CHAPTER 8

Community care assessments

continued

Urgent cases

8.51 *R (AA) v Lambeth LBC* [2001] EWHC 741 (Admin), (2002) 5 CCLR 36
The court is entitled to order a local authority to provide services pending assessment, even where the local authority does not consider that the criteria for interim provision are met

8.52 *R (Alloway) v Bromley LBC* [2004] EWHC 2108 (Admin), (2005) 8 CCLR 61
Services may be provided pending completion of a re-assessment even in cases where there have been prior assessments

Nature of an assessment

8.53 *R v Avon CC ex p M* (1999) 2 CCLR 185, [1994] 2 FCR 259, QBD
An assessment must also encompass psychological needs and an authority had to have strong reasons for diverging from the cogently reasoned conclusions of a complaints panel

8.54 *R v Bristol CC ex p Penfold* (1997–8) 1 CCLR 315, QBD
An assessment must fully explore needs

8.55 *R v Haringey LBC ex p Norton* (1997–8) 1 CCLR 168, QBD
An assessment must explore social and recreational needs, not just social care needs

Assessment process

8.56 *R v North Yorkshire CC ex p William Hargreaves* (1997–8) 1 CCLR 104, QBD
Account must be taken of the service user's views even where they are difficult to ascertain, for whatever reason

8.57 *R v Islington LBC ex p Rixon* (1997–8) 1 CCLR 119, QBD
Assessments are central; they must comply in substance with statutory guidance and demonstrably have regard to relevant departmental guidance

8.58 *R v Kensington and Chelsea RLBC ex p Kujtim* (1999) 2 CCLR 340, CA
Local authorities are required to re-assess the possible needs of persons, even after their service has been terminated as a result of persistent, unequivocal misconduct, if it appears that they intend to conduct themselves properly

8.59 *R v Birmingham CC ex p Killigrew* (2000) 3 CCLR 109, QBD
An assessment contain an explanation for its decision and take into account up-to-date medical evidence and evidence from carers

8.60 *R v Newham LBC ex p Patrick* (2001) 4 CCLR 48, QBD
Referring a homeless woman with care needs to a housing charity did not amount to a discharge of the duty to assess or meet her needs

8.61 *R (A and B) v East Sussex CC and the Disability Rights Commission* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194
Local authorities were under a duty to assess the needs and take into account the preferences of persons even when those persons have substantial communication difficulties, including by consulting carers as to how it is best to communicate

8.62 *R (Heffernan) v Sheffield CC* [2004] EWHC 1377 (Admin), (2004) 7 CCLR 350
An assessment that was incompatible with the eligibility criteria was unlawful

8.63 *R (B) v Lambeth LBC* [2006] EWHC 639 (Admin), (2006) 9 CCLR 239
The function of judicial review is to pronounce upon the lawfulness or otherwise of public decision-making, not to investigate its merits

8.64 *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, (2007) 10 CCLR 243
It was unnecessary in the particular circumstances to allow the applicant to comment on a medical adviser's adverse report before completing the assessment; assessments are iterative and should not be too finely scrutinised

8.65 *R (AM) v Birmingham CC* [2009] EWHC 688 (Admin), (2009) 12 CCLR 407
A properly completed assessment also discharges the disability equality duty

8.66 *R (B) v Cornwall CC* [2009] EWHC 491 (Admin), (2009) 12 CCLR 381
A local authority must fully involve the service user and other relevant persons but is ultimately required to undertake its own assessment

8.67 *R (F, J, S, R) v Wirral BC* [2009] EWHC 1626 (Admin), (2009) 12 CCLR 452
Minor criticisms of assessments, not likely to result in changed services, should be brought through a complaints procedure

8.68 *R (SG) v Haringey LBC* [2015] EWHC 2579 (Admin), (2015) 18 CCLR 444
The failure to appoint an independent advocate, under section 67(2) of the Care Act 2014, for a vulnerable adult, who spoke no English and was illiterate, and who suffered from PTSD, insomnia, depression and anxiety, rendered the assessment unlawful

Introduction

8.1 The main purpose of an assessment is identified at paragraph 6.5 of the *Care and Support Statutory Guidance*:

> 6.5 The aim of the assessment is to identify what needs the person may have and what outcomes they are looking to achieve to maintain or improve their wellbeing. The outcome of the assessment is to provide a full picture of the individual's needs so that a local authority can provide an appropriate response at the right time to meet the level of the person's needs. This might range from offering guidance and information to arranging for services to meet those needs. The assessment may be the only contact the local authority has with the individual at that point in time, so it is critical that the most is made of this opportunity.

8.2 As this indicates, the purpose of an assessment goes well beyond identifying what 'eligible needs' an adult or carer might have, that a local authority is required to meet.

8.3 Experience shows that the main causes of litigation in this particular context are where a local authority:

- fails to start an assessment, even though the low statutory threshold has arisen, requiring an assessment;[1]
- fails to make immediately necessary provision pending completion of an assessment;[2]
- fails to complete an assessment within a reasonable period: paragraph 6.29 of the Guidance states that an assessment –

  > ... should be carried out over an appropriate and reasonable timescale, taking into account the urgency of needs and a consideration of any fluctuation in those needs,

  and that local authorities:

  > ... should inform the individual of an indicative timescale over which their assessment will be conducted and keep the individual informed throughout the assessment process;
- completes an unlawful assessment, on the basis of which inadequate services are offered, for example, by failing to involve relevant persons, failing to take into account relevant material or reaching unreasoned or irrational conclusions.[3]

8.4 That said, applications for judicial review of assessment-related failures generally only succeed when the claimant establishes a clear breach of the legal parameters (see chapter 27 for more on judicial review). The courts tend to:

- focus on the substance of the issue, rather than on the detail of what remains, even now, a highly complex and detailed scheme that cannot always be perfectly adhered to;

1 See, under the previous regime, *R v Bristol CC ex p Penfold* (1997–8) 1 CCLR 315.
2 See, under the previous regime, *R (AA) v Lambeth LBC* [2001] EWHC 741 (Admin), (2002) 5 CCLR 36.
3 See, again under the previous regime, *R v North Yorkshire CC ex p William Hargreaves* (1997–8) 1 CCLR 104 and *R v Islington LBC ex p Rixon* (1997–8) 1 CCLR 119.

- defer to professional evaluation and judgment, by adopting a relatively generous reading of the assessment material;
- manifest a strong appreciation that the function of judicial review is to correct legal errors and not to engage with factual disputes or ongoing monitoring of local authority activity, particularly bearing in mind the availability of alternative remedies (currently, alternative dispute resolution (ADR) and the statutory complaints procedure (see para 7.97 below)),[4] especially where the challenge is perceived to be fact-specific or focussed on relatively minor aspects of the assessment process or as being little more than a challenge to the merits of the local authority assessment (see paras 27.8–27.9 and 27.15–27.28 below). That tendency is likely to increase as a result of:
  - the enactment of section 31(2A) of the Senior Courts Act 1981, which provides that the High Court must refuse to grant relief 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred', unless there is an 'exceptional public interest' in granting relief (see para 3.8 above and para 27.10 below); and
  - the forthcoming statutory appeals procedure (see para 7.97 above).

8.5 The courts tend to involve themselves more readily on issues of interim relief, in order to hold the ring or create a situation of stability; where significant errors of law may be involved; where something appears to have gone seriously awry in the assessment process and where significant numbers of people may be involved; but again the court is likely to hold back when it perceives there to be a suitable alternative remedy and that tendency is likely to increase for the reasons set out above in para 8.4.

Legislative and administrative framework

8.6 The statutory duty to assess the needs of adults and carers, and in some cases, children, is set out in the Care Act 2014 at sections 9–13 (adults and carers), 58–59 (children's needs after they turn 18), 60–62 (children's carers) and 63–64 (young carers). Aspects of the Care Act 2014 that concern children/young persons are addressed later at 'children in transition' (see para 8.25 below).

8.7 In relation to adults and carers, the two crucial assessment steps, before the care planning process starts, are to:

- assess in writing the adult's needs for care and support (the 'needs assessment') and the carer's needs for support (the 'carer's assessment' (under sections 9–12); then
- (i) 'determine' in writing which of those needs are 'eligible needs'; (ii) 'consider' what could be done to meet those needs; (iii) 'ascertain' whether the adult wishes the local authority to meet those needs; and

4 See, in particular, *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, (2007) 10 CCLR 243 and *R (F, J, S, R) v Wirral BC* [2009] EWHC 1626, (2009) 12 CCLR 452.

(iv) 'establish' whether the adult/carer is ordinarily resident in the local authority's area (section 13).

Assessment key features

8.8 Key features of the statutory duty to assess adults and carers, found in the Care Act 2014 itself, are:

A low threshold

- the threshold is low: the duty to assess arises 'where it appears to a local authority' that an adult, or carer, 'may have needs' for 'care and support' (adult) or 'support' (carer) (sections 9(1) and 10(1)). The possibility that a need may exist must no doubt be a realistic one, but the threshold is on any view low;
- the duty requires an assessment to be completed 'regardless of the authority's view' of 'the level of the adult's needs for care and support'/ 'the level of the carer's needs for support' or 'the level of the adult's financial resources'/'the level of the carer's financial resources or of those of the adult needing care' (sections 9(2) and 10(4)). In other words, the duty to assess will arise even though –
  - it seems plain that none of the adult's or carer's needs will amount to 'eligible needs' or, indeed, needs that the local authority is at all likely to exercise a power to address;
  - it seems plain that the adult's or carer's means will exceed the 'financial limit' (see paras 11.10–11.15 below).

A free service

- A local authority may not charge for undertaking any form of assessment under the Care Act 2014 (see para 11 8 below).

Matters to be covered

- the assessment of an adult must include an assessment of the impact of the adult's needs for care and support on their 'well-being' (as defined in section 1(2)), the 'outcomes' the adult wishes to achieve in day-to-day life and whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes (section 9(4)). This emphasises the importance of assessing what it is that the adult wants to do with his or her life;
- the assessment of a carer must include an assessment of whether the carer is able, and is likely to continue to be able, to provide care; whether they are willing, and are likely to continue to be willing to do so; the impact of the carer's needs for support on their 'well-being' (as defined in section 1(2)); the 'outcomes' the carer wishes to achieve in day-to-day life and whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes (section 10(5)); and the local authority must take into account whether the carer works, or wishes to do so and is participating in education, training or recreation, or wishes to do so (section 10(6)). This emphasises the

importance of ensuring that carers do not become trapped in a caring role.

