Education case law update
Tom Cross

(1) SEN: substantive law

(a) *C v Oxfordshire CC (UT)* (HS/1288/2015)

1. This is further case to consider when the FTT can properly order residential provision, including in circumstances where there is concern about the effect of a length of a child's journey to and from school.

2. The child had significant SEN: ASD with severe communication difficulties, anxiety and challenging behaviour. The parents sought a residential placement, on the basis that the child required a waking day curriculum so as to ensure a consistency of approach both in and outside the normal school day in dealing with her challenging behaviour.

3. During the course of the hearing (which was heard over a number of days over a number of months for various reasons), the parties agreed that the child should go to a particular school. That school could provide either day or residential provision: it was flexible.

4. Having directed itself in accordance with the well-established case law to the effect that a need for consistency of approach does not necessarily amount to a need for special educational provision across the waking day, the Tribunal concluded that a residential placement at the school should not be ordered.

5. The child had in fact started at the school two days before the final day of the hearing. At that final day, it was argued on behalf of the parents that the length of the child's journey to the school (said to be around 2 hours each way) was having an effect on her behaviour both at school and when she returned home.

6. In its decision, the Tribunal had commented that it did not accept that travelling to and from home would inevitably result in the child's progress regressing, but that if they were wrong about that, it was a matter which could be considered at the next annual review (which was to take place reasonably soon).

7. On appeal it was argued among other grounds that the tribunal dealt inadequately with the question of the child's transport difficulties. It was common ground between the parties that if the effect of the journey was such that the child arrived at the school otherwise than in a fit state to learn that might justify a placement on educational grounds. The judge derived a broader proposition in paragraph [23]:

> "If a journey that a child would have to undertake to or from the nearest school that is capable of meeting his or her special educational needs is, or has an effect on the child, such that it is not reasonable to expect the child to undertake it and if a residential placement is not otherwise required on social care grounds, it certainly seems to be clearly arguable that a residential placement is required on educational grounds".

8. On the facts, however, the Upper Tribunal did not find that the FTT had erred. It did regard any difficulties with the child's journey to the school as being potentially

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

relevant; that is why it had referred to the annual review. Furthermore, there was no evidence before the FTT from which it could have inferred that the child was not in a fit state to learn when she arrived at school.

(b) *H v A London Borough Council* [2015] UKUT 316 (AAC)

9. Following a time at primary school when he had been exposed to pornography and possibly sexual abuse, the child exhibited harmful sexual behaviour. This appeal concerned whether provision ordered by the FTT for addressing that behaviour was correctly included within his Statement as special educational provision within Part 3.

10. The tribunal considered that, although the child needed therapy for his sexual harmful behaviour, that was not special educational provision. In so concluding, the Upper Tribunal held that it had asked itself the wrong question.

11. The problem was that the FTT considered that the child's sexualised behaviour was something which had been "learned" (essentially from his time at primary school); and that whether or not behaviour was "learned" was relevant to whether special educational provision was called for to meet a child's special educational needs. Judge Ward held that to be wrong:

> "24. I am unable to see that whether it is required in response to behaviour that is learned is a legally correct test to apply in determining whether something constitutes "special educational provision" or not. As correctly understood (see above) education in mainstream schools is not limited to the principles of physics or French verbs where it is a question of acquiring knowledge, but extends to topics such a religious education, PSHE (Personal, Social, Health and Economic Education), sex education and, latterly with increased emphasis, "British values", to any of which addressing learned attitudes, from, for instance, home, peer group or religious environments, is likely to be integral … a pupil who has grown up in an environment where little importance is attached to obtaining informed consent in sexual matters and whose special educational needs make it hard to see the limitations and moral inadequacies of such an approach would in my view be the proper recipient of special educational provision…".

12. The point here is that, in considering whether particular provision is called for by a child's learning difficulty, it is irrelevant whether the provision is in response to something that is "learned". The Upper Tribunal held that the FTT had thought otherwise. Had it approached the question correctly, it was possible that the FTT would have reached the conclusion that provision in the form of therapy for the child's sexual harmful behaviour was directly related to his learning difficulty.

