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**R (JL and LL) v Islington LBC**  
A Case Study in Collaboration

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**Introduction**

1. This paper outlines the collaborative approach between claimant lawyers and the voluntary sector taken in the case of R (JL and LL) v Islington LBC [2009] EWHC 458 (Admin).<sup>2</sup> This case has defined the legal parameters within which local authorities must operate when setting eligibility criteria for services provided to disabled children. Although in many respects the case was a standard judicial review of unlawful decision-making by a local authority, the case originated in collaborative working between the Council for Disabled Children and a group of claimant lawyers and the impact of the case has been maximised by this ongoing collaboration.

**Background**

2. Services for disabled children in England and Wales are the proverbial postcode lottery. This situation persists despite an underpinning set of legislation, regulations and statutory guidance which should provide for consistency in decision-making. Yet the experience of families with disabled children (as told to voluntary organisations such as the Council for Disabled Children and Contact a Family) is that decisions are frequently made about what support (if any) their families will receive with total disregard to the statutory scheme. As a result, hardly any families with disabled children actually receive any support from the state that might traditionally be described as 'social care'. The Disabled Children's

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<sup>2</sup> Reported at [2009] 12 CCLR 322; [2009] 2 FLR 515; [2009] Fam Law 485; [2009] All ER (D) 140 (Mar), transcript available at <http://www.bailii.org/ew/cases/EWHC/Admin/2009/458.html>

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Indicator Local Reports published by DCSF in August 2009<sup>3</sup> show that over 70 per cent of families with disabled children are not currently accessing any care and family support services.<sup>4</sup>

3. In recognition of this shortfall in services and support, the government has invested over £700 million in a service transformation programme known as Aiming High for Disabled Children.<sup>5</sup> The majority of this funding has been allocated to increase the quality and quantity of short break services. Yet as the August 2009 survey data shows, this additional funding has not yet meant that even a bare majority of families can access support. The consequences of this under-provision can be devastating, with 8 in 10 families with severely disabled children describing themselves as at or close to 'breaking point'.<sup>6</sup>
  
4. To force the pace of change, the key voluntary sector organisations working with disabled children and their families came together in July 2006 to launch the Every Disabled Child Matters campaign (EDCM).<sup>7</sup> The Aiming High for Disabled Children programme resulted in part from EDCM's campaigning work. In addition to calling for further investment, EDCM has also sought (and seeks) to clarify and expand the legal entitlement to services and support for families. This was done initially through two private member's bills, the Disabled Children (Family Support) Bills 2006 and 2007. The 2006 Bill was adopted by Gary Streeter MP and achieved a high level of political and media interest before it was talked out at Second Reading.

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<sup>3</sup> <http://www.dcsf.gov.uk/everychildmatters/resources-and-practice/RS00200/> (all web links accessed 10<sup>th</sup> October 2009)

<sup>4</sup> [http://www.edcm.org.uk/Page.asp?originx\\_982ks\\_36204289000024e5d\\_20098192118e](http://www.edcm.org.uk/Page.asp?originx_982ks_36204289000024e5d_20098192118e)

<sup>5</sup> <http://www.ecm.gov.uk/ahdc>

<sup>6</sup> [www.mencap.org.uk/breakingpoint/](http://www.mencap.org.uk/breakingpoint/)

<sup>7</sup> [www.edcm.org.uk](http://www.edcm.org.uk)

## **Moving towards a right to short breaks**

5. Work on these Bills brought EDCM into contact with Professor Luke Clements (Cardiff Law School) and Paul Bowen (Doughty Street Chambers). EDCM wanted to know whether instead of forcing through new legislation it would be possible to interpret the existing legal framework in such a way as to 'create' a right to short breaks (i.e. an enforceable duty on local authorities to provide short breaks if certain qualifying criteria were met). Paul Bowen and Luke Clements agreed to provide EDCM with a detailed legal opinion on this issue (opinion attached to this paper).
  
