council’s failure to grapple with the daily evening needs. In my judgment, what that plainly indicates – alongside the contents of the rest of the Needs Assessment – is this. The Council was lawfully assessing (i) that there was not the need for a personal assistant to be present in the house each evening to provide that daily care and support that was being requested. There is in the Needs Assessment a detailed explanation of the position of the two parents and family as a whole and their position, including as to the implications of effectively introducing a ‘third parent’ into the household every evening. What, against that backcloth, the recommendation of additional provision – 4 hours support spread flexibly – does is to constitute a response to a flexible need for further help, in the context of the ‘burnout’ being described. I do not accept, even arguably, that there is an unlawfulness or an arbitrariness or a lack of a legally adequate assessment, explanation or response. The Council, in my judgment, consistently with its legal functions and duties has properly assessed and responded to this part of the needs, subject to the Special Spirits point to which I need to return. I emphasise that the Council is the primary decision-maker and that the Court on judicial review does not have the function stepping into the shoes of the local authority and substituting its own evaluative decision. The Court is supervising the lawfulness of the Council’s decision-making, including its evaluative judgments

The Broken Foot

16. The second part of the case, on which I have not been persuaded today constitutes the suggested ‘freestanding’ claim relating to the impacts of the Claimant’s mother’s broken foot. I have found it helpful to think about the practicalities of the position which was, and is now, put forward. I have already explained that an additional 4 hours provision was made (on 6 October 2023). It was made for a period of 6 weeks. Those 6 weeks were the period in which it was expected to the foot would be in the cast, as it was. That 6 week period was also the period that was being used for the purposes of the claim for interim relief being sought in this case, up until two days ago. I can see the figures in terms of what the 4 hours of provision means in practical terms over a 6 week period (ie. 24 hours at an hourly rate of £10.90, now a rate of £12.10). I also have candid and clear evidence from the Claimant’s mother as to how

in fact the family went about dealing with the mobility difficulties during the 6 week period. In fact, there is a fairly close correlation between the figures that were actually spent and those that were provided. The evidence is that “up to £300” was spent by being able to access key workers: individuals who were prepared, during that period, to assist the family at a rate of £5 an hour. I have found that helpful information when thinking about the practical realities.

17. But leaving that to one side, it is in my judgment not arguable with any realistic prospect of success that the response to the 6 week period breached any duty on the part of the Council. It is also, in my judgment, not arguable with any realistic prospect of success that the ongoing effects of the broken foot introduce additional needs which it is now a breach of the Council’s statutory duties to fail to address, by making provision for support. I reach that conclusion having looked with care at the description put forward, including in the very recent evidence. I do not see a viable ‘freestanding’ claim for judicial review so far as that part of the case is concerned.

Special Spirits

18. That leaves the two parts of the case where I have been satisfied today that there is an arguable claim for judicial review. And so I turn to Special Spirits. What is said by Ms Sharron on behalf of the Claimant, as I see it, really comes to this:
19. Special Spirits is a respite provider. It is a lifeline for the Claimant and the family. The Claimant is able to attend sessions 4 times during the week (for what I understand is a cumulative $7\frac{3}{4}$ hours per week). The sessions were previously at the rate of £15 per session. These sessions feature strongly in the Needs Assessment, where there is a very positive description of their significance for the Claimant. They affect the timing for the start of evenings, and the description of the realities of life within the home. The Needs Assessment reads as proceeding on the basis that Special Spirits is an important part of the Claimant’s needs being met as well as an important part of reducing the burden on the rest of the family. The Needs Assessment recommendation of “4 hours” of direct payments per week, used flexibly, reads very much as being additional required funding to meet the Claimant’s needs, in addition to Special Spirits already being met and affordable. The idea (as Ms Sharron pointed out in her reply) that the “4 hours” is referable to each single “hour” contributing “towards” one Special Spirits session – as Mr Pojur’s summary grounds of resistance characterise it – is not only unexplained in the Needs Assessment recommendation but also inconsistent with it. That is because of the specific reference to the social worker recommending using the flexible funding for extra assistance on a Friday. Friday is not a day when the Claimant attends Special Spirits. The fundamental problem is this. Special Spirits was previously funded with the Council’s “4 hours” allocation. It is not affordable or covered as a consequence of the Needs Assessment and response. In the first place, 4 hours are themselves insufficient even to cover for sessions at £15 per session (£60 per week). In the second place, the Council was placed on clear notice throughout of the fact that Special Spirits sessions were going to cost the family £30, rather than £15, for the future (£120 per week). That featured in the first of the letters before claim (9 June 2023). The Council’s response to it (26 June 2023) was that it would be addressed by the Council, once the Needs Assessment had been undertaken. But thirdly, even leaving aside the sufficiency of the coverage and the increase in the charges, there is the fact that there could not be the additional provision of 4 hours to be applied flexibly by the parents.

