

Local authorities' obligations to unaccompanied child asylum seekers (KA and another v London Borough of Croydon)

19/07/2017

Local Government analysis: When can a local authority act upon an age assessment decision? Following the judgment in *KA and another v London Borough of Croydon*, Peggy Etiebet, barrister at Cornerstone Barristers, says there is likely to be a re-evaluation by local authorities as to how long support is given after the reasoned determination is announced.

Original news

KA and another v London Borough of Croydon [\[2017\] EWHC 1723 \(Admin\)](#), [\[2017\] All ER \(D\) 76 \(Jul\)](#)

The defendant local authority's practice or policy of ending support for unaccompanied child asylum seekers at the same time as it announced its decision that they were not a child was not unlawful, as the evidence did not show that it interfered or abrogated the right of access to justice. The Administrative Court also held that, as the decision did not engage Article 8 of the European Convention on Human Rights (ECHR), the consequential withdrawal of services could not either.

What issues did this case raise?

The context to the case is the vexed question of when a local authority is entitled to cease support under the [Children Act 1989 \(ChA 1989\)](#) to a former unaccompanied asylum seeking child (UASC) once it has determined that the USAC is an adult following a 'Merton-compliant' age assessment (see *R (B) v Merton London Borough Council* [\[2003\] EWHC 1689 \(Admin\)](#), [\[2003\] 4 All ER 280](#)).

As the evidence in the case shows, although Mrs Justice Laing was clear that the local authorities named had not had an opportunity to comment on the evidence, different local authorities have different policies—some cease services immediately, some give two weeks' notice, others give up to three months, and still others decide on a case-by-case basis.

The competing interests in determining the length of time a local authority may provide services after a determination of age are, for local authorities, safeguarding concerns (eg accommodating an adult with children) and cost (providing services in a time of austerity where it has no duty to) and, for the former UASC, the likely dispersal by the Home Office, the difficulties in seeking legal advice when dispersed, the disruption to their support networks, schooling and friendships.

The issue raised in the case was whether a local authority could lawfully cease the provision of [ChA 1989](#) services to a young person at the same time it informed, with reasons, that young person that it had determined he was an adult following, on its case, a *Merton* compliant age assessment.

The claimants' case was that the immediate cessation of support breached their common law right of access to justice and/or was an unlawful and disproportionate interference with their Article 8 ECHR rights. The claimants maintained that the local authority had to continue to provide support for at least one week after the reasoned decision was announced to allow the young person to seek legal advice, challenge the decision and make an application for interim relief.

To what extent is the judgment helpful in clarifying the law in this area?

Local authorities that cease support immediately on the announcement of the reasoned determination of age can take comfort from this determination. Laing J was pretty robust in her determination that the immediate cessation of support neither abrogated the claimants' right of access to justice nor, if Article 8 ECHR was even engaged, and she found it was not, was it a disproportionate interference with the claimant's Article 8 ECHR rights.

Laing J was clear that the right of access to justice was the right of access to the courts to challenge an adverse decision. It was not a right to be protected from the potential injustice—that of being treated as an adult if and when the Upper Tribunal found one was a child—of the decision. Nor was it a right to remain in the 'best' position for successfully obtaining interim relief—the claimant's submission being that a former UASC is a lot more likely to obtain interim relief if he is accommodated by the local authority when the application is made. The evidence provided by the claimants showed that former UASC are able to apply for judicial review and interim relief. As such there was no interference with the right of access to justice.

The Article 8 ECHR claim was dealt with fairly shortly. Laing J considered herself bound by the decision of the Court of Appeal in *A v Croydon* [2008] EWCA Civ 1445, [2008] All ER (D) 236 (Dec) that an age assessment decision does not engage Article 8 ECHR. This was because it was not a judgment in rem that bound the world on its determination of age but merely a staging post on the way to the local authority's decision as to what duty if any was owed under [ChA 1989](#).

However, she went on to find that, even if Article 8 ECHR was engaged, the general safeguarding concerns, the cost of the provision of services, the fact that if money was spent on the former UASC it could not be spent on a child for whom the local authority was responsible, and the savings local authorities have had to find in recent years rendered the decision proportionate.

Are there any grey areas or unresolved issues that practitioners should watch out for?

Local authorities should not take the decision as carte blanche to immediately cease support in every case. A policy, while of general application, must allow the exercise of discretion in an individual exceptional case.

What are the practical or wider implications of this case?

There is likely to be a re-evaluation by local authorities as to how long support is given after the reasoned determination is announced. Every local authority will have similar concerns regarding safeguarding and the expenditure of public funds and so there may be a move to reduce support were possible.

This is particularly the case where it is taking over nine months for fact finding hearings on age to be determined by the Upper Tribunal and Bhatia Best's (one of the experienced firms in this area) own figures indicate resistance is not necessarily futile—since July 2014 they had 14 cases with seven applications for interim relief where four succeeded.

However, if support is cut short, there is also likely to be an increase in urgent applications for interim relief. Local authorities will need to assess the likelihood of successfully resisting as against the legal cost incurred in the application in the context of the robustness of their age assessment under challenge—here Bhatia Best is running on a 50% success rate.

What are the implications for practitioners?

The claimants' submission, based on, it must be said, a common perception that it is easier to get mandatory interim relief when the former UASC is still accommodated by the local authority, than where he has been dispersed but is being adequately housed and fed by the Home Office, was not accepted by Liang J. However, she did grant some comfort to claimant lawyers by making clear the status quo, when making a prompt application for interim relief, is likely to be that the young person was receiving support from the local authority and that the court should take into account the practical effect of the authority's policy when considering an application for interim relief.

Are there any other points of interest worth mentioning here?

Croydon probably has, with Kent, the highest number of unaccompanied asylum seeking children, and have developed their age assessment procedures under keen scrutiny of stakeholders in the area. It may be worth other local authorities reviewing their own procedures—particularly as regards the thorny issues of minded to and outcome meetings—against Croydon's, as was helpfully set out in the judgment.

Peggy is joint head of Cornerstone's health & social care and Court of Protection team. She is an experienced health, social care, housing, and property practitioner advising and representing local authorities in all aspects of social welfare law undertaken by adult social services, children's services, education, housing, homelessness, and general public law teams within local authority legal departments.

Interviewed by Kate Beaumont.

FREE TRIAL