6. The joint opinion concluded that there was a 'strong argument' that an enforceable right to short breaks for families with disabled children could be found within the existing legal framework. It suggested that a right to residential short break care could stem from s20(1) Children Act 1989, while a right to short break care at home may exist under s17 Children Act 1989, taken together with s2 and s28A Chronically Sick and Disabled Persons Act 1970 ('CSDPA'). The opinion was published on 13th November 2007, on the day that EDCM launched the proposed Disabled Children (Family Support) Bill 2007, the campaign's second attempt to change the law through a Private Member's Bill. The launch of the opinion was covered in the specialist sector press (Community Care and Children and Young People Now) and a copy was sent to Ministers at DCSF and the Department of Health, including DCSF Secretary of State Ed Balls MP who had already shown a keen interest in this area.
  
7. The endnote to the opinion stated:  
*'This opinion demonstrates the extraordinary complexity of the current legislative regime and the extreme difficulties some families face in accessing vital support services...(litigation) cannot in our opinion be a*

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*substitute for effective law reform: reform that clarifies, simplifies and underpins the rights of disabled children and their family carers.'*

8. Using the opinion, EDCM continued to push for legislative change. The outcome of this was an amendment to Schedule 2<sup>8</sup> of the Children Act 1989 ('Local Authority Support for Children and Families'), Paragraph 6 of which now reads:

*Provision for disabled children*

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*(1) Every local authority shall provide services designed—*

*(a) to minimise the effect on disabled children within their area of their disabilities; and*

*(b) to give such children the opportunity to lead lives which are as normal as possible[; and*

*(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring].*

*[(2) The duty imposed by sub-paragraph (1)(c) shall be performed in accordance with regulations made by the appropriate national authority.]*

9. This new duty to provide short breaks was inserted into the Schedule by s 25 of the Children and Young Persons Act 2008 through an amendment jointly tabled by DCSF Minister Lord Adonis and Lord Rix, cross-bench Peer and Chair of Mencap. Although the duty is not yet in force, Lord Adonis gave EDCM repeated assurances that it would be brought into force in time for April 2011, when the funding for short breaks through the Aiming High for Disabled Children programme is at its height.

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<sup>8</sup> The relevant part of Schedule 2 has effect by virtue of s 17(2) of the 1989 Act, which states that '*For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part I of Schedule 2*'.

## The test case

10. In parallel to the parliamentary activity, EDCM decided to actively seek out families who could bring judicial review proceedings to clarify the existing legal framework. Further meetings with Luke Clements, Paul Bowen and Mitchell Woolf (Scott-Moncrieff, Harbour and Sinclair Solicitors) helped refine exactly what characteristics we were looking for in a test case, being essentially that:
- a. The family should be eligible for public funding;
  - b. There should be no dispute that the child was 'disabled' for the purposes of the relevant legislation; and
  - c. The family should have either been turned down for services or had their service entitlement recently reduced.
11. A particular issue we collectively sought to challenge through test case litigation was the operation of eligibility criteria to limit access to disabled children's services. The use of eligibility criteria in adult social care is governed by the *Fair Access to Care Services* statutory guidance. No such guidance exists for children's social care. Given this, we collectively could not see on what statutory basis local authorities were founding their criteria. We also knew that criteria were often arbitrary and in some areas were not even published.
12. Having determined what we were looking for, a call for suitable potential cases went out through the EDCM campaign networks, using the Contact a Family and Mencap helplines as referral points. Helpline advisors were given specific briefings on the legal issues likely to be raised and a number of families were referred to solicitors. Ultimately a suitable case arose (that of JL and his mother LL) and was taken on by Mitchell Woolf, who instructed Paul Bowen on behalf of the family. The factual context of this case was helpful in that Islington (the relevant local authority) had just

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introduced new eligibility criteria which dramatically reduced the family's entitlement to services).

13. Once proceedings were issued, the Claimants joined the Council for Disabled Children (CDC, the sector organisation for disabled children which hosts EDCM) as an interested party. This immediately gave the campaign standing within the proceedings and allowed CDC to submit both summary grounds and detailed grounds. The purpose of CDC's intervention was to stress the national significance of the case, the blanket use of eligibility criteria by local authorities and the lack of clarity in the statutory scheme.

