Neutral Citation Number: [2022] EWHC 2886 (Admin)

Case No: CO/2425/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2022

Before :

David Pievsky KC
sitting as a Deputy Judge of the High Court

- -

Between :

THE KING (ON THE APPLICATION OF P) (BY HER LITIGATION FRIEND SP)	**Claimant**
- and -	
LONDON BOROUGH OF CROYDON	**Defendant**

- -
- -

Laura Shepherd (instructed by **Sinclairslaw** for the **Claimant**
Joshua Swirsky (instructed by **London Borough of Croydon)** for the **Defendant**

Hearing date: 1 November 2022

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JUDGMENT

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 15/11/2022

David Pievsky KC (sitting as a Deputy Judge of the High Court) :

Introduction

1. The Claimant is 27 years of age. She lives with Autistic Spectrum Disorder ("ASD"), absence epilepsy, learning difficulties and a number of other significant disorders and anxieties. She brings this application for judicial review of her local authority by her litigation friend and father ("SP").

2. The Defendant authority is responsible under the Care Act 2014 ("the 2014 Act") for assessing and meeting the needs of adults who meet the eligibility criteria. It accepts that the Claimant has needs, that she meets the criteria, and that it is required to meet such of her needs as cannot be met by her family.

3. This case is about the amount of support which the Defendant has decided to provide or fund. The Claimant's case is that the Defendant's decision to fund 35 hours per week of support is unlawful, and that it has failed to meet her needs contrary to the requirements of the 2014 Act. The Defendant's case is that its decision was lawful, and/or that any unlawfulness made no difference to the outcome.

The factual background

4. The Claimant is a 27 year old woman. She has diagnoses of ASD, and a number of other complex conditions and difficulties. She lives with her parents, who support her. Her father works full time and in practice much of her day-to-day support is provided by her mother. The Claimant has received additional support from the Defendant for a number of years. She is currently receiving £437.50 per week by way of direct payments, equivalent to 35 hours of support.

5. The Claimant previously attended a specialist college. She received substantial day-to-day help with her needs there. She was due to leave the college in July 2020. In fact she left in March 2020, because of the pandemic. In consequence there was an increased need for her parents to care for her at home. The Defendant undertook a carer's assessment of the Claimant's mother in March 2020, shortly before the Claimant left college.

6. On 6 October 2021 the Defendant, following a meeting with the Claimant and her family, recorded an analysis of the Claimant's needs and how it might properly meet those needs ("the October 2021 analysis"). This document referred in detail to the Claimant's need for support with various important aspects of daily life, including the need to: maintain personal hygiene, wear appropriate clothes, manage toilet needs, eat and drink properly, be aware of hazards, develop social relationships, and access work, training, education or volunteering. It noted her vulnerability to exploitation and abuse (including but not only online). It concluded with a section indicating that the Claimant needed:

i) "*24 hour support*", for "*personal care, eating and drinking, and home and living*");

ii) "*up to 7 hours support, 7 days a week*", to assist with accessing and engaging in work, training, education or volunteering;

iii) "*up to 7 hours support, 7 days a week*", to assist her to maintain relationships and engage in normal everyday activities;

iv) An "*indicative*" support budget of £1,200 per week.

7. However, as set out in more detail below, the Defendant's position is that the indicative support budget set out in the October 2021 analysis was wrong.

8. SP wrote to the Defendant on 25 January 2022 and again on 24 February 2022. He asked the Defendant to undertake a review of support payments going back to August 2019, pointing out that it had agreed to increase those payments from 30 hours per week to 35 hours per week, but had subsequently failed to do so. He also asked the Defendant to finalise a support plan for the future, reflecting the fact that the Claimant was no longer in full-time education. He asked for the Claimant's existing 12 hours of overnight respite support per week to be added to the proposed plan. His understanding was that those 12 hours of overnight support, when added to the other hours of support specified in the assessment, would confirm and justify the overall budget of £1,200 per week, representing a total of 96 support hours at an hourly rate of £12.50 per hour. He provided a detailed document (which he called an outline support plan) listing the likely activities in which the Claimant would engage each week, and the assistance she would need with them, were she to receive the 96 hours of support sought.

9. On 25 February 2022, the Defendant responded. It stated again that the "*Indicative Budget*" was not legally binding and did not determine the Support Plan amount. It added that any increase in the support package would be subject to "*review / reassessment*". The Defendant asked for a more specific breakdown of how the support payments were being spent, what additional services the family required, and why.

