



Neutral Citation Number: [2021] EWHC 674 (Admin)

Case No: CO/4089/2019

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/03/2021

**Before:**

**MR JUSTICE CHAMBERLAIN**

-----  
**Between:**

**THE QUEEN**

**on the application of**

**AA, a protected party, by his litigation friend, the  
Official Solicitor**

**Claimant**

**- and -**

**LONDON BOROUGH of HACKNEY**

**Defendant**

-----  
-----  
**ROWENA MOFFATT (instructed by Wilson Solicitors LLP) for the Claimant**  
**LEE PARKHILL (instructed by Hackney Legal Department) for the Defendant**

Hearing date: 3 March 2021

-----  
**Approved Judgment**

## **MR JUSTICE CHAMBERLAIN:**

### **Introduction**

- 1 The Claimant is a Nigerian failed asylum seeker with long-term physical and mental health conditions. He has been recognised as a potential victim of trafficking and sexual exploitation. On 8 October 2019, the Defendant (“Hackney”) decided on the basis of an assessment carried out by one of its social workers that he had no eligible care needs for the purposes of the Care Act 2014 (“the 2014 Act”).
- 2 By a claim issued on 18 October 2019, the Claimant challenged this decision and also the decision of the Secretary of State for the Home Department not to provide him with accommodation in London. On the same day, Foster J granted interim relief requiring Hackney to accommodate him. On 31 January 2020, Jay J granted permission to challenge the Defendant’s decision that he had no eligible care needs. Permission was refused to challenge other decisions, in particular those of the Secretary of State.

### **Background**

- 3 The Claimant suffers from osteoarthritis of the knee, osteonecrosis (a disease which causes bone tissue to die, causing pain in the affected area), chronic venous insufficiency (a condition affecting the leg veins causing blood to collect in these veins) and leg swelling. These conditions affect his legs and thus his ability to mobilise without difficulty and pain. He also suffers from anal fistulas, which cause faecal urgency and partial incontinence.
- 4 In 2016, the Claimant was assessed by Professor Cornelius Katona, Emeritus Professor of Psychiatry at the University of Kent. Professor Katona concluded that the Claimant suffered from mild depressive symptoms and diagnosed him with delusional disorder of the persecutory type. Professor Katona concluded that he was unlikely to have a major cognitive impairment or learning disability, but he may have borderline learning difficulties, which warranted further investigation. The Claimant has received medication for his depressive symptoms from his GP.
- 5 The Claimant came to the attention of the Helen Bamber Foundation (“HBF”) in 2015-2016 and again in 2019, when he presented as homeless. On 9 July 2019, the HBF made a referral to Hackney’s Adult Social Care Department, requesting an assessment of the Claimant’s needs. It set out a list of day-to-day tasks which the Claimant was unable to carry out without difficulty or pain.
- 6 Hackney carried out an assessment of the Claimant’s needs. There were two interviews conducted by the lead social worker, Paola Marin Blanco, on 2 and 5 August 2019 and a functional assessment conducted by an occupational therapist, Danielle Leben-Beckles, on 22 August 2019. Ms Blanco conducted a human rights assessment on 23 August 2019.
- 7 The functional assessment recorded, among other things, that the Claimant experiences chronic pain in his knees, ankles, lower back, flank and shoulders, has difficulties mobilising, requires two crutches, has laboured movement in his lower limbs and limited floor clearance. It noted that he had a standing tolerance of 5-10 minutes before needing to sit down due to pain in his lower limbs. He required one crutch to undertake seating/standing transfers and had reported falls off the bed whilst repositioning. His

toilet transfers were “unsafe” because he “holds on to basin and radiator to assist transfers”. He had difficulty using stairs due to pain in his lower limbs and lower back and had difficulty controlling his bladder and bowels and required a strict toileting regime involving not drinking or eating when in the community. The conclusion of the functional assessment was, however, that the Claimant was “fully independent in all aspects of his daily living” and that his “presenting challenge” was “as a result of his inability to access public funds or employment to tell to obtain remuneration and accommodation given his current immigration status”.