Process

Legislation

- the local authority must *involve* the adult and any carer and any person whom the adult asks to be involved or, where the adult lacks capacity, who appears to the authority to be interested in the adult's welfare (sections 9(5) and 10(7)). The importance of ensuring effective participation and involvement is further emphasised and provided for in regulation 3 of the Care and Support (Assessment) Regulations 2014 and at paragraphs 6.30–6.53 of the *Care and Support Statutory Guidance*;
- it is implicit in the Act that, in assessing an adult's needs, the local authority must disregard any support being provided by a carer, although such support (willingly provided) may be taken into account later, during the care and support planning stage and that is spelled out at paragraph 6.15 of the Guidance;
- when carrying out an assessment, a local authority must also consider whether matters other than the provision of care and support might contribute to the achievement of the outcomes the adult/carer wishes to achieve and whether the adult/carer might benefit from 'anything which might be available in the community', under section 2 (preventative measures) or under section 4 (information and advice) (section 9(6) and section 10(8));
- the local authority is required to provide and retain 'a written record' of adult's and carer's assessments (section 12(3) and (4));
- a local authority may undertake 'combined assessments' (adult's and carer's) and/or 'joint assessments' (with other agencies) (section 12(5), (6) and (7));
- in the case of an adult the local authority must make, and provide, a written and reasoned determination 'whether any of the needs meet the eligibility criteria' (section 13(1) and (2)) and, if so, it must (i) 'consider' 'what could be done to meet those needs'; (ii) 'ascertain' 'whether the adult wants to have those needs met by the local authority' and (iii) 'establish' 'whether the adult is ordinarily resident in the local authority's area' (section 13(2));
- in the case of a carer the local authority must make a written and reasoned determination 'whether any of the needs meet the eligibility criteria' (section 13(1)) and, if so, it must (i) 'consider' 'what could be done to meet those needs'; and (ii) 'establish' 'whether the adult needing care is ordinarily resident in the local authority's area' (section 13(3));
- where none of the adult's needs meet the eligibility criteria, the local authority must give him or her written advice and information about 'what can be done to meet or reduce the needs' and 'to prevent or delay the development of needs for care and support, or the development of needs for support, in the future' (section 13(4) and (5));
- section 67 provides that where an individual would experience substantial difficulty in participating in the assessment process, the local authority must appoint an independent advocate. Paragraph 6.23 of

the Guidance states that from the time of first contact 'local authorities should consider whether the individual would have substantial difficulty in being involved in the assessment process and if so consider the need for independent advocacy' and paragraphs 6.33–6.34 and Chapter 7 contain further advice. The Care and Support (Independent Advocacy Support) (No 2) Regulations 2014, regulate both local authorities and advocates;[5]

- a local authority need not carry out an assessment when it is refused (section 11(1)) although it remains under a duty to do so when the adult lacks capacity to refuse the assessment and the local authority is satisfied that it would be in their best interests to carry out the assessment, or that they are experiencing or at risk of abuse or neglect (section 11(2)). Otherwise, the obligation to carry out an assessment revives when, after a refusal, an assessment is requested, or the circumstances change (sections 11(3), (4), (5) and (7));
- assessments may be delegated (section 79(1); paragraph 6.99 and Chapter 18 of the Guidance).

Regulations

8.9 The assessment duties in the Care Act 2014 are supplemented by duties found in the Care and Support (Assessment) Regulations 2014, which provide that:

- local authorities are required to facilitate a 'supported self-assessment' where the adult or child concerned wishes and has the capacity/competence (regulation 2);
- assessments are to be conducted in a manner which is 'appropriate and proportionate to the needs and circumstances of the individual to whom it relates' and 'ensures that the individual is able to participate in the process as effectively as possible' (regulation 3);
- where the level of an individual's needs fluctuates, the local authority must take into account their circumstances over an appropriate period of time (regulation 3(3) of the Care and Support (Assessment) Regulations 2014 and paragraphs 6.58–6.59 of the Guidance);
- the local authority must provide information about the assessment process, wherever practicable before it commences (regulation 3(4) and (5));
- assessments must consider the impact of the needs of the individual on 'any person who is involved in caring for the individual' and 'any person the local authority considers to be relevant'; they must also consider the impact of providing care on child carers (regulation 4);
- local authorities must ensure that every person undertaking assessments 'has the skills, knowledge and competence to carry out the assessment in question' and 'is appropriately trained' and, where appropriate, seeks an expert view (regulation 5). Further 'An assessment which relates to an individual who is deafblind must be carried out by a person who has specific training and expertise relating to individuals

5 This has teeth: an assessment completed without having engaged an independent advocate, in breach of section 67, was held to be unlawful in *R (SG) v Haringey LBC* [2015] EWHC 2579 (Admin), (2015) 18 CCLR 444.

who are deafblind' (regulation 6). These provisions, together with the Guidance, also in effect require persons who assess adults with autism to have specialist training (see paragraphs 6.83–6.88 of the Guidance);
- local authorities must refer individuals to the relevant NHS body where it appears that they may be eligible for NHS continuing healthcare (regulation 7).

Guidance

8.10 Key features of the *Care and Support Statutory Guidance* (March 2016), Chapters 6 and 7 are:

- the assessment process (paragraphs 6.1–6.43);
- supported self-assessments (paragraphs 6.44–6.53);
- cases where a safeguarding issue arises (paragraphs 6.54–6.57);
- fluctuating needs and prevention (paragraphs 6.58–6.62);
- the person's strengths and capabilities (paragraphs 6.63–6.64);
- the 'whole family approach' (paragraphs 6.65–6.71);
- combined and integrated assessments (paragraphs 6.72–6.77);
- NHS continuing healthcare cases (paragraphs 6.78–6.81);
- roles, training, record-keeping and delegation (paragraphs 6.82–6.97);
- eligibility and service provision (paragraphs 6.98–6.132);
- independent advocacy (Chapter 7).

8.11 Paragraphs 6.87 of the *Care and Support Statutory Guidance* (March 2016) requires additional guidance to be taken into consideration:

- Think Autism (2014);
- Fulfilling and Rewarding Lives (2014 Update);
- the strategy for adults with autism in England.

8.12 Accordingly, before one even embarks on the substance of an assessment a number of critical questions arise:

- is the statutory threshold for an assessment met?
- is the person undertaking the assessment suitably qualified to do so? Is an expert view required?
- how are all the relevant people going to be properly involved?
- should there be a referral to the NHS?
- should there be a supported self-assessment?
- should there be an independent advocate?
- should there be a combined or integrated assessment?
- how long should the process take?

Eligibility

8.13 The Care Act 2014 sweeps away the long-standing entitlement of each local authority to determine its own local eligibility criteria, albeit, in recent years, by reference to nationally applicable banding criteria, based on 'Critical', 'Substantial', 'Moderate' and 'Low' needs, as defined. Instead, there are now fixed, nationally applicable eligibility criteria, designed to end the worst features of the 'postcode lottery' and facilitate the 'portability' of care packages by establishing a minimum level of provision.

8.14 The new national eligibility criteria are to be found in the Care and Support (Eligibility Criteria) Regulations 2015. Regulation 2 sets out the eligibility criteria for adults, regulation 3 for carers:

Needs which meet the eligibility criteria: adults who need care and support

2(1) 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.

(2) The specified outcomes 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.

(3) 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.

(4) Where the level of an adult's needs fluctuates, in determining whether the adult's needs meet the eligibility criteria, the local authority must take into account the adult's circumstances over such period as it considers necessary to establish accurately the adult's level of need.

Needs which meet the eligibility criteria: carers

3(1) A carer's needs meet the eligibility criteria if–
- (a) the needs arise as a consequence of providing necessary care for an adult;
- (b) the effect of the carer's needs is that any of the circumstances specified in paragraph (2) apply to the carer; and
- (c) as a consequence of that fact there is, or is likely to be, a significant impact on the carer's well-being.

(2) The circumstances specified in this paragraph are as follows–
- (a) the carer's physical or mental health is, or is at risk of, deteriorating;
- (b) the carer is unable to achieve any of the following outcomes–
  - (i) carrying out any caring responsibilities the carer has for a child;

(ii) providing care to other persons for whom the carer provides care;
(iii) maintaining a habitable home environment in the carer's home (whether or not this is also the home of the adult needing care);
(iv) managing and maintaining nutrition;
(v) developing and maintaining family or other personal relationships;
(vi) engaging in work, training, education or volunteering;
(vii) making use of necessary facilities or services in the local community, including recreational facilities or services; and (viii) engaging in recreational activities.

(3) For the purposes of paragraph (2) a carer is to be regarded as being unable to achieve an outcome if the carer–
(a) is unable to achieve it without assistance;
(b) is able to achieve it without assistance but doing so causes the carer significant pain, distress or anxiety; or
(c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the carer, or of others.

(4) Where the level of a carer's needs fluctuates, in determining whether the carer's needs meet the eligibility criteria, the local authority must take into account the carer's circumstances over such period as it considers necessary to establish accurately the carer's level of need.

8.15 Advice about these provisions is to be found at Chapter 6 of the *Care and Support Statutory Guidance*. Paragraphs 6.103 and 6.104 are critical:

6.103 The second condition that authorities must consider is whether the adult is 'unable' to achieve two or more of the outcomes set out in the regulations. Authorities must also be aware that the regulations provide that 'being unable' to achieve an outcome includes any of the following circumstances, where the adult:

- is unable to achieve the outcome without assistance. This would include where an adult would be unable to do so even when assistance is provided. It also includes where the adult may need prompting for example, some adults may be physically able to wash but need reminding of the importance of personal hygiene;
- is able to achieve the outcome without assistance but doing so causes the adult significant pain, distress or anxiety. For example, an older person with severe arthritis may be able to prepare a meal, but doing so will leave them in severe pain and unable to eat the meal;
- is able to achieve the outcome without assistance, but doing so endangers or is likely to endanger the health or safety of the adult, or of others – for example, if the health or safety of another member of the family, including any child, could be endangered when an adult attempts to complete a task or an activity without relevant support;
- is able to achieve the outcome without assistance but takes significantly longer than would normally be expected. For example, an adult with a physical disability is able to dress themselves in the morning, but it takes them a long time to do this, leaves them exhausted and prevents them from achieving other outcomes.