20. I am quite satisfied, for the purposes of today, that this issue has loomed very large in this case. It is not difficult to see why. Special Spirits features very strongly in the lives of the Claimant and the family. It is described in very positive terms for her in all of the materials. The inability to be able to afford the Special Spirits sessions is a very serious matter. So is the question of mounting debt and the shadow which it casts over the well-being of everybody. From reading the Needs Assessment, I cannot presently be satisfied that this has properly been appreciated or assessed by the Council. If it had been investigated – by a legally sufficient enquiry – and assessed, I would have expected to see a passage or passages within the Needs Assessment that grasp the nettle (to use Ms Sharron’s phrase), about where the Claimant is supposed to be left so far as her Special Spirits sessions are concerned. The Needs Assessment does not, in my judgment, answer that question. Nor does the witness statement which the social worker has provided in these proceedings. Nor does any document that I have seen. These are the concerns which give rise to an arguable claim, with a realistic prospect of success, on this part of the case, for the purposes of permission for judicial review and interim relief.

Special Spirits: Interim Relief

21. I would grant interim relief today to address the position so far as the affordability of Special Spirits by the family is concerned. Applying the balance of convenience and justice, and envisaging an expedited timetable for the substantive hearing, I would grant interim relief to secure, in addition to the 4 hours of funding being paid for flexible application, a payment at least at the £15 rate for each and every Special Spirits session. Ms Sharron emphasised that she was not seeking today, as interim relief, an order from the Court relating to any “back payment”.

Finalising Interim Relief

22. I want the Court to have complete clarity, from any documents or materials which the parties have (or can speedily obtain), as to what the rate is, as to what payments have been made, and as to what indebtedness has been incurred. Some of the materials before the Court suggest that the rate changed in September to £30 per session. A witness statement from the Claimant’s mother, dated 10 November 2023 refers to the inability to pay that £30 rate and an outstanding debt. But it also says that “Special Spirits currently offer us a reduced rate of £15 per session ...” The original version of the Council’s summary grounds of resistance in this case (dated 21 November 2023) picked up on that passage in that witness statement and told the Court this, with a statement of truth: “It is understood that the intention of Special Spirits is to charge £30 per session from £15 at the discounted rate, for those who are *able* to pay. That is not understood to mean that the Claimant will not be able to attend £15 per session...” If there is a documented basis on which either party is relying, I have not yet seen it. Both parties in judicial review owe duties of candid disclosure, including at the permission stage. I have been given an email exchange dated 1 and 2 August 2023 which, I accept, only became available to the Claimant’s parents at the start of this week. It is an exchange between the Council and Special Spirits. It is revealing, in the first place, in that it records on the part of the Council that (as at 1 August 2023) the social worker who conducted this Needs Assessment regarded the position as being that the Council was funding, indirectly through the hourly payments, the Special Spirits sessions. The social worker was aware that these were four sessions a week. That would mean, even at £15 per session, £60 per week. That is more expensive than