(2) SEN: procedure

(a) *The Royal Borough of Kensington & Chelsea v CD (SEN)* [2015] UKUT 0396 (AAC)

13. This case was about the approach the FTT should take to "non-standard" expert evidence (i.e. expert evidence which is not SALT, OT, ED Psych evidence).

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

14. The child was profoundly deaf. There were disputes between the local authority and parents as to: the size of the class which should be specified in Part 3 of her Statement; and which school should be named in Part 4 ("DH" or "A"). The local authority argued that she had no educational need for small classes.

15. Each party instructed an acoustic engineer to undertake an assessment of acoustic characteristics of the rival schools. In case management, the tribunal encouraged but did not require the parties to instruct a single joint expert.

16. Neither expert was present at the hearing but their reports concerned evidence relevant to the issues of class size and appropriate acoustic environment. Their written reports were before the Tribunal.

17. The Tribunal considered it "inappropriate" to make findings about class size and acoustic environment on the basis of the reports, ostensibly on the basis that "the contents of the reports had not been agreed and the subject matter of the reports was highly technical". The Tribunal criticised the fact that neither of the authors was available to give evidence. The tribunal found for the parents.

18. On appeal the local authority argued that the Tribunal had erred in law in not considering the evidence of the acousticians. The Upper Tribunal agreed. At paragraphs [30]-[31] it said this:

> "30. Given, in my view, there was an issue in relation to the expert evidence, the tribunal was faced with a dilemma. The hearing had concluded, yet, on the face of Mr. Small's written submission, there was no agreement as to the expert evidence upon which the tribunal was being invited to make findings. Had there been more focussed case management at the start of the hearing, this situation would not have arisen. Faced with the written experts' reports it would have been preferable if the tribunal had established at the outset of the hearing by way of a preliminary matter precisely which parts of the reports were agreed, which parts were not agreed, and, if there were areas of dispute, how the parties were inviting the tribunal to resolve the disputed matters (whether by calling the experts to give oral evidence or doing the best it could on the written evidence). The parties' submissions/concessions could then have been recorded in writing by the tribunal and, if there were any issues, those issues could have been adjudicated upon and, again, recorded in writing.
>
> 31. In this case it was the absence of such a procedure that led to the predicament encountered by the tribunal after the hearing had concluded and the written submissions had been received. However, even at that stage, the tribunal should have considered how to deal with the matter. It may have called for further written submissions on how to resolve the issues between the experts. It may have decided to hold a further hearing so that the experts could have been called to give evidence. Or it may have considered that any further submissions or evidence would have been entirely disproportionate, and made findings on the basis of the written reports. Instead, the tribunal simply decided that it was not appropriate to make findings on the basis of the experts' reports "as the contents of the reports had not been agreed and the subject matter of the

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

reports was highly technical." That was not an adequate reason for refusing to consider and make findings on the expert evidence and, in my judgment, it constituted an abdication of responsibility on the part of the tribunal. Accordingly, I am of the view that the tribunal erred in law, and I set aside its decision".

19. It went on to give the following guidance in paragraphs [32]-[38]:

"32 On the basis of what has happened in this case, it may be helpful if I make some observations on how what may be described as "non-standard" expert evidence may be dealt with. It is crucial that I emphasise that I am not, here, considering the "standard" type of evidence of educational psychology, speech and language therapy and occupational therapy.

33 As in all cases, the parties and tribunal must bear in mind the provisions of the overriding objective of rule 2 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the First-tier Tribunal Rules") – that dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.

34 Further, whilst I am, of course, mindful of the fact that the CPR 1998 do not apply to First-tier Special Educational Needs and Disability Tribunals, and that un-necessary formality in those tribunal proceedings must be avoided, nevertheless, in my judgment Part 35 of the Civil Procedure Rules provides a useful backdrop in relation to case management decisions concerning expert evidence in such tribunals, and I draw upon it.