- 8 In its needs assessment dated 8 October 2019, Ms Blanco concluded that the Claimant was “able to meet all his care and support needs independently”. She continued: “His current needs are related to his immigration status and housing situation not because of any physical or mental impairment”.

### **The law**

- 9 Where it appears to a local authority that an adult may have needs for care and support, s. 9(1) requires a local authority to assess (a) whether the adult does have needs for care and support and (b) if the adult does, what those needs are.
- 10 By s. 9(4), a needs assessment must include an assessment of the impact of the adult’s needs for care and support on the matters specified in s. 1(2). Section 1(2) specifies the elements of a person’s “well-being” which must be assessed: (a) personal dignity (including treatment of the individual with respect); (b) physical and mental health and emotional well-being; (c) protection from abuse and neglect; (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided); (e) participation in work, education, training or recreation; (f) social and economic well-being; (g) domestic, family and personal relationships; (h) suitability of living accommodation; (i) the individual’s contribution to society.
- 11 Where a local authority is satisfied that an adult has needs for care and support, it must determine whether any of these needs meet the eligibility criteria: see s. 13(1). Needs meet these criteria if (a) they are of a description specified in regulations, or (b) they form part of a combination of needs of a description so specified: s. 13(7).
- 12 Section 18 of the 2014 Act imposes a duty on a local authority to meet an adult’s care and support needs “which meet the eligibility criteria”. Section 19 confers a power to meet needs which the local authority is not required to meet under s. 18.
- 13 Section 67 of the 2014 Act applies to a local authority in the performance of various functions, including when carrying out a needs assessment. In a case where the condition in s. 67(4) is met, s. 67(2) requires a local authority to arrange for a person who is independent of the authority (an “independent advocate”) to be available to represent and support the individual for the purpose of facilitating the individual’s involvement. Section 67(4) provides as follows:

“The condition is that the local authority considers that, were an independent advocate not to be available, the individual will experience substantial difficulty in doing one or more of the following—

- (a) understanding relevant information;
- (b) retaining that information;
- (c) using or weighing that information as part of the process of being involved;
- (d) communicating the individual's views, wishes or feelings (whether by talking, using sign language or any other means)."

14 The Care and Support (Eligibility Criteria) Regulations 2015 (SI 2015/313: "the Regulations"), made under s. 13 of the 2014 Act, provide in reg. 2(1) that an adult's needs meet the eligibility criteria if:

- "(a) the adult's needs arise from or are related to a physical or mental impairment or illness;
- (b) as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2); and
- (c) as a consequence there is, or is likely to be, a significant impact on the adult's well-being."

15 The outcomes specified in reg. 2(2) are:

- "(a) managing and maintaining nutrition;
- (b) maintaining personal hygiene;
- (c) managing toilet needs;
- (d) being appropriately clothed;
- (e) being able to make use of the adult's home safely;
- (f) maintaining a habitable home environment;
- (g) developing and maintaining family or other personal relationships;
- (h) accessing and engaging in work, training, education or volunteering;
- (i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
- (j) carrying out any caring responsibilities the adult has for a child."

16 Regulation 2(3) provides:

"For the purposes of this regulation an adult is to be regarded as being unable to achieve an outcome if the adult—

- (a) is unable to achieve it without assistance;
- (b) is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;
- (c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or
- (d) is able to achieve it without assistance but takes significantly longer than would normally be expected.”

17 There is no dispute that the provision of accommodation may be called for under the 2014 Act, but only where it is “the necessary and appropriate conduit for the practical and effective delivery of care and support for the relevant ‘looked after needs’”: *R (Aburas) v London Borough of Southwark* [2019] EWHC 2754 (Admin), [6] (Michael Fordham QC). The concept of “looked after needs” was explained (in the context of the predecessor legislation) by Lady Hale in *R (M) v Slough Borough Council* [2008] UKHL 52, [2008] 1 WLR 1808, at [33]:

“Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which are mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list.”