10. By that time, although the Claimant and her family did not know it, a Care and Support Plan ("CSP") had in fact been completed. It was dated 14 February 2022. The CSP was not in fact provided to the Claimant's family until after these proceedings were commenced. It set out the Defendant's "*weekly commitment*" as being 35 hours per week (or £437.50, at £12.50 per hour). It stated that the Claimant "*will achieve her day-to-day outcomes as well as her long-term outcomes*". This followed a meeting of a funding panel of the Defendant, in which the much higher level of support proposed in the October 2021 analysis had been rejected and replaced with a package amounting to 35 hours per week. The Claimant and her family were not told about the meeting.

11. SP replied to the Defendant's 25 February 2022 email on 28 February 2022, setting out details of the support available to the Claimant, the Claimant's need for "*24/7*" support (which he believed the Defendant had correctly identified in the October 2021 assessment), and a summary of how the Claimant's skills and welfare would be improved with the additional support requested.

12. On the same day, the Defendant emailed SP referring to the support that the Claimant received from her parents (which needed to be factored into any assessment of support to be provided by the local authority), repeating that the "*indicative budget*" was not binding, and stating that the Claimant's current agreed budget was £437.50 per week, equivalent to 35 hours of support. It asked SP to provide a breakdown of how the £437.50 was being spent, and details of the additional support he was requesting so that the request could be considered.

13. SP replied to the effect that he was not sure what else he could say, since the Defendant already had the relevant information contained in the assessments, reports, and SP's February 2022 outline support plan, but he maintained his request for the Defendant's panel to consider his request "*for additional support*" for the Claimant.

The pre-action correspondence

14. On 23 March 2022 the Claimant through her solicitors sent a letter before claim, asking the Defendant to agree to produce a care plan identifying her need for 96 hours per week of additional support (i.e. support from non-family members), at a cost of £1,200 per week. The Claimant also sought compensation for what was said to be the Defendant's failure to provide for her care and support needs.

15. The Defendant on 24 March 2022 informed SP that its funding panel had "*not agreed*" with the "*previous assessment*" of "*24 care and support of Direct payment* [sic]". It stated that the best way to resolve the dispute would be to reassess the Claimant's needs. It stated that this was the only way of changing the Defendant's funding panel's stance.

16. SP declined this offer on the basis that there appeared to be no need to put the Claimant through a further assessment of her *needs* when those needs had not changed and were accurately reflected in the Defendant's own October 2021 analysis.

17. On 7 April 2022, in its formal response to the letter before claim, the Defendant stated that the "*indicative budget*" in the October 2021 analysis had "*been put together and authorised erroneously*". The Defendant had decided that the errors "*need to be rectified and recalculated*". The Claimant through her solicitors on 4 May 2022 confirmed that their position was that a reassessment of need would not be the right way forward, since the October 2021 analysis had (in her family's view) *accurately* reflected her needs, and there had been no reasonable explanation of how the assessment had been wrong.

The claim

18. The claim form, dated 6 July 2022, identified the decisions sought to be reviewed as follows:

> "*a. the Defendant's ongoing failure to meet the Claimant's needs pursuant to section 18 of the Care Act 2014…;*

> *b. The Defendant's ongoing failure to undertake an assessment of the Claimant's carers' support needs pursuant to s.10 of the 2014 Act in a timely manner or at all;*
>
> *c. The Defendant's unreasonable attempt to revoke the Claimant's assessment of need dated 6 October 2022; and*
>
> *d. the Defendant's ongoing failure to prepare a care and support plan within a reasonable time, pursuant to s.24 of the 2014 Act*."

19. The proposed grounds of claim were, in summary as follows:

    i) Ground 1 was that the Defendant had failed to meet the Claimant's needs.

    ii) Ground 2 was that it had failed to assess the Claimant's carers' needs.

    iii) Ground 3 was that it had unreasonably sought to revoke the Claimant's assessment of need dated 6 October 2022; and

    iv) Ground 4 was that the Defendant had failed within a reasonable time to prepare a care and support plan.

20. The remedy sought in the claim form was described as follows:

> "*a. The Defendant must complete a care and support plan within 28 days of the final order;*
>
> *b. …they should complete a carer's assessment of [the Claimants' parents] within 28 days of any order;*
>
> *c. A final mandatory order and a declaration the Defendant has unlawfully failed to implement a care and support plan within a reasonable time and has failed to meet the Claimant's needs; and*
>
> *d. The Claimant applies for their costs in bring this claim*."

