Judicial Communications Office

5 May 2021

COURT EXAMINES DEPRIVATION OF LIBERTY ISSUES IN SPECIAL EDUCATIONAL SETTINGS

Summary of Judgment

Mrs Justice Keegan, sitting today in the Family Division of the High Court, found that the Special Educational Needs and Disability Tribunal had not erred in law in making a determination that special educational provision at a school facility was appropriate for a young person rather than home tuition. However the court examined the wider human rights issues associated with deprivation of liberty in special school settings and determined that deprivation of liberty can apply in special school settings. If it does it had to be authorised under the Mental Capacity NI Act 2016 or the inherent jurisdiction to protect young people in this situation.

The court said it would be useful if the Department of Education, in liaison with the Department of Health, now issue a joint protocol which reflects what has been said by the court even on an interim basis whilst the consultation is ongoing. It also stated that this judgment does not detract from the positive obligation imposed upon State authorities under Article 5 ECHR deprivation of liberty:

> "All public authorities need to be aware of this and even if the special educational provision is deemed to be appropriate there is a lawfulness issue if it is thought to be a deprivation of liberty and not authorised. I am quite confident that the public authorities who have engaged in this case are well aware of this obligation. This judgment should be shared with all relevant authorities as the matter needs urgent attention in terms of guidance and protocols."

As part of the hearing, the court heard from the Northern Ireland Children's Commissioner and the Attorney General as intervenors as well as the Department of Education, the Education Authority, the relevant Health Trust and representatives of the Tribunal.

Background

JKL is a young person aged 17 years old who has special education needs as a result of severe learning difficulties, social behaviour and emotional well-being difficulties and a medical diagnosis of Autistic Spectrum Disorder. He also has epilepsy and challenging behaviour. He has had a Statement of Special Education Needs since 2008. He has attended a special school from that date until October 2018 when, following an incident at the school where he assaulted a member of staff, the school had to accept they could no longer meet his needs without the provision of additional accommodation. In February 2018 the school had formally requested additional accommodation from the Education Authority (EA). From December 2018, the young person was provided with 4.5 hours home tuition per week as an interim measure pending the construction of a bespoke modular unit to meet his needs. This unit would contain a classroom, bathroom facilities and a safe area for the young person to go when experiencing a challenging episode with facilities for staff to remain in a safe place during such time.

The young person's mother ("the appellant") visited the school on 11 June 2019 to view the new unit but was reported to be concerned that, in her view, it resembled "a prison cell" with key fobs/code pads to allow access to and exit from the unit and that it was fenced off with gates on each side. She felt it would not work for her son has he would be isolated from his peers and the curriculum. The appellant also had strong objections to any suggestion that either social services or the PSNI might be called as set out in initial drafts of a Positive Behaviour Support Plan. The Principal of the school advised that this mechanism of calling social services or the PSNI would be avoided at all costs. The Principal also described the unit as being designed for use at specific times and not for the whole school day, with it being intended to assist the young person's transition from home tuition back into the classroom with his peers, providing a place where staff can withdraw and allowing the young person his own space.

In an earlier decision in this case delivered on 3 December 2019, the court was asked to grant leave to apply for judicial review of the decision by the EA to discontinue home tuition for the young person. The court refused leave and directed the matter to the Special Educational Needs and Disability Tribunal ("the Tribunal").

On 20 January 2020, the Tribunal delivered its decision dismissing the appeal on the grounds that it was of the view that it would be in the young person's best interests to have the opportunity to reintegrate back into school, that the unit was intended to assist this and also to provide a retreat for him or for his classmates if he has a challenging episode. The appellant challenged this decision and it came for hearing by way of a case stated for the opinion of the High Court.

Case Stated

The Tribunal stated a case on the following questions of law:

1. Did the Tribunal err by failing to determine whether the placement provided for in the Statement of Special Educational Needs was "appropriate" within the meaning of Article 16(4)(a) of the Education (NI) Order 1996 ("the 1996 Order"), properly construed by reference to sections 3 and 6 of the Human Rights Act 1998 ("the HRA 1998")?
2. Insofar as the Tribunal did, implicitly, rule that the proposed placement was "appropriate" did that decision amount to an error of law?
3. Did the Tribunal err in law by failing to conclude that "appropriate" in this context must include that the proposed placement is lawful by reference to sections 3 and 6 of the HRA 1998, noting that it was common case between the parties that the placement proposed amounted to a deprivation of liberty wherein no lawful authorisation has been sought by the school or by the Tribunal in accordance with a procedure under the Mental Capacity Act (NI) 2016 ("the MCA 2016")?
4. Did the Tribunal err in law by taking the view that its role was to hear the evidence submitted by the parties and determine whether the young person's needs can best be met by his reintegration into the special school or home tuition, without having to determine whether the placement proposed was lawful by reference to sections 3 and 6 of the HRA 1998?
5. By dismissing the appeal and thereby endorsing the placement, did the Tribunal breach section 3 and/or section 6 of the HRA 1998 as a contravention of the young person's rights under Article 5 ECHR given that the placement amounts to a deprivation of his liberty which had no lawful authorisation?

