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The progressive potential of the Care Act 2014: wellbeing, autonomy and rights

Alison Tarrant*

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In *R (RW) v Windsor and Maidenhead Royal Borough Council* ([2023] EWHC 1449 (Admin)) the High Court considered whether the costs of activities undertaken by a disabled person as part of a social and life skills group should be considered ‘disability-related expenditure’ (DRE), and therefore exempt from the local authority’s calculations in relation to the charge that the claimant was required to pay for his support under the Care Act 2014. The consideration of the financial issues is of interest to anyone with a practical or academic interest in charging regimes under the Act, particularly in relation to DRE, and discussion on this can be found elsewhere (see, for example, Local Government Lawyer, 2023). However, this note focuses on two issues of broader significance: the treatment by the Court of both the wellbeing duty, which forms the underpinning principle of the 2014 Act, and the role of the UN Convention on the Rights of Persons with Disabilities (CRPD) in understanding how the statute should be interpreted. In its treatment of these two issues, this judgment reminds us of the progressive potential of the Care Act 2014.

The claimant, RW, was a gentleman in his twenties with a diagnosis of autistic spectrum disorder. He required support with various matters including developing social relationships, communication and managing money. As part of his care plan, agreed with the defendant local authority under the 2014 Act, he attended a social and life skills group with whom he undertook various activities. The cost of attending the group was £80 plus VAT per day, paid from RW’s personal budget. The cost of the activities was around £15 per day, paid by the claimant from his private income. RW asserted that the £15 was a ‘disability-related cost’, as he could not attend the group without taking part in the activities. The local authority argued that the cost of the activities was not DRE on the basis that the claimant had chosen to undertake them, that they were the kind of activities that non-disabled people might do, and that the claimant’s need was for the staff support that he received in the group rather than the activities that he undertook. It was clear from the evidence that the purpose of attending the group was to take part in various activities with peers and with staff support, and that it was not possible for RW to take part in the group without also taking part in the activities. The Court found emphatically for the claimant.

The focus and emphasis of the Court on the wellbeing duty set out in section 1 of the Care Act 2014 is remarkable in this case. In his judgment, Dias J identified the *sole* issue for the court as ‘whether the defendant has acted unlawfully in not treating the activity and associated costs as DRE’ (para. 23). DRE is precisely defined in The Care and Support (Charging and Assessment of Resources) Regulations 2014, Schedule 1, paragraph 4, as augmented by Annex C of the statutory guidance under the 2014 Act. Both the Regulations and the Annex are entirely functional in their approach, and neither refers to the wellbeing duty (albeit the broader

* Cardiff University, UK. Email: TarrantAE2@cardiff.ac.uk

guidance on charging makes some reference). In placing such emphasis, the Court in this case affirms the relevance of the wellbeing duty to *all* decisions made under the 2014 Act. Section 1 of the Act certainly makes it clear that the duty is pervasive. It states (at s.1(1)) that:

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.

In accordance with this duty, Dias J frames his reasoning as a requirement to find routes to wellbeing regardless of the narrowness of the question under discussion, even when this relates to an essentially administrative function.

Dias J begins his reasoning with a statement of the transformative purpose of the 2014 Act and moves forward from there. The judgment as a whole reads as a powerful statement of a new approach to both the provision and the purpose of care and support, as established by the Act. Additionally, as in the earlier case of *R (BG and KG) v Suffolk County Council*, the Court considers the wellbeing duty as a legal principle wholly connected with the autonomy and personal integrity of the individual receiving care and support. This discourse infuses the judgment in its entirety. At paragraph 56, Dias J states:

“[the person's] thoughts and ambitions cannot simply be ignored. That would be to revert to a former and less enlightened age when the autonomy, agency and preferences of the individual in question were given little if any priority.... That time has gone. The entire ethos of the Care Act 2014 is to finally place the individual front and centre of this decision-making process.”