6.104 The Eligibility Regulations set out a range of outcomes. Local authorities must consider whether the adult is unable to achieve two or more of these outcomes when making the eligibility determination. The following section of the guidance provides examples of how local authorities should consider each outcome set out in the Eligibility Regulations (which do not

constitute an exhaustive list) when determining the adult's eligibility for care and support:

(a) managing and maintaining nutrition – local authorities should consider whether the adult has access to food and drink to maintain nutrition, and that the adult is able to prepare and consume the food and drink.
(b) maintaining personal hygiene – local authorities should, for example, consider the adult's ability to wash themselves and launder their clothes.
(c) managing toilet needs – local authorities should consider the adult's ability to access and use a toilet and manage their toilet needs.
(d) being appropriately clothed – local authorities should consider the adult's ability to dress themselves and to be appropriately dressed, for instance in relation to the weather to maintain their health.
(e) being able to make use of the home safely – local authorities should consider the adult's ability to move around the home safely, which could for example include getting up steps, using kitchen facilities or accessing the bathroom. This should also include the immediate environment around the home such as access to the property, for example steps leading up to the home.
(f) maintaining a habitable home environment – local authorities should consider whether the condition of the adult's home is sufficiently clean and maintained to be safe. A habitable home is safe and has essential amenities. An adult may require support to sustain their occupancy of the home and to maintain amenities, such as water, electricity and gas.
(g) developing and maintaining family or other personal relationships – local authorities should consider whether the adult is lonely or isolated, either because their needs prevent them from maintaining the personal relationships they have or because their needs prevent them from developing new relationships.
(h) accessing and engaging in work, training, education or volunteering – local authorities should consider whether the adult has an opportunity to apply themselves and contribute to society through work, training, education or volunteering, subject to their own wishes in this regard. This includes the physical access to any facility and support with the participation in the relevant activity.
(i) making use of necessary facilities or services in the local community including public transport and recreational facilities or services – local authorities should consider the adult's ability to get around in the community safely and consider their ability to use such facilities as public transport, shops or recreational facilities when considering the impact on their wellbeing. Local authorities do not have responsibility for the provision of NHS services such as patient transport, however they should consider needs for support when the adult is attending healthcare appointments.
(j) carrying out any caring responsibilities the adult has for a child – local authorities should consider any parenting or other caring responsibilities the person has. The adult may for example be a step-parent with caring responsibilities for their spouse's children.

8.16 In addition, the Social Care Institute for Excellence has published advice about decision-making on eligibility.[6]

6 www.scie.org.uk/care-act–2014/assessment-and-eligibility/eligibility/.

Different types of assessments

8.17 The Guidance sets out some of the different types of assessment process that a local authority might decide to adopt as the most appropriate/proportionate in a particular case:

> 6.3 An 'assessment' must always be appropriate and proportionate. It may come in different formats and can be carried out in various ways, including but not limited to:
>
> - A face-to-face assessment between the person and an assessor, whose professional role and qualifications may vary depending on the circumstances, but who must always be appropriately trained and have the right skills and knowledge.
> - A supported self-assessment, which should use the same assessment materials as a face-to-face assessment, but where the person completes the assessment themselves and the local authority assures itself that it is an accurate reflection of the person's needs (for example, by consulting with other relevant professionals and people who know the person with their consent).
> - An online or phone assessment, which can be a proportionate way of carrying out assessments (for example where the person's needs are less complex or where the person is already known to the local authority and it is carrying out an assessment following a change in their needs or circumstances).
> - A joint assessment, where relevant agencies work together to avoid the person undergoing multiple assessments (including assessments in a prison, where local authorities may need to put particular emphasis on cross-agency cooperation and sharing of expertise).
> - A combined assessment, where an adult's assessment is combined with a carer's assessment and/or an assessment relating to a child so that interrelated needs are properly captured and the process is as efficient as possible.

8.18 Regulation 2 of the Care and Support (Assessment) Regulations 2014 requires local authorities proposing to undertake an assessment to ascertain whether the subject wishes it to be a supported self-assessment (reg 2(2)) and, if so, the assessment must take that form, so long as the subject has the capacity to engage (reg 2(3)): supported self-assessments are addressed in the Guidance at paragraphs 6.44–6.53.

8.19 Once the person has completed the assessment, 'the local authority must ensure that it is an accurate and complete reflection of the person's needs, outcomes, and the impact of needs on their well-being' (paragraph 6.46 of the Guidance). This is consistent with the approach established under the earlier regime, under which it was clearly recognised that the ultimate responsibility for ensuring that there was an adequate needs assessment lay with the local authority.[7] See also:

> 6.47 In assuring self-assessments local authorities may consider it useful to seek the views of those who are in regular contact with the person self-assessing, such as their carer(s) or other appropriate people from their support network, and any professional involved in providing care such as a housing support officer, a GP, a treating clinician, a district nurse, a rehabilitation officer or relevant prison staff. In doing this, the local authority

7 *R (B) v Cornwall CC* [2009] EWHC 491 (Admin), (2009) 12 CCLR 381 at para 68.

should first seek the person's consent. This may be helpful in allowing local authorities to build an understanding of the individual's desires, outcomes, needs, and the impact on their wellbeing.

Other publicly available material on assessment and care planning

8.20 The Department of Health's Factsheet 3 deals with assessing needs and determining eligibility.[8]

8.21 The Social Care Institute for Excellence has published a range of resources to support local authority staff, social workers and others involved in assessment and eligibility.[9]

8.22 The Social Care Institute for Excellence has also published advice about independent advocacy.[10] There is a briefing note by the Department of Health, Association of Directors of Adult Social Care Services (ADASS) and the Local Government Association (LGA) on independent advocacy.[11]

8.23 It should also be noted that the Mental Capacity Act 2005, and access to an Independent Mental Capacity Advocate, will apply for all those who may lack capacity: see chapter 23 below.

The previous legislative scheme

8.24 The statutory basis for assessments of adults was section 47 of the National Health Service and Community Care Act 1990 which provided, inter alia, immediately before its repeal:

Assessment of needs for community care services

47(1) Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority–

(a) shall carry out an assessment of his needs for those services; and

(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.

Children in transition

8.25 The statutory machinery relevant to the transition between children's and adult social care is located at:

- sections 58–66 of the Care Act 2014;
- the Care and Support (Children's Carers) Regulations 2015;
- Chapter 16 of the Care and Support Statutory Guidance.

8 www.gov.uk/government/publications/care-act–2014-part–1-factsheets/care-act-factsheets-–2#factsheet–3-assessing-needs-and-determining-eligibility).

9 www.scie.org.uk/care-act–2014/assessment-and-eligibility/).

10 www.scie.org.uk/care-act–2014/advocacy-services/commissioning-independent-advocacy/duties/independent-advocacy-care-act.asp.

11 www.local.gov.uk/documents/10180/5756320/Briefing+note+V1+for+Advocacy+providers++final_LPlogo.pdf/4f1c20ad–3933–4291-b842–558511d8836f.

8.26 The Care Act 2014 seeks to help preparation for adulthood by focussing on transitional planning for:

- 'children' (sections 58–59, 65–66);
- 'child's carers' (sections 60–62, 65–66); and
- 'young carers' (sections 63–64, 65–66).

Children

8.28 The duty to assess a child's need for care and support under the Care Act 2014 after becoming 18 is as follows:

Assessment of a child's needs for care and support

58(1) Where it appears to a local authority that a child is likely to have needs for care and support after becoming 18, the authority must, if it is satisfied that it would be of significant benefit to the child to do so and if the consent condition is met, assess–

(a) whether the child has needs for care and support and, if so, what those needs are, and

(b) whether the child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be.

8.29 The '*consent condition*' is met if:

- a child with capacity consents;
- or it is in the best interests of an incapacitated child; except that
- the local authority must always undertake an assessment if it considers that the child is experiencing or at risk of abuse or neglect –

(sections 58(3)–(4)).

8.30 A local authority must give written reasons for any refusal to undertake a '*child's needs assessment*' under this section at the request of a parent or carer (sections 58(5)–(8)).

8.31 It is fundamental to a '*child's needs assessment*' that the local authority does, as required by section 58(1), assess:

- whether the child currently has needs for care and support and, if so, what those needs are; and
- whether the child is likely to have needs for care and support after the child turns 18 and, if so, what those needs are likely to be.

8.32 However, a '*child's needs assessment*' requires far more than that. By virtue of section 59:

Child's needs assessment: requirements etc.

59(1) A child's needs assessment must include an assessment of–

(a) the impact on the matters specified in section 1(2) of what the child's needs for care and support are likely to be after the child becomes 18,

(b) the outcomes that the child wishes to achieve in day-to-day life, and

(c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.

...

(3) When carrying out a child's needs assessment, a local authority must also consider whether, and if so to what extent, matters other than the provision of care and support could contribute to the achievement of the outcomes that the child wishes to achieve in day-to-day life.

(4) Having carried out a child's needs assessment, a local authority must give the child–
  (a) an indication as to whether any of the needs for care and support which it thinks the child is likely to have after becoming 18 are likely to meet the eligibility criteria (and, if so, which ones are likely to do so), and
  (b) advice and information about–
    (i) what can be done to meet or reduce the needs which it thinks the child is likely to have after becoming 18;
    (ii) what can be done to prevent or delay the development by the child of needs for care and support in the future.

8.33 In undertaking the assessment, the local authority:

- must involve the child, their parents and other relevant persons (section 59(2));
- must provide the section 59(4) advice and information to the parents when the child lacks capacity; and
- may treat the assessment as a 'needs assessment' once the child turns 18.

(section 59(6)–(7)).

Child's carers

8.34 A '*child's carer'* is an adult (including one who is a parent of the child) who provides or intends to provide care for the child, usually when that is otherwise than under a contract or as voluntary work (section 60(7)–(9)).

8.35 The duty to undertake a *'child's carer's assessment'* is found at section 60 of the Care Act 2014 and arises in similar circumstances to the duty to undertake a children's transitional assessment (see above): the question is, essentially, whether the child's carer is likely to have needs for support under the Care Act 2014 after the child becomes 18 and it would be of significant benefit to the carer to undertake an advance assessment.

8.36 It is a fundamental requirement, imposed by section 60(1), that a '*child's carer's assessment'* assesses whether the carer has needs for support and, if so, what those needs are and whether the carer is likely to have needs for support after the child becomes 18 and, if so, what those needs are likely to be.

8.37 Again, however, far more is required:

Child's carer's assessment: requirements etc.

61(1) A child's carer's assessment must include an assessment of–
  (a) whether the carer is able to provide care for the child and is likely to continue to be able to do so after the child becomes 18,
  (b) whether the carer is willing to do so and is likely to continue to be willing to do so after the child becomes 18,
  (c) the impact on the matters specified in section 1(2) of what the carer's needs for support are likely to be after the child becomes 18,
  (d) the outcomes that the carer wishes to achieve in day-to-day life, and
  (e) whether, and if so to what extent, the provision of support could contribute to the achievement of those outcomes.