6. If prior authorisation for the proposed deprivation of liberty was required should this have been sought under the terms of the MCA 2016 or by way of declaratory order?
7. Should the Tribunal have allowed the appeal on the basis that the placement could not, in law, be considered "appropriate" given that it would amount to an unauthorised deprivation of liberty?
8. Should the Tribunal have adjourned the appeal to wait confirmation that the deprivation of liberty proposed had been authorised in accordance with the procedure prescribed by law?
9. Did the Tribunal otherwise err in law by their decision to dismiss the appeal?

Consideration

The court said this case involved important issues within the setting of special education and the inter-play between special educational provision and ECHR rights given the potential deprivation of liberty.

It noted that in early 2020 a review was commenced by the Department of Education in collaboration with relevant partners with the aim of developing updated guidance for education settings to ensure that any seclusion and/or restraint is reasonable, proportionate and justifiable in the circumstances and that appropriate documentation is prepared.

A working group was formed in October 2020 and has met on a number of occasions. The Department of Education has further identified a need to develop guidance on the use of seclusion and the management of deprivation of liberty authorisations in education settings. This work is at a nascent stage with consideration presently being given to the nature and format of the process itself. In terms of an indicative timeframe, the court was told that the Department hopes to publish the revised guidance on the use of restraint and seclusion during 2021 but is also considering whether consolidated guidance which also addresses the issue of deprivation of liberty should be formulated.

The court said it was "obviously imperative that priority is given" to this multi-disciplinary work to support and protect children in the special educational field. It said that whilst is it not for the court to draft the guidance it could deal with some of the important legal issues raised in this case which may be of assistance in the preparation of the guidance.

The court considered that there is a strength in the argument made by the EA supported by others that the Tribunal is a specialist tribunal tasked under law to deal with a particular issue namely whether educational provision is appropriate:

> "It is not tasked to authorise deprivations of liberty. In my view the Tribunal is capable of making a determination on whether educational provision is appropriate otherwise the statutory scheme would be frustrated and also delayed. This also applies to the issue of a Statement itself. In this case the core issue was whether home tuition or education at school was appropriate. This is what Parliament has asked the specialist tribunal to decide by virtue of Article 16 of the [1996] Order. There is some confusion about whether or not the Tribunal actually addressed deprivation of liberty as well. I do not think it is particularly purposeful to dissect this but suffice to say there is nothing wrong with a Tribunal being alive to the issue and in fact that is preferable. However what it actually has to decide is the appropriateness of the educational provision on offer."

The court referred to case law in which the meaning of "appropriate" has been explained. To determine whether a school is appropriate for a pupil, an assessment has to be made by the Tribunal of what the school offers and what the pupil needs. Unless there is a sufficient match between these two the school is not appropriate for the pupil for the purposes of Article 16(4)(b) of the 1996 Order. The court said the Tribunal did this in this case by weighing up parental preference and the evidence provided by the EA.

The court commented that Article 5 may be engaged in such cases but did not accept the argument that the Tribunal was required to interpret the legislation in such a way as to consider authorisation of deprivation of liberty:

> "In my view that is a different consideration which forms part of a parallel process and it is not the function of [the Tribunal] to deal with it under the relevant legislation. … I consider that this approach is Convention compliant".

The court said this means there has to be multi-disciplinary joined up thinking in relation to these issues. It said it appeared clear that deprivation of liberty may be required in a school setting but that it is not the function of the Tribunal to determine whether there is a deprivation of liberty on the facts of any case or a restriction of liberty: "That would usurp the statutory scheme which Parliament has put in place under the [MCA 2016]".

The court noted that there have been 12 applications of this nature, which is allowed for in legislation, and that training has taken place. It said that if the mental capacity legislation did not so provide there could be recourse to the inherent jurisdiction. Either way authorisation has to be sought to satisfy Article 5 ECHR.

The court also said that it was not its function to decide on the substantive issue of whether or not this case represents a deprivation or restriction of liberty. It noted that authorisation has now been sought in relation to the young person's placement at home. The court said that if this special educational provision was a deprivation of liberty, or if it was thought to be a deprivation of liberty, the statutory authorities need to take a cautious approach and consider authorisation. As regards sequencing, the court said there is no difficulty in the Tribunal operating and determining cases whilst this other parallel process occurs and that the application for authorisation should be made by the relevant Trust in liaison with the EA.

Conclusion

The court answered no to the first five questions in the case stated finding that the Tribunal had not erred in law or breached sections 3 and 6 of the Human Rights Act 1998. The court said that any authorisation should be brought under the terms of the Mental Capacity Act NI 2016 or the inherent jurisdiction if the legislation is unavailable The court found that the Tribunal was entitled to dismiss the appeal and reject an application to adjourn.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

Judicial Communications Office

ENDS

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