the 4 hour per week allocation (previously £43.60, now £48.40). The phrase that was used by the social worker in that email was: “we fund these sessions”. The email response from Special Spirits told her that the family were “up-to-date” with the payments, of “£165 per month”. It said that, from September 2023, it would be £30 per session and she “may” not be able to continue joining without the funds. It is, on the face of it, possible to read the word “may” as meaning one of at least two things. One is that ‘£30 will be payable and you cannot come unless you pay it’, which you “may” (or may not) be able to afford from your other resources if the Council does not fund the increased charges. The other is that we Special Spirits “may” (or may not) require the £30 to be paid, if you cannot afford it. That email also tells me that there were other communications because it uses this phrase: “can I point out again...”

23. I am not prepared to proceed to finalise the interim relief, based on an evidential picture regarding Special Spirits which, in my judgment, is materially incomplete on both sides. It is for that reason that I will be returning to finalise the order for interim relief next week, having given the parties an opportunity to provide further materials. I reiterate that the arguments relating to Special Spirits are, as I have already said, interrelated with arguments about the assessment of needs and the response to needs. That is because of the integral nature that Special Spirits play, on the face of it, in the Council’s assessment and thinking. It is because of that interrelationship that I am taking the precautionary step of directing that the other grounds can be before the Court on a rolled up basis. I want to avoid any risk of any artificial restriction of any argument that could be made relating to Special Spirits and its implications.

School Holidays

24. Finally, I come to the other part of the case on which I am going to grant permission for judicial review. This is the question of the school holidays. I am satisfied, on the face of it, that the question of the Claimant’s needs in the school holidays has featured in this case from the start. It has not been possible today to find in the detailed Needs Assessment any passage which addresses this part of the claim for assistance. This is an important part of the case and there are various considerations that apply to it. One, as Mr Pojur points out, is that both parents are in principle around during school holidays. That is because the Claimant’s father works as a part-time teacher. But another is that the Claimant and the family do not – in the school holidays – have the great advantage, for her and for them, of her being at school during the school day. Another consideration is the question of whether and to what extent Special Spirits is available during the school holidays. I am told by Ms Sharron, and I accept, that there is some availability but not the same pattern as applies during term-time. It is, in my judgment, obvious that important questions arise in this case about how the Claimant’s needs are properly assessed and properly to be met during the school holidays. I cannot find the answer within the Needs Assessment. There is no reasoned decision for the subsequent allocation of the additional 4 hours per week for the school holidays, on 30 October 2023. There is no discussion of this topic in the social worker’s witness statement. In my judgment, it is arguable with a realistic prospect of success that the Council has breached its statutory duties so far as the school holidays are concerned.

School Holidays: Interim Relief

25. The part of the order for interim relief that relates to the school holidays is one of the components that was raised for the very first time as an application for interim relief in the skeleton argument, filed two days ago. The way it is there formulated is linked to the Claimant's mother's recovery from the foot injury and a Parental Carers Assessment of her. There is a claim before me for an order that the Defendant fund 6 hours each day during the school holidays. That would, I think, give rise to some £457.80 per week at the old rate; now some £508.20 per week. Given the circumstances that I have described in relation to Special Spirits, and given that both parties now have my reasons for the ruling that I am giving today, I think the best course would be for me to address interim relief 'in the round' next week. It is not that I am requiring further information from the parties about the school holidays. However, as I said at the beginning, I have allowed the new materials to be put forward with a close eye on fairness to the Council. I think in all the circumstances it is appropriate that the parties should be able to take the opportunity, if they wish, to add any points in relation to the school holidays and interim relief, now that they know that I have been satisfied that the claim is arguable on that part of the case. It would have been possible for the revised application for interim relief to be notified much earlier in these proceedings. But I should make clear, as Ms Sharron rightly reminds me, so far as her skeleton argument is concerned that she filed it within the two working day time-frame described in the Judicial Review Guide 2023 §20.4.3. And I should record, in fairness to Mr Pojur, that he very fairly accepted that an updated position on interim relief could properly be communicated today, orally on behalf of the Claimant.