21. In Summary Grounds dated 22 July 2022 the Defendant contended that the £1,200 per week budget set out in the October 2021 document was an error. It had arisen because the author had recorded a need for the provision of 24/7 hour care (which included care provided to the Claimant by family members). The indicative budget was therefore wrong. The statutory Personal Budget was set out in the CSP dated 14 February 2022. The Personal Budget was set at £437.50 per week. This had represented an increased number of hours of support per week: 35 hours rather than 30. Whilst the October 2021 analysis had contained errors, it did not follow and was not the case that the budget or the CSP was unlawful. The Defendant contended that it had not sought to "*revoke*" its own assessment but rather to "*implement*" it. However, it had offered to carry out a reassessment.

22. On 27 July 2022 the Claimant finally received the CSP referred to in the Defendant's Summary Grounds. Also on 27 July 2022, the Claimant filed a Reply to the Defendant's

Summary Grounds. The Reply contained modifications to the Claimant's case on Grounds 1 and 2.

23. On 29 July 2022 the matter was considered on the papers by Mr Justice Cotter. The learned Judge:

    i) Granted permission on Grounds 1 and 2;

    ii) Refused permission on Grounds 3 and 4;

    iii) Refused an application for interim relief;

    iv) Made an anonymity order, and appointed the Claimant's father SP as the Claimant's next friend;

    v) Required the Claimant to file an amended claim by 15 August 2022 ("*so as to incorporate the matters addressed in the [Claimant's 27 July 2022] reply*");

    vi) Gave directions, including a direction that the Defendant file its Detailed Grounds and any written evidence that is to be relied upon by 5 September 2022; and

    vii) Granted the application for expedition, requiring the case to be listed on the first available date after 3 October 2022.

24. In relation to Ground 1, the Judge observed that it was arguably unlawful for the Defendant to have set a level of required care in an assessment, and then to have provided a CSP making assumptions that the required care could be provided by her parents. The "*heart of the claim*" was said to be the Defendant's apparent failure to assess the level of care which could and would be provided by the Claimant's parents.

25. On 15 August 2022 the Claimant filed an amended Statement of Facts and Grounds. The Claimant sought to substitute Grounds 3 and 4 with the following:

    i) New Ground 3: the Defendant, in calculating the Personal Budget, acted unlawfully in that it failed to comply with the Statutory Code; and

    ii) New Ground 4: the Defendant, in preparing and producing the CSP, acted unlawfully in that it failed to comply with the Statutory Code.

26. The Claimant also sought new and/or different relief, i.e:

    i) A declaration that the Defendant had unlawfully failed to meet the Claimant's needs from 23 July 2019 onwards (or any other such period as the Court sees fit);

    ii) A mandatory order for the Defendant to complete a carer's assessment of both parents within 28 days;

    iii) An order quashing the February 2022 decision to provide 35 hours of support within the Personal Budget and a mandatory order requiring the Defendant to retake the decision;

iv) A mandatory order requiring the Defendant to produce a new Care and Support Plan in compliance with the Code; and

v) Costs.

27. Although these amendments arguably went further than might have been anticipated by Cotter J when directing the Claimant to file an amended claim, the Defendant has very sensibly taken no point about them, and counsel for the Defendant expressly confirmed at the outset of the hearing that they were all properly before the Court. To the extent necessary I grant permission. Amended Grounds 3 and 4 are plainly arguable (and they are closely related to Grounds 1 and 2 which already have permission).

28. The Defendant filed Detailed Grounds of Resistance on 6 September 2022.

29. The Claimant filed a Reply on 12 September 2022 along with a second witness statement of SP. One of the complaints made in the Reply (at paragraphs 13-16) was that the Defendant had not provided any proper explanation as to how the figure of 35 hours had been arrived at, particularly in circumstances where the Claimant was requesting an increase, was no longer at college, and where her reliance on her mother for support had recently been described by the Defendant itself as "*quite overwhelming for her mother and… not healthy for either of them*". She also applied to rely on a second witness statement from SP.

30. The Defendant applied on 26 October 2022 (less than a week before the substantive hearing) to admit a witness statement of Mr Haluk Sisman dated 18 October 2022, along with a number of exhibits. The statement was said to be a response to the second statement of SP dated 15 August 2022. In fact it was a more general account of what had occurred. These documents ought to have been filed more promptly (particularly in light of the directions made by Cotter J – see paragraph 23(vi) above). Notwithstanding its lateness, counsel for the Claimant indicated that she had no objection to the Defendant's application. I granted it. The statement contained relevant and objectively presented information which would assist the Court in determining the claim.