35 With that introduction, the starting point must be that expert evidence should be restricted to that which is reasonably required to resolve the appeal. If a party intends to seek to rely upon expert evidence, then pursuant to the duty under rule 2(4) of the First-tier Tribunal Rules , this should be communicated to the other party as soon as possible. If (as is likely in most cases) the issue falls within a substantially established area of knowledge, where it is not necessary for the tribunal to sample a range of opinion, it may well be that the evidence should be provided by a written report of a single expert jointly instructed by the parties.

36 Any issues regarding expert evidence should, of course, be apparent from the parties' respective Attendance Forms. Upon perusal of those Attendance Forms a tribunal judge may wish to decide whether and, if so, how to exercise his or her discretion to give directions as to expert evidence. In doing so, he or she will be mindful of: (i) rule 15(1)(c) of the First-tier Tribunal Rules , which provides that, without restriction on its general case management powers, "the tribunal may give directions as to … whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

> expert to provide such evidence," and (ii) the observations which I have made at paragraphs 33 — 35 above. It may well be that the parties would have to make out a strong case either for relying on expert evidence from an expert who had not been jointly instructed, or for requiring oral evidence of an expert at the hearing of the appeal.
>
> 37 Further, in giving any case management directions relating to expert evidence it would be helpful to all involved if the tribunal judge were to identify precisely the issues which the experts are to address.
>
> 38 If these matters are borne in mind, it is to be hoped that a tribunal charged with conducting the hearing of an appeal will not face what this tribunal faced at the start of the hearing. However, if for any reason that is not the case, and/or if there are before the tribunal expert reports from experts instructed by more than one party, the tribunal should consider my comments in paragraph 30 above".

(b) LW v Norfolk County Council (SEN) [2015] UKUT 0065 (AAC) [2015] E.L.R. 167

20. This concerns the sometimes confusing procedure which applies when the FTT, faced with an application for permission to appeal, "reviews" the FTT decision the subject of the application.

21. The FTT named the local authority's preferred school. The parents sought permission to appeal. The file came before Judge Brayne – a FTT judge who was not a member of the original tribunal. (It is standard practice for the judge who considers a permission to appeal application not to have been a member of the FTT which heard the case).

22. As he was entitled, Judge Brayne "reviewed" the decision under rule 9 of the FTT Rules. Under r.9(4), it was within his powers, in light of the review, to (a) correct accidental errors in the decision; (b) amend reasons given for the decision; or (c) set the decision aside. Under r.9(5), if he decided to set the decision aside, the FTT had to either re-decide the matter, or refer it to the Upper Tribunal.

23. Having found that, because the FTT had made an error of law, the threshold conditions for a review were satisfied, Judge Brayne did not then refer to those provisions. Instead, he purported to direct the original tribunal to re-consider one aspect of the case alone but not others. He said that, "having consulted Judge Vassie [the Judge who had presided over the original hearing], and in reliance on her record, her recollection and consultation with other panel members", he was satisfied that the Tribunal had "robust evidence" for findings on particular aspects of the case, on which he proceeded to give a commentary. He said that, when it reconsidered the case, the tribunal should explain its reasons for those particular aspects in accordance with his commentary.

24. The Upper Tribunal agreed with both parties on appeal that there were "significant procedural irregularities" involved in the above process:

    (a) Judge Brayne should not have discussed matters with Judge Vassie in the way he did. Such a discussion was unnecessary for the purposes of the exercise of the

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

review powers, and gave the impression that the process was not a transparent and fair one.

(b) Judge Brayne should not have fettered the scope of the decision to be made by the panel which was to re-decide the matter. That should have been left to the panel to establish as a case management issue.

25. The Upper Tribunal agreed that those irregularities were of such magnitude as to cause procedural unfairness and taint, the review process to such an extent that Judge Brayne's order was of no effect. (That meant that the appeal to the Upper Tribunal lay against Judge Vassie's tribunal, which the Upper Tribunal set aside on the basis of the error of law identified by Judge Brayne).

26. The Upper Tribunal added that under the FTT Rules Judge Brayne should furthermore have given notice to the parties so that they may have had the opportunity to apply for the setting aside decision itself to be set aside.