Order

26. Having given those reasons, and with the assistance of the parties as to what I should be ordering for directing for the purposes of today, I am making the following Order:

Anonymity. 1. *Until further Order: (1) For the purposes of these proceedings the Claimant shall be anonymised and referred to as LHG and the Claimant's mother and litigation friend shall be anonymised and referred to as HHG. (2) Pursuant to CPR r.39.2, in any report of these proceedings, there shall be no publication of the name and address of the Claimant and her litigation friend, nor any other particulars likely to lead to their identification. (3) No person shall disclose or publish any document relating to these proceedings in such a manner as to identify either directly or indirectly the Claimant or the Claimant's mother and litigation friend. (4) Non-parties may not, without permission of the Court, obtain any document from the court file which has not been anonymised and/or redacted to protect the identity of the Claimant and her litigation friend, in accordance with paragraph 1(1) above. 2. Any person shall have liberty to apply in writing on notice to the parties, to vary or set aside paragraph 1 above.*

The Claim. 3. *The Claimant has permission to rely on the second witness statement of HHG. 4. Permission for judicial review on the Special Spirits and School Holidays issues is granted. That is to say the following grounds: (i) The Defendant's assessment of need and service provision decision dated 17 August 2023 is unlawful insofar as it fails to adequately address the circumstances relating to the Claimant's continuing attendance at Special Spirits; (ii) The Defendant's assessment of need and service provision decision dated 17 August 2023 (and 13 October 2023) are unlawful insofar as it fails to adequately address the Claimant's needs for care and support during school holidays. 5. Permission for judicial review on the remaining issues is (a) refused insofar as they are advanced as 'freestanding' grounds (b) deferred on a rolled-up hearing insofar as they overlap with the Special Spirits or School Holidays issues, so that those issues can fully be dealt with by the Court.*

Interim Relief. 6. *In addition to the 4 hours' of Direct Payments at the rate of £12.10 that the Claimant currently receives during the week, and the additional 4 hours' a week received during*

school holidays, the Defendant shall provide an additional 5 hours' a week of Direct Payments per week, pending further order. This is equivalent to the cost of the Claimant's 4 sessions at Special Spirits per week, at the reduced rate of £15 per session. 7. The Court will determine on the papers on or after 14 December 2023, whether to grant anything further by way of interim relief in respect of: (i) The full cost of the Claimant's attendance at Special Spirits 4 times per week (at a rate of £30 per session); (ii) The Claimant's need for additional support during school holidays. 8. The Claimant shall file and serve by 4pm on 11 December 2023: (a) Any disclosure in its possession relating to the funding arrangements and amount payable, regarding the Claimant's attendance at Special Spirits; (b) Any additional material upon which it seeks to rely regarding the funding arrangements and amount payable, regarding the Claimant's attendance at Special Spirits; (c) a short position statement (a maximum of 5 pages in length) within confined to the issues regarding interim relief for (i) the full cost of the Claimant's attendance at Special Spirits and (ii) support during school holidays. 9. The Defendant shall file and serve by 4pm on 12 December 2023: (a) Any disclosure in its possession relating to the funding arrangements and amount payable, regarding the Claimant's attendance at Special Spirits; (b) Any additional material upon which it seeks to rely regarding the funding arrangements and amount payable, regarding the Claimant's attendance at Special Spirits. (c) a short position statement (a maximum of 5 pages in length) within confined to the issues regarding interim relief for (i) the full cost of the Claimant's attendance at Special Spirits and (ii) support during school holidays. 10. The Claimant shall file and serve by 4pm on 13 December 2023 any short position statement (a maximum of 5 pages in length) in reply. 11. The court will determine the outstanding matters in relation to interim relief on the papers on 14 December 2023. 12. The parties shall by 4pm 13 December 2023 submit a draft order (agreed if possible) providing for onward case management of the proceedings to final disposal.

Costs. 13. *Costs in the case.*

Judgment: 8.12.23
Order made 11.12.23