Submissions on behalf of the Claimant

31. The Claimant's case, as refined by Ms Shepherd during oral argument, may be summarised as follows.

32. As to Ground 1 and 2:

i) The Defendant had determined in August 2019 that the Claimant needed 35 hours of support from the Defendant per week. It had expressly agreed with SP that these would be funded.

ii) But until February 2022 she had only been provided with 30 hours of support per week. That constituted an unlawful failure to comply with s.18 of the 2014 Act. There should in the first place be a declaration that there was a historic failure to meet the Claimant's needs during that period.

iii) It was predictable that the Claimant would need significantly more support at home, once she was no longer being supported for substantial parts of the day by her college, and that this would in turn increase the burden on her family. The Defendant ought to have approached the current exercise with that in mind.

iv) The October 2021 assessment contained numerous references to the Claimant requiring "*more*" support. That could only sensibly be understood as meaning more support than she was at that time receiving.

v) The October 2021 assessment also contained numerous references to the Claimant's over-dependency on her mother, which was described as worrying. The Defendant had effectively already accepted that the balance between (a) the provision of support by the Claimant's mother and (b) the provision of support by others was wrong and would need to be adjusted.

vi) The Defendant had accepted in its October 2021 analysis that the Claimant needed 24/7 support for "*personal care, eating and drinking and home and living*", 49 hours per week for "*access and engaging in work, training, education, or volunteering*", and 35 hours per week for "*social relationships and activities*". These were, on any view, high levels of support, reflecting her complex needs. Even if the Court accepted that the Defendant had made an error in indicating a *budget* of £1,200 per week on that basis, there was no evidence to suggest that there was an error in assessing the Claimant's basic *needs* for support or what they were. On any reasonable view the October 2021 assessment indicated that she needed far more than 35 hours per week of support and there had been no finding, at any rate no reasoned finding, that her mother was willing and able to provide it.

vii) The witness statement of Mr Susman at paragraph 37 suggested that the Defendant's decision to increase the hours from 30 to 35 per week in February 2022 was based *solely* on a recognition that the increase agreed in August 2019 had not been actioned. There is no suggestion that he or anyone else in the Defendant turned their minds to the relevant question, i.e. whether in light of the considerations set out in the October 2021 assessment and the information provided by SP, more than 35 hours per week of support was now required to meet her needs. In any event, the absence of any evidence of a reasoned conclusion of how 35 hours per week of support would be adequate the decision was unlawful and should be quashed.

viii) The omissions were telling in a case where the appropriate level of support to be provided depended on the extent to which the Claimant's mother remained "*willing and able*" to provide support – a matter which had not properly been considered: see R (BG and KG) v Suffolk County Council [2021] EWHC 3368 (Admin) at paragraphs 84 and 142. Whilst the Defendant had now agreed to carry out a carer's assessment, which was welcome, and which disposed of Ground 2 as a discrete complaint, the failure to have carried one out since March 2020, or as part of the current analysis, was illuminating, and further undermined the Defendant's overall decision to provide 35 hours per week of support to the Claimant.

ix) The Defendant's offer to "*reassess*" the Claimant's needs under s.9 of the 2014 Act was unsatisfactory and did not constitute a good reason to deprive the Claimant of the relief which a Claimant would ordinarily expect following findings by this Court of unlawful decision-making. There was no proper basis for a requirement to reassess the Claimant's *needs*. No one had suggested that (still less explained how) they had been inaccurately described in the October 2021 assessment. It would be disproportionate to reassess the Claimant *de novo*.

33. As to Ground 3, the budget decision had not been carried out in a "*transparent*" manner. Nor was it "*sufficient*". These defects amounted to non-compliance with the Statutory Guidance, particularly at paragraph 11.24. The budget was unlawful for that additional reason.

34. As to Ground 4, the CSP had not been drafted with any (or any sufficient) involvement of the Claimant or the Claimant's family. This was a significant procedural flaw and was contrary to the Statutory Guidance, particularly paragraph 10.49. It rendered the CSP unlawful for this additional reason.

Submissions on behalf of the Defendant

35. For the Defendant, Mr Swirsky's submissions were in summary as follows. As to Ground 1, the Claimant's case had changed over time and the "*goalposts*" had moved. The Claimant's family and her solicitors had been asking the Defendant to pay for 96 hours of support per week. It was the Defendant's decision to refuse *that* particular request that had led to proceedings. The decision to refuse 96 hours was perfectly lawful, notwithstanding the erroneous indicative budget set out in the 2021 October assessment. 96 hours per week of external support (costing £1,200 each week) was a level of support to which only the most profoundly disabled and needy persons were likely to be entitled.