### **The Claimant’s submissions**

- 18 Rowena Moffatt, for the Claimant, challenges Hackney’s decision that he has no eligible needs on three bases.
- 19 First, she submits that the decision is at odds with the information recorded in the body of the functional assessment report. She places particular reliance on the findings that the Claimant’s transfers to and from the toilet were unsafe due to his physical disability; that he needed to be in close proximity to a toilet at all times and was unable to eat or drink when outside of the home because of his incontinence; that he had a standing tolerance between 5 and 10 minutes before needing to sit down because of chronic pain in his lower limbs; and that he could climb stairs only with difficulty. In addition, Ms Moffatt submits that the assessment failed to take proper account of certain matters set out in the HBF referral letter: the existence of ongoing exploitative relationships; the Claimant’s difficulty in using certain forms of public transport; the Claimant’s partial incontinence; his ability to wash below the knee; his inability to tie his shoelaces; his difficulties and slowness in dressing; and his memory problems. Finally, complaint is made of the failure to give proper weight to Professor Katona’s conclusions as to the Claimant’s mental health problems.
- 20 Second, Ms Moffatt submits that the failure to provide an interpreter at the second interview on 5 August 2019 was unlawful because it led to an unacceptable risk that the questions and answers were not clearly and fully understood and/or communicated.

- 21 Third, it is said that there was a breach of the duty imposed by s. 67 to provide an independent advocate.

### **The Defendant's submissions**

- 22 For the Defendant, Lee Parkhill relied on *Lambeth London Borough Council v Ireneschild* [2007] EWCA Civ 234, [2007] HLR 34, where Hallett LJ referred at [44] to the “heavy burden of establishing” that a care assessment under the predecessor legislation was unlawful. She noted that Lord Brightman’s observations in *Pulhofer v Hillingdon London Borough Council* [1986] AC 484, at 518B-E, were apposite. They included this:

“Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.”

- 23 At [57], Hallett LJ said this:

“...one must always bear in mind the context of an assessment of this kind. It is an assessment prepared by a social worker for his or her employers. It is not a final determination of a legal dispute by a lawyer which may be subjected to over zealous textual analysis. Courts must be wary, in my view, of expecting so much of hard pressed social workers that we risk taking them away, unnecessarily, from their front line duties.”

- 24 Mr Parkhill responded to Ms Moffatt’s three points as follows.

- 25 First, Ms Blanco plainly had regard to the functional assessment. In terms of reg. 2(3)(c) of the Regulations, the question was whether the Claimant’s method of transfer to and from the toilet endangered his health and safety. That was a matter for Ms Blanco’s judgment. Although the occupational therapist describes the Claimant’s transfer technique as “unsafe”, she did not advise that support or equipment was necessary either in the short or medium term and took the view that there was “not a barrier” to the claimant accessing the toilet independently. It was a matter for Ms Blanco to apply the legal test in the light of this information.

- 26 The Claimant’s practice of not eating or drinking whilst in the community also did not compel the conclusion that he had eligible needs. Similarly, his difficulty in using stairs might have meant that he could not use his home if there were stairs in it, but they were not – and he reported “no difficulties” with the three steps at the front of the hotel where he lived.

- 27 As to the HBF letter, it was a matter for Ms Blanco to decide what weight to give the assessments contained in it. It was not irrational for her to prefer her own assessment and that of the occupational therapist to that contained in the letter.

- 28 Second, the failure to provide an interpreter could only vitiate the assessment if on the material before Ms Blanco on 5 August 2019 it was *Wednesbury* unreasonable to proceed

without one. But Ms Blanco considered whether the Claimant needed an interpreter and judged that he did not. The occupational therapist independently formed the same view.