(3) Disability discrimination

(a) X v Governors of a School [2015] UKUT 7 (AAC) [2015] E.L.R. 133

27. The Upper Tribunal (sitting as three Judges) has, in this appeal, laid to rest for the time being whether the decision of Lloyd-Jones J in *Governing Body of X Endowed Primary School v SENDIST* [2009] EWHC 1842 (Admin) ("X") in relation to the Disability Discrimination Act 1995 was correctly decided (and can safely be applied in the context of the Equality Act 2010). It also dealt with a related issue.

28. In X, a pupil with ADHD had been excluded from school following an assault. The tribunal had found that, in failing to take advice before the incident which led to the exclusion, the school had breached its duty to take reasonable steps contrary to the then s.28C of the Disability Discrimination Act 1995. On appeal, the school argued that that was legally wrong, because the only aspect of the pupil's ADHD in relation to which the Tribunal had ruled there had been a failure to take reasonable steps was his "tendency to physical abuse of other persons", which was not to be treated as an impairment under the forerunner to what is now Regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010/2128.

29. Lloyd-Jones J held that the protection of the legislation did not extend to conditions excluded under the (forerunner to the) 2010 Regulations (including tendency to physical abuse of other persons) whether or not they were manifestations of an underlying protected impairment. The effect (in short) is that if a child's impairment (which would otherwise make them disabled by law) manifests in a tendency to physical abuse of others, and if the child has such a tendency and is excluded for an incident or incidents exhibiting that tendency, the child cannot claim disability discrimination, because they will not be legally disabled in the first place.

30. In this appeal, confusing also called X, the Upper Tribunal upheld the correctness of Lloyd Jones J's conclusion in X in relation to the Equality Act 2010: see paragraph 101.

31. It also considered the meaning of the expression "tendency to physical … abuse". It held at paragraph 115:

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

> "The issue is ultimately one of fact, and is eminently appropriate for consideration by a tribunal…".

32. It went on to give guidance to tribunals, which included that "it is not necessary for a tendency to physical abuse to be manifested frequently or regularly" (paragraph 120); that conduct constituting "something akin to a spasmodic reflex" would not, in its view, meet the terms of the definition (paragraph 117); that violent conduct constituting a form of frustrated lashing out triggered by particular stresses could amount to evidence of the required tendency (paragraph 127); and that, although the existence of some sort of misuse of power or coercion may lead to the conclusion that a much lower degree of violence than would otherwise fall within the terms of the regulation would suffice, a finding of physical abuse in the absence of such factors would be likely to require careful justification (paragraph 118).

33. However, whilst the Upper Tribunal inferred that there had to be an element of violent conduct (paragraph 116), it did not hold that the statutory test required the violent conduct to be "serious". On the particular facts of that case, re-making the decision (having held that the FTT had erred in law), the Upper Tribunal paid regard to the "significant element of violent conduct on the part of S", commenting that "what [S] did could in no way be described as being akin to a spasmodic reflex but rather, on each occasion, constituted attacks, frequently sustained over seven month period, on [others]" (paragraph 129). It was satisfied, on a balance of probabilities, that the child in question had the requisite tendency.

34. These aspects of the second "X" case were considered further in *C v I School* (HS/1244/2014), as yet unreported.

(4) School transport

P v East Sussex CC [2014] EWHC 4634 (Admin) [2015] E.L.R. 178

35. A 15-year old pupil attended a school some 27 miles away from her home. She had medical conditions and regular frequent medical appointments during the school day. She had originally been transported by the local authority to school in a taxi on her own, which allowed for greater flexibility as to the timing of her coming and going. The authority started to provide her with transport in the form of a shared taxi. This meant that the authority's transport did not allow her to attend school (or after school clubs) after medical appointments. If her mother were to take her, it would involve a round trip of about two hours.

36. The child (via her parent as litigation friend) challenged the authority's decision by way of judicial review. The primary ground of challenge was that the authority had failed to comply with its duty under s.508B of the Education Act 1996, which required it to make, in the case of an eligible child (such as she was) "such travel arrangements as they consider necessary in order to secure suitable home to school travel arrangements for the purpose of facilitating the child's attendance at the relevant educational establishment", for free.