36. As to the arguments now advanced, it was, suggested Mr Swirsky, not good enough for the Claimant to ask rhetorically why "*more*" than 35 hours of support per week had not been provided to her. In order to succeed, the Claimant would need at the very least to have communicated to the Defendant, and to demonstrate to the Court, which *particular* need or needs she actually had, which were not in fact being met by the provision of 35 hours per week of support. Despite being asked on numerous occasions, the Claimant had never specified that there were any such needs, or had never done so with the required precision.

37. Ground 2 was academic because a carer's assessment of Mrs P was now being undertaken.

38. Grounds 3 and 4 were partly conceded. The personal budget and CSP had not been determined "*transparently*" or with the involvement of the Claimant's family. These were procedural shortcomings that admittedly meant that there had been non-compliance with the Statutory Guidance. But they made no difference to the outcome because there would never realistically have been an agreement between the parties as to the right way forward. In any event, a new care plan was now inevitable, or likely,

in light of the Defendant's agreement to carry out a carer's assessment of Mrs P. Accordingly, no relief was necessary or appropriate.

Legal framework

39. The meaning and scope of the relevant provisions of the 2014 Act are not in dispute in this case. Those provisions may be summarised as follows:

    i) Section 1 imposes a general duty on local authorities to promote well-being when providing care and support to relevant individuals under the 2014 Act. The concept of well-being in this context incorporates not just physical, mental, or emotional well-being, but also "*control by the individual over day-to-day life*" in relation to the support that is provided to her, and the way in which it is provided: see s.1(2)(d).

    ii) Section 9 sets out the duty to carry out a needs assessment.

    iii) Section 13 sets out the relevant approach to determining whether a person whose needs are being assessed meets the "eligibility criteria".

    iv) Section 18 imposes a duty on the relevant authority, having determined that a person is eligible under s.13, to ensure that their "*needs for care and support*" are met if certain conditions are met. Section 18(7) provides that the duty does not apply to such of the person's needs as are being met by a carer.

    v) Sections 24-26 describe, inter alia, the requirements for an authority subject to a s.18 duty to prepare a CSP, tell the adult which (if any) of the needs that it is going to meet may be met by direct payments, and include the personal budget for the adult concerned.

40. The Care and Support Statutory Guidance ("the Statutory Guidance") is a lengthy document which addresses, among other things, when and how to undertake care and support planning and how to meet needs. The critical passages which are relevant to this case are:

> "10.26 Local authorities are not under a duty to meet any needs that are being met by a carer. The local authority must identify, during the assessment process, those needs which are being met by a carer at that time, and determine whether those needs would be eligible. But any eligible needs met by a carer are not required to be met by the local authority, for so long as the carer continues to do so. The local authority should record in the care and support plan which needs are being met by a carer, and should consider putting in place plans to respond to any breakdown in the caring relationship…
>
> 10.49 In addition to taking all reasonable steps to agree how needs are to be met, the local authority must also involve the person the plan is intended for, the carer (if there is one), and/or

> any other person the adult requests to be involved. Where the adult lacks capacity to ask the authority to do that, the local authority must involve any person who appears to the authority to be interested in the welfare of the person and should involve any person who would be able to contribute useful information… The person, and their carers, will have the best understanding of how the needs identified fit into the person's life as a whole and connect to their overall wellbeing…
>
> 11.24 Regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency… Transparency: Authorities should make their allocation processes publicly available as part of their general information offer, or ideally provide this on a bespoke basis for each person the authority is supporting in a format accessible to them. This will ensure that people fully understand how the personal budget has been calculated, both in the indicative amount and the final personal budget allocation. Where a complex RAS process is used, local authorities should pay particular consideration to how they will meet this transparency principle, to ensure people are clear how the personal budget was derived,,. Sufficiency: The amount that the local authority calculates as the personal budget must be sufficient to meet the person's needs which the local authority is required to meet under section 18… "

41. I asked counsel to consider the significance of the fact that these requirements are contained in guidance, particularly in light of section 78(1) of the 2014 Act, which states that a local authority "*must*" act under the general guidance of the Secretary of State when exercising relevant functions. Both counsel agreed that this had the effect that the provisions of the Statutory Guidance relied on this case are mandatory, at any rate unless an authority, without freedom to take a substantially different course, has decided that there are cogent reasons for departing from its requirements: c.f. R v Islington LBC ex parte Rixon [1997] 1 CCLR 119 at p. 123. No such reasons had been articulated here.

Analysis

Ground 1 – failure to meet needs

(a) Was the Defendant's decision to provide 35 hours of support per week from February 2022 onwards unlawful?