14. CDC's detailed grounds also put in evidence from research commissioned by the then-DfES in 2003, which involved CDC surveying all English local authorities to look at the issue of eligibility criteria. The relevant section of CDC's grounds is set out below:

*Responses from 65 local authorities found that each local authority had developed its own eligibility criteria, resulting in service provision being dependent on postcode rather than need. While some children were not disabled enough to meet disabled children's team eligibility criteria, others were 'too disabled' and were denied services despite clearly meeting eligibility because their needs could not be met through available provision.*

*The report concluded (at p2) that 'each council has developed a different interpretation of Section 17 of the Children Act 1989 regarding service provision for disabled children. By doing so, service quality is dependent on postcode rather than need.' Three-quarters of the authorities surveyed told CDC that there were disabled children who were eligible for services but for whom the authority had no suitable provision to offer. These children included*

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*children on the autistic spectrum, children with moderate learning difficulties and children with complex health needs, all of which constitute significant groups within the population of disabled children.*

15. The Detailed Grounds were submitted in the name of Christine Lenehan, CDC Director. CDC did not instruct Counsel and did not seek permission to be represented at the final hearing.
  
16. The matter came before Mrs Justice Black in December 2008. Black J found for the Claimants and quashed Islington's eligibility criteria as unlawful. The judgment achieved the following outcomes for CDC / EDCM:
  - a. Clarity that different statutory provisions establish different types of duty on local authorities, and that blanket eligibility criteria are always unlawful;
  - b. Confirmation that eligibility criteria cannot be used to limit access to services when the s 20(1) Children Act 1989 duty arises ;<sup>9</sup>
  - c. Confirmation that eligibility criteria can only be used to determine which children fall within the class of children who are generally eligible for services under s 2 CSDPA, but that once a child is within the eligible class all assessed needs must be met;
  - d. Confirmation that eligibility must be determined after an assessment, i.e. that the primary duty under s 17 and Schedule 1 of the 1989 Act to assess the needs of a disabled child as a 'child in need' subsists;
  - e. A key finding that the approach of Islington in this case had breached s 49A Disability Discrimination Act 1995 (to our

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<sup>9</sup> Although it was disappointing that Black J did not accept that the s 20(1) duty arose on the facts of this case

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knowledge, the first time the s 49A duty had been considered in a case involving a disabled child); and

- f. A strong message to DCSF that there is a 'pressing need' for central guidance on the use of eligibility criteria in disabled children's services.

17. Mrs Justice Black made significant use of CDC's detailed grounds in her judgment, as set out below (emphasis added, CDC referred to as 'the Council' in the judgment):

*[4] Neither the Secretary of State nor the Council appeared at the oral hearing in front of me but both made helpful written submissions. **The Council indicates that the issue of eligibility criteria in disabled children's services is real and pressing in local authorities across England. It says that every local authority operates such criteria which serve to limit "the ever-increasing claim on local authority resources imposed by the growing and increasingly complex population of disabled children."** Local authority members and officers have expressed to the Council their concerns about the variation in eligibility criteria between authorities and the lack of clarity about the legal position in relation to them. The Council refers to unpublished research commissioned by the then DfES in 2003 which concluded that "service quality is dependent on postcode rather than need". A report of the Audit Commission in 2003 also found a "lottery of provision" and found families dissatisfied with eligibility criteria which, amongst other things, they considered to be based on arbitrary decisions. The Council indicates that the position has not improved since 2003 and that its consultancy visits to local authorities suggest that, in fact, eligibility criteria have tightened, as a result of increasing pressures on social care budgets, so that fewer families receive a service. In these circumstances, the*

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*Council indicates that it would welcome greater legal clarity on whether local authorities should operate eligibility criteria for services to disabled children under the various statutory provisions and as to whether the Department for Children, Schools and Families should issue guidance on the operation of eligibility criteria for disabled children's services to ensure greater consistency.*

...

*59. Where a service is provided simply under the auspices of the general duty in section 17(1), therefore, there can be no objection in principle to the use of eligibility criteria. The claimants concede this. However, they complain that there is no governmental guidance to local authorities as to how to achieve a fair distribution of social services resources. They contrast this with the position in relation to adult social care in relation to which the Department of Health has provided a Local Authority Circular entitled "Fair Access to Care Services" (FACS). In the absence of guidance, they submit that there are likely to be different criteria applied in different local authority areas, leading to inequalities which may be discriminatory or otherwise unlawful. **This is a point also identified by the Council which states that although FACS is criticised as a blunt instrument for determining eligibility in some areas, it does have benefits, including promoting transparency, because it is clear at what level services are provided in each authority.** The most that is available in relation to disabled children is the "Core Offer" which is intended to be a statement of the standards which families with disabled children can expect across the country from local services. The Council submits that this provides limited guidance to local authorities on how to operate their eligibility criteria but falls short of the comprehensive guidance contained in FACS and, in particular, does nothing to prevent a*

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*local authority from applying eligibility criteria to individuals to whom the authority is, in law, under a duty to provide services.*

...