(2) A local authority, in carrying out a child's carer's assessment, must have regard to–
  (a) whether the carer works or wishes to do so, and

(b) whether the carer is participating in or wishes to participate in education, training or recreation.

...

(4) When carrying out a child's carer's assessment, a local authority must also consider whether, and if so to what extent, matters other than the provision of support could contribute to the achievement of the outcomes that the carer wishes to achieve in day-to-day life.

(5) Having carried out a child's carer's assessment, a local authority must give the carer–

(a) an indication as to whether any of the needs for support which it thinks the carer is likely to have after the child becomes 18 are likely to meet the eligibility criteria (and, if so, which ones are likely to do so), and

(b) advice and information about–

(i) what can be done to meet or reduce the needs which it thinks the carer is likely to have after the child becomes 18;

(ii) what can be done to prevent or delay the development by the carer of needs for support in the future.

8.38 The process is similar to the process for '*child's needs assessments*' (see sections 61(3) and (5)–(8)) and, ultimately, the local authority has a power to meet the '*child's carer's*' needs for support (section 62).

Young carers

8.39 A '*young carer* is '*a person under 18 who provides or intends to provide care for an adult*', usually otherwise than under a contract or as voluntary work (sections 63(6)–(8)).

8.40 The duty to undertake a '*young carer's assessment'* arises when it appears that a young carer is likely to have needs for support after turning 18 and the local authority is satisfied that it would of significant benefit to the young carer to undertake an advance assessment) (section 63(1)).

8.41 The assessment is of whether the young carer is likely to have needs for support after turning 18 and, if so, what those needs are likely to be (section 63(1)). However, in addition:

Young carer's assessment: requirements etc.

64(1) A young carer's assessment must include an assessment of–

(a) whether the young carer is able to provide care for the person in question and is likely to continue to be able to do so after becoming 18,

(b) whether the young carer is willing to do so and is likely to continue to be willing to do so after becoming 18,

(c) the impact on the matters specified in section 1(2) of what the young carer's needs for support are likely to be after the young carer becomes 18,

(d) the outcomes that the young carer wishes to achieve in day-to-day life, and (e) whether, and if so to what extent, the provision of support could contribute to the achievement of those outcomes.

(2) A local authority, in carrying out a young carer's assessment, must have regard to–

(a) the extent to which the young carer works or wishes to work (or is likely to wish to do so after becoming 18),

(b) the extent to which the young carer is participating in or wishes to participate in education, training or recreation (or is likely to wish to do so after becoming 18).

...

(4) When carrying out a young carer's assessment, a local authority must also consider whether, and if so to what extent, matters other than the provision of support could contribute to the achievement of the outcomes that the young carer wishes to achieve in day-to-day life.

(5) Having carried out a young carer's assessment, a local authority must give the young carer–

(a) an indication as to whether any of the needs for support which it thinks the young carer is likely to have after becoming 18 are likely to meet the eligibility criteria (and, if so, which ones are likely to do so), and

(b) advice and information about–

(i) what can be done to meet or reduce the needs for support which it thinks the young carer is likely to have after becoming 18;

(ii) what can be done to prevent or delay the development by the young carer of needs for support in the future.

8.42 The process is similar to that for '*child's needs assessments*' and '*child's carers' assessments*' (sections 64(3) and (6)–(8)).

General

8.43 Section 65 contains provision for combining '*child's needs assessments*', '*young carer's assessments*' and '*child's carers' assessments*' with each other and with other assessments.

8.44 Section 66 inserts section 17ZH and 17ZI at the end of section 17 of the Children Act 1989 which, in essence, requires local authorities to continue to provide services under section 17 of the Children Act 1989 in cases where they are under a duty to undertake a '*child's needs assessment*', '*young carer's assessment*' or '*child's carers' assessment*' and certain other cases.

8.45 Section 66 also inserts section 2A into the Chronically Sick and Disabled Persons Act 1970, which requires there to be continued provision of services under section 2 of the 1970 Act to disabled children, until the completion of transitional planning under the Care Act 2014, in cases where such transitional planning is required and certain other cases.

8.46 There is detailed practical guidance in Chapter 16 of the *Care and Support Statutory Guidance*, which is particularly useful as to:

- the relationship between planning under the Care Act 2014 and planning for children with special educational needs, who will be subject to an Education, Health and Care (EHC) plan; and
- the duty of co-operation, in particular between children's and adults' professionals.

8.47 Section 23CZA, added by the Children and Families Act 2014, allows local authorities to make arrangements whereby a '*former relevant child*' may continue to live with their foster carer up to the age of 21:

- the statutory guidance in the *Children Act 1989 Regulations and Guidance, Volume 3: planning transition to adulthood for care leavers*[12] has been updated accordingly; and
- The Children's Partnership has published *Staying Put: a good practice guide*.[13]

Cases

Threshold for assessments

8.48 *R v Bristol CC ex p Penfold* (1997–8) 1 CCLR 315, QBD

The threshold for an assessment is low and the duty arises irrespective of the likelihood of resources being available to meet the need

Facts: Ms Penfold was a homeless single parent who suffered from anxiety and depression. She was no longer entitled to assistance under the Housing Acts. Bristol declined to assess Ms Penfold's needs under the National Health Service and Community Care Act 1990, on the ground that she did not appear to be a person who 'may' need services and, in any event, there was no realistic prospect of the local authority providing her with accommodation under any of the community care legislation, given its straightened resources and the applicant's accommodation history.

Judgment: Scott Baker J held (at 322E) as follows:

> It seems to me that Parliament has expressed section 47(1) in very clear terms. The opening words of the subsection, the first step in the three stage process, provide a very low threshold test. The reference is to community care services the authority *may* provide or arrange for. And the services are those of which the person *may* be in need. If that test is passed it is mandatory to carry out the assessment. The word *shall* emphasises that this is so ... As a matter of logic, it is difficult to see how the existence or otherwise of resources to meet a need can determine whether or not that need exists ... Even if there is no hope from the resources point of view of meeting any needs identified in the assessment, the assessment may serve a useful purpose in identifying for the local authority unmet needs which will help it to plan for the future ... Resource implications in my view play no part in the decision whether to carry out an assessment.

Comment: the principle has been encapsulated in the Care Act 2014 and its machinery but the case remains a useful authority as to what a low threshold means in practice.

8.49 *R v Berkshire CC ex p P* (1997–8) 1 CCLR 141, QBD

The duty to assess arises whenever there is a power to make provision

Facts: P lived in a care home in London but sought an assessment from Berkshire, where he used to live. A dispute arose as to where P was ordinarily resident and Berkshire declined to assess P's needs on the ground that he was not ordinarily resident in Berkshire.

12 www.gov.uk/government/uploads/system/uploads/attachment_data/file/397649/CA1989_Transitions_guidance.pdf.

13 www.ncb.org.uk/media/1154341/staying_put.pdf.

Judgment: Laws J held that the duty to assess arose whenever a local authority had power to provide services to a person who it appeared might need them and that, since a local authority was entitled to provide services to a person who was ordinarily resident in another area, the duty to assess had arisen.

8.50 *R (NM) v Islington LBC* [2012] EWHC 414 (Admin), (2012) 15 CCLR 563

There is no duty to assess a prisoner until the Parole Board has decided in principle they should be released, or MAPPA needs information about what care services would be available

Facts: NM had a significant learning disability and was in prison. The Parole Board had made directions about the making of MAPPA (multi agency public protection) arrangements but no such arrangements had as yet been initiated. NM sought a community care assessment from Islington, so as to inform the Parole Board as to what support would be available to him on release. Islington declined to undertake such an assessment.

Judgment: Sales J held that, since no relevant MAPPA process had as yet been undertaken, the prospect of NM's release was as yet too speculative for the duty to assess to arise. A duty would arise when the Parole Board takes a decision in principle that someone should be released and, also, when there has been a full MAPPA consideration with an indication that community care services would be likely to be required and the Parole Board needs more information about that.

Comment: nothing in the Care Act 2014 seems to displace this somewhat restrictive approach.

Urgent cases

8.51 *R (AA) v Lambeth LBC* [2001] EWHC 741 (Admin), (2002) 5 CCLR 36

The court is entitled to order a local authority to provide services pending assessment, even where the local authority does not consider that the criteria for interim provision are met

Facts: AA, a destitute asylum-seeker, got into dire straits and applied to Lambeth for urgent assistance. Lambeth submitted that, notwithstanding the terms of section 47(5) of the National Health Service and Community Care Act 1990, it had no power to provide interim assistance under section 21 of the National Assistance Act (NAA) 1948 unless and until it had completed an assessment of need: section 47 could not affect that.

Judgment: Forbes J held that Lambeth had statutory power to provide services before completing an assessment, because section 47(5) simply spelled out what had always been implicit in section 21, but, in any event, the court had jurisdiction to grant an interim injunction in the exercise of its general discretion to grant interim relief (under what is now section 37 of the Senior Courts Act 1981).

Comment: section 19(3) of the Care Act 2014 contains a wider power to provide services in urgent cases, before completing an assessment but it is still contingent on the local authority forming the view that the situation is urgent; therefore, the overarching power of the High Court to grant interim relief remains important.

8.52 *R (Alloway) v Bromley LBC* [2004] EWHC 2108 (Admin), (2005) 8 CCLR 61

Services may be provided pending completion of a re-assessment even in cases where there have been prior assessments

Facts: Mr Alloway was a 19-year-old man who was autistic and suffered from learning disabilities. Bromley's community care assessment concluded that he should be placed at Hesley Village and College. However, the Council then purported to place him at a cheaper option at Robinia Care. However, Bromley did not assert that its decision-making was affected by, or justified by, resources considerations.

Judgment: Crane J quashed this decision and said this at paragraphs 80–82:

> 80. I say in parenthesis that if any of the facilities mentioned can be urged to keep open the offers made, then that would certainly be desirable and the court's view about that can be conveyed to them.
>
> 81. I note in passing that it would be open to the defendant, if it so wished, to decide that a new assessment was required in all the circumstances, and that it needed to act on a temporary basis under section 47, subsection (5) and subsection (6). A temporary placement could be made in those circumstances. But that, is one of the matters that I simply bring to the local authority's attention.
>
> 82. It seems to me, and it is difficult to reach a conclusion about the best way ahead, so far as remedy is concerned, that the only remedy I need to grant is the quashing of the two decisions, if that is what they are, which I have mentioned. It does not seem to me, at the moment, that any declaration is required. In my view the judgment will speak for itself and, subject to counsel's submissions, I would propose merely to make an order quashing the decisions made so far and to leave the judgment to speak rather than to grant declarations. The other remedies sought I refuse.