42. In my judgment, the Defendant's decision to provide the Claimant with 35 hours of support per week was unlawful.

43. The Defendant had decided not to adopt the indicative budget of £1,200 per week, or the level of support associated with that indicative budget, which had been set out in its October 2021 assessment. It was (as is now not in dispute) entitled to do so. The

Defendant's reason for not adopting the indicative budget, now supported by the (late) witness statement of Mr Sisman, was that it had concluded that the author of the October 2021 assessment had made an error in forgetting to take into account the level of support being provided by the Claimant's family.

44. What was then required, applying basic principles of public law to the decision that still needed to be made under s.18(7) of the 2014 Act, was a reasoned, procedurally fair, and reasonable decision from the Defendant about how - if it was not going to meet the Claimant's needs by adopting the indicative budget and the associated recommendations contained in its own October 2021 assessment - it was instead intending to meet the Claimants' needs, taking due account of the care which her family were willing and able to provide to her. The Defendant has not in my judgment demonstrated that any such reasoned decision was ever made. Even if it was made, no (or no adequate) reasoning was ever provided to the Claimant or her family.

45. The requirement to provide intelligible (if brief) reasoning for a decision about how to meet (or, in a case different to this one, a decision *not* to meet) an eligible person's needs under s.18 is one that in my judgment must apply generally. But the need for appropriate reasoning and explanation was particularly acute in the circumstances of this case, because:

i) The Defendant was in its February 2022 decision radically departing from a recent recommendation contained in one of its own assessments. The Claimant's family had been told that there was to be an indicative budget of £1,200 per week, which they had plainly understood (not, from their perspective, entirely surprisingly) to suggest that the Defendant was recognising that the Claimant needed up to 96 hours per week of external support – on any view far more than she was at that stage receiving.

ii) If the Defendant in February 2022 now considered that it only needed to fund 35 hours of support per week, it was highly likely that the Claimant's family would feel profound disappointment and would legitimately expect an intelligible explanation for the decision that had been made.

iii) Just as reasons are, on well-established principles, likely to be required when a decision appears aberrant, it seems to me that reasons are also likely to be required when a public authority changes its mind and now intends not to provide someone with something it has previously indicated that it will or should provide.

iv) Reasons were not in this case provided. The Claimant's family were not even told about the fact of the decision (which appears to have been made at a meeting of the funding panel of the Defendant, at which (I was informed) no minutes were taken), let alone the reasons for it. Nor was it told about the existence or contents of any support plan, until well after these proceedings were commenced.

v) The Claimant had recently left college, and it was predictable that some of the day-to-day support previously provided to her there needed to be provided to her by her parents at her home. A key question for the Defendant was whether and to what extent her family could cope with the increased support burden. I

have been shown no evidence that the Defendant grappled with that question properly when determining that a payment representing 35 hours per week of support would be sufficient to discharge its duties under s.18 of the 2014 Act.

vi) The Defendant had in its October 2021 assessment recorded specific evidence that the Claimant was "*over-reliant*" on her mother, that this over-reliance was "*worrying*", "*unhealthy*" and needed to be tackled, and that the Claimant's mother was feeling "*overwhelmed*" with the pressures of meeting her daughter's needs.

vii) If the Defendant considered that the October 2021 assessment's provisional or indicative description of what needed to be provided to the Claimant was fundamentally wrong, it should have considered afresh whether any (and if so which) of the Claimant's needs could continue to be met by the Claimant's carer(s) before announcing its decision to provide 35 hours of support.

46. I do not accept the Defendant's contention that it was for the Claimant, who has complex needs which need to be met under the 2014 Act, to specify precisely which particular needs would or might not be met by the provision of 35 hours of support per week, in order for a complaint about the lawfulness of the decision to get off the ground.

i) In this case the Claimant has a carer (her father) who is, if I may say so, capable of writing articulate, informed, cogent and persuasive letters. Many individuals whose needs are required to be met under the 2014 Act will not have that sort of written advocacy at their disposal. The burden cannot sensibly be placed on the adult who needs care and support. It was for the Defendant, in the first instance, to inform itself, make a judgment under s.18 on the basis of the information available to it, and communicate that intelligibly to the Claimant and her family.

ii) In any event, the argument that was being made forcefully on the Claimant's behalf at that time was an argument that 96 hours per week of support should be provided. It was or should have been obvious to the Defendant that her family considered 35 hours per week to be seriously inadequate.

iii) On 28 February 2022, SP further explained: "*we need the additional hours to continue to develop [P's] skills as per the recent assessment, but also to make up for lost ground through the pandemic in being able to access work, training, or volunteering. Personal independence and living skills, healthy eating and using the home environment safely and productively, building and maintaining relationships, social interaction and activities with people her own age*." That was in the context of detailed prior correspondence with the Defendant, including a detailed outline support plan.