***74. The Council submit that it is frequently unclear, in practice, under which statutory provision a disabled child's needs are being assessed and a decision taken as to the provision of services but does not hazard any further attempt at pigeonholing various types of provision.***

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### **Maximising the Impact**

18. The R(JL and LL) v Islington LBC judgment has stimulated significant concern from many local authorities that their eligibility criteria were (and remain) equally unlawful and has led to a series of meetings between CDC and local and central government to remedy the position. A follow-up meeting was also held between CDC and Paul Bowen, Luke Clements and Mitchell Woolf to ensure that all aspects of the judgment were properly understood and all avenues for further challenges explored.

19. Following extensive discussions with DCSF, CDC published a statement on the use of eligibility criteria in disabled children's services in August 2009 (statement attached).<sup>10</sup> The statement summarised CDC's understanding of the key implications of the judgment and set out a suggested staged approach to the assessment of need and application of eligibility criteria by local authorities. While this statement records that CDC has discussed the judgment with government officials and taken legal advice, it is of course not formal government guidance. It is understood that a formal response from DCSF to the judgment remains forthcoming.

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<sup>10</sup> [http://partner.ncb.org.uk/cdc/eligibility\\_final\\_24\\_08\\_09.doc](http://partner.ncb.org.uk/cdc/eligibility_final_24_08_09.doc)

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20. In the meantime, parents of disabled children can rely on the judgment to challenge unfair and unlawful eligibility criteria limiting their family's access to services. The delay in DCSF issuing formal guidance makes it more likely that local authorities will continue to operate unlawful criteria and increases the probability that further cases will need to be brought in other areas. However, CDC is aware that a number of authorities are taking urgent steps to review their criteria following the judgment.

### Conclusion

21. As outlined above, R (JL and LL) v Islington LBC provides an example of effective collaboration between voluntary organisations and claimant lawyers. This case saw a happy coming together of CDC and EDCM's strategic objectives with the particular needs of the individual family bringing the challenge. Of course, this coincidence of objectives was assisted by the history of joint working that led up to the claim being brought.

22. It may be helpful for others to note that CDC achieved its strategic outcomes from the case without the need to instruct Counsel or take an active role in the final hearing.<sup>11</sup> In retrospective, it seems likely that it would have been equally effective for CDC to simply put in a witness statement in support of the Claimant. However, CDC's status as an interested party did ensure that it retained an autonomous role in the proceedings and may have influenced Black J to place greater reliance on the Detailed Grounds than would have been given to a simple statement. Whether as an Interested Party or through witness statement impact evidence, CDC was of course not exposed to costs.

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<sup>11</sup> The transcript of the judgment wrongly records that Steven Kovats appeared for both interested parties; in fact he made written representations on behalf of the first interested party, the Secretary of State

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23. There are of course challenges for voluntary organisations engaging in strategic litigation, which in this case included:

- a. Ensuring that the needs of the family retained priority over the needs of the organisation (something the legal team rightly never lost sight of);
- b. Being able to respond effectively to an urgent judicial review timetable;
- c. Maintaining the correct relationship to all parties (given CDC's role as a 'critical friend' to both local authorities and central government); and
- d. Sustaining the involvement through staffing changes.

24. All these challenges were met, the relationship between CDC and EDCM and the lawyers involved in the case remains ongoing and it is hoped that future opportunities will arise for strategic collaborations of this sort. This is only possible because of the goodwill and commitment of Paul Bowen, Luke Clements and Mitchell Woolf. CDC and EDCM have been fortunate to have such an effective partnership with leading lawyers in this field, and it is hoped that other organisations will be able to build similar alliances where possible. The 'impact to effort' ratio of this work is high and it can achieve benefits that simply cannot be achieved in any other way, particularly in an unfavourable economic (and in many cases political) environment.

15<sup>th</sup> October 2009

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