- 29 Third, the question whether an independent advocate was required also involved a judgment. The court should be cautious about relying on *ex post facto* evidence as to whether an independent advocate was required. In any event, the evidence relied upon includes the report of Dr Brady, who herself assessed the Claimant without any support from a third party. Overall, there is no basis for stigmatising as irrational Ms Blanco's conclusion that an independent advocate was not required.

## Discussion

- 30 It is obvious both from the language of the statute and from the authorities that a needs assessment involves a multi-factorial expert judgment. Like a judge, the assessor has to evaluate evidence from many sources, reach conclusions about that evidence and apply those conclusions in answering the questions posed by the statute. Even a judge does not have to produce a judgment which refers to every piece of evidence before him or her. As Hallett LJ pointed out in *Ireneschild*, assessments by social workers are not to be read like legal judgments. The temptation to parse them in the manner of an appellate court must be resisted. What is required is simply that the principal issues are considered, the correct legal questions asked and answered and a conclusion reached that is within the broad margin of discretion afforded to the assessor.

- 31 Ms Moffatt placed a great deal of emphasis on the contents of the functional assessment and, in particular, the finding that the Claimant “was observed to be independent with toilet transfers, however, his technique was unsafe, due to the space and design of the bathroom” in that he “holds onto basin and radiator to assist his transfers”. But this was a comment on one observation during the assessment. The overall recommendation was that “[d]uring the visit, [the Claimant] was observed as being and reported to be fully independent in all aspects of his activities of daily living”. The occupational therapist went on to say:

“a raised toilet seat and shower stool may be of minimal assistance to [the Claimant] based on his observed technique completing toilet transfers and [the Claimant's] reported challenges in the shower cubicle given his height. However, despite this equipment not currently being in situ, this is not a barrier to [the Claimant] independently accessing washing/toilet facilities or maintaining his personal hygiene”.

- 32 The functional assessment has to be read as a whole. If the occupational therapist had considered that an adapted bathroom was required to enable the Claimant to get to and from the toilet, she would no doubt have said so. She did not. Instead, she identified some equipment that might be of “minimal” assistance but said that, even without it, there was no barrier to the Claimant independently accessing toilet facilities. That being so, it was, in my judgment, open to Ms Blanco to conclude that there was “little or no difficulty/risk” in the Claimant using the toilet.
- 33 As to the evidence about the Claimant's continence, the occupational therapist recorded that the Claimant had told her about his need to avoid eating or drinking when in the community. But there was no evidence that this made him unable to make use of necessary facilities or services in the local community. On the contrary, he had developed

a strategy to enable him to do so. There was also positive evidence in the functional assessment that he “independently manages his own shopping tasks”. In the needs assessment, Ms Blanco recorded that the Claimant finds it difficult if he is unable to access the toilet in a timely way, but also that “[d]uring the time he has spent in the B&B no issues have been identified in relation to his toileting needs”. Contenance problems could, in principle, be such as to make someone unable to access facilities or services in the local community without significant distress or anxiety. Deciding whether they are such in any particular case involves an expert judgment. Ms Blanco’s judgment was that the Claimant’s difficulties were not of that kind. The conclusion was open to her on the evidence.

34 Likewise, the question whether the Claimant’s standing tolerance made him unable to achieve any of the outcomes specified in reg. 2(2) (read with reg. 2(3)) also involved a judgment. There was nothing in the evidence before Ms Blanco which undermined her assessment that it did not. The difficulty with stairs was expressly mentioned in the functional assessment. In some cases, such a difficulty might make a person unable to make use of his home safely. But, as the occupational therapist noted, the Claimant’s home had no stairs – and the difficulties were not such as to cause problems with the three steps outside the entrance to the hotel. There was also no evidence to suggest the difficulties gave rise to problems accessing facilities or services in the community.