Nature of an assessment

8.53 *R v Avon CC ex p M* (1999) 2 CCLR 185, [1994] 2 FCR 259, QBD

An assessment must also encompass psychological needs and an authority had to have strong reasons for diverging from the cogently reasoned conclusions of a complaints panel

Facts: a social services complaints review panel concluded that, as a result of his Down's Syndrome, M had developed the entrenched view that it was necessary for him to live in residential accommodation at a place called Milton Heights, such that to place him elsewhere would cause serious damage to his health; thus, he had a strong psychological need to live there. The panel recommended a placement at Milton Heights for three years, to allow for M to develop his living skills and be prepared to

move elsewhere. In response, Avon concluded that whilst M had a strong personal preference to live at Milton Heights, his needs could be met at Berwick Lodge, which was substantially cheaper.

Judgment: Henry J held that Avon was under a duty to meet needs, including psychological needs of the kind that the panel held existed in this case and that Avon had not had *Wednesbury* rational reasons for disagreeing with the panel's assessment:

> Examining their reasons in detail, the following comments can be made:
> - The panel correctly found that in law the assessment must be based on current needs.
> - The panel correctly found that in law need is clearly capable of including psychological need. In particular, that must be so when (as it was on the evidence before them) that psychological need was contributed to by the congenital Down's Syndrome condition itself. I have recited the evidence that the panel had had as to that. That evidence was all one way once Mr Passfield had agreed that he was not an expert on Down's Syndrome.
> - Next, the panel had found that M's entrenched position was part of his psychological need. This is the crucial finding of fact. It is arrived at against the background, recited in these reasons, that M would not be forced to live anywhere against his will; that the only place he would presently consider would be Milton Heights, that that entrenched position was contributed to by the Down's Syndrome, and that his present needs included a need for a period of stability.
>
> ...
>
> But the making of the final decision did not lie with the review panel. It lay with the social services committee. I would be reluctant to hold (and do not) that in no circumstances whatsoever could the social services committee have overruled the review panel's recommendation in the exercise of their legal right and duty to consider it. Caution normally requires the court not to say 'never' in any obiter dictum pronouncement. But I have no hesitation in finding that they could not overrule that decision without a substantial reason and without having given that recommendation the weight it required. It was a decision taken by a body entrusted with the basic fact-finding exercise under the complaints procedure. It was arrived at after a convincing examination of the evidence, particularly the expert evidence. The evidence before them had, as to the practicalities, been largely one way. The panel had directed themselves properly in law, and had arrived at a decision in line with the strength of the evidence before them. They had given clear reasons and they had raised the crucial factual question with the parties before arriving at their conclusion.
>
> The strength, coherence, and apparent persuasiveness of that decision had to be addressed head on if it were to be set aside and not followed. These difficulties were not faced either by the respondents' officers in their paper to the social services committee, or by the social services committee themselves. Not to face them was either unintentional perversity on their part, or showed a wrong appreciation of the legal standing of that decision. It seems to me that you do not properly reconsider a decision when, on the evidence, it does not seem that that decision was given the weight it deserved. That is, in my judgment, what the social services committee failed to do here. To neglect to do that is not a question which merely, as is suggested in one of the papers, impugns the credibility of the review panel, but instead ignores the weight to which it is prima facie entitled because of its place in

> the statutory procedure, and further, pays no attention to the scope of its hearing and clear reasons that it had given.
>
> It seems to me that anybody required, at law, to give their reasons for reconsidering and changing such a decision must have good reasons for doing so, and must show that they gave that decision sufficient weight and, in my judgment, it is that that the social services committee have here failed to do. Their decision must be quashed. As is often the case in Wednesbury quashings, it can be put in a number of ways: either unintentional perversity, or failure to take the review panel's recommendation properly into account, or an implicit error of law in not giving it sufficient weight.

8.54 *R v Bristol CC ex p Penfold* (1997–8) 1 CCLR 315, QBD

An assessment must fully explore needs

Facts: Ms Penfold was a homeless single parent who suffered from anxiety and depression. She was no longer entitled to assistance under the Housing Acts. Bristol declined to assess Ms Penfold's needs under the National Health Service and Community Care Act 1990, on the ground that she did not appear to be a person who 'may' need services and, in any event, there was no realistic prospect of the local authority providing her with accommodation under any of the community care legislation, given its straightened resources and the applicant's accommodation history.

Judgment: Scott Baker J held (at 321B) as follows:

> An assessment is something that is directed at the particular person who presents with an apparent need. One cannot be said to have been carried out unless the authority concerned has fully explored that need in relation to the services it has the power to supply. In some cases the exercise will be very simple; in others more complex.

8.55 *R v Haringey LBC ex p Norton* (1997–8) 1 CCLR 168, QBD

An assessment must explore social and recreational needs, not just social care needs

Facts: Mr Norton was severely disabled as a result of Multiple Sclerosis. Haringey reduced his care provision from 24 hours/day live-in care, to five hours a day practical assistance for budgetary reasons. There was no suggestion that Mr Norton's needs had changed. However, on re-assessment, Haringey concluded that Mr Norton had not, in reality, needed his earlier care package and that five hours a day was sufficient to meet his needs.

Judgment: Deputy High Court Judge Henderson QC held it had been unlawful only to assess Mr Norton's social care needs and not, also, his social, recreational and leisure needs:

> I consider that the Respondent misdirected itself in law. Reading the underlined sentences of the decision letter in context, the Respondent differentiated between the Applicant's social, recreational and leisure needs for which it did not believe that it needed to provide from the Applicant's personal care needs for which it recognised that it did need to provide. While the differentiation itself was not objectionable in point of law, because the Act of 1970 itemises such matters separately, it was impermissible to carry out the reassessment by putting social, recreation and leisure needs on one side and saying that 'I would be happy to provide you with details of the Winkfield Road Resource Centre.

Assessment process

8.56 *R v North Yorkshire CC ex p William Hargreaves* (1997–8) 1 CCLR 104, QBD

Account must be taken of the service user's views even where they are difficult to ascertain, for whatever reason

Facts: a dispute arose between Mr Hargreaves and North Yorkshire as to what form suitable respite care ought to take for Mr Hargreaves' intellectually impaired sister, Beryl Hargreaves. North Yorkshire had experienced great difficulty in communicating with Ms Hargreaves, exacerbated by Mr Hargreaves' overly protective actions. However, Ms Hargeaves had demonstrated an ability to express preferences and there was some evidence that her preferences were not identical to her brother's.

Judgment: paragraphs 3.15 and 3.25 of the statutory guidance at the time, the Policy Guidance, required local authorities to involve the individual service user in the assessment process and take account of their preferences. At 112H, Dyson J held that:

> ... the Respondent made its decision without taking into account the preferences of Miss Hargreaves on the issue in question. It must follow that the decision was unlawful in the sense that it was made in breach of paragraphs 3.16 and 3.25 of the Policy Guidance.

Comment: no doubt, had it been impossible or impracticable to ascertain Ms Hargreaves' preferences, North Yorkshire's failure to do so would have been lawful because it would have had a cogent reason for departure from the statutory guidance. However, under the current statutory scheme, the question would arise as to why the local authority had not appointed an independent advocate, or an IMCA, see:

- involvement/independent advocates/relevance of Mental Capacity Act 2005, above (para 7.53); and
- *R (SG) v Haringey LBC* [2015] EWHC 2579 (Admin), (2015) 18 CCLR 444 (see para 8.68 below), where an assessment was quashed owing to the local authority's failure to appoint an independent advocate, in breach of section 67 of the Care Act 2014.

8.57 *R v Islington LBC ex p Rixon* (1997–8) 1 CCLR 119, QBD

Assessments are central; they must comply in substance with statutory guidance and demonstrably have regard to relevant departmental guidance

Facts: the applicant was a severely mentally and physically disabled 24-year-old man, whose mother considered that inadequate provision had resulted in him losing skills acquired at his special needs school and failing to develop his full potential. It was common ground that Islington's assessment and care plan failed to address comprehensively the applicant's needs and failed to comply with relevant central government guidance.

Judgment: Sedley J held that Islington had acted unlawfully in failing to 'act under' statutory guidance and in failing properly to take into account non-statutory guidance:

This section, therefore, creates a positive duty to arrange for recreational and 'gateway' educational facilities for disabled persons. It is, counsel agree, a duty owed to the individual and not simply a target duty. I will come later to the question of its legal ambit and content. It introduces in turn section 7(1) of the Local Authority Social Services Act 1970:

> *Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.*

(By an amendment introduced into the statute, section 7A *requires* local authorities to exercise their social services functions in accordance with any such *directions* as may be given to them by the Secretary of State.)

What is the meaning and effect of the obligation to 'act under the general guidance of the Secretary of State'? Clearly guidance is less than direction, and the word 'general' emphasises the non-prescriptive nature of what is envisaged. Mr McCarthy, for the local authority, submits that such guidance is no more than one of the many factors to which the local authority is to have regard. Miss Richards submits that, in order to give effect to the words 'shall act', a local authority must follow such guidance unless it has and can articulate a good reason for departing from it. In my judgment Parliament in enacting section 7(1) did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of statutory guidance on a par with the many forms of non-statutory guidance issued by departments of state. While guidance and direction are semantically and legally different things, and while 'guidance does not compel any particular decision' (*Laker Airways Ltd v Department of Trade* [1967] QB 643, 714 per Roskill LJ), especially when prefaced by the word 'general', in my view Parliament by section 7(1) has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.

...

A failure to comply with the statutory policy guidance is unlawful and can be corrected by means of judicial review: *R v North Yorkshire County Council ex p Hargreaves* (1997–98) 1 CCLR 104 (Dyson J, 30 September 1994). Beyond this, there will always be a variety of factors which the local authority is required on basic public law principles to take into account. Prominent among these will be any recommendations made in the particular case by a review panel: *R v Avon County Council ex p M* [1994] 2 FLR 1006 (Henry J). In contradistinction to statutory policy guidance, a failure to comply with a review panel's recommendations is not by itself a breach of the law; but the greater the departure, the greater the need for cogent articulated reasons if the court is not to infer that the panel's recommendations have been overlooked.