37. The Court rejected that challenge. The Deputy Judge set out the following principles at [58]-[60]:

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

> 58 I consider that the council in determining travel arrangements they consider necessary can take account of cost and practicability. Further, that such considerations also bear on the purpose; namely for securing suitable home to school transport, for the purpose of facilitating the claimant's attendance at her school.
>
> 59 This is not a counsel of absolute perfection, nor is it a requirement that the claimant be provided with a chauffeur. Further, it is not a duty for the purpose of facilitating matters other than attendance at school. That such events occur is unfortunate, but as Sir George Newman sitting in *D v Bedfordshire County Council and Special Educational Needs and Disability Tribunal [2008] EWHC 2664 (Admin), [2009] ELR 1* , at para [28] indicated, it is essential properly to analyse the statutory context or boundaries of the function for which provision is being made.
>
> 60 Further, in *R (M and W) v London Borough of Hounslow [2013] EWHC 579 (Admin), [2014] ELR 338* , Sales J, as he then was, indicated that travel arrangements within the section do not necessary involve a door-to-door exercise. Suitability governed both the mode and extent of the travel arrangements so that one can have pick-up points imposed, rather than being entirely voluntary or being provided by consent by the parents.

38. Applying those principles, if one asked the question: have the council secured suitable travel, the answer was "yes". If one asked: have they secured it for the purpose of facilitating the claimant's attendance at school, the answer was also "yes". The Court explained that the purpose behind the provision was not for facilitating attendance at medical appointments (however desirable a purpose that might be); nor was it a duty which stood to be exercised on a kind of perpetual stand-by basis, that is to say, to be available at various times to suit medical appointments rather than to provide for travel arrangements home to school, for the school day.

39. A second ground was that the council's decision was in breach of its duty to make reasonable adjustments in the provision of services. (The claim was not, nor could it have been, that of failure to make reasonable adjustments under that Part of the Equality Act dealing with *education*). The problem with that claim was that the legislation, properly understood, requires that there be a provision, criterion or practice putting disabled persons at a disadvantage *in relation to the provision of the service.* Here, in the provision of the service of transport, no PCP put disabled persons at any disadvantage. As the Court put it: "the starting-point of the journey is not a disadvantage in its provision, it is merely the starting point. The real complaint is the inadequacy of local education provision, rather than the provision of transport". Accordingly, that point, together with a final ground based on the public sector equality duty, failed also.

(5) School admissions criteria

London Oratory School v OSA [2015] EWHC 1012 (Admin)

40. This was a judicial review challenge to a decision of the School's Adjudicator concerning the lawfulness of the admissions arrangements of the London Oratory School, a Roman Catholic school. There were numerous grounds of challenge (ten in all). Many were upheld; some rejected. The focus below is on a few.

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

41. The school is an Academy. It is vastly over-subscribed. It is a school with a "religious character" for legislative purposes. Its Funding Agreement provides (typically) that "the admissions policy and arrangements for the school will be in accordance with admissions law, and the DfE Codes of Practice, as they apply to maintained schools". The Governing Body of the school is the relevant admission authority, and so was in this case the body responsible for "acting in accordance with" the Government's Admissions Code.

42. Paragraph 1.38 of the Admissions Code states that, when constructing faith-based oversubscription criteria, admissions authorities for schools designated as having a religious character must "have regard" to any guidance from the body or person representing the religion. This was the Archdiocese of Westminster. The Archdiocese had published guidance, and over a number of years the school's position on its criteria had differed from the guidance.

43. Following a complaint by the British Humanist Association, the Schools Adjudicator looked at the criteria. He concluded that the majority of them contravened paragraph 1.38 of the Admissions Code: by including these criteria the Governing Body cannot properly have had 'regard to' the Archdiocese's guidance, which would not have required them and would in some respects have prohibited them.

