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Citation for final published version:

Tarrant, Alison and Goodall, Carolyn 2022. Welcome break? Holidays and recreation as eligible needs under the care act 2014. *Journal of Social Welfare and Family Law* 44 , pp. 544-546. 10.1080/09649069.2022.2136707

Publishers page: <https://doi.org/10.1080/09649069.2022.2136707>

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# Welcome Break? Holidays and recreation as eligible needs under the Care Act 2014

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## Introduction

In *R (BG and KG) v Suffolk County Council* the Court of Appeal has upheld the High Court decision that the Care Act 2014 (CA 2014) empowers a local authority to pay for holidays and other recreational activities for people who are in need of care and support, where there is an eligible need. In doing so, the judgment does more than any previous case to advance self-determination and agency in the CA 2014 and infuse its provisions with a sense of personhood.

The case concerned adult brothers, BG and KG, who have autism, learning disabilities, anxiety and physical conditions including epilepsy. BG and KG require 24-hour care which is provided on an unpaid basis by their mother, SQ, with assistance from other family members. The brothers are unable to trust other carers as a result of abuse they previously experienced when attending a day centre. From 2011, Suffolk County Council ('SCC') provided direct payments of between £108-150 per week to both BG and KG. SCC approved the use of these to fund family outings, activities and breaks as it had assessed the brothers as having eligible needs for recreation and holidays. From 2014, SCC also provided an annual 'respite budget' of £3000 to each brother which they used to finance trips and holidays including family holidays in Florida in 2015, 2017 and 2018. A community nurse described these breaks as having a therapeutic value, allowing all the family to feel less distress, as well as enabling SQ to continue her caring role.

In 2020, SCC advised the family that it would be ending both the direct payments and the respite budgets. In respect of the direct payments, SCC stated that as all the brothers' support needs were being fulfilled by their family, there were no eligible unmet needs that it could lawfully meet. The respite budget was no longer to be paid for the same reason, and on the basis that holiday costs were not an eligible need under the CA 2014. In relation to all the payments, SCC stated that as the eligibility criteria under the CA 2014 require needs to arise from 'a physical or mental impairment' (Regulation 2(1)(a) The Care and Support (Eligibility Criteria) Regulations 2014), it was not empowered to fund the 'universal' costs connected to leisure activities that would be incurred by anyone undertaking that activity. It stated, for example, that it was not responsible for paying costs such as holiday travel or accommodation, or an entrance ticket to an attraction, but only costs arising from impairment, such as the cost of a carer or a carer's entrance ticket. BG and KG sought a judicial review of the Council's decisions to cease the payments.

The central legal question at both first instance and appeal was whether a local authority can provide financial support for recreational activities and holidays under section 18 of the CA 2014, or through its discretionary powers under section 19. The judgment was given by Lady Justice Nicola Davies and agreed by Baker LJ and Phillips LJ.

The Court was emphatic in its dismissal of SCC's argument that certain costs associated with holidays or recreation, such as travel or accommodation, are necessarily 'universal' and therefore incapable of being met by a local authority under the CA 2014. It found that the brothers' need for holidays and recreational activities arose directly from their impairments and, as such, were capable of being eligible

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for support. This reiterates a principle that had been established under the legislative regime that predated the CA 2014 (see *R v North Yorkshire CC ex p Hargreaves* (No 2) (1997-98) 1 CCLR 331). Unlike its predecessor legislation, the CA 2014 contains no express statement that holidays may be considered as a potential means of meeting a person's eligible needs – an omission that had been noted as a concern during the passage of the Act (*Clements et al* 2019, para 8.8) – and holidays are also omitted from the statutory guidance. The judgment removes uncertainty on this matter.

Equally significant is the Court's confirmation of the High Court decision that a local authority is able to meet a person's eligible needs by the provision of financial assistance. The judgment not only approves the finding at first instance that the term 'care and support', used throughout the CA 2014, is capable of including the provision of financial assistance, but also considers the impact of an individual's own resources, or lack of them on their ability to meet their own needs. On other facts, it is possible that this might have implications extending beyond costs related to recreation. The language of the judgment is robust:

I do not accept that it is possible to use recreational facilities merely by the provision of support to access the facility if the adult in question cannot afford to pay for the entry requirements.... The financial support .... is a means of meeting their needs which arise from and are related to the physical and mental disability from which each suffers. It is a need which cannot be met without financial support from the appellant (paras. 74-75).

The judgment is also notable for its discussion of the purpose of care and support under the CA 2014 and, indeed, the purpose of the Act itself. The Court paid close attention to the 'wellbeing principle', which lies at the heart of the CA 2014. Section 1(1) of the Act states:

The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.

Critically, the judgment identifies the autonomy of the individual in need of care and support as a core element of the wellbeing principle. In doing so, and in indicating that section 1 clarifies the 'purpose of the statute' (para. 69), it places autonomy at the heart of the Act as a whole. Of particular interest is the Court's discussion of the meaning of the statutory phrase 'care and support', and the significance of the departure from the phrase 'care and attention' deployed in the predecessor legislation. SCC had argued that the phrase "needs for care and support" in s9 CA 2014 expressed 'needs to be "looked after"' (para. 48). It relied on the recent judgment in *R (Aburas) v Southwark LBC* [2019] EWHC 2754, which held this to be the case and equated the concept of 'care and support' with the previous terminology of 'care and attention'. In *Suffolk*, the Court of Appeal rejected this interpretation. The judgment draws a clear distinction between the language of the current statute and that of the former legislative regime. While the Court accepted that the formerly used language of 'care and attention' can indeed equate with 'looking after', it found that 'care and support' reflected an entirely different idea:

Section 1 of the CA 2014 is clear as to the purpose of the statute namely the promotion of an individual's well-being, within that is recognition of the autonomy of that individual.... 'In my view, "support" begins with the identification of the needs and wishes of the particular individual and is, or should be tailored, to address the same. .... the needs under the CA 2014 can no longer be described as "looked-after" needs as such a description does not properly reflect the individual nature of the assessment, [and] its recognition of the autonomy of the individual...' (paras. 69-70).

These comments indicate a change in the conceptualisation of individuals who use social care. They pull away from narratives of passivity and external management and move towards those of self-

determination and agency. Taken as a whole, they indicate a legal construction within the CA 2014 of adults with support needs as individuals with their own ideas, freedom of will and a right to independent judgment. While previous cases, notably *R (JF) v LB Merton* [2017] EWHC 1519 (Admin), have emphasised the centrality of the wellbeing principle, its importance in ensuring that actions under the CA 2014 are lawful, and the need to take account of the person's views, wishes and assessment of their own wellbeing (as required under section 1(3)), *Suffolk* has done more than any previous case to infuse these provisions with a sense of personhood.

Resources are an inevitable underlying current in social care cases and *Suffolk* cannot be divorced from the austerity context in which it has arisen. The judgment is explicit that '[t]he core purpose of [the] provision of adult social care and support as set out in the CA 2014 is to help individuals to achieve outcomes which matter to them in the life which they lead (para. 69)'. If local authorities are to fulfil this legal requirement, they must be adequately funded to do it. SCC came to its decision to stop funding the costs of holiday travel and accommodation after conducting a review of how direct payments were being used elsewhere, and the implication is that other local authorities are taking similar 'cost control' methods. While *Suffolk* has lent stronger legal teeth to the rhetoric of choice and control that has appeared in English social care policy for two decades (Tarrant 2020), these principles are likely to remain hollow for too many until social care is properly funded.

## References

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