A second source of considerations which manifestly must be taken into account in coming to a decision is the practice guidance issued by the Department of Health. This currently takes the form of a Practitioners' Guide entitled 'Care Management and Assessment', which sets out 'a set of principles' derived from 'current views of practice'. The guidance breaks care management down into a series of stages, moving through communication and assessment to assembly of a care plan, and then on to the implementation, monitoring and periodic review of the plan.

...

> The care plan, as Mr McCarthy readily admits, does not comply either with the policy guidance or the practice guidance issued by central government. There has been a failure to comply with the guidance contained in paragraph 3.24 of the policy document to the effect that following assessment of need, the objectives of social services intervention as well as the services to be provided or arranged should be agreed in the form of a care plan. For the reasons which I have given, if this statutory guidance is to be departed from it must be with good reason, articulated in the course of some identifiable decision-making process even if not in the care plan itself. In the absence of any such considered decision, the deviation from the statutory guidance is in my judgment a breach of the law; and so *afortiori* is the reduction of the Flexiteam service from 3 hours as originally agreed, whatever the activity, to 3 hours swimming or 1 hours at home. I cannot accept Mr McCarthy's submission that the universal knowledge that no day centre care was available for Jonathan was so plainly the backdrop of the section 2 decision that there was no need to say so. It is one thing for it to have been a backdrop in the sense of a relevant factor, but another for it to have been treated as an immoveable object. The want of any visible consideration of it disables the respondent from showing that it was taken into account in the way spelt out in the *Gloucestershire* case. I do, however, accept Mr McCarthy's submission that Miss Richards' further contention that the respondent has failed to consider alternatives to day centre care for Jonathan comes so late that there has been no opportunity to file evidence about it. Further, the whole situation in relation to day centre provision is about to change, making this element marginal save perhaps by way of fallback.
>
> The care plan also fails at a number of points to comply with the practice guidance on, for example, the contents of a care plan, the specification of its objectives, the achievement of agreement on implementation on all those involved, leeway for contingencies and the identification and feeding back of assessed but still unmet need. While such guidance lacks the status accorded by section 7 of [Local Authority Social Services Act 1970], it is, as I have said, something to which regard must be had in carrying out the statutory functions. While the occasional lacuna would not furnish evidence of such a disregard, the series of lacunae which I have mentioned does, in my view, suggest that the statutory guidance has been overlooked.
>
> In such a situation I am unable to accede to Mr McCarthy's submission that the failures to follow the policy guidance and practice guidance are beyond the purview of the court. What he can, I think, legitimately complain of is the fact that both of these submissions, in their present formulation, have emerged for the first time in the presentation of the applicant's case in court and were not adumbrated earlier. While he has not suggested that the lateness of the points has prevented material evidence from being placed before the court, Mr McCarthy may be entitled to rely on it in resisting any consequential relief, and I will hear him in due course on this.

Comment: this is a generally, although not universally, accepted statement of the legal consequences of failing to 'act under' statutory guidance, or properly take into account non-statutory guidance. Sedley J's decision in relation to statutory guidance turned on the language of section 7(1) of the Local Authority Social Services Act 1970; but section 78 of the Care Act 2014 contains the same duty, to 'act under the general guidance of the Secretary of State'; and there continues to be relevant non-statutory guidance. So this decision should have continued relevance. Perhaps more

questionable is whether there is such a great difference in the approach to statutory and non-statutory guidance, as is indicated by Sedley J, or whether there is a continuum which recognises that statutory guidance is inherently more likely to require a good reason for departure but that each set of guidance is to some extent different in what it requires and that a cogent reason may be required for any substantial divergence from some departmental guidance. It may also be considered that even a substantial departure from statutory guidance can, in principle, be justified by a sufficiently cogent reason.

8.58 *R v Kensington and Chelsea RLBC ex p Kujtim* (1999) 2 CCLR 340, CA

Local authorities are required to re-assess the possible needs of persons, even after their service has been terminated as a result of persistent, unequivocal misconduct, if it appears that they intend to conduct themselves properly

Facts: Kensington & Chelsea refused to continue to provide Mr Kujtim with residential accommodation after complaints about his misconduct, which continued after a written warning.

Judgment: once a local authority had assessed a person as 'needing' residential accommodation, it was under a duty to provide it as long as the need remained in existence and unless the applicant manifested a persistent and unequivocal refusal to observe reasonable requirements relating to occupation of the accommodation. Even in such cases, it was essential that the local authority carefully considered the applicant's current needs and circumstances, the causes of his conduct and the surrounding circumstances, allowing the applicant a fair opportunity of putting his case. The duty arose again, once the applicant satisfied the local authority that his needs required service provision to be made and that he will no longer persist in refusing to observe the local authority's reasonable requirements:

The extent of the duty under section 21 (l)(a) of the 1948 Act

30. That being so, the question which arises is whether or not there is any limitation upon the duty to provide or continue to provide such accommodation for as long as the need, once assessed, continues. In my view the position is as follows. Once a local authority has assessed an applicant's needs as satisfying the criteria laid down in s21(1)(a), the local authority is under a duty to provide accommodation on a continuing basis so long as the need of the applicant remains as originally assessed, and if, for whatever reason, the accommodation, once provided, is withdrawn or otherwise becomes unavailable to the applicant, then (subject to any negative reassessment of the applicant's needs) the local authority has a continuing duty to provide further accommodation. That said, however, the duty of the local authority is not absolute in the sense that it has a duty willy-nilly to provide such accommodation *regardless of the applicant's willingness to take advantage of it.*

31. In this connection there are two realities to be recognised. First, the duty to provide accommodation is predicated upon the co-operation of the applicant in the sense of his willingness to occupy it on such terms and in accordance with such requirements as the local authority may reasonably impose in relation to its occupation. The second, and connected, reality is that the resources of the local authority are finite and that, in providing accommodation for the needy, save in rare cases where individual

or special accommodation may be necessary and available to meet the special needs of a particular applicant, the accommodation may, and will usually be, provided within multi-occupied premises, whether in the form of flats, or hostel or bed and breakfast accommodation, in relation to which it will be reasonable for the local authority to lay down certain requirements as to the use of such accommodation and the activities to be permitted in it, whether from a health and safety point of view, or for the purpose of preventing injury, nuisance or annoyance to fellow occupiers of the premises.

32. Thus it seems to me that, when the circumstances warrant, if an applicant assessed as in need of Part III accommodation either unreasonably refuses to accept the accommodation provided or if, following its provision, by his conduct he manifests a persistent and unequivocal refusal to observe the reasonable requirements of the local authority in relation to the occupation of such accommodation, then the local authority is entitled to treat its duty as discharged and to refuse to provide further accommodation. That will remain the position unless or until, upon some subsequent application, the applicant can satisfy the local authority that his needs remain such as to justify provision of Part III accommodation and that there is no longer reason to think that he will persist in his refusal to observe the reasonable requirements of the local authority in respect of the provision of such accommodation.

33. In formulating the right of the local authority to treat its duty as discharged by conduct as requiring manifestation of *persistent and unequivocal* refusal, rather than a single transgression, I have in mind the following matters which were urged upon us by Mr Gordon as part of his submission that the duty of providing Part III accommodation is unqualified and absolute. The provisions of section 21 of the 1948 Act as amended are 'safety net' provisions designed to assist the poorest and most needy members of society, at rock bottom as it were. For a variety of reasons of personal and social disadvantage, they may well be persons who find difficulty complying with the norms of social behaviour or self control, while falling outside the specific areas of need catered for by other provision within the Community Care Services or under housing legislation. To create a class consisting of a substantial number of persons outside the scope even of the minimum requirements of the safety net provisions cannot lightly be contemplated. To withdraw Part III accommodation in respect of persons with such needs is likely to reduce such persons to living and sleeping on the streets; not only does it tend to defeat the overall purpose of the 1948 Act as well as Community Care, but it produces the socially undesirable effect of increasing rather than alleviating deprivation and encourages return to the practice of begging in the streets

34. In the particular case of a genuine refugee who is homeless while awaiting resolution of his claim for asylum (and, as already indicated, there is no reason to doubt the genuineness of Mr Kujtim's claim) the effect of a refusal to supply Part III accommodation despite the existence of need is to remove from him basic food and shelter in a situation where, upon recognition of his claim, he would be entitled to receive the usual benefits available to British citizens in a position of hardship and unemployment; further, in the case of an applicant who is unwell, there may result damage to health, or in extreme cases threat to life, as a result of his being put out on the streets.

35. The existence of those considerations makes it essential that local authorities should reach the conclusion that their duty to supply Part III

accommodation is discharged in respect of any particular applicant only after being satisfied of his persistent and unequivocal refusal to comply with the local authority's requirements, coupled with a careful consideration of his *current* needs and circum stances. Either or both may involve consideration of any relevant medical condition or infirmity known to the local authority. Before concluding that there has been such refusal, it will plainly be desirable for a local authority to write a letter of final warning of the kind written by the respondents to the applicant in this case. As to the question of current need, the instant case provides a good example of why a re-consideration of need is essential. Had the respondents been aware, as they were not when they reached their decision, that the behaviour of the applicant in failing to observe their requirements to obey local hostel rules and to comply with the warning given to him by letter following his first expulsion, was the product of a depressive condition associated with the very ill-treatment which had driven him to seek refuge in this country, it seems unlikely that they would have treated his actions as manifesting a persistent and unequivocal refusal to comply with their requirements. However, they were entirely unaware of his medical condition and, in those circumstances, cannot be blamed for ignoring it.

8.59 *R v Birmingham CC ex p Killigrew* (2000) 3 CCLR 109, QBD

An assessment contain an explanation for its decision and take into account up-to-date medical evidence and evidence from carers

Facts: Birmingham had provided the claimant with 12 hours care each day, in the light of her severe disability. It then moved the claimant to better adapted accommodation and reduced her hours of care to three and a half hours during weekdays, with some additional care over the weekend. The decision was unreasoned. After the issue of a judicial review, Birmingham undertook an assessment, which concluded that the hours should be increased to six hours each day, and which gave as its reason that, under the existing arrangements, little direct care was provided for most of the day.

Judgment: Hooper J held that it was notable that the reduction in the hours of care coincided with a decision that two carers rather than one needed to be provided, to comply with manual handling requirements, and that it was important that the reduction in hours was not driven by the economic consequences of that decision. In any event, Birmingham's assessment was unlawful for two reasons: (1) it contained no proper analysis of why 12 hours care had been provided, why that was no longer necessary and what would be done if an emergency arose, (2) in breach of the statutory guidance, Birmingham had failed to take into account up-to-date medical evidence and the views of the GP and the claimant's carers.