47. The appropriate relief is, in my judgment, an order quashing the Defendant's February 2022 decision pursuant to s.18 of the 2014 Act that the Claimant's needs were to be met by providing for or funding 35 hours of support per week. Largely for the reasons articulated by the Claimant's counsel, I do not accept that the case for a quashing order is substantially undermined by the offer of the Defendant to "*reassess*" the Claimant's needs (see s.9 of the 2014 Act). The Claimant seems to me entitled, in the circumstances of this case, to an order which reflects the unlawfulness of the *actual* decision that she

has challenged and which has been found wanting. The actual decision which has been established to be unlawful is the Defendant's s.18(7) decision, not its prior s.9 decision. Whether it will be necessary, applying the principles of rationality and fairness, for the Defendant to reconsider what the Claimant's underlying *needs* are at some point in the future is not something I am being asked to or should determine at this stage.

48. I do not, however, consider that a mandatory order for reconsideration is necessary. There is no reason to think that the Defendant, as a responsible public authority, will not reconsider relevant matters, having duly considered the observations set out in the Court's judgment.

49. Nor do I consider that it would be appropriate for the Court to declare that there has been a failure to meet the Claimant's needs since February 2022. My decision does not go that far. It is that the Defendant's decision as to how to meet those needs was unlawful. The Defendant now needs to make a lawful decision. It does not necessarily follow that the Defendant has in fact failed to meet the Claimant's needs. Although the Claimant's family had originally wanted the Defendant to provide 96 hours of support, her counsel did not seek to persuade me that the Defendant's failure to grant that level of support was unlawful *per se*. She was right not to do so. The evidence referred to by the parties did not come close to establishing the (ambitious) proposition that no reasonable local authority could have declined to pay for 96 hours of support per week. Indeed, the Court is in no position to determine the *merits* of the question as to what precise level of support ought to have been provided to the Claimant since February 2022.

(b) Was there an unlawful failure to provide 35 hours of support before February 2022?

50. The Defendant concedes that between August 2019 and February 2022 the Defendant failed to increase the level of the Claimant's support from 30 hours per week to 35 hours per week, as it had agreed to do.

51. The Defendant contends that it does not follow that this was an unlawful failure to meet her needs, and/or that the Court should not be concerned with "historic" breaches of the 2014 Act, which go beyond the parameters of the real issues in this claim.

52. I reject those contentions.

53. First, it was the Defendant's own assessment, from August 2019 onwards, that she needed and would be provided with 35 hours of support per week. It was not provided. A lesser amount of support was provided. It is not said that there was any good reason for that. It was simply an oversight. The inference that the Defendant did not meet her needs in that respect appears to me irresistible.

54. Secondly, it is not accurate to contend that the Court is unconcerned with "*historic*" breaches, in this context. In R (CP) v North East Lincolnshire Council [2019] EWCA Civ 1614, the Court of Appeal held that an authority had unlawfully failed to ensure that an individual's personal budget included payment for the costs of undertaking

particular activities. The Court of Appeal at paragraph 86 noted, and rejected, an argument advanced by the authority to the effect that this breach was irrelevant because it related to "*past matters*" and had no "*continuing effect*". Although the facts of the case were different, I see no good reason why the similar argument about historic breaches advanced on behalf of the Defendant should prevail here.

55. Thirdly, whilst I entirely accept that the issues between the parties in this case have changed over the course of these proceedings, I am not persuaded that this aspect of the claim goes beyond the parameters of the Claimant's pleaded case. The issue of this alleged breach, whilst perhaps not centre-stage, was fairly and squarely before the Court: see paragraphs 12, 19(c), 14(a), 66, and 81(a) of the Amended Statement of Facts and Grounds, paragraph 11 of the Reply, and paragraphs 12(a) and (b), and 13, of the Claimant's skeleton argument.

56. In my judgment the Claimant is entitled to declaratory relief on this aspect of Ground 1. I will hear counsel on the precise drafting. My provisional view is that the Court should declare that the Defendant unlawfully failed to meet the Claimant's needs between 19 August 2019 and 14 February 2022, in that it provided 30 hours of support to her per week, instead of the necessary 35 hours per week.

Ground 2 – failure to carry out a carer's assessment

57. The Defendant has, since the commencement of these proceedings, agreed to carry out an assessment of the Claimant's mother's needs. Ms Shepherd advanced no independent submissions, either in her skeleton argument or orally, in support of this Ground, which has become academic.