Dias J does not stop there. He goes on to consider the meaning of autonomy, describing it as ‘part of the essence of being human’ and as a right, as an act of ‘self-creation’ and as the agency that “allows each of us to be responsible for shaping our lives according to our own coherent or incoherent – but, in any case, distinctive – personality” (para 84, citing Dworkin, 1993). This is a hugely important statement. Like *Suffolk*, it promotes a new legal construction of those receiving care and support as equal ‘individuals with their own ideas, freedom of will and a right to independent judgment’ (Tarrant and Goodall, 2022, p.546) and considers such autonomy as the essential demand and purpose of adult social care.

An equally remarkable aspect of the judgment is that in arriving at his understanding of the wellbeing duty, Dias J deploys the CRPD as part of an unquestioned statement of rights and a *necessary* interpretive aid. In paragraph 77 of the judgment there is reference to ‘the vindication of [the claimant's] right under the [CRPD] to live independently and autonomously; and paragraph 90 states:

The high legal obligation, deriving from international jurisprudence about the importance of autonomy for people with disabilities, is to put them at the centre of the decision-making. The Preamble of the [CRPD] unmistakeably recognises:

“... the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices”.

What is unusual here is the reference to the Convention as an undisputed part of the broad legal tapestry in which the Care Act 2014 sits. In contrast to the case of *R (on the application of Davey) v Oxfordshire CC* ([2017] EWCA Civ 1308), in which the claimant attempted to rely on the CRPD as a source of actionable rights, the Court in this case does not assume that the Convention should be considered as an aid to interpretation only where there is ‘ambiguity or uncertainty’ in the domestic provision (*Davey*, para 62). In directing the 2014 Act towards ‘[t]he high legal obligation’, Dias J demonstrates the value of the Convention as an indicator of what disabled people should be entitled to expect.

The approach to the CRPD is in line with the general spirit of this judgment, which is imbued with a strong sense of principle. References to humanity and to the claimant’s quality of life run as a thread throughout, as do statements that support for disabled people is a matter of collective social responsibility (paras 4, 77 and 91). Again echoing (although not relying on) the *Suffolk* case, the judgment takes the view that the 2014 Act heralds a new, more empowering approach to individuals drawing on social care, particularly in consigning the former legislative regime to ‘a less enlightened age’ (para 56).

The judgment has its uneven moments. It is worth noting that the approach taken to disabled people owes much to ‘traditional’ narratives of vulnerability and misfortune, rather than the radical vision of equal and empowered citizenship enshrined within the CRPD. Similarly, there are suggestions that ‘independent living’ is understood in the sense of ‘living alone’ or without a need for support, rather than living ‘with choices equal to others’ (and support to enable these choices), as it is understood in Article 19 of the Convention. It would seem, therefore, that work remains to be done in terms of developing the understanding the broader vision of the Convention beyond its individual rights. But the focus by Dias J on the ‘vindication of [the claimant’s] right under the UN Convention to live independently and autonomously’ brings a new energy to the Care Act 2014 and reminds us of its progressive potential.

As with almost all cases relating to social care, it is resources – or the lack of them – that lie at the heart of this case. As more local authorities slide into effective bankruptcy, the realisation of the rights of those drawing on social care is likely to become increasingly precarious. In a further very recent case (at the time of writing) the dire financial situation of the local authority – which had issued a 114 notice – formed the critical backdrop, and a key deciding factor, in another challenge to charging policy under the 2014 Act (*R (on the application of YVR) v Birmingham City Council*). In that case the defendant council was successful, in part because of its ‘exceptional’ circumstances. While *RW* has given further demonstration of the ‘teeth’ of the Care Act 2014 in terms of putting the individual at the centre of their support, and while local authorities would do well to take note of this, it remains the case that radical change cannot be achieved in the absence of adequate funding.

References

Dworkin, R., 1993. *Life’s Dominion: An Argument about Abortion and Euthanasia*. London: Vintage Books.

Local Government Lawyer, ‘Claimant wins High Court battle over social and life skills activities and disability related expenditure’ (22 June) at <https://www.localgovernmentlawyer.co.uk/adult-social-care/391-adult-care-news/54214->

[claimant-win-high-court-battle-over-social-and-life-skills-activities-and-disability-related-expenditure](#) (accessed 14 March 2023).

Tarrant, A. and Goodall, C. 2022. Welcome break? Holidays and recreation as eligible needs under the Care Act 2014. *Journal of social welfare and family law*, 44(4), 544-546.