35 As to the HBF letter, it is plain from the needs assessment that Ms Blanco considered this before reaching her decision. She has confirmed as much in her evidence in these proceedings. The weight to be given to it, however, was a matter for her. The same is true of Prof. Katona’s report. This was nearly three years old at the time of the needs assessment. Ms Blanco sought up-to-date information from the Claimant’s GP, which confirmed that the Claimant was only being treated for depression. Ms Blanco recorded HBF’s view that the Claimant had a learning disability, but noted that there was no medical diagnosis of this. All this is consistent with Ms Blanco reaching a properly informed independent view of her own. She was entitled to give greater weight to her own findings, and those of the occupational therapist she had asked to assess the Claimant, than those of the organisation which had referred him.

36 Turning now to the complaint about the failure to provide an interpreter on 5 August 2019, Ms Blanco considered this in terms. Even leaving aside her evidence in these proceedings, she recorded as follows on the needs assessment: “[The Claimant] is able to communicate his wishes and needs in Yoruba and English. Following several meetings with him, he has demonstrated the ability to make simple and complex decisions about his life.” The occupational therapist reached the same view independently:

“[The Claimant’s] understanding of English was sufficient to effectively communicate during the visit, despite reporting that English is not his first language. To maximise communication, the occupational therapist used non-complex/simple language/instructions and short sentences.”

37 Those undertaking needs assessments will frequently have to communicate with those whose English is less than fluent. That will often involve making an assessment about whether an interpreter is required. In this case, both Ms Blanco and the occupational therapist undertook such an assessment. Both reached the same view. This is an inauspicious start to a challenge alleging that the absence of an interpreter vitiated the assessment.



- 38 The other evidence in the case (produced in the context of the proceedings) tends to confirm that the Claimant was able to communicate at a basic level in English. At the meeting with Ms Wardale on 20 August 2019, the Claimant was told he could ask for an interpreter if he felt unable to express himself. He did not ask for an interpreter and was “able to answer most of the questions put to him”. Ms Dexter’s evidence is that the Claimant “struggles to retain and process more complex conversations in English which involve a detailed level of information, especially if the language is difficult or technical”. The occupational therapist made express reference to the importance of using simple language. Here, there is nothing to suggest the language required to answer Ms Blanco’s questions would be detailed or technical.
- 39 Finally, I turn to the complaint about the failure to provide an independent advocate. The evidence relied upon by the claimant in support of this ground of challenge comes from two psychologists, Robert Sellwood and Dr Brady. In both cases the evidence has been produced as part of these proceedings and was not before Ms Blanco when she conducted the assessment.
- 40 I would not exclude the possibility that such evidence might be admissible and even determinative if it showed that the individual could on no view participate meaningfully in an assessment without an independent advocate. In such a case, expert evidence produced *ex post facto* might be admissible to show that there had been a procedural defect vitiating the decision. But in this case, Dr Brady herself felt able to assess the Claimant without any intermediary or independent advocate. She said:
- “Although [the Claimant] struggles to retain the information from week to week, he did on each occasion retain enough information in the short term to understand the purpose of the appointment and the need for it in regards to his asylum case in a broad sense. I therefore judge that he had the capacity to consent to the assessment and proceeded with this.”
- 41 The condition in s. 67(4) – which triggers the right to an independent advocate – is that the individual will experience “substantial difficulty” in understanding, retaining, using or weighing information or in communicating his views, wishes or feelings. Assessing whether the threshold of “substantial difficulty” is passed in a particular case is a matter of judgment for the assessor.
- 42 In this case, the assessor judged that an independent advocate was not necessary. The fact a similar judgment was made by a psychologist in the context of the assessment she had been instructed to undertake makes it impossible to suggest that Ms Blanco reached a decision that was not properly open to her.

## **Conclusion**

- 43 For these reasons, the Claimant has not succeeded in demonstrating that the needs assessment was vitiated by any justiciable error. The claim will therefore be dismissed.