44. The first ground of challenge on the judicial review of the Adjudicator's decision was that this was a mistaken approach to paragraph 1.38. Mrs Justice Cobb considered in great detail the meaning of the expression 'have regard' in the Code. She decided it meant that admissions authorities had to take the guidance into account and, if they decide to depart from it, they must have and give clear reasons for doing so. In considering whether a Governing Body has 'had regard' to the guidance, it needs to demonstrate that it has considered and engaged with the Guidance, not ignored it or merely paid lip-service to it. The Adjudicator had not applied that test and so his decision was flawed.

45. The Court also held that the Adjudicator had made certain flawed findings in any event. For example, paragraph 1.8 of the Admissions Code states that "admission authorities must ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group…". The Adjudicator had concluded that the school's criteria unfairly disadvantaged less well-off families, contrary to that requirement. The Court was unimpressed that, without reference to the school, the Adjudicator embarked on his own research of the socio-economic profile of the locality and other schools in the area, from which he inferred that there was "good reason to believe" the school's arrangements disadvantaged less well off Catholic families, without making any specific finding that the disadvantaged was caused by the criteria. The Judge held that his reasoning was flawed or deficient, and that he should have given the school the opportunity to comment on the data which he had researched.

46. Not all of the challenge succeeded. The Court upheld, for example, the Adjudicator's conclusion that the following criterion offended against the Code: "service in a Catholic parish or in the wider Catholic Church by the candidate or a Catholic parent" ("the Catholic service criterion"). Paragraph 1.9 of the Code says that admission arrangements must not prioritise children on the basis of their own or their parents' hobbies or activities, although schools of religious character may take account of

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

religious activities "as laid out by the body or person representing the religion". Here the Diocesan guidance specifically prohibited schools from "making judgments on pastoral matters such as Catholic practice". Since, on the Court's analysis, the school's Catholic service criterion was not "laid out" by the Archdiocese, the Governing Body failed to act in accordance with the Code in having it.

(6) Nursery education

R (on the application of Morris) v Rhondda Cynon Taf CBC [2015] EWHC 1403 (Admin)

47. This is an important case on the state of the law of consultation post *Moseley*, which Andrew Sharland will discuss in more detail. It finds mention here as an education case.

48. The local authority used to provide full time nursery education free of charge but determined that, from September 2015, nursery education from the age of three would cease to be free. It had sought to make a similar decision the previous year but that decision was quashed (as I discussed at last year's Local Authority Conference). The decision under challenge here followed a consultation which had been extended (accompanied by the publication of additional information) in light of the Supreme Court's decision in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947. The primary ground of challenge was that the consultation undertaken was nevertheless inadequate in light of Moseley. The principal argument was that, in circumstances where the authority was proposing to cut a public service, it was unlawful for it to consult without providing information about alternatives.

49. Patterson J carried out a detailed analysis of the case law including Moseley. She found that "there is no inviolable rule established by Moseley that alternatives must be consulted upon in every consultation case", although sometimes fairness might require that so that consultees can make sense of the consultation exercise. On the facts, the consultation was lawful: unrealistic options essentially to preserve the status quo, together with reasons for their rejection, were consulted on alongside the preferred option.

50. Consultation aside, it was also argued that the (Welsh) local authority was in breach of its duty under s.22 of the Childcare Act 2006 to "secure, so far as is reasonably practicable, that the provision of childcare is sufficient to meet the requirements of parents in their area who require childcare in order to enable them (a) to take up, or remain in, work, or (b) to undertake education or training which could reasonably be expected to assist them to obtain work". (There is an equivalent duty for English local authorities in s.6 of the Childcare Act). Rejecting the challenge, the Court noted that this was a target duty (so owed generally in respect of the authority's area); that authorities could take into account their resources and capabilities in making decisions about when to intervene to address gaps in the childcare market; and that there is no duty on an authority directly to provide childcare. The Judge held on the evidence that, in contrast to the previous quashed decision, the authority had this time approached the issue of childcare on the basis of a proper appreciation of its statutory duty. The challenge therefore failed.

Tom Cross
October 2015

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Tom.Cross@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com