8.60 *R v Newham LBC ex p Patrick* (2001) 4 CCLR 48, QBD

Referring a homeless woman with care needs to a housing charity did not amount to a discharge of the duty to assess or meet her needs

Facts: Ms Patrick, a single woman who suffered from physical and mental ill health, was evicted on the ground of neighbour nuisance and found intentionally homeless. Newham had purported to discharge its duty towards her under section 21 of the National Assistance Act 1948, by

offering her accommodation provided by a charity, which she had refused. Ms Patrick then slept rough.

Judgment: Henriques J held that Newham had failed in breach of statutory duty to assess Ms Patrick's needs and had not discharged its duty under section 21:

> 27. Her solicitor in her witness statement says that she did not take up the accommodation provided by HOST because she believed she was being sent to Sunderland and not to Southwark. In any event, Southwark was a distance away from her sister and from her medical support network.
>
> 28. Since the offer of accommodation was on 28 April and the certificate of mental incapacity to handle her affairs was granted on 9 May, it requires no mental gymnastics to conclude that her decision to reject the offer of accommodation at Southwark was neither considered nor likely to have been well informed.
>
> 29. It is of particular significance that the respondent knew that solicitors were acting for the applicant as they had written on her behalf on 5 April.
>
> 30. Further, they had informed the respondent that they could obtain no clear instructions from the applicant due to her mental health and enclosed a note from her general practitioner.
>
> 31. If the respondent sought to put an end to its section 21 duties to provide accommodation, they ought in my judgment at the very least to have ensured that the applicant was legally represented when the offer was made to her to ensure not only that she understood what the offer was, both in terms of location and services offered, but also that she understood the legal consequences or potential legal consequences of refusing the offer.
>
> 32. Since she may well not have understood what was being offered and its location, I am not prepared to find that her refusal of it was unreasonable.
>
> 33. In the exercise of its duty to provide accommodation a local authority must have a concurrent duty to explain fully and to the point of comprehension any offer it may make. I am not persuaded that the local authority has discharged its duty. In my judgment the duty to provide Part III accommodation continues pursuant to section 21 of the 1948 Act.

8.61 *R (A and B) v East Sussex CC and the Disability Rights Commission* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194

Local authorities were under a duty to assess the needs and take into account the preferences of persons even when those persons have substantial communication difficulties, including by consulting carers as to how it is best to communicate

Facts: A and B were severely disabled sisters who continued to live in the family home, owing to a dispute with Sussex over aspects of the care package, in particular, as to the extent to which Sussex could be required to instruct carers to undertake manual lifting.

Judgment: Munby J held that the Manual Handling Operations Regulations 1992 imposed a duty on Sussex to avoid or minimise the risk of injury from hazardous lifts so far as reasonably practicable. That required Sussex to balance the Article 8 rights of the sisters, and their carers. On the difficulty of assessing persons lacking capacity to participate in the process, Munby J said this:

132. I have said that the assessment must take account of the disabled person's wishes, feelings and preferences. How are these to be ascertained?

133. In a case where the disabled person is, by reason of their disability, prevented, whether completely or in part, from communicating their wishes and feelings it will be necessary for the assessors to facilitate the ascertainment of the person's wishes and feelings, so far as they may be deduced, by whatever means, including seeking and receiving advice – advice, not instructions – from appropriate interested persons such as X and Y involved in the care of the disabled person.

134. Good practice, Miss Foster suggests, would indicate, and I am inclined to agree that:

(i) A rough 'dictionary' should be drawn up, stating what the closest carers (in a case such as this, parents and family, here X and Y) understand by the various non-verbal communications, based on their intimate long term experience of the person. Thus with familiarisation and 'interpretation' the carers can accustom themselves to the variety of feelings and modes of expression and learn to recognise what is being communicated.

(ii) Where the relatives are present with the carers and an occasion of 'interpretation' arises, great weight must be accorded to the relatives' 'translation'.

(iii) As I commented in *Re S* [2003] 1 FLR 292 at 306 (para 49):

... the devoted parent who ... has spent years caring for a disabled child is likely to be much better able than any social worker, however skilled, or any judge, however compassionate, to 'read' his child, to understand his personality and to interpret the wishes and feelings which he lacks the ability to express.

(iv) That said, in the final analysis the task of deciding whether, in truth, there is a refusal or fear or other negative reaction to being lifted must, as Miss Foster properly concedes, fall on the carer, for the duty to act within the framework given by the employer falls upon the employee. Were the patient not incapacitated, there could be no suggestion that the relative's views are other than a factor to be considered. Because of the lack of capacity and the extraordinary circumstances in a case such as this, the views of the relatives are of very great importance, but they are not determinative.

Comment: see now the Mental Capacity Act 2005 and the entitlement to an IMCA and, for persons who do not lack capacity but would experience substantial difficulty, see the Care and Support (Independent Advocacy Support) (No 2) Regulations 2014. For a useful and relevant analysis in relation to un-cooperative children, see *R (J) v Caerphilly CBC*.[14]

8.62 ## *R (Heffernan) v Sheffield CC* [2004] EWHC 1377 (Admin), (2004) 7 CCLR 350

An assessment that was incompatible with the eligibility criteria was unlawful

Facts: Mr Heffernan was severely disabled as a result of Still's Disease. Sheffield provided him with 24½ hours care per week but, on the basis of an independent report, he claimed he needed 27–30 hours and a live-in carer.

14 [2005] EWHC 586 (Admin), (2005) 8 CCLR 255.

Judgment: Collins J held that Sheffield had failed to apply the guidance in circular LAC (2002) 13: Fair Access to Care Services. In particular, it had treated '*significant health problems*' as falling within the Substantial Band, rather than the Critical Band. Care needs resulting from significant illness, or the need to prevent significant illness, fell within the Critical Band, and had to be met:

> The practical consequences of the above interpretation may be shown by the following example. Mrs Jones cannot perform the majority of personal care or domestic routines although none are vital to her independence. At the same time her involvement in one or two support systems cannot be sustained. According to the eligibility framework of paragraph 16 of the FACS policy guidance, Mrs Jones' difficulties with personal care and domestic routine fall within the substantial risk band: while her support system difficulties fall within the low risk band. If the council's eligibility criteria include critical and substantial risks, the council is only obliged to consider meeting needs associated with personal care and domestic routines. It is not obliged to address needs associated with support systems. Furthermore, the council when determining which personal care and domestic routine difficulties to address is only obliged to address those which will ameliorate, contain or reduce the substantial risks. This means that Mrs Jones may be helped with bathing, aspects of toileting, aspects of cooking and paying bills, but may not be helped with gardening, shopping for weekly groceries (because these can be delivered by the local supermarket) and writing letters to friends.
>
> There is another way to think about needs, risks and eligibility. If among an individual's needs there are some needs which if presented by themselves would lead to risks that would be placed outside a council's eligibility criteria, the council may consider it unnecessary to address those needs. The council would do so where it was sure the needs in question did not exacerbate or otherwise worsen the other needs to be addressed.
>
> When implementing and applying FACS-based eligibility criteria, it is not generally possible to identify eligible needs directly from the risks described in eligibility framework of paragraph 16. This is because the eligibility bands are expressed as risks not needs, meaning that councils have to make sense of the risks and consider how best to tackle them. Hence, in the example above, Mrs Jones may not be helped with all the personal care and domestic routines that she can no longer do.

8.63 *R (B) v Lambeth LBC* [2006] EWHC 639 (Admin), (2006) 9 CCLR 239

The function of judicial review is to pronounce upon the lawfulness or otherwise of public decision-making, not to investigate its merits

Facts: the claimant, a 15-year-old girl, brought judicial review proceedings against Lambeth after she became homeless, alleging that Lambeth had failed adequately to assess her needs or make suitable provision. After a number of hearings, she withdrew those proceedings without permission to apply for judicial review having been granted. Lambeth applied for costs on the grounds that the judicial review grounds had failed to identify clearly any error of law and that, despite repeated requests, that had not been done until the last moment.

Judgment: Munby J held that there would be no order for costs, but practitioners should be aware that costs and/or wasted costs might well be

awarded in future when a judicial review application failed properly to identify any alleged errors of law: the whole of paragraphs 26–36 of the judgment, in particular, contain salutary advice to practitioners. These passages commence thus:

> 26. This is yet another case exemplifying problems about which I have had to complain on too many occasions already. As I said in *R (P, W, F and G) v Essex County Council* [2004] EWHC 2027 (Admin) at paragraphs [30]–[31]:
>
> > '[30] The present litigation exemplifies a certain type of judicial review case which experience suggests can too often end up following a less than desirable course: I have in mind community care, housing and other cases involving either children or vulnerable adults, especially those where, as here, the first task of the local or other public authority is the preparation of an assessment.
> >
> > [31] This is not the first time that I have felt impelled to express my unease about this particular type of litigation: see *R (A, B, X and Y) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194, at paras [156]–[166], and *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 1 FCR 577, at paras [217]–[219]. There is, I think, a problem here that needs to be addressed. Too often in my experience inadequate thought is given to what precisely the court is being asked or can properly be asked to do.'
>
> 27. I then went on to set out what I referred to as a few basic principles, starting with some observations on the proper function of the court in a case such as this:
>
> > '[32] What the claimants here seek to challenge are decisions taken by the County Council in pursuance of the statutory powers and duties conferred on it by Part III of the Act. So I am here concerned with an area of decision-making where Parliament has chosen to confer the relevant power on the County Council: not on the court or anyone else. It follows that we are here within the realm of public law, not private law. It likewise follows that the primary decision maker is the County Council and not the court. The court's function in this type of dispute is essentially one of review – review of the County Council's decision, whatever it may be – rather than of primary decision making. It is not the function of the court itself to come to a decision on the merits. The court is not concerned to come to its own assessment of what is in these children's best interests. The court is concerned only to review the County Council's decisions, and that is not a review of the merits of the County Council's decisions but a review by reference to public law criteria: see *A v A Health Authority, in re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, and *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 1 FCR 577, at paras [20]–[32]. Just as I pointed out in *R (A, B, X and Y) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194, at para [161], that it was the function of the local authority and not the court to make and draw up the assessments that were there in issue, so too in the present case it is for the County Council and not the court to make the initial and core assessments of these children.
> >
> > [33] Now this has two important corollaries. Although I am, in a sense, concerned with the future welfare of very vulnerable children, I am not exercising a 'best interests' or 'welfare' jurisdiction, nor is it any part of my functions to monitor, regulate or police the performance by the County Council of its statutory functions on a continuing basis. A judge

> of the Family Division exercising the wardship jurisdiction has a continuing responsibility for the day to day life and welfare of the ward, exemplified by the principle that no important or major step in the life of a ward of court can be taken without the prior consent of the court: see *Kelly v British Broadcasting Corpn* [2001] Fam 59 at p75. The function of the Administrative Court is quite different: it is, as it is put in CPR Part 54.1(2)(a), to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function. In other words, the Administrative Court exists to adjudicate upon specific challenges to discrete decisions. It does not exist to monitor and regulate the performance of public authorities: see in the context of community care *R v Mayor and Burgesses of the London Borough of Hackney ex p S* (unreported, 13 October 2000) at paras [8] and [11] and *R v Mayor and Burgesses of the London Borough of Hackney ex p S (No 2)* [2001] EWHC 228 (Admin) at para [4].

Comment: this really speaks for itself and is just as applicable to cases involving vulnerable adults as it is to cases involving children. Not only is it illegitimate to use the judicial review process to persuade the court to micro-manage a public authority's decision-making process, or to interfere with substantive decisions that are lawfully made, blatant attempts to do so may result in adverse or wasted costs orders.

8.64 *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, (2007) 10 CCLR 243

It was unnecessary in the particular circumstances to allow the applicant to comment on a medical adviser's adverse report before completing the assessment; assessments are iterative and should not be too finely scrutinised

Facts: Ms Ireneschild was disabled and asserted that her current accommodation was grossly unsuitable on account of her inability to manage the stairs. An occupational therapist agreed with her but Lambeth's medical advisor visited and awarded Ms Ireneschild a high amount of moving points, but not emergency transfer status.

Judgment: the Court of Appeal (Dyson and Hallett LJJ, Sir Peter Gibson) held that the assessment did take into account all relevant matters including an earlier assessment (albeit indirectly, as it was referred to in a more recent assessment) and it had not been unfair in this case not to invite Ms Ireneschild to comment on the medical adviser's report because Ms Ireneschild had been able to discuss her needs with the medical adviser and because, under the statutory scheme, service users are entitled to comment on assessments and may then utilise the complaints procedure. Hallett LJ's judgment includes the following:

> 44. Mr Drabble further conceded that the Respondent, having brought the proceedings to review the assessment judicially, bore the heavy burden of establishing that the assessment was unlawful. He did not attempt to persuade this court to ignore the strictures of Lord Brightman in *Puhlhofer v Hillingdon LBC* [1986] AC 484, 518B–E put before us by Mr Béar. Lord Brightman said this:
>
> > 'My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their function under the Act of 1977. Parliament intended the local authority

> to be the judge of fact. The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative discretion is abuse of power, eg bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the *Wednesbury* sense – unreasonableness verging on an absurdity: see the speech of Lord Scarman in *R v Secretary of State for the Environment ex p Nottinghamshire County Council* [1986] AC 240, 247–248. 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.'
>
> Those remarks may have been directed at a different statutory function in a different era, but, to my mind, they are as pertinent today as they were in the 1980s.
>
> ...
>
> 52. It should not be forgotten that this assessment, upon which this court and Lloyd Jones J have spent so much time, was essentially a work in progress and Ms Ireneschild in the normal course of events would have had a proper opportunity to challenge the assessment or parts thereof. Even when an assessment was finalised, nothing was writ in stone; if the Respondent's circumstances changed she could seek another assessment.
>
> ...
>
> 57. With great respect, I disagree. I see considerable force in Mr Béar's argument that Mr Drabble's challenge to the assessment on this ground took an overly critical approach to the assessment. Again, 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.

8.65 *R (AM) v Birmingham CC* [2009] EWHC 688 (Admin), (2009) 12 CCLR 407

A properly completed assessment also discharges the disability equality duty

Facts: AM, who was severely disabled, obtained a place at university. He sought a fully adapted toilet facility including a hoist. That provision would have been expensive and Birmingham decided that because AM was continent, it was unlikely that he would need to use such a facility during the

day. Accordingly, Birmingham resolved to provide only a certain amount of additional personal care. AM sought a judicial review but was granted permission only to argue that Birmingham had failed to discharge its duty under section 49A of the Disability Discrimination Act 1995.

Judgment: Cranston J dismissed the application, holding that in substance the community care assessment process had resulted in Birmingham having due regard to the need to promote equality of opportunity in education and the other obligations owed to disabled persons.

8.66 *R (B) v Cornwall CC* [2009] EWHC 491 (Admin), (2009) 12 CCLR 381

A local authority must fully involve the service user and other relevant persons but is ultimately required to undertake its own assessment

Facts: a dispute arose as to B's liability to pay charges for his home care services.

Judgment: Hickinbottom J described the general nature of the assessment process as follows:

> 9. The Secretary of State has given directions under Section 47(4), namely the Community Care Assessment Directions 2004 which, in paragraph 2, provide:
>
> > '(1) In assessing the needs of a person under Section 47(1) of the Act a local authority must comply with Paragraphs (2) to (4).
> >
> > (2) The local authority must consult the person, consider whether the person has any carers and, where they think it appropriate, consult those carers.
> >
> > (3) The local authority must take all reasonable steps to reach agreement with the person and, where they think it appropriate, any carers of that person, on the Community Care Services which they are considering providing to him to meet his needs.
> >
> > (4) The local authority must provide information to the person and, where they think it appropriate, any carers of that person, about the amount of the payment (if any) which the person will be liable to make in respect of the Community Care Services which they are considering providing to him.'
>
> These directions set a pattern for the general scheme of community care. Decision-making rests in the responsible authority, but their powers are only to be exercised after appropriate engagement with the service user and any relevant carers (who may include for example the service user's parents or other family). Prior to coming to a concluded view on needs, they should consult: prior to coming to a decision on steps to be taken to meet that need, they should attempt to reach agreement: and in relation to the on-cost to the service user, they should provide appropriate information.
>
> ...
>
> 68. Fourth, it is for the Authority to assess eligible needs. That is their statutory duty under section 47 of the 1990 Act. Of course, if requested to do so, a service user must provide evidence that DRE has actually been expended (by the provision of receipts, bills etc), and that is the specific reference to the provision of evidence in the 2003 Guidelines (see paragraph 13(ix) above). Furthermore, it is right that the views of the service user and family carers are sought as to his needs and the steps the authority propose to take in respect of those needs. The relevant guidance requires that. The user

> may of course also be able to produce evidence of a particular need. But the authority cannot avoid its obligation to assess needs etc by failing to make an appropriate assessment themselves, in favour of simply requiring the service user himself to provide evidence of his needs. In this case, so far as the August assessment is concerned, I am afraid the Authority appears to have abrogated its obligation in that way. Ms Harvey appears to have accepted that the care plan fell short. In any event, I consider the Authority acted unlawfully by disallowing expenditure as DRE on the basis that B had failed to evidence the expenditure as DRE to their satisfaction whilst they gave B (effectively Mr & Mrs B) no opportunity to make good that perceived evidential deficit. In the Authority's own guidance, it is suggested that, if evidence is not forthcoming, then the Finance Officer should ask for it to be produced at the next charges review. Whilst that appears to be concerned with evidence of expenditure (receipts, bills etc), there is no suggestion in that guidance that a failure to produce evidence should be fatal, and that no opportunity should be allowed to correct evidential deficits.

8.67 *R (F, J, S, R) v Wirral BC* [2009] EWHC 1626 (Admin), (2009) 12 CCLR 452

Minor criticisms of assessments, not likely to result in changed services, should be brought through a complaints procedure

Facts: a supported living provider, Salisbury Independent Living, funded litigation brought by residents living in accommodation it provided, essentially claiming that due to inadequate assessments, Wirral had not provided the residents with funds that would in turn reimburse SIL for the assistance it provided.

Judgment: McCombe J held that, leaving aside one potentially major point that had been raised at the hearing for the first time and which the claimants would not be permitted to rely on, the criticisms of the assessments were relatively minor and ought to be have been raised in a complaints procedure, in particular because no case had emerged where it was likely that there had been a failure to meet eligible needs; accordingly, he dismissed the application for judicial review as an abuse of process.

8.68 *R (SG) v Haringey LBC* [2015] EWHC 2579 (Admin), (2015) 18 CCLR 444

The failure to appoint an independent advocate, under section 67(2) of the Care Act 2014, for a vulnerable adult, who spoke no English and was illiterate, and who suffered from PTSD, insomnia, depression and anxiety, rendered the assessment unlawful

Facts: SG was an asylum-seeker provided with asylum support. She spoke no English and was illiterate, and suffered from post-traumatic stress disorder (PTSD), insomnia, depression and anxiety. She needed help with self-care, preparing and eating food, simple tasks and medication. Haringey declined to provide residential accommodation to SG under section 21 of the National Assistance Act 1948 and then, later, under the Care Act 2014.

Judgment: Deputy High Court Judge Bowers held that the assessment under the Care Act 2014 was unlawful because (i) Haringey failed to ensure

that SG was offered an independent advocate, under section 67(2) of the Care Act 2014; and (ii) Haringey failed to ask itself the correct question as to whether accommodation was required. On the issue of the independent advocate, the Deputy High Court Judge said this:

> *(1) Absence of an independent advocate*
>
> 53. The defendant appears to accept the claimant was entitled to but did not have an independent advocate when she was assessed under the Care Act, but contends nonetheless that this did not 'lead to flawed assessment process' because referral for such an advocate was made at the time of the assessment and since then an independent advocate has been appointed in the form of Mind.
>
> 54. Section 67(2) of the Act could not be clearer:
>
> > 'The authority must ... 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.'
>
> 55. There are detailed criteria for being an independent advocate, as set out in the Care and Support (Independent Advocacy Support) No 2 Regulations 2014 SI No 2889, together with the manner in which they are to carry out their functions. This testifies to the importance of this protection for essentially vulnerable persons.
>
> 56. Ms Okafor points to the fact that Mind has now accepted a referral and she contends that as a result of the new Care Act 'demand currently outstrips supply.' She says the claimant's services have not been prejudiced as a result concerning the outcome of the assessment, but I agree with Mr Burton that we simply do not know that. I do accept the defendant's submission that there may be cases in which it is unlikely the presence of an independent advocate would make any difference to the outcome. This is not one of them, because this appears to me the paradigm case where such an advocate was required, as in the absence of one the claimant was in no position to influence matters. I keep particularly in mind the account given by Ms Mohr-Pietsch. I think the assessment was flawed as a result and must be redone. This is the first of only two grounds of unlawfulness which I find in this case.