Grounds 3 and 4 - the Statutory Code

58. Although the Defendant, entirely properly, involved the Claimant and her family in its October 2021 assessment process, it went on (having rejected the key recommendations of that process) to determine the Claimant's current personal budget and her CSP without any further substantial involvement of the Claimant or her family. Indeed, as I have mentioned, they did not know about the CSP's existence until after proceedings were commenced. Mr Swirsky conceded, in my judgment correctly, that this was not consistent with the requirements of the Statutory Code, and that under Grounds 3 and 4 respectively the personal budget and CSP were (prima facie) unlawful for this further reason.

59. However, Mr Swirksy raised at the hearing a further point: he said that these defects made no difference to the outcome. I must therefore consider whether it appears "*highly likely*" that the outcome for the Claimant would not have been "*substantially different*" had the conduct complained of not occurred: see section 31(2A) of the Senior Courts Act 1981 ("the 1981 Act").

60. I do not consider that s.31(2A) of the 1981 Act applies, or that there is any other good reason to refuse to grant relief:

i) There is no material which supports the Defendant's (late) contention that it would have made the same decisions even if it had involved the Claimant and her family as it should have done in setting the personal budget and formulating the CSP in February of 2022. The point was raised for the first time orally. It did not feature in the Defendant's Detailed Grounds of Resistance, nor in its skeleton argument. The Defendant's witness statement is silent on the point.

ii) This argument sits uneasily with the Defendant's other submission about relief, which is that a quashing order is unnecessary because the Defendant has offered the Claimant a full and open-minded reassessment of her needs under the 2014 Act and/or because a new budget decision and CSP are likely to be required in any event.

iii) Mr Swirsky submitted that, as at February 2022, the parties were so far apart – with SP asking the Defendant to pay for 96 hours of support per week and the Defendant offering to pay for only 35 - that further engagement between the Defendant and the family was most unlikely to have resulted in any agreement or arrangement in which both sides were happy. That may be correct, so far as it goes. But it does not support the case the Defendant needs to meet: i.e. that the failure to involve the Claimant and her family in the relevant decisions is highly likely to have made no "*substantial*" difference. An *agreed* solution was not the only way in which the substantive outcome could have been substantially different.

iv) The burden of proof is on the Defendant, and the "*highly likely*" standard of proof sets a "*high hurdle*": see R (Cava Bien Ltd) v Milton Keynes Council [2021] EWHC 3003 at paragraph 52. In my judgment the Court cannot possibly be satisfied on the material before it that it is highly likely that either the contents of the Defendant's care plan or the level of its budget would not have been substantially different if the Defendant had complied with the Statutory Guidance. Insofar as I am required to envisage the counterfactual, I consider it highly likely that the proper involvement of the Claimant and her family *would* have made a substantial difference to the outcome.

v) Moreover, it seems to me significant for this part of the analysis that the need for the Claimant and her family to be involved with the decision making process was required not only by general principles of fairness in public law, but also by the particular regime created by the 2014 Act. This is legislation concerned not just with the consequentialist objective of promoting the physical and mental health and emotional well-being of persons who have relevant needs. It also reflects Parliament's concern to give them the kind of *autonomy* that is associated with their being able to exercise control over day-to-day life: see s.1(2)-(3) of the Act. Seen in that light, an outcome decision, made about a person who is entitled to care and support under the 2014 Act, which fails to involve her or her family in a meaningful way so as to provide the sort of autonomy and control expressly anticipated by that Act is itself "*substantially different*" from one which does.

61. Accordingly, Grounds 3 and 4 of the claim also succeed. The appropriate relief is in my judgment an order quashing the Defendant's personal budget decision in respect of the

Claimant, and its 14 February 2022 CSP. For the reasons set out at paragraph 48 above under Ground 1, a mandatory order is not necessary.

Conclusion

62. The claim for judicial review succeeds.

63. There will be quashing orders of (a) the Defendant's February 2022 decision to provide or fund 35 hours of support per week; and (b) the Defendant's CSP dated 14 February 2022.

64. There will also be declaratory relief reflecting the Claimant's success under Ground 1 relating to the Defendant's historic failure to provide her with 35 hours per week of support prior to February 2022. Following the circulation of this Judgment in draft, counsel agreed with the provisional declaration that I had suggested at paragraph 56 above. I will make that declaration.

65. I will also make an order for costs which reflects the agreed position. The Defendant shall pay the Claimant's costs on the standard basis to be assessed if not agreed. There will be a detailed assessment of the Claimant